

Class Action Litigation Newsletter | Summer 2022



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

Highlights from this issue include:

- Supreme Court resolves circuit split, ruling courts need not require prejudice to establish waiver of the right to arbitrate.
- Third Circuit clarifies when the time period for CAFA removal is triggered.
- Third Circuit finds typicality is met though named plaintiffs did not invest in all of the funds at issue.
- Fifth Circuit confirms CAFA does not provide jurisdiction to consider non-CAFA grounds for removal when reviewing a CAFA remand order.
- Sixth Circuit addresses interested party's pre-certification and post-certification communications with class members.
- Western District of Washington applies new Ninth Circuit decision to find class action plaintiffs with insufficient evidence of injury lack standing to pursue claims.
- Eleventh Circuit affirms denial of law firm's request for fees, even though counsel conferred substantial benefit to the class, when counsel acted against interests of the class.

Supreme Court

Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022)

Supreme Court resolves circuit split, declining to require prejudice to find waiver of the right to arbitrate.

Petitioner Morgan was an employee at a restaurant franchise owned by Sundance. When Morgan applied for the job, she signed an agreement to “use confidential binding arbitration, instead of going to court” to resolve any employment disputes. Despite this agreement, Morgan filed a putative nationwide collective action alleging that Sundance violated the Fair Labor Standards Act.

For approximately eight months Sundance defended the lawsuit as if no arbitration agreement existed. First, Sundance filed a motion to dismiss the suit as duplicative of another collective action; the court denied the motion. Second, Sundance answered the complaint and engaged in a joint mediation. Sundance then moved to stay the litigation and compel arbitration under the Federal Arbitration Act (FAA). Morgan opposed, arguing that Sundance waived its right to arbitrate by litigating for nearly eight months without raising this right. The lower court applied Eighth Circuit precedent, which required prejudice to establish waiver. The Supreme Court granted certiorari to resolve the question of whether federal courts may adopt an arbitration-specific procedural rule demanding a showing of prejudice for a party to waive arbitration. The Court held that prejudice is not required.

In its decision, the Supreme Court explained that, outside the arbitration context, federal courts assessing waiver generally do not evaluate prejudice, and when determining waiver in other contexts, courts focus on “the actions of the person who held the right,” not the effects of those actions on another party. By demanding a finding of prejudice, the lower court incorrectly applied a rule specific to arbitration. But “the FAA’s policy favoring arbitration does not authorize federal courts to invent special, arbitration-preferring procedural rules,” and courts must hold parties to an arbitration contract the same as parties to any other contract. The Court thus remanded the case to the Eighth Circuit for further proceedings to evaluate whether Sundance “knowingly relinquish[ed] the right to arbitrate by acting inconsistently with that right.”

First Circuit

Sargent v. MaineHealth, No. 2:22-cv-00006-JAW, 2022 U.S. Dist. LEXIS 105621 (D. Me. June 14, 2022)

District court dismisses putative class action without prejudice based on putative class representative’s claim splitting.

Defendant’s motion for judgment on the pleadings argued that the plaintiff could not maintain this lawsuit because she previously filed an individual claim based on the same basic facts. In the first-filed lawsuit, plaintiff sued defendant’s subsidiary for alleged disability discrimination under the Americans with Disabilities Act and state law. Slightly over a year later, and shortly before the end of discovery in the first lawsuit, plaintiff filed a putative class action against the parent company for alleged retaliation under the Family Medical Leave Act and state law. The district court explained that, as a general principle, a plaintiff with multiple related claims must not split them into different, successive lawsuits. Rather, a plaintiff must include all such claims in the first action. This is referred to as the “doctrine against claims splitting.” Whether a second action is duplicative depends on whether the claims, parties, and available

relief do not significantly differ between the two actions. If they do not, the claims-splitting doctrine applies.

In certain circumstances, however, a putative class action may be an exception to the claims-splitting doctrine when, for example, a putative class member later seeks to pursue a damages claim that could not have been advanced in a prior class action or that was expressly excluded from the class action. Although the district court referred to the class-action exemption as unsettled, the court did not find it necessary to address the exemption because the plaintiff filed her initial individual claim before filing the putative class action. As a remedy to prevent claims splitting, and to protect the rights of the absent putative class members, the district court dismissed plaintiff's second lawsuit without prejudice.

Second Circuit

Wilson v. Triller, Inc., No. 21-cv-11228, 2022 U.S. Dist. LEXIS 71085 (S.D.N.Y. Apr. 18, 2022)

District court dismisses in-app information sharing case, ruling unjust enrichment claim was precluded by website terms and conditions, and Computer Fraud and Abuse Act claim failed because it was based on information-misuse theory.

Plaintiff alleged that Triller's app retained personally identifiable information about its users and unlawfully disclosed that information to third parties, who allegedly combined the disclosures with additional information to identify individual users. Plaintiff, an Illinois citizen, alleged that she downloaded the app, created an account, and used it for approximately six months for one hour per day. Plaintiff asserted that during this time, Triller violated the Computer Fraud and Abuse Act (CFAA), the Video Privacy Protection Act (VPPA), and the Illinois Consumer Fraud Act (ICFA), and she also asserted a claim for unjust enrichment. Triller filed a motion to dismiss, which was granted in its entirety.

First, the court dismissed the CFAA claim with prejudice, finding that plaintiff failed to plead facts showing that Triller "exceed[ed] its authorized access" within the meaning of the statute. Plaintiff alleged that Triller exceeded its authorized access by causing users to "download and install the App" without first informing users that the app collected and disclosed the users' information beyond what users expected the app to do. But the court found that Triller did not obtain this information by accessing "off limits" parts of the device. Contrary to other cases where a plaintiff's information is stored on a third-party cloud-based server, Triller accessed plaintiff's device and collected information about how plaintiff interacted with Triller's own servers. At most, plaintiff could only allege Triller "misused the information collected about her," which is insufficient to state a CFAA claim.

