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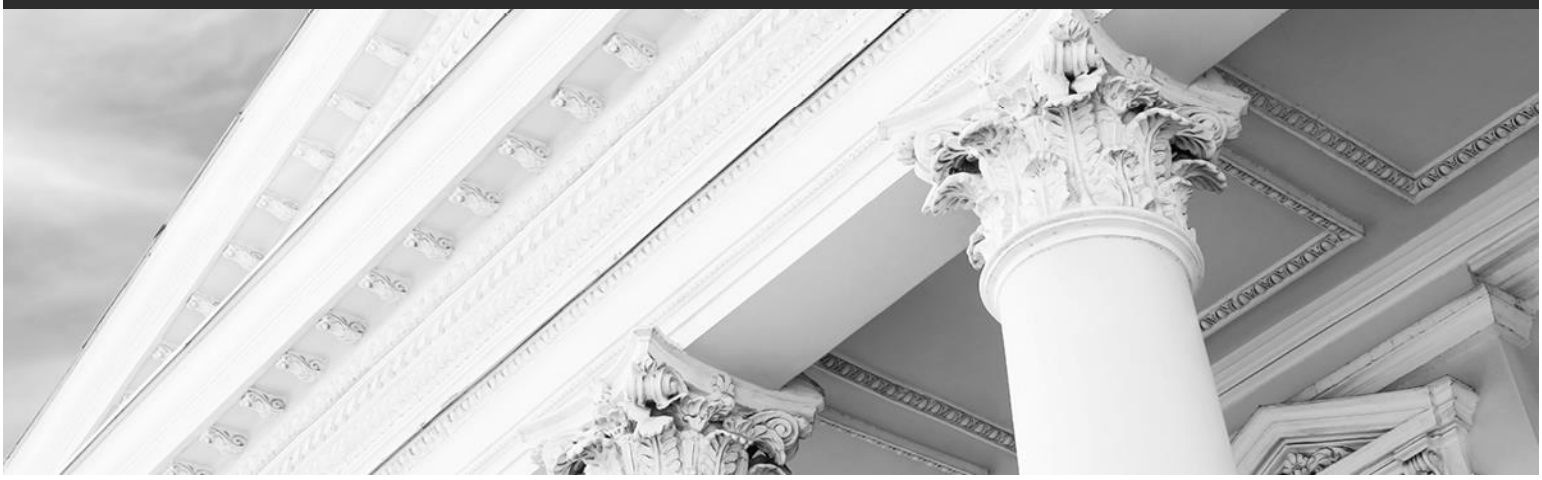
Class Action Litigation Newsletter | Spring 2021



In this Issue:

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

Highlights from this issue include:

- Supreme Court holds that serving a product market in the forum state is sufficient for specific personal jurisdiction in product liability lawsuits even when the product was not designed, manufactured or sold in that market.
- First Circuit looks to recent Massachusetts decision in upholding order compelling individual arbitration and dismissing putative class action based on an online "clickwrap" agreement.
- Second Circuit holds that a district court can *sua sponte* decertify a class after class certification, even absent a significant intervening event.
- Third Circuit finds mootness of individual plaintiff's claim renders class claims moot.
- Fourth Circuit rejects predominance arguments and affirms certification of class asserting breach of contract and unconscionable inducement claims.
- Fifth Circuit rejects conditional certification process in FLSA collective actions, articulating a new standard requiring district courts to make final certification decisions before allowing cases to proceed.
- Fifth Circuit rules that the *Daubert* standard applies to expert opinions at the class certification stage.
- Sixth Circuit holds that non-expert evidence need not be admissible at the class certification stage.

- Seventh Circuit reverses class certification where the concept of employment based "ambient harassment" is insufficient to satisfy Rule 23 requirements given the class definition.
- Arkansas Supreme Court affirms class certification where public records and objective criteria aid in ascertaining the class.
- Ninth Circuit remands price fixing class action for consideration of evidence that more than a "de minimis" portion of class members was not injured.
- District court in the D.C. Circuit rules that CAFA jurisdiction is improper unless the complaint itself invokes the class action rule or mechanism.

U.S. Supreme Court

Ford Motor Company v. Montana Eighth Judicial District Court, No. 19-368, 592 U.S. ___ (Mar. 25, 2021)

Supreme Court holds that a causal link is not required for in-state plaintiffs to establish specific personal jurisdiction over an out-of-state defendant and that specific jurisdiction can be satisfied if claims "relate to" a defendant's contacts with the forum state (and need not necessarily "arise out of" those contacts).

The Supreme Court addressed the constitutional requirements for personal jurisdiction in these consolidated cases relating to accidents involving two of Ford's vehicles, a 1996 Explorer and a 1994 Crown Victoria. The Supreme Courts of Montana and Minnesota previously rejected Ford's argument that the design, manufacture, and original sale of the product in question outside the state deprived the court of personal jurisdiction in a product liability lawsuit arising out of an accident in the state. Specifically, Ford had argued that the state court could only exercise jurisdiction if the company's conduct in the state gave rise to the plaintiff's claims, and that such a causal link could exist only if the company designed, manufactured, or originally sold the car in question in the forum state. Both state courts found that Ford purposefully sought to serve the automobile market in the state – including by encouraging the state's residents to purchase and drive Ford vehicles – making it immaterial whether Ford designed, manufactured, or originally sold the vehicle in the state. The Supreme Court granted certiorari to determine whether Ford was subject to personal jurisdiction , ultimately finding that it was.

In so holding, the Supreme Court detailed the parameters of specific jurisdiction, as described in prior rulings – that is, that "[i]t covers defendants less intimately connected with a State, but only as to a narrower class of claims" whereby a defendant's conduct reflects "purposeful availment" of its contacts in that state and the claims pursued arise out of or relate to those contacts. Under this formulation , the Court rejected Ford's argument that the "needed link" between its activities in the forum states and plaintiffs' claims "must be causal in nature," highlighting how "a strict causal relationship" is not necessary given the "relate to" grounds for specific jurisdiction – such that "serv[ing] a market for a product in the forum [s]tate" is enough. Put differently, that Ford "systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States" is sufficient, even though these precise vehicles were not sold by Ford in those states.

The Court distinguished its decision from *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. ___, 137 S. Ct. 1773 (2017), noting that in that case there was no tie to the state (California) and the plaintiffs were not California residents – unlike here, where the plaintiffs were residents of the forum states, used the

products at issue in these states (even if they did not buy them directly from Ford in these states), and were allegedly injured in these states, making Minnesota and Montana the "natural" places to file suit.

While the Supreme Court's decision was unanimous, the concurrences delivered by Justices Alito and Gorsuch (the latter of which was joined by Justice Thomas) took issue with the majority's suggestion that claims may simply "relate to" contacts in a forum state (and need not "arise out of" them). According to Justice Alito, "[r]ecognizing 'relate to' as an independent basis for specific jurisdiction risks needless complications," including that district courts may have difficulty establishing limits on what satisfies the "related to" test because of its "potentially boundless reach." Justices Gorsuch and Thomas expressed a similar sentiment, noting that "[w]here this leaves us is far from clear."

First Circuit

Emmanuel v. Handy Techs., Inc., No. _____, 2021 U.S. App. LEXIS 8467 (1st Cir. Mar. 22, 2021)

First Circuit affirms dismissal of putative class action and order compelling individual arbitration based on arbitration agreement entered into through an online "clickwrap" agreement.

The complaint in this case asserted wage and hour claims against a company that operated an online platform allowing users to obtain house cleaning and other home-related services. Service providers were required to complete an application, after which the defendant would provide a personal identification number for providers to access a smartphone app, enabling them to connect with defendant's customers who were seeking services. Plaintiff was a service provider who filled out the application and downloaded the app to connect with customers. To use the app, the plaintiff was required to click a "Confirm" button signifying plaintiff's agreement with various items and then to "Accept" the defendant's independent contractor agreement, which contained a mandatory arbitration clause.

