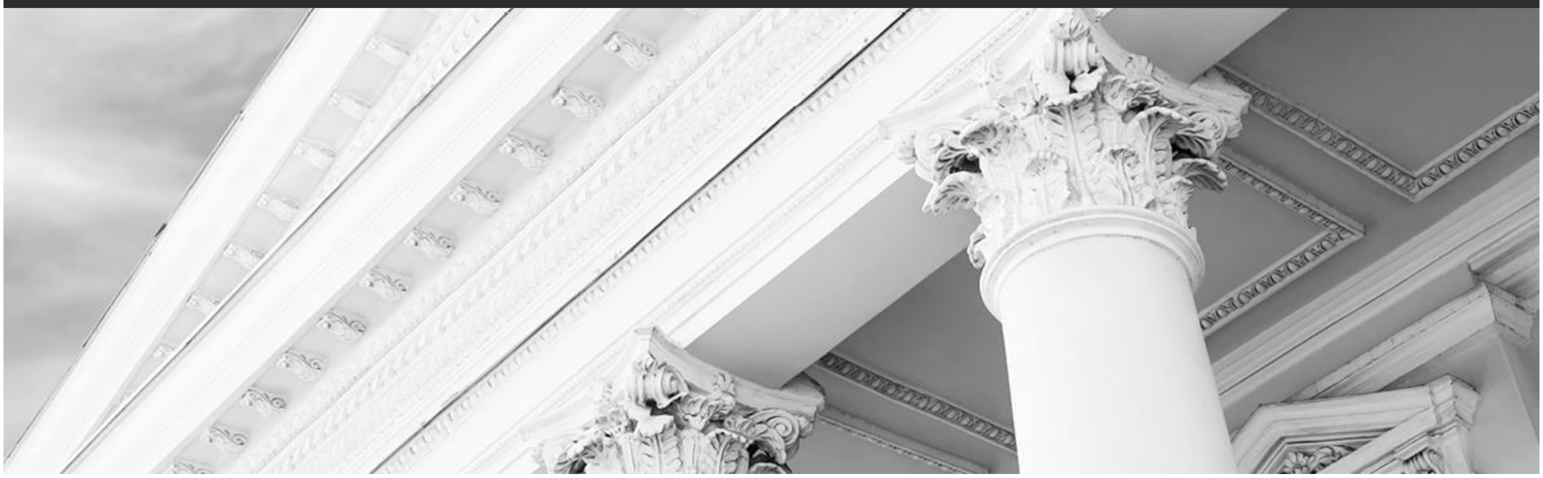
Class Action Litigation Newsletter | Fall 2021



This GT Newsletter summarizes recent class-action decisions from across the United States.

Highlights from this issue include:

- First Circuit affirms ruling that individualized issues of consent prevent certification of TCPA "junk fax" class.
- Southern District of New York denies certification of FDCA class, finding improper "fail-safe" class.
- Third Circuit addresses standard for certification of issue classes under Rule 23(c)(4).
- Fourth Circuit vacates certification of class of 35 purchasers and remands for numerosity analysis.
- Fifth Circuit reverses remand to state court holding corporate defendant was a "primary defendant."
- Sixth Circuit addresses retroactivity of Supreme Court TCPA decision, reversing dismissal of claim.
- Seventh Circuit applies comity abstention doctrine to remand claims removed under CAFA.
- Eighth Circuit reverses class certification finding common issues do not predominate over individual questions of causation.
- Ninth Circuit affirms order compelling arbitration, holding Uber drivers are not exempt from mandatory arbitration under Section 1 of the FAA because they are not a "class of workers engaged in foreign or interstate commerce."
- Ninth Circuit directs more probing inquiry for approval of class action settlement where attorneys' fees dwarf anticipated monetary payout to the class.
- D.C. Circuit holds that objectors' appeal challenging settlement approval was premature.

First Circuit

Bais Yaakov of Spring Valley v. ACT, Inc., No. 20-1537, 2021 U.S. App. LEXIS 26135 (1st Cir. Aug. 30, 2021)

Individualized issues of consent prevent certification of TCPA "junk fax" class.

A small private high school brought a claim against Act, Inc. under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, based on three facsimiles. Act, Inc. develops and administers the ACT college admission test. The school had provided Act, Inc. its facsimile number in a "High School Code Request Form." Students use the High School Code number to have their ACT test scores reported to their high schools. On the form, the school checked a box indicating that it wanted to (i) administer certain standardized tests, (ii) receive its students' test scores, and (iii) receive SAT or ACT publications. Other putative class members also may have provided their consent to receive such facsimiles, which, among other things, caused the district court to deny class certification on predominance grounds.

On appeal, the First Circuit affirmed the district court's decision, as the school did not meet its burden to show how a court could cull from the proposed class those putative class members who may have provided the appropriate consent to receive the subject facsimiles. Instead, as found by the district court, Act, Inc. had presented sufficient evidence that the proposed class likely included members who invited Act, Inc. to send materials by facsimile. The district court further found that "to identify those members the court would have to 'parse through each unique relationship' between every class member" and ACT, Inc. Also, although the First Circuit did not need to address it, the district court concluded that a proposed class definition based on those class members who received an "unsolicited" facsimile was an impermissible fail-safe class.

Am. Inst. for Foreign Study, Inc. v. Fernandez-Jimenez, Nos. 20-1641, 20-1692, 2021 U.S. App. LEXIS 20420 (1st Cir. July 9, 2021)

Arbitration clause that did not expressly authorize class arbitration stalls class action arbitration.

