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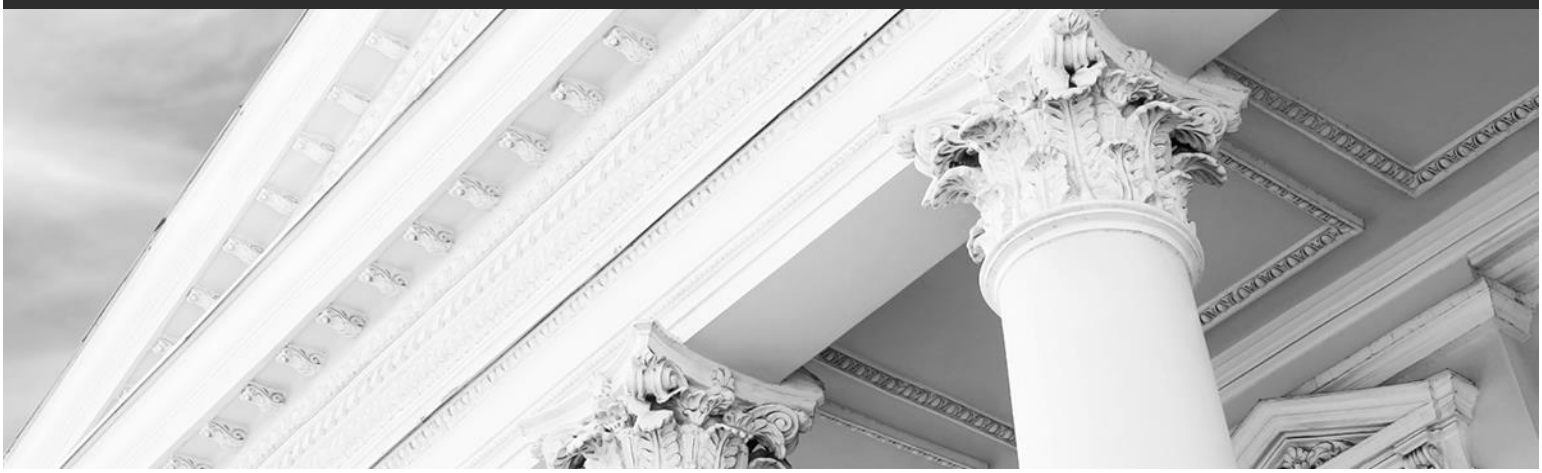

This GT Newsletter summarizes recent class-action decisions from across the United States.

Highlights from this issue include:

- Supreme Judicial Court of Massachusetts rules that lawyer's authority to act terminates upon death of named plaintiff before a motion for class certification is filed.
- Third Circuit reiterates standard of review for Rule 23(f) petitions challenging class certification rulings and grants review.
- Fourth Circuit denies objection to attorneys' fees calculation under CAFA's coupon settlement provisions.
- Fifth Circuit holds that actual findings on unsuccessful claims must be considered in awarding attorneys' fees to prevailing class counsel as part of class settlement.
- Seventh Circuit rules on CAFA's mandatory "local controversy" exception.
- Ninth Circuit reverses remand to state court, finding district court erred in disregarding reasonable assumptions in support of CAFA's amount in controversy requirement.
- Eleventh Circuit declares that a sua sponte order of remand under CAFA is unreviewable.

First Circuit

In re Evenflo Co., Mktg., Sales Pracs. & Prods. Liab. Litig., MDL No. 20-md-02938-DJC, 2022 U.S. Dist. LEXIS 14797 (D. Mass. Jan. 27, 2022)

Failure to plead facts demonstrating "economic harm" arising from purchase of allegedly unsafe consumer products warrants dismissal.

Defendant moved to dismiss a putative class action arising from the purchase of its products, which, according to plaintiffs, were associated with undisclosed safety risks. The products at issue were not subject to a product recall, and plaintiffs did not otherwise allege the products failed to meet any specific safety standard required by law. Rather, plaintiffs alleged they suffered an "economic injury," claiming they would not have purchased the product, would have paid less for the product, or would have purchased a safer product if defendants had disclosed the safety risks. In granting the motion and dismissing the complaint, the district court concluded that plaintiffs lacked standing because they failed to allege an actual product defect or that the product was worth any less than what they paid for it. In other words, according to the district court, plaintiffs received the "benefit of the bargain." Accordingly, plaintiffs failed to plead an "injury-in-fact" to satisfy Article III standing requirements. For similar reasons, the court concluded that plaintiffs lacked standing to seek injunctive relief.

Kingara v. Secure Home Health Care Inc., No. SJC-13173, 2022 Mass. LEXIS 148 (Mass. Mar. 28, 2022)

Upon death of putative class representative before a motion for class certification is filed, lawyer's authority to act for client terminates.

The Massachusetts Supreme Judicial Court (SJC) addressed counsel's and a court's authority to protect the interests of putative class members when the named plaintiff dies before a motion for class certification is filed and no substitute plaintiff appears. The named plaintiff brought a putative class action against his employer alleging wage-related claims. Plaintiff died before plaintiff's counsel had filed a motion for class certification. Thereafter, plaintiff's counsel filed a motion to send notice to the putative class informing them of plaintiff's death and inviting them to join the action. Plaintiff's counsel also sought an order requiring defendant to identify the putative class members' names and addresses and extend the tracking order deadlines to allow substitution of another putative class representative. The trial court granted the motions, and the defendant appealed to a single justice of the appeals court. That justice reported certain questions to the appeals court.

The SJC transferred the questions, *sua sponte*, to itself for determination and, upon review, overruled the trial court. The SJC explained that, upon a client's death, a lawyer's authority to act for the client terminates. As plaintiff had not filed a motion for class certification before he died, plaintiff's counsel could not take further action absent a motion by the deceased plaintiff's legal representative. In addition, although counsel for a certified class has a continuing obligation to each class member, the SJC concluded that counsel does not have any authority to act for a putative class when, as here, no motion for class certification was pending, counsel had not located the deceased client's representative, and counsel had not identified any other putative class member to serve as a putative class representative. Furthermore, although recognizing that counsel do at times act as "officers of the court," allowing a deceased plaintiff's counsel to act in such a matter here would impermissibly allow counsel to utilize the courts to solicit clients. But according to the SJC, the trial court does have limited authority under Massachusetts Rule of

Civil Procedure 23(d) to, *sua sponte*, order notice to the putative class members if they would otherwise face significant prejudice.