Based on *Kauders v. Uber Technologies, Inc.*, 486 Mass. 557 (2021), a recent decision by the Massachusetts Supreme Judicial Court, the First Circuit concluded that plaintiff formed an arbitration agreement. According to *Kauders*, to form an online contract under Massachusetts law, a user of an online interface must be given "reasonable notice of the terms" of the agreement and must make a "reasonable manifestation of assent to those terms." The First Circuit explained that the "reasonable notice" requirement was satisfied, according to *Kauders*, when a user has "actual notice" of its terms, which would occur when a user reviews or "interacts" with the terms before agreeing to them. As further explained in *Kauders*, even absent actual notice, this notice requirement may be satisfied if "the totality of the circumstances" indicates that the user was provided with such notice of the terms. Similarly, as to whether a user manifests assent to the contract terms, a court may look at "clickwrap" agreements (where a user is "required to expressly and affirmatively manifest assent to an online agreement by clicking or checking a box that states that the user agrees to the terms and conditions") or, absent such express assent, a court may look again to the "totality of the circumstances," including whether "the connection between the action taken and the terms is []clear" and whether "the action taken . . . clearly signif[ies] assent."

Based on these criteria, the First Circuit concluded the plaintiff's selection of "Accept" while using the defendant's app demonstrated that the plaintiff had reasonable notice of the mandatory arbitration provision in the independent contractor agreement such that the plaintiff was bound by that provision.

The First Circuit came to this conclusion even though the terms of the clause were not visible on the smartphone screen unless the plaintiff scrolled down to view the clause.

Rovinelli v. Trans World Entm't Corp., No. _____, 2021 U.S. Dist. LEXIS 37875 (D. Mass. Feb. 2, 2021)

District court dismisses putative class action with prejudice because the failure to plead sufficient facts to satisfy Rule 23's commonality and predominance requirements resulted in lack of subject matter jurisdiction.

The district court dismissed with prejudice a putative class action complaint alleging that plaintiffs were individually solicited at the point-of-sale to purchase what they were led to believe would be "free" subscriptions, but were later charged for the subscriptions in violation of the Massachusetts Consumer Protection Act, Mass. Gen. Laws c. 93A. The district court ruled that the complaint did not plead sufficient facts associated with each putative class member's claim, and thus concluded that the pleading "irreparably lacks key dimensions of commonality and predominance that are required to adjudicate claims as a class action" in federal court. As the action could not proceed as a class action, the district court further concluded that it lacked subject matter jurisdiction over the entire complaint because the amount in controversy as to the plaintiffs' individual claims was less than the $75,000 jurisdictional minimum. In addition, the district court declined to allow a substitute plaintiff and further amendment to cure the defects for two reasons. First, "no conceivable amendment . . . could overcome, on behalf of the class as a whole, the hurdle created by the need for particularized details regarding each putative member's experience" at the point of sale. Second, the plaintiffs already had three chances to plead a proper putative class action but failed to do so.

As to the class action requirements, the district court explained that the Rule 23(a)(2) commonality and 23(b)(3) predominance requirements were "plainly insurmountable issues[.]" Specifically, although class actions have been certified based on oral misrepresentations, those types of actions relied on evidence of a "standardized sales pitch." Here, the plaintiffs did not allege the sales pitch was scripted; rather, they merely cited anonymous online reviews allegedly written "by unhappy customers and disaffected former employees." Far from evidencing a uniform script, the reviews "indicate that critical disparities exist between customers' experiences at the check-out counter." As explained by the district court, "each individual conversation is critical to Plaintiffs' proof of what they understood when they enrolled in the VIP and/or magazine programs during check-out." Thus, citing *Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338 (2011), the court concluded that "[t] he necessity to address critically important issues through individualized determinations meaningfully erodes the ability to satisfy the commonality requirement for a class action."

The district court further concluded that any common questions could not possibly predominate over individual issues. In particular, according to the district court, the putative class members "would each plainly have had a unique enrollment experience based on their interactions with . . . [the defendant's] employee during checkout. . . . [T]hey are likely to have asked questions, to which a variety of answers may have been provided." This would require testimony concerning each transaction — by customers, store clerks, and management — to establish whether a given customer was injured by an alleged misrepresentation, omission, or deception. Accordingly, the district court explained that, as individualized issues predominated over common questions (and answers), "it is obvious even at this early stage that this case cannot properly proceed as a class action."

Second Circuit

Jianmin Jin v. Shanghai Original, Inc., No. 19-3782, 2021 U.S. App. LEXIS 6739 (2d Cir. Mar. 9, 2021)

Second Circuit holds that, after class certification, a significant intervening event is not necessarily required for a district court to *sua sponte* decertify a class.

In this putative class action in which kitchen workers at Joe's Shanghai restaurant in Flushing, Queens asserted Fair Labor Standards Act claims, the district court originally certified the proposed class and then *sua sponte* decertified it five days before trial. The justification the court provided was that "while there have been numerous red flags over the past few months, including counsel's failure to adequately respond to the court's orders and apparent attempts to delay trial, the 'significant intervening event' triggering decertification is counsel's disclosure that he plans to call only two class members as witnesses at trial." The court ultimately held a bench trial on the plaintiff's individual claims and entered judgment in his favor, awarding him various forms of damages.

On appeal, plaintiff argued the district court abused its discretion in decertifying the class. The Second Circuit first addressed what it described as a "curious preliminary question" – that is, whether plaintiff's success on the merits of his individual claims moots his interest in appealing the decertification of the class. The court ultimately found no mootness, drawing parallels between plaintiff's interest in appealing the decertification order on behalf of a proposed class comprised predominantly of immigrants and "the interest of a private attorney general" seen in prior case law, whereby "the objectives of the class action device" and public policy considerations support jurisdiction. The Second Circuit then turned to the substantive question of decertification, finding that the district court "acted within its discretion in decertifying the class on the ground that class counsel was no longer adequately representing the class." The Second Circuit noted how "[t]he record is replete with counsel's shortcomings" and such representation "fell woefully short of the skilled and zealous representation expected of class counsel under Rule 23(g), justifying decertification." In so doing, the Second Circuit highlighted how an "intervening event" need not necessarily be the "impetus" for decertification; indeed, a district court may simply find that Rule 23's exacting requirements are no longer or not in fact met.

In re Teva Secs. Litig., No. 3:17-CV-558, 2021 U.S. Dist. LEXIS 43316 (D. Conn. Mar. 9, 2021)

Connecticut district court finds that a complete *Daubert* inquiry is appropriate in evaluating expert reports at the class certification stage.

In these consolidated putative class actions, plaintiffs alleged various securities claims against Teva and several current and former officers and employees. Plaintiffs' motion for class certification relied on expert opinions, which defendants sought to exclude and strike. The court granted the motion for class certification and denied the motion to exclude, but in so doing, assessed whether *Daubert* applied at the class certification stage.

The court noted that, "[i]t is still an open issue whether and to what extent a district court should conduct a *Daubert* analysis at the class certification stage." That said, the court posited that "the Supreme Court and Second Circuit have hinted that district courts should undertake a full *Daubert* analysis at the class certification stage, when necessary," leading it to conduct a full *Daubert* analysis as to plaintiff's expert's opinions. This decision follows the January 2021 decision in *In re Namenda Indirect Purchaser Antitrust*

Litig., No. 1:15-CV-6549, 2020 U.S. Dist. LEXIS 247078 (S.D.N.Y. Jan. 12, 2021), from the Southern District of New York, in which the court similarly held that a full *Daubert* inquiry was appropriate at the class certification stage.

Borgese v. Baby Brezza Enters. LLC, No. 20-CV-1180, 2021 WL 30216 (S.D.N.Y. Feb. 18, 2021)

S.D.N.Y. strikes class allegations at the pleadings stage, finding it clear that class certification requirements cannot be met based on the face of the complaint.

In this putative class action relating to alleged failures in the design, sale, and marketing of Baby Brezza baby formula machines, the defendant manufacturer moved to strike the class allegations under Fed. R. Civ. P. 23(d)(1)(D). Noting that "[t]he plausibility standard applies to such motions" and that the court may "strike the class allegations at any practicable time after the suit has been filed" if the complaint demonstrates an inability to satisfy the class certification requirements, the court ultimately granted the motion.

