

## **Class Action Litigation Newsletter | Winter 2021/2022**



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

**Highlights** from this issue include:

- First Circuit affirms denial of class certification based on need to use extrinsic evidence to determine each putative class member’s breach of contract claim.
- First Circuit rejects extension of personal jurisdiction arguments based on *Bristol-Myers* to FLSA opt-in action.
- Second Circuit finds no standing under *TransUnion* when plaintiffs alleged only a risk of harm.
- Third Circuit clarifies procedure for handling combined FLSA collective and class actions.
- Seventh Circuit holds that district courts must rigorously analyze elements of each underlying claim when rendering class certification decisions.
- Seventh Circuit holds that removal timelines run separately for preemption removal and Class Action Fairness Act removal.
- Eighth Circuit holds PSLRA does not impose a “lookback obligation” to reconsider attorneys’ fee award by determining amount actually paid to the class years later.
- Ninth Circuit addresses what constitutes a “coupon” under CAFA.
- Eleventh circuit affirms dismissal of putative class action based on timeshare ownership.

## First Circuit

*Aronstein v. Mass. Mut. Life Ins. Co.*, Nos. 20-2103, 20-2135, 2021 U.S. App. LEXIS 30105 (1st Cir. Oct. 6, 2021)

### **First Circuit affirms denial of class certification in insurance contract claim based on need to use extrinsic evidence.**

Plaintiff alleged he purchased an annuity he believed had a guaranteed annual interest rate of 3%, when the defendant included a rider reducing the guaranteed rate to 1.5%. The district court denied class certification because, under New York law, extrinsic evidence was needed to determine which interest rate each putative class member believed prevailed when they purchased the annuity, which destroyed predominance. The First Circuit affirmed, explaining that, “although [the plaintiff] was never told that MassMutual reduced the interest rate to 1.5%, MassMutual produced evidence that it engaged in an extensive marketing campaign to inform sales agents of the minimum guaranteed interest rate change, its marketing materials were modified to reflect this change, and sales agents generally explained this key interest rate to potential purchasers orally.” Thus, the court held that, because the plaintiff only produced evidence that he had not been informed of the rate change, nothing showed that other potential class members were not informed.

*Waters v. Day & Zimmerman NPS, Inc.*, 23 F.4th 84 (1st Cir. 2022)

### **First Circuit rejects personal jurisdiction arguments based on *Bristol-Myers* in FLSA opt-in action.**

A former employee brought a putative class action under the Fair Labor Standards Act (FLSA) in the District of Massachusetts, alleging that the employer failed to pay him and other similarly situated employees overtime wages. More than 100 current and former employees from around the country filed “opt-in” consent forms with the court, electing to participate. The employer moved to dismiss for lack of personal jurisdiction based on *Bristol-Myers Squibb v. Superior Court of California*, 137 S. Ct. 1773, 1779-81 (2017), which held that state courts could not entertain a state-law mass action if it included out-of-state plaintiffs with no connection to the forum state. The district court denied the employer’s motion to dismiss, declining to extend *Bristol Myer’s* personal jurisdiction requirements to FLSA cases in federal court.

The First Circuit affirmed the district court, noting that the purpose of the FLSA is to allow for efficient enforcement of the wage and hour laws against large, multi-state employers, and that barring such action would frustrate that purpose. The First Circuit expressly disagreed with decisions by the Sixth and Eighth Circuits limiting personal jurisdiction over FLSA claims. Specifically, the First Circuit determined that Rule 4 of the Federal Rules of Civil Procedure serves as a territorial limit on effective service of a summons and thus could not be read to limit a federal court’s jurisdiction after a summons is properly served.

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

**Individualized consent issues prevent certification of TCPA “junk fax” class.**

A small private high school brought a claim against ACT, Inc. under the Telephone Consumer Protection Act (TCPA) based on three facsimiles sent to the school. ACT, Inc. develops and administers the ACT college admission test. The school had provided ACT, Inc. its facsimile number in a “High School Code Request Form,” which students use to have their ACT test scores reported to their high schools. On the form, the school checked a box indicating that it wanted to (i) administer certain standardized tests, (ii) receive its students’ test scores, and (iii) receive SAT or ACT publications. The district court denied certification because the issue of consent was too individualized to permit class treatment.

The First Circuit affirmed, ruling that the school did not meet its burden to show how a court could cull from the proposed class those putative class members who may have provided the appropriate consent. Rather, as found by the district court, ACT, Inc. had presented sufficient evidence that the proposed class likely included members who invited the company to send materials by facsimile. The district court further found that “to identify those members the court would have to ‘parse through each unique relationship’ between every class member” and ACT, Inc.

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

**Injunction preventing class arbitration affirmed when arbitration clause did not expressly authorize class arbitration.**

An institute placing au pairs with host families in the United States sought injunctive relief against an au pair from Spain who had filed a class arbitration demand. The au pair signed an agreement with the institute, which contained the following arbitration clause: “I agree that any dispute with or claim against [the Institute] . . . will be exclusively resolved by binding arbitration[.]” The agreement also provided that the au pair waived the right to assert any “claims, in either an individual capacity or as a member of any class action, by any means and in any form other than arbitration[.]” The parties agreed that the agreement required the au pair to submit any *individual* claims to arbitration but disputed whether class arbitration was available.

Reviewing the district court order granting injunctive relief to preclude class arbitration, the First Circuit concluded that the agreement “does not provide an affirmative basis to conclude that the parties agreed to class arbitration.” According to the First Circuit, the “arbitration clause is silent about class arbitration. And the waiver clause only mentions class actions in precluding the parties from litigating as a class.” The court rejected the au pair’s assertion that the “the waiver clause waives ‘only’ the right to litigate a class claim in court,” explaining that this argument “entirely begs the question: Did she have a right to arbitrate as a class, which right might then be preserved by exclusion from the waiver clause? And as to that question, [the au pair] is back to square one: She can point to no ‘affirmative contractual basis for concluding’ that the parties agreed to arbitrate class claims.” Thus, the First Circuit concluded that the district court did not err in granting injunctive relief to preclude class arbitration.

