

Class Action Litigation Newsletter | 4th Quarter 2022



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

Highlights from this issue include:

- First Circuit vacates class settlement based on differences in class members' claims.
- Second Circuit reverses class certification because district court determined predominance was satisfied without analyzing affirmative defenses.
- Fifth Circuit concludes fraud plaintiffs lacked Article III standing.
- Seventh Circuit rules district court must consider Rule 23(c)(4) issue class certification.
- Eastern District of California denies motion for absent class member discovery.

First Circuit

Murray v. Grocery Delivery E-Services USA, Inc., 55 F.4th 340 (1st Cir. Dec. 16, 2022)

First Circuit upholds objection to adequacy of class settlement based on differences in class members' claims.

This appeal arose from a proposed class settlement in an action brought against a food subscription service that allegedly violated the Telephone Consumer Protection Act (TCPA). The named plaintiffs brought three separate claims: (1) using an “automatic telephone dialing system” to make marketing calls, (2) calling people listed on the National Do Not Call (“DNC”) registry, and (3) calling people who had requested the defendant to stop calling and, thus, were or should have been on the defendant’s internal “DNC” registry.

The parties entered into a mediated settlement with the named plaintiff’s counsel acting on behalf of all putative class members possessing one or more of the three potential claims. The district court preliminarily approved the \$14 million settlement. Class notice was sent to 4.4 million class members, with approximately 100,000 submitting valid claims and 270 opting out of the settlement. Each class member who submitted a valid claim form was to receive approximately \$100, less counsel fees and costs.

Three individuals objected because (i) the settlement was too small compared to the potential statutory damages of over \$2.4 billion, and (ii) no lawyer or group of lawyers could adequately negotiate a settlement on behalf of three subgroups having materially different claims. The First Circuit assessed whether the class representatives and class counsel adequately represented the class, whether the settlement was negotiated at arm’s length, and whether the relief provided was adequate and treated class members equitably relative to each other. The First Circuit found significant differences between the claims of the various class members. And because the First Circuit could not conclude that the relative value of those claims was “sufficiently clear-cut so as to enable a court to approve a proposed apportionment of a common fund[,]” the court vacated the approval order.

Second Circuit

Haley v. Teachers Ins. & Annuity Ass’n of America, 54 F.4th 115 (2d Cir. Dec. 1, 2022)

Court of Appeals vacates decision granting class certification, reiterating the need to consider all applicable affirmative defenses in evaluating predominance.

Plaintiff participated in a defined contribution savings retirement plan offered by Washington University in St. Louis (WashU). Participants were able to take out either non-collateralized or collateralized loans by borrowing against their retirement savings without incurring a taxable event, and WashU engaged outside “service providers,” including Teachers Insurance and Annuity Association of America (TIAA) and Vanguard, to facilitate these loans.

Plaintiff’s lawsuit alleged that the collateralized loans TIAA offered violated ERISA’s “prohibited transactions” rules. Plaintiff also sought to hold TIAA liable as a non-fiduciary for its knowing participation in the alleged violations. The district court held that TIAA was not an ERISA fiduciary but allowed the claims to proceed against TIAA as a non-fiduciary.

Plaintiff then moved for class certification, which the district court granted. In its decision, the court did not make any findings about the purported variations among loans and did not address the exemptions to ERISA's statutory prohibitions.

TIAA filed an interlocutory appeal challenging class certification. The Second Circuit ruled that class certification was not appropriate, finding that “[b]ecause the district court determined that predominance was satisfied without analyzing the § 408 exemptions or TIAA’s claimed variations among the loans,” the decision must be vacated.

The Second Circuit reiterated that “[a]ffirmative defenses do not carry ‘less weight’ on the class certification issue simply because the defendant will bear the burden of proof at the merits stage.”

Fourth Circuit

Dewalt v. Hooks, 879 S.E.2d 179 (N.C. 2022)

North Carolina Supreme Court finds that putative class of prisoners lacks common proof regarding conditions of solitary confinement.