In so ruling, the court highlighted that the complaint "does not indicate where the other purchasers of the Baby Brezza machines reside, where they purchased the machines, or where they may have suffered any resulting injury," making the court "unable to determine which state laws apply, and in turn, whether those laws materially differ." Accordingly, it cannot "determine whether common questions of law predominate because the Complaint fails to identify any other potential state's law outside New York." The court also highlighted how the complaint provides "only conclusory allegations about the existence of other class members" and provides "no other information about, or similarities among, the purported class members"– overall, rendering entitlement to class treatment implausible.

Third Circuit

Laspina v. SEIU Pennsylvania State Council, 985 F.3d 278 (3d Cir. 2021)

Third Circuit finds mootness of individual plaintiff's claim renders class allegations moot as well.

Plaintiff in this putative class action resigned from her union because she protested the union fees that were required and sought an order recognizing her resignation and requiring the union to cease deducting union fees. The district court found that these claims were moot because the union complied with plaintiff's requests for relief and thus her claims failed to present a justiciable claim or controversy as required for Article III standing. The Third Circuit agreed that plaintiff's claim was moot and that the voluntary cessation doctrine did not apply because the union was not challenging the disputed conduct.

The panel next considered whether the class allegations could proceed even though plaintiff's individual claim was moot. The panel recognized that, for example, "when a plaintiff files a motion to certify a class when his individual claim still is live, the mooting of that claim while the motion is pending permits the court to decide the certification motion" and that plaintiff still could pursue class allegations. The panel distinguished the circumstances before it, however, because plaintiff "has not yet moved for class certification and maintains no personal stake in the resolution of this claim. The lack of personal stake in the resolution of the claim makes [plaintiff] a particularly inappropriate class representative." Accordingly, the panel affirmed the dismissal of the class allegations as well.

Fourth Circuit

Alig v. Quicken Loans, Inc., 990 F.3d 782 (4th Cir. 2021)

Fourth Circuit rejects predominance arguments and affirms certification of class.

The Fourth Circuit affirmed the district court's grant of class certification in this action in which plaintiffs alleged that pressure tactics used by mortgagors to influence home appraisers to raise appraisal values constituted a breach of contract and unconscionable inducement under the West Virginia Consumer Credit and Protection Act.

Defendants argued that the district court erred in granting class certification due to individualized issues on the questions of standing, the statute-of-limitations defense, the unconscionable-inducement analysis, various breach-of-contract issues, and the calculation of damages. The Fourth Circuit rejected each of these arguments.

The panel rejected the argument that the plaintiffs lacked standing because they received loans after obtaining the challenged appraisals, reasoning that, if a plaintiff is harmed, even by a small amount, they have standing even if the financial harm may be outweighed by the benefit enjoyed. On the statute of limitations defense, the panel found that the court could perform the "ministerial exercise" of determining which plaintiffs fell inside and outside the limitations period, which was based on objective criteria. On unconscionable inducement, the panel disagreed that individualized issues of state of mind defeated class certification because "actual inducement" was not an element of the statutory claim. On the breach of contract claim, the court ruled that any individual issues regarding plaintiffs' failure to perform or lack of damages could easily be dealt with by the district court after certification of the class. Finally, the panel found that statutory damages could be assessed class-wide because the issue did not involve an analysis of each class member's level of harm.

Zander v. Orange County, 851 S.E.2d 883 (N.C. 2020)

North Carolina Supreme Court rejects argument that class certification was improper due to application of statute of repose.

Plaintiffs sought to recover impact fees assessed by public-entity defendants under a now-repealed statute that had been enacted to allow certain counties and municipalities to defray the costs for constructing public schools, among other public services. The trial court certified two classes, and defendants appealed.

Defendants argued that the district court erred in granting class certification because all of the class members' claims fell outside of the applicable statute of repose, and therefore, individual issues predominated. The North Carolina Supreme Court rejected this argument. The Supreme Court reviewed the background of the statute as well as the allegations in the pleadings and found that all plaintiffs alleged that they had been damaged within the statute of repose. The Court did not assess any evidence on this point. On the basis of the pleadings alone, the Court found that the statute-of-repose defense did not raise any individual issues and, on that basis, affirmed certification.

Fifth Circuit

Swales v. KLLM Transport Services, LLC, 985 F.3d 430 (5th Cir. 2021)

Fifth Circuit rejects *Lusardi* conditional certification process in collective actions under the Fair Labor Standards Act and requires district courts to make final certification decisions before allowing cases to proceed.

In a minimum-wage Fair Labor Standards Act ("FLSA") collective action, truck drivers sued KLLM Transport Services, LLC, an Indiana-based transportation company, claiming they had been misclassified as independent contractors and demanding that they be paid the minimum wage. The plaintiffs moved for "conditional certification," which would have led to notice being sent to employees, who could then become parties by filing their written consent with the court. Applying the two-step method outlined in *Lusardi v. Xerox Corporation*, 118 F.R.D. 351 (D.N.J. 1987), the Southern District of Mississippi granted the plaintiffs' certification request. The district court certified its decision for appeal, and KLLM accepted that invitation.

In a unanimous panel opinion, the Fifth Circuit vacated the district court's certification ruling. The court addressed the question of "[h]ow rigorously, and how promptly, should a district court probe whether potential members are 'similarly situated' and thus entitled to court-approved notice of a pending collective action?" Perceiving a need for clarity, the court explained that the lack of a defined standard left district judges "applying ad hoc tests of assorted rigor in assessing whether potential members are 'similarly situated'" under the FLSA. The court rejected approaches adopted by other courts and outlined its own standard.

"Embrac[ing] interpretative first principles," the court began with the FLSA's text, which does not define what "similarly situated" means under the statute, and then considered the Supreme Court's warning that a district court should not "signal approval of the merits or otherwise stir up litigation" at the collective-action-certification stage. From that, the court held that "a district court must rigorously scrutinize the realm of 'similarly situated' workers, and must do so from the outset of the case, not after a lenient, step-one 'conditional certification.'" The court explained that "nothing in the FLSA, nor in Supreme Court precedent interpreting it, requires or recommends (or even authorizes) any 'certification' process." Instead, district courts "should identify, at the outset of a case, what facts and legal considerations will be material to determining whether a group of 'employees' is 'similarly situated.'" And courts should allow preliminary discovery to address that issue. This determination "must be made, and as early as possible." Once that is done, then the district court should consider the evidence and "determine whether the requested opt-in notice will go to those who are actually similar to the named plaintiffs." Rejecting the "near-universal practice" outlined in *Lusardi*, the court of appeals vacated the district court's conditional certification and remanded the issue to the district court.

Prantil v. Arkema Inc., 986 F.3d 570 (5th Cir. 2021)

Fifth Circuit rules that the *Daubert* standard applies at class certification stage and vacates class certification in a chemical explosion case brought by property owners when issues of causation, injury, and damages would be highly individualized.

Property owners and residents in southeastern Texas sued Arkema, Inc., the owner of a chemical facility where nine refrigerated trailers containing combustible materials burned in an explosion in the wake of Hurricane Harvey, claiming property damage seeking medical surveillance for personal injury in the

federal court for the Southern District of Texas. The plaintiffs asserted claims under the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and various common law torts. The plaintiffs moved to certify both a damages class under Rule 23(b)(3) and injunctive-relief class under Rule 23(b)(2). The district court certified the classes. The defendants sought, and the court of appeals granted, leave to appeal the district court's certification ruling.

The Fifth Circuit began its analysis by joining the Third, Seventh, and Eleventh Circuits in holding that expert opinions on class certification must be admissible under the *Daubert* standard. Recognizing that "certification changes the risks of litigation often in dramatic fashion," the court of appeals clarified that "the *Daubert* hurdle must be cleared when scientific evidence is relevant to the decision to certify." Here, the district court had expressed "hesitation to apply *Daubert*'s reliability standard with full force," but emphasized that "an assessment of the reliability of plaintiffs' scientific evidence for certification cannot be deferred."