## Second Circuit

*Maddox v. Bank of N.Y. Mellon Tr. Co., N.A.*, No. 19-1774, 2021 U.S. App. LEXIS 34056, (2d Cir. Nov. 17, 2021)

### **Second Circuit holds no standing when plaintiffs alleged only a risk of harm.**

In this putative class action, the Second Circuit ruled that plaintiffs' allegations that the bank violated New York's mortgage-satisfaction-recording statutes were not enough to show standing because the allegations showed only a risk of injury, not that plaintiffs suffered any actual harm. The Second Circuit explained that the Supreme Court's recent decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) "established that in suits for damages[,] plaintiffs cannot establish Article III standing by relying entirely on a statutory violation or risk of future harm." Thus, even though the plaintiffs alleged the bank failed to timely record satisfaction, they did not allege that anyone saw the misleading records, that they suffered reputational harm, or other injury. As a result, the plaintiffs lacked standing.

*Williams v. Kucoin*, No. 20-cv-2806, 2021 U.S. Dist. LEXIS 204334 (S.D.N.Y. Oct. 21, 2021)

### **Magistrate Judge issues report recommending certification of a narrowed class, finding that a cryptocurrency token purchaser did not have standing to assert claims on behalf of individuals who purchased other tokens.**

This case involved purchases of digital tokens on defendant KuCoin's website, an online crypto-asset exchange. According to the amended complaint, KuCoin sold 10 brands of digital tokens on its platform, with each Token offered to the public through an "initial coin offering." Issuers of these Tokens allegedly did not register them as securities with the U.S. Securities and Exchange Commission and KuCoin allegedly did not register itself as an exchange or a broker-dealer. The amended complaint further alleged that issuers of Tokens merely released "whitepapers" that described the Tokens and their initial offering terms, which were not as robust as the disclosures required by the securities laws.

Plaintiff sought to represent a broad class of "[a]ll persons who purchased on the KuCoin exchange any of the [10] Tokens" between September 15, 2017, and July 2, 2021. The Magistrate Judge ultimately recommended denial of class certification as to individuals who purchased the nine Tokens plaintiff did not buy but granted certification as to the more limited subset of individuals who, like plaintiff, purchased TOMO brand Tokens. Finding that plaintiff had no standing to pursue claims relating to non-TOMO Tokens, the court found that plaintiff's alleged injury did not "implicate the same concerns" as KuCoin's alleged harm to other putative class members who purchased other Tokens on its platform.

*In re Goldman Sachs Grp., Inc.*, No. 10-CV-3461, 2021 U.S. Dist. LEXIS 235241 (S.D.N.Y. Dec. 8, 2021)

### **Southern District of New York grants class certification again, finding defendants failed to rebut the *Basic* presumption by a preponderance of the evidence.**

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. After discovery, plaintiffs moved for class certification, invoking the presumption of class-wide reliance established 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. That decision resulted in multiple appeals, remands, and decisions from the Second Circuit and the Supreme Court, with the most recent remand to the district court in 2021 to consider “the generic nature of a misrepresentation” which is often “important evidence of price impact” on stock price.

On remand, the Southern District of New York solicited supplemental briefing but not supplements to the already substantial evidentiary record, which already “fully addressed the factual issues raised in the remand orders.” Evaluating this evidence with the “fresh guidance” from the Supreme Court, the district court found once again that GS could not rebut the *Basic* presumption because it did not show, “by a preponderance, that the alleged misstatements had *no* price impact whatsoever.” Specifically, the district court noted that its “thorough review of all evidence probative of price impact reveals that the alleged misstatements had *some* impact on the price of Goldman’s stock during the Class Period.”

For more information on this case, see our [June 2021 GT Alert](#) or [the Summer 2021 Class Action Newsletter](#).

## Third Circuit

*In re Citizens Bank*, 15 F.4th 607 (3d Cir. 2021)

### **Third Circuit clarifies procedure for handling combined FLSA collective and class actions.**

Employees of Citizens Bank filed a complaint alleging that the bank maintained an unofficial policy requiring them to work but not report over 40 hours per week. The district court scheduled a trial of the FLSA collective action on the primary factual issue in the case – i.e., whether the bank had a policy or practice that caused certain employees not to report all of the hours they worked – but left unresolved whether it would certify a class under Rule 23. Because the FLSA collective action and the Rule 23 class action turned on the same facts, Citizens objected to the FLSA collective action proceeding first, but the district court denied those objections. With a trial date approaching, Citizens filed a petition in the Third Circuit for a writ of mandamus. The Third Circuit stayed the case to decide that petition, and issued an opinion explaining its decision to issue the stay.

The panel focused on whether Citizens had a likelihood of success on the merits of the appeal. The panel’s primary criticism of the district court’s procedure was that it intended to resolve key liability issues before class certification, “ignoring Rule 23’s text and history, flouting Supreme Court precedent, and departing from the case law of seven circuits while undercutting four others.” The panel noted that seven courts of appeals have held that “Rule 23 requires class certification prior to a trial on the merits.” No court of appeals had “approved foisting trial-before-certification on an unwilling Rule 23(b)(3) defendant” as the district court did here.

The panel observed that failing to rule on class certification creates “an atmosphere of confusion” that is “compounded when what is scheduled for trial is a hybrid wage-and-hour case.” For example, if a class was certified after a plaintiffs’ verdict in the FLSA trial, the “most likely result” would be that the class members would decline to opt out of the class because the FLSA trial win would quickly lead to a plaintiff verdict in the class action. Conversely, a defense verdict in the FLSA trial would only bind those who had

opted in to the FLSA collective action, and the others would be free to opt out of the class action to pursue their own lawsuits. “In other words, an FLSA trial victory could thwart Citizens’ hope for global peace via a class action, leave Citizens with a substantial amount of litigation remaining on its plate, and greatly increase Citizens’ litigation costs and potential liability exposure.” The panel also stated that if holding FLSA trials before class certification became the norm “most employees likely would never opt in to an FLSA action” because the employees could use any plaintiff verdict in the FLSA trial to their benefit in the class action, and they “would avoid any risk of being bound by an unfavorable judgment in the FLSA action. That scenario, in short, is a win-win for the employees and disadvantages [defendants] at every turn.”

The panel declined to resolve whether the district court’s “order of battle” violates Rule 23 or creates a substantial danger of unfair one-way intervention, “whether class certification is even possible after a trial on the merits has already taken place,” or “whether there could be circumstances under which an FLSA trial might reasonably proceed prior to class certification in a parallel Rule 23 action.”