Second, the court dismissed plaintiff's VPPA claim without prejudice. Plaintiff alleged that Triller violated the VPPA by: (1) disclosing to others information regarding users' video watch history, including other information that can allegedly be used to associate the watch history with a particular individual; and (2) by retaining a user's "personally identifiable information" (PII). The court noted how the VPPA is "not well drafted." Adopting a narrow definition of PII, the court found that plaintiff did not allege that Triller disclosed any of her PII and that this claim should be dismissed. Although plaintiff admitted that the information Triller disclosed was "anonymized," the court found it was not enough that a third party could combine it with other information to deduce the true identity of the individual associated with the data because the "scope of PII would be limitless." The court also dismissed plaintiff's claim that Triller violated the VPPA by not destroying PII as soon as practicable, because the VPPA does not provide a private right of action for violations of this provision.

Third, the court rejected plaintiff's unjust enrichment claim given the app's terms of use. To create a Triller account, a user is presented with a screen that has the terms of use at the bottom of the sign-up page, which states that by signing up for an account the user accepts the terms of service and privacy policy (providing a link to both). The privacy policy explains that Triller collects "Personal Information" and "Usage Information," describing each. Triller argued that a valid agreement between the parties existed, and its terms governed. Plaintiff responded that she was never aware of the terms and that they were allegedly "hidden on the sign-up page." The court found the terms conspicuous enough to put the user on inquiry notice and create a valid contract, so the unjust enrichment claim was barred.

Finally, the court dismissed the ICFA claim because this statute does not have extraterritorial effect and applies only if the circumstances that relate to the dispute occurred primarily and substantially in Illinois. Here, the only connection to Illinois was that plaintiff was a resident of the state.

Aponte v. Northeast Radiology, P.C., No. 21-cv-5883, 2022 U.S. Dist. LEXIS 87982 (S.D.N.Y. May 16, 2022)

District court finds plaintiffs did not have standing in alleged information misuse case because they failed to show a risk of future harm.

Plaintiffs brought this putative class action alleging that defendants failed to protect their electronic protected health information (e-PHI) from unauthorized disclosure. The court granted defendants' motion to dismiss for lack of subject matter jurisdiction, finding that plaintiffs did not have standing.

Plaintiffs alleged that, by being patients, they provided defendants their names, addresses, dates of birth, gender, and medical history information. Unauthorized individuals allegedly accessed defendants' computer servers (the Picture Archiving and Communications Systems (PACS)), and plaintiffs alleged that defendants failed to include basic security features on its PACS system such that the list of file names containing the e-PHI could be downloaded and saved. Following the hack, defendants issued a press release announcing unauthorized individuals gained access to its systems and that at least 29 patients' information was accessed.

The court ruled that plaintiffs had not sufficiently alleged a future risk of fraud or identity theft because they did not allege they were among the 29 patients whose information was accessed, they did not allege third parties misused or attempted to misuse their data, and their allegations that an unauthorized user would have viewed their e-PHI and downloaded a copy were too remote to establish a risk of future harm from identity theft. In addition, plaintiffs failed to show they were at a substantial risk of future identity theft, so the time that they spent protecting themselves against this "speculative threat" could not create an injury to confer standing. Because plaintiffs did not allege any misuse or attempted misuse of their data resulting from the breach, they had not alleged any concrete harm from the alleged breach and also could not obtain any "benefit of the bargain" injury.

On June 14, 2022, plaintiffs appealed the dismissal to the Second Circuit. That appeal remains pending.

Garcia de Leon v. N.Y.U., No. 21-cv-05005, 2022 U.S. Dist. LEXIS 110787 (S.D.N.Y. June 22, 2022)

Court declines to certify a “fees class” based on NYU’s decision to cancel or modify in-person instruction and access to campus facilities during the COVID-19 pandemic.

This putative class action against New York University (NYU) alleged that NYU breached its contractual obligations to provide in-person instruction and access to campus facilities and activities when NYU decided to modify, curtail, and/or cancel activities for the spring 2020 semester due to the COVID-19 pandemic.

NYU charges enrolled students various fees for services and programs, but not every student pays the same amount, as fees vary depending on what school the student attends and the particular program and courses he or she enrolls in. All students also pay different Registration & Services fees (R&S Fees) based on a school-by-school or program-by-program basis. After the COVID-19 pandemic began, NYU analyzed the course-based fees billed to students and issued full or pro rata refunds. Like the original fees, these refunds also varied. Although NYU did refund a portion of housing and dining fees, it did not refund the R&S Fees because it continued to provide certain services connected to those fees. Plaintiff was a full-time graduate student enrolled in the Master of Social Work program at NYU’s Rockland campus in spring 2020. NYU did not refund her R&S Fees or art supply fees, which were the only two fees plaintiff paid for the spring 2020 semester.

At the outset of the case, NYU filed a motion to dismiss, which was granted in part. The court allowed claims related to the payment of fees in exchange for services and access to the campus (the Fees Claims) to proceed past the pleading stage. Plaintiff then brought a motion to certify a proposed “fees class,” defined as “all persons who paid fees for or on behalf of students enrolled at [NYU] who were charged for services, facilities, resources, events, and/or activities for the spring 2020 Semester that were not provided in whole or in part.” The court denied plaintiff’s motion.

In considering the various Rule 23 factors, the court found that plaintiff could not establish commonality and typicality. Among other things, plaintiff did not demonstrate she suffered the same injury as every other NYU student based on the school-specific nature of the fees and because plaintiff did not take a single class on the New York City campus. The evidence also showed that plaintiff never came to or called the New York City campus after her orientation in August 2019. Plaintiff’s status as a student was also not typical of the average NYU student, as she was one of just 88 candidates in the Rockland County branch and could not contend her status as an occasional visitor to the main campus made her typical of the extended class she proposed to represent. In addition to NYU students paying different fees for different services, all students could not be said to have suffered the same injury by NYU having failed to refund those fees because NYU continued to operate certain programs and services during the shutdown. The court noted that determining “which members of a class consisting of all students who paid fees to NYU actually sought to avail themselves of services but were unable to do so is an exercise that requires making a fact specific determination about each putative class member.”

The court also found plaintiff to be an inadequate class representative. In addition to attending a small adjunct campus, the court expressed concerns with the plaintiff’s credibility given her discovery conduct, including her conflicting deposition testimony and refusal to answer certain inquiries. The court also found plaintiff lacked a “firm grasp” of the facts of the case and did not even know who her lawyers were. Relatedly, the court found proposed class counsel inadequate given both a lack of experience and a lack of candor to the court, among other things.