The court of appeals next considered the various Rule 23 factors and concluded that the district court's analysis was not sufficiently exhaustive. Beginning with predominance under Rule 23(b)(3), the court of appeals determined that the district court erred because it "did not discuss the considerations affecting the administration of trial," and it did not adequately address the defendant's arguments that individualized issues of causation, injury, and damages would overwhelm common questions. Even though plaintiffs argued there was only one named defendant and one "course of conduct," the court of appeals ruled that the district court should have engaged in a "discussion of how proof of Arkema's conduct will affect trial." The Fifth Circuit explained that "the relative balance of concededly common claim elements to contested elements of causation and injury warrants closer attention."

The court of appeals also took issue with the district court's certification of an injunctive class under Rule 23(b)(2). In seeking to certify that class, the plaintiffs sought injunctive relief in the form of medical monitoring and property remediation. The district court determined that the medical monitoring injunction would address the plaintiffs' common injury. As to property remediation, the district court accepted that an injunction would be appropriate because individual clean-up efforts would not work. The court of appeals, however, concluded that the district court had failed to fully analyze these arguments. On medical monitoring, the district court failed to "discuss the range or types of medical monitoring the injunction would implement." On property remediation, the district court "made no specific findings as to what the property remediation program would entail." The court of appeals explained that "[t]hese discussions of the injunctions in their broad strokes do not satisfy the requirement that injunctive relief be reasonably specific." The court emphasized that "more is needed than a common failure by the defendant and the prospect that all class members could realize some benefit if the defendant is compelled to act or desist." While an injunctive-relief class could be capable of certification, the district court must address the opposing party's arguments and "evaluat[e] the particulars of each injunction," and "arrive at a nuanced assessment of whether Plaintiffs' claims for relief can be effectively addressed in a class action." With that, the Fifth Circuit vacated the district court's certification order and remanded the case for further proceedings.

Sixth Circuit

Lyngaas v. Curaden AG, No. 20-1199, 2021 U.S. App. LEXIS 8601 (6th Cir. Mar. 24, 2021)

Sixth Circuit holds that non-expert evidence need not be admissible at the class certification stage.

A dentist in Michigan (Lyngaas) filed a class action against a toothbrush manufacturer (Curaden AG) for two unsolicited faxes he received from the defendant's U.S. subsidiary (Curaden USA), which he claimed violated the Telephone Consumer Protection Act ("TCPA"). The district court in the Eastern District of Michigan held a bench trial and found that the unsolicited faxes violated the TCPA, but that Curaden AG was not a "sender" under the statute. The court also ruled that Lyngaas's fact and expert evidence on the total number of faxes was inadmissible because it was unauthenticated. So the court created a claims administration process for class members to verify their receipt of unsolicited faxes.

Both parties appealed the district court's rulings, and the Sixth Circuit affirmed 2 to 1. On the issue of whether Curaden AG was a "sender" under the TCPA, the court of appeals agreed with the district court that, although Curaden USA's unsolicited faxes "advertised and promoted" Curaden AG's products, Curaden AG did not have "knowledge of or involvement in the fax advertisements" and thus did not "cause" the faxes to be sent. The fact that Curaden AG entered into a distribution agreement with Curaden USA to "use its best endeavours to promote the sale of the Products throughout the Territory" was insufficient. (The Sixth Circuit also affirmed the district court's conclusion that, for personal jurisdiction purposes, Curaden AG was not Curaden USA's "alter ego," though it did find that the court had jurisdiction over Curaden AG on other grounds.)

The Sixth Circuit also held that class certification need not be based on admissible evidence. The court explained that it "has never required a district court to decide conclusively at the class-certification stage what evidence will ultimately be admissible at trial. Nor does any binding precedent impose such a requirement." The court first cited language from two different Supreme Court cases—*General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982), and *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013)—recognizing that "a party seeking to maintain a class action must satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." But, following the lead of the Eighth and Ninth Circuits, the Sixth Circuit held that the "evidentiary proof" required "need not amount to admissible evidence, at least with respect to nonexpert evidence." The court reasoned that class certification is "inherently tentative," and that applying an admissibility standard to class certification evidence "makes little common sense." Assessing the district court's decision below, the court of appeals explained that "the district court here undertook the rigorous analysis required of it and correctly found sufficient evidence for class certification." "Requiring the court to rely on formalistic evidentiary opinions at this stage could have been inappropriate, particularly given Lyngaas's assurance that he would be able to authenticate the logs at trial." Given that, the court ruled that the claims administration process was appropriate.

Finally, the Sixth Circuit rejected Curaden AG's argument that the Supreme Court's 2017 decision in *Bristol-Meyers Squibb Company v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773 (2017), applied to federal class actions. The court refused to interpret *Bristol-Meyers* as requiring a federal court in a class action to have personal jurisdiction over the defendant as to each class member, which is a requirement for all plaintiffs in a state court mass action. After discussing *Bristol-Meyers* and other decisions, the court of appeals offered two reasons for its decision. "First," the court explained, "a class action is formally one suit in which, as a practical matter, a defendant litigates against only the class

representative." And "[s]econd, and relatedly," the court reasoned, "absent class members are not considered parties, as a class representative is, for certain jurisdictional purposes." The differences between a federal class action and a coordinated state court mass action warrant different approaches.

Primus Grp. v. Smith & Wesson Corp., No. 19-3992 (6th Cir. Feb. 8, 2021)

Sixth Circuit rejects proposed class action to hold gun manufacturers liable for mass shootings in public places.

The Sixth Circuit affirmed an Ohio federal judge's decision to dismiss Primus Group's proposed class action against gun manufacturers based on Primus Group's failure to establish proper standing.

In August 2009, Primus Group—a Columbus, Ohio-based entertainment venue—filed a class action suit against eight firearm manufacturers to enjoin them from selling or distributing assault weapons to civilians. Primus alleged that the arms manufacturers violated the Racketeer Influenced and Corrupt Organizations Act ("RICO") and "intentionally misrepresented the purpose of these weapons." After the gun manufacturers sought dismissal by asserting Primus Group's "fail[ure] to allege an actual case or controversy conferring Article III standing," Primus Group amended its petition to include public-nuisance, negligent-design, failure-to-warn, RICO, and intentional-misrepresentation claims. Primus Group supported its position to pursue the class action suit by complaining that the "persistent killing and wounding of countless persons" endangers the health, welfare, safety and lives of all people living in the United States, and that "'gun violence' poses an 'imminent' and inevitable' threat of irreparable harm to American society[.]"

The issue before the Sixth Circuit was whether Primus Group had pled an injury in fact. Affirming the district court, the panel ruled that Primus had not. The panel reasoned that Primus Group's claimed injury "is typical of any entity that operates where people assemble to attend, inter alia, entertainment or music venues, restaurants, bars, stadiums and shopping centers" that "now lose market share due to public hysteria or the real threat of mass shootings[.]" This did not meet the threshold to establish standing. The complaint supplied no facts to demonstrate that Primus Group was "among th[ose] injured by mass shooting; that gun violence affects Primus Group "in a personal and individual way"; or that Primus Group had "a direct stake in the outcome" of the suit.

The Sixth Circuit rejected Primus Group's argument that "anxiety arising from the omnipresent threat of mass shootings by civilians armed with assault weapons is sufficient to state an injury in fact." The panel pointed to Primus Group's assertion that it "br[ings] this suit on behalf of all citizens, person, and inhabitants of the United States of America" as an indication that Primus Group did not conceive of gun violence as a personal injury. The panel ultimately decided that "particularization is necessary to establish injury in fact; and by failing to allege a particular harm, Primus has failed to meet its burden at the pleading stage to demonstrate injury in fact."

Seventh Circuit

Thornley v. Clearview AI, Inc., 984 F.3d 1241 (7th Cir. 2021)

Seventh Circuit holds no Article III standing to bring Section 15(c) BIPA claim in federal court without allegations of particularized injury.

Plaintiff filed a class action suit in state court, asserting violations of the Illinois Biometric Information Privacy Act (BIPA), 740 ILCS 14/15(c), against a facial recognition company that pulls data from publicly available social media sites. After defendant removed the case to federal court, plaintiff moved to remand for lack of Article III standing. The district court granted the plaintiff's request to remand, and the Seventh Circuit affirmed.