## Fourth Circuit

*Plantation Bldg. of Wilmington, Inc. v. Town of Leland*, 863 S.E.2d 772 (N.C. 2021)

### **North Carolina Supreme Court finds defendant waived objection to class certification being decided after summary judgment.**

A builder brought an action against a town seeking a refund of all impact and capacity fees collected by the town as a condition precedent to the town issuing a building permit. In the trial court, defendant consented to and joined in plaintiff’s motion for a continuance that indicated the parties would file cross-motions for summary judgment and address class certification if the matter was not resolved on summary judgment. Thereafter, the trial court granted plaintiff’s summary judgment motion on liability, but not on damages. Plaintiff then filed a motion for class certification, and defendant filed a motion to dismiss, objecting to the trial court addressing class certification after resolving summary judgment. The trial court granted class certification and denied defendant’s motion to dismiss. Defendant appealed.

The North Carolina Supreme Court held that defendant had waived its objection to the trial court deciding class certification after summary judgment because defendant had joined in the motion for a continuance. The Court reasoned that the motion stated that “[b]oth parties to this action join in and consent to this Motion” and the parties followed the sequence set forth in the motion. Thus, the Court did not consider any of defendant’s substantive arguments.

*McMillan v. Blue Ridge Cos.*, 866 S.E.2d 700 (N.C. 2021)

### **North Carolina Supreme Court affirms certification in debt collection case.**

Plaintiffs filed a complaint against a landlord alleging violations of North Carolina’s debt collection statutes by sending unduly threatening collection letters and prematurely accessing certain fees against tenants behind on their rent. The trial court certified three classes: the “Collection Letter Class,” the “Eviction Fee Class,” and the “Complaint-Filing Fee Class.” Landlord appealed.

The North Carolina Supreme Court upheld the trial court’s certification of each of the three classes. As to the Collection Letter Class, the Court rejected the landlord’s argument that predominance was lacking because each tenant’s subjective reaction to the letters was relevant to each tenant’s injury, reasoning that

“the collection letters need not have caused each class member a personal, factual injury based on his or her subjective reaction to it, but only an informational injury based on alleged misrepresentations and misleading information contained in the letters, in violation of the statute.” Regarding damages, the Court held that “although different members of the class could indeed end up with different damages based on individual circumstances, these differences do not undermine the availability of a class-wide theory of generalized liability.”

As to the Eviction Fee and Complaint Filing Fee Classes, the landlord argued the trial court’s factual findings were inadequate to support class certification. The Court disagreed, reasoning that “[w]e agree the trial court’s findings of fact are relatively succinct; but succinct does not necessarily mean inadequate.” In particular, the Court noted that “the trial court’s succinctness here acts to support class certification rather than to undermine it; that is, because [the landlord’s] procedures regarding the collection letters, eviction fees, and complaint-filing fees were admittedly uniform for all defaulting tenants, more detailed, tenant-specific factual findings are rendered unnecessary.”

Finally, the Court rejected the landlord’s objections to the trial court’s superiority determination. First, the Court decided that the trial court did not abuse its discretion in determining that “statutory damages can be measured using objective, class-wide criteria” because “statutory damages here could be determined based on the generalized theory of alleged class-wide informational injuries and deprivation of statutory rights.” Second, the Court rejected the argument that the identification of class members was an impediment to class certification because (i) “class-member identification is only one of many factors that a trial court may consider within a superiority determination”; and (ii) there was competent evidence in the record identifying who was subject to the landlord’s actions. Third, the Court rejected the landlord’s argument that superiority was lacking because plaintiffs sought both statutory damages and attorneys’ fees. The Court credited the trial court’s findings that class certification would avoid “the same legal issues [being] relitigated in potentially hundreds of individual cases in different courts throughout North Carolina, which could lead to inconsistent decisions” and that “[t]he benefits of litigating this case as a class action overrides any drawbacks.”

*State ex rel. W. Va. Univ. Hosps.-East, Inc. v. Hammer*, 866 S.E.2d 187 (W. Va. 2021)

### **West Virginia Supreme Court clarifies standing in data breach class actions.**

A hospital system employee misappropriated the private medical information of approximately 7,445 patients. Two of the patients (Welch and Roman) filed putative class actions under state law and sought to certify a class of all patients whose information was accessed. The hospitals opposed class certification in part because the named plaintiffs lacked standing. In particular, they argued that (i) Welch’s information was accessed during the employee’s authorized job duties so was not misappropriated, and (ii) plaintiffs failed to establish how Roman’s information came into the employee’s possession. The trial court granted class certification, and the hospitals sought a writ of prohibition to prevent the trial court from enforcing its class certification order.

The West Virginia Supreme Court considered an issue of first impression: whether at least one named plaintiff must have standing for each claim asserted in the case. The court “expressly [held] that, in order to bring a class action lawsuit, at least one named plaintiff must have standing with respect to each claim asserted, and the burden of establishing standing is on the plaintiff(s).” The court agreed with the hospitals that Welch lacked standing because her information was accessed lawfully and, therefore, she did not suffer an injury-in-fact. As for Roman, the court was “unable to conclude that he has suffered no injury-in-fact” given the undisputed fact that Roman’s confidential information was found in the employee’s apartment.

In considering whether the trial court properly had certified a class based on Roman’s claim, the Supreme Court focused on the typicality element. It was plaintiff’s burden to prove that Roman’s claim “arises from the same event or practice or course of conduct that gives rise to the claims of other class members” and that his “claims are based on the same legal theory.” The court was unable to determine whether Roman’s claims were typical of the other patients because there was no evidence that the employee actually accessed Roman’s information. The court held that “[d]ue to the absence of any consideration by the circuit court of Mr. Roman’s individual circumstances as they relate to the claims he asserts, we find the circuit court’s order fails to provide the ‘thorough analysis’ required by” prior precedent. The court remanded the case to the trial court for a thorough analysis of the typicality element.

## **Fifth Circuit**

*Ochoa v. Pershing LLC*, Civil Action 3:16-CV-1485-N, 2021 U.S. Dist. LEXIS 214299 (N.D. Tex. Nov. 5, 2021)

### **Northern District of Texas refuses to apply *American Pipe* tolling to follow-on class action.**

Victims of the Stanford Ponzi scheme pursued a class action against Pershing, LLC, which had been Stanford’s clearing broker. These investors had been carved out of a related, previously filed class action. Plaintiffs filed their suit in May 2016, and Pershing moved to dismiss the case on statute-of-limitations grounds.

