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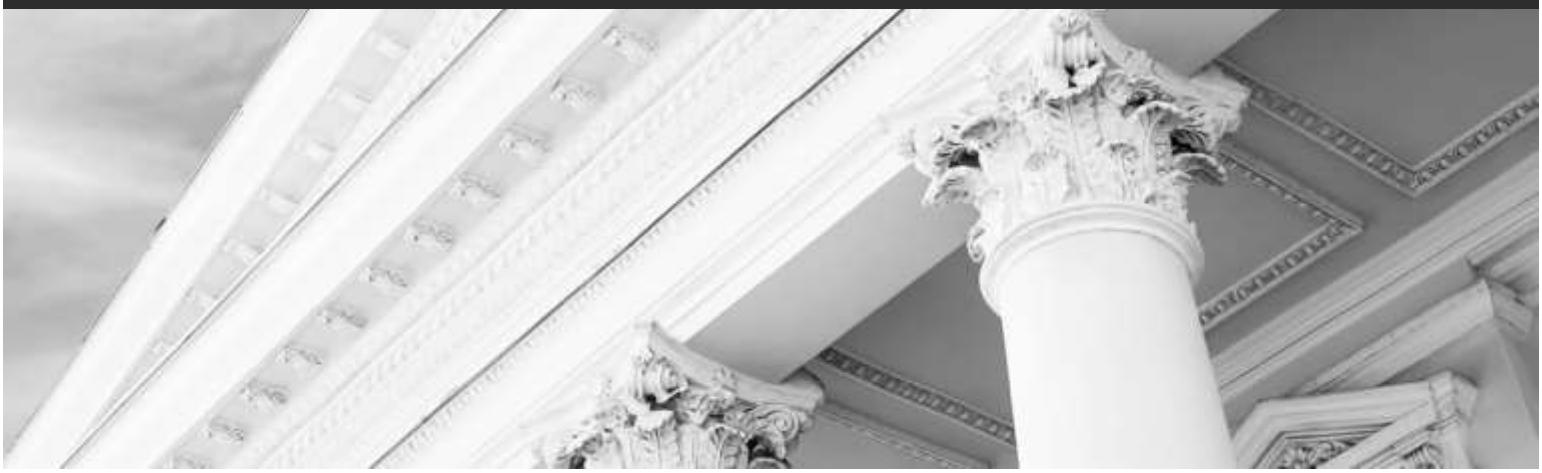
Class Action Litigation Newsletter | Fall 2022



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

Highlights from this issue include:

- Southern District of New York decertifies "All Natural" class action following deposition testimony showing each plaintiff held a different understanding of the phrase on product label.
- Third Circuit clarifies courts should not deny certification on ascertainabilty grounds based on volume of records to be reviewed.
- Fifth Circuit vacates FDCPA class certification order for lack of Article III standing.
- Seventh Circuit affirms dismissal of class action based on "price premium" theory for lack of subject matter jurisdiction.
- Eighth Circuit rules district court retains jurisdiction under CAFA after severing claims on which jurisdiction was predicated.
- Eastern District of California finds attorneys' fees must be proven with summary judgment-type evidence in assessing CAFA's $5 million amount-in-controversy requirement.
- Eleventh Circuit vacates certification of settlement class and approval of class settlement holding Rule 23(e) requires every member of the class have Article III standing.

First Circuit

Wilkins v. Genzyme Corp., No. 21-10023-DPW, 2022 U.S. Dist. LEXIS 165678(D. Mass. Sept. 14, 2022)

District court declines to extend *American Pipe* tolling to untimely putative class allegations.

Defendant moved to dismiss a putative class action complaint under Rule 12(b)(1), arguing that the individual claims and class allegations were untimely. In response, plaintiffs cited the Supreme Court's *American Pipe* tolling doctrine. The district court, however, noted that *American Pipe* does not apply when a court sits in diversity. Thus, the court needed to consider whether the relevant state courts had adopted the doctrine and whether the doctrine "fits with the facts" of this case.

The district court ultimately concluded that *American Pipe* tolling was a "poor fit" for the case, even if the doctrine applied. While recognizing that First Circuit authority was not binding as to state law, the court noted the First Circuit's recent conclusion that, while "a putative class member may join an existing suit or file an individual action upon denial of class certification, a putative class member may not commence a class action anew beyond the time allowed by the untolled statute of limitations." This clarification, according to the First Circuit, means that "the tolling effect of a motion to certify a class applies only to individual claims, no matter how the motion is ultimately resolved."

