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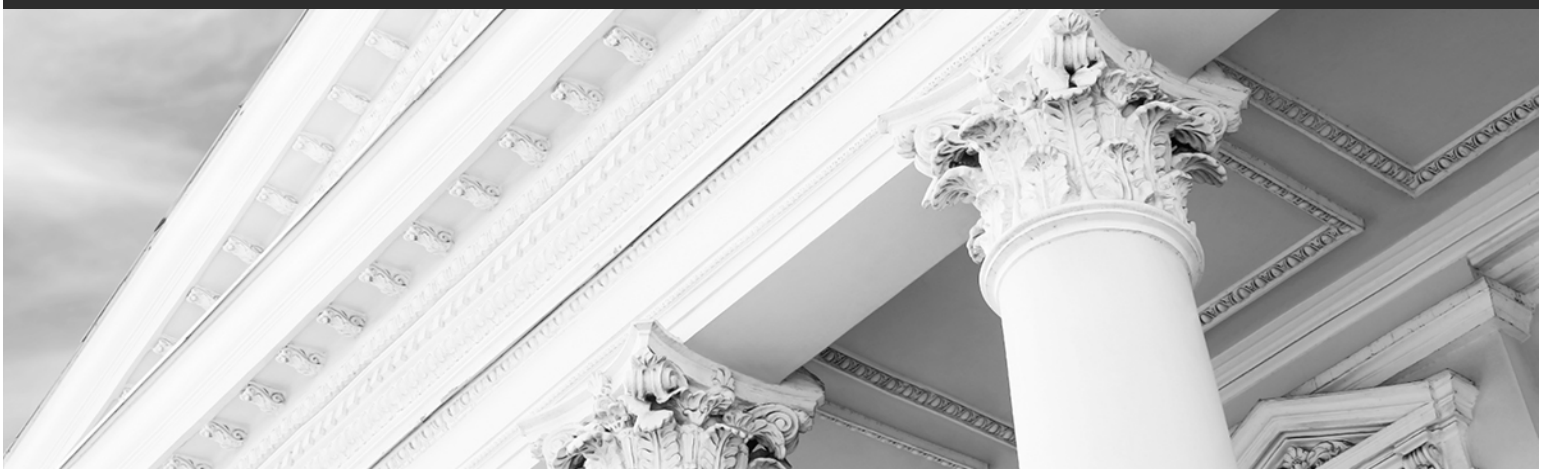
Class Action Litigation Newsletter | 2nd Quarter 2023



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

Highlights from this issue include:

- U.S. Supreme Court holds that a district court must stay its proceedings while an interlocutory appeal concerning the question of arbitrability is ongoing.
- Third Circuit reaffirms ascertainability requirement, rejecting invitation to reconsider it.
- Sixth Circuit rejects the "juridical link" doctrine for Article III standing in class actions.
- Seventh Circuit vacates class certification in COVID-19 student tuition and fee refund case, requiring rigorous analysis and assessment of commonality and predominance on a claim-by-claim and element-by-element basis.
- Eighth Circuit explains that amount in controversy under CAFA is based not on what plaintiff argues he will ask for but on what a fact finder could legally award.
- Ninth Circuit confirms that in awarding attorney's fees, the court must consider the actual settlement amount paid to the class, not the settlement cap set forth in the settlement agreement.
- D.C. Circuit widens Circuit split in rejecting rule against "fail-safe" classes as a per se basis for denying class certification.

U.S. Supreme Court

Coinbase, Inc. v. Bielski, No. 22-105 (June 23, 2023)

A district court must stay its proceedings while an interlocutory appeal concerning the question of arbitrability is ongoing.

Faced with a putative class action on behalf of Coinbase users, Coinbase filed a motion to compel arbitration premised on the Coinbase User Agreement, which provided for dispute resolution through binding arbitration. The district court denied the motion to compel, and Coinbase filed an interlocutory appeal to the Ninth Circuit under the Federal Arbitration Act, 9 U.S.C. § 16(a), which provides a statutory right to an interlocutory appeal from an order denying a motion to compel arbitration. The district court denied Coinbase's motion to stay its proceedings pending resolution of the interlocutory appeal. The Ninth Circuit also declined to stay the district court's proceedings pending appeal. The Supreme Court granted certiorari to resolve the disagreement among the circuit courts as to whether an appeal from the denial of a motion to compel arbitration stays lower court proceedings.

