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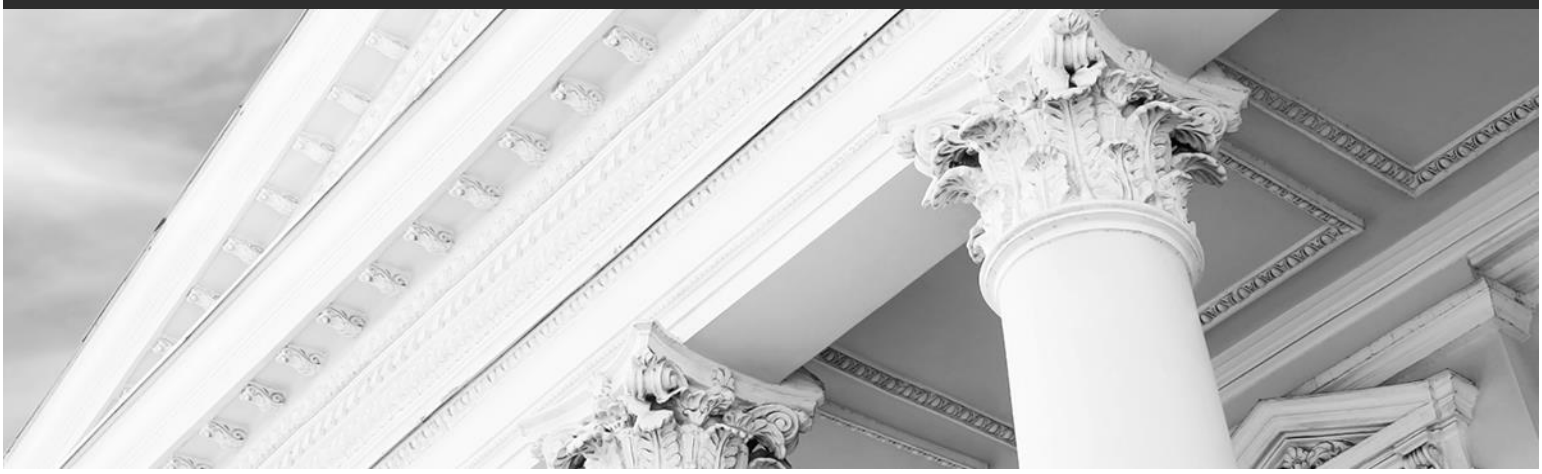

This GT Newsletter summarizes recent class-action decisions from across the United States.

Highlights from this issue include:

- Second Circuit directs reduction of excessive service award to class representatives.
- Third Circuit rules issue preclusion does not bind party who was absent class member at time of prior ruling in the MDL.
- Fifth Circuit affirms ruling granting motion to strike class allegations on predominance grounds at motion to dismiss stage.
- Illinois Supreme Court holds that Illinois Biometric Information Privacy Act claim accrues each time biometric information is collected or transmitted.
- Eighth Circuit rejects anti-removal presumption in CAFA jurisdictional dispute.
- Ninth Circuit reverses class certification where individualized issues generated by retailer discounts predominate over common issues.
- Federal Circuit vacates $185 million attorneys' fee award notwithstanding $3.7 billion class award.

First Circuit

Manoogian v. LoanCare, LLC, 22-CV-10487, 2023 U.S. Dist. LEXIS 47882 (D. Mass. Mar. 21, 2023)

Defendant not able to moot individual or putative class-action claims by sending check.

Plaintiff brought a putative class action alleging violations of the Telephone Consumer Protection Act (TCPA). Defendant sent plaintiff's counsel a check for $13,500, which plaintiff's counsel returned. Defendant moved to dismiss under Fed. R. Civ. P. 12(b)(1) and asserted that plaintiff's claims were moot because the $13,500 payment represented the plaintiff's maximum recovery under the TCPA. The district court denied the motion. First, the parties disputed the number of telephone calls made to plaintiff and, therefore, the payment made may not have been the total amount recoverable. Second, defendant did not provide all relief plaintiff requested in the complaint, i.e., class-wide statutory damages, injunctive, and declaratory relief. The court further noted that, even assuming plaintiff's individual claims had been mooted properly (*see South Orange Chiropractic Ctr., LLC v. Cayan LLC*, No. 15-13069-PBS, 2016 U.S. Dist. LEXIS 49067, at *4 (D. Mass. Apr. 12, 2016), the case could still proceed as a putative class action under Article III's "inherently transitory" exception.

Chechowitz v. Autofair, Inc., 102 Mass. App. Ct. 1107, 2023 Mass. App. Unpub. LEXIS 26 (Jan. 18, 2023)

Objectors to settlement lack standing to appeal under Massachusetts no opt-out class action procedure.

Appellants were objectors to a class action settlement approved by the Massachusetts Superior Court. Appellants had filed a similar putative class action in Superior Court but had agreed to arbitrate their claims with defendant. When the arbitrators stayed the arbitrations because the settlement would resolve appellants' arbitration claims, appellants moved to intervene prior to final approval of the proposed class-action settlement. The Superior Court denied the motion. The Superior Court then approved the settlement over appellants' objections. Appellants appealed the final order approving the settlement.