Plaintiffs argued their claims were timely because they were tolled during the pendency of the related class action under the Supreme Court’s *American Pipe* doctrine. That doctrine holds that after denial of class certification, putative members of the now-defunct class could intervene in the original action to press otherwise untimely individual claims if such claims would have been timely at the outset of the class action. But *American Pipe* did not address whether the doctrine also applied to subsequent “follow-on” class actions.

The district court rejected plaintiffs’ tolling argument. Relying on the Supreme Court’s decision in *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018), which limited *American Pipe* to apply to individual suits only and not follow-on class actions, the district court refused to expand *American Pipe* and concluded that plaintiffs’ claims were time-barred.

## **Sixth Circuit**

*Desai v. Geico Cas. Co.*, No. 1:19-cv-2327, 2021 U.S. Dist. LEXIS 232456 (N.D. Ohio Dec. 6, 2021)

### **Federal district court denies class certification in “cash value” insurance class action because individual issues predominated.**

Plaintiff Milind Desai filed a putative class action against Geico Casualty Company, alleging the insurance company had failed to pay actual cash value under his auto insurance policy after a wreck rendered his vehicle a total loss. To arrive at a cash value number, Geico used a program called “CCC One,” which Desai claimed violated Ohio’s actual-cash-value statute because Geico did not pay license, title, and dealer fees.



Desai moved to certify a class of Geico policyholders in Ohio who made and were paid claims for a total loss.

The district court denied class certification based on Rule 23(b)(3)'s predominance and superiority requirements. Although common questions regarding the Geico policy could be presented, the court ruled “that those common questions recede and that individual issues predominate in the face of Defendant’s practices for adjusting and settling total-loss claims.” What’s more, the court explained, “the individual issues involved in determining whether Defendant paid the fees as part of the actual settlement amount—no matter what method is used to determine that—involves considerable time, effort, and expense that outweighs the efficiencies, if any, in class certification.”

The court further denied certification of a Rule 23(b)(2) declaratory class, relying on the Supreme Court’s decision in *Walmart v. Dukes*, because (i) each individual class member would be entitled to an award of money damages, and as such, the claim belongs under Rule 23(b)(3), not 23(b)(2); and (ii) class certification under Rule 23(b)(2) is not allowed when the available “monetary relief is not incidental to the injunctive or declaratory relief.”

## Seventh Circuit

*Santiago v. City of Chicago*, No. 20-3522, 2021 U.S. App. LEXIS 36742 (7th Cir. Dec. 13, 2021)

### **Seventh Circuit holds that district courts must rigorously analyze elements of each underlying claim when rendering class certification decisions.**

Plaintiff, a disabled Chicago resident, filed a putative class action against the City of Chicago, asserting that the city’s scheme for impounding vehicles was improper. Plaintiff used her handicap-accessible vehicle only sporadically, leaving it parked on the street outside her home when not in use. After receiving a complaint, the city eventually impounded the vehicle and destroyed it before plaintiff was able to recover it. Plaintiff pled 10 causes of action, divided between two purported classes – one harmed by the pre-tow notice procedure, and the other by the vehicle disposal procedure. The district court denied class certification for all declaratory and injunctive relief claims, noting plaintiff had failed to show she faced a real and immediate threat of future injury. But the district court granted certification of both classes for plaintiff’s monetary relief claims.

The Seventh Circuit reversed the certification. In determining whether common questions predominate, the Seventh Circuit emphasized that courts must begin with the underlying causes of action. “Only by properly circumscribing the claims and breaking them down into their constituent elements can a district court decide which issues are common, individual, and predominant.” Yet, in rendering its decision, the district court failed to address any element of any cause of action. Ultimately, the district court’s order, which not only failed to address the various elements but also lumped different claims together, left the Seventh Circuit with many questions about how the lower court conducted its class certification analysis. “Because the district court did not engage in the detailed analysis that a Rule 23 decision requires,” the Seventh Circuit held that “an abuse of discretion occurred.”

Similarly, the Seventh Circuit questioned whether the district court properly engaged in the rigorous analysis required to determine whether plaintiff was an adequate representative of both classes she sought to represent. Without identifying the causes of action and “attach[ing] its arguments to specific elements of the claims,” the district court’s assessment that plaintiff was an adequate class representative

was an abuse of discretion. The Seventh Circuit concluded that it “simply [did] not have enough information organized efficiently to reach a conclusion that the order of class certification is correct or incorrect[.]”

*Railey v. Sunset Food Mart, Inc.*, 16 F.4th 234 (7th Cir. 2021)

### **Seventh Circuit holds that removal timelines run separately for preemption removal and Class Action Fairness Act removal.**

Alleging violations of the Illinois Biometric Information Privacy Act, plaintiff filed a putative class action in state court in January 2019, alleging she was required to use her biometric information to clock in and out of work. Nearly two years later, in November 2020, defendant removed the case to federal court, claiming that plaintiff’s claims were completely preempted by the Labor Management Relations Act (the LMRA). Defendant justified its delay based on an interrogatory response from plaintiff that confirmed she was part of a labor union. Two months later, defendant further sought to bolster its removal position with a supplemental statement, arguing that the Class Action Fairness Act (CAFA) also supported removal due to plaintiff’s change in domicile from Illinois to Georgia. The district court found defendant’s removal untimely and remanded.

The Seventh Circuit confirmed that “[r]emoval is not a one-shot proposition. A defendant may remove even a previously remanded case if subsequent pleadings or litigation events reveal a new basis for removal.” As such, a removing party is subject to the removal timeline based on the time at which the removing party learns of those bases. In other words, each removal basis runs on a different clock. Thus, the court held that defendant’s CAFA argument must be evaluated on its own merits; it was not dependent upon the time in which defendant sought removal based on preemption. The Seventh Circuit explained that, “if a defendant independently discovers that the case is removable under the terms of [CAFA], it may remove the case at whatever point it deems appropriate, regardless of whether the window for removal on another basis already opened and closed.” Because defendant discovered plaintiff’s domicile change in January 2021 (supporting minimal diversity to justify removal), and shortly after submitted its alternative ground for federal jurisdiction under CAFA, its notice of removal was timely. Yet timeliness was ultimately irrelevant because the home-state exception applied. Because plaintiff’s class definition was limited to Illinois citizens, involving claims against an Illinois company, for locations in Illinois, the definition “all but ‘guaranteed that the suit would remain in state court.’”