Plaintiff—an institute placing au pairs with host families in the United States—sought injunctive relief against an au pair from Spain who had filed a class arbitration demand against the institute. When agreeing to be placed, the au pair signed an agreement with the institute that contained an arbitration clause, which provided: "I agree that any dispute with or claim against [the Institute] . . . will be exclusively resolved by binding arbitration[.]" Also, the agreement provided that the defendant waived the right to assert any "claims, in either an individual capacity or as a member of any class action, by any means and in any form other than arbitration[.]" The parties ultimately agreed that the agreement required the au pair to submit any *individual* claims to arbitration. The First Circuit concluded that the agreement "does not provide an affirmative basis to conclude that the parties agreed to class arbitration." According to the First Circuit, the "arbitration clause is silent about class arbitration. And the waiver clause only mentions class actions in precluding the parties from litigating as a class." Furthermore, the First Circuit rejected the au pair's assertion that the "the waiver clause waives 'only' the right to litigate a class claim in court," as well as her argument that "by negative inference [] it was intended to preserve a right excluded from that waiver—the right to arbitrate a class action." According to the First Circuit, "that reasoning entirely begs the question: Did she have a right to arbitrate as a class, which right might then be preserved by exclusion from the waiver clause? And as to that question, [the au pair] is back to square one: She can point to no 'affirmative contractual basis for concluding' that the parties agreed to arbitrate class claims." As such, the First Circuit concluded that the district court did not err in granting injunctive relief to preclude class arbitration.

Second Circuit

DiDonato v. GC Servs. Ltd. P'ship, 2021 U.S. Dist. LEXIS 176555 (S.D.N.Y. Sept. 16, 2021)

Southern District of New York denies class certification, finding an improper "fail-safe" class that cannot meet the requirements of Rule 23(a) or (b).

Plaintiff alleged that defendants attempted to collect private student loans discharged in bankruptcy, misrepresenting the character and legal status of those loans in violation of the Fair Debt Collection Practices Act (FDCPA). The case turned on whether plaintiff's loans and those of the putative class members were discharged in bankruptcy or were "qualified educational loans" and thus non-dischargeable.

On a motion for class certification, plaintiff sought to certify a class of borrowers in various states who (1) filed for bankruptcy in any of the U.S. district courts, (2) were issued discharge orders since April 20, 2005, and who also (3) "(a) obtained Consumer Education Loans that were discharged in bankruptcy by virtue of any of the [following] three characteristics: (1) were made to students attending non-Title IV schools; (2) were made in excess of the 'cost of attendance'; (3) were made to ineligible students under the Higher Education Act" and who "(b) have nonetheless been subjected to Defendants' attempts to induce payment or discharge debts." The court denied plaintiff's motion on four separate grounds.

In assessing whether plaintiff could meet the requirements of Rule 23(a), the court found there were "serious questions as to whether Plaintiff is a member of the proposed class he purports to represent." Although plaintiff attended a Title IV university at the time he received his loans and asserted that the loans exceeded the cost of attendance, "the certifications that Plaintiff made in connection with his loan applications and promissory notes . . . may preclude him from denying that the[se loans] . . . are qualified education loans." Both these facts and "conflicting statements" made by plaintiff, which "rais[ed] questions about his credibility," resulted in a finding that the typicality requirement was not satisfied.

The proposed class also could not be certified under Rule 23(b)(1)(A) or Rule 23(b)(3). Plaintiff sought individualized monetary damages. But because potential class members would not have the opportunity to opt out and litigate their entitlement to, and amount of, individualized damages, the court denied certification under Rule 23(b)(1)(A). And despite finding some common issues, the court noted that individual issues surrounding the dischargeability of each potential class member's student loans predominated.

Finally, the court found that the proposed class was a "fail-safe"—that is, the proposed class definition "shields the putative class members from receiving an adverse judgment." Further, the "class may be unmanageable because a determination on the merits would be required to identify class members who would receive notice and an opportunity to opt out." The court noted that, although "at first blush these issues are not as problematic because the FDCPA is a strict liability statute and the criteria for class membership are seemingly objective, . . . contested issues nevertheless may arise and require resolution," like those involving the lead plaintiff. These necessarily "giv[e] rise to the fairness and manageability objections to fail-safe classes."

Third Circuit

Russell v. Educational Commission for Foreign Medical Graduates, 2021 WL 4343657 (3d Cir. 2021)

Third Circuit addresses standard for certification of issue classes.

Plaintiffs filed a putative class action against the Educational Commission for Foreign Medical Graduates (the "Commission") alleging negligent infliction of emotional distress due to the Commission's alleged improper certification of a foreign medical doctor who treated plaintiffs. The district court certified an issue class under Rule 23(c)(4) as to whether the Commission owed and breached a duty to plaintiffs, hospitals, or state medical boards.

The Third Circuit vacated and remanded for further proceedings. The panel reiterated prior rulings that a plaintiff seeking to certify an issue class must satisfy the prerequisites for certification under Rule 23(a) and under Rule 23(b)(1), (2) or (3), but prior decisions lacked "clear guidance" as to when an issue class was "appropriate" or what types of "issues" may or may not be suitable for class treatment. The court's 2011 decision in *Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2011) included a non-exhaustive list of nine factors for courts to consider, but *Gates* did not decide whether the issues to be certified could include claim elements and defenses or if those issues "must be limited to questions that would resolve a defendant's liability." The panel decided that district courts may certify "particular issues" for class treatment "even if those issues, once resolved, do not resolve a defendant's liability, provided that such certification substantially facilitates the resolution of the civil dispute, preserves the parties' procedural and substantive rights and responsibilities, and respects the constitutional and statutory rights of all class member and defendants."

The Third Circuit found that the district court erred because it did not determine whether the issues satisfied Rule 23(b)(3) and it failed to "rigorously consider" the *Gates* factors and the efficiencies that would be gained by resolution of the certified issues.