Inmates in the custody of the North Carolina Department of Public Safety (DPS) filed a putative class action alleging that DPS’s solitary confinement practices violated the state constitution. The trial court determined that the four studies plaintiffs relied on to link DPS’s solitary confinement practices to a risk of physical harm were insufficient to establish such a link by common proof. The North Carolina Supreme Court agreed, finding that the studies failed to establish that causation could be resolved “in one stroke” because they described conditions different than those experienced by putative class members.

The Supreme Court also reviewed the other evidence plaintiffs submitted, namely DPS’s solitary confinement policies. Yet the Court determined that the policies could not show causation because there was evidence that these policies were not uniformly applied.

Because “the fundamental distinctions and individual issues identified by the trial court are material and far from collateral,” the court found that the trial court did not abuse its discretion in denying class certification.

Access Funding, LLC v. Linton, 2022 Md. LEXIS 497 (Md. Dec. 1, 2022)

Maryland Court of Appeals determines that court – not arbitrator – properly determines whether arbitration agreement procured by fraud.

Plaintiffs were beneficiaries of structured settlements who filed a putative class action for fraud against factoring companies who bought certain annuity payments. After the Court of Appeals of Maryland rejected the proposed class action settlement in 2020, defendants filed a motion to compel arbitration on an individual basis.

The trial court granted the motion, finding that (1) arbitrability must be decided by the arbitrator given the delegation clause, (2) defendants had standing to enforce the arbitration clause, and (3) defendants had not waived their right to compel arbitration. The Court of Special Appeals reversed, finding that the court, not the arbitrator, must decide plaintiffs’ challenge to the validity of the arbitration agreement.

The Court of Special Appeals affirmed that ruling, finding that the complaint alleged that the arbitration agreement itself – not just the contract – was procured by fraud. Thus, the validity question was for the court. In addition, the arbitration agreement expressly conditioned arbitration on the closure of underlying transactions, and plaintiffs’ challenge to the validity of the underlying transaction also was a challenge to the existence of an arbitration agreement, which must be determined by the court.

Fifth Circuit

Earl v. Boeing Co., 53 F.4th 897 (5th Cir.)

Fifth Circuit dismisses fraud suit against Boeing and Southwest Airlines for lack of Article III standing.

Plaintiffs alleged that Boeing and Southwest Airlines defrauded them by concealing a serious safety defect in the Boeing 737 MAX 8 aircraft that caused two fatal crashes. Plaintiffs asserted they “were harmed and suffered actual damages” because the ticket prices they paid “were significantly higher than the value of those tickets, which for many, if not most, passengers was zero.” The defendants moved to dismiss, arguing among other things, that plaintiffs lacked Article III standing. The district court held that, although plaintiffs had not suffered physical injury, they had suffered an economic injury sufficient to support standing by having been overcharged for tickets they likely would not have bought had they known of the MAX 8’s safety issues.

On appeal, the Fifth Circuit rejected plaintiffs’ theory of injury. Plaintiffs’ theory rested on two inferences: (1) plaintiffs assumed that if there were widespread public knowledge of the defect during the class period, the airlines would have continued to offer flights on the MAX 8 but with a price discount to compensate for the heightened risk that passengers would die; and (2) plaintiffs assumed the Federal Aviation Administration (FAA) would have permitted airlines to fly the MAX 8 even with full knowledge of the defect. The Fifth Circuit reasoned that plaintiffs’ inferences were unsupported. The airlines likely would have not offered flights using the MAX 8 until the airlines fixed them, thereby increasing overall ticket prices. And after the defect became public knowledge, the FAA grounded the MAX 8.

Seventh Circuit

Bennett v. Dart, 53 F.4th 419 (7th Cir. 2022)

Seventh Circuit rules district courts must consider issue class certification when appropriate.

The district court initially denied class certification of a class of disabled inmates who sought class certification for Cook County’s purported violations of the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA). The plaintiffs successfully appealed. On remand, the district court granted class certification, but – several years later – decertified the class because some inmates who would have fallen into the class definition might not have been “disabled” within the meaning of the ADA and the RA, and these differences would make the case “too complex” to proceed as a class action.