The Appeals Court ruled in favor of the appellee and affirmed the Superior Court's judgment approving the class-action settlement, extinguishing appellants' arbitration claims. In doing so, the Appeals Court questioned whether appellants had standing to appeal because, unlike its federal counterpart, Mass. R. Civ. P. 23 does not permit class members to opt out of a class action. Consequently, although appellants were members of the settlement class, they were not parties to the action because their motion to intervene was denied, and they did not appeal its denial. As explained by the Appeals Court, although an order denying intervention is ordinarily appealable, the nonparty "has no right to seek review of [other] rulings." Even if appellants had standing, the Appeals Court will only reverse a class-action settlement upon showing of an abuse of discretion by the Superior Court. Despite appellants' argument that their arbitration agreements bound defendant to arbitrate their claims, the Appeals Court deferred to the arbitrators' interpretation of the arbitration agreement as giving them the power to stay the arbitration pending the Superior Court's approval of the settlement. Further, the Appeals Court found that the Superior Court had not abused its discretion in determining that the settlement was in the best interests of the class.

Second Circuit

Fikes Wholesale, Inc v. Visa U.S.A., Inc., 62 F.4th 704) (2d Cir. 2023)

Second Circuit directs Eastern District of New York to reduce excessive service award to class representatives to the extent it includes time spent lobbying for issues that do not increase damages recovery for the class.

A putative class of over 12 million merchants brought an antitrust action under the Sherman Act against Visa U.S.A. Inc., MasterCard International Inc., and other banks that serve as payment-card issuers for those networks. Plaintiffs alleged that Visa and MasterCard purportedly enforced practices relating to payment cards that had a combined effect of injuring merchants by allowing the credit card companies to charge supercompetitive "interchange fees" on each payment card transaction. After years of litigation and negotiations, the parties agreed on a settlement of approximately $5.6 billion (reduced by $700 million to reflect opt-outs). After granting final approval of the agreement, the Eastern District of New York awarded Class Counsel 9.31% of the settlement fund in attorneys' fees—which was $523 million—and $39 million in expenses. Separately, the district court granted the eight lead plaintiffs $900,000 in service awards, in addition to out-of-pocket expenses; the highest award was $200,000. Appellants objected, arguing that the lower court erred when it certified the class, approved the settlement, granted the service awards, and computed attorneys' fees.

On appeal, the majority of the Second Circuit affirmed the district court's substantive decision but agreed that the service award must be reduced as excessive because it accounted for time spent working to obtain legislative reform for an injunctive class—no longer part of this case—and not for the damages class that the lead plaintiffs represented. In response to appellants' argument that the Supreme Court decision in *Trustees v. Greenough*, 105 U.S. 527 (1881) precluded granting service awards in this case "and in virtually all other cases," the court reasoned that "practice and usage seem to have superseded *Greenough* (if that is possible)" and "even if (as we think) practice and usage cannot undo a Supreme Court holding[,]" Second Circuit precedent not prohibiting service awards is what the court must follow. The Second Circuit noted that given that the basis for service awards in class actions is "at best dubious" under *Greenough*, appellants' point that the "class should not pay for time spent lobbying for changes in law that do not benefit the class" was "valid" and directed the district court to reduce the award "to the extent its size was increased because of time spent lobbying."

Judge Jacobs' concurrence notes that the $900,000 in service awards is $900,000 "more than permitted under Supreme Court authority," citing *Greenough*. Judge Leval wrote separately in his concurrence to address disputes between oil companies and their branded service stations over settlement funds.

Waite v. UMG Recordings, Inc., 19-cv-01091, 2023 U.S. Dist. LEXIS 14465 (S.D.N.Y. Jan. 27, 2023)

Southern District denied class certification on predominance grounds, as the "work made for hire" defense could not be resolved on common proof.

Plaintiffs are professional musicians who entered into recording agreements in the 1970s and 80s granting defendants' predecessors copyrights in plaintiffs' sound recordings. Plaintiffs served defendants written notices of termination to reacquire the copyrights in their sound recordings pursuant to Section 203 of the Copyright Act of 1976, which entitles an author of a work created on or after Jan. 1, 1978, to terminate or transfer a copyright after a certain amount of time. Plaintiffs then alleged that defendants

infringed on their copyrights by continuing to market and sell the recordings for which the effective dates of termination passed. Defendants challenged the effectiveness of plaintiffs' notices of termination, invoking the "work made for hire" defense and arguing that plaintiffs' works were "prepared by an employee within the scope of his or her employment" or a similar context such that all of plaintiffs' works fall within this Section 203 exception.

The court denied plaintiffs' class certification motion, holding that the predominance requirement was not satisfied. The court explained that defendants' "work-made-for-hire" defense requires a fact-intensive inquiry based on fact-based tests that could not be resolved on common proof. The court explained that the "predominance test is a qualitative, rather than quantitative, assessment" and requires the court "to give careful scrutiny to the relation between common and individual questions." Here, defendants' position that the work constituted work made for hire was "central to this lawsuit" because if the work was made for hire the artist's "copyright infringement claim is not legally viable" and the artist "does not have a termination right" pursuant to Section 203. The court also noted that other of defendants' arguments, such as the validity of the defendants' termination notices, also precluded a finding of predominance.

Bank v. Icot Holdings, 18-cv-02554, 2023 U.S. Dist. LEXIS 676 (E.D.N.Y. Jan. 1, 2023), report and recommendation adopted, 2023 U.S. Dist. LEXIS 41898 (E.D.N.Y. Mar. 10, 2023)

Report and recommendation denying class certification adopted where putative classes were unascertainable because the court would need to conduct "mini-hearings" based on fact-specific criteria to determine whether an individual would qualify as a class member.