Third Circuit

McLaren v. UPS Store Inc., 32 F.4th 232 (3d Cir. 2022)

Third Circuit clarifies time period for CAFA removal is triggered by what a defendant receives, not what knowledge it possesses.

Customers filed two putative class actions in New Jersey state court alleging that The UPS Store charged excessive fees for notary services. Neither complaint alleged an amount in controversy over \$5 million, and one of the complaints stated that the amount in controversy was less than \$1 million. After unsuccessfully moving to dismiss the complaints, UPS filed answers and in discovery produced a spreadsheet that, together with the complaints, revealed that each case had an amount in controversy that satisfied the Class Action Fairness Act (CAFA). Days after the New Jersey Appellate Division affirmed the denial of UPS's motions to dismiss, UPS filed removal petitions. Plaintiffs moved to remand, and the district court granted the motion, finding that the complaints and the information available to UPS allowed UPS to "reasonably and intelligently" calculate the amount in controversy and, thus, the removal petition was untimely. UPS appealed.

The Third Circuit reversed. The panel observed that the 30-day clock for removing a case under 28 U.S.C. § 1446 "is triggered only when the defendant receives a particular document: in (b)(1) the initial pleading, and in (b)(3) an amended pleading, motion, order, or other paper." The panel found that the initial pleadings here did not trigger the 30-day clock because (1) one of the complaints did not reveal the number of notary services provided at the allegedly prohibited rate, and (2) the other complaint alleged that the amount in controversy was far less than \$5 million. Plaintiffs argued that UPS possessed information at the time the complaints were served that allowed it to determine that the amount in controversy for CAFA jurisdiction was satisfied and thus the 30-day clock was triggered at that time. The Third Circuit rejected that argument because "the text of § 1446(b) requires that courts focus on what a defendant receives, and not on what knowledge it possesses." "[T]he statute does not contemplate that the thirty-day clock would be triggered by information that the defendant already possesses or knows from its own records."

This "bright line rule" advances judicial economy because (1) inquiring into what a defendant knew could "degenerate into a mini-trial"; (2) it discourages defendants from prematurely removing cases for fear of accidentally letting the 30-day window close; and (3) it discourages plaintiffs from attempting to prevent or delay removal by failing to reveal information showing removability but later objecting to removal when the defendant discovers the information on its own.

The panel recognized that this rule may allow defendants who possess information regarding removability to delay removing until a disadvantageous ruling from the state court. This concern, however, did not justify ignoring the plain language of the statute. And the panel found that this concern could be addressed by a plaintiff conducting discovery and thereafter serving a paper from which federal jurisdiction could be ascertained, thereby starting the removal clock.

Boley v. Universal Health Services, Inc., 36 F.4th 124 (3d Cir. 2022)**Third Circuit finds typicality is met notwithstanding differences among class member claims, including that named plaintiffs invested in only certain of the funds at issue.**

Three participants in a defined-contribution plan filed a putative class action on behalf of all plan participants alleging that Universal breached its fiduciary duties under ERISA. Universal opposed class certification on the basis that the named plaintiffs did not invest in 30 of the plan's 37 funds and, as such, (1) lacked standing to bring claims relating to all the funds, and (2) had claims that were atypical because they lacked incentive to pursue claims as to the funds in which they did not invest. The district court certified a class of all plan participants, and the Third Circuit granted interlocutory review.

The Third Circuit first addressed plaintiffs' standing. Because plaintiffs "allege concrete injuries traceable to the challenged decisions and courses of conduct" that affected all of the funds in the plan, they had standing. Universal argued that this "straightforward standing inquiry should be adjusted in light of the Supreme Court's decision in *Thole v. U.S. Bank N.A.*, --- U.S. ---, 140 S. Ct. 1615, 207 L. Ed. 2d 85 (2020)," which requires a "personal loss to a plaintiff's account" to have standing for a breach of fiduciary duty claim, but the panel found that plaintiffs alleged such a concrete injury.

As to typicality, Universal argued that plaintiffs "have no incentive to focus their litigation efforts on the objective imprudence of offering the funds in which they did not invest." The panel rejected that argument because each plan participant's potential recovery arose under the same legal theory – i.e., Universal's breach of fiduciary duty in managing the plan's investment options – regardless of the funds in which they invested. The panel found that "[t]ypicality does not require the class representatives' claims be coterminous with those of the class" and observed that "[w]e have held that typicality may be satisfied even if the class representative must introduce additional evidence to support the claims of absent class members." Plaintiffs' "interests are sufficiently aligned with those of the class because the common allegation for each class member. . . is 'comparably central to the claims of the named plaintiffs as to the claims of the absentees.'" Thus, typicality was satisfied.

Fifth Circuit

Easom v. US Well Services, Incorporated, ___ F.4th ___, 2022 U.S. App. LEXIS 16556 (5th Cir. June 15, 2022)**Fifth Circuit holds that COVID-19 does not qualify as a natural disaster under the WARN Act's natural disaster exception.**

Plaintiffs filed a class action against US Well Services, Inc. under the Worker Adjustment and Retraining Notification (WARN) Act, claiming that their employment was terminated without notice. US Well argued that the termination, which was caused by COVID-19, was proper under the WARN Act's natural-disaster exception. The parties cross-moved for summary judgment. The district court denied both motions but concluded that COVID-19 was a natural disaster, and that the natural disaster exception uses but-for causation standards. The court reasoned that COVID-19 qualified as "natural" because people did not start or consciously spread it, and it was a "disaster" based on how many people were killed or infected by the virus. But the court found that the record did not show that COVID-19 was the but-for cause of the layoffs. The court denied plaintiffs' motion for reconsideration but certified three questions for interlocutory appeal.

The Fifth Circuit disagreed with the district court's reasoning and held "that COVID-19 does not qualify as a natural disaster under the WARN Act's natural-disaster exception." The Fifth Circuit narrowly construed the WARN Act's language, which limited examples of natural disasters to "flood, earthquake, or drought" and other hydrological, geological, and meteorological events.