The plaintiffs sought interlocutory review with the Seventh Circuit. Citing Federal Rule of Civil Procedure 23(c)(4), which permits an action to be maintained as a class action for particular issues, the Seventh Circuit reversed. On the initial appeal, the Seventh Circuit had identified one such issue that could be

resolved on a class-wide basis. But the district court did not address Rule 23(c)(4) or the single issue the Seventh Circuit noted was fit for class resolution.

Page v. Alliant Credit Union, 52 F.4th 340 (7th Cir. 2022)

Seventh Circuit rejects home-state exception argument under CAFA.

Plaintiff filed a putative class action against defendant for allegedly charging fees in violation of an agreement between them. Following motion practice on the pleadings, the district court dismissed the case with prejudice. On appeal, the plaintiff sought revival of the breach of contract claim.

In assessing whether it had jurisdiction, the Seventh Circuit connected the plaintiff's state-law claim with the Class Action Fairness Act (CAFA), which was the only basis on which the court could retain jurisdiction. The Seventh Circuit noted that the case met the general requirements of CAFA as implicating a controversy that exceeds \$5 million and involving members of the class who are diverse. But the court also considered the home-state exception, which defeats CAFA jurisdiction if two-thirds of members of the proposed class and the primary defendants are citizens of the same state. Because the record did not contain sufficient evidence, the court requested supplemental briefing on the issue. The Seventh Circuit ultimately determined that the home-state exception did not apply because over 80% of the defendant's customers resided outside Illinois.

Johnson v. Mitek Sys., 55 F.4th 1122 (7th Cir. Dec. 21, 2022)

Seventh Circuit denies arbitration for Illinois Biometric Privacy Act closed action.

Plaintiff filed a state-court class action based on alleged violations of the Illinois Biometric Privacy Act. One defendant removed under the Class Action Fairness Act and, based on an arbitration clause in an agreement between plaintiff and another defendant, asked the district court to send the case to arbitration. The district court declined.

The Seventh Circuit affirmed. The arbitration clause stated that it applied to a dispute with the defendant-company and "any subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns, as well as all authorized or unauthorized users or beneficiaries of services or goods provided under the Agreement." Because the other defendant did not satisfy any of these categories – including that it was not a user or beneficiary of any services or goods – the Seventh Circuit determined that arbitration was inappropriate. Although "[c]ourts cannot disfavor arbitration," they also may not "jigger the rules to promote arbitration."

Eighth Circuit

Altice USA, Inc. v. City of Gurdon ex rel. Kelley, 2022 Ark. 199 (2022)

Affirming class certification, Arkansas Supreme Court holds there is no right to interlocutory appeal regarding a motion to compel arbitration where there was no order denying arbitration.

Altice USA appealed from the circuit court's class certification decision arguing the circuit court erred by (1) failing to resolve its motion to compel arbitration before ruling on class certification and (2) certifying the class. Altice USA relied on a statutory requirement that the circuit court "shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final

decision....” Ark. Code. Ann. § 16-108-207(f). The Arkansas Supreme Court, however, noted that this issue was not appealable because only orders denying motions to compel arbitration are eligible for interlocutory appeal.

The Arkansas Supreme Court addressed the order granting class certification under an abuse of discretion standard, holding that, because Gurdon sought declaratory judgment on a series of issues common to the class, it had satisfied the requirement of commonality. The only issue unique to class members was the amount of the alleged charges, which was insufficient to undermine predominance. Finally, the Arkansas Supreme Court held that resolving the issues on a class-wide basis was superior as Altice USA could have all of the claims against it resolved in one ruling.

Ninth Circuit

Kang v. Credit Bureau Connection, Inc., Case No. 1:18-cv-01359-AWI-SKO, 2022 U.S. Dist. LEXIS 201837 (E.D. Cal. Nov. 6, 2022)

Court denies motion for class member discovery.