Dee v. Chelsea Jewish N. Shore Assisted Living, Inc., No. 21-10980, 2022 U.S. Dist. LEXIS 24727 (D. Mass. Feb. 10, 2022)

Putative class action removed to federal court under Class Action Fairness Act (CAFA) remanded to state court under CAFA's home-rule exception, as two-thirds or more of members of putative class were Massachusetts citizens.

The district court granted plaintiff's motion to remand a putative class action alleging that defendant's assisted-care facilities failed to comply with state law in charging, collecting, and handling fees and security deposits from current and former residents of its facilities. The court considered the home-state exception to CAFA, which requires a district court to decline jurisdiction over a putative class action when the primary defendants and two-thirds or more of the members of all proposed classes, in the aggregate, are citizens of the state in which the action was originally filed. Here, the putative class included tenants who currently reside in or previously resided in assisted living facilities owned, operated, and/or managed by defendant in Massachusetts. Though the First Circuit has not yet decided plaintiff's burden in demonstrating citizenship, the district court held that plaintiff provided enough evidence to conclude that under either a "preponderance of the evidence" or the "reasonable probability" standard, two-thirds or more of the putative class members are domiciled in Massachusetts. Jurisdictional discovery revealed that only 59 of the 436 putative class members had an unknown last known address, and the rest could be traced to Massachusetts. The court found that fact, combined with the lack of mobility of the proposed class, defendant's exclusive access to the relevant information, the unavailability of information concerning factors beyond residence to determine the domiciles of putative class members, and the paucity of members for whom defendant had affirmative evidence of out-of-state residence, all warranted a finding that the home-rule exception applied.

Patenaude v. Orgain, LLC, No. 21-40018-TSH, 2022 U.S. Dist. LEXIS 46405 (D. Mass. Mar. 16, 2022)

A label's reference to vanilla, without additional language modifiers, is not sufficiently deceptive and misleading to a reasonable consumer.

Defendant moved to dismiss plaintiff's complaint for failure to state a claim that the labelling on vanilla-flavored milk was deceptive and misleading. The front label of defendant's unsweetened vanilla almond milk said "vanilla" without any additional language modifiers. Plaintiff alleged that the label's reference to vanilla misled him and other consumers to the conclusion that the product contained vanilla, not as an exclusive ingredient, but as one of its characterizing ingredients. To plausibly claim an act or practice is deceptive, a complaint must allege the act can mislead consumers to act differently from how they otherwise would have acted. Here, the district court determined that a mere reference to vanilla on the front label of a product, without a reference to extract, vanilla beans, "real vanilla" or bearing any image of a vanilla plant, flower, or bean, would not have misled a reasonable consumer, who would have understood that vanilla was merely a flavor designation and not an ingredient claim. Thus, plaintiff's Chapter 93A claim failed because it did not sufficiently plead a "representation, practice, or omission likely to mislead consumers."

Second Circuit

Abbananto v. County of Nassau, No. 19-cv-01102, 2022 U.S. Dist. LEXIS 19975 (E.D.N.Y. Feb. 3, 2022)

Eastern District of New York finds Rule 23's commonality requirement can be satisfied in employment litigation even if the proposed class covers both sexes and sex discrimination is alleged.

In this putative class action, male and female Police Communications Operators and Police Communications Operators Supervisors (Police Reps) alleged that their employer, Nassau County of Long Island, subjected them to a system of illegal employment practices, including failing to provide appropriate overtime pay for any hours worked over 40 hours, failing to compensate for mileage when working overtime, and subjecting them to random drug testing. Plaintiffs brought claims under Title VII and the New York Human Rights Laws (NYHRL) for, among other things, creating a system whereby the predominately male Fire Communication Technicians and Fire Communications Technicians Supervisors (Fire Reps) were treated more favorably (and not pursuant to the aforementioned practices) than the predominately female Police Reps, despite having nearly identical job responsibilities. Plaintiffs alleged that Nassau County's more favorable treatment of Fire Reps constituted sexual discrimination in violation of Title VII and NYHRL and brought a motion to certify a class irrespective of sex.

In assessing the numerosity prerequisite, the court found that the approximately 200 Police Reps satisfied this requirement. Although plaintiffs failed to show that the proposed members were "so geographically dispersed to make joinder impracticable" and failed to demonstrate that the proposed members "lack the financial wherewithal or ability to find their own counsel so as to render joinder impracticable," the "benefit of judicial economy in certifying the class" outweighed all of the other factors and holding one trial, as opposed to two hundred trials, is more efficient.

With respect to commonality, the court found plaintiffs satisfied this requirement because defendant imposed an overarching system of sex discrimination against the predominantly female Police Reps that it did not impose on the predominantly male Fire Reps. In so doing, the Court looked to the racial discrimination case *Hill v. City of New York*, 2019 U.S. Dist. LEXIS 71757 (E.D.N.Y. Apr. 29, 2019), where the district found commonality when a proposed class of dispatchers was made up of 95% minorities. The non-minority class members (accounting for 5%) did not disturb the commonality of the class as a whole because the allegations focused on discrimination of the group as a whole, not discrimination of the individuals themselves, and the challenged policies aggrieved all plaintiffs, not just minority plaintiffs. Here, because defendant's challenged system applied to and aggrieved all, rather than just female, Police Reps, the court found a common question of fact sufficient to satisfy commonality.

Because the claims asserted by both male and female Police Reps were "grounded in the same overarching pattern of discrimination,'" that was also enough to find plaintiffs' claims typical of those of the proposed class. Defendant's alleged discriminatory policies impacted all Police Reps, regardless of sex, and therefore all proposed class members were aggrieved by defendant's policies.

The court found that the proposed class satisfied the predominance requirement for similar reasons, and generalized proof would apply to all class members because the claim concerned policies that applied to Police Reps as a group, rather than individuals. The court held that the superiority, adequacy, and ascertainability requirements were also met, and so the class was certified.

Third Circuit

Laudato v. EQT Corp., 23 F.4th 256 (3d Cir. 2022)

Third Circuit reiterates standard for reviewing Rule 23(f) petition challenging class certification decisions.