The court also examined whether the phrase "due to" in the natural disaster exception requires but-for or proximate causation. The Fifth Circuit pointed to the Supreme Court and other precedent equating direct causation and proximate causation. Based on that precedent, the court held that the WARN Act's natural-disaster exception incorporates proximate causation.

Stewart v. Entergy Corp., 35 F.4th 930 (5th Cir. 2022)

Fifth Circuit holds that it did not have jurisdiction to consider non-CAFA removal grounds when considering a remand order.

Plaintiffs filed a class action against their power company in Louisiana state court complaining that defendants had negligently designed, operated, and maintained the electricity transmission system, which led to power outages in the wake of Hurricane Ida. Defendants removed to federal court by asserting, among other bases, jurisdiction under CAFA. Plaintiffs conceded that CAFA's statutory requirements were met but asserted that the local-controversy and home-state exceptions precluded federal jurisdiction. Plaintiffs moved to remand, and the district court granted the motion.

Defendants appealed, but the Fifth Circuit affirmed. Based on the class definition and facts alleged, the class consisted overwhelmingly of Louisiana citizens and corporations. Thus, the local-controversy and home-state exceptions applied.

The Fifth Circuit also affirmed its precedent that CAFA does not provide jurisdiction to consider non-CAFA-related grounds for removal when reviewing a CAFA remand order. Defendants unsuccessfully argued the Supreme Court's 2021 decision in *BP P.L.C. v. Mayor of Baltimore* overruled the Fifth Circuit prior precedents. In *BP*, the Court held that, when a district court's remand order rejects multiple grounds for removal, CAFA authorizes a court of appeals to review each and every one of them because "the statute allows courts of appeals to examine the whole of a district court's 'order', not just some of its parts or pieces." Although the Fifth Circuit acknowledged that some of its sister circuits agreed with defendant's position, the court continued following the rule "that [its] jurisdiction to review a CAFA remand order stops at the edge of the CAFA portion of the order[.]"

Turner v. GoAuto Ins. Co., 33 F.4th 214 (5th Cir. 2022)

Fifth Circuit declines to evaluate state trial court's procedural rulings before removal.

Mark Turner sued his car insurance carrier, GoAuto Insurance Company, complaining that it underpaid policy benefits under his policy and Louisiana law. Turner later amended and transformed the suit into a class action by defining the class as similarly situated "residents of Louisiana." Turner amended again to redefine the class from "residents of Louisiana" to "citizens of Louisiana." Two days later, GoAuto removed under CAFA. After removal, the parties disputed which complaint controlled and the sufficiency of removal. The district court remanded the case, holding that GoAuto, as a Louisiana citizen, could not show minimal diversity.

GoAuto appealed to the Fifth Circuit, arguing that the district court ignored facts showing diversity and wrongly considered plaintiff's amended class definition for jurisdictional purposes. The Fifth Circuit

disagreed. The court noted that the Louisiana court accepted Turner’s amended class definition before GoAuto removed and declined to evaluate the state court’s procedural rulings before removal. The Fifth Circuit also rejected GoAuto’s other arguments that it was plausible that some of the class members were not citizens of Louisiana and that plaintiff should be barred from determining citizenship based on conclusory allegations.

Sixth Circuit

Fox v. Saginaw County, Michigan, 35 F.4th 1042 (6th Cir. 2022)

Sixth Circuit affirms district court ruling on interested party’s post-certification communications with class members but vacates injunction over pre-certification communications.

Plaintiffs sued Saginaw County, Michigan for failing to pay sale proceeds to owners of foreclosed properties. During the litigation, Asset Recovery Inc. (ARI) began contacting potential plaintiffs to pursue relief for them. Believing this was an improper solicitation, plaintiff asked the district court to prevent ARI from contacting class members. The district court granted the motion in part. Invoking its authority under Rule 23, the court enjoined ARI from communicating with class members without court approval and ordered ARI to send a curative notice to class members that they could withdraw from their agreements with ARI and stay part of the class. ARI appealed the ruling to the Sixth Circuit under the collateral order doctrine.

After concluding it had jurisdiction, the Sixth Circuit affirmed in part and vacated in part. The Sixth Circuit began its decision by recognizing the “broad authority” Rule 23 gives federal courts to manage class actions. The court explained that the authority includes the authority to restrict “abusive communications” to class members. The Sixth Circuit agreed with the district court’s conclusion that ARI’s communications with class members were “abusive” because ARI (1) “distorted the facts surrounding the claims process when it contacted potential claimants” and (2) “kept soliciting clients from the class even after the court granted certification and before class members received fair notice of the class action.”

The Sixth Circuit disagreed, however, with the scope of the district court’s remedy. The Sixth Circuit distinguished between pre-certification and post-certification communications. It explained that “the district court went a step too far in allowing class members who hired ARI before the class was certified to rescind their agreements.” Thus, “it abused its discretion by not explaining why *pre*-certification agreements should be abrogated.” The Sixth Circuit explained that “[t]here is nothing inherently abusive about engaging clients who later ended up members of a class,” and “there is no evidence ARI knew the class action was pending until after the district court certified the class.” As a result, the Sixth Circuit said it “will not penalize the company for engaging clients before they were class members.”

Hanover Am. Ins. Co. v. Tattooed Millionaire Entm’t, LLC, 2022 U.S. App. LEXIS 17746 (6th Cir. June 28, 2022)

Sixth Circuit reverses injunction of ongoing state court proceedings under the “necessary in aid of its jurisdiction” exception to the Anti-Injunction Act.

Hanover American Insurance Company sued a recording-studio in federal court in the Western District of Tennessee for submitting fraudulent loss claims after a burglary. The jury found for defendants, and

Hanover challenged the jury award. The district court granted Hanover's Rule 50(b) motion, but the ruling was overturned on appeal. While the appeal was pending, one defendant sued his co-defendants in Tennessee state court, and Hanover filed a separate declaratory judgment and interpleader action in federal court over the distribution of the \$2.5 million federal jury award. Hanover then asked the federal court to enjoin the state court action under the Anti-Injunction Act "in aid of its jurisdiction." The district court granted the injunction.

