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Class Action Litigation Newsletter | Summer 2021

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

Highlights from this issue include:

- Supreme Court rules that class members who did not suffer concrete harm do not have Article III standing to sue for violation of a federal statute.
- Supreme Court holds that generic nature of a misstatement is important evidence to show no price impact at the class certification stage, but that defendant bears the burden of persuasion to prove a lack of price impact.
- District court in the First Circuit (D. Mass.) grants motion to strike nationwide class allegations at the pleading stage.
- Second Circuit holds that a plaintiff cannot establish injury-in-fact sufficient to confer Article III standing where personally identifiable information was inadvertently disclosed and not yet misused by any third party.
- Third Circuit follows majority rule that *American Pipe* tolling applies to plaintiffs who file individual suits *before* a ruling on class certification.
- Fourth Circuit finds ERISA plaintiff established Article III standing and reverses denial of class certification.
- District court in Fifth Circuit (N.D. Tex.) denies class certification because individual issues predominate in case alleging fraud and misrepresentation.

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- Divided Sixth Circuit panel affirms dismissal of proposed insurance coverage class action.
- Seventh Circuit affirms summary judgment for defendant in consumer class action, finding no reasonable consumer would be materially misled by alleged misrepresentations.
- Eighth Circuit reverses class certification, holding that plaintiff's expert's computer technology and algorithm cannot overcome individualized inquiry into economic loss.
- Ninth Circuit reverses approval of class action settlement, holding that under revised Rule 23(e)(2)(C)(iii), a district court must review a proposed class settlement for unfair collusion.
- D.C. district court permits tolling of putative class members' claims under *American Pipe* because they are based on the same acts and will be proven by the same evidence as prior claims.

U.S. Supreme Court

TransUnion LLC v. Ramirez, __ S. Ct. __, 2021 WL 2599472 (U.S. June 25, 2021)

Supreme Court rules that class members who did not suffer "a concrete harm" do not have Article III standing to pursue their claims in federal court.

The Supreme Court addressed whether a violation of a federal statute providing for a private right of action, without concrete harm, will provide standing in federal court. In a 5-4 decision, the Court reversed a Ninth Circuit decision approving a damages award to 6,332 class members asserting that TransUnion violated the Fair Credit Reporting Act by mislabeling their credit reports as a "potential match" to a name on the list of terrorists, drug traffickers, and other criminals maintained by the U.S. Treasury Department's Office of Foreign Asset Control. These class members comprised more than three-quarters of the total class, but their claims were distinct in that TransUnion had only flagged their credit reports internally, without distributing the reports to potential creditors or any other third party.

Writing for the majority, Justice Kavanaugh's decision began by stating "no concrete harm, no standing", and explained that mislabeling, alone, was not a "concrete injury" needed to establish Article III standing, because "the retention of information lawfully obtained, without further disclosure, traditionally has not provided the basis for a lawsuit in American courts." Thus, "[t]he mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm." The risk of future harm resulting from potential distribution to third parties also was not enough to establish concrete harm. Though the Court recognized that someone "exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, … so long as the risk of harm is sufficiently imminent and substantial," here, the plaintiffs sought only money damages. And Justice Kavanaugh explained, "a plaintiff's standing to seek injunctive relief does not necessarily mean that the plaintiff has standing to seek retrospective damages." *Id.* at 20.

The dissent by Justice Thomas took issue with the fact that the TransUnion credit reports erroneously flagged many law-abiding people inaccurately and found that these actions were significant enough. Among other things, the dissent noted that "each class member established a violation of his or her private rights" and therefore had "a sufficient injury to sue in federal court." The second dissent — authored by Justice Kagan and joined by Justice Breyer and Justice Sotomayor – joined Justice Thomas's dissent with one caveat. In Justice Thomas's view, any violation of a statutory right could give rise to Article III standing, while Justice Kagan maintained that some concrete injury is still needed. Even so,

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Justice Kagan proffered that courts should defer to Congress's judgment "to determine when something causes harm or risk in the real world," and that "[o]verriding an authorization to sue is appropriate when but only when Congress could not reasonably have thought that a suit will contribute to compensating or preventing the harm at issue."

For more information on this case, see June 2021 GT Alert, *'No Concrete Harm, No Standing': Supreme Court Reverses Judgment Where Class Members Did Not Have Standing*.

Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Sys., __ S. Ct. __, 2021 WL 2519035 (U.S. June 21, 2021)

Supreme Court holds that (1) the generic nature of a misstatement is important evidence of price impact in a securities fraud case, and the district court should consider all (not just some) evidence probative of price impact at the class certification stage, and (2) once a plaintiff invokes the *Basic* presumption of class-wide reliance, the defendant bears the burden of persuasion to prove a lack of price impact.

In this purported securities fraud suit against Goldman Sachs and three of its former executives (collectively, GS), plaintiffs alleged GS had misrepresented the existence of conflicts of interest surrounding several collateralized debt obligation (CDO) transactions involving subprime mortgages, and that the plaintiffs were purportedly injured after those conflicts were revealed in, among other things, a 2010 SEC complaint, and GS's stock price dropped. After discovery, plaintiffs moved for class certification, invoking the presumption of class-wide reliance established by the Supreme Court in *Basic Inc v. Levinson*, 485 U.S. 224 (1988). The district court granted the motion and held that GS had failed to meet its burden to rebut the presumption, notwithstanding evidence that GS's stock had not decreased on at least 34 occasions when the media had reported on the alleged conflicts *prior* to the filing of the SEC complaint.

On appeal, the Second Circuit unanimously vacated the decision, reasoning that the district court had failed to apply the proper standard in considering whether the presumption invoked by plaintiffs had been rebutted (i.e., by a preponderance of the evidence) and should have considered evidence that GS's stock price had not decreased when the media reported on the company's alleged conflicts of interest prior to 2010. The Second Circuit also reasoned that a defendant seeking to rebut the *Basic* presumption bears the ultimate burden of persuasion. On remand, the district court granted class certification again, GS appealed, and the Second Circuit affirmed.

The Supreme Court held that the Second Circuit correctly held that a defendant bears the burden of persuasion to prove a lack of price impact once the *Basic* presumption is invoked by a plaintiff. In so holding, the Court disagreed that a defendant need only produce "any competent evidence of a lack of price impact" to rebut the *Basic* presumption at the class certification stage, interpreting its prior opinions as having assigned to the defendant the burden of persuasion with respect to price impact, too.