Noting that Article III standing requires concrete and particularized injuries, the Seventh Circuit highlighted that the complaint must contain allegations supporting a specific injury, regardless of whether that injury is procedural or substantive. The court acknowledged that a plaintiff may construct her complaint under Section 15(c) of BIPA to allege a concrete injury sufficient for Article III standing. However, the *Thornley* plaintiff purposefully did not meet this bar by alleging that she and the putative class had not suffered any injury aside from the statutory violation. Because of this limitation, the plaintiff lacked Article III standing and could avoid removal to federal court; though the Seventh Circuit also noted that anyone falling outside of the putative class definition, i.e., those who have suffered a concrete injury, could possess standing under Article III in a separate suit.

In re Navistar MaxxForce Engines Marketing, Sales Practices, & Products Liability Litigation, 990 F.3d 1048 (7th Cir. 2021)

The Seventh Circuit held failure to opt out in a timely manner and according to the process provided by the district court results in a class-member being bound by the class-wide settlement.

This appeal arose from the district court's order holding that intervenor's failure to opt out under the prescribed process in a timely manner was inexcusable. Intervenor was a plaintiff in a separate case against Navistar in Ohio. Navistar sent two first-class letters to intervenor regarding the proposed settlement, and intervenor's attorneys had actual notice of the settlement and corresponded with Navistar's counsel regarding the settlement.

The district court held that mailing of properly addressed letters is evidence of their receipt and a disclaimer of memory does not refute receipt. Intervenor attempted to argue that notice by first-class mail is insufficient, but the Seventh Circuit held that this was "a hard line of argument to pursue," And concluded that the undisputed knowledge of intervenor's lawyers was imputed to intervenor. As such, intervenor was required to opt-out under the straightforward process provided for in the opt-out notice.

While a district court has discretion to permit an untimely opt out when the delay is excusable, it is not an abuse of discretion to bar such an opt out where intervenor's counsel had actual knowledge of the settlement. The district court, "having approved a detailed process . . . was entitled to require the class members to do what they had been told or bear the consequences of inaction."

Anderson v. Weinert Enters., 986 F.3d 773 (7th Cir. 2021)

The Seventh Circuit holds that numerosity was lacking where joinder was practical for thirty-seven identifiable class members.

This appeal arose from the district court's denial of class certification under Fed. R. Civ. P. 23(a). The named plaintiff was a seasonal employee for defendant roofing company and asserted challenges to the defendant's calculation of overtime wages. Without adequate support, the plaintiff could only pursue his claims under the FLSA individually, but ultimately pursued a collective action based on Wisconsin state law claims. Plaintiff moved for certification after identifying a class of thirty-seven employees who worked for the defendant between June 14, 2016, and December 31, 2018, with an additional request to include all expected hires for the 2019 season within the proposed class. The district court, however, limited the proposed class size to the 37 current and former employees that could be accounted for and held this number insufficient to satisfy numerosity requirements under Rule 23(a) given the feasibility of the joinder of all members.

The Seventh Circuit affirmed, ruling that plaintiff failed to establish the impracticability of joining all class members. The court determined that this inquiry was did not depend on the number of class members alone, but rather other factors related to the viability of joinder, such as the proposed members' locations, the sizes of their individual claims, or the properties subject to the dispute. While noting that forty member classes often may satisfy numerosity, the court held that the district court had not abused its discretion in finding joinder practical for plaintiff's proposed class of thirty-seven identifiable members, only two of whom lived outside a 50-mile radius of the courthouse where the lawsuit was filed.

Howard v. Cook County Sheriff's Office, 989 F.3d 587 (7th Cir. 2021)

The Seventh Circuit reverses class certification where the concept of employment based "ambient harassment" is insufficient to satisfy commonality, typicality and predominance.

This appeal challenged a district court's certification of a class initially comprising over 200,000 women employed throughout various departments of the Cook County Sheriff's Office, including the jail, courthouse and health services departments. The named plaintiffs sued the Sherriff's Office and Cook County, alleging that the defendants failed to act against the extreme sexual harassment received from the inmates, thereby contributing to a hostile work environment and gender discrimination in violation of Title VII, Section 1983, and the Fourteenth Amendment. In certifying the class, the district court emphasized the concept of "ambient harassment," where sexual degradation saturates a workplace, creating normative and continuing indirect harassment. The district court determined that the putative class had satisfied the requirements of commonality, typicality and predominance under Rule 23 of the Federal Rules of Civil Procedure. However, the class was subsequently modified, excluding all employees from the class who had no contact with male inmates.

On an interlocutory appeal, the Seventh Circuit reversed the certification order. The court held that plaintiffs' reliance on ambient harassment was no longer tenable once plaintiffs modified their class to exclude employees without inmate contact, because ambient harassment could no longer form a common question, as indirect harassment became a peripheral issue for the modified class. The court reiterated this point in assessing typicality, holding that the requirement was unsatisfied given that the named plaintiffs were poor proxies for class members whose claims depended on ambient harassment. The court also determined that there was not a common question that sufficiently predominated, primarily because of the wide variety of circumstances presented to the class members based upon their location throughout

the workplace and their individual experiences. While the defendants had uniform policies in response to harassment, the court determined that the reasonableness of those policies was largely dependent upon the specific circumstances of the class member challenging the policy.

Indiana Univ. by & through Board of Trustees v. Thomas, 20A-PL-361, 2021 WL 1013937 (Ind. Ct. App. Mar. 17, 2021)

Indiana Court of Appeals reversed certification of classes claiming remediation of indoor mold growth was a breach of contract, where plaintiffs' complaint sought remediation.

The Indiana Court of Appeals held that: (1) where the complaint sought remediation of indoor mold growth, class certification cannot be based on the unpleaded assertion that such remediation was a breach; and (2) where a government entity provides payments in excess of the Indiana Tort Claims Act cap of $5,000,000 contained in the Indiana Tort Claims Act (ITCA), summary judgment was appropriate on all tort claims.

This interlocutory appeal arose from the trial court's certification of plaintiffs' classes and denial of defendant's partial summary judgment motion. When plaintiffs' complaint was filed, defendant Indiana University had already gotten mold remediation efforts underway and relocated students residing in the impacted dormitories. In addition, defendant implemented compensation programs for students affected by the mold, including applying a $3,000 credit to each impacted student's account (totaling $7,374,000) and paying an additional $237,629 for damages and losses related to the mold and mold-remediation.

The Indiana Court of Appeals reversed the trial court's decision to certify the "Moldy Dorms" and "Noise Polluted Dorms" classes, as these classes were not included in plaintiffs' amended complaint. The complaint sought "court-ordered remediation" and, when Indiana University undertook remediation of the mold, plaintiffs reversed course and argued in support of certification of these subclasses that defendant breached its contract by conducting the requested remediation. The Indiana Court of Appeals found that these classes were "based on claims not pled in the Plaintiffs' amended complaint" and "refuse[d] to perpetuate the adage that no good deed goes unpunished."

The Indiana Court of Appeals also reversed the trial court's denial of summary judgment based upon payouts defendant had already made for tort claims. Plaintiffs had plead that "all class members were injured through the uniform unlawful conduct described" in the complaint. Defendant made payments of $3,000 to each of the residents of the impacted dormitories – payments which exceeded the aggregate liability cap in the ITCA by nearly 50%. The Court of Appeals found "that the trial court erred in denying [Defendant's] motion for partial summary judgment" because defendant's payments "exceeded its aggregate liability for the Plaintiffs' tort claims under the ITCA."

Eighth Circuit

C.J. Mahan Constr. Co. v. Betzner, 2021 Ark. 42 (Mar. 4, 2021)

Arkansas Supreme Court affirms class certification where public records and objective criteria aid ascertaining the class, and common dispositive issues predominate over individual questions of proximate cause.

The circuit court certified a class of property owners whose water systems were damaged by defendant contractor's actions in a suit for negligence and breach of contract. The defendant appealed, arguing that

the class of property owners was too difficult to ascertain because: (1) the court must determine title to all properties involved; and (2) those owning the affected water accounts may not reside at the damaged property and the class definition did not identify all those who resided at the property. The defendant also challenged the predominance requirement of Rule 23, claiming individual issues regarding proximate cause made certification inappropriate in tort actions. Finally, the defendant claimed certification on the breach of contract claims was improper.