The district court also explained that most states following *American Pipe's* reasoning "have adopted a rule allowing tolling during the pendency of a class action filed in their own courts." Federal courts also have been "disinclined to import cross-jurisdictional tolling into the law of a state that has not ruled on the issue" based on forum-shopping concerns. Because the relevant state courts had not explicitly adopted cross-jurisdictional tolling, the court found that *American Pipe* tolling was not available.

Wortman v. Logmein, Inc., No. 218-11475-GAO, 2022 U.S. Dist. LEXIS 154807 (D. Mass. Aug. 29, 2022)

District court denies class certification of Massachusetts Consumer Protect Act claims based on inability to prove injury through common proof.

Plaintiffs brought a putative class action against defendants for allegedly renewing plaintiffs' subscriptions to cloud-based document-sharing services at higher prices than plaintiffs initially agreed. Plaintiffs alleged they would not have subscribed to the services had they known their subscriptions would be renewed at higher prices. Defendants' conduct, according to plaintiffs, violated the Massachusetts Consumer Protection Act, Chapter 93A. The district court considered and denied plaintiffs' motion for class certification. In doing so, the court concluded that plaintiffs did not satisfy the commonality or typicality requirements of Fed. R. Civ. P. 23(a).

According to the district court, the record showed that (1) defendants' policies and practices regarding renewal notifications and refunds differed from customer to customer, and (2) the putative class members' alleged injuries varied significantly. For example, some putative class members, like plaintiffs, were dissatisfied when their subscriptions renewed at a higher price, but others continued using the products without complaint. As to those who complained, some did so immediately after receiving notice of the first renewal, and some waited until after multiple renewal periods before contacting customer service. Also, some customers received full refunds, some received partial refunds, and some received no

refund at all. According to the district court, absent a "painstaking" individualized inquiry, there was no manageable way to determine which consumers were like plaintiffs and which were not.

According to the district court, it would be inappropriate "to impute injury" to putative class members "by inference." Although plaintiffs argued their "common injury" was inherent in defendants' conduct (i.e., that all consumers paid a higher price than the initial contract price), Chapter 93A requires proof "of an identifiable injury that is distinct from the alleged unfair or deceptive practice itself." Here, there was no basis "to assume that the renewal price paid by each individual consumer was not a good value to that consumer or commensurate with a competitive price." As the court explained, "a critical inquiry when evaluating injury in Chapter 93A cases is whether the allegedly unlawful practice harmed buyers 'in any material respect.'" Thus, materiality would differ between consumers, and because some consumers "were not bothered by the price increase," the increase was not "material" to the "renewal decisions by class members generally."

The court also found plaintiffs failed to satisfy the predominance and superiority requirements. Among other things, the court ruled that, "absent . . . some other mechanism that can manageably remove uninjured persons from the class in a manner that protects the parties' rights," the court "would be forced to conduct a detailed inquiry into each proposed class member." Finally, the court noted that, although Chapter 93A contained more lenient standards for class certification, Rule 23, a procedural rule, governed certification in federal court.

Costa v. Dvinci Energy, Inc., No. 21-11501-NMG, 2022 U.S. Dist. LEXIS 130208 (D. Mass. July 22, 2022)

District court denies defendant's request to strike class allegations based on alleged fail-safe class definition.

Plaintiff alleged she received telemarketing calls from defendant in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (based on plaintiff allegedly being on the National Do-Not-Call Registry). Plaintiff sought to represent a nationwide class of all persons who received similar calls and also were on the Do-Not-Call Registry. Defendant moved to strike the class allegations because the proposed class definition created a "fail safe" class where putative class members either won or were excluded from the class. Although recognizing that striking class allegations at the pleading stage is a "drastic remedy," the district court explained a court may rightfully do so when the class definition is pleaded as a "fail-safe" class. A "fail-safe" class occurs when class membership is defined in terms of the underlying legal injury, i.e., when the definition includes those persons to whom a defendant's liability already is established. Such a definition is impermissible because it makes it virtually impossible for a defendant to "win" the case, as any class member against whom the defendant succeeds is excluded from the class. Here, the proposed class (those persons who received telephone calls and who were listed on the Do-Not-Call Registry) included persons to whom defendant would and would not be liable, and membership in the class could be determined without reaching any legal conclusions as to defendant's liability. The court denied defendant's motion as a result.