Plaintiff sought compensation for defendant's use of plaintiff's underground pore space for storing natural gas and sought to certify a class of similarly situated landowners. The district court found that "it would seem in everyone's best interests to resolve this case on a class basis" and declared that "class certification will be granted, with instructions," but rejected plaintiff's class definition. Defendant filed a petition under Federal Rule of Civil Procedure 23(f) for appellate review.

Plaintiff argued the petition should be dismissed as premature because the district court's order was "preliminary" and did not grant class certification. The Third Circuit rejected that argument, reasoning that "[d]espite the forward-looking language, however, the District Court plainly contemplated that any subsequent certification order would be limited to merely redefining the class" and "the District Court also made clear that the order contained its final word on certification itself."

As to the standard for reviewing a Rule 23(f) petition, plaintiff argued that the Third Circuit's discretion should be limited to "only those 'rare' cases that justify taking jurisdiction in interlocutory appeals." The Third Circuit disagreed and stated that "this Court exercises our 'very broad discretion' using a more liberal standard," and identified several circumstances when appellate review of a class certification order is appropriate: "'when denial of certification effectively terminates the litigation because the value of each plaintiff's claim is outweighed by the costs of stand-alone litigation'; 'when class certification risks placing inordinate . . . pressure on defendants to settle'; 'when an appeal implicates novel or unsettled questions of law'; 'when the district court's class certification determination was erroneous'; and 'when the appeal might facilitate development of the law on class certification.'" Applying these factors, the court granted the petition "[b]ecause of the apparent pressure the purported certification places on EQT to settle and this Court's opportunity to facilitate development of the law on class certification."

Fourth Circuit

Cantu-Guerrero v. Lumber Liquidators, Inc., 27 F.4th 291 (4th Cir. 2022)

Fourth Circuit denies objection to attorneys' fees calculation under CAFA's coupon settlement provisions.

Objectors to the settlement of two multidistrict lawsuits involving the defendant's alleged sale of defective laminate flooring products appealed the initial attorneys' fee award, and the Fourth Circuit vacated the district court's order because it failed properly to calculate fees in accordance with CAFA's "coupon" settlement provisions. On remand, the district court again awarded plaintiffs' counsel fees of $10.08 million to be paid from the $22 million cash fund. Objectors again appealed.

The Fourth Circuit first considered the objectors' argument that the lodestar method was improper for a coupon settlement under 28 U.S.C. § 1712. The court noted that, although there was a split of authority, CAFA gives a district court discretion to use either the percentage-of-recovery or lodestar method when calculating attorneys' fees in a coupon settlement. Thus, the court held the district court's use of the lodestar method was proper.

The objectors also challenged the district court's analysis of the degree of success obtained, as the court had included the face value of the vouchers without considering the vouchers' actual value based upon redemption rates. The Fourth Circuit rejected this argument. Although CAFA requires a district court to consider the redemption rate of coupons when calculating fees pursuant to the percentage-of-recovery method, "[t]he alternative allowance of the lodestar method in § 1712(b), however, contains no such directive." "Rather, a district court applying the lodestar approach must carefully contemplate the makeup of the settlement at hand in deciding whether the calculated lodestar award is reasonable, and that judgment is committed to the court's discretion." The Fourth Circuit determined that the district court did not abuse its discretion when it performed this analysis.

Finally, the Fourth Circuit rejected the objectors' argument that the fee was excessive because it represented 45.8% of the cash fund and exceeded the cash remaining for distribution to the class members – after notice and administration expenses were paid. The court reasoned that CAFA does not require a district court to use a percentage-of-recovery cross-check on a lodestar award.

McAdams v. Robinson, 26 F.4th 149 (4th Cir. 2022)

Fourth Circuit decides when a magistrate judge has jurisdiction to consider approval of a class settlement but does not adopt a standard for appellate review of class notice.

A putative class of borrowers alleged that defendant mortgage company violated federal and state consumer-protection laws in servicing their mortgage loans. The parties agreed to a class settlement and filed a joint motion to proceed before the magistrate judge (who had mediated the settlement). McAdams objected to the settlement, "arguing that the class notice was insufficient; the settlement was unfair, unreasonable, and inadequate; the release was unconstitutionally overbroad; and the attorneys' fee award was improper." The magistrate judge overruled the objection and approved the settlement. The objector appealed to the Fourth Circuit.

The objector first questioned the magistrate judge's jurisdiction to approve the class settlement because she did not consent to proceeding before the magistrate judge. Under 28 U.S.C. § 636(c), the magistrate judge could consider approval of the settlement by consent of the parties, and the objector argued that "parties" under the statute included absent class members like her. The Fourth Circuit recognized this was a question of first impression but followed "every other circuit to address the issue" in concluding "that absent class members aren't parties." The court reasoned that Congress did not intend absent class members to be parties, and that the practical effect of the objector's interpretation would mean that the district court would have to seek the consent of the almost 350,000 absent class members, which was impractical. Accordingly, because plaintiff and defendant consented to the magistrate judge presiding over the fairness hearing, the objector's jurisdictional argument failed.

The Fourth Circuit next considered the objector's argument that the class notice was inadequate. The parties disputed the standard of review, and the court recognized that it "ha[s]n't spoken on this question" and there was a circuit split as to whether the abuse of discretion or de novo standard of review applied. The Fourth Circuit did not decide which standard applied but stated that "even assuming de novo review is proper, the class notice was adequate." Specifically, the court found that (1) estimating the class members' recovery from the common fund would be difficult, if not impossible, because the number of claims was not known; and (2) it was sufficient to include the amount of attorneys' fees being requested and the method of distribution in the longform notice, even if that information was not included in the email or postcard notice. The court also rejected all of the objector's other challenges to the fairness of the settlement.

1988 Trust for Allen Children v. Banner Life Ins. Co., No. 20-1630, 2022 U.S. App. LEXIS 6712 (4th Cir. Mar. 15, 2022)

Fourth Circuit clarifies roles of parties and district court in evaluating objections to class settlement.