The Supreme Court also confirmed that the generic nature of a misstatement is not only *relevant* to price impact, but "often will be *important* evidence of price impact because, as a rule of thumb, 'a more-general statement will affect a security's price less than a more specific statement on the same question.'" The Court repeatedly emphasized that courts must consider "*all*" evidence probative of the price impact issue, "regardless of whether the evidence is also relevant to a merits question like materiality." Finding it "unclear" whether the Second Circuit considered GS's evidence—in particular, expert testimony regarding

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the generic nature of the alleged misstatements—the Court vacated the decision below and remanded with an instruction for the Second Circuit to "take into account *all* record evidence relevant to price impact."

Justice Sotomayor concurred in part and dissented in part. Justice Sotomayor agreed with the Court's answers to the questions presented but disagreed with the Court's judgment to vacate and remand because she believed the Second Circuit properly considered the generic nature of GS's statements.

Justice Gorsuch, Justice Thomas, and Justice Alito also concurred in part and dissented in part in a separate opinion. These justices disagreed that the defendant should bear the burden of persuasion on price impact and characterized the majority's ruling as the first time the Court had ever placed a burden of persuasion on the defendant with respect to an element of a plaintiff's case.

For more information on this case, see June 2021 GT Alert, *Rebutting the Presumption of Class-Wide Reliance at the Class Certification Stage (Part II): Key Takeaways from the Supreme Court's Decision in Goldman Sachs Grp., Inc. v. Arkansas Teacher Ret. Sys. (2021)*.

First Circuit

Downing v. Keurig Green Mt., Inc., 2021 U.S. Dist. LEXIS 110334 (D. Mass. June 11, 2021)

District court strikes nationwide putative class claims at pleading stage.

Plaintiff asserted that the defendant deceptively advertised its products as recyclable when they allegedly were not according to federal regulations and in violation of Massachusetts General Laws Chapter 93A—the Massachusetts Consumer Protection Act. The plaintiff's complaint proposed two classes—one consisting of persons who purchased the products in Massachusetts and one consisting of all product purchasers nationwide. After expressing caution about striking class-action allegations at the pleading stage, the district court struck the Chapter 93A nationwide class allegations from the complaint under Federal Rule of Civil Procedure 12(f). In doing so, the district court explained that, although Chapter 93A does not require a plaintiff to reside in Massachusetts, courts consider where the plaintiff acted in reliance on the alleged misrepresentations, where the plaintiff received the alleged misrepresentations, where the defendant made the alleged misrepresentations, and the domicile, residence, nationality, place of incorporation, and place of business of the parties when assessing whether a plaintiff may proceed under Chapter 93A. The district court placed greater emphasis on the "place of reliance" factor than the defendant's principal place of business and concluded that, because the alleged misrepresentations were made on the product packages themselves, the plaintiff (and putative class members) would have seen and acted in reliance on those alleged misrepresentations outside of Massachusetts, meaning they were not covered by Chapter 93A for those residing outside of Massachusetts.

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Second Circuit

McMorris v. Carlos Lopez & Assocs., LLC, 995 F.3d 295 (2d Cir. 2021)

Second Circuit holds that a plaintiff cannot establish an injury in fact sufficient to confer Article III standing where their personal information was inadvertently disclosed and not yet misused by any third party, and declines to consider protective measures taken as part of the standing analysis.

This case arose out of an email sent by mistake to all approximately 65 employees of Carlos Lopez & Associates (CLA). The email contained sensitive personally identifiable information (PII) of approximately 130 then-current and former employees. CLA emailed the then-current employees to address the accidental email but did not contact any of the former employees regarding the disclosure or take any other corrective action. Three individuals whose information had been shared then filed a putative class action complaint. Notably, plaintiffs did not allege that their PII had been shared outside of CLA or misused by third parties, or that they were the victims of fraud or identity theft, but rather, claimed that "because their PII had been disclosed to all of CLA's then-current employees, they were 'at imminent risk of suffering identity theft' and becoming the victims of 'unknown but certainly impending future crimes.'"

CLA moved to dismiss for lack of Article III standing, among other things. The parties reached a class settlement, but in advance of the fairness hearing, the district court *sua sponte* ordered further briefing on the issue of Article III standing. The district court ultimately found that the plaintiffs lacked Article III standing because they failed to allege '"an injury that is concrete and particularized and certainly impending." As such, the court dismissed the case for lack of subject matter jurisdiction, noting it was "powerless to approve the parties' proposed class settlement."

On appeal, the Second Circuit affirmed, finding that the alleged "increased risk of identity theft" was not sufficient to confer Article III standing. In so ruling, the court was persuaded by, among other things, the fact that the data disclosure at issue was inadvertent (and not a cyberattack) and plaintiffs did not allege that their PII had been misused. The court also declined to consider the proactive measures plaintiffs took to protect themselves in assessing standing, noting that their efforts against a hypothetical future threat "cannot create an injury."

Pirone v. City of New York, No. 17-cv-3070, 2021 WL 2184894 (E.D.N.Y. May 28, 2021)

District court denies plaintiff's request to amend a complaint to include putative class allegations due to the belated nature of the request and the prejudice it would cause.

Plaintiff brought an action alleging that a New York police officer used excessive force while arresting him, and that the New York Police Department unlawfully handcuffed him during his subsequent hospitalization based on a policy requiring that, among other things, all hospitalized suspects be handcuffed. Three years after he commenced his action on a *pro se* basis, and more than a year after fact discovery closed, plaintiff moved to amend his complaint to certify a class of all hospitalized prisoners subject to the purported handcuffing policy.

In denying the request, the district court explained that prejudice is "perhaps the most important factor" bearing on the Rule 15(a) analysis. It ultimately held that "[t]he hour is late for plaintiff to seek to transform this case into a class action," highlighting that plaintiff waited to bring this request until "more

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than a year after the close of fact discovery, more than two years after his counsel first appeared, and nearly three years after he commenced the action." The court explained that parties may not "strategically withhold all notice that they plan to move for class certification until they deem it most advantageous."

The court also noted that transforming the case into a class action would cause defendant undue prejudice because it would "fundamentally transform the litigation in a manner burdensome to defendants" as a class action is "more costly, more time-consuming, and exposes defendants to more substantial recoveries than an individual [] suit."

Chen v. Hunan Manor Enter., No. 17-cv-802, 2021 WL 2282642 (S.D.N.Y. June 4, 2021)

Report and recommendation denying plaintiffs' motion for class certification based solely on the inadequacy of proposed class counsel.