The Arkansas Supreme Court affirmed class certification, finding first that relying on public property records to determine title would not require an "extensive or individualized fact-finding mission" and did not otherwise impede ascertaining the class. It further held that account ownership and residency were objective criteria on which to base the class, making it readily ascertainable. As to predominance, the court rejected the defendant's position and determined that certain questions regarding causation would be dispositive for the class as a whole. As such, the court would not be required to examine the facts as to causation for each individual class member. To the extent individual questions surfaced after the common issues were resolved, the Arkansas Supreme Court noted that the lower court had the ability to decertify the class at a later date or bifurcate proceedings. Lastly, the Court did not address the merits of the breach of contract certification because the defendant did not preserve the issue on appeal. On the preservation issue, one justice dissented, opining that the defendant's argument was apparent and developed in his brief.

Ninth Circuit

DiCarlo v. MoneyLion, Inc., 988 F.3d 1148 (9th Cir. 2021)

Under terms of arbitration agreement, public injunctive relief is available in a single plaintiff proceeding.

Plaintiff brought proposed class action claims against a smartphone app financial services provider under California's Unfair Competition Law (UCL), False Advertising Law (FAL) and Consumers Legal Remedies Act (CLRA), challenging the terms for allowing cancellation of a banking membership agreement. The membership agreement included an arbitration clause waiving the right to bring a class action, serve as a private attorney general or join claims of other customers. The district court granted defendant's motion to compel arbitration.

On appeal, plaintiff argued that the arbitration clause violated the rule stated by the California Supreme Court in *McGill v. Citibank*, 2 Cal. 5th 945 (2017) – i.e., "a person cannot contractually waive the right to seek 'public' injunctive relief." But the Ninth Circuit rejected the argument, noting that the arbitration provision allowed an arbitrator "to award all remedies available in an individual lawsuit," including injunctive relief. The Ninth Circuit then noted that public injunctive relief is available under the UCL, FAL and CLRA, which could be sought in an individual, bilateral arbitration. The Ninth Circuit therefore affirmed the district court.

Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC, No. _____, 2021 U.S. App. LEXIS 9880 (9th Cir. Apr. 6, 2021)

Ninth Circuit remands price fixing class action for consideration of evidence that more than a "*de minimis*" portion of class members was not injured.

Purchasers of various tuna products sued producers of packaged tuna products for price-fixing and other anti-competitive conduct. The district court certified the proposed classes, despite evidence showing that potentially 28% of the class members had not suffered actual and direct injury -- i.e., they were not impacted by price-fixing and, thus, did not pay an inflated price. The district determined that this was an issue for trial.

The Ninth Circuit disagreed, finding that it was an abuse of discretion for the district court to "gloss over" this potential number of uninjured plaintiffs. In connection with analysis of predominance, there is no set threshold for what portion of the class must suffer actual injury. But the Ninth Circuit found that the uninjured portion must be "*de minimis*," and 28% would be far out of bounds. The case was remanded for consideration of the issue.

Arena v. Intuit, Inc., No. _____, 2021 U.S. Dist. LEXIS 41994 (N.D. Cal. Mar. 5, 2021)

Court denies preliminary approval of class action settlement finding the monetary compensation was too low in comparison to potential damages.

Plaintiffs filed a class action for breach of contract and state consumer protection violations as to defendant's tax preparation product. The parties negotiated a $40 million settlement in which each class representative would receive a $10,000 award, the attorneys' fees would constitute 25% of the fund, and the remaining $28 million would be paid to class members who signed a written attestation stating that they paid a $100 annual fee for tax filing, when they expected it to be free. Defendant also agreed to modify certain business practices. In connection with preliminary approval, the court held that the monetary compensation did not constitute adequate relief because: (1) defendant's potential liability was at least $1.9 billion, and class members would only recover 1.5% of that amount; (2) class members paid at least $100 each, but the settlement provided only 28% recovery of their damages; and (3) the settlement provides the same relief for those that paid for one year, and those that paid for more than one year. The court further held that the opt-out procedure was burdensome, as it required class members to sign in wet-ink and mail a hard copy of the opt-out. The court found this particularly important because many individuals were arbitrating the same claims outside the scope of the proposed class action.

Handloser v. HCL Technologies, Ltd., No. _____, 2021 U.S. Dist. LEXIS 45183 (N.D. Cal. Mar. 9, 2021)

Commonality must be firmly proven where plaintiffs seek class certification for alleged countrywide discriminatory hiring practices.

Plaintiffs brought a class action against an information technology services and consulting company for alleged discriminatory hiring practices. Plaintiffs alleged that, through its hiring process, defendant screened out all non-South Asian, local candidates, and only hired foreign South Asian candidates. On plaintiffs' motion for class certification, the court held that plaintiffs failed to establish commonality for several reasons, including: (1) a portion of the class could not have been subjected to the alleged

discriminatory practices because they applied for specific positions that excluded visa holders and required the positions to be filled by citizens or green card holders; (2) over 50% of positions during the class period were withdrawn because of matters outside of defendant's control, e.g., they were filled by a competitor, filled by a client's direct applicant, or withdrawn by the client; (3) plaintiffs were unable to provide the "glue" holding the various alleged discriminatory experiences together, as is required where plaintiffs challenge a countrywide employment system, because defendant's hiring process is different for each position applied; (4) during the class period, defendant used approximately 1,800 hiring managers across the country, each of whom had discretion to make hiring decisions; (5) employment decisions took place in "*47 states*, involved roughly 16,000 job searches, and concerned approximately 200 job types," all of which required individual employment decisions involving different factual circumstances; and (6) plaintiffs did not show a "common direction" from defendant's management regarding hiring procedures.

Javier v. Assurance IQ, LLC, No. _____, 2021 U.S. Dist. LEXIS 48777 (N.D. Cal. Mar. 9, 2021)

Consent to a privacy policy through a webpage defeated a California Invasion of Privacy Act claim.

Plaintiff brought a class action for violation of the California Invasion of Privacy Act (CIPA). Defendant had a website that allows consumers to obtain life insurance quotes. A user enters various pieces of personal information and then clicks "View My Quote." The website states that, "by clicking 'View my Quote,' the user provides an 'electronic signature as an indication of . . . intent to agree to the website's Privacy Policy' and 'Terms of Service.'" The Privacy Policy allowed for various activities, such as collection of personal information, monitoring of website actions, and sharing information with third parties.

Defendant also partnered with a third party to support its website. The third party provided a "lead certification product that helps businesses comply with regulations like the Telephone Consumer Protection Act . . . by documenting consumer consent." That product can record "keystrokes, mouse clicks, data entry, and other electronic communications of visitors to websites." Defendant therefore could secure a video of a user's interaction with the website, including consent to being contacted by phone.

Plaintiff visited defendant's website and completed the click-through process. When he subsequently received telephone calls from a supposedly unknown party and complained about them, he was "shocked to discover" that his activities had been recorded on defendant's website and filed the CIPA action.

Defendant filed a motion to dismiss, arguing that plaintiff consented to being recorded when he agreed to defendant's privacy policy on the website. Plaintiff argued that the consent was invalid because: (1) he did not consent until after the privacy violation occurred; (2) he did not have sufficient notice of the policy; and (3) the policy did not disclose the conduct at issue. Although the court found no cases addressing retroactive consent in the privacy context, it held that, because retroactive consent is found in other areas of California law, the consent was valid. The court further concluded that plaintiff had sufficient notice of the policy because, when he pressed "View My Quote," he agreed to the terms of the policy that were hyperlinked to the same button, and the page containing the button was "clean and uncluttered." Lastly, the court found that the policy did disclose the conduct at issue, stating that defendant "tracks activity" on its website, and the recording was a form of such tracking.

Julian v. TTE Technology, Inc., No. _____, 2021 U.S. Dist. LEXIS 40119 (N.D. Cal. Mar. 3, 2021)

Purchasing a durable good does not provide standing to seek a permanent injunction relating to future purchases when such purchases are not likely to be repeated with any frequency.

Plaintiffs filed a putative class action based on the allegation that defendant's advertising of its televisions as having a "120Hz CMI effective refresh rate" was false or misleading because the TVs in fact had a 60Hz refresh rate. Plaintiffs alleged claims under the UCL, FAL, CLRA, and New Jersey Consumer Fraud Act (N.J. Stat. Ann. § 58:8-1 *et seq*.), as well as for unjust enrichment.