A putative class of life insurance policyholders sued defendant insurance companies to recover excess premiums paid. The parties agreed to a class settlement, but the Allen Trust objected to the settlement on multiple grounds, including that the plaintiffs did not give sufficient weight to the Allen Trust's claim when negotiating the settlement. The district court heard the objection at a fairness hearing and continued the hearing to permit the Allen Trust to conduct discovery – which the Fourth Circuit noted "was an extremely unusual occurrence." At the conclusion of the second part of the fairness hearing, the district court overruled the objection and approved the settlement. The Allen Trust appealed.

The Fourth Circuit first "synthesize[d]" the burden of proof of an objector: (1) the objector "must state the basis for its objection with enough specificity to allow the parties to respond and the court to evaluate the issues at hand," which is akin to the pleading requirement under Fed. R. Civ. P. 8(a); (2) the parties then "must show that the objection does not demonstrate that the proposed settlement fails one of [Rule 23's] requirements," including that the settlement is fair, reasonable and adequate; and (3) the district court, as a "fiduciary of the class," "must protect the class's interests from parties and counsel overeager to settle (who may deny absent class members relief they would otherwise receive) and frivolous objectors (who may impede or delay valuable compensation to others)" and "may, in its discretion, grant an objector discovery to assist the court in determining an objection's merit." The Fourth Circuit found the district court did not do "anything different than what we have just outlined" and rejected the Allen Trust's argument that the court "improperly placed upon it the burden of overcoming the settlement."

Fifth Circuit

Fessler v. Porcelana Corona De Mex., S.A., 23 F.4th 408 (5th Cir. 2022)

Factual findings on unsuccessful claims must be considered in awarding attorneys' fees to prevailing class counsel as part of class settlement.

A putative class of consumers sued Porcelana, a toilet manufacturer, for defective toilet tanks. The case settled in two parts. The parties first entered into a partial settlement over certain model toilets manufactured in Porcelana's Benito Juarez plant between 2007 and 2010. The settlement agreement authorized the district court to determine appropriate attorneys' fees. Plaintiff then sought to certify the non-settled claims, and the district court rejected the motion. A settlement agreement for this second class was later reached.

Plaintiff's counsel filed a motion for attorneys' fees for the two classes, and Porcelana challenged the amount sought. Porcelana argued that the recovery by plaintiff's counsel should be limited to hours spent on behalf of successful class members only, rather than every member of the putative class. The district court granted the plaintiff's motion in part, finding it "practically impossible" to identify which hours should be removed from the attorneys' fee award. Instead, the court simply reduced the lodestar applicable to the fee award.

Porcelana appealed, and the Fifth Circuit reversed the district court's fee award. The court of appeals held that, when a fee requested by class counsel is supported by time spent on both successful claims and

unsuccessful claims, the district court "must address the 'common core of facts' and 'common legal theories' sufficiently so that no fees are awarded on unsuccessful theories." The Fifth Circuit based its ruling on Rules 23(h) and 52(a), which require a district court to "find the facts specifically and state its conclusions of law separately" when awarding reasonable attorneys' fees in a certified class action. The court vacated the attorneys' fee award and remanded the case to the district court to "consider the amount of damages and non-monetary relief sought compared to what was actually received by the Class."

Sixth Circuit

Jones v. Lubrizol Advanced Materials, Inc., No. 1:20-cv-00511, 2022 U.S. Dist. LEXIS 18322 (N.D. Ohio Feb. 1, 2022)

Northern District of Ohio strikes class allegations under Rule 23(d)(1)(D) for putative class members lacking an injury in fact.

Homeowners sued manufacturers of chlorinated polyvinyl chloride pipes called "FlowGuard Gold," on behalf of putative nationwide and state classes. Plaintiffs asserted an assortment of product liability, warranty, fraud, and consumer protection claims, alleging the pipes and fittings were defective and failed prematurely. Defendants moved to dismiss for failure to state a claim under Rule 12(b)(6), and the court granted the motion in part.

A few months after the ruling, defendants attacked plaintiffs' class definitions and moved to strike plaintiffs' class allegations under Rules 12(f) and 23(d)(1)(D). Plaintiffs' class definitions included purchasers of the FlowGuard Gold product during a certain period but did not require any actual harm from the product. Defendants insisted that plaintiffs' class claims should be stricken because "the proposed class definitions include potentially millions of members who have no trouble with their pipes or fittings and lack standing because they have not suffered a concrete and particularized injury in fact." The court found that, because defendants previously had moved to dismiss under Rule 12(b)(6), a motion to strike under Rule 12(f) was procedurally unavailable. Even so, the court explained, Rule 23(d)(1)(D) offered the proper procedural mechanism to strike improper class allegations. The district court relied on the Sixth Circuit's decision in *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943 (6th Cir. 2011), which recognized that Rule 23(d)(1)(D) "provides for a pre-certification motion to strike, at least in circumstances like those here and limited to purely legal questions or those resolved with little factual development." "In this respect," the district court explained, "the Court treats the motion to strike as something of a pleading-stage determination."

In considering plaintiffs' alleged injuries, the court reasoned that "[w]here an allegedly defective product results in harm to every potential class member that has already manifested, the class has standing. But where, as here, the remaining allegations show a risk of harm in the future, Plaintiffs will not be able to carry their burden under Rule 23 of establishing the propriety of class certification, making striking the class allegations an appropriate procedural response." The court also considered plaintiffs' demand for a Rule 23(b)(2) injunctive class and reached the same conclusion. The court explained that "a repair-or-replace remedy would carry enormous costs and necessarily implicate the same standing deficiencies as a class or classes under Rule 23(b)(3) because it would extend to those who have not suffered harm and might not." The court thus granted defendants' motion to strike.

Seventh Circuit

Schutte v. Ciox Health, LLC, 28 F.4th 850 (7th Cir. 2022)

Seventh Circuit rules on CAFA's mandatory "local controversy" exception.

Plaintiff sued in Wisconsin state court, asserting defendant violated a Wisconsin statute limiting the amount providers may charge for the release of medical records. Defendant removed the action to federal court under CAFA, asserting the proposed class had at least 100 members, there was at least minimal diversity, and the amount in controversy was in excess of $5 million. This interlocutory appeal arose from the trial court's denial of plaintiff's motion to remand based in part on the "local controversy" exception, which, if certain conditions exist, denies federal courts jurisdiction CAFA would otherwise provide.