Plaintiff brought this putative class action alleging violations of the TCPA and New York General Business Law (GBL) based on telephone calls he answered at his mother's home. At the time of these calls, his mother's phone number was on the National Do-Not-Call Registry for over 31 days, and the calls were made without "prior express written consent of any person who had the legal right to provide first consent." The calls were initiated by a media marketing company, Prospects DM, that was engaged in a hearing aid campaign for the defendants and received telephone numbers from various sources. When a call was answered, a live agent from Prospects DM played a "prerecorded snippet" intending to gauge the call recipient's interest in a hearing aid; based on the screening criteria the company then transferred the calls to defendants, who attempted to make a sale. In moving for class certification, plaintiff urged that membership of the proposed classes should be broad and should include "not only subscribers of the telephone numbers called" but also any "non-subscriber customary users" of the telephone numbers, such as himself, who are frequent users of a telephone number. He proposed using criteria such as the amount of time an individual uses the phone, whether he or she has authority to answer it, and how much time the individual spends in the subscriber's home, to determine whether an individual should be considered part of the proposed classes.

In recommending a denial of class certification, the magistrate judge explained that Rule 23(a) contains an "implied requirement of ascertainability" and that while the court does not need to "ascertain who is in the Proposed Classes at the class certification stage" "the exact membership of the class[es] must be ascertainable at some point in the case." Here, the court found that (1) plaintiff failed to propose a workable methodology for the class because the proposed classes did not only include the subscribers of the telephone numbers but also non-subscribers like plaintiff who "claim some other basis for joining the class" and (2) plaintiff's description of who could qualify as a class member "mudd[ied] the seemingly objective criteria by which membership in the classes can be determined" by adding a subjective element to a process that should only contain objective criteria. Plaintiff "suggested that it should be left to the

relevant individuals [in a household where multiple people have access to a landline] to determine who among them received the telephone call" but the magistrate judge recognized that this only would resolve who—from the household—collects the damages and not who should be named the class member. Because there was no way to identify who would qualify as a non-subscriber class member, and no records of who answered the calls at the addresses, there was no way to identify who would qualify as a non-subscriber class member. The court also highlighted the absence of objective criteria to determine the number of hours needed to be spent at the household or in use of the telephone, or the kind of permission that would suffice for someone to be permitted to join one of the proposed classes, and the "Court would be forced to conduct a mini-hearing for each potential class member to determine" whether that person could qualify. As such, the court would not certify the class.

Plaintiff filed a timely objection to the report and recommendation, but the district court adopted the report and recommendation in its entirety.

Third Circuit

Home Depot USA, Inc. v. Lafarge N. Am., Inc., 59 F.4th 55 (3d Cir. 2023)

Third Circuit finds issue preclusion does not apply to absent class member.

In a multidistrict litigation (MDL) concerning price fixing in the drywall industry, the Eastern District of Pennsylvania district court relied on law of the case and issue preclusion to exclude Home Depot's expert witness. The court found the expert's testimony contrary to prior decisions in the MDL and that Home Depot was bound by those prior decisions, including a summary judgment decision in a direct purchaser class action settled before Home Depot's action was consolidated in the MDL. Home Depot filed an interlocutory appeal, and the Third Circuit reversed.

The panel ruled that issue preclusion did not bind Home Depot because it was not a party to the putative class action at the time the summary judgment decision was rendered. At that time, Home Depot was an "absent class member" and was not a party to the case. Thus, Home Depot did not have a full and fair opportunity to litigate the issue. Although Home Depot later became a class member when it joined the settlement class, the summary judgment decision was not "actually litigated and decided" as part of the settlement. In sum, the panel held that pre-certification decisions can only bind the parties at the time and not absent class members who later become part of the certified class.

Fifth Circuit

Elson v. Black, 56 F.4th 1002 (5th Cir. 2023)

Fifth Circuit affirms district court's ruling granting a motion to strike class allegations on predominance grounds at motion to dismiss stage.

Consumers who bought a "FasciaBlaster" face massager from Ashley Black brought a putative nationwide class action against various related defendants for false and misleading claims. Seeking relief for alleged Magnuson-Moss Warranty Act violations under various state consumer-protection laws and unjust enrichment, plaintiffs alleged defendants falsely advertised that the product could "virtually eliminate cellulite," help with weight loss, and relieve pain. At the pleading stage, defendants moved to dismiss the complaint and to strike plaintiffs' class allegations under Rule 12(f). The Southern District of Texas granted the motion to strike and struck the class allegations for failure to demonstrate commonality and

predominance. After plaintiffs unsuccessfully sought interlocutory appeal of that ruling, the district court granted the motion to dismiss and dismissed the complaint. Plaintiffs appealed.

The Fifth Circuit affirmed the district court's decision to strike plaintiffs' class allegations, explaining that "[d]istrict courts are permitted to make such determinations on the pleadings and before discovery is complete when it is apparent from the complaint that a class action cannot be maintained." The court of appeals also reasoned plaintiffs could not establish predominance for two reasons: (1) different state laws governed different plaintiffs' claims and (2) plaintiffs' allegations introduced several factual differences that did not comprise a coherent class. Even though plaintiffs proposed seven state-specific subclasses under Rule 23(c)(5) to preserve the possibility of proceeding as a class, the Fifth Circuit concluded they had failed to demonstrate independently how each proposed subclass satisfied the Rule 23 requirements.