On appeal, the Sixth Circuit ruled that the district court erred and that the "in aid of its jurisdiction" exception to the Anti-Injunction Act did not apply. The Court of Appeals explained that the exception applies only when a case is removed from state court or when the federal court has "in rem" jurisdiction over specific property. Here, the district court lacked in rem jurisdiction because Hanover had never deposited the \$2.5 million award into the district court's registry. Thus, the district court proceedings were not in rem, and "an injunction was not 'necessary' to aid the district court's jurisdiction." The Sixth Circuit emphasized that, "[i]t may be more efficient for the district court to oversee this case without a concurrent state-court action"; however, "the law allows an injunction only for necessity, not simply for efficiency."

Seventh Circuit

Ross v. Gossett, No. 20-1992, 2022 U.S. Dist. App. LEXIS 12177 (7th Cir. May 5, 2022)

Seventh Circuit affirms class certification in case seeking relief due to policy and procedure-based constitutional violations.

Plaintiffs, inmates in Illinois Department of Corrections (IDOC), alleged that defendants' prison-wide shakedowns violated their constitutional and statutory rights. The district court consolidated several cases, and plaintiffs moved for class certification, seeking to certify a class of inmates incarcerated at three facilities during specific periods when the shakedowns occurred. Even though the claims sought relief against hundreds of defendants, the certification related only to claims involving 22 defendants in supervisory roles. The district court granted plaintiffs' certification request, and defendants appealed.

The Seventh Circuit affirmed. On appeal, both parties agreed that the shakedowns occurred and were executed according to a uniform plan under certain defendants' supervision but disagreed on the description of the plan itself. Defendants asserted that, because plaintiffs' certification theory relied on an unconstitutional policy or procedure, plaintiffs were required (and failed) to present significant proof of that policy. The Seventh Circuit rejected this argument, noting that, although such proof would be necessary on the merits, it was not a "proper focus in a class certification determination." Given the undisputed evidence that defendants acted uniformly across the facilities and during the shakedowns, there was no question that plaintiffs had met their burden in establishing commonality for class certification. What defendants ultimately challenged was the content of the uniform policy, which amounted to a merits question and did not impact the court's determination of commonality. For this same reason, the Seventh Circuit affirmed the district court's determination that predominance was met. The court noted that, when a common policy or practice forms the basis of the complaint, predominance is likely present, which was especially true here because the proposed class allegations implicated only 22 supervisors out of the hundreds of individual officer-defendants. Because of the purported shakedown policy, damages could also likely be resolved on a classwide basis, depending on each facility at issue.

Ali v. City of Chicago, No. 21-1536, 2022 U.S. Dist. App. LEXIS 13197 (7th Cir. May 17, 2022)

Seventh Circuit holds “stealth” class actions impermissible.

Plaintiff sued the City of Chicago, alleging police officers had violated his constitutional rights. Every version of the complaint plaintiff filed was drafted for a single plaintiff; there were no class allegations. But two days before fact discovery closed, plaintiff moved to certify a class without seeking leave to amend. The district court granted defendant’s motion to strike and denied plaintiff leave to amend his complaint to include class allegations because plaintiff’s request “came too late in the case.” On the same day plaintiff stipulated to dismissal after settling with defendant, a third-party (Miller) moved to intervene under Federal Rule of Civil Procedure 24, claiming to be part of the proposed class. The district court denied the motion, and Miller appealed.

Affirming the district court’s decision, the Seventh Circuit held that Miller could not have reasonably relied on plaintiff to protect Miller’s interests because the case was never proceeding as a class action. Though Miller asserted he should be permitted to intervene because Rule 23 does not require a complaint to include class allegations, the Seventh Circuit rejected this argument, noting such “stealth” class actions are impermissible. Rule 23 requires the court to determine whether to certify a class “at an early practicable time;” but if a plaintiff is allowed to “keep his class-action intentions hidden,” the district court is unable to comply with Rule 23. “Stealth” class actions would not only hinder the district court but also prejudice defendants entitled to fair notice of plaintiff’s claims. Thus, the Seventh Circuit affirmed and rejected Miller’s intervention arguments.

In re Stericycle Sec. Litig., No. 20-2055, 2022 U.S. Dist. App. LEXIS 13414 (7th Cir. May 18, 2022)

Seventh Circuit cuts class action fee award, requiring deeper analysis from district court.

Plaintiffs filed a securities fraud class action suit against defendant after its stock price had fallen, alleging defendant made misleading statements about its billing practices. Following two years of motion practice and while motions to dismiss were pending, the parties settled the case, prompting a class member to object to the attorney fee award of 25% and request discovery into potential “pay-to-play” arrangements between class counsel and a lead plaintiff. The class member argued that the fee award was too high considering the low risk of litigation and the early stage at which the case settled. The district court denied the class member’s requests, noting the award was reasonable based on the nature of the case and that it amounted to a percentage of the settlement as opposed to billable hours or a lodestar calculation. The court also denied the discovery request because the class member had not provided any evidence of wrongdoing.

Finding the district court’s fee award analysis incomplete, the Seventh Circuit reserved, pointing out that the district court (i) failed to consider an *ex ante* fee agreement in place for one plaintiff, (ii) did not properly account for the risk of nonpayment due to prior litigation involving the defendant, and (iii) gave inadequate weight to the early stage at which the case settled. Without proper analysis of these considerations, the district court failed to abide by the market-based approach for calculating fee awards, warranting remand. The Seventh Circuit did not, however, reverse the district court’s discovery ruling. Although securities litigation “involves unique pay-to-play concerns,” the Seventh Circuit determined that the value of the discovery the class member sought did not outweigh the intrusiveness of the request,

especially because the class member's claims turned on political contributions, which lawyers are free to make.

Sorkin v. Target Corp., No. 21-C-3546 (N.D. Ill. Jun. 2, 2022)

Northern District of Illinois clarifies standing requirements for consumer fraud class actions.

After purchasing a product labeled “oil free,” plaintiff allegedly discovered the product was mislabeled and filed a class action against the defendant-retailer for common law fraud, unjust enrichment, breach of warranties, and violation of various states’ consumer fraud statutes. Despite having bought only one product, plaintiff included in his complaint 12 other products he believed were similarly mislabeled. Defendant filed a Rule 12(c) motion for judgment on the pleadings, asserting plaintiff lacked standing to bring some of his claims.