The Seventh Circuit found that the removing party only needed to provide a good-faith estimate for the amount in controversy that was plausible and adequately supported by evidence. In this case, plaintiff's allegations that there were several thousand class members supported removal because punitive damages, which could be up to $25,000 per claimant, factor into the analysis. This was enough to find that a factfinder might award in excess of $5 million.

The Seventh Circuit next found that the mandatory local controversy exception does not apply where another case was brought on similar factual allegations against the same defendant in the three years prior to the filing of the complaint. In this case, the filing of another class action based on similar facts in another state was sufficient to prevent application of the mandatory local controversy exception. Accordingly, the Seventh Circuit affirmed the denial of the motion to remand.

K.F.C. v. Snap Inc., No. 21-2247, 2022 U.S. App. LEXIS 7766 (7th Cir. Mar. 24, 2022)

Contracts with minors are voidable rather than void under Illinois law; contract enforcement question for arbitrator rather than court.

Plaintiff, a minor who first signed up for a Snapchat account at age 11, brought a claim under the Illinois Biometric Privacy Act alleging that Snapchat did not obtain her consent and does not follow the statute's purpose, disclosure, and retention rules. Defendant moved to compel arbitration based upon an arbitration clause in the app's terms and conditions. The district court ordered the parties to arbitrate and dismissed the suit. On appeal, plaintiff argued her suit should be allowed to go forward because the court must determine the question of contract formation and she, as a minor, could not form a contract. Illinois law, however, provides that the contract of a minor is voidable rather than void. Thus, the Seventh Circuit affirmed, finding that, although the arbitrator may find that plaintiff has voided her contract, that is a question for the arbitrator to address rather than the court.

Marion Diagnostic Ctr., LLC v. Becton Dickinson & Co., No. 21-1513, 2022 U.S. App. Lexis 7198 (7th Cir. 2022)

Seventh Circuit affirms dismissal of class-action antitrust claims alleging "hub-and-spokes" conspiracy where injury was not traceable to defendants and products were not purchased from either of the spokes of the conspiracy.

A putative class of medical providers brought a class-action antitrust suit against certain manufacturers, group purchasing organizations, and distributors of syringes and catheters, alleging a conspiracy to drive

up prices in violation of federal antitrust law. As an initial matter, the Seventh Circuit considered plaintiffs' standing and found that when plaintiffs did not purchase any products from one of the "spokes" of the hub-and-spoke conspiracy, they lacked standing because they had no injury fairly traceable to defendants. Plaintiffs also could not bring suit under *Illinois Brick* because they did not purchase products from either member of the conspiracy.

In addition, the Seventh Circuit found the allegations insufficient to indicate collusion. In this case, the court found defendants' action could just as easily reflect innocent conduct or rational self-interest. Thus, under *Twombly*, the claim was not plausible.

Fischer v. Instant Checkmate LLC, No. 19 C 4892, 2022 U.S. Dist. LEXIS 59143 (N.D. Ill. Mar. 31, 2022)

In Illinois Right of Publicity Act case, district court grants motion for class certification in part and denies it in part.

Plaintiff brought a class action alleging a violation of the Illinois Right of Publicity Act against Instant Checkmate, a service that operates a website providing background checks including a free search function through which a user can search for an individual. The court granted plaintiffs' motion for class certification of the SEO directory and injunctive relief classes but denied certification of the search results class.

The court considered Rule 23(a) factors, including whether the class-action waiver provisions plaintiffs agreed to barred their claims. The first provision was intertwined with the terms of use's arbitration agreement. The court found that because defendant had waived its right to seek arbitration, that class-waiver provision was barred. The second provision was limited to claims arising from the terms of use, which the court held did not apply.

The court also looked at whether the proposed classes satisfied Rule 23(b)(2) (as to the injunctive relief class) and 23(b)(3) (as to the search results and SEO directory classes), determining that liability could be proven as a categorical matter. The court concluded the individual issues defendants raised either could be determined mechanically to exclude certain individuals from the class or were not pertinent to liability. But the court denied certification of the search results class under Rule 23(b)(3), finding the class did not satisfy superiority or manageability because the database was unable to report what data was stored at a historical point.

For the SEO directory class, the same concern regarding historical data did not apply, and plaintiffs' claims did not require that the data be displayed to a third party. Thus, defendant's objection that it could not determine whether the data was displayed to any user did not prevent certification. The injunctive relief class was certified, as defendant could not demonstrate its opt-out feature did not prevent a new record from being generated. The court also found that the availability of money damages did not preclude certification when plaintiffs adequately alleged the likelihood of ongoing and future injuries.

Carpenter v. McDonald's Corp., No. 1:21-CV-02906, 2022 U.S. Dist. LEXIS 60230 (N.D. Ill. Jan. 13, 2022)

District court denies motion to dismiss Illinois Biometric Information Privacy Act claim for creating and storing customer "voiceprints," but grants motion to dismiss claim for disclosing biometric data.

Plaintiff sued under the Illinois Biometric Information Privacy Act (BIPA) alleging defendant uses artificial intelligence to interpret and understand individual's voices and, unlike common speech-to-text systems, creates and stores customers' individual voiceprints to identify repeat customers and deliver an individualized experience. Defendant moved to dismiss, arguing, based upon the patent plaintiff cited in the complaint, that it did not obtain biometric identifiers and it did not store any voiceprints.

BIPA Section 15(b) provides a claim against entities that "collect, capture, purchase, receive through trade, or otherwise obtain" biometrics. The court ruled that plaintiff plausibly alleged that defendant's technology analyzed customers' voices and collected a voiceprint—including from plaintiff. Thus, because plaintiff had alleged defendant "actively collected or otherwise obtained" his voiceprint, plaintiff's claim could proceed under Section 15(b).

But the court dismissed plaintiff's claim under Section 15(d), which prohibits private entities from disclosing, redisclosing, or otherwise disseminating BIPA information without consent, holding that plaintiff did not allege that defendant had *disclosed* his biometric data to another entity.

Wachala v. Astellas US LLC, No. 20 C 3882, 2022 U.S. Dist. LEXIS 24052 (N.D. Ill. Feb. 10, 2022)

Northern District of Illinois grants motion for class certification over challenges focused on typicality and adequacy.