Fourth Circuit

In re: Zetia (Ezetimibe) Antitrust Litigation, 7 F.4th 227 (4th Cir. 2021)

Fourth Circuit provides additional guidance on numerosity element.

Plaintiffs are a group of pharmaceutical buyers who brought a class action against two drug manufacturers for an alleged anticompetitive settlement of a patent dispute. The district court certified a class of 35 purchasers, but the Fourth Circuit reversed, finding that the numerosity analysis was based on "faulty logic."

The panel first considered the district court's reasoning that "multiple individual trials" would result if the case proceeded without class status. The panel found that reasoning "ran afoul" of Rule 23(a)(1)'s dictate that the class be "'so numerous that joinder of all members is impracticable,' not whether the class is so numerous that failing to certify presents the risk of many separate lawsuits." On remand, the panel directed the district court to "consider whether judicial economy favors either a class action <u>or</u> joinder." Without considering the efficiencies gained by joinder, the panel observed, "the judicial-economy factor would always favor class certification, which is simpler to manage than individual lawsuits. In fact, even compared to joinder, class certification will often be preferable from a judicial economy perspective."

Further, the district court improperly considered the economics of individual suits in analyzing numerosity. The district court ignored whether it would be uneconomical for smaller claimants to be joined as parties in a traditional lawsuit, as opposed to pursuing individual suits. The panel ruled that on remand, "[p]laintiffs must bring to bear some evidence to this effect—and the district court may not consider the economics of individual suits in analyzing this factor."

Cain v. Midland Funding, LLC, 2021 WL 3400552 (Md. 2021)

Maryland Court of Appeals addresses when a prior class action tolls the statute of limitations.

Plaintiffs filed two putative class actions challenging debt collection practices of defendant. Both lawsuits were dismissed on statute of limitations grounds. Among other things, the trial court found that the statute of limitations was not tolled based upon plaintiffs' status as putative class members in a prior federal court and Maryland state court cases.

The Maryland Court of Appeals affirmed, except as to the individual claims of one of the plaintiffs. The court noted that Maryland had accepted *American Pipe* tolling but had only applied it to an individual action filed after class certification had been denied in Maryland state court. Here, the court was called upon to decide whether *American Pipe* tolling would apply to a successive putative class action filed after class certification was denied in another jurisdiction.

As to the first issue, the court found that tolling did not apply to a successive putative class action, reasoning that a contrary result was antithetical to the policies behind the statute of limitations – to encourage prompt resolution of claims – and "could result in a 'rolling tolling' approach to class action suits, whereby a putative class member could toll his or her statute of limitations after the denial of one class action certification in one circuit court by filing a successive class action in one of the other 23 state circuit courts."

As to the second issue – "cross-jurisdictional tolling" – the court noted that other states are split on the issue, but it nevertheless recognized tolling for individual actions filed by "absent members of putative class actions filed in other state and federal courts." To benefit from the principle, the plaintiff must prove that (1) the prior class action notified the defendant of the substantive claims and the "number and generic identities of the potential plaintiffs," and (2) the individual suit concerns "the same evidence, memories, and witnesses as the subject matter of the original class suit." Such "tolling ends when there is a clear dismissal of a putative class action, including a dismissal for *forum non conveniens*, or a denial of class action for any reason."

Fifth Circuit

Madison v. ADT, LLC, 2021 U.S. App. LEXIS 25457 (5th Cir. Aug. 24, 2021)

Fifth Circuit clarifies what constitutes a "primary defendant" under CAFA and holds that remand was improper under CAFA's "home state" exception.

Plaintiffs filed a lawsuit in Texas state court against a former employee of ADT, LLC who had used his access credentials to spy on customers through their home-security surveillance systems. ADT intervened as a defendant and removed under the Class Action Fairness Act of 2005 (CAFA). The plaintiffs moved to remand, arguing that although the employee was a "primary defendant" under CAFA, ADT was not. Thus, the plaintiffs argued, the case belonged in state court under CAFA's "home state" exception, which requires a federal court to abstain if two-thirds of the plaintiffs and the "primary defendants" are citizens of the state where the action was filed. The district court agreed and granted plaintiffs' motion to remand.

ADT sought permission to appeal from the Fifth Circuit, which granted the request and reversed. Recognizing that "there is scant discussion across our sister circuits," the Fifth Circuit looked to reasoning from *Vodenichar v. Halcon Energy Props., Inc.*, 733 F.3d 497 (3rd Cir. 2013), a 2013 Third Circuit decision that evaluated when a corporate "defendant is the 'real target' of the plaintiffs' accusations." This included whether (1) the plaintiffs are seeking to hold the defendant liable for its own actions and (2) given the claims asserted, the defendant "has potential exposure to a significant portion of the class and would sustain a substantial loss as compared to other defendants if found liable." The Fifth Circuit also looked to its own decision in *Hollinger v. Home State Mut. Ins. Co.,* 654 F.3d 564 (5th Cir. 2011). There, the court considered the lawsuit's "primary thrust," which would indicate the "primary defendant." Taking these together—the Third Circuit's "real target" test and the Fifth Circuit's "primary thrust" standard—the Fifth Circuit concluded that ADT was a primary defendant. Although the plaintiffs had yet to assert a claim against ADT, the court explained that "the thrust of this suit is to gain access to ADT's deep pockets, and ADT, having properly intervened, must be considered a primary defendant under CAFA."

This decision may give defendant corporations whose employees are sued in state court an avenue to remove under CAFA, even if the plaintiffs have crafted their suit to avoid federal jurisdiction.