Reversing the Ninth Circuit, in a 5-4 decision the Supreme Court held that district courts must stay their proceedings during an interlocutory appeal on the question of arbitrability. The Supreme Court first looked to the language of § 16(a) and noted that it does not say whether the district court proceedings must be stayed. That said, "Congress enacted § 16(a) against a clear background principle prescribed by this Court's precedents," including *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982), and "[a]n appeal, including an interlocutory appeal, 'divests the district court of its control over those aspects of the case ***involved in the appeal***.'" (quoting *Griggs*, emphasis added). The court further explained that the foregoing "*Griggs* principle reflects a longstanding tenet of American Procedure" and here, where the question on appeal is whether the case belongs in arbitration instead of in the district court, "the entire case is essentially 'involved in the appeal.'"

The Supreme Court went on to explain that most circuit courts to address this issue in the context of § 16(a) have reached the same conclusion, such that "[t]he common practice . . . is for a district court to stay its proceedings while the interlocutory appeal on arbitrability is ongoing"—and further noted how "[t]hat common practice reflects common sense." Similarly, the Supreme Court reasoned that if the district court could move forward with pre-trial and trial proceedings while the appeal as to the question of arbitrability was pending, "many of the asserted benefits of arbitration" would be lost. Providing for a stay in the interim, and maintaining the status quo, preserves such benefits while the question of arbitrability as to a specific agreement is pending on the appellate level.

Dupree v. Younger, 143 S. Ct. 1382 (2023)

A post-trial motion under Federal Rule of Civil Procedure 50 is not required to preserve for appellate review a purely legal issue resolved at summary judgment.

Plaintiff Kevin Younger was a pretrial detainee at a state prison in Baltimore, Maryland, who alleged that three guards beat him at the direction of defendant Neil Dupree, a correctional officer lieutenant. Younger brought suit against Dupree under 42 U.S.C. § 1983, alleging that Dupree used excessive force in violation of Younger's 14th Amendment Due Process rights. The district court rejected Dupree's argument that the suit was barred because plaintiff failed to exhaust his administrative remedies, as mandated by the Prison Litigation Reform Act. At trial, Dupree did not present any evidence relating to his exhaustion defense, and the jury found him and the four codefendants liable. Dupree did not file a post-trial motion pursuant

to Rule 50(b) of the Federal Rules of Civil Procedure; instead, he appealed the district court's rejection of his exhaustion defense to the Fourth Circuit. The Court of Appeals dismissed his appeal on the grounds that he had raised the administrative exhaustion argument in a pre-trial motion for summary judgment but did not raise it again in a post-trial motion. The Fourth Circuit found its precedent required that any claim or defense rejected at summary judgment would not be preserved for appellate review unless it was renewed again in a post-trial motion. The Supreme Court granted certiorari to resolve the disagreement among the circuit courts as to whether a purely legal challenge resolved at summary judgment must be renewed in a post-trial motion in order to preserve that challenge for appellate review.

In a unanimous decision vacating the Fourth Circuit's decision and remanding the case for further proceedings, the Supreme Court found that a Rule 50 post-trial motion is ***not*** required to preserve a purely legal issue resolved at summary judgment for appellate review. The Supreme Court noted that in *Ortiz v. Jordan*, 562 U.S. 180 (2011), it held that denial of summary judgment on sufficiency of the evidence grounds must be raised in a post-trial motion in order to be preserved for appeal. In declining to extend that same preservation requirement to a purely legal issue resolved at summary judgment, the Supreme Court explained that such a ruling would not be "supersede[d]" by later developments and there would be "no benefit to having a district court reexamine a purely legal issue after trial, because nothing at trial will have given the district court any reason to question its prior analysis."

First Circuit

Offley v. Fashion Nova, LLC, No. 22-cv-10603, 2023 WL 3185550 (D. Mass. Apr. 21, 2023)

District court declines to retroactively apply an arbitration clause and class action waiver.

Plaintiffs brought a putative class action against defendant for allegedly suppressing lower-starred consumer reviews from its online website in violation of consumer protection laws of various states for purchases made up until December 25, 2018. On December 26, 2018, Fashion Nova revised its then-existing terms of service to require consumers purchasing products from the website to affirmatively scroll to the bottom of the checkout page and click a "pay now" button. Near the "pay now" button was bold hyperlinked text stating: "By submitting your order you agree to our **Terms of Service**, **Privacy Policy**, and **Returns Policy**." The revised terms of service required any dispute relating in any way to a consumer's visit to, or use of, the website, the products, or any purchase, or otherwise related to the Agreement to be submitted to confidential arbitration.