Among other forms of relief, plaintiffs sought a permanent injunction, and defendant moved to dismiss that claim based on lack of standing. The court granted the motion, finding that plaintiffs' conclusory allegation that they intend to purchase one of defendant's televisions without any factual allegations to suggest a purchase in the relatively near or foreseeable future is not sufficient, at least in the context where, as here, the goods are not like consumable items that are bought on a repeat basis, but rather durable goods not typically purchased on a regular basis.

Ramirez v. Electronic Arts, Inc., No. _____, 2021 U.S. Dist. LEXIS 43032 (N.D. Cal. Mar. 5, 2021)

Where an arbitration clause incorporates AAA rules, the question of enforceability must be presented to the arbitrator.

Plaintiff sued a video game developer, alleging that a feature of certain games violated California law. Each game was governed by a standard user agreement, which contains an arbitration provision with a class-action waiver. The arbitration provision was subject to the rules of the American Arbitration Association (AAA), which provide that "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or *validity* of the arbitration agreement or to the arbitrability of any claim or counterclaim."

In opposing defendant's motion to compel arbitration, plaintiff argued that the provision was unenforceable under *McGill v. Citibank*, 2 Cal. 5th 945 (2017), because it bars his ability to seek public injunctive relief. The court rejected this argument, finding that "incorporation of the AAA rules constituted clear and unmistakable evidence that the contracting parties agreed to arbitrate arbitrability." Thus, the enforceability issue would proceed before the arbitrator, not the court.

Saunders v. DoorDash, Inc., No. _____, 2021 U.S. Dist. LEXIS 27555 (N.D. Cal. Feb. 12, 2021)

It was proper for the court to look to plaintiff's amended complaint to determine whether the "home state controversy" applied under CAFA.

Plaintiff brought state law wage and hour claims on behalf of drivers who use defendant's California-based platform to make food deliveries for defendant's customers. The case was initially filed in San Francisco County Superior Court, and defendant removed the case to the Northern District of California under the Class Action Fairness Act (CAFA). On plaintiff's motion for remand, the court examined, among other things, the "home state controversy" exception, which requires a district court to decline to exercise

jurisdiction "over a class in which two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed."

In the original complaint, plaintiff defined the putative class as "each individual whom [defendant] has employed as a [d]river in California at any time since the date four years prior to the filing of the instant case and whom [defendant] has classified as an independent contractor." Following removal, plaintiff filed an amended complaint, defining two subclasses: (1) "each individual . . . employed as a [d]river in California at any time beginning on March 1, 2020, and whom [defendant] classified as an independent contractor during that time"; and (2) drivers who were terminated because they opted out of defendant's arbitration agreement.

The parties engaged in discovery, which demonstrated that the vast majority of class members under the amended complaint – more than 80% – likely were California residents. Defendant, however, argued that this evidence was insufficient to establish CAFA's home state controversy exception because jurisdictional analysis must be based on the pleadings at the time of removal – i.e., looking at the definition in the initial complaint. The court rejected this argument, finding that plaintiff's amendment was not intended to "chang[e] the nature of the class to divest the federal court of jurisdiction," which would be improper. Rather, plaintiff had amended to account for the settlement of similar class claims in another pending action. Thus, analyzing the definition in the amended complaint, the court noted that the burden of establishing the exception "should not be exceptionally difficult to bear," and found that plaintiff had shown by a preponderance of the evidence that at least two-thirds of the putative class members were California citizens.

Jialu Wu v. iTalk Global Communications, Inc., No. _____, 2021 U.S. Dist. LEXIS 31496 (C.D. Cal. Feb. 2, 2021)

Plaintiffs could not seek equitable relief under California's UCL when damages will provide adequate relief for any alleged harm from automatically renewing television services.

Plaintiffs filed a putative class action alleging that, without clear warnings or affirmative consent, defendant (1) enrolled its customers in subscription services that automatically renew for iTalkBB Chinese TV, which connects to a television (similar to a cable box) and provides access to popular Chinese movies and television shows through defendant's service, and (2) fails to give its customers the ability to cancel such services online. Plaintiffs alleged a single cause of action for violation of California's Unfair Competition Law (UCL), codified at California Business & Professions Code §§ 17200, *et. seq*.

The district court granted defendant's motion to dismiss, finding that plaintiffs' claims failed as a matter of law because plaintiffs did not establish the inadequacy of legal remedies (i.e., damages), as required under the Ninth Circuit's recent decision in *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020). The court rejected plaintiffs' argument that *Sonner* was distinguishable because, unlike the plaintiff in *Sonner*, the plaintiffs in *Jialu Wu* sought both restitution and injunctive relief. The court found this to be a distinction without a difference, noting that the clear rule in *Sonner* is that plaintiffs must plead the inadequacy of legal remedies before requesting any equitable relief.

The court also rejected plaintiffs' argument that, unlike the plaintiff in *Sonner*, who sought damages for past conduct, the plaintiffs in *Jialu Wu* sought relief for future violations based on automatic renewals in the future for plaintiffs and the putative class members. The court found that plaintiffs had not explained why their potential future monetary harm caused by defendant – if they choose to continue using

defendant's services – would be irreparable, and that lost money is the exact type of harm that money damages can adequately remedy, whether suffered in the past or potentially suffered in the future.

Next, the court rejected plaintiffs' argument that injunctive relief was appropriate because they were suffering a continuing injury due to automatic renewals, finding that monetary relief was also adequate to compensate for such harm.

Finally, the court rejected plaintiffs' argument that *Sonner* did not apply because they only sought relief under the UCL. The court found that plaintiffs' argument would impermissibly allow state legislatures to empower federal courts to issue equitable relief – regardless of the type of harm suffered by the claimant or whether such harm could be remedied by money damages – so long as the claimant sues under a state statute that only permits equitable relief.

Glenn Liou v. Organifi, LLC, No. _____, 2021 U.S. Dist. LEXIS 24681 (S.D. Cal. Feb. 8, 2021)

Plaintiff stated claims under the UCL, FAL, and CLRA by alleging facts regarding direct evidence that benefit statements on juice packaging were provably false.

Plaintiff filed a putative class action against defendants alleging claims for, *inter alia*, violation of the California UCL, FAL and CLRA based on defendant's allegedly false and misleading statements about its product Organifi Green Juice.

The district court denied defendant's motion to dismiss claims that were based on benefit statements on the Green Juice packaging in which defendants claimed that "Green Juice's effectiveness at treating certain conditions has been proven by third-party clinical trials." The court found that plaintiff stated claims because he adequately alleged direct evidence that the statements were provably false by claiming that (1) there has only been one study of Green Juice conducted, not multiple; (2) the single study of Green Juice does not qualify as a "clinical trial"; (3) any other studies relied on by defendants are of Green Juice's component ingredients, rather than studies of Green Juice itself; and (4) the 18 clinical trials specifically referenced by defendants in support of the benefit statements do not actually support Green Juice's efficacy. With respect to statements for which plaintiff did not allege facts showing they were provably false, the court found that such claims were "lack of substantiation claims," which private litigants are prohibited from bringing under the CLRA or UCL under *Nat'l Council Against Health Fraud, Inc. v. King Bio Pharm., Inc.*, 107 Cal. App. 4th 1336 (2003).

Hunter v. Legacy Health, No. _____, 2021 U.S. Dist. LEXIS 371 (D. Ore. Jan. 4, 2021)

Equitable tolling does not apply to permissible procedural delays in providing contact information for putative class members.

Plaintiff filed a wage and hour putative class action based on alleged FLSA violations. In her motion for class certification, plaintiff asked the court to equitably toll the statute of limitations for opt-in plaintiffs from the date by which she requested defendant provide the proposed collective members' identities and contact information, pursuant to *Stoll v. Runyon*, 165 F.3d 1238 , 1242 (9th Cir. 1999) (holding that in general, "[e]quitable tolling applies when the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant or when extraordinary circumstances beyond a plaintiff's control

made it impossible to file a claim on time." Further, the Ninth Circuit has held equitable tolling is appropriate when "such tolling is supported by substantial policy reasons.").