Ortiz v. Am. Airlines, Inc., 2021 U.S. App. LEXIS 21336 (5th Cir. July 19, 2021)

Fifth Circuit concludes that putative class lacked standing to pursue an ERISA suit for alleged breaches of fiduciary duties.

Two former American Airlines (AA) employees filed a putative class action suit against AA, its Pension Asset Administration Committee, and its federal credit union (FCU) on behalf of former AA employees and beneficiaries who had invested in AA's ERISA plan. Asserting claims for breach of fiduciary duty, plaintiffs complained that the ERISA plan offered its FCU as an ERISA-qualifying "safe" investment option, but that better, comparable funds—like stable value funds—were available and would have offered a greater return. AA did not offer the stable value funds until late 2015—a few months before plaintiffs sued. The plaintiffs also alleged that the FCU fund should have received higher interest rates on the airline's 401k plan assets.

The defendants prevailed on summary judgment in the district court, but for different reasons. The district court ruled that the plaintiffs lacked standing to sue AA and the committee because "their alleged injuries are at best speculative, not concrete," since the plaintiffs chose whether to invest, how much, and which options to choose. Since the plaintiffs could not show that they would have chosen the stable value funds had they been available, they had no justiciable injury. The court, however, determined that plaintiffs had standing to sue the FCU, although their claim failed for lack of fiduciary liability.

On appeal, the Fifth Circuit determined that the plaintiffs lacked standing, explaining that although "lost investment income is a concrete and redressable injury for the purposes of standing," the plaintiffs had failed to place their money into the stable value fund when they had the opportunity. Thus, causation was lacking, and so was Article III standing. As for the claims against the FCU, the court explained that plaintiffs failed to prove that they could have received higher interest rates from the 401k plan's assets. The Fifth Circuit thus remanded the case with instructions for the district court to dismiss plaintiff's claim against FCU for lack of jurisdiction.

City of New Boston, Texas v. Netflix, Inc., No. 5:20-cv-00135-RWS, (E.D. Tex. Sept. 30, 2021)

Federal district court dismisses municipality's class action seeking franchise fees from Netflix and Hulu under Texas state law.

The city of New Boston, Texas filed a class action on behalf of Texas municipalities against Netflix, Inc. and Hulu, LLC for failing to pay statutory franchise fees typically required of cable companies. New Boston alleged that state law established a regime for municipalities to collect franchise fees from cable and video services, and thus municipalities are authorized to charge Netflix and Hulu 5% of their gross revenue to use the public's broadband wireline facilities. Netflix and Hulu moved to dismiss, arguing the statute only applies to holders of state-issued certificates of franchise authority, which they were not.

The district court agreed and granted the motion to dismiss, concluding that "[t]he Texas Legislature's language is clear: to incur a franchise fee, the provider must be 'the holder of a state-issued certificate of franchise authority.'" The court reasoned that the statute does not grant courts authority to decide which entities must obtain certificates of franchise authority; that power lies solely with the Public Utility Commission. The statute "did not reserve to municipalities any authority to declare a provider a holder of a state-issued certificate of franchise authority." Nor does the statute allow the court to "bypass the state's authority to declare who holds a state-issued certificate of franchise authority for municipalities." In other words, the court explained that the municipalities' grievance should be raised with the Public Utilities Commission, not the court. The court, however, did not foreclose New Boston's right to refile the case if or when Netflix and Hulu become holders of state-issued certificates of franchise authority.

Sixth Circuit

Lindenbaum v. Realgy, LLC, No. 20-4252, 2021 U.S. App. LEXIS 27159 (6th Cir. Sep. 9, 2021)

Sixth Circuit interprets Supreme Court severance of unconstitutional government-debt exception in TCPA as applying retroactively, leaving businesses potentially liable for robocalls.

In 2019, Roberta Lindenbaum sued Realgy, LLC in a putative class action after she received two pre-recorded robocalls to her cell phone and landline, alleging that the calls violated the TCPA's robocall restriction. After the case was filed, the U.S. Supreme Court issued a plurality opinion in *Barr v. Am. Ass'n of Pol. Consultants, Inc. (AAPC)*, 140 S. Ct. 2335 (2020), which held that a 2015 amendment to the TCPA that permitted robocalls made "solely to collect a debt owed to or guaranteed by the United States" unconstitutionally discriminated based on content. The court's plurality then severed the government-debt exception from the statute.

After the Supreme Court's decision in *AAPC*, Realgy moved to dismiss, arguing that the calls were not actionable under the TCPA because they occurred during the five-year period before the public-debt exception was deemed unconstitutional under *AAPC*. Thus, Realgy argued, the statute was facially invalid and could not be enforced. The Northern District of Ohio granted the motion, reasoning that severability is only a prospective remedy, so the offending TCPA exception was "void" while it was "on the books." As such, the district court concluded that there was no federal-question jurisdiction over the claim. Lindenbaum appealed the ruling, and the United States intervened.

The Sixth Circuit reversed the dismissal. On the issue of severability, the court decided that the Supreme Court's decision did, in fact, apply retroactively. Considering the "fundamental rule of 'retrospective operation,'" the Sixth Circuit concluded that the severance in *AAPC* was not a remedy because "the Court severed the exception in a way that gave *AAPC* none of the relief it sought." So, "[b]ecause severance is not a remedy," the Sixth Circuit reasoned, "it would have to be a legislative act in order to operate prospectively only." Since the Supreme Court merely interpreted the TCPA, the High Court's "legal determination applies retroactively." As a result, the TCPA's robocall ban was enforceable during the 2015 to 2020 timeframe.

Ass'n of Am. Physicians & Surgs. v. United States FDA, 2021 U.S. App. LEXIS 27157 (6th Cir. Sep. 9, 2021)

Sixth Circuit affirms dismissal of association's claims for lack of Article III standing because the association failed to adequately plead that any member had suffered an injury in fact.