Second Circuit

Williams v. Block One, No. 20-cv-2809, 2022 U.S. Dist. LEXIS 171550 (S.D.N.Y. Aug. 15, 2022)

District court denies motion for approval of class settlement, finding lead plaintiff was not an adequate representative because he may have been incentivized to accept a lower settlement amount than other members of the proposed class.

This putative class action concerns Block One's initial coin offering (ICO), whereby ERC-20 tokens were sold to investors to fund software development relating to novel EOS blockchain technologies, with the expectation that those tokens could later be exchanged for tokens produced on a forthcoming EOS blockchain. Block One never registered its sale of the ERC-20 tokens with the SEC and attempted to prevent token purchases by U.S. investors, a prohibition which "was easily circumvented," including by resale on U.S. cryptocurrency exchanges. In its lawsuit, Crypto Assets Opportunity Fund LLC (the "Lead Plaintiff"), which did not purchase tokens directly from Block One in the ICO, alleged that the ERC-20 tokens were securities and Block One violated the securities laws by failing to register its ICO. Lead Plaintiff also alleged certain public statements and omissions by Block One and its founders were materially false and misleading.

The parties ultimately reached a proposed settlement, purporting to settle on behalf of all purchasers of Block One tokens over an approximate two-year period, irrespective of whether they were located within the United States. The court granted an unopposed motion for conditional certification of the proposed class, but then requested more information given its concerns about the potential inadequacy of the Lead Plaintiff to serve as class representative. The material the court requested included, among other things, information about Lead Counsel's costs in pursuing this case, support for the contention that the majority of the proposed class members were foreign, and support for the assumption that purchasers of only 25% of the tokens were likely eligible to recover as part of the settlement. According to the court, whether the Lead Plaintiff will adequately represent the interests of absent class members "depends upon whether the proportion of the [Lead P]laintiff's purchases that were subject to the federal securities laws is the same as, or representative of, the proportion of such purchases by absent class members." The court reasoned that if the Lead Plaintiff's "proportion of purchases covered by the securities laws was lower than the proportion of such purchases by other class members, plaintiff could have had a financial interest in accepting a settlement at a price lower than the price that would have been demanded by adequately represented class members."

Ultimately, the court found that Lead Plaintiff failed to provide sufficient information regarding the proportion of its transactions that were domestic as compared to those of the absent class members and declined to approve the proposed settlement. The court also noted the "structural conflict" that "has had a detrimental effect on absent class members," in that "Lead Plaintiff already has accepted a settlement offer that is 75 percent less than the total alleged loss to class members largely because of the presence of foreign purchasers."

In re KIND LLC "Healthy & All Nat." Litig, 15-MD-2645, 2022 U.S. Dist. LEXIS 163207 (S.D.N.Y. Sept. 9, 2022)

Southern District of New York decertifies class when common questions of law or fact no longer predominate because each plaintiff held a different theory of the phrase "All Natural" on product label.

Plaintiffs challenged the labeling of KIND products that contained the "All Natural/Non GMO" description. In January 2020, plaintiffs moved to certify three Rule 23(b)(3) damages classes for certain time periods—a New York class, California class, and Florida class. The court certified those classes but denied a motion to certify an injunctive class under Rule 23(b)(2). After certification, the parties completed discovery, and defendants moved for summary judgment and to decertify.

When deciding the motion to decertify, the court noted that it must "reassess . . . class rulings as the case develops" in order to "ensure continued compliance with Rule 23's requirements." When the class was certified, the judge focused on the fact that "All Natural" and "Non GMO" claims were subject to common proof because KIND always coupled the "All Natural" statement with the "Non GMO" statement on its labeling, and so the question of whether labels with "All Natural" and "Non GMO" were true was a binary question. But this theory of common proof was eliminated after plaintiffs abandoned their "Non GMO" claims.