Retirement-plan-participant plaintiffs brought a putative class action under ERISA § 502(a)(2), seeking to certify three separate classes. Defendants opposed class certification, contending there were intractable conflicts between members of the classes that prevented plaintiffs from meeting Rule 23(a)'s typicality and adequacy requirements. In particular, defendants asserted that (1) some portion of the proposed class suffered no net loss and (2) some class member might prefer to raise a different theory of breach that would better maximize their losses.

The court held that it need not resolve the loss-calculation question on a motion to class certification because it was "something of a red herring." The court found "Defendants' focus on individual class members' potential recoveries under various theories is misplaced because it ignores their shared interest in establishing defendants' liability." The court also found there was no risk that any putative class member would have their Plan assets reduced as a result of the lawsuit. Further, the court found that hypothetical claims that a class member might be harmed rang hollow where the defendants knew all of the putative class members and could have found a specific example if one existed. Thus, the court held plaintiffs satisfied their burden under Rule 23(a).

The court further found that plaintiffs satisfied their burden under Rule 23(b)(1), as "claims for breach of fiduciary duty under ERISA § 502(a)(2) are 'paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class,' in light of their derivative nature."

Eighth Circuit

Midland Funding, LLC v. Briesmeister, 2022 Ark. App. 52 (Ark. Ct. App. Feb. 2, 2022)

Arkansas Appellate Court enforces arbitration provision for assignee and declines to exercise jurisdiction over motion to strike class allegations in interlocutory appeal.

Defendants sought an appeal of the lower court's denial of their motion to compel arbitration and strike class allegations. Plaintiff and a third-party credit card issuer entered into a credit card agreement, which included a provision that (1) the issuer party could sell or transfer its rights under the agreement, (2) plaintiff was required to arbitrate claims against the issuer, and (3) plaintiff was prohibited from participating in a class action against the issuer. After plaintiff entered into this agreement, the third-party issuer transferred all accounts to defendants.

Following this transfer, defendants filed a suit in Arkansas state district court, seeking an unpaid balance, interest, and costs from plaintiff's account. They subsequently sent plaintiff a debt collection letter, requesting a response by a specific date. Upon receipt of the letter, plaintiff chose to file a putative class action suit, alleging the debt collection letter amounted to a violation of the Arkansas Fair Debt Collection Practices Act. In response, defendants filed a motion to compel arbitration and strike the class allegations, based on the language of the credit card agreement. Plaintiff responded, arguing the credit card agreement applied only to the third-party issuer and its conduct, and not to the defendants or conduct committed by the defendants. She further asserted that even if the agreement applied to defendants, by filing their collection action in district court, defendants had waived their right to compel arbitration of plaintiff's action. The circuit court agreed with plaintiff and denied defendants' motion to compel.

The Arkansas Appellate Court reversed and remanded. First, although Utah (the law that applied under the agreement) had not addressed a similar circumstance, other jurisdictions had consistently held that assignees of credit card agreements step into the shoes of the assignor. This rule comported with Utah law in that Utah courts had applied this principle in other assignee-assignor circumstances. The court noted that this approach was supported by public policy to provide identical rights and liabilities to the assignee as those that were owned by the assignor. Consequently, any reference to "us", "we", or "ours" that had originally applied to the third party equally extended to the defendants. The appellate court next rejected plaintiff's argument that only the third party's conduct could be subject to arbitration under the provision. Because the entire agreement, including the arbitration provision, extended to defendants, defendants had the same rights to demand arbitration as the third party had. Moreover, the arbitration provision was drafted broadly enough to encompass "any dispute or claim" between plaintiff and defendants. Thus, plaintiff's unfair debt-collection practices claim fell within this broad scope, and such a conclusion aligned with courts in other jurisdictions. Finally, the appellate court rejected plaintiff's waiver argument. Utah law recognizes an important public policy behind enforcing arbitration provisions, and there is a strong presumption against waiver. The credit card agreement expressly noted that where defendants give up some rights in certain situations, they will not give up those same rights in another situation. The agreement also permitted defendants to file the collection action in district court, as an express exception to the arbitration provision. Thus, their decision to file a collection action as opposed to arbitrating the matter was not conduct so inconsistent with the arbitration provision as to warrant waiver.

The appellate court declined to address defendants' request to strike the class allegations. Because this was an interlocutory appeal, and the Arkansas Rules of Appellate Procedure did not permit the court to consider motions to strike class allegations at this stage, the court found that it lacked subject matter jurisdiction over this portion of defendants' appeal.

Ninth Circuit

Saucillo v. Peck, 25 F.4th 1118 (9th Cir. 2022)

Class action PAGA plaintiff, not a party to representative PAGA action, lacks standing to appeal PAGA settlement; For class actions, district court should have applied a higher legal standard in determining whether pre-certification settlement was fair.

Plaintiffs brought class action claims and representative claims under California's Private Attorneys General Act (PAGA) on the basis of alleged California labor law violations. After years of litigation, the parties reached a settlement. The district court overruled the objection of an objector who had filed a separate PAGA claim in a different case but was not a party to the underlying PAGA claims. The Ninth Circuit held the objector did not have standing to appeal the PAGA settlement because a representative action under PAGA is distinct from a class action – i.e., he had no right to appeal in the action to which he was not a party. In reaching this conclusion, the Ninth Circuit rejected the objector's contention, among others, that he could appeal because, ultimately, he might receive a portion of the PAGA settlement.

On the class action, a different objector argued that, in evaluating the proposed, pre-certification settlement, the district court "erroneously applied a presumption of fairness." The district court considered that "the parties engaged in arm's-length, serious, informed and non-collusive negotiations between experienced and knowledgeable counsel," and applied the presumption of fairness. The Ninth Circuit found that, in the pre-certification context, the district court should have employed a "higher standard of fairness and a more probing inquiry than may normally be required under Rule 23(e)," and remanded for further proceedings.

Flores-Mendez v. Zoosk, Inc., No. C 20-04929 WHA, 2022 U.S. Dist. LEXIS 21684 (N.D. Cal. Feb. 7, 2022)

Plaintiff adequately alleges reliance for claim under California's Unfair Competition Law (UCL) but fails to allege violation of UCL's unlawful prong under FTC Act Section 5.