Affirming in part and reversing in part the district court's dismissal of plaintiffs' claims, the Fifth Circuit affirmed dismissal of plaintiffs' fraud claims, agreeing that those claims suffered from a combination of fatal defects and did not satisfy the dictates of Rule 9(b). But the Court of Appeals reversed the district court on the breach of express warranty claims. The district court had dismissed these claims on the grounds that they constituted "puffery" without applying the law of a specific jurisdiction. The Fifth Circuit found error, and it reversed and remanded the district court's ruling with instruction to reconsider the motion to dismiss under applicable state law.

Seventh Circuit

Cothron v. White Castle Sys., Inc., 2023 IL 128004 (2023)

Illinois Supreme Court holds that a claim under the Illinois Biometric Information Privacy Act accrues each time biometric information is collected or transmitted.

The Seventh Circuit Court of Appeals presented the Illinois Supreme Court with a certified question regarding the Illinois Biometric Information Privacy Act (BIPA): "Do section 15(b) and 15(d) claims accrue each time a private entity scans a person's biometric identifier and each time a private entity transmits such a scan to a third party, respectively, or only upon the first scan and first transmission?" In a four-to-three decision, the Illinois Supreme Court decided that under the plain language of the statute, a new BIPA violation occurs each time an individual's biometric information is collected or transmitted. The majority further held that because the statutory language was clear, it must be given effect despite the harsh consequences.

The dissent asserted that under the plain language of the statute, and consistent with BIPA's purposes, an individual's biometric information can only be collected or disclosed once. The dissent further noted that under the majority's interpretation, an entity that purposefully sold biometric information—the worst BIPA violation—would be subject to damages of $5,000, but an employer who unintentionally violated BIPA through a fingerprint authentication could be subject to damages of hundreds or thousands of times that amount. The dissent argued that the court should avoid a construction leading to an absurd result.

Tims v. Black Horse Carriers, Inc., 2023 IL 127801 (2023)

Illinois Supreme Court considers question of which limitations period controls claims under the Illinois Biometric Information Privacy Act; holds that the five-year limitations period at 735 ILCS 5/13-205 applies.

The Illinois Supreme Court held that it would be an absurd, inconvenient, or unjust outcome to apply two different statutes of limitations to claims under the Illinois Biometric Information Privacy Act (BIPA). Defendant sought to apply the one-year limitations period for actions relating to the "publication of matter violating the right of privacy." Plaintiff, on the other hand, sought to apply the five-year catchall limitations period under 735 ILCS 5/13-205

While the Illinois Supreme Court held that certain subsections of BIPA could be found to meet the definition of "publication" necessary for application of the one-year statute of limitations, the remaining sections would necessarily fall into the five-year catchall limitations period. In order to ensure certainty and predictability, the court ultimately determined that the five-year statute should be applied to all claims.

Zarinebaf v. Champion Petfoods USA Inc., No. 18-cv-6951, 2023 U.S. Dist. LEXIS 45238 (N.D. Ill. Mar. 17, 2023)

Northern District of Illinois denies motion for class certification, holding that common questions of law of law or fact do not predominate.

Plaintiffs were pursuing class certification on an Illinois Consumer Fraud and Deceptive Practices Act (ICFA) claim that petfood defendant manufactured was deceptively advertised. The court noted that answering the questions involved in an ICFA claim requires comparing the allegedly deceptive phrases, the labels context, and the contents of the product. In this case, however, the court noted that such an inquiry would have to be repeated for each combination of the multiple products, labels, formulas, and consumers at issue.

Given the number of different factors, the court ultimately determined that "there are simply too many combinations for a single jury to consider." The court went on to hold that while creating subclasses is useful where clear dividing lines exist, such an approach would be unmanageable in this case, as it would still require the jury to analyze each possible combination of products, labels, and bag contents, and pair each unique combination with a possible calculation of damages. For this reason, the court denied plaintiffs' motion for class certification.

Eighth Circuit

Rossi v. Arch Ins. Co., 60 F.4th 1189 (8th Cir. 2023)

Eighth Circuit affirms dismissal of putative class action seeking recovery for unused ski passes.

Plaintiffs purchased certain ski passes for the 2019-2020 season and opted to pay for related insurance. The insurance policy covered the pass holders if they were "quarantined" but did not define "quarantined." After applicable ski resorts closed in light of the COVID-19 pandemic in March 2020, plaintiffs sought a prorated reimbursement for their passes, which the defendant denied on the grounds

that the stay-at-home orders did not qualify as "quarantine." In response, plaintiffs filed a putative class action. The district court granted defendant's motion to dismiss for failure to state a claim because the policy was unambiguous and did not include coverage for stay-at-home orders that "merely limited travel and activities." Plaintiffs appealed.

The Eighth Circuit affirmed the dismissal. Applying Missouri law, the court held that the policy was not ambiguous. The failure to define the term "quarantine" did not, in and of itself, result in an ambiguity. Nor did multiple reasonable definitions of a word render the policy ambiguous. Based on the plan meaning of the term, as well as the surrounding terms, "quarantine" meant isolation—as opposed to activity restrictions. The Eighth Circuit held that because there was no ambiguity, and plaintiffs had not alleged they were isolated within the meaning of the word, they failed to state claim for relief. Judge Grasz concurred with the decision. Although he disagreed that the term "quarantine" was not ambiguous, he determined the outcome should still be affirmed based on a separate policy term denying coverage where the ski resorts failed to provide the requested services.

LeFlar v. Target Corp., 57 F.4th 600 (8th Cir. 2023)

Eighth Circuit rejects anti-removal presumption in CAFA jurisdictional dispute.