Defendant moved to compel arbitration in light of the arbitration agreement and class action waiver contained in the revised terms of service on the website. The question presented to the court was whether the revised terms of service requiring arbitration applied to pre-revision purchases. The First Circuit has determined that retroactive application of an arbitration clause is acceptable if the natural reading of the provision unambiguously extends to claims that arose prior to the adoption of the provision. In this case, the court concluded that the arbitration agreement should not be given retroactive effect, as the provision could not be read to naturally apply to prior purchases; the language of the provision used present tense for "purchase" and "purchases," and the 30-day opt-out period cut against retroactive application of the provision.

Omori v. Brandeis Univ., No. 20-11021, 2023 WL 3511341 (D. Mass. May 17, 2023)

District court declines to certify putative class in breach of contract action related to COVID-19 campus closure.

Plaintiffs brought a putative class action arising out of Brandeis University's decision to retain the full amount of tuition and fees it collected from students for the spring 2020 semester despite closing its on-campus facilities due to COVID-19. Plaintiffs sought to certify the proposed class under Rule 23(b)(3), which requires that common questions of law or fact "predominate" over those affecting individual class members. Plaintiffs claimed the common questions of fact related to whether each class member sustained damages as a result of the alleged breach of contract. Because the amount of any such damages could not be based on a subjective assessment of education quality, plaintiffs proffered a damages model that purported to provide a non-subjective assessment to demonstrate that damages could be resolved on a class-wide basis. The court, however, concluded that the model could not determine an actual value to be applied on a class-wide basis. The court found plaintiffs' inability to determine an actual value of the education to be applied class-wide would lead to countless questions about individual class members, the particular courses at issue, and the conduct of those courses, which would predominate over common ones. Because plaintiffs could not establish the actual value of the post-COVID-19 education that Brandeis students received during spring 2020, the court concluded they could not satisfy Rule 23 predominance and denied plaintiffs' motion for class certification.

Second Circuit

Konig v. TransUnion, LLC, No. 18-cv-7299, 2023 WL 3002396 (S.D.N.Y. Apr. 13, 2023)

Disclosure of inaccurate information alone is insufficient to establish the "concrete harm" required for Article III standing.

Plaintiff Maurice Konig brought this action against Bank of America, N.A. (BANA) and credit reporting agency TransUnion, LLC under the Fair Credit Reporting Act (FCRA) for allegedly reporting old BANA accounts on his TransUnion credit reports for a period in excess of the maximum time allowed under the FCRA. Plaintiff obtained a copy of his credit report in 2018, and noticed that his BANA accounts were still appearing on his credit report, even though he had not made any payments on those accounts since approximately 2008. Plaintiff alleged that defendants violated FCRA by inaccurately reporting and furnishing his aged BANA accounts for more than seven-and-a-half years past the date of delinquency and by failing to mark his accounts as "disputed" when responding to plaintiff's challenge to his credit report. After two years of discovery, plaintiff filed a motion for class certification, which the Southern District of New York denied on the basis of lack of Article III standing.

In denying class certification, the court conducted a threshold "bifurcated" inquiry into whether the plaintiff had standing to pursue claims on behalf of himself and the putative class. Put differently, the proposed representative plaintiff must first establish Article III standing himself and then establish statutory standing for the class. In the wake of the Supreme Court's 2021 ruling in *TransUnion v. Ramirez*, the Southern District noted that merely alleging a FCRA violation—as plaintiff did here—without showing how the violation caused a "concrete harm" was insufficient to demonstrate Article III standing. "[A] bare statutory or procedure violation," as plaintiff asserted, is not enough.

In addition, the court rejected plaintiff's argument that he was "harmed" by BANA disseminating his information regarding aged accounts to third party credit reporting agencies (CRAs), including

TransUnion, noting that "in [the FCRA] context, not all 'third parties' are created equally," and that mere dissemination to CRAs is insufficient because CRAs "are not the type of third parties contemplated by the Supreme Court in *TransUnion*," and plaintiff failed to demonstrate any dissemination to any other third parties. The court also rejected plaintiff's argument that his credit score was diminished due to the inaccurate disclosure to CRAs based on his expert's "hypothetical" testimony that the disclosure was "extremely *likely* to hurt consumers," "*will* impact credit scores and creditworthiness," and "*likely*" "impacted Plaintiff's credit score and creditworthiness." The court found such risks hypothetical and "purported" risks that never materialized. Further, the court rejected plaintiff's "emotional harm" arguments (i.e., that dissemination of his delinquent accounts caused him humiliation, embarrassment, anxiety, and other stress), finding that "[a] perfunctory allegation of emotional distress, especially one wholly incommensurate with the stimulant, is insufficient to plausibly allege constitutional standing."