The district court agreed that plaintiff lacked standing to pursue claims for products he had not purchased. Noting that standing requires a personal stake in the case, the court highlighted that plaintiff had not suffered any injury as to products he had not purchased. The court rejected plaintiff’s argument that standing should extend to products similar to the product actually purchased, holding that similarity of possible injury is distinct from the concrete injury requirement for standing. The court also denied plaintiff’s attempt to alter standing requirements when the claim is on behalf of a putative class, finding that “someone else might have been injured by overpayment for th[e] other products does not matter.” The court also noted that plaintiff could not establish standing by buying the other products now because standing must be present at the time the suit is filed and “cannot [be] manufacture[d] [] afterwards,” thus precluding an amendment. The court did, however, allow plaintiff to continue pursuing claims on behalf of class members who bought the product in nine other states.

Eighth Circuit

Jones v. Monsanto Co., No. 21-2292, 2022 U.S. App. LEXIS 17937 (8th Cir. June 29, 2022)

Eighth Circuit affirms district court decision overruling objections about the sufficiency of class notice, settlement amount, and *cy pres* provision.

The proposed settlement at issue included a \$2,500 incentive payment to each plaintiff, provided for a narrow scope for the class members’ release of claims, named the National Consumer Law Center and the National Advertising Division of the Better Business Bureau as *cy pres* recipients, and provided for an extended notice period and opt-out deadline. The claims administrator reported that the Parties’ notice efforts reached 82% of class members with an average of 2.51 contacts. Following the claim period, the valid claims represented approximately 2-3% of total sales. The parties estimated that the value of the valid claims will be \$11.72 to \$13.34 million, with an attorneys’ fee award of \$9.89 million, and administrator’s fees of \$1.8 million. The remaining \$14-16 million will be distributed *cy pres*.

Anna St. John objected on the ground that class notice was insufficient, the amount per claim was insufficient, the donation to *cy pres* organizations constitutes compelled speech, and the *cy pres* amount should be excluded from the calculation of the attorneys’ fee under a proposed class-wide settlement.

The Eighth Circuit held that the district court did not abuse its discretion by not requiring the parties to subpoena purchase records from large retailers and sending individual notice to potential class members identified that way. The court noted the only evidence in the record suggested that the notice approach taken was more effective than a listed mailing. The Eighth Circuit also held that the district court did not abuse its discretion in finding that class members had no equitable claim to funds beyond 50% of the value of the product as such an amount fully compensated class members.

With regard to *cy pres* amounts, the Eighth Circuit held that because *cy pres* funds are only distributed after class members who have filed claims are fully compensated, those funds are not taken from any member of the class and, as such, cannot constitute compelled speech by any individual class member. The court thus ruled that the *cy pres* award cannot be found to infringe on their first amendment rights. Finally, the Eighth Circuit determined that using a lodestar analysis which included time spent on prior, related litigation was appropriate and that including *cy pres* funds in the calculation of attorneys' fees was also appropriate.

Schumacher v. SC Data Center, Inc., 33 F.4th 504 (8th Cir. 2022)

Eighth Circuit rules that district court lacked subject matter jurisdiction under *Spokeo*.

The Eighth Circuit vacated the decision of the district court and ruled that the plaintiff lacked Article III standing where an employer offered plaintiff a job, gave her a start date, and then revoked the job offer based upon a consumer report without being given a chance to see or respond to the report. The court ruled that there is no requirement in the Fair Credit Reporting Act that an employer offer a prospective employee an opportunity to dispute or explain the contents of such a consumer credit report. Similarly, a technical defect in the disclosure form—in this case that the font was small and did not use the words “consumer report”—was insufficient to confer standing on plaintiff. While plaintiff did not give a specific authorization regarding her consumer report, she did authorize defendant to conduct a background search. Such an authorization was sufficient to allow searches related to her criminal history and the sex offender registry.

The Eighth Circuit thus found that plaintiff failed to allege anything more than technical violations of the Fair Credit Reporting Act and, as a result, lacked standing. Therefore, the court ruled that it did not have jurisdiction to approve a settlement. Because the case had been removed to federal court, the Eighth Circuit remanded the case to the district court with instructions to return the case to state court.

Monday Restaurants v. Intrepid Insurance Co., 32 F.4th 656, 658 (8th Cir. 2022)

Eighth Circuit affirms district court dismissal of a claim under an insurance policy providing coverage for “direct physical loss of or damage to property” relating to the business interruption caused by COVID-19.

The Eighth Circuit affirmed the dismissal of a class action brought on behalf of a class of businesses with identical insurance policies with defendant. Plaintiffs' policies provided coverage for “direct physical loss of or damage to property.” The Eighth Circuit noted that plaintiffs did not allege that COVID-19 was physically present on their premises or that any physical damage occurred at their properties. As such, applying their policies as written, the Eighth Circuit held that their claims were appropriately dismissed unless plaintiffs allege a physical loss.

Ninth Circuit

Kellman v. Spokeo, No. 3:21-cv-08976-WHO, 2022 U.S. Dist. LEXIS 71985 (N.D. Cal. April 19, 2022)

The injury caused by misappropriating rights of publicity by using names and likenesses without plaintiffs’ consent is sufficient to confer Article III standing.

Defendant runs a website that provides information about particular individuals aggregated from various sources. To advertise paid subscriptions to the site, defendant uses “teasers” – profiles of real people with some information redacted. Plaintiffs filed a putative class action alleging that defendant’s teasers violated their rights of publicity by misappropriating their names and likenesses in violation of California, Ohio, and Indiana law.

Defendant moved to dismiss, arguing that plaintiffs lacked Article III standing because they could not show cognizable injury. The district court disagreed and denied the motion. Finding that injury caused by misappropriating rights of publicity are sufficiently concrete to confer standing, the court explained that this was “a direct wrong of a personal character resulting in injury to the feelings without regard to any effect which the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community.” The district court also found that misappropriating names, likenesses, and personas is a harm long recognized at common law before being codified by various states.