Nine former employees of defendants' restaurants alleged that defendants failed to pay employees minimum wage, overtime, and spread of hours pay and failed to give employees a wage notice at the time of hire. Plaintiffs moved for class certification, but the Magistrate Judge denied the motion solely based on plaintiffs' failure to demonstrate that their counsel would adequately represent the class.

Defendants argued that plaintiffs' proposed class counsel was inadequate because the conduct of counsel, John Troy, and his firm, Troy Law PLLC, in previous cases and in the current litigation was inadequate. The Magistrate Judge agreed, citing numerous reasons. First, the Second Circuit previously upheld the decertification of a class due to inadequate representation by Troy Law and John Troy individually in *Jin v. Shanghai Original, Inc.*, 990 F.3d 251 (2d Cir. 2021). The court noted that the derelictions described in *Jin* could by themselves have justified the denial of the class certification motion in this case. Second, another court recently rejected Troy Law as class counsel in *Rodpracha v. Pongsri Thai Rest. Corp.*, 2021 WL 1733515 (S.D.N.Y. Mar. 22, 2021), and other courts have imposed sanctions as a result of Troy Law's conduct and the conduct of its attorneys. In other cases, this proposed class counsel was found to "repeatedly fail[ ] to comply" with court deadlines, fail to file a revised motion for default judgment, and "fail[ ] to submit jointly proposed jury instructions, a jointly proposed verdict sheet, or exhibits in usable form." The Magistrate Judge found these other cases compelling evidence of Mr. Troy and Troy Law's "lack of adequacy to represent a class."

As for proposed class counsel's conduct in this case, the court pointed to the fact that counsel "cancelled multiple depositions for plaintiffs at the last minute in the case, sometimes on the day of the scheduled depositions" and missed various court deadlines. In addition, counsel sought to add six new defendants to the case, and the court denied the request due to counsel's unexplained failure to pursue the remedy diligently. The court found these tactics and unexplained delays rendered proposed class counsel inadequate.

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Third Circuit

Aly v. Valeant Pharmaceuticals International Inc, No. 19-3326, 2021 WL 2448108 (3d Cir. June 16, 2021)

Third Circuit follows majority rule that *American Pipe* tolling applies to plaintiffs who file individual suits *prior to* a ruling on class certification.

Plaintiffs filed a putative securities class action against a pharmaceutical company. Prior to a ruling on class certification, certain putative class members filed individual lawsuits. The district court dismissed the individual complaints as untimely under the two-year statute of limitations and found that *American Pipe* tolling did not apply to individual complaints filed before a ruling on class certification.

The Third Circuit reversed. The court recognized that while the U.S. Supreme Court had not addressed the issue, the Second, Ninth, and Tenth Circuits had held that *American Pipe* tolls the limitations period for individual claims filed both before and after the certification stage. Only the Sixth Circuit held otherwise, although that circuit had called that conclusion into question. The Third Circuit adopted the majority rule: "*American Pipe* makes clear that the filing of a class action is the operative event that tolls the limitations period, and that once the period is tolled, it remains tolled for all putative members until they are no longer part of the class. The Court has not held that anything further, such as a certification denial, is required to benefit from tolling. Like the majority of our sister circuits, we see no reason not to take the Supreme Court's words at face value."

The panel found that the rationale behind *American Pipe* was served by the ruling. While the statute of limitations is intended to prevent the "surprise" revival of old claims, that was not an issue where defendants "were undisputedly aware of the substantive claims at issue for more than two years before the Individual Complaint was filed." Also, denying tolling would serve "no compelling purpose" because it would "lock" putative members into the class until after certification. The court concluded it made sense to allow individuals "to promptly file their individual actions, rather than indefinitely delay[ing] the resolution of those claims for no good reason."

The panel rejected defendants' arguments that post-*American Pipe* Supreme Court jurisprudence compelled a different result. While recognizing that "the Supreme Court's recent jurisprudence tends to underscore the importance of judicial economy," "we cannot construe the doctrine in a way that would undermine its primary purpose—to protect the individual rights of putative members." Finally, the panel found that the district court's decision was counterintuitive, in that individuals who filed suit earlier would be time-barred but those who filed after a class certification decision would not be.

Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157 (2021)

New Jersey Supreme Court reverses motion to dismiss class action allegations, relying on lenient standard of review.

Plaintiffs filed a putative class action in New Jersey state court seeking statutory damages from retailers, based on willful noncompliance with the Fair and Accurate Credit Transactions Act (FACTA) by printing customers' credit card or debit card expiration dates on their receipts. Defendants moved to dismiss the class allegations, and the trial court granted the motion, finding: (1) plaintiffs failed to allege numerosity because they did not specify how many members were in the class; (2) predominance was not adequately alleged because some class members may have suffered actual damages and liability would therefore have

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to be determined on a case-by-case basis; and (3) superiority was not adequately alleged because FACTA's statutory award sufficiently incentivized plaintiffs to bring suit individually. The Appellate Division affirmed the dismissal, but the New Jersey Supreme Court reversed.

The New Jersey Supreme Court emphasized the procedural posture of the case and the lenient standard of review involved: on a motion to dismiss, a reviewing court must examine "the legal sufficiency of the facts alleged on the face of the complaint," giving the plaintiff the benefit of "every reasonable inference of fact," searching the complaint thoroughly "and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Under that standard, the Court ruled that plaintiffs adequately pled the class action elements.

Plaintiffs adequately pled numerosity by stating that "there are, at a minimum, thousands" of members of the class. The Court rejected the lower courts' conclusion that numerosity must be pled with specificity. Plaintiffs also adequately pled predominance because they alleged that defendants' non-compliance was "consistent" and "the common nucleus of operative facts is, as plaintiffs pled, whether defendants programmed their equipment to print the expiration dates of customers' credit/debit cards on receipts; the answer to that question will apply to all class members."

Finally, the Court rejected defendants' argument that plaintiffs failed to adequately allege superiority because plaintiffs did not explain why statutory damages, which could be recovered in small claims court, were an inadequate means to redress any FACTA violation. The Court credited plaintiffs' allegations that "a class action is superior because individual statutory damages will be relatively small" and "even if individual litigation were brought, the class action is still superior because individual claims would 'present the potential for varying, inconsistent or contradictory judgments.'" In so holding, the Court distinguished an earlier decision finding that small claims court was a superior forum for adjudicating TCPA claims, finding that it is more difficult to establish a FACTA claim than a TCPA claim.