Defendant sells credit reports that automobile dealers use to manage compliance obligations, including under the Treasury Department Office of Foreign Assets Control (OFAC) regulation that prohibits dealers from doing business with anyone designated as a “Specially Designated National” on OFAC’s list. Individuals on that list consist of persons affiliated with targeted countries, along with people like drug traffickers. Plaintiff was identified as a person on the list, allegedly in error, and the dealer denied his credit application. He brought a class action under various state and federal laws and, following certification, defendant filed a motion seeking permission to serve five interrogatories on approximately 1,194 class members, focusing on a statute of limitations defense and punitive damage.

The court noted that discovery of absent class members generally is disfavored, but that the Ninth Circuit allows discretion, without elaborating on what those circumstances would be. But the court denied the motion, finding that defendant had not established necessity for the discovery because limitations and damages involve only some, not predominating, individualized issues, which more properly could be handled later in the proceedings. The court also reasoned that the proposed discovery likely would serve to decrease the size of the class by eliminating claims and chill participation in the class action process.

Horti v. Nestle Healthcare Nutrition, Inc., Case No. 21-cv-09812-PJH, 2022 U.S. Dist. LEXIS 202479 (N.D. Cal. November 7, 2022)

Court dismisses claims that packaging is deceptive because it did not mislead reasonable consumers by implying that the products control glucose.

Defendant sells Boost Glucose Control and Glucose Control High Protein drinks in packaging stating that the products “help manage blood sugar” and are “designed for people with diabetes.” Plaintiffs filed a putative class action alleging claims under the UCL, FAL, and CLRA, and an equivalent New York statute based on the contention that defendant’s packaging implies that the products control glucose.

The court granted defendant’s motion to dismiss holding that, although the issue of whether a reasonable consumer would be deceived is usually a question of fact, the labels on the Boost products describe them as “balanced nutritional drinks” and disclose the number of carbohydrates and grams of sugar each drink contains in large print on the front of the label. The court found these statements demonstrate to

reasonable consumers that the products are a food that would necessarily impact glucose levels. The court found this was particularly true for the targeted consumer group, persons with diabetes or prediabetes, who are aware of the relation between consuming sugar and blood glucose levels. The court also found that allegations about the context in which the products are sold – among diabetes medicines and supplies on retail store shelves, not among bread and cereal – did not save plaintiffs’ claims, because third-party retailers’ placement of products cannot be used to justify a claim of deception unless plaintiff can plausibly allege that defendant controls third parties that stock grocery stores and other locations.

Barnett v. Concentrix Solutions Corp., Case No. CV-22-00266-PHX-DJH, 2022 U.S. Dist. LEXIS 220670 (D. Ariz. Dec. 7, 2022)

Court holds that FLSA class action waivers are enforceable outside of the arbitration context, and that a provision shortening the applicable statute of limitation is substantively unconscionable but severable.

Plaintiffs filed a putative class action against defendant, alleging claims under the FLSA and Arizona labor statutes based on the contention that defendant failed to pay regular and overtime wages, as well as paid sick time and factored incentive pay.

Defendant moved to dismiss on the ground that plaintiffs’ employment applications included FLSA class action waiver provisions (but did not also contain arbitration clauses). The court noted that the Ninth Circuit had not addressed the issue of whether FLSA class action waivers were unenforceable outside the arbitration context. But the court noted that a majority of circuits, including the Second, Third, Fourth, Fifth, Eighth, and Eleventh Circuits and district courts in the Ninth Circuit in California, had approved enforcement of such class action waivers despite the absence of an arbitration provision. The court also found the language of the waiver at issue to be procedurally conscionable because it was set out in clear terms in bold text. Yet the court found a provision shortening the applicable statute of limitations unconscionable, but severable, so the court granted defendant’s motion.

In re Ethereummax Invest. Litig., Case No. CV 22-00163-MWF (SKx), 2022 U.S. Dist. LEXIS 220968 (C.D. Cal. Dec. 6, 2022)

Court grants motion to dismiss claim based on celebrity endorsements of digital tokens.