An association of physicians sued the Food and Drug Administration for broader access to the drug hydroxychloroquine. Although the FDA approved hydroxychloroquine for distribution in 1955 for treating malaria, lupus, and arthritis, the FDA has not approved it for treating COVID-19. And while the FDA had authorized hydroxychloroquine for emergency use in the early stages of the COVID-19 pandemic, the federal government allowed only limited access to its stockpile.

The Association of American Physicians and Surgeons asserted three claims: violation of equal protection under the Fifth Amendment, violation of the right to association under the First Amendment, and violation of the Administrative Procedures Act. In support of its claims, the association claimed three injuries: to itself, because it was considering cancelling a conference; associational standing on behalf of its members who could not prescribe hydroxychloroquine; and third-party standing on behalf of patients who could not get the drug for COVID-19 treatment.

The district court dismissed the association's complaint for lack of subject matter jurisdiction, concluding that there was no Article III standing. The Sixth Circuit affirmed.

The Sixth Circuit began by recognizing that a challenge to the actions of a governmental agency is insufficient to convey standing. Under Supreme Court precedent, the association had to allege an actual injury. On appeal, the association abandoned its claim of direct injury, leaving only its claims of associational injury. After wrestling with what it perceived as "tension" between the Supreme Court's decisions on associational injury, the Sixth Circuit recognized that "an organization must do more than identify a likelihood that the defendant's conduct will harm an unknown member in light of the organization's extensive size or membership base" and "must instead identify a member who has suffered (or is about to suffer) a concrete and particularized injury from the defendant's conduct." Moreover, "the organization must show that its requested relief will redress this injury." Further, the court determined that "*Twombly*'s plausibility test" applies to a motion to dismiss on standing grounds. Thus, because the association had not plausibly alleged an actual, redressable injury by any of its members, it lacked standing to sue on their behalf. Finally, because the association failed to plead that any of its members had suffered an injury, it could not rely on third-party standing.

Johnson v. FCA US LLC, 2021 U.S. Dist. LEXIS 154132 (E.D. Mich. Aug. 17, 2021)

District court rules that whether a plaintiff can assert claims on behalf of a putative nationwide class is a question of predominance, not an issue of Article III standing.

Automotive consumers from seven states brought a putative class action against FCA US LLC for defective interior trim panels in certain Dodge and Chrysler cars. Seeking to represent a nationwide class, as well as state classes, plaintiffs sued under the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, *et seq*., as well as various state consumer protection statutes and common law causes of action. FCA moved to dismiss under Rule 12(b)(6) on several bases, including whether the named plaintiffs had Article III standing to assert claims arising under the laws of different states.

The district court began by considering the landscape of federal decisions on this point. While the Sixth Circuit had not expressly answered the question, district courts are split as to whether this is "an Article III problem that must be resolved at the pleading stage," or whether it is "a matter going to the propriety of class certification under [Rule 23] that is properly resolved in connection with class certification proceedings." Looking to decisions from the Second and Seventh Circuits, as well as analogous reasoning from the Sixth Circuit, the district court took the latter approach. In prior decisions dealing with choice-of-law issues, the Sixth Circuit had recognized that substantial differences in the laws of different states affected manageability and were considered under Rule 23, not as an Article III standing issue.

Seventh Circuit

City of Fishers v. DIRECTV, 2021 U.S. App. LEXIS 21549 (7th Cir. Jul. 21, 2021)

Seventh Circuit holds that the comity abstention doctrine applies to claims brought under CAFA.

Several Indiana cities filed suit in Indiana state court against various streaming platforms, claiming the platforms owed the cities past and future franchise fees under the Indiana Video Service Franchises Act of 2006 (IVSFA). The defendant-platforms removed to federal court, asserting that the court could exercise jurisdiction under CAFA. The plaintiffs moved to remand on the grounds that the district court should not exercise subject-matter jurisdiction over IVSFA claims. The district court agreed with the plaintiffs and remanded. The defendant-platforms appealed.

Holding that precedential jurisdictional limits applied to CAFA, the Seventh Circuit affirmed the remand to state court. Generally, federal courts decline to exercise federal jurisdiction over cases involving local revenue collection and taxation, applying what is referred to as the comity abstention doctrine. The defendants argued that because CAFA contains two express jurisdictional limitations without consideration of the comity abstention doctrine, Congress did not intend for the doctrine to apply to CAFA. The Seventh Circuit disagreed: "To be sure, CAFA's express exceptions reflect Congress's judgment that it would be unwise to reroute a class action with deep roots in a single state to federal court. But those exceptions complement—and do not displace—preexisting comity concerns." Because abstention reflects "foundational features of our constitutional system," such as state sovereignty and autonomy over state taxation, the Seventh Circuit determined that the doctrine was applicable to CAFA, warranting remand back to state court. Regardless, the defendants had failed to properly preserve this jurisdictional issue in the district court, thus waiving it on appeal.

Ware v. Best Buy Stores, L.P., 2021 U.S. App. LEXIS 22486 (7th Cir. Jul. 29, 2021)

Seventh Circuit holds that conclusory invocation of CAFA is insufficient to establish subject-matter jurisdiction in the face of the specific jurisdictional limits for a Magnuson-Moss Warranty Act claim.

Plaintiffs filed a putative class action in federal court under the Magnuson-Moss Warranty Act (MMWA), which provides consumer protection rights and establishes minimum criteria for different types of warranties and warranty-like products. Relying on arguments aimed at the merits, defendant filed a motion to dismiss, which the district court granted. Although the dismissal was not based on subject-matter jurisdiction, the Seventh Circuit was obligated to conduct an independent assessment of jurisdiction when the case was brought up on appeal. The Seventh Circuit determined that the federal court lacked subject-matter jurisdiction over the MMWA claims.