The court then explained how each named plaintiff had a different understanding of "All Natural," such that common questions no longer predominated. One plaintiff testified she believed that "natural" meant "the Products were made from whole nuts, fruits, and whole grains." Another testified that "All Natural" means that the "ingredients were not synthetic, not chemicals, [but were] natural ingredients." Another plaintiff testified she thought "an all natural product would be one without GMO ingredients and one that would be 'good for' her," and a fourth plaintiff testified a natural product "would be one that is 'pull[ed] out of the Earth' or 'dirt,' or 'untouched.'" Based on this testimony, the court concluded that plaintiffs failed to articulate a workable definition of "All Natural" held by a reasonable consumer and decertified.

Third Circuit

Artem Gelis v. BMW Of North America, LLC, 49 F.4th 371 (3d Cir. 2022)

Third Circuit Reverses Fee Award Due to Insufficient Proofs.

In the context of settling a class action, the parties agreed that defendant would not object to an award of attorneys' fees up to $1.5 million and class counsel would not request an award above $3.7 million. Defendant appealed a fee award at the upper end of that range. The Third Circuit reversed the award and remanded for further proceedings.

The panel first addressed plaintiff's argument that defendant had waived its right to appeal by agreeing to submit the issue of attorneys' fees to the district court "for final evaluation and decision" while not explicitly reserving the right to appeal in the settlement agreement. The panel rejected plaintiff's argument, finding that a party must expressly waive its right to appeal a fee award, which defendant did not do.

Next, the panel addressed defendant's argument that the district court's lodestar calculation was based upon an insufficient record. Class counsel submitted summary charts outlining the aggregate number of

hours incurred by each attorney in each phase of the case, but did not describe the tasks each attorney undertook. The panel found the summary charts insufficient because they did not allow the court to determine whether hours were duplicative or reasonable for the work performed. The panel reiterated prior precedent that the submission of contemporaneously recorded time sheets is the preferred practice.

Kelly v. Realpage Inc., 47 F.4th 202 (3d Cir. 2022)

Third Circuit clarifies courts should not deny certification on ascertainability grounds based simply on the volume of records to be reviewed.

Plaintiffs brought a putative class action against Realpage – a consumer reporting agency – for violations of the Fair Credit Reporting Act (FCRA) after their rental applications were denied due to false information in their consumer reports. The district court found plaintiffs failed to establish superiority and predominance due to individual questions regarding whether putative class members directly requested their files or reports. The district court also concluded that the class was not ascertainable because determining who was in the class would require a review of each individual file, which was not "administratively feasible." The Third Circuit reversed.

As to predominance and superiority, the panel observed that it had never addressed whether Section 1681g(a)'s disclosure obligations could be triggered by an indirect request from a third-party for a "report." After analyzing the text, context and structure of FCRA, the panel agreed with the district court that Section 1681g's disclosure obligation was triggered only by a direct request, not an indirect request. The panel came to a different conclusion with respect to requests for a "file," which could be requested indirectly. Nevertheless, because the evidence demonstrated that Realpage did not distinguish between requests for "files" and "reports," no individualized inquiry was necessary, and predominance was satisfied.

The Third Circuit also reversed the ascertainability ruling. The panel analyzed recent precedent and observed that "a straightforward 'yes-or-no' review of existing records to identify class members is administratively feasible even if it requires review of individual records with cross-referencing of voluminous data from multiple sources." The panel found the volume of records that needs to be reviewed is not a valid objection to ascertainability, reasoning that "[t]o hold otherwise would be to categorically preclude class actions where defendants purportedly harmed too many people."

Duncan v. Governor of the Virgin Islands, 48 F.4th 195 (3d Cir. 2022)

Third Circuit clarifies the type of evidence needed to establish adequacy of representation.

Plaintiff brought a putative class action against high-ranking officials of the Virgin Islands, challenging the practice of delaying tax refunds for most taxpayers but expediting refunds for others. During the lawsuit, the Territory sent plaintiff a refund check, but plaintiff challenged the amount. The district court held that receipt of the refund check called into question plaintiff's standing, denied class certification because plaintiff's claims were now atypical of putative class members, and rendered plaintiff an inadequate class representative. The Third Circuit accepted plaintiff's interlocutory appeal and reversed.