Plaintiff filed a class action on behalf of all Arkansas citizens who bought technology from defendant without being able to view the product warranties before purchase. Although plaintiff initially filed suit in Arkansas state court, defendant removed to federal court under the Class Action Fairness Act (CAFA). Plaintiff moved to remand the case back to state court because the amount in controversy did not meet CAFA's $5 million requirement. The district court agreed and remanded the case to state court. Defendant filed a timely request for permission to appeal.

The Eighth Circuit granted the request to assess the issue. The court discussed CAFA's requirements and noted the notice of removal must plausibly allege the case meets each of the jurisdictional requirements to remain in federal court. At the pleadings stage, the removing party need only plausibly allege the case "might" be worth more than $5 million. If a jurisdictional challenge arises subsequently, then the district court "must determine if 'a fact finder might legally conclude' that the value of the case is more than $5 million, not whether the damages 'are greater than the requisite amount.'" Noting that doubts with respect to federal jurisdiction under CAFA need not be resolved in favor of remand, the Eighth Circuit held that the district court was required to accept defendant's allegations if they were made in good faith. Instead, the district court improperly applied an "anti-removal presumption" where there was a factual question at the pleadings stage as to whether the amount in controversy had been met. This led the district court to disregard defendant's declaration that supported the amount in controversy exceeding $5 million. As such, the Eighth Circuit vacated the remand order and returned the case to the district court for further consideration.

City of Creve Coeur v. DirecTV LLC, 58 F.4th 1013 (8th Cir. 2023)

Eighth Circuit affirms remand to state court where comity concerns prevent federal jurisdiction.

Plaintiff filed a class action in Missouri state court on behalf of local government authorities under the Video Services Providers Act (VSPA), which allows local governments to impose fees on video service providers such as cable companies. Defendants removed the case to federal court under CAFA. The district court remanded the case back to state court, finding the doctrine of comity applied and stating there was a "strong preference" for litigation of state tax issues to take place in state court. After the state

court entered an order confirming that VSPA payments are fees, rather than taxes, defendants filed a second notice of removal, asserting this decision established the required federal jurisdiction. One basis for refiling was because plaintiff had initially argued that the VSPA fee was a tax in order to avoid jurisdiction but then changed tack when defendants moved to dismiss. Plaintiff moved to remand again, and the district court agreed and remanded.

The Eighth Circuit affirmed the remand on this second attempt. Pointing to the district court's initial order, the Eighth Circuit determined that the decision to deny removal was based on comity principles dictated by the Supreme Court that interference with fiscal operations of state governments in any case was inappropriate—not just with respect to state tax comity concerns. Instead, the Eighth Circuit viewed this as an improper attempt at a second bite at the apple for removal because it was ultimately based on the same grounds as the initial request. Because defendant has not met its burden to establish federal jurisdiction and failed to raise any new argument with its second attempt, the Eighth Circuit affirmed the rejection of defendant's removal efforts.

Ninth Circuit

Van v. LLR, Inc. d/b/a LuLaRoe, 61 F.4th 1053 (9th Cir. 2023)

Class certification reversed where individualized issues generated by retailer discounts offsetting a purportedly improper tax predominated over common issues.

Plaintiffs filed a putative class action against defendant multilevel-marketing company that sells clothing to purchasers across the United States through so-called "fashion retailers" located in all 50 states. The fashion retailers are not typical brick-and-mortar retail outlets, but instead are generally individuals who sell LuLaRoe merchandise through word-of-mouth or social media sites. Plaintiff, an Alaska resident who purchased large volumes of defendants' products, alleged that defendants violated Alaska's Unfair Trade Practices and Consumer Protection Act (UTPCPA) by allegedly charging sales tax to purchasers of LuLaRoe products based on the location of the fashion retailer, rather than the location of the purchaser, which allegedly resulted in some online purchasers being charged, and having paid, sales tax when none was purportedly owed. In reversing the district court's order granting class certification, the Ninth Circuit held that the district court erred in its assessment of whether the individualized issues generated by fashion retailer discounts offered to consumers – some of which were used to offset the improper sales tax – defeated the predominance of class issues. The Ninth Circuit, however, rejected defendants' additional argument that whether class members voluntarily paid the tax at issue raised individual issues precluding class treatment, because defendants failed to offer evidence that the consumers' invoices showed they paid the tax and thus knew of the tax and voluntarily paid it.

Piplack v. In-N-Out Burgers, 88 Cal. App. 5th 1281 (2023)

Court reverses denial of motion to compel arbitration in light of U.S. Supreme Court's *Viking River Cruises* ruling.

Former employee plaintiffs brought a Labor Code Private Attorneys General Action (PAGA) class action. Their employment contracts included arbitration provisions and private attorney general waivers. Litigation proceeded, with the filing of answers, demurrers, amended complaints, and a discovery motion. After these filings, defendant filed a motion to compel arbitration, explaining its delay by referring to *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), which was pending at the time, and arguing

that it expected the Supreme Court to overturn or materially alter California's *Iskanian* rule, which barred arbitration of PAGA claims. The Superior Court denied the motion, and defendant appealed.

As to plaintiffs' individual PAGA claim, the Court of Appeal held that *Viking River* controlled and reversed and remanded the denial, But as for plaintiffs' representative PAGA claim, the court held that the California Supreme Court's ruling in *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, controlled over *Viking River*, as it recognized only two requirements for standing under PAGA, neither of which is affected in any way by moving the individual component of a PAGA claim to arbitration (contrary to *Viking River*). The court held, "[d]espite the deep deference we afford the United States Supreme Court, even on purely state law questions where the United States Supreme Court's opinions are only persuasive, not binding, we conclude we must follow *Kim* and hold that plaintiffs retain standing to pursue representative PAGA claims in court even if their individual PAGA claims are compelled to arbitration. We simply cannot reconcile the *Viking* decision's standing analysis with the *Kim* decision."