The court held that procedural delays typically do not justify equitable tolling, and that specifically, the FLSA does not require defendants to provide contact information for potential plaintiffs until after the court certifies a putative class action. The court thus rejected plaintiff's argument that tolling was appropriate because defendant allegedly improperly withheld the contact information for potential plaintiffs. The court found that defendant's refusal to provide the contact information prior to an order certifying a class does not constitute wrongful conduct that would justify equitable tolling.

Maldonado v. Fast Auto Loans, Inc., 60 Cal. App. 5th 710 (2021)

Class action waiver provision requiring consumers to waive their right to pursue public injunctive relief was unenforceable under *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017).

In this putative class action, plaintiffs alleged that defendant charged unconscionable interest rates on loans in violation of California Financial Code sections 22302 and 22303. The defendant filed a motion to compel arbitration and stay the action pursuant to an arbitration clause contained within the putative class members' loan agreements. The court denied the motion on the grounds the provision was invalid and unenforceable because it required consumers to waive their right to pursue public injunctive relief, under the California Supreme Court's ruling in *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017). The court noted that plaintiffs' complaint and prayer did not limit the requested remedies for only plaintiffs or certain putative class members, but rather encompass all consumers and members of the public. The court also found that an injunction against defendant's unlawful practices would not directly benefit the named plaintiffs because they have already been harmed and are already aware of the misconduct, and any benefit to the plaintiffs was incidental to the general public benefit of enjoining such a practice. The court also rejected defendant's argument that *McGill* applies only to plaintiffs seeking to enjoin false or misleading advertising on behalf of the general public, finding that California's consumer protection laws must be liberally, not narrowly, applied. The court further held the class action provision was not severable and rejected defendant's argument that *McGill* is preempted by the Federal Arbitration Act.

McGuire v. 99 Cents Only Stores, LLC, No. B301863, 2021 Cal. App. Unpub. LEXIS 1356 (Mar. 2, 2021)

A defendant does not waive its right to compel arbitration where it waited for the outcome of a Supreme Court decision that would substantively affect the merits of a motion to compel arbitration.

Defendant appealed a California superior court's order finding waiver of the right to compel arbitration against a proposed class. Defendant had filed the motion shortly after issuance of a United States Supreme Court decision, *Lamps Plus Inc. v. Varela*, 139 S. Ct. 1407 (2019), which eliminated the risk that the arbitration agreement could be interpreted as allowing class-wide arbitration. At that time, the case had already been being litigated for 14 months, and discovery was underway. The superior court held that it would be prejudicial to commence arbitration after the case had been litigated for this length of time. However, the California Court of Appeal, Second District, found insufficient prejudice and good reason for defendant to wait for the *Lamps Plus* decision as it was pertinent to the merits of the motion. Thus, the Court of Appeal reversed the trial court, and ordered that the motion to compel arbitration be granted.

Eleventh Circuit

Batista v. South Florida Woman's Health Assn., Inc., No. 19-10133 (11th Cir. Feb. 1, 2021)

Eleventh Circuit resuscitates attorney's fee claim after trial judge awards $0.00

The Eleventh Circuit Court of Appeals found that a district court's denial of attorney's fees in a FLSA suit was not warranted, as the court's decision was based on unsubstantiated claims presented by the defendant.

The magistrate judge had based the ruling below on an assertion by defendant that it had mailed plaintiff her final paycheck at her last known address. However, the record was devoid of any evidence supporting the claim that the check for $551.00 had been mailed. Plaintiff asserted she had contacted defendant seeking her last check and was told she would not be paid. Plaintiff's counsel filed suit against defendant for the unpaid wages without sending any form of demand letter. Defendant sought settlement of the claim, but the settlement could not be reached because defendant would not agree to pay the resulting attorney's fees.

The Eleventh Circuit panel found that any examination of the reasonableness of fees would necessarily involve "an assessment of the relative reasonableness of each party's action during the tedious negotiation process, including the extent to which counsel Kozolchyk had initially requested exorbitant fees, which request defendants argue was the unreasonable act that prompted ensuing negotiations and triggered the additional expense that Kozolchyk now tries to reap." The magistrate judge had found that defendants had timely issued and mailed plaintiff her last paycheck. Accordingly, the magistrate awarded $0.00 in attorney's fees finding plaintiff's counsel's action unreasonable. However, there existed no record evidence to substantiate defendant had mailed the paycheck to plaintiff's last known address.

AE Management, LLC v. Illinois Union Insurance Co., Civ. Action No. 20-22925, 2021 U.S. Dist. LEXIS 40230 (S.D. Fla. Mar. 4, 2021)

District court rejects claims of restaurant owners seeking damages under all-risk insurance policy.

The district court for the Southern District of Florida dismissed the claims of restaurant owners seeking damages under their all-risk insurance policies as a result of government orders closing business due to the spread of COVID-19.

A group of South Florida restaurants ranging from casual eateries to upscale dining establishments brought suit against their insurer due to the interruption to their businesses necessitated by government orders prohibiting on-premises dining. The restaurants suffered business income losses and incurred additional expenses related to the COVID-19 shutdown. The restaurants all had an all-risk commercial property insurance policy containing a business interruption clause. Plaintiffs argued that the policy did not contain an exclusion for the loss of business income caused by emergency government orders resulting in the physical loss of or damage to their properties.

Plaintiffs argued they were entitled to coverage under one of three possible theories: (i) a government order caused the limiting of the functionality of their property; (ii) the imminent risk of harm due to exposure to COVID-19; or (iii) the need to preserve property under the insurance policy and common law.

The heart of the arguments was premised on the assertion that the government orders caused the restaurants to lose physical use and access to their properties. Accordingly, plaintiffs claimed that the loss of use of the premises or loss of access satisfied the requirements of "direct physical loss of or damage" to the property. The restaurant owners argued that the most reasonable interpretation of their policies required the court to find coverage.

The district court rejected plaintiff's arguments with respect to physical loss, since the government orders did not cause direct physical loss of or damage to the restaurant's property so as to trigger coverage under the policy. The court concluded that to find a covered loss would require it to "read additional words into the policy." The court concluded that under Florida law the phrase "direct physical loss of or damage to property" requires "a distinct, demonstrable, physical alteration of the property." No such alterations occurred as a result of the pandemic shutdown. Thus, the district court dismissed the complaint with prejudice because plaintiffs failed to state a claim under Rule 12(b)(6).

D.C. Circuit

Beyond Pesticides v. Exxon Mobil Corp., No. 20-1815, 2021 U.S. Dist. LEXIS 53032 (D. D.C. Mar. 22, 2021)

D.C. district court finds that diversity jurisdiction cannot be satisfied based on total cost of compliance with the requested injunction or attorneys' fees, and that CAFA jurisdiction is improper unless the complaint itself invokes the class action rule or mechanism .

Beyond Pesticides filed a lawsuit against Exxon Mobil Corp. in the Superior Court of the District of Columbia, alleging claims under the District of Columbia Consumer Protection Procedures Act (DCCPPA). Exxon removed the case to federal court and argued, among other things, that diversity jurisdiction was established and that the case qualified as a class action under CAFA. Beyond Pesticides filed a motion to remand, which the federal district court granted.

In finding a lack of diversity jurisdiction, the court noted that Exxon could not satisfy the amount in controversy requirement of 26 U.S.C. § 1332(a) by relying upon "the total cost of compliance with the requested injunction" or the plaintiff's request for attorneys' fees. Indeed, to do so would "violate the non-aggregation principle," and to use the cost of compliance or attorneys' fees to satisfy the amount-in-controversy would require division by the number of purported beneficiaries of the requested injunction or attorney services (and necessarily that Exxon's share of the total is still greater than $75,000, which Exxon has not shown).

The court also found that the requirements for CAFA jurisdiction were not satisfied either. The court flagged several points relating to plaintiff's pleading – specifically, plaintiff made "no allegations in its complaint about a potential class and did not bring its action under Superior Court Rule of Civil Procedure 23." The absence of such labeling categorizes these DCCPPA claims as "private attorney general suits," not class actions.

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