Initially, the panel found plaintiff had a justiciable claim notwithstanding her receipt of a refund check. Plaintiff's claim was not moot because the refund check was not in the amount plaintiff claimed she was owed, rendering it a "partial remedy." Even if the check was in the amount plaintiff claimed she was owed, the panel found the "picking-off exception" to mootness would apply. Because plaintiff had a "small claim

for cash" and moved for class certification weeks after filing her complaint, plaintiff's claims would relate back to the date she filed her complaint – before she received the refund check.

The panel also reversed the district court's finding on adequacy of representation, that plaintiff had not put forth any evidence that intra-class conflicts were lacking. The panel stated it had not found any authority requiring such evidence, and case law supported the discretion of a district court to find adequacy of representation without such evidence. To satisfy her burden, a plaintiff need not present the type of evidence one might expect on summary judgment. Rather, the class definition, the factual allegations in the complaint, and the relief sought are "highly indicative" of whether the putative class representative is adequate. The panel disclaimed that it was reverting to a pleading standard, stating that the court also should review any documents or evidence that questions a plaintiff's allegations. The panel remanded for further consideration.

Fourth Circuit

Jonathan R. v. Justice, 41 F.4th 316 (4th Cir. 2022)

Fourth Circuit considers mootness and abstention in challenge to West Virginia's child welfare system.

Plaintiffs filed a putative class action on behalf of thousands of foster children in West Virginia, challenging the state's administration of the child welfare system. The district court abstained from hearing the case in deference to parallel state court proceedings, reasoning that federal intervention would undermine notions of comity and federalism and reflect negatively on the state court's ability to enforce constitutional principles. The Fourth Circuit reversed.

The panel initially addressed justiciability. Since the filing of the complaint, no plaintiff was part of the class or subclasses because the named plaintiffs all had aged out or had been adopted. The panel rejected plaintiff's argument that the "capable of repetition yet evading review" exception applied because there was a 7.5% chance the adopted children would return to the system. But the panel accepted plaintiff's argument that the class-action-specific "relation back" exception to mootness applied because the claims became moot before the district court had an opportunity to certify the class, and other class members would continue to be subject to the challenged conduct.

The Fourth Circuit also reversed the district court's abstention ruling. The panel reasoned that plaintiffs did not seek to pause or end any state administrative proceedings. Rather, they asked the federal court to bring the child welfare system into compliance with federal law. While the federal court may find a violation where the state court did not, res judicata principles would apply to such a situation. Thus, *Younger* abstention was not implicated.

Fifth Circuit

Perez v. McCreary, Veselka, Bragg & Allen, P.C., 45 F.4th 816 (5th Cir. 2022)

Fifth Circuit vacates class-certification order *sua sponte* for lack of Article III standing.

Plaintiff sued a law firm that specializes in debt collection for local governments in Texas, claiming the law firm violated the Fair Debt Collection Practices Act (FDCPA) by trying to collect a debt for which the statute of limitations had run. Plaintiff also asked to certify a state class of individuals who received the

same form letter. The district court certified the class, and defendant appealed the certification ruling under Rule 23(f).

On appeal, the Fifth Circuit considered plaintiff's standing *sua sponte* and found that plaintiff lacked standing. The court began with the requirement that every plaintiff have a concrete injury-in-fact. Applying the Supreme Court's *TransUnion* decision, the court considered whether plaintiff's alleged injury had a "close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." Under this consideration, the Fifth Circuit concluded that plaintiff had failed to make such a connection. Plaintiff alleged her injury from defendant's conduct took the form of a statutory violation alone, a material risk of financial harm, confusion, a waste of time, and an intrusion upon seclusion. But the court rejected each of these arguments, explaining that "Congress *didn't* elevate the receipt of a single, unwanted message to the status of a legally cognizable injury in the FDCPA." Rather, Congress was concerned with "economic harms that consumers suffered due to aggressive and unfair attempts to collect their debts," and plaintiff had not alleged any such injury here. The Fifth Circuit thus vacated the district court's class certification order and remanded the case for dismissal.

Sixth Circuit

Askew v. Inter-Cont'l Hotels Corp., No. 5:19-cv-24-BJB, 2022 U.S. Dist. LEXIS 140459 (W.D. Ky. Aug. 8, 2022)

District court rules Fair Labor Standards Act not an "applicable federal statute" that limits a party's ability to dismiss an action under Rule 41(a)(1)(A)(ii).