The MMWA has specific jurisdictional limitations that strip federal courts of subject-matter jurisdiction if: (1) the amount in controversy of any individual claim is less than $25; (2) the amount in controversy is less than $50,000 for all claims to be determined in the suit; or (3) the action is brought as a class action and the number of named plaintiffs is less than 100. Because these limitations were not satisfied, plaintiffs turned to CAFA. The Seventh Circuit rejected plaintiffs' argument, noting that plaintiffs had failed to meet the pleading burden required to rely on CAFA for federal jurisdiction. First, plaintiffs' complaint lacked any allegations supporting the $5 million amount in controversy requirement. Second, although the complaint alleged that damages were sufficient to overcome the MMWA $50,000 jurisdictional limitation, inferring that damages would meet the $5 million CAFA threshold was "entirely speculative."

Tims v. Black Horse Carriers, Inc., 2021 IL App (1st) 200563 (Sept. 17, 2021)

Separate limitations periods apply to different violations of the Illinois Biometric Information Privacy Act.

Plaintiff filed a complaint under Section 15 of the Illinois Biometric Information Privacy Act (BIPA) nearly two years after his claims had arisen, alleging the defendant-employer (i) collected and disclosed his fingerprint data for timekeeping purposes without obtaining consent under Section 15(b), (ii) failed to have a retention and destruction policy in violation of Section 15(a), and (iii) disclosed his data in violation of Section 15(d). Defendant moved to dismiss, arguing that plaintiff's claims were foreclosed by a one-year statute of limitations that applies to privacy-related actions. The plaintiff disagreed, asserting that a five-year limitations period applied. The circuit court agreed with plaintiff.

On appeal, the First District Illinois Appellate Court determined that not all BIPA violations are created equally and thus should be subject to separate limitations periods. The court noted that, based on the plain language of the Illinois Code of Civil Procedure, 735 ILCS 5/13-201, the defendants' privacy-based limitations theory could only apply to those actions in which private information was actually published. Applying this to the BIPA, only certain violations implicated any form of publication: Section 15(c) to sell, lease, trade, or profit from a person's biometric data; and Section 15(d) to disclose or disseminate biometric data. Consequently, the one-year limitations period would apply to these alleged violations. Alternatively, the remaining violations – Section 15(a) for failing to develop a publicly available retention and destruction policy for biometric data; 15(b) for collecting or obtaining biometric data without written notice and release; and 15(e) for failing to take reasonable steps to store, transmit, or protect biometric data – made no reference to publication. Because publication was not a necessary element, the five-year limitations period under 735 ILCS 5/13-205 applied. The court then remanded for application of the distinct statute of limitations periods.

Eighth Circuit

Hudock v. LG Elecs. U.S.A., Inc., 12 F.4th 773 (8th Cir. 2021)

Eighth Circuit reverses trial court's grant of class certification, finding common issues would not predominate over individual questions of causation.

This appeal arose from the trial court's grant of class certification under Federal Rule of Civil Procedure 23(b)(3). The district court certified classes related to claims of unjust enrichment and under the consumer protection statutes of Minnesota and New Jersey.

On appeal, the Eighth Circuit noted that both Minnesota and New Jersey law require evidence of causation. Defendants presented evidence that "some consumers did not see, or did not rely on, the allegedly false representations—here, assertions about refresh rates for their televisions." The companies presented evidence making clear that some of the products at issue were not advertised as the plaintiffs asserted. The companies also presented testimony making clear that consumers frequently made their decisions based on other features and some referred to enhanced refresh rates as a "[w]aste of money." Based on this evidence, the Eighth Circuit concluded that "[b]ecause determination of the companies' liability would require individual determinations on causation and reliance, 'common issues will not predominate' in the case."

Johannessohn v. Polaris Indus. Inc., 9 F.4th 981 (8th Cir. 2021)

In an undisclosed-defects case, the Eighth Circuit affirms a decision denying class certification, holding that individual issues of reliance and causation predominated.

Plaintiff all-terrain vehicle (ATV) buyers brought a class action against defendant Polaris Industries, Inc., claiming it failed to disclose heat defects, which artificially inflated the price of their ATVs. Plaintiffs in six states sought to certify a nationwide class under Minnesota consumer protection laws for four different models. The Eighth Circuit affirmed the denial of class certification.

Under Minnesota law, Polaris was allowed to present evidence rebutting plaintiffs' allegations that they relied on certain representations and omissions. Here, Polaris had evidence that some of the named plaintiffs had owned prior Polaris vehicles and had prior knowledge of the alleged defect (and even had sold used ATVs with knowledge of the alleged defect without mentioning it). Given these facts, individual questions regarding reliance and causation predominated.

The Eighth Circuit also held that the district court did not abuse its discretion by denying class certification based on superiority. First, the proposed subclasses "w[ould] require application of the laws of four different states to forty-three different vehicle configurations, including at least four different engines, with changing exhaust standards through the years, and various attempts by Polaris to remedy the problems." Second, because many Polaris owners either resold their ATVs or purchased them used, these sales would require "vehicle-specific litigation."

Finally, plaintiffs' class definition was too broad, as it included everyone who had a *risk* of a product defect manifesting. The Eighth Circuit found that not all ATVs had the alleged product defect and that a *risk* of a product defect manifesting is insufficient to support standing. The Eighth Circuit rejected plaintiffs' argument that a price premium was sufficient to establish standing in a product defect case.