EthereumMax is a cryptocurrency project centered around EthereumMax tokens, a blockchain-based digital asset. Plaintiffs allege that celebrity defendants endorsed EthereumMax through various social media posts and incentive programs. Plaintiffs alleged that these defendants as well as certain EthereumMax executives made purportedly false and misleading statements to pump up the trading volume and price of the tokens at issue to provide exit liquidity for defendants. Based on this allegation, plaintiffs alleged claims under the California Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumer Legal Remedies Act (CLRA), as well as for common law aiding and abetting and violation of other states’ consumer protection laws, and a federal Racketeer Influenced and Corrupt Organizations Act (RICO) claim.

Defendants moved to dismiss. The court granted the motion in its entirety. As to the RICO claim, the court held that plaintiffs lacked standing because their injury was only disappointment over what their tokens were worth at present – not what they were worth when purchased. The court also found that plaintiffs did not allege a RICO enterprise because a celebrity’s self-interested alleged recklessness does not evince a common scheme or purpose sufficient to establish a RICO claim. Next, the court dismissed

plaintiffs' claims under the consumer protection laws of states in which they do not reside. Regarding the CLRA claim, the court disagreed with other courts that held that selling intangible goods for in-product game use amounts to a "service" under the CLRA, and held that the statute is inapplicable to the sale of intangible goods such as cryptocurrency. The court also granted defendants' motion to dismiss the UCL and FAL claims because plaintiffs did not allege facts showing they relied on statements purportedly made before they purchased their tokens. And finally, the court rejected plaintiffs' aiding and abetting and conspiracy claims because plaintiffs failed to allege that defendants had actual knowledge of the primary wrong at issue. The court did, however, grant plaintiffs leave to amend except as to the CLRA claim.

Tenth Circuit

Coe v. Cross-Lines Retirement Center, Inc., Case No. 22-2047-EFM, 2022 U.S. Dist. LEXIS 222752 (D. Kan. Dec. 9, 2022)

Court holds that Americans with Disabilities Act does not apply to residential apartment buildings; private nuisance actions unavailable to tenants against their landlord.

Plaintiffs, elderly residents of a private apartment complex, filed a putative class action against defendant landlord, alleging violation of the Americans with Disabilities Act (ADA) and for private nuisance, based on alleged substandard living conditions in the complex.

Defendant moved to dismiss. The court granted the motion, agreeing with decisions in the District of Utah holding that the ADA does not include a private residence, such as a residential home or apartment. Instead, the court held that the ADA regulates public accommodations, such as a day care center or senior citizen center. The court also found that the Kansas Supreme Court (and therefore also the district court) would likely agree with most courts holding that a private nuisance is unavailable to tenants against their landlord.

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Editors

Robert J. Herrington
Shareholder
+1 310.586.7816
Robert.Herrington@gtlaw.com

Stephen L. Saxl
Shareholder
+1 212.801.2184
saxls@gtlaw.com

Contributors

Christopher S. Dodrill
Shareholder
+1 214.665.3681
Christopher.Dodrill@gtlaw.com

Lisa M. Simonetti ‡
Shareholder
+1 310.586.7824
simonettl@gtlaw.com

Sylvia E. Simson
Shareholder
+1 212.801.9275
Sylvia.Simson@gtlaw.com

David G. Thomas
Shareholder
+1 617.310.6040
David.Thomas@gtlaw.com

Gregory A. Nylén
Of Counsel
+1 949.732.6504
nyleng@gtlaw.com

Aaron Van Nostrand
Of Counsel
+1 973.443.3557
Aaron.VanNostrand@gtlaw.com

Kara E. Angeletti
Associate
+1 312.456.1057
angelettik@gtlaw.com

Angela C. Bunnell
Associate
+1 617.310.5202
bunnella@gtlaw.com

Andrea N. Chidylo
Associate
+1 212.801.9207
chidyloa@gtlaw.com

Gregory Franklin
Associate
+1 214.665.3708
Gregory.Franklin@gtlaw.com

Brian D. Straw
Associate
+1 312.476.5113
Brian.Straw@gtlaw.com

‡ Admitted in California. Not admitted in New York.

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