In addressing the preemption removal basis, the Seventh Circuit noted that, while a defendant has 30 days to file its notice of removal, that 30-day clock does not begin to run until the defendant receives a pleading or other paper with sufficient information to provide a basis for removal. But “a defendant cannot bury its head in the sand or feign ignorance about information within its control.” Because defendant had information sufficient to link plaintiff to a union since the complaint had been filed, the preemption-based removal under the LMRA was untimely.

Despite affirming the district court, the Seventh Circuit advised:

Do not read this opinion to impose any meaningful burden on defendants. We stand fully by our prior determination that district courts are not required to engage in a ‘fact-intensive inquiry about what the defendant subjectively knew or should have discovered’ about the plaintiff’s case to assess the timeliness of a defendant’s removal. We add only the straightforward observation that, when it comes to removal, a defendant can be held to information about its own operations that it knows or can discern with ease.

*Persinger v. Sw. Credit Sys., L.P.*, No. 21-1037, 2021 U.S. App. LEXIS 37986 (7th Cir. Dec. 22, 2021)

**Seventh Circuit finds standing when defendant allegedly used plaintiff's confidential information without authorization.**

This case challenged defendant's use of the plaintiff's "propensity-to-pay score" without a permissible purpose, in violation of the Fair Credit Reporting Act (FCRA). The court reasoned that "the FCRA's protection of consumer credit information is akin to the common law's protection of private information through the tort of invasion of privacy," and that in making it "unlawful to furnish, obtain, or use a consumer's credit information without a permissible purpose," "Congress created a federal cause of action for a common-law-like harm." In other words, because the plaintiff's alleged harm resembled a harm traditionally protected by common law, it was a "concrete injury" for purposes of standing.

## **Eighth Circuit**

*In re BankAmerica Corp.*, 15 F.4th 865 (8th Cir. 2021)

**Eighth Circuit affirms trial court denial of a motion to reconsider an award of attorneys' fees nearly 20 years after they were awarded, holding PSLRA does not impose a "lookback obligation" to determine amount actually paid to the class.**

This appeal arose from the trial court's denial of a motion to reconsider an award of attorneys' fees. One of the lead plaintiffs in the *In re BankAmerica Corp.* securities litigation filed a motion for reconsideration of the fee award to class counsel and sought disgorgement of \$38 million in fees. Plaintiff relied on a provision of the PSLRA providing that "[t]otal attorney's fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. § 78u-4(a)(6). He argued that because the court could not determine the amount *actually paid to the class* until the settlement fund has been distributed, this provision necessarily provides for re-evaluating the amount of attorney fees at the end of distribution of a settlement fund. The Eighth Circuit held that the PSLRA simply incorporates the percentage-of-recovery method of determining reasonable attorney's fees. The Eighth Circuit also found that the district court properly applied laches and preclusion principles in denying the motion.

*Portz v. St. Cloud State Univ.*, 16 F.4th 577 (8th Cir. 2021)

**Eighth Circuit reverses trial court decision finding defendant university did not comply with Title IX in its allocation of athletic participation opportunities, holding trial court incorrectly mandated equity at each tier of participation.**

Plaintiffs brought a class action alleging gender discrimination in violation of Title IX of the Education Amendments Act of 1972. After a bench trial, the district court found that the university failed to comply with Title IX requirement in its allocation of athletic opportunities, treatment, and benefits and issued declaratory relief. In particular, the district court found the university split its support for different sports into three tiers and that treatment and benefits are not equitable because fewer women benefit from a Tier 1 level of support. Accepting that the university split its support for different sports into three tiers, the court held that the district court improperly relied on the tiers to conclude that the university inequitably allocated treatment and benefits on a global level. The Eighth Circuit held that the district

court was required to analyze how the university distributes treatment and benefits across the entire program rather than on a tier-by-tier basis. Thus, the Eighth Circuit reversed and remanded for further proceedings.

*Smith v. S. Farm Bureau Cas. Ins. Co.*, 18 F.4th 976 (8th Cir. 2021)

**Eighth Circuit reverses trial court decision dismissing a putative class action, finding complaint’s contract claim could be construed as two separate claims: one based on the incorporation of state insurance regulation and another for common law breach of contract.**

Plaintiff brought a class action alleging that his insurer undervalued his totaled pickup truck. Plaintiff alleged the insurer used a third party to determine the actual cash value. The report identified three comparable vehicles listed on dealers’ websites, adjusted for the features each vehicle had, and then deducted 9% as a “Projected Sold Adjustment.” Plaintiff brought a one-count class action complaint for breach of contract, asserting the contract incorporated a state regulation providing that deductions “must be measurable, discernible, itemized and specified as to dollar amount and shall be appropriate in amount.” Ark. Ins. Rule 43 § 10(a)(3). Plaintiff also alleged his insurer failed to base its payment on the fair market value of his vehicle.

The district court dismissed, holding the breach of contract claim was based solely on the state insurance regulation. Because the district court found the contract did not incorporate the regulation, it granted the motion to dismiss. The Eighth Circuit, however, found plaintiff had separately pled a claim for common law breach of contract based on the fair market value of his vehicle. Because plaintiff alleged that the 9% deduction did not reflect market realities, the Eighth Circuit found he stated a claim for breach of contract.

*City of Plantation Police Officers Pension Fund v. Meredith Corp.*, 16 F.4th 553 (8th Cir. 2021)

**Eighth Circuit affirms dismissal of a putative securities action for failure to allege actionable statements and failure to allege facts sufficient to infer recklessness.**

Plaintiff brought a class action alleging securities fraud under Section 10(b) of the Securities Exchange Act and for control-person liability under Section 20(a) of the Exchange Act. The complaint identified 138 allegedly false or misleading statements about the merger made during the class period. The district court dismissed the complaint with prejudice and denied plaintiff’s request for leave to amend.

The Eighth Circuit affirmed, finding that “137 of the 138 statements listed in the amended complaint were clearly either (1) statements identified as forward-looking and accompanied by meaningful cautionary statements, (2) corporate puffery, or (3) forward-looking statements that the complaint’s allegations do not imply by strong inference were made with actual knowledge of their falsity.” These statements were largely “paradigmatic examples of the kind of ‘vague’ and ‘optimistic’ rhetoric that constitutes corporate puffery.”