The Court made clear that "we are not certifying the class." Rather, the Court remanded "the matter for the parties to conduct discovery related to class action certification."

Fourth Circuit

Peters v. Aetna Inc., No. 19-2085, 2021 WL 2448108 (4th Cir. June 22, 2021)

Fourth Circuit finds ERISA plaintiff established Article III standing and reverses denial of class certification.

Plaintiff filed a putative class action alleging that defendants breached their fiduciary duties under ERISA by bundling an administrative fee into the rates for health benefits. The district court denied class certification on commonality and ascertainability grounds, finding that plaintiff failed to establish that there was a class of participants who actually were harmed, and that some participants actually benefit from the challenged conduct.

The Fourth Circuit reversed. The panel first addressed plaintiff's Article III standing, concluding that plaintiff adequately demonstrated a financial injury – i.e., plaintiff paid more on individual claims than she otherwise would have but for the challenged conduct – to establish standing under her restitution claim. But even if she could not show such an injury, plaintiff still had standing to seek a surcharge, disgorgement, and declaratory and injunctive relief.

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As to class certification, the panel found that the "district court analyzed ascertainability and commonality too rigidly." Specifically, the district court based its ascertainability conclusion on a determination that plaintiff lacked any financial injury. Yet the district court ignored the viability of plaintiff's other remedies for surcharge, disgorgement, and declaratory and injunctive relief. Thus, the panel instructed the district court to "reexamine the ascertainability prong" based on the totality of plaintiff's claimed remedies. Similarly, as to commonality, the panel found that the district court erroneously ignored the totality of plaintiff's claims. Also, the panel observed that the common issues of fact as to defendant's conduct "may be sufficient to meet the commonality requirement."

State ex rel. Health Care Alliance, Inc. v. O'Briant, No. 20-1029, 2021 WL 2432126 (W. Va. June 15, 2021)

West Virginia Supreme Court rejects pre-certification discovery of identities of putative class members.

Plaintiff filed a putative class action against defendants in West Virginia state court, alleging they sent collection letters in violation of the West Virginia Consumer Credit and Protection Act. In pre-certification discovery, plaintiff sought the identities of all West Virginia individuals to whom defendants sent similar collection letters, as well as the name of the original creditor, account number, amount allegedly owed, and current balance. The trial court granted plaintiff's motion to compel that information, reasoning that it "goes towards proving at the certification stage common questions of fact or law, typical claims or common defenses, i.e., 'commonality' and 'typicality.'"

The West Virginia Supreme Court reversed the order compelling discovery. The Court recognized the distinction, as noted by the U.S. Supreme Court in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), between attempts to seek the identification of class members for purposes of class notice as opposed to other purposes. Because the request here was made pre-certification, it was not for purposes of serving class notice. The Court then analyzed whether the request sought information relevant to the class certification requirements and concluded it did not. The identity of class members was not relevant to the commonality element of the class certification test because the common issues identified in the complaint involved the conduct of defendants, not the identities or addresses of potential class members. Nor was that information relevant to the predominance analysis because plaintiff sought to certify a class of all individuals who received a letter similar to plaintiff, not "potential class members treated at a particular facility or who lived in a particular city or town," for whom names and addresses would be relevant. Finally, while the number of individuals who received a similar letter would be relevant to the numerosity element, the identities and details regarding the debts of those individuals were not relevant to numerosity.

Accordingly, the Court concluded "that the circuit court clearly erred and exceeded its legitimate powers in compelling [defendants] to disclose at this pre-certification stage names and addresses of non-litigant, third-party individuals to whom debt collection letters were sent, dates of letters sent by [defendants], names of the original creditors, the original creditors' account or reference numbers, the amount owed or allegedly owed and the current balance owed."

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Fifth Circuit

Miller v. Grand Canyon Univ., Civil Action No. 4:20-cv-00652-P, 2021 U.S. Dist. LEXIS 94800 (N.D. Tex. May 19, 2021)

District court denies class certification in putative fraud and RICO class action against online university because individualized issues overwhelmed the commonality and typicality inquiries under Rule 23(a) or predominance and superiority inquiries under Rule 23(b)(3).

An online graduate student and Texas resident, Miller, sued Grand Canyon University (GCU), claiming that GCU misled its students into believing that its graduate programs were accredited in each state where its students reside. On behalf of a putative class of "[a]ll Grand Canyon University students who have been enrolled in an online professional graduate degree or certificate program that is not accredited in the state where they are employed or, if not employed, where they reside," Miller asserted claims for fraudulent omission, fraudulent misrepresentation, and unjust enrichment, and for violation of the federal RICO act, the Arizona RICO Act, and the Arizona Consumer Fraud Act.

Miller filed a motion to certify the class, and the district court denied the motion. Considering Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy, the district court concluded that Miller had failed to establish commonality or typicality. As for commonality, the court recognized that while Miller had identified common questions that would apply to the entire putative class, she had failed to show that the class action would generate "common answers apt to drive the resolution of the litigation," as required by the Supreme Court's *Dukes* decision. The district court explained that "determining whether GCU committed fraud or misrepresentation as to Miller does not establish that GCU did so vis-à-vis every putative class member." Further, the questions that Miller presented could not be answered from a single source. As for typicality, the court explained that the same analysis applied. Miller's fraud claims were unique to her, and she had not established any uniform misrepresentations to the putative class as a whole. So, issues of reliance and injury would differ from person to person. Miller's unique facts also raised defenses that would apply to her alone.

In that same vein, the court found that Miller failed to carry her burden of proving predominance and superiority under Rule 23(b)(3). Emphasizing that "a fraud class action cannot be certified when individual reliance will be an issue," the court struggled to envision "what a trial would look like." The court reasoned, "[v]ariations as to the degree of reliance by prospective students on statements that may or may not have been made makes class certification improper." Moreover, "[t]he varied and individualized levels of reliance, derived from dynamic conversations, make this case improper for class certification due to the individual issues relating to reliance." Finally, the court ruled that certification under Rule 23(b)(2) would be denied because the proper remedy for any violation was money damages, not prospective injunctive relief.

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Sixth Circuit

Wilkerson v. Am. Family Ins. Co., 997 F.3d 666 (6th Cir. 2021)

Divided Sixth Circuit panel affirms the dismissal of a proposed Ohio class action suit seeking payment of taxes and fees in insurance payouts for totaled cars.