Ninth Circuit

Capriole v. Uber Technologies, Inc., 7 F.4th 854 (9th Cir. 2021)

Ninth Circuit holds that Uber drivers are not exempt from mandatory arbitration under Section 1 of the FAA because they are not a "class of workers engaged in foreign or interstate commerce."

Plaintiffs Uber drivers brought a class action suit, alleging Uber misclassified them as independent contractors rather than as employees under Massachusetts law. Before becoming Uber drivers, all potential drivers must sign Uber's 2015 Technology Services Agreement (the "Agreement"), which contains a mandatory arbitration provision. Uber brought a motion to compel arbitration, which the district court granted. Plaintiffs appealed, arguing they were exempt from mandatory arbitration under Section 1 of the FAA because they were a "class of workers engaged in foreign or interstate commerce." The Ninth Circuit disagreed, holding that Uber drivers as a class of workers do not fall within the "interstate commerce" exemption of the FAA. The court held that Uber drivers "are not engaged in interstate commerce" because their work "predominantly entails intrastate trips," even though some Uber drivers undoubtedly cross state lines in the course of their work and rideshare companies do contract with airports "to allow Uber drivers . . . to pick up arriving passengers." In reaching this decision, the Court cited *United States v. Yellow Cab Co.*, 332 U.S. 218, 228-29 (1947), which held that "when local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation." The court added that "interstate trips, even when combined with trips to the airport, represent a very small percentage of Uber rides, and only occasionally implicate interstate commerce."

Hodges v. Comcast Cable Commc'ns., LLC, No. 19-16483, 2021 U.S. App. LEXIS 27268 (9th Cir. Sept. 10, 2021)

Ninth Circuit holds that public injunctive relief under *McGill* is limited to forward-looking injunctions that aim to restrain future violations of law for the general public's benefit as a whole, rather than a discrete subset of similarly situated persons.

Plaintiff brought a putative class action challenging Comcast's alleged privacy and data-collection practices, seeking a variety of monetary and equitable remedies. The district court held that because plaintiff's complaint sought "public injunctive relief" as one of its requested remedies, it implicated California's *McGill* rule, under which an arbitration provision that waives the right to seek "public injunctive relief" in all forums is unenforceable.

The Ninth Circuit reversed. Taking into account *Blair v. Rent-A-Center, Inc.*, which held that the Federal Arbitration Act did not preempt *McGill*, the panel held that, under California law, non-waivable public injunctive relief is limited to forward-looking injunctions that seek to prevent future violations of law for the benefit of the general public as a whole. The panel concluded that, under this standard, plaintiff's complaint did not seek public injunctive relief because it sought only to benefit Comcast cable subscribers with respect to their personal information, not the public as a whole. The panel also found that administering the injunctive relief plaintiff sought would entail the consideration of the individualized claims of numerous cable subscribers. Accordingly, the panel held that the arbitration agreement at issue should have been enforced.

Kim v. Allison, No. 2:18-cv-3093-JFW-AS, 2021 U.S. App. LEXIS 24495 (9th Cir. Aug. 17, 2021)

More probing inquiry required for approval of class action settlement where the attorneys' fees dwarf anticipated monetary payout to the class.

Plaintiff brought a putative class action under California's Unruh Civil Rights Act and Unfair Competition Law (UCL) based on the allegation that Tinder offered reduced pricing to subscribers under 30 years old. After the case was compelled to arbitration, the parties reached a settlement that applied to the putative class. Several class members objected, arguing the settlement terms offered too little in cash payouts, credits that premium Tinder subscribers did not need, and subscriptions that former subscribers did not want. Objectors also pointed to recent victories in related cases where the court determined the plaintiff had stated a claim for age discrimination under the Unruh Act. The district court rejected the objections and certified a settlement class, awarding plaintiff a $5,000 incentive payment and $1.2 million in attorneys' fees to plaintiff's counsel.

The Ninth Circuit reversed, holding that although the district court applied the correct fairness factors under Fed. R. Civ. P. 23(e)(2), it understated the strength of plaintiff's claims and substantially overstated the settlement's worth given that (a) Tinder's agreement to eliminate age-based pricing going forward only applied to new California-based subscribers (which did not include the class members), (b) the claims rate at the time of final approval was 0.745% (which meant Tinder stood to pay less than $45,000 to the class members, not the $6 million claimed by plaintiffs), and (c) most importantly, the district court failed to consider evidence of collusion in the form of a request for attorneys' fees that dwarfed the anticipated payout to the class.

Moser v. Benefytt, Inc., No. 19-56224, 2021 U.S. App. LEXIS 23661 (9th Cir. Aug. 10, 2021)

Defendant did not waive objection under *Bristol-Myers* to nationwide certification by failing to move to dismiss claims of non-resident class members.

The court considered whether defendant waived an objection under *Bristol-Myers Squibb Co. v. Superior Court of California* to the district court's certification of nationwide classes because defendant had not moved to dismiss the non-resident putative class members' claims for lack of personal jurisdiction. In *Bristol-Myers*, the United States Supreme Court held that the Fourteenth Amendment's Due Process Clause prohibited a California state court from exercising specific personal jurisdiction over nonresident plaintiffs' claims in a mass action against a non-resident company. The Supreme Court did not reach whether *Bristol-Myers* would apply to a class action in federal court.

In *Moser*, the plaintiff, a California resident, sued defendant in federal court, alleging nationwide class claims for TCPA violations. Defendant is incorporated in Delaware, with its principal place of business in Florida. Defendant moved to dismiss on various grounds, but not for lack of personal jurisdiction over the non-California class members. Plaintiff later moved for certification of two nationwide classes, and defendant then argued lack of personal jurisdiction under *Bristol-Myers*. The district court found that defendant had waived the argument by not moving to dismiss.