Plaintiffs filed a putative class action alleging they provided their personal information to defendant Zoosk upon joining its online dating platform. Zoosk's privacy policy, posted to its website, contained the company's data-security related representations. Plaintiffs alleged injury from a May 2020 data breach that allegedly occurred because Zoosk did not adequately protect their information. After several rounds of pleadings, plaintiff Flores-Mendez alleged UCL violations based on the contention that he would have stopped using Zoosk had it properly notified him that its security was inadequate and not compliant with its privacy policy. The court held these allegations sufficient. The court declined to follow cases holding that clicking through and certifying that one had read certain representations did not adequately allege reliance, because Zoosk's own terms showed that plaintiffs consented to the privacy policy at issue, in that they stated "[b]y registering, using or subscribing to the Services, you confirm that you have read and consent to 'the portions of the Privacy Policy described . . . ." The court found that "read and consented to means understood," and plaintiff had alleged that he would have cancelled his subscription had Zoosk disclosed its "true" data-security practices. The court also found that "a presumption arises that average subscribers would find [representations regarding privacy policies] important enough to affect their decision to purchase."

The court also found that plaintiff adequately alleged a loss of money or property as a result of Zoosk's purported unfair business practices because plaintiff contended that Zoosk had already presumed that plaintiff knew of and consented to the privacy policy. Therefore, the court concluded plaintiff adequately alleged that plaintiff "actually bargained" for a Zoosk dating service with reasonable security practices.

The court also found that plaintiff adequately alleged a claim under the UCL's "unfair" prong under the balancing test, detailing misleading statements coupled with Zoosk's failure to disclose its purportedly "inadequate" data-security practices. But the court found that plaintiff had *not* adequately alleged a claim for breach of the unfair prong based on breach of contract, because plaintiff only alleged that Zoosk's privacy policy *presumed* Zoosk subscribers read the policy and that it "confirmed" their affirmation, which "bound" Zoosk. The court found that, without something more to indicate the express theory to a reader, Zoosk could not have divined the breach-of-contract theory of liability.

Finally, the court found that plaintiff did not state a claim for violation of the unlawful prong based on violation of Section 5 of the FTC Act, because that statute does not provide a private right of action, and it was unclear how the claim was tethered to the FTC Act based on plaintiff's pleading.

Bennett v. North American Bancard, LLC, No. 17-cv-00586-AJB-KSC, 2022 U.S. Dist. LEXIS 34031 (S.D. Cal. Feb. 25, 2022)

Motions to strike class allegations are improper under Rule 12(f), as Rule 23 is the proper vehicle for dismissing class allegations, especially after a case has been pending for years.

Plaintiffs filed a putative class action on behalf of consumers allegedly charged undisclosed monthly fees in connection with credit card processing service and products. After plaintiffs filed a second motion to certify a class, defendant moved to strike the class allegations.

The court denied the motion to strike, noting that such motions are "generally regarded with disfavor" in the Ninth Circuit "because of the limited importance of pleading in federal practice, and because they are often used as a delay tactic." The court also found that "dismissal of a class at the pleading stage is rare because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." The court noted that "several courts within this Circuit have held that Rule 12(f) is an improper vehicle for dismissing class claims and should rather be addressed through Rule 23." The court also found that defendant's motion was untimely because it was filed three months after defendant's answer and five years after the action was filed originally.

In re Scripps Health Data Sec. Breach Litig., No. 21cv1135-GPC(MSB), 2022 U.S. Dist. LEXIS 14553 (S.D. Cal. Jan. 26, 2022)

District court may rely on reasonable inference of citizenship in evaluating evidence in support of CAFA's home-state controversy exception to jurisdiction.

In connection with claims arising from a ransomware attack, where cybercriminals accessed highly personal health data, defendant health care provider moved to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction. Defendant invoked CAFA's home-state controversy exception, which requires a court to decline jurisdiction if "two thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." A party seeking to apply this exception must carry the burden of providing "some facts in evidence from which the district court may make findings regarding class members' citizenship." Noting that citizenship

is determined by state of domicile, the district court accepted defendant's showing that: (1) of the 144,011 individuals notified of the breach, about 138,831 individuals, or 96.3%, had California addresses; (2) this percentage was consistent with the approximate percentage of California residents in defendant's overall patient population; and (3) the addresses most likely were current. The court rejected plaintiffs' contention that CAFA imposed a requirement to "examin[e] the domicile of every proposed class member before ruling on . . . citizenship . . . [as] it would render class actions totally unworkable." The court, instead, was entitled to rely on reasonable inferences.

Sellers v. JustAnswer LLC, 73 Cal. App. 5th 444 (4th Dist. 2022)

California Court of Appeals affirms denial of petition to compel arbitration, finding arbitration provision in terms of service was hyperlinked in a small notice below a sign-up button and was insufficient to place plaintiffs on notice.

The California Court of Appeals affirmed the denial of a petition to compel arbitration in this putative class action brought under California's Automatic Renewal Law (ARL) set forth in Business and Professions Code section 17600. Under the ARL, a business cannot enroll a customer in an automatic renewal without presenting the service terms to the customer in a "clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and in visual proximity … to the request for consent to the offer." Plaintiffs used the website to submit a request for a service, allegedly believing there would be a one-time $5 fee, but were then automatically enrolled in a $46 monthly membership. Defendant filed a motion to compel arbitration on an individual basis under an arbitration clause included in its terms of service. Defendant argued that, when plaintiffs entered their payment information on the website and clicked a button that read "start my trial," they agreed to the terms of service. In small font below the "start my trial" button, a notice read: "By clicking '[s]tart my trial' you indicate that you agree to the terms of service and are 13+ years old." The 26-page-long terms of service were hyperlinked in this notice. The trial court denied the motion to compel arbitration, finding the terms of service notice too small and "inconspicuous" to be binding.