A group of tip-earning bartenders sued restaurant operators in a Fair Labor Standards Act (FLSA) collective action. The district court conditionally certified the class, and after plaintiffs' counsel notified putative class members, 14 people opted in. The named plaintiffs then filed stipulations of dismissal. One of the stipulations voluntarily dismissed six of the opt-in plaintiffs because "they were not employed in a tipped employee capacity and paid at or above minimum wage"; the other was a notice of dismissal with prejudice and without explanation.

The district court considered whether it was required to approve the stipulations of dismissal. Federal Rule of Civil Procedure 41(a)(1)(A)(ii) allows a plaintiff, subject to "any applicable federal statute," to "dismiss an action without a court order by filing . . . a stipulation of dismissal signed by all parties who have appeared." The court thus considered whether the FLSA is an "applicable federal statute" that requires judicial approval before dismissal. Considering the advisory notes to Rule 41, along with the statutory text, the court ruled that the FLSA is not such a statute. This decision, the court recognized, follows a decision reached by the Fifth Circuit but conflicts with decisions from the Second and Eleventh Circuits, and at least one other district court, on this same issue. The court considered the rationale of these contrary opinions but determined it was bound by the FLSA's language. The court stated, "If Congress, presumably out of concern over the adequacy of plaintiffs' representation, wishes to limit the voluntariness of a dismissal, it knows how to do so."

Seventh Circuit

Johnson v. Diakon Logistics, Inc., 44 F.4th 1048 (7th Cir. 2022)

Seventh Circuit rules that choice-of-law provides does not govern action for wages under Illinois Wage Payment and Collection Act.

This appeal arose from the district court's grant of summary judgment. The court had granted class certification, but on summary judgment determined that contractual choice-of-law provisions opting for Virginia law applied. Applying Virginia law, the court found that plaintiffs were independent contractors, and the Illinois Wage Payment and Collection Act (IWPCA) did not govern.

The Seventh Circuit, however, noted that courts in Illinois generally disregard language in the contract classifying workers as independent contractors versus employees and instead rely on the definition included in the IWPCA itself. Similarly, Illinois law would not honor the choice-of-law provision for determining a worker's rights under the IWPCA. Based on this, the Seventh Circuit reversed summary judgment and remanded for further proceedings finding that the worker's contract did not apply to a claim under the IWPCA.

Flynn v. FCA US LLC, 39 F.4th 946 (7th Cir. 2022)

Seventh Circuit affirms trial court rulings dismissing class action based on "price premium" theory for lack of subject matter jurisdiction.

Plaintiffs brought claims on behalf of every consumer who had purchased or leased a Chrysler vehicle with a uConnect infotainment system from 2013-2015, alleging a security risk that could potentially allow a hacker to take control of the vehicle. Defendant unsuccessfully challenged plaintiffs' standing at the motion to dismiss stage, when the court found injury based on allegations that plaintiffs paid more for the vehicles than they would have if they had known about the vulnerability. Ultimately, classes in Illinois, Michigan, and Missouri were certified.

Following discovery, defendant brought another motion to dismiss for lack of subject matter jurisdiction raising a factual challenge: that plaintiffs had no competent evidence to support their "price premium" theory. Responding to the dismissal motion, plaintiffs failed to cite any evidence supporting their overpayment theory. On that basis, the district court found that plaintiffs lacked standing and dismissed.

On appeal, Plaintiffs cited evidence in their expert reports, but the Seventh Circuit noted that plaintiffs raised this evidence for the first time on appeal. Because plaintiffs failed to cite any evidence supporting their alleged injury, the Seventh Circuit affirmed the district court's decision and found the case was properly dismissed for lack of subject-matter jurisdiction.

Koehler v. Infosys Technologies Limited Inc., No. 13-cv-885-pp, 2022 U.S. Dist. LEXIS 165646 (E.D. Wis. 2022)

District Court holds it must conduct a full *Daubert* analysis of expert opinions before deciding motions for class certification or summary judgment.

Plaintiffs claimed that defendant made adverse hiring or employment decisions based on their Caucasian race and their American national origin. Plaintiffs sought to represent classes of individuals who were not

of South Asian race or Indian national origin who: (a) sought a position with defendant but were not hired; (b) were employed by defendant for at least 18 months and were not promoted; and (c) were employed by defendant and were terminated. In both their motion for partial summary judgment and their motion for class certification, plaintiffs attached and relied on an expert report.