Wilkerson, a driver with an automotive insurance policy with American Family Insurance Company, was in a car accident and suffered a total loss. She sued American Family on behalf of a putative class of insureds after American Family refused to reimburse the taxes and fees that she paid for her new car as a part of the "actual cash value" under the policy terms. Wilkerson argued that excluding the taxes and fees from the "actual cash value" was a breach of contract under the policy, which stated that American Family "will pay for loss of or damage to your insured car and its equipment, less the deductible." American Family moved to dismiss, contending that other language in the policy controlled. Concluding that "actual cash value" was unambiguous and did not include taxes and fees, the district court granted the motion to dismiss. The plaintiff appealed.

The Sixth Circuit panel affirmed in a 2-1 decision. The majority opinion acknowledged that the phrase "actual cash value of stolen or damaged property" could carry some ambiguity. Relying on Ohio rules for contractual interpretation, the court recognized that "actual value" could mean "the measure of damages for the loss or destruction of personal property is the market value" or "the replacement cost minus normal depreciation for the damaged car." But considering the four corners of the policy, the court concluded that American Family's policy confirms that "actual cash value" means market value only. Otherwise, the court explained, American Family provisions limiting liability to (1) "the actual cash value of the stolen or damaged property" or (2) "the amount necessary to repair or replace the property" would be rendered "incoherent" under the plaintiff's interpretation.

Bradford v. Team Pizza, Inc., No. 1:20-cv-60, 2021 U.S. Dist. LEXIS 99413 (S.D. Ohio May 26, 2021)

Southern District of Ohio adds to growing circuit split, ruling that employer's reimbursement of vehicle-related expenses not bound by IRS reimbursement rate method.

In this minimum-wage FLSA collective action, pizza delivery drivers sued Team Pizza Inc., a company operating a portfolio of pizza delivery stores in Ohio. The plaintiffs alleged that Team Pizza "violated the minimum wage provisions of the FLSA and Ohio laws by requiring delivery drivers to pay for automobile expenses and other job-related expenses out of pocket and not properly reimbursing them for these expenses."

The dispute turned on the Department of Labor's anti-kickback regulation, 29 C.F.R. § 531.35, which requires that employers pay minimum wages "finally and unconditionally" or "free and clear" of job-related expenses. Under the regulation, "if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the law in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid under the law." Here, the alleged "work tools" were pizza delivery vehicles. The plaintiffs claimed they were entitled to reimbursement under the IRS mileage reimbursement rates, while Team Pizza argued that only a "reasonable approximation" method is required.

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Federal courts have differed on how the FLSA treats the reimbursement of pizza delivery drivers' vehicle expenses. Some courts (including district courts in Ohio and Illinois) have held that the IRS mileage reimbursement rate is the proper standard. Conversely, other courts (including district courts in Colorado, Kansas, New York, and Missouri) have decided that the FLSA does not require employers to use the IRS rate but instead allows them "reasonably approximate" pizza delivery drivers' vehicle expenses. The approaches differ depending on whether the anti-kickback regulation is deemed ambiguous. Courts adopting the IRS reimbursement rate method have determined that the anti-kickback regulation is ambiguous because it lacks guidance on how the mileage rate should be calculated. Other courts have adopted the reasonable approximation standard set forth in FLSA regulations because they explain how reimbursements are treated for calculating overtime rates.

Despite another Southern District of Ohio decision adopting the mileage-reimbursement-rate approach, the court in this case sided with Team Pizza. Relying on a plain-language interpretation of the FLSA regulation, the court found that the anti-kickback regulatory language was not "genuinely ambiguous" and ruled that Team Pizza could "reasonably approximate" the vehicle-related expenses and was not required to use the actual or IRS rate to comply with the FLSA.

Seventh Circuit

Weaver v. Champion Petfoods USA Inc., No. 20-2235, 2021 WL 2678801 (7th Cir. June 30, 2021)

Seventh Circuit affirms trial court's grant of summary judgment for defendant on the basis that plaintiff offered no evidence from which a reasonable consumer could prove that the mere risk of a presence of BPA or pentobarbital rendered the phrase "biologically appropriate" misleading and plaintiff failed to provide sufficient evidence that a reasonable consumer would be materially misled by representations regarding "fresh regional ingredients" or outsourcing.

This appeal arose from the trial court's grant of summary judgment for defendant, a manufacturer of pet food. Plaintiff alleged that Defendant Champion Petfoods USA Inc. misrepresented its dog food in three ways: (1) stating that the food was "biologically appropriate"; (2) stating that it included fresh, regional ingredients; and (3) stating that it is "never outsourced" and is "prepared" in Champion's kitchens. Plaintiff argued that because there was a risk that the food was contaminated with Bisphenol A ("BPA") and pentobarbital through the supply chain, the food was not "biologically appropriate." Plaintiff further argued that because the dog food was not made solely with fresh ingredients, the label representation that it features fresh ingredients was false. Finally, plaintiff asserted that the representation "never outsourced" was false because some of the ingredients were sourced internationally.

The Seventh Circuit upheld summary judgment regarding the "biologically appropriate" representation finding that, with regard to BPA, plaintiff "offered no evidence that a reasonable consumer here would interpret 'biologically appropriate' as certifying the product was BPA-free" and, with regard to pentobarbital, plaintiff "lacks standing because he failed to show that the dog food he purchased was at risk of containing pentobarbital." Similarly, the Seventh Circuit upheld summary judgment on the fresh, regional ingredients claim and the "never outsourced" claim because the packaging did not state that it was made with "100% fresh regional ingredients" and plaintiff did not offer evidence showing that a reasonable consumer would be materially misled by the representations.

MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co., 994 F.3d 869 (7th Cir. 2021)

Seventh Circuit holds that, by failing to move to compel discovery in the district court, plaintiff could not complain on appeal that defendant was not responsive to the general discovery requests served during class discovery.

Plaintiff debt collectors brought a class action against Defendant State Farm Mutual Automobile Insurance Company. Two years prior, the Seventh Circuit decided an appeal in litigation between the same parties where the district court had dismissed plaintiffs' claims for lack of standing, affirming the district court's ruling finding that plaintiffs had to identify specific examples of unreimbursed payments to demonstrate the existence of an actual injury.

The appeal in this case arose from the trial court's grant of State Farm's motion for summary judgment. The district court ruled that, while plaintiffs pled a concrete, individualized injury through an illustrative beneficiary, they failed to raise a genuine issue of material fact at summary judgment. Ultimately, the evidence showed that the reimbursement of physical therapy at issue for the illustrative beneficiary was for an injury that occurred prior to the car accident from which the claim arose. As a result, the district court granted State Farm's motion for summary judgment, and the Seventh Circuit affirmed.