Considering an issue of first impression under California law, the Court of Appeal considered whether and under what circumstance a "sign-in wrap" agreement is valid and enforceable. The court defined a "sign-in wrap" agreement as one in which "a user signs up to use an internet product or service, and the sign-up screen states that acceptance of a separate agreement is required before the user can access the service. While a link to the separate agreement is provided, users are not required to indicate that they have read the agreement's terms before signing up." The court noted that, while "sign-in wrap" agreements could be sufficient to put a consumer on inquiry notice of the linked terms, the issue must be determined on a case-by-case basis, as the context of the transaction is relevant. Here, the court found that defendant's showing failed because: (1) the textual notice itself was small and inconspicuous; and (2) the screen to which users were directed showed that they signed up for a $5 trial, not a $46 subscription. Further, the textual notice failed to comply with ARL guidelines, which state that a notice must be "in *larger type* than the surrounding text, or in contrasting type, font, or color to the surrounding text *of the same size*, or set off from the surrounding text *of the same size* by symbols or other marks, in a manner that clearly calls attention to the language." The court thus held that "enforcing a mandatory arbitration provision that includes a class action waiver based on these textual notices—which are less conspicuous than the statutory notice requirements governing [p]laintiffs' underlying claims—would permit [defendant] to end-run around legislation designed to protect consumers in these specific transactions."

G.G. v. Valve Corp., No. C16-1941JLR, 2022 U.S. Dist. LEXIS 3656 (W.D. Wash. Jan. 7, 2022)

District court grants summary judgment when plaintiff parents could not demonstrate reliance or causation required for their claims under Washington state's consumer protection statute regarding video games their children played because parents never saw or played the games themselves.

Plaintiff parents brought a putative class action alleging that defendant supported their children's illegal gambling by embedding video games with a "lootbox" feature that, plaintiffs asserted, "simulated an online slot machine and effectively constituted a gambling feature in what otherwise appeared to be normal video games." The court granted defendants' motion for summary judgment on a number of grounds. First, the court held that plaintiff parents did not offer evidence that they gave money to their children to play certain of the games at issue. With respect to claims concerning other games, the court held that plaintiffs could not establish causation under Washington's consumer protection statute because they could not show they ever saw or read any representations by defendants concerning the games at issue, and therefore could not have relied upon any affirmative representations. And with regard to omissions, plaintiffs could not prove causation because they never visited defendant's websites or played their games. The court held that, even if defendants had disclosed on their websites the "true odds of a loot box containing a given item and the value of various items contained within a loot box," or the "harms and risks presented by loot boxes," plaintiffs would not have seen such disclosures.

Eleventh Circuit

Ruhlen v. Holiday Haven Homeowners, Inc., 28 F.4th 226 (11th Cir. 2022)

Eleventh circuit declares that a sua sponte order of remand under CAFA is unreviewable.

In a matter of first impression in the Eleventh Circuit, a three-judge panel in a 2-1 decision declared that a *sua sponte* order of remand in a CAFA case was not reviewable. The panel held that CAFA's express language did not provide the court with jurisdiction over a *sua sponte* remand order, unlike situations where a party filed a motion for remand. Other federal circuits have found appellate courts do have such authority under CAFA.

The case involved a group of current and former mobile homeowners and their homeowners' association. Plaintiffs asserted claims under Florida Rule of Civil Procedure 1.222, which states in pertinent part:

> If the association has the authority to maintain a class action under this rule, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action under this rule.
>
> . . .
>
> An action under this rule shall not be subject to the requirements of Rule 1.220 [The Florida Class Action Rule]

Defendants, a grouping of numerous entities, removed to federal court. Plaintiffs subsequently amended the complaint, dropping any federal claims and leaving solely state law claims. The district court *sua sponte* remanded the case to state court, finding that CAFA did not provide jurisdiction for a claim under Florida Rule of Civil Procedure 1.222. Defendants sought Eleventh Circuit review.

The court took a narrow view of the text of the CAFA statute that provided appellate jurisdiction where the appeal was "from an order of a district court granting or denying a ***motion*** to remand a class action to the State court from which it was removed." 28 U.S.C. δ 1453 (c)(1) (emphasis added). The issue turned on the meaning of the word "motion" in the statute. The court held that a *sua sponte* order, while commonly referred to as a court acting on its own motion, was not actually a motion in the clear legal sense of the word. The court determined the motion was a request made by a party and was not an independent action of a court. Accordingly, the *sua sponte* order of remand was not reviewable.

The dissenting judge pointed to what she found to be an "absurd result," the contrary positions of four other circuits, and the fact that the ruling left unresolved certain unique issues of Florida law concerning Rule 1.222 of the Florida Rules of Civil Procedure.

D.C. Circuit

White v. Hilton Hotels Ret. Plan, No. 16-856 (CKK), 2022 U.S. Dist. LEXIS 51151 (D.D.C. Mar. 22, 2022)

Court applies "fail-safe" class rule to deny third attempt at Hilton employee class certification, acknowledging district and circuit splits on rule's application.

In this ERISA class action suit, plaintiffs, former employees of Hilton Hotels, sought for a third time to certify three sub-classes consisting of persons that "[h]ave been denied vested rights to retirement benefits" by the Hilton Hotel Retirement Plan. The district court denied class certification, finding the proposed classes violated the rule against certifying "fail-safe" classes. "A fail-safe class exists where the class definition depends on the merits of the underlying claim (i.e., whether the person has a valid claim), making "it impossible to determine who is in the class until the case ends." In this instance, the class members could not be determined until there was a merits determination as to what constituted "vested" rights under the plan, for example, such as whether fractional years of employment with Hilton should be rounded up in determining whether rights to benefits vest. As this merits issue was "at the very heart" of plaintiffs' claims, the court found the class was impermissibly fail-safe.

The court explained that, while the D.C. Circuit has not opined on the applicability of the fail-safe rule in barring class certification, at least one court in the circuit has adopted the rule (though two others in the circuit have declined to adopt it). In addition, eight circuit courts have either adopted a rule against certifying fail-safe classes or discussed it with disapproval (the Fifth Circuit is the only circuit that has rejected the rule). Finally, the court reasoned that the fail-safe rule is a "common-sense" rule, as there are sound practical and policy considerations for applying it: (1) fail-safe classes prevent determination of class members until the end of the case, causing administrative challenges in providing proper notice to class members, and (2) fail-safe classes contravene the efficiency aims of the class action mechanism because "[a] merits ruling against a fail-safe class does not resolve a class-wide dispute, but instead hollows out the failsafe class at issue, leaving further litigation for a later date," and unfairly subjects the defendant to possible additional rounds of litigation from claimants who ultimately fell out of the class based on the merits.

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