The only statement the Eighth Circuit held rose above that level was the claim that the merged entity had “fully integrated [its] HR, finance, legal and IT functions.” The only allegation that this was a material misrepresentation was that the legacy employees of the two former entities still operated on different finance software systems. With regard to this statement, the Eighth Circuit held the complaint failed to

state with particularity “facts suggesting that it would have been so obvious that two software systems were in use that it was ‘an extreme departure from the standards of ordinary care’” for the CEO to turn a blind eye to the fact. Moreover, the Eighth Circuit held the more plausible inference from the allegations is that he simply had limited information about the inner workings of the legacy firms’ finance department. As such, the allegations with regard to this statement failed to sufficiently allege defendant’s mental state.

*Detmer v. La'James Coll. of Hairstyling, Inc. of Fort Dodge*, No. 21-0220, 2021 Iowa App. Lexis 1044 (Ct. App. Dec. 15, 2021)

**Iowa Court of Appeals affirms certification of a class, nothing that Iowa’s class action rules are remedial and should be liberally construed.**

Plaintiff brought a putative class action on behalf of Iowa hairstyling school students, asserting claims for violations of the Iowa Consumer Fraud Act, fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, and breach of contract stemming from the school’s handling of financial aid disbursements. The trial court granted the motion for class certification. On appeal, the school focused its arguments on the question of predominance. While the Iowa Court of Appeals found that the damages would vary for each student and require individual inquiries, the court found the liability question could be resolved on a class-wide basis, as the school made uniform representations regarding how and when financial aid would be disbursed. In reaching this conclusion, the court noted that Iowa “class-action rules are remedial in nature and should be liberally construed to favor the maintenance of class actions.” Indeed, the Court of Appeals found “‘the proponent’s burden is light’ at the class certification stage.”

*Hotels.com, L.P. v. Pine Bluff Advert. & Promotion Comm'n*, 2021 Ark. 196, 632 S.W.3d 742 (2021)

**Supreme Court of Arkansas dismisses interlocutory appeal of a decision denying a motion to decertify a damages class as not subject to one of the exceptions to the final-order rule.**

Plaintiffs brought a declaratory judgment action asserting that certain online travel companies failed to properly remit taxes imposed by local governments. The trial court certified a class in 2013. In 2018, the plaintiffs won their motion for summary judgment on their declaratory judgment claims, and the court provided that the named class members would have 30 days to petition for additional relief relating to past taxes owed. In July 2020, plaintiffs filed a second amended and supplemental complaint. The online travel companies filed a motion seeking to decertify the class as to any claimed right of the named plaintiffs to seek damages on a class-wide basis. The trial court denied the online travel companies’ motion.

The online travel companies appealed, but the Arkansas Supreme Court dismissed their appeal, holding that Rule 2 of the Arkansas Rules of Appellate Procedure-Civil requires a final judgment. There are limited exceptions to this rule. The online travel companies argued the exception relating to “an order granting or denying a motion to certify a case as a class action” applied. The Arkansas Supreme Court, however, held that “the fact that a significant issue may be involved is not sufficient, in itself, for the appellate court to accept jurisdiction of an interlocutory appeal” and that no class certification motion was at issue.

*Rivera-Ceren v. Presidential Limousine & Auto Sales, Inc.*, 2021 Ark. 219 (2021)**Supreme Court of Arkansas reverses and remands circuit court’s denial of class certification regarding defendant’s practices around repossessing vehicles, noting that defendant’s objections to certification were improperly based on “merits” arguments.**

Plaintiff brought a putative class action on behalf of Arkansas consumers who had a retail installment contract with defendant, had their property repossessed, and were sent post-repossession notices that failed to disclose the consumer’s right to an accounting. Plaintiff noted in moving for class certification that there were approximately 200 vehicles repossessed during the relevant period and that the common and predominant question was whether the form notices provided violated the UCC. Defendant argued that because the relevant period was shorter, the class was less numerous than plaintiff asserted and plaintiff was not typical because she received an accounting prior to repossession.

On appeal, the Supreme Court found that addressing issues of the statute of limitations for purposes of evaluating numerosity “delves into the potential merits of the claims, which we have held is impermissible when reviewing a motion for class certification.” Even if the statute of limitations was three years rather than five, that would still suggest approximately 120 class members (assuming an even distribution of repossessions across the five-year period). Similarly, the Arkansas Supreme Court found that evaluating whether any of the notices sent upon repossession satisfy the UCC involves the merits of the claim and goes well beyond the procedural issue of whether there are common questions of law or fact.

## Ninth Circuit

*McKinney-Drobnis v. Oreshack*, No. 20-15539 (9th Cir. Oct. 20, 2021)**Ninth Circuit addresses what constitutes a “coupon” under CAFA.**

Plaintiffs alleged that a membership-based, spa-services company increased membership fees in violation of the governing agreement. In a class settlement with a putative nationwide class of current and former members, the parties included vouchers for spa services, corresponding to the increased fees class members paid. The vouchers would be valid for 18 months; could be used to purchase 251 retail products, massage sessions, enhancements and/or facial sessions; and could be transferred, combined with other promotions and discounts and used in multiple transactions. The district court approved the settlement and attorneys’ fee award, overruling an objection that the vouchers were “coupons” for purposes of CAFA.

Under CAFA, a coupon settlement is subject to “heightened scrutiny,” and an attorneys’ fee award “shall” be based on the redemption value, not face value, of the coupons. Disagreeing with the district court, the Ninth Circuit found the vouchers were “coupons” within the meaning of CAFA. First, class members probably would be required “to hand over more of their own money before they can take advantage of” the vouchers. The cost of a massage, the central benefit of a membership, exceeded the voucher amount. Second, the vouchers applied only to “select products or services.” Even though defendant sold 251 different products, they were all related only to health and wellness, and the products were not available online or at every location. Third, the vouchers were flexible in terms of credit provided – they could “be transferred, sold, and aggregated.” The first and second considerations weighed in favor of a finding for the objector, and the third, against. But no single consideration was dispositive. On balance, the Ninth Circuit determined the vouchers were “coupons” and remanded for the district court to use the value of redeemed vouchers in evaluating the attorneys’ fees award.