On appeal, plaintiffs argued that they needed additional discovery to oppose State Farm's summary judgment motion. In particular, plaintiffs sought additional non-party discovery related to three additional illustrative beneficiaries that had not been pled and asserted that State Farm was not responsive to general discovery requests during class discovery. The Seventh Circuit held that plaintiffs could not complain about what transpired during discovery when they never filed any motions to compel State Farm to respond to a single request in the district court.

Lukis v. Whitepages Inc., 19 C 4871, 2021 WL 1600194 (N.D. Ill. Apr. 23, 2021)

District court denies motion to strike class allegations based on matters outside the pleadings rather than on flaws inherent to the class as alleged in the complaint.

In this putative class action under the Illinois Right of Publicity Act, the district court was presented with multiple motions, including Whitepages Inc.'s motion to strike class allegations. Whitepages asserted that plaintiff's testimony demonstrated that she was an inadequate class representative, and that class counsel was inadequate for putting her forward as the named plaintiff. The court noted that Whitepages's motion to strike relied heavily on evidence outside the pleadings and noted that it is unclear whether a motion to strike class allegations can properly go beyond the complaint. The court reviewed authority and concluded that the majority rule was that a motion to strike class allegations must be limited to the face of the complaint. The court thus denied the motion to strike.

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Eighth Circuit

Ford v. TD Ameritrade Holding Corp., 995 F.3d 616 (8th Cir. 2021)

Eighth Circuit holds that technology cannot overcome individualized inquiry into economic loss in duty of best execution case.

Plaintiff alleged that the defendant, a brokerage company, violated its duty of best execution by routing trades to best profit the company rather than the customer. The plaintiff sought relief on behalf of both himself and a putative class. The magistrate judge recommended denial of Rule 23(b)(3) class certification due to a lack of predominance. He reasoned that each class member's economic loss would depend on an order-by-order analysis and thus defeat Rule 23's common issue requirement. However, the district court disagreed and granted class certification based on the plaintiff's expert, who presented an algorithm designed to "solve the predominance problem" and estimate each class member's economic loss.

Finding that economic loss was an individualized inquiry, the Eighth Circuit reversed the class certification. The court noted that economic loss associated with duty of best execution violations was a more difficult damages assessment than standard broker's fraud claims. This contributed to the challenge of certifying a best execution case, as the court highlighted in relying on a Third Circuit decision that also denied certification for similar claims, *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001). Ultimately, the Eighth Circuit concluded: "[D]espite advances in technology, individual evidence and inquiry is still required to determine economic loss for each class member. . . . Advanced computing power can expedite that determination, but it cannot change its underlying nature by converting individual experience into common evidence."

In addition, the court determined that the plaintiff sought to represent an improperly defined class. The class definition incorporated two elements of the claim—those seeking best execution and those sustaining economic loss. In doing so, class membership depended on having a valid claim, allowing "putative class members to seek a remedy but not be bound by an adverse judgment." For both reasons, the Eighth Circuit reversed the class certification and remanded the case.

Ahmad v. City of St. Louis, 995 F.3d 635 (8th Cir. 2021)

Eighth Circuit determines class certification is premature where Rule 23(b)(2) relief seeks to remedy discrete experiences of different named plaintiffs.

The three named plaintiffs sought to represent a putative class of protesters who allegedly had been unconstitutionally exposed to chemical agents, subjected to excessive force and improper searches, and arrested. Each of the named plaintiffs had experienced one of these actions, and they collectively sought injunctive relief against the City of St. Louis to limit police authority to interfere in public demonstrations. Under Rule 23(b)(2), the district court granted the plaintiffs' motion for class certification, noting that the city had acted or refused to act on grounds generally applicable to the protesters' allegations.

The Eighth Circuit reversed, holding that class certification had been premature. Although Rule 23(b)(2) certification may be appropriate for injunctive or declaratory relief, Rule 23(b)(2) classes require "even greater cohesiveness" than Rule 23(b)(3) classes because (b)(2) class members cannot opt out. As such, class certification is only appropriate where the same injunctive or declaratory relief would remedy all of the class members' injuries. In this case, each of the three named plaintiffs experienced a different injury,

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but they attempted to bring all three under the same umbrella by seeking broad injunctive relief, phrasing their request as "one super-claim." The court rejected this approach. Because the evidence at this stage had not established that a single injunction would remedy each of the plaintiffs'—and thus, class members'—injuries, the Eighth Circuit reversed the certification ruling as premature.

Donelson v. Ameriprise Fin. Servs., 999 F.3d 1080 (8th Cir. 2021)

Eighth Circuit holds motion to strike class allegations does not waive right to arbitrate and may be considered prior to a motion for class certification.

The plaintiff had entered into an agreement for the defendant-brokers to handle the plaintiff's financial trading. This agreement contained an arbitration clause that required arbitration for all disputes except putative or certified class actions. After trading practices allegedly went wrong, the plaintiff filed a putative class action against the defendants for violations of various federal securities laws and regulations. The defendants simultaneously moved to strike the class allegations and compel arbitration in line with the agreement. The district court denied both requests.

On appeal, the plaintiff asserted that, by seeking to strike the class allegations, the defendants had waived their right to arbitrate under the agreement. The Eighth Circuit disagreed, stating that a party may waive their right to arbitrate if they invoke the "litigation machinery" by engaging in the litigation process and seeking decisions on the merits. However, the court determined that filing a motion to strike class allegations in conjunction with the motion to compel arbitration did not run afoul of the defendants' right to arbitrate. In fact, it complemented this right because it addressed the single exception to the arbitration clause – a putative or certified class action.

The court next considered whether the district court abused its discretion in declining to strike the class allegations. Circuits are split on whether it is premature for a court to strike class allegations under Rule 12(f) prior to a motion for class certification where certification is a "clear impossibility." The Eighth Circuit determined it is not premature. Striking class allegations prior to certification briefing aligns with Rule 23(c)(1)(A), which allows courts to discern certification "at an early practicable time" without limiting that decision to the timing of motion practice. Requiring the defendants to delay this request would not only "needlessly force the parties to remain in court" when they had previously agreed to arbitrate but also risk the defendants' engaging in the "litigation machinery" and placing their arbitration right in jeopardy. As such, the Eighth Circuit held that the district court abused its discretion in denying the motion to strike, finding that the plaintiff's causes of action lacked cohesion, involved individualized inquiries, and otherwise did not comply with Rule 23(b)(2) requirements.