Hogan v. Freedom Mortgage Corp., No. 5:21-cv-00782-JWH-SPX, 2022 U.S. Dist. LEXIS 83470 (C.D. Cal. April 7, 2022)

Costs of postage borne by attorneys and attorneys’ fees “incurred” in a contingency fee arrangement do not constitute actual damages required to sue under California’s Real Estate Settlement Procedures Act.

Plaintiffs filed a putative class action against defendant alleging a single claim for alleged violation of California’s Real Estate Settlement Procedures Act (RESPA), based on the contention that plaintiffs requested but did not receive audio recordings of oral communications with defendant.

In moving to dismiss, defendant argued that plaintiff failed to allege they sustained actual damages, an essential element of a RESPA claim and a prerequisite for statutory damages in the Ninth Circuit. Plaintiffs responded by argued that the mailing costs to send follow-up letters to defendant constituted actual damages. The district court sided with defendant and granted the motion, noting that plaintiffs conceded their counsel transmitted the follow-up letters, not plaintiffs, and plaintiffs did not sufficiently establish that they bore the costs. The district court also rejected plaintiffs’ argument that the attorneys’ fees they allegedly incurred in transmitting follow-up letters did not constitute actual damages because they would not be “incurring” attorneys’ fees if their fee arrangement was on a contingency basis, and plaintiffs did not specify the type of fee arrangement they had with their lawyers.

Lohr v. Nissan North America, No. C16-1023RSM, 2022 U.S. Dist. LEXIS 83552 (W.D. Wash. May 9, 2022)

Safe harbor provision in Washington’s Consumer Protection Act only shields conduct affirmatively authorized by a government agency, but plaintiffs cannot rely on what a survey expert may prove in the future to show the injury required under the statute.

Plaintiffs filed a putative class action alleging that panoramic sunroofs for various vehicle models shattered and exploded over occupants while driving. Plaintiffs alleged claims under Washington State’s Consumer Protection Act (CPA), as well as breach of express warranty, breach of the warranty of merchantability, and violation of the Magnuson-Moss Warranty Act.

Defendant moved for summary judgment. The court first addressed defendant’s argument that plaintiffs’ claims were barred by the CPA’s “safe harbor provision,” which provides that the statute does not apply to “actions or transactions permitted by any . . . regulatory body or officer acting under statutory authority of this state or of the United States.” Plaintiffs contended that the sunroofs at issue were defective and unsafe because defendant used tempered rather than laminated glass. Defendant argued that because using tempered glass is expressly permitted by federal safety regulations, neither its use nor a failure to disclose that use can support a CPA claim. On this issue, the court held that the safe harbor provision shields only conduct affirmatively authorized by a government agency and did not apply to plaintiffs’ “more nuanced claim” that defendant violated the CPA in how the tempered glass was applied to the vehicles in question. Thus, the court found the safe harbor provision did not preclude plaintiffs’ claim that defendant violated the CPA in how the tempered glass was applied to the vehicles at issue.

But as to the requirement that plaintiffs demonstrate an unfair or deceptive act or practice under the CPA, the court found that plaintiffs failed to make a sufficient showing that defendant knew of and failed to disclose a potential defect in their panoramic sunroofs and dismissed the claim on that basis.

As to the CPA’s requirement that plaintiffs show some injury, plaintiffs argued that they overpaid for their vehicles, and that their experts would calculate the difference between the value of the defective vehicles as purchased and non-defective vehicles they believed they were receiving. The court found this evidence “had not been created yet,” and that it would not simply take plaintiffs’ word that their experts would conclude that plaintiffs overpaid for their vehicles after conducting a class-wide survey. The court also found that “bizarrely,” plaintiffs had not offered more traditional evidence of injury such as medical bills or repair expenses.

Ngethpharat v. State Farm Mut. Auto. Ins. Co., 2022 U.S. Dist. LEXIS 80979, No. C20-454 MJP (W.D. Wash. May 4, 2022)

New Ninth Circuit decision *Lara v. First Nat’l Insurance Co. of Am.* makes clear that class action plaintiffs with insufficient evidence of injury lack standing to pursue claims.

Plaintiffs filed a class action against State Farm for allegedly using an improper method to determine the actual cash value (ACV) of an insured’s total loss. The parties filed cross-motions for summary judgment, with State Farm arguing that under the recent Ninth Circuit decision in *Lara v. First National Insurance Company of America*, 25 F.4th 1134 (9th Cir. 2022), plaintiffs offered insufficient evidence of injury and thus lacked standing to pursue their claims.

The court agreed with State Farm, holding that under *Lara*, 1) to show an injury for breach of contract, plaintiff must demonstrate that they received less than the ACV, 2) plaintiff cannot show injury merely by proving that the insurer failed to follow a state’s regulatory process for determining ACV, and 3) simply calling defendants’ adjustments illegal is insufficient to demonstrate injury because deviation from the regulatory process may still lead to the correct ACV. Plaintiffs put forth no evidence that they received less than the ACV. Rather, they alleged that State Farm’s process for determining ACV was improper, and that they would have received a higher amount if State Farm used a proper process. The court held that “[t]his position is fatal under *Lara* because Plaintiffs bear the burden of providing evidence that what State Farm offered is less than the actual ACV for each loss vehicle.” And even though plaintiffs put forth evidence that State Farm’s adjustments “could never be allowed under insurance regulations,” a regulatory violation is not evidence of injury.

Ramirez v. Pac. Bay Masonry, Inc., 2022 Cal. App. Unpub. LEXIS 4005, No. A163316 (Cal. App. June 27, 2022)

Arbitration agreement is not substantively unconscionable when examples of claims in the contract are one-sided.

Plaintiffs filed a class action alleging various wage-and-hour claims and violations of California’s Unfair Competition Law against defendant Pacific Bay. Pacific Bay moved to compel arbitration. Plaintiffs argued that the arbitration agreement was procedurally unconscionable because the lead plaintiff did not read or speak English. On substantive unconscionability, plaintiffs argued that the agreement was one-sided and lacked mutuality because the three categories of claims listed “appear[] to emphasize its application to claims that employees bring to employers but not . . . claims employers bring to employees.” The court denied the motion to compel and agreed that it was “minimally” substantively unconscionable, but highly procedurally unconscionable as Pacific Bay had a “strong suspicion or knowledge that he did not understand English and did not understand that the contract would waive his access to the courts regarding employment related claims.”