DeBono v. Cerebral, Inc., No. 22-cv-03378-AGT, 2023 U.S. Dist. LEXIS 8661 (N.D. Cal. Jan. 18, 2023)

Plaintiff failed to plead a violation of California's Automatic Renewal Law (ARL) by not showing that an incomplete description of defendant's cancellation policy and an alleged failure to clearly present renewal terms harmed them.

Plaintiffs alleged defendant violated multiple ARL provisions by not adequately disclosing the company's subscription and renewal terms. In granting defendant's motion to dismiss, the court held that plaintiffs did not adequately plead injury under California's Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumer Legal Remedies Act (CLRA) because they did not explain how they would be harmed by such shortcomings and why they would not have subscribed to defendant's services if its disclosures had been more complete. Nor did plaintiffs allege they relied on any particular false or misleading representations. And the court rejected plaintiffs' allegation that defendant's sign-up process was "fatiguing" and resulting in consumers spending "less time and effort critically evaluating the information" about future charges or cancellation, because plaintiffs did not tie these allegations to the named plaintiffs specifically. The court also rejected plaintiffs' allegation that defendant omitted material information to induce them to subscribe because plaintiffs failed to allege that defendant's nondisclosures were "an immediate cause" of any harm they suffered. The court also dismissed claims by out-of-state residents, rejecting their argument that defendant's choice of law provision incorporating California law supported their claims, because that provision incorporated "California's presumption against extraterritorial application of its law."

Klammer v. Mondelez International, Inc., No. 22-cv-02046-JSW, 2023 U.S. Dist. LEXIS 2939 (N.D. Cal. Jan. 4, 2023)

District court holds statements on packaging that lentil chips were "high protein" and "protein-packed" were not likely to deceive reasonable consumers as a matter of law when the packaging was viewed as a whole.

Plaintiff filed a putative class action alleging defendant's use of the terms "high protein" and "protein-packed" on the packaging for its Enjoy Life Lentil Chips was false and misleading in violation of the UCL, FAL, and CLRA because the chips allegedly were not high in protein and did not provide a good source of protein. In granting defendant's motion to dismiss, the court held that the term "high protein," when viewing the packaging as a whole, was not likely to mislead reasonable consumers as a matter of law

because the term never appeared in isolation and was used on the packaging to describe lentils and lentil flour. Therefore, the court found it "implausible" that reasonable consumers would understand the phrase "high protein" to refer to the quantity of protein contained in the chips. The court also rejected plaintiff's contention that the phrase "high protein lentils" with an arrow pointing to the chips was deceptive, because the argument failed "to meaningfully address the fact that 'high protein' is never used in isolation and always used in connection with lentils or lentil flour, not the chips themselves." The court further rejected plaintiff's argument that the phrase "high protein" was misleading in any context unless it complied with FDA regulations because plaintiff did not sufficiently allege that the reasonable consumer was sufficiently aware of those regulations such that they would be misled by the product's alleged lack of conformity with the regulations. The court also found the phrase "protein-packed" non-actionable puffery. And the court ruled that reasonable consumers would not be misled by that term because the nutrition facts on the back of the packaging clarified the grams of protein in the product, and that there was no affirmative misleading statement to be dispelled by the ingredients list, and thus defendants could rely on it to shield them from liability. And finally, the court rejected plaintiff's claim that defendant's purported omission of the daily recommended value for protein on the packaging was misleading, because plaintiff did not allege that he reviewed or relied on the nutrition facts panel or that its contents affected his purchasing decision. Thus, the court dismissed the complaint.

Yeraldinne Solis v. Coty, Inc., No. 22-cv-0400-BAS-NLS, 2023 U.S. Dist. LEXIS 38278 (S.D. Cal. March 7, 2023)

Court lacks jurisdiction to hear false advertising claims under California's consumer protection statutes where plaintiff fails to allege concrete injury.

Plaintiff filed a putative class action alleging that defendants marketed a beauty product as "safe" and "sustainable" when it purportedly contained a harmful and carcinogenic chemical know as PFAS. The court granted defendants' motion to dismiss, holding that plaintiff failed to allege injury in fact under a "benefit of the bargain" theory because she failed to "draw a cogent nexus" between statements that the cosmetic at issue was "dermatologically tested" and "suitable for sensitive skin" and her belief the product she purchased was PFAS-free. The court also found "an even weaker link between the statements [plaintiff] identified in Defendants' online marketing materials and the purported safety benefit" plaintiff believed she had bargained for but did not receive. The court further ruled that plaintiff "is not free to ignore the ingredient list on the Product's label," which listed PTFE, a type of PFAS, as an ingredient. The court concluded this disclosure doomed plaintiff's omission theory of liability, as well as her alternate overpayment theory of damages.

Corpuz v. Bayer Corp., No. 22-cv-1085-MMA (JLB), 2023 U.S. Dist. LEXIS 33558 (S.D. Cal. Feb. 28, 2023)

Court finds reasonable consumers may find use of term "natural" on front of packaging false and misleading when product contains synthetic ingredients.