Ninth Circuit

Briseno v. Henderson, 998 F.3d 1014 (9th Cir. June 1, 2021)

Under revised Rule 23(e)(2)(C)(iii), a district court must review a proposed class action settlement for collusion.

The Ninth Circuit reversed the district court's approval of the class action settlement in this case, in which plaintiffs claimed allegedly misleading labels on Wesson Oil. The labels stated that the oil was "100% Natural," but it allegedly contained genetically modified organisms. Following certification of a damages class under Rule 23(b)(3), the parties reached a settlement. The settlement contained a claims process and required defendant to pay $0.15 for each unit of oil purchased by households (up to a maximum of 30

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units without proof of purchase and unlimited with such proof). According to defendant, with a class size of 15 million consumers, the amount available for claims would be almost $67.5 million (assuming the entire class submitted claims). Meanwhile, the settlement: (1) did not require defendant to identify or provide direct notice to class members; (2) enjoined advertisement of the oil as "natural"; (3) was premised on an expert report valuing the injunctive relief at $27 million; and (4) awarded $6.85 million in attorneys' fees and costs.

In the settlement administration, only 0.5% class members submitted claims, resulting in awards in the amount of $418,919. A class member objected to the discrepancy between the class member awards and the attorneys' fees and moved to strike the expert report. The district court overruled the objection and granted final approval.

On appeal, the Ninth Circuit reversed the district court's approval of the class action settlement, holding that, under revised Rule 23(e)(2)(C)(iii), a district court must "scrutinize settlement agreements – including post-class certification settlements – for potentially unfair collusion in the distribution of funds between the class and their counsel." Applying that standard, the court held that the disparity between the funds awarded to class members and the attorneys' fees raised "an urgent red flag." The court noted another red flag in the "clear sailing arrangement," which suggested "the potential that a defendant agreed to pay class counsel excessive fees in exchange for counsel accepting a lower amount for the class members." Further, the court criticized the expert's estimate of the value of the injunctive relief as "worthless" because defendant ceased labeling the oil as "natural" two years prior to the settlement, thus rendering the injunction "illusory."

Fisher v. Osmose Utilities Services, Inc., Case No. 1:18-cv-1704-NONE-EPG, 2021 U.S. Dist. LEXIS 66775 (E.D. Cal. Apr. 5, 2021), Report and Recommendation adopted (July 22, 2021)

Class settlement rejected when the parties did not have enough information to consider proper valuation.

Plaintiff sued for various state law wage and hour violations. The parties reached a class settlement, providing that each class member's share would be allocated as 33.3% wages, 33.3% interest, and 33.4% penalties. In the motion for preliminary approval, plaintiff's counsel stated that the damages analysis was based exclusively on his interview with plaintiff, and extrapolated across the class, resulting in: (1) $320,000 for unpaid meal and rest break premiums; (2) $250,000 for wage statement damages; (3) $1.7 million for waiting time penalties; (4) $500,000 for PAGA damages; (5) $210,000 for unpaid wages; and (6) $200,000 for unpaid mileage and business expense damages. The Magistrate Judge recommended denial of the motion for preliminary approval of the class action settlement, finding that the damages analysis was unclear, and that the parties did not consider enough information to "make an informed decision about the value of the settlement." The Magistrate Judge further found that the proposed incentive award and attorneys' fees were too high. The incentive award was 2.66% of the total settlement amount, where plaintiff had spent approximately 15-20 hours on the case, and the attorneys' fees award was 33.33% of the settlement amount, above the Ninth Circuit's 25% benchmark. On July 22, 2021, the district court adopted the Magistrate Judge's report and recommendation and denied the motion for preliminary approval.

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Rodriguez v. Just Brands USA, Inc., Case No. 2:20-CV-0489-ODW (PLAx), 2021 U.S. Dist. LEXIS 94413 (C.D. Cal. May 18, 2021)

Allegation that plaintiff "may" purchase CBD products in future is insufficient for Article III standing, and plaintiff cannot maintain a claim for restitution under the UCL, FAL and CLRA as an alternative to actual damages.

Plaintiff brought claims for himself and a putative class against a producer of cannabidiol (CBD) products under the brand "JustCBD." Plaintiff alleged that he purchased JustCBD vape cartridges, gummies, and dog treats after reviewing and relying on the product packaging, which he claimed promised specific quantities of CBD. Plaintiff claimed he later discovered through independent lab testing commissioned by counsel that JustCBD products contained between 10% to 100% less CBD content than promised on the labels, and that plaintiff therefore "paid a substantial premium due to the false and misleading CBD claims . . . [and] did not receive the benefit of his bargain." Based on these allegations, plaintiff alleged claims for violation of California's Unfair Competition Law (UCL), Consumer Legal Remedies Act (CLRA), and False Advertising Law (FAL), as well as Florida's Deceptive and Unfair Practices Act, unjust enrichment, express warranty, and fraud.

Defendant moved to dismiss plaintiff's claims, and the court granted the motion in part and denied it in part. First, the court held that plaintiff lacked Article III standing to pursue injunctive relief because he alleged only that he "may" purchase JustCBD products in the future, and therefore lacked the "firm intention" to purchase the product in the future that is required to have standing to seek such relief in the Ninth Circuit. Second, the court denied defendant's motion to dismiss claims brought on behalf of out-of-state putative class members under *Bristol Myers Squibb Co.* because the case at issue involved a nationwide class action, and noted that "in class actions, the citizenship of the unnamed plaintiffs is not taken into account for personal jurisdiction purposes."

The court also dismissed plaintiff's claims under the CLRA, UCL, and FAL because they are all based on the same factual predicates (namely, the underfilling of CBD content), and plaintiff cannot maintain claims for restitution under those statutes as an alternative to actual damages, because only equitable relief is permitted.

Kalaveras v. NCR Corp., Case No. 20-C-6930 YGR, 2021 U.S. Dist. LEXIS 77728 (N.D. Cal. Apr. 22, 2021)

Court declines to exercise supplemental jurisdiction over PAGA claim after elimination of class allegations that had been the basis for removal.

Plaintiff brought claims in state court for himself and a putative class, along with representative claims under California's Private Attorney General Act (PAGA), and defendant removed under the Class Action Fairness Act (CAFA). Plaintiff then stipulated to submit his individual claims to arbitration, except the PAGA claim, which was not subject to arbitration as a matter of law. The question became whether the district court should retain jurisdiction over that claim.