*Martinez-Sanchez v. Anthony Vineyards, Inc.*, No. 1:19-cv-01404-DAD-JLT (E.D. Cal. Dec. 6, 2021)

**Magistrate Judge recommends granting motion to strike representative allegations under the California Labor Code Private Attorney General Act (PAGA).**

Defendants filed a motion to strike plaintiffs' PAGA representative allegations, alleging the claims could not be manageably tried based on individualized liability issues. Plaintiffs sought civil penalties for a series of distinct, alleged violations. The Magistrate Judge noted that motions to strike under Federal Rule of Civil Procedure 12(f) generally are disfavored, especially when they cause delay, and that strong judicial policy favors resolution on the merits. Also, courts disagree whether PAGA imposes "a manageability requirement per se on plaintiffs bringing these representative actions," but sometimes grant motions to strike based on manageability concerns. Given the facts presented, the Magistrate Judge recommended denying the motion to strike where plaintiffs had established a routine, common practice regarding alleged post- and pre-shift off-the-clock work. But the Magistrate Judge recommended granting the motion as to claims based on meal period and rest break violations, failure to reimburse for tools and equipment, failure to issue accurate wage statements, failure to pay wages owed at termination, and failure to permit the inspection of employment records. The individualized inquiries were too numerous and complex and thus could not proceed. Both sides have filed objections to the report and recommendation.

*Dieisha Hodges v. King's Hawaiian Bakery West, Inc.*, No. 21-cv-04541-PJH (N.D. Cal. Nov. 8, 2021)

**The mere use of a geographic reference to a product's origin is not likely to deceive reasonable consumers as a matter of law and does not convey a representation about a product's current origin.**

Plaintiffs filed a putative class action alleging that the phrase "EST. 1950 HILO, HAWAII" inside a three-point crown evocative of a pineapple's crown on the front of defendant's King's Hawaiian Original Hawaiian Sweet Rolls packaging conveys the impression that the sweet rolls are currently made in Hawaii, even though they are now made in Torrance, California. Plaintiffs alleged that reasonable consumers expect the product is not only made in Hawaii but is also special and authentic – a form of Portuguese sweet bread made by Portuguese immigrants in Hawaii in the 1800s – and that it would necessarily contain traditional ingredients sourced from Hawaii, including pineapple juice and honey (even though the ingredient list expressly states otherwise). Plaintiffs also took issue with the brand's use of the term "mainland" and evocative terms like "Aloha" in connection with the description of the company shipping policy on its website.

Defendant moved to dismiss plaintiffs' claims under California's Unfair Competition Law (UCL) (Business and Professions Code §§ 17200 et seq.), False Advertising Law or (FAL) (Business and Professions Code §§ 17500 et seq.) and Consumer Legal Remedies Act (CLRA) (Civil Code §§ 1750 et seq.), arguing the product's packaging was not likely to deceive a reasonable consumer as a matter of law. The court agreed and granted the motion to dismiss on several grounds. First, the court held that defendant's reference on its label to its Hawaiian founding would not lead a reasonable consumer to believe that the bread at issue was still made in Hawaii. The court found that the mere use of a geographic reference, including a reference to the company's historical origin, does not convey a representation about a product's current origin. The court also noted that the packaging in question stated on the back label that the bread was now made in Torrance, California.

Second, the court found plaintiffs failed to establish that reasonable consumers expect sweet rolls to contain unique Hawaiian sweet bread ingredients, including honey and pineapple juice. The court noted that the production of sweet rolls is inapposite to the brewing of beer, where (according to the court) the location of production was highly relevant to the quality of the product because water makes up over 90% of the end product.

Third, the court found the packaging does not include any misrepresentation suggesting the inclusion of honey or pineapple in the sweet rolls. The court found the King's Hawaiian brand name is displayed on the product label within a crown-shaped logo that may fairly be described as "pineapple-like," but plaintiffs do not argue this shape informs their belief that the bread would include pineapple juice.

Fourth, the court found plaintiffs were "selectively blind" in claiming defendant's statements on its website were misleading, ignoring statements making it clear that the bread is currently made in Torrance in favor of other statements about the product's historical origins in Hawaii.

*Juan Flores-Medez, v. Zoosk, Inc., No. C 20-04929 WHA (N.D. Cal. Oct. 5, 2021)*

### **Subscribers and non-subscribers to online dating service failed to plead facts demonstrating standing to sue for data breach under the UCL.**

Plaintiffs were subscribers to Zoosk, defendant's free dating platform. Plaintiffs could join for free or pay for a premium subscription service. Customers provide their personal information to Zoosk upon joining. Zoosk directs new customers to its privacy policy, which allegedly contains data-security related representations.

Plaintiffs filed a putative class action claiming injury from a data breach, which allegedly occurred because Zoosk failed to protect plaintiffs' personal information adequately. The district court granted defendant's initial motion to dismiss the UCL claim (§ 17200) on the ground that plaintiffs did not allege a loss of money or property caused by unfair competition because, while plaintiffs alleged a loss of privacy and heightened risk of future identify theft, loss of time, and anxiety, they did not allege that they had to buy credit-monitoring services, nor did they adequately allege the value of their time in terms of opportunity cost.

Plaintiffs then amended their 17200 claim to allege harm by arguing that had plaintiffs known their personal information would not be adequately secured and protected, they would not have used Zoosk's services. Plaintiffs also added the allegation that defendant collected money from the putative subscription subclass members but failed to commit appropriate portions of that money to enact security measures to protect plaintiffs and the putative class members.

The district court dismissed plaintiffs' 17200 claim again (without prejudice). With respect to putative class members who did not subscribe to Zoosk, the court found again that plaintiffs failed to allege a loss of money or property. The court reiterated that the loss of non-subscribers' personal information did not constitute an economic loss for 17200 standing purposes because, although plaintiffs alleged market valuation for that personal information, they failed to specify how the data breach impaired the putative class members' ability to participate in the market for that information. The district court also found that the non-subscription class members cannot prevail on a restitution theory because plaintiffs did not allege how the class members lack an adequate remedy at law, which the court held is required to claim restitution in federal court.



With regard to subscription class members, the district court also held that loss of personal information does not constitute an economic loss. But the court found the subscription class members “presented a close call” with respect to 17200 standing on an “overpayment” theory. The district court held plaintiffs failed to allege that they saw and relied on Zoosk’s alleged misrepresentations about its data-security practices, and that they considered this in purchasing Zoosk’s service. Yet plaintiffs did not allege “enough awareness or consideration” to satisfy this requirement, because they did not allege they were aware of the purported statements at the time of purchase, either by reading the statements or because they appeared in materials plaintiffs saw in binding terms of service or advertisements, and would not have paid for or paid less for Zoosk’s services had they known about the representations’ purported falsity.