The Ninth Circuit reversed. The court observed that, under Rule 12(h)(1)(A), a party "waives any defense" under Rule 12(b)(2) by "omitting it from a motion in the circumstances described in Rule 12(g)(2)." Rule 12(g)(2) provides that "a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was *available* to the party but omitted from its earlier motion." In rejecting the district court's waiver conclusion, the court reasoned that the personal jurisdiction argument as to non-California class members was not "available" within the meaning of Rule 12(g)(2) for purposes of a motion to dismiss. Rather, with respect to personal jurisdiction, only the named plaintiff's own claims were at issue, and unnamed class members were not yet parties to the case.

Wesson v. Staples The Office Superstore, LLC, 68 Cal. App. 5th 746 (2021)

Addressing an issue of first impression, California Court of Appeal holds that trial courts have inherent authority to ensure claims under the Private Attorneys General Act will be manageable at trial.

Plaintiff asserted various claims, including a representative claim under the Private Attorneys General Act of 2004 (PAGA), for himself and 345 other current and former general managers of Staples stores in California. Plaintiff alleged that Staples misclassified general managers as exempt executives (who are not entitled to overtime pay and off-duty meal and rest periods), when they should have been classified as nonexempt, hourly employees.

Throughout the course of the proceedings, Staples argued that, given the number of employees covered and the nature of plaintiff's allegations, the action would be unmanageable and would violate its due process rights. Specifically, Staples contended its affirmative defense – i.e., that it properly classified general managers as exempt and, thus, committed no Labor Code violations – would require individualized proof as to each general manager, and the claim could not be fairly and efficiently litigated. In response, plaintiff argued, among other things, that the trial court lacked authority to make a manageability determination on a PAGA claim. The trial court ultimately found the claim unmanageable and struck it.

On appeal, the court concluded that: "(1) [trial] courts have inherent authority to ensure PAGA claims can be fairly and efficiently tried and, if necessary, may strike claims that cannot be rendered manageable; [and] (2) as a matter of due process, defendants are entitled to a fair opportunity to litigate available affirmative defenses, and a court's manageability assessment should account for them."

D.C. Circuit

In re: Domestic Airline Travel Antitrust Litigation, Case No. 19-7058 (D.C. Cir. July 9, 2021)

Court holds that objectors' appeal challenging settlement approval was premature.

This multidistrict litigation involves four airline defendants and over 100 million settlement class members alleging that the airlines engaged in price-fixing in violation of antitrust laws. In 2018, the district court preliminarily approved a $15 million settlement from Southwest Airlines and a $45 million settlement from American Airlines, while the litigation against Delta Air Lines and United Airlines proceeded. The preliminarily approved settlements did not specify how the funds should be allocated and distributed until the entire lawsuit concluded, intentionally leaving the question open to avoid piecemeal payments to the settling parties. Two class members objected, arguing that the settlements' failure to specify how the funds would be distributed could lead to *cy pres* distribution to undisclosed recipients that would create a "slush fund" to line the plaintiffs' lawyers' pockets. The district court overruled the objections, approved the Southwest and American settlements and dismissed those two defendants from the case, but declined to issue a final judgment, seeing no reason to issue one and finding "just reason for delay" under Fed. R. Civ. P. 54(b) in preventing fragmented appeals regarding issues in the litigation which still includes Delta and United. The objectors appealed.

The D.C. Circuit Court dismissed the appeal for lack of appellate jurisdiction, holding there was no final appealable judgment or interlocutory order from which an appeal may be taken. Specifically, the D.C. Circuit Court held that *Gelboim v. Bank of America*, 574 U.S. 405 (2015) was not applicable because in that case the plaintiffs' sole claim was dismissed, ending the entire lawsuit. By contrast, in this case, claims remained against two of the four defendants. The court also explained that *Gelboim* "clarify[ies] that the ordinary requirements of finality apply to appeals from multidistrict litigation," thus undermining objectors' arguments. Finally, the court found that that the approval order was not an appealable interlocutory order or "injunction" under 28 U.S.C. § 1292(a)(1) since the "gist of the settlement agreements was the large amount of money the defendants agreed to pay the plaintiffs."

In re Visa Inc., Case No. 21-8005 (D.C. Cir. Oct. 1, 2021)

Court grants Visa and Mastercard's petition to file interlocutory appeal calling class certification "questionable" and accompanied by potential "death-knell."

Plaintiffs filed this litigation in 2011, alleging that Visa and Mastercard's ATM fee rules violated antitrust laws and caused unlawful overcharges for access fees at ATM terminals. On Oct. 1, 2021, the D.C. Circuit granted Visa and Mastercard's petition to file an interlocutory appeal of the district court's order certifying three classes of plaintiffs: a class of ATM operators comprised of thousands of businesses and two consumer classes sized in the millions. The district court had held that the plaintiffs' class-wide injury theories were "colorable" and that further inquiry as to damages was proper on the merits and not at class certification. Visa and Mastercard challenged the decision as erroneous and inconsistent with *In re: Rail Freight Fuel Surcharge Antitrust Litigation* (D.C. Cir. 2019) because the district court did not determine the presence of uninjured class members in assessing the predominance requirement for certification. Arguing that the classes cannot be certified because they are composed of a significant number of uninjured members, Visa and Mastercard contended that these questions must be answered at the class certification stage. They also argued that immediate appeal is proper because, if the certification decision stands, it could "sound the death-knell" for the litigation. The D.C. Circuit granted permission to appeal, agreeing that the "certification decision was, at least, 'questionable' and is accompanied by a potential 'death-knell,'" citing *In re: Rail Freight*.

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