The court found that, when a party relies on an expert report in a motion for class certification or a motion for summary judgment, the court must conduct a full *Daubert* analysis of that expert's qualifications and opinions. The court then engaged in such a *Daubert* analysis and found plaintiffs' expert was not qualified to analyze the data and categorize individuals as of South Asian race or Indian national origin on the basis of name recognition and that his methodology for identifying the race and national origin of incumbent employees and applicants was unreliable. On this basis, the court granted defendants' motion to exclude plaintiffs' expert. Because plaintiffs' motion for partial summary judgment and motion for class certification were based upon their expert's analysis, the court denied both motions.

Eighth Circuit

Fochtman v. Hendren Plastics, Inc., 47 F.4th 638 (8th Cir., Aug. 25, 2022)

Eighth Circuit rules district court retains jurisdiction under Class Action Fairness Act after severing claims.

Plaintiffs were participants in a drug and alcohol recovery program, who could avoid imprisonment by participating in the program. As part of the program, plaintiffs were provided with room and board, clothing, and other necessities and were not charged a fee for their participation. The program also required plaintiffs to work for local for-profit businesses to build work ethic. Rather than compensating plaintiffs for the work, the businesses provided funds to the program for each hour plaintiffs worked, which were the program's only source of revenue. After not receiving compensation, plaintiffs filed a class action against two recovery programs and two participating local for-profit businesses for failure to pay minimum wage.

Because plaintiffs alleged only state-law wage and hour claims, the suit was originally filed in Arkansas state court. A local business removed to federal court under the Class Action Fairness Act (CAFA). The district court ultimately severed the claims against two of the four defendants and ordered plaintiffs to file an amended complaint addressing only those claims against one recovery program and one local business. The district court then ruled in plaintiffs' favor on summary judgment, and defendants appealed.

On appeal, defendants challenged the district court's subject matter jurisdiction, arguing the amount-in-controversy requirement under CAFA could not be met after the district court severed the claims against two of the defendants. The Eighth Circuit rejected this argument because "'jurisdiction is determined at the time of removal, even though subsequent events may remove from the case the facts on which jurisdiction was predicated.'" Jurisdiction did not need to be reestablished for each action following the severance.

Ninth Circuit

Ramos v. TDB Communications, Inc., et al., No. 2:22-cv-00479-KJM-CKD, 2022 U.S. Dist. LEXIS 130446 (E.D. Cal. July 22, 2022)

In assessing CAFA's $5 million in controversy requirement, attorneys' fees must be proven with summary judgment-type evidence.

Defendant removed this class action to federal court, arguing the district court had jurisdiction under CAFA. In estimating the amount of attorneys' fees at stake, defendant argued that "attorneys' fees will be 25 percent of plaintiff's potential damages" because "this [c]ourt has previously found this precise figure permissible in the context of evaluating CAFA jurisdiction." The court found the showing insufficient, ruling that the evidentiary burden of proving attorneys' fees for purposes of showing the amount in controversy must meet a "preponderance of the evidence" standard and must be shown using "summary-judgment-type evidence." Parties could not simply state that "the [c]ourt has done this before."

Rogers v. Lyft, Inc., No. A160182, 2022 Cal. App. Unpub. LEXIS 4522 (Cal. App. July 21, 2022)

Request for injunctive relief rendered moot by Proposition 22, passed while appeal was pending, and court declines to allow plaintiffs to maintain appeal of a moot preliminary public injunction by asserting claims for ancillary restitution.

Plaintiffs brought a class action against defendant for allegedly misclassifying them as independent contractors. The trial court compelled arbitration of a claim for injunctive relief and denied plaintiffs' application for an emergency preliminary injunction. Plaintiffs appealed both orders, but while the appeal was pending, California passed Proposition 22, which generally classified app-based drivers as independent contractors. Plaintiffs argued that 1) notwithstanding Proposition 22, an actual controversy remained because they would have been entitled to incidental relief (paid sick leave during COVID-19) and attorneys' fees had the injunction been granted, and 2) the injunction sought public injunctive relief, which is not subject to arbitration. The court dismissed the appeal, rejecting both arguments. First, the court held that orders compelling arbitration are non-appealable, and the action did not fall within two existing exceptions to that rule. Second, the court held that Proposition 22 rendered any claim for injunctive relief moot, and "no California case holds that plaintiffs can maintain an appeal from the denial of a moot preliminary public injunction by asserting claims for 'ancillary restitution.'" The court also declined to exercise its discretionary authority to decide moot issues involving, for instance, a matter of continuing public interest that is likely to recur.