On appeal, Pacific Bay argued it had no obligation to explain the provisions to plaintiff, but the court held that California courts “have made clear that an arbitration provision in an employment agreement is procedurally unconscionable when presented in English without explanation to an employee who cannot read English.” Pacific Bay further argued there was insufficient evidence that it knew plaintiff could not speak English, but the court held that, because Pacific Bay went through the onboarding documents with plaintiff in both English and Spanish, there was sufficient evidence that Pacific Bay had knowledge that plaintiff did not understand English.

As for substantive unconscionability, the court held that the agreement was not one-sided, and even though the three categories of claims described in the arbitration provision were claims an employee would bring, did not mean the provision did not apply equally to both the employer and employee, particularly when the categories were only examples, and the language stated that “both agree” to arbitration. Thus, because there was no substantive unconscionability, the court reversed the trial court’s denial of Pacific Bay’s motion to compel arbitration.

Tenth Circuit

Fullmer v. A-1 Collection Agency, LLC, No. 4:20-cv-00143-DN-PK, 2022 U.S. Dist. LEXIS 88090 (D. Utah May 16, 2022)

Claims under Utah’s Consumer Sales Practice Act are not preempted by FRCP 23 because the statute contains substantive provisions that significantly affect the outcome of litigation by providing for claims for actual and statutory damages.

Plaintiffs filed a putative class action based on defendants’ alleged improper disclosure of confidential personal and protected health information in state court debt collection proceedings. Plaintiffs alleged a variety of claims, including under the Utah Consumer Sales Practice Act (UCSPA).

The UCSPA permits class actions for damages only for consumers who can show they suffered “actual damages caused by an act or practice.” In opposing defendant’s motion to dismiss, plaintiffs argued that their UCSPA claim was not precluded or limited by the UCSPA because the statute is preempted by Rule 23.

The court disagreed, applying the two-part test set forth by Justice Stevens in *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). The court found that under the first part of the test, there was no direct conflict between the UCSPA and Rule 23 because the UCSPA does not preclude class actions, but rather provides substantive requirements for maintaining class actions seeking actual damages. The court also ruled that, under the second part of the test, an *Erie* analysis showed that the UCSPA subsections at issue were substantive provisions that significantly affected the outcome of the litigation by providing claims for actual and statutory damages, rather than procedural laws. Thus, Rule 23 did not preempt these claims. The court also found that plaintiffs failed to allege facts to support a plausible claim for damages under the UCSPA, because although the alleged unauthorized disclosure of medical information may have amounted to a breach of contract, such disclosure, alone, was insufficient to allow for a reasonable inference that defendant impermissibly amended the parties’ contracts in violation of the UCSPA.

Eleventh Circuit

Steven Arkin, Anderson & Wanca v. Pressman, Inc. No. 21-11502 (11th Cir. 2022)

Eleventh Circuit denies law firm bid for payment of fees from a common fund when counsel acted against interests of the class.

In this TCPA class action, the Eleventh Circuit rejected an Illinois law firm’s request for an award of attorney’s fees from a common fund, holding that the Illinois law firm Anderson + Wanca (Wanca) had placed its own interests before those of class members.

Dr. Steven Arkin, a Florida resident, received an unsolicited fax from Smith Medical Partners in September 2017. Dr. Arkin filed suit in the Middle District of Florida individually and on behalf of a putative class of persons or companies that allegedly received unsolicited advertisements via fax from Smith Medical in violation of the TCPA. Wanca represented Arkin and filed suit on behalf of the putative class. In the ensuing litigation, the parties became embroiled in a discovery dispute that resulted in an order requiring Smith Medical to produce various documents for review and the parties to mediate and report back to the court.

In mediation, the parties reached a settlement that would create a \$21 million common fund to pay verified claims. Wanca would receive a third of the common fund, i.e., \$7 million as a fee award pending court approval. In the Eleventh Circuit, 25% of a common fund award is presumptively reasonable. Anything above 25% requires the district court to analyze 12 factors prior to awarding a higher percentage award from a common fund.

In an apparent attempt to reap the benefit of more favorable Illinois law, Wanca dismissed the Florida lawsuit before the deadline to notify the district court of the outcome of mediation and instead filed another lawsuit in Illinois state court, apparently because “Illinois precedent allows state trial courts to award one-third of the common fund as attorneys’ fees in class actions.” The settlement achieved in Florida and taken to Illinois provided that either party could terminate the settlement at any time for any reason. If terminated, the lawsuit would return to the Middle District of Florida.

One of the putative class members, Pressman Inc., objected to the settlement and retained independent counsel, Bock, Hatch, Lewis & Oppenheim, LLC (Boch). Smith Medical terminated the settlement, presumably due to the objection. Dr. Arkin refiled in the Middle District of Florida and Pressman filed suit in Illinois. The Illinois suit was later transferred to the Middle District of Florida and consolidated with the Arkin suit. The second Florida lawsuit was settled through the efforts of Boch with the creation of a \$4.5 million common fund. The Boch settlement was approved with each class member receiving \$1,100.00 and the Boch firm receiving \$1.125 million in fees as a 25% fee award from the common fund.

The district court denied a motion filed by Dr. Arkin and Wanca seeking attorneys’ fees out of the common fund. The Eleventh Circuit affirmed the denial, noting that “only those lawyers who ‘recover a common fund’ for the plaintiffs are entitled to a portion of the common fund as a reasonable attorneys’ fee.” The court acknowledged that non-class counsel could be awarded attorney’s fees under Rule 23(h) if it conferred a substantial and independent benefit to the class. But unlike the ordinary case, “the record clearly shows that Wanca subordinated the interests of the class to its own interests” and raised ethical issues. The only reason for Wanca’s dismissal of the Florida action and the refile in Illinois state court was to benefit the law firm. Moreover, the court was also troubled by the rather one-sided terms of the initial settlement that allowed defendant to terminate the settlement for no reason at all.

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