Plaintiff filed a putative class action alleging that defendant's advertising campaign for its "One A Day" multivitamins was false, deceptive, and misleading because it purportedly held out defendant's products as "natural" even though they allegedly contained non-natural, synthetic ingredients. In denying defendant's motion to dismiss, the court held that reasonable consumers would understand similar labeling involving the term "natural" to mean a product does not contain any non-natural ingredients. The court noted that the FDA has not promulgated regulations formally defining the term "natural," and rejected as an outlier a district court decision finding that dismissal under similar circumstances was

warranted because the Federal Trade Commission declined to adopt a definition of "natural" because the word may be used in many contexts and is subject to many interpretations. The district court found that rather than serving as a basis for dismissal, the FTC's decision supports the existence of a question of fact on these issues. And because the court concluded the use of the term "natural" on the front of the package was potentially misleading, the court held defendant could not rely on its ingredient list on the back of the package to shield itself from liability.

Hernandez v. Radio Systems Corp., No. ED22-1861 JGB (KKx), 2023 U.S. Dist. LEXIS 40038 (C.D. Cal. March 9, 2023)

Statements that electronic dog collar products were "safe" and "effective" were not puffery and could reasonably deceive reasonable consumers.

Plaintiff filed a putative class action alleging that defendant violated the UCL, FAL, and CLRA by advertising that its electronic dog collars were "safe," "comfortable," "harmless," "humane," and "effective," when they supposedly were not because they could injure dogs. Defendant moved to dismiss on the ground that the foregoing statements were non-actionable puffery. The court denied defendant's motion holding that representations of safety are "precisely the kind of 'factual assertions' about product attributes upon which a reasonable consumer may rely – and upon which plaintiff allegedly relied – in deciding [to] purchase the [p]roducts." The court also held it could not conclude as a matter of law that members of the public would not be deceived by defendant's representations that its products were "safe" and "harmless," and that consumers were not expected to look beyond such statements to find print in packaging materials disclosing known risks. However, the court granted defendant's motion with respect to products plaintiff did not purchase, finding plaintiff had no standing to bring such claims because the products were not substantially similar to the ones plaintiff bought.

Weiner v. Ocwen Fin. Corp., No. 2:14-cv-02597-TLN-DB, 2023 U.S. Dist. 33107 (E.D. Cal. Feb. 28, 2023)

Court granted reconsideration of order decertifying class because Supreme Court's holding in *TransUnion* only requires that a plaintiff present evidence "capable" of demonstrating class-wide harm.

Plaintiff alleged his mortgage servicer assessed improper, undisclosed default service fees in violation of the governing agreement and initiated a class action, asserting claims for (1) violation of California's UCL, (2) violations of the federal RICO statute, (3) violation of the Rosenthal Fair Debt Collection Practices Act (Rosenthal Act), (4) unjust enrichment, (5) fraud, and (6) breach of contract. One district judge initially granted plaintiff's motion for class certification, but after the case was transferred to a different judge, defendant moved to decertify. That court granted the motion, and plaintiff moved for reconsideration, arguing misapplication of the Supreme Court's decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). Plaintiff asserted the court incorrectly concluded that TransUnion modified the predominance inquiry under Fed. R. Civ. P. 23(b)(3) and erroneously found that, because plaintiff's class-wide evidence on damages was disputed, the court would be required to engage in individualized inquiries as to class member standing. Plaintiff further argued that this holding conflated *TransUnion's* discussion of Article III standing with Rule 23(b)(3)'s preponderance requirement. The court agreed, reconsidering its prior ruling and holding that "*TransUnion* does not require [p]laintiff to definitively establish at this juncture that each class member in each of the three classes certified [] has suffered concrete harm." Instead, plaintiff need only present evidence that "is capable of showing class members suffered . . . [harm] on a class-wide basis." Thus, the court vacated its order decertifying the class.

Frederickson v. City of Bellevue, No. C21-1517-JCC, 2023 U.S. Dist. LEXIS 3761 (D. Wash. Jan. 9, 2023)

To support a motion for class certification under Rule 23(a), plaintiff could not take a sample of individuals over a two-month period and extrapolate over the three-year class period to show numerosity.

Plaintiff brought a putative class action against the City of Bellevue and South Correctional Entity (SCORE), claiming her Fourth Amendment rights were violated because she was arrested without a warrant and held in a SCORE jail for over 48 hours without a judicial determination of probable cause. The proposed class members were all persons who were booked into a SCORE jail and not afforded a judicial determination of probable cause within 48 hours after an arrest, and/or were not released within that time. In denying plaintiffs' motion for class certification, the court held that plaintiff could not use arrest records to identify twelve allegedly similarly situated individuals over a two-month period, and then extrapolate that sample over a three-year class period to show commonality, especially when plaintiff asserted that the class was readily ascertainable through arrest records. Moreover, the defendant presented evidence that seven of the originally identified individuals fell outside the proposed class definition because they were granted probable cause hearings within hours of arrest. The court also ruled that plaintiff could not show commonality because plaintiff sought damages, not injunctive relief, and the class members' claims would require a constitutional analysis of individual facts leading to the arrest and detention of each class member.

Keila Cross v. Allied Waste Services of North America, LLC, No. CV21-145-M-SHE, 2023 U.S. Dist. LEXIS 21693 (D. Mont. Jan. 12, 2023)

Rule 23 preempts the Montana Consumer Protection Act (MPCA) prohibition on class action lawsuits.