Turman v. Parent, Jr., No. G060330, 2022 Cal. App. Unpub. LEXIS 4236 (Cal. App. July 6, 2022)

Trial court not required to explain its reasoning for reducing attorneys' fees or enhancement awards or rejecting *cy pres* designations in class action settlements.

The trial court preliminarily approved the parties' class action settlement that provided for a non-reversionary settlement payment totaling $2.2 million, including $1,040,000 in attorneys' fees and $100,000 in enhancement awards. The agreement also provided that unclaimed settlement payments would be allocated to a designated *cy pres* recipient. The trial court's final order provided for a reduced attorneys' fee award in the amount of $880,000 and reduced enhancements to $55,500. The final order

did not approve the designated *cy pres* recipient and instead tendered unclaimed payments to the State Controller's Office under the Unclaimed Property Law. Plaintiffs appealed, arguing the trial court abused its discretion by reducing the awards and rejecting the proposed *cy pres* recipient. The Court of Appeal affirmed, holding that the trial court was not required to explain 1) its reduction of the fee awards because there was no analogue to Code of Civil Procedure section 632 (requiring courts to explain reasoning in a statement of a decision) in the attorneys' fee context; or 2) its reasoning for not approving the *cy pres* provision because "trial courts should have the full range of alternatives at their disposal" when selecting the appropriate method for fluid recovery in any case.

Eleventh Circuit

Drazen v. Pinto, 41 F.4th 1354 (11th Cir. 2022)

Eleventh Circuit vacates approval of class action settlement, holding that approval of class certification and settlement pursuant to Rule 23(e) requires that every member of the class have Article III standing.

Plaintiff sued in the Southern District of Alabama, asserting Godaddy.com violated the Telephone Consumer Protection Act (TCPA) by calling and texting plaintiff through a prohibited automatic telephone dialing system. The initial case was consolidated with two cases filed in the District of Arizona, one by Jason Bennett and the other by John Herrick. The three class representatives purported to represent a class of "persons within the United States who received a call or text message to his or her cellular telephone from Defendant . . . ." Plaintiff Herrick had received a single text message from defendant.

The parties proposed a settlement, making available $35 million for the class and its counsel. The district court, after review, held that class representative Herrick must be excluded from the class definition under the Eleventh Circuit's 2019 holding in *Salcedo v. Hanna*: "receipt of a single unwanted text message was not a sufficiently concrete injury to give rise to Article III standing." The district court also concluded that, as to "absent class members" that may have received only one text message, they comprised only seven percent of the class and thus the class could be certified, and the settlement approved. The district court noted that, while the "absent class members" had no claim in the Eleventh Circuit, they did have such a claim in their respective circuits and thus would remain a member of the settlement class. A putative class member objected to the settlement raising issues about the notice and violations of the Class Action Fairness Act (CAFA).

On appeal, the Eleventh Circuit first reviewed whether it had subject matter jurisdiction, holding that "the class definition does not meet Article III standing requirements . . . and remand[ed] to give the parties an opportunity to revise the class definition." The court also examined whether a trial court could approve a class settlement where only some of the class members had standing, concluding that, under *TransUnion LLC v. Ramirez*, "[t]o recover individual damages, all plaintiffs within the class definition must have standing." Rejecting the district court's rationale, the court held that "when a class seeks certification for the sole purpose of a damages settlement under Rule 23(e), the class definition must be limited to those individuals who have Article III standing." Every member of a class must have Article III standing in order for the class to be certified for settlement purposes under 23(e).

The Eleventh Circuit did leave unanswered one question under the TCPA: whether, consistent with Eleventh Circuit precedent, the receipt of a single cellphone call is sufficient to establish Article III standing. The court left the issue open for subsequent briefing after remand.

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