The court noted the absence of Ninth Circuit authority. The court then stated that, on the one hand, elimination of class allegations generally does not divest a court of CAFA jurisdiction. On the other, a PAGA case would not be removable, as it is not a mass or class action. After considering district court decisions going both ways on the issue, the court determined that it could only exercise supplemental

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jurisdiction under 28 U.S.C. section 1367(c). Applying those factors, the court found there was no basis for maintaining federal jurisdiction.

Heathcote v. Spinx Games Ltd., Case No. C20-131-RSM, 2021 U.S. Dist. LEXIS 81559 (W.D. Wash. Apr. 28, 2021)

Court upholds defendants' revision to terms of service to include a class-action waiver after initiation of litigation.

Plaintiff sued video casino game providers for losses suffered through mobile phone gaming. Following initiation of litigation, defendants added a pop-up window to the application, which amended the terms of service to add an arbitration provision with a class-action waiver. For persons covered by the claims, the provision also stated that the litigation was pending; described the claims and relief sought; noted that the court had made no decision on class certification; provided the name and telephone number for plaintiff's counsel; and noted that, if the gamer accepted the terms, and did not opt out of the arbitration provision, the gamer could not participate in the litigation. The gamer was required to accept the terms of service in order to play.

Plaintiff sought a temporary restraining order, seeking to control defendants' communications with putative class members under Rule 23(d). Plaintiff argued that the pop-up was misleading and inadequate in explaining class members' rights. The court disagreed and denied the temporary restraining order, finding that the pop-up met the requirements previously stated in *Kater v. Churchill Downs Inc.*, 423 F. Supp. 3d 1055 (W.D. Wash 2019). Specifically, the pop-up: (1) referenced class members' ability to opt out and instructed them how to do so; (2) explained the claims and class members' rights in such a way as "an average user would understand what they are giving up"; and (3) advised class members to contact plaintiff's counsel and provided the contact information.

Eleventh Circuit

Benson v. Enterprise Leasing Company of Orlando, LLC, Case No. 6:20-cv-891-Orl-37LRH (M.D. Fla.)

Federal district court in Florida allows a purported class action to proceed asserting violation of the WARN Act.

A federal district judge denied a motion to dismiss this putative class action brought under the Worker Adjustment and Retraining Act (WARN Act) for dismissing employees without the required 60-days' notice during the Pandemic.

The case arises from a suit brought by former Enterprise employees laid off due to the COVID-19-related business downturn. In April 2020, layoffs of Enterprise employees began at both the Orlando and Tampa airports due to pandemic-related travel restrictions. The class representatives alleged that, before termination, they either received no notice (in one case) or six days' notice (in the other case). The putative class consists of 508 people laid off between the two locations.

Enterprise sought dismissal of the purported class action based upon two affirmative defenses within the WARN Act: (i) the occurrence of a natural disaster and (ii) unforeseeable business circumstances. The court reasoned that the dismissal of a claim based on such affirmative defenses could only be warranted when such defense clearly appears on the face of the complaint. "To qualify for . . . [natural disaster

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exception], an employer must be able to demonstrate that its plant closing or mass layoff is a direct result of a natural disaster." 20 C.F.R. §639.9(c)(2).

The court found that the complaint did not allege that the layoffs were a direct result of the pandemic and determined that the pandemic caused a global slowdown in travel. The slowdown in global travel meant that fewer people were flying, and as a result, fewer people were renting cars. So, while Enterprise suffered "a dramatic downturn in business," that downturn did not result directly from COVID-19. There was no outbreak of the virus at the facilities at issue in the complaint. The downturn in business was a result of a downturn in business travel. That such business travel slowed because of COVID-19 does not amount to a direct result as required by the statute, according to the court.

The court next examined the "unforeseeable business circumstances" defense and noted that this defense does not waive the 60-day notice requirement but instead softens it to "as much notice as practicable." One plaintiff received no notice at all, and the other received six days' notice. Whether no notice or a short six-day notice is sufficient is inherently a question of fact. The court held that such issues could not be properly decided on a motion to dismiss, and as such, the case could proceed.

D.C. Circuit

In re Rail Freight Fuel Surcharge Antitrust Litig. (No. II), MDL No. 2925, 2021 WL 1909777 (D. D.C. May 12, 2021)

District court permits tolling of putative class members' claims under *American Pipe* doctrine, as they had a sufficient factual nexus to timely claims.

Plaintiffs brought this action alleging that defendant railroads engaged in a multi-year price-fixing conspiracy to increase the price of rail-freight transport. Defendants moved for reconsideration of the court's decision to deny their motions to dismiss 10 individual complaints based on the exception to the running of statute of limitations for former putative class members set forth in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). The district court denied the motion for reconsideration.

Plaintiffs argued that their claims were timely because of "the tolling made generally available to former putative class members under *American Pipe*" which "suspends the applicable statute of limitations . . . as to all putative class members' individual claims concerning 'the same evidence, memories, and witnesses as the subject matter of the original class suit' . . . 'until class certification is denied. . . .'" Defendants argued that the allegations in these MDL II complaints differed from the allegations in the MDL I complaints, depriving plaintiffs of the benefit of *American Pipe* tolling.

While denying the motion for reconsideration, the court explained that the tolling rule is designed to "promote both Federal Rule of Civil Procedure 23's 'goals of efficiency and economy of litigation' by eliminating the need for putative class members to file protective motions to intervene in the pending class action to preserve their claims, and thus preventing a 'needless multiplicity of actions.'" The D.C. Circuit "takes a 'functional' approach to the application of these guideposts of *American Pipe* tolling" and the central inquiry is whether the claims of the former putative class members are "'predicated on the same acts' as the conduct challenged in the original class action, 'such that 'there can be no doubt that the defendants have received sufficient notice of the contours of potential claims.'" Here, tolling was permitted only for allegations with a "'sufficient factual nexus' to the conduct alleged by the putative MDL I class" but "'allegations outside the class period that address conduct or harm completely unrelated to conduct or harm that occurred within the class period are untimely'." The court held that "[i]n sum, the

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limited lingering-effects allegations tolled . . . were correctly found to fall within the scope *of American Pipe's* exception to the running of the statute of limitations because they are 'predicated on the same acts' and will be proven by the same evidence as the claims advanced by the putative class in MDL I."

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