Plaintiff filed a putative class action alleging defendant violated the MPCA by "repeatedly impl[ying] it does not actually recycle some of the materials it claims" to recycle. The court denied defendant's motion to dismiss, rejecting defendant's argument that the MPCA expressly prohibits class claims under the statute. The court held that Rule 23 preempts the state law prohibition on class action lawsuits. The court also denied defendant's motion to compel arbitration because the invoices defendant sent did not contain an arbitration and class waiver clause, and because defendant added such a clause to their agreement over two years after plaintiff became a member of defendant's service.

Eleventh Circuit

In re: Johnson & Johnson Aerosol Sunscreen Marketing Sales Practices and Products Liability Litigation, No. 0:21-md-3015-SINGHAL/Valle (S.D. Fla Feb. 27, 2023)

Florida district court judge rejects class member objection to settlement of multidistrict litigation (MDL) since objector only wished for "a better settlement."

In May 2021, a consumer action group filed a citizens' petition with the U.S. Food & Drug Administration (FDA), alleging that certain consumer products contained high levels of the toxic chemical benzene and requesting a recall of the products sold under the Neutrogena and Aveeno brands. Several class action lawsuits ensued throughout the United States, the claims generally grounded upon alleged violations of various state consumer-protection acts, unjust enrichment, negligent misrepresentation/omission, breach

of express and implied warranties, strict product liability/failure to warn, and strict product liability/manufacturing defects. All the matters were consolidated in October 2021 in the Southern District of Florida.

The parties engaged in settlement negotiations while conducting discovery on several issues relating to the design and manufacture of the products at issue. In December 2021, the parties executed a settlement and filed a motion for preliminary approval of the settlement. In March 2022, the court granted preliminary approval and set a hearing for final approval of the settlement (Fairness Hearing). The class consisted of some 209,000 claims. In July 2022, one class member filed an objection to approval of settlement.

At the Fairness Hearing in August 2022, the court asked the objector's counsel "what would make the settlement more fair in the eyes of the objector," to which counsel responded simply, "a better settlement." Finding the response unpersuasive, the court quoted Theodore Roosevelt: "complaining about a problem without posing a solution is called whining."

The court in examining whether the settlement was "fair, reasonable and adequate" looked to the factors enunciated in *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984), which include "(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair adequate and reasonable; (4) the complexity, expense, and duration of litigation; (5) the substance and amount of opposition to the settlement and (6) the stage of proceedings at which the settlement was achieved."

The court explained that its decision on fairness was not an examination of a trial on the merits but rather was "limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." The court found the settlement met all necessary criteria and rejected the objector's non-specific demand for "a better settlement."

Federal Circuit

Health Republic Ins. Co. v. United States, 58 F.4th 1365 (Fed. Cir. 2023)

Federal Circuit vacates $185 million attorneys' fee award notwithstanding $3.7 billion class award.

Quinn Emanuel Urquhart & Sullivan, LLP served as plaintiffs' lead counsel in two class actions representing certain health insurers against the federal government based on claims that the government failed to make payments to the insurers under the Affordable Care Act. The two actions resulted in $3.7 billion in awards to class plaintiffs. After the Federal Court of Claims awarded Quinn its requested 5% ($185 million) in attorneys' fees from the class recovery, class members who had objected to Quinn request appealed. The Federal Circuit agreed with the objectors, vacated the award, and remanded the attorneys' fee determination back to the Court of Claims.

First, the Federal Circuit held that the Court of Claims erred under the circumstances in failing to perform a "lodestar cross-check" when making an attorneys' fee award based a percentage of the fund calculation. The "lodestar cross-check" occurs where the court calculates the reasonable attorney hours performed times a reasonable rate and compares the result (the "lodestar") to the proposed percentage fee by dividing the proposed fee by the lodestar resulting in a "lodestar multiplier." Where the lodestar multiplier is too great, the court should consider reducing the award requested under the percentage-of-

the-recovery method. The Federal Circuit ruled that the Court of Claims was required to perform this cross-check because the class opt-in notice Quinn Emanuel sent class members guaranteed that such a cross-check would be performed. Although the Federal Circuit did not decide whether a lodestar cross-check would be required in the absence such a provision in the opt-in notice, it cautioned that Federal Court of Claims Rule 23(h), which is analogous to Rule 23(h) of the Federal Rules of Civil Procedure, "might well call for a lodestar cross-check as part of the inquiry [in determining attorneys' fees] at least as a general matter."

Second, the Federal Circuit held that the Court of Claims failed to give due consideration to the central principles guiding percentages fees: "[i]f the benefits are large in comparison to the amount of time counsel spent on the case, a downward adjustment is in order," and "a court should disallow windfalls for lawyers." The Federal Circuit found the Court of Claims erred in two ways in this regard: it did not examine or justify the use of the lodestar multiplier, which in this case was 18 or 19—far above the normal range of 1 to 4—and it presumptively granted the request for fees without conducting its own analysis in violation of its fiduciary duty to protect the class in the fee award context. The Federal Circuit noted that given the facts of the case, it did not discern a justification for the fees awarded. Although $185 million was only 5% of the class recovery, the lodestar cross-check would have resulted in a lodestar of approximately $10 million, which is much closer to the objector's proposed $8.828 million in fees and far below the requested $185 million. The Federal Circuit held that rather than choosing between Quinn Emanual's proposed $185 million and the objectors' proposed $8.828 million, the Court of Claims was required to make its own determination, not simply accept the requester's determination. Accordingly, the Federal Circuit remanded the attorneys' fees award to the Court of Claims for further determination consistent with the class opt-in notice and the Federal Circuit's opinion.

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