*Boston Retirement System v. Uber Technologies, Inc.*, No. 19-cv-06361-RS (N.D. Cal. Oct. 1, 2021)

**Adding named plaintiffs from a prior federal putative class action as named plaintiffs in a subsequent, existing putative class action consolidated with the first case is not barred under *China Agritech v. Resh*.**

Plaintiffs filed a putative class action against Uber, alleging claims based on violations of the Securities Act of 1933 in relation to defendant’s 2019 initial public offering. Different plaintiffs previously filed a putative class action against Uber in California state court that was voluntarily dismissed after the state court found a federal forum selection clause in Uber’s bylaws enforceable. The same plaintiffs then filed a putative class action in the Northern District of California. That case was consolidated with this action. The plaintiffs in this case then amended their complaint to include four of the named plaintiffs from the other state and later federal case.

Defendants moved to dismiss the claims of the new plaintiffs, arguing their addition was barred by the Supreme Court’s decision in *China Agritech v. Resh*, 138 S. Ct. 1800 (2018), which disallowed tolling for successive class actions filed after the expiration of the relevant statute of limitations. The court rejected defendant’s argument and denied its motion to dismiss, finding the case involved the addition of new plaintiffs to an existing class action, not the filing of a new class action. The court found *China Agritech* did not apply to the addition of new plaintiffs to a class action, even under these somewhat unique circumstances, because the new plaintiffs were simply added to an existing class action and did not file an entirely new case themselves.

*Meza v. Prepaid Attorney Services, Inc.*, No. B308033 (Cal. Ct. App. Oct. 26, 2021)

**Order granting motion to compel arbitration not appealable under “death knell” doctrine.**

Plaintiffs brought proposed class-action claims against attorney service providers, including for declaratory relief. Defendants moved to compel arbitration, and plaintiffs moved for class certification. The trial court took up certification first, granting only as to the declaratory relief claim. Defendants then renewed the arbitration motion, which the court granted on the individual claims and the remaining class claim. Plaintiffs filed an appeal from that order. But the court of appeal found the order was not appealable under the “one final judgment” rule – i.e., the order did not result in a final judgment of the entire action. The court also rejected plaintiffs’ attempt to rely on the “death knell” exception to that rule. The California Supreme Court developed the death knell doctrine in the context of an order denying class certification. The doctrine squares with the settled rule “that orders amounting to de facto judgments as to some but not all parties could be treated as final judgments and appealed.” Plaintiffs argued that the order “effectively rang the death knell” because, in enforcing the agreement containing the arbitration

provision, the trial court concluded the agreement was legal. The basis for the declaratory relief claim was the alleged illegality of that agreement. The court of appeal disagreed, distinguishing between enforceability of the arbitration provision and illegality of the entire agreement.

## Eleventh Circuit

*Lennen v. Marriott Ownership Resorts Inc.*, No. 19-13215 (11th Cir. Dec. 9, 2021)

### **Eleventh circuit affirms dismissal of putative class action based on timeshare ownership.**

The Eleventh Circuit Court of Appeals affirmed the dismissal of a putative class action asserting that the seller of beneficial interests in a timeshare trust misled plaintiffs into purchasing vacation ownership products premised on a points-based ownership structure contrary to Florida law. Anthony and Beth Lennen asserted that the Marriott Vacation Club Destinations Trust program violated Florida law because the program claimed to provide an interest in real property while not providing an actual property interest. The Eleventh Circuit, in a 44-page opinion, found that the putative class action was properly dismissed by the district court, finding the “Lennens’ beneficial interests were real property interests under both the Florida Land Trust Act and the Florida Timeshare Act.” Since the district court had resolved the case on motions to dismiss and for judgment on the pleadings, no judge or jury made any findings of fact. This summary is taken from the allegations in the plaintiffs’ pleadings.

The Lennens claimed that, in January of 2008, they purchased two timeshare estates at a resort located in Marco Island, Florida. The plaintiffs alleged that subsequently, Florida suffered through the mortgage foreclosure crisis and Marriott Ownership Resorts, Inc. (MORI), the manager of the condominium, allegedly found itself with a glut of properties. Plaintiffs alleged that as a means to market this surplus of property, MORI created the MVC Trust. The MVC Trust was, according to the Lennens, “a points-based product in a multistate timeshare plan’ that included forty-four Marriott-owned timeshare condominiums located in eleven states.” The Lennens asserted that MORI appointed a title company to serve as trustee and retained the beneficial interest in the MVC Trust.

Plaintiffs claimed that MORI assigned a point value to each timeshare it deeded to First American, allegedly calling the number of points required to reserve a particular timeshare “Points for Use.” Plaintiffs asserted that MORI then deeded purchasers’ beneficial interests in the trust in blocks of 250 “points,” calling these beneficial interests “Points for Sale” and allegedly selling them to purchasers as “timeshare estates.” Trust owners could, Plaintiffs claimed, spend their points to book any available timeshare in the trust.

In May 2016 the Lennens filed a putative class action claiming that they and other purchasers had been duped into purchasing beneficial interests in the trust, commonly referred to as “points” interests. The Lennens also sued the Trustee and Orange County as the county recorded the deeds in question.

The district court initially dismissed the complaint as a “shotgun pleading” that improperly incorporated one count into another, inconsistently grouping the different defendants in the various counts and the complaint was “replete with repetitive and confusing allegations . . . .” The Lennens filed an amended complaint, portions of which were dismissed on a subsequent motion to dismiss. The balance of the amended complaint was dismissed on defendants’ motion for judgment on the pleadings.

The Eleventh Circuit, in reviewing the district court's orders, found no error. With respect to the gravamen of the legal issues that actually survived dismissal as "shotgun pleadings," the Eleventh Circuit held that this form of timeshare ownership did not violate Florida's Condominium Act or Florida Land Trust Act, nor was it violative of the Florida Timeshare Act. The legal vehicle of a trust conformed with Florida law, and as such plaintiffs could not articulate a legally cognizable claim. This point system of ownership, as opposed to the more traditional timeshare model where customers receive a fractional interest in real property, was held to be entirely valid under Florida law.

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