As to claims against TransUnion, plaintiff claimed that TransUnion reported the harmful and legally not reportable information about plaintiff to third party Capital One Auto and that the disclosure of this inaccurate information "causes a harm akin to defamation." The Southern District rejected this argument as well, finding any criminality of the information disseminated was missing, and it was undisputed that plaintiff's loan application from Capital One was approved (further demonstrating a lack of harm). As such, plaintiff failed to allege an "actual tangible harm resulting from the disclosure" and necessarily that he "faced any real-world—tangible or intangible—consequences" as a result of the dissemination of the information. As the court concluded that plaintiff did not have Article III standing and, thus, that it lacked subject matter jurisdiction, the case was remanded to state court.

Passman v. Peloton Interactive, Inc., No. 19-cv-11711 (LJL), 2023 WL 3195941 (S.D.N.Y. May 2, 2023)

Court denies class certification under a price premium theory of injury, due to inability to establish all of Rule 23's requirements.

After prior motion practice involving previous named plaintiffs, newly named plaintiffs Eric Passman and Ishmael Alvarado brought this action against Peloton claiming that the company engaged in purportedly false advertising by stating that it offered subscribers an "ever-growing" or "growing" library of live and on-demand studio classes. After discovery relating to class certification, the court denied plaintiffs' motion for class certification, finding that they failed to satisfy all of the Rule 23 requirements, chiefly predominance, due to individual issues of causation, injury, and damages.

Plaintiffs had argued that the purported class injuries and damages were common questions based on one of the expert's analysis allegedly demonstrating a "price premium" attributable to Peloton's alleged misrepresentations and that damages could be established with class-wide evidence. Conversely, Peloton argued that the experts' analyses did not establish that a price premium actually existed or that the consumers were actually injured as a result of the allegedly deceptive statements because the analyses did not consider the class's exposure to the alleged misrepresentations, among other things. The court agreed, finding plaintiffs' price premium theory "does not absolve Named Plaintiffs of the obligation to demonstrate that at least some class members saw the alleged misrepresentation and paid a price greater than what they otherwise would have been willing to pay based on the misrepresentation." The court emphasized that, "[a]s a matter of fact, Named Plaintiffs have had ample time and opportunity to develop the evidence of [sic] that there was a price premium as a result of the" statement, "if such evidence exists," and failed to do so. In short, because plaintiffs relied on a price premium theory to overcome what would "otherwise be an individualized inquiry requiring each member of the putative class to demonstrate actual

reliance on the" challenged statement, and the court found such theory deficient, they could not establish predominance, a required element for certification.

In addition, while Passman was found to be an adequate class representative, Alvarado was held to be inadequate to represent the interests of the class because he demonstrated a "lack of understanding of the case and of his role and responsibilities." This made him "an inadequate fiduciary for the interests of the absent class members." In reaching this ruling, the court looked to Alvarado's deposition testimony and noted that the record established his knowledge of the issues was "wholly deficient" because he did not understand what representing a class involved and did not review any legal documents.

The court also considered Peloton's motion to strike plaintiffs' expert declarations, wherein Peloton argued that plaintiffs' experts' testimony was "not helpful to the trier of fact, irrelevant, and unreliable" and thus moved to exclude such testimony at the class certification stage. With respect to the question of whether a *Daubert* analysis is appropriate at the class certification stage, the court noted that the "heavy weight of authority mitigate[es] towards a *Daubert* inquiry" guided by the purpose for which the evidence would be introduced. Put differently, at this stage, the question is whether the court "may utilize it in deciding whether the requisites of Rule 23 have been met" as opposed to whether a jury could rely on it to find facts as to liability. In this case, the court found that it was premature to address Peloton's reliability challenges and declined to exclude the evidence at this stage.

Subsequent to this decision, the court granted a joint motion staying discovery pending resolution of plaintiffs' petition for leave to appeal the order denying class certification to the Second Circuit.

Third Circuit

Roman v. Prince Telecom LLC, 2023 WL 3194464 (3d Cir. May 2, 2023)

Discovery and application of summary judgment standard permissible on a motion to compel arbitration.

In a wage and hour class and collective action, defendants moved to compel arbitration based on arbitration clauses in their employment agreements. Plaintiffs opposed the motion with declarations stating that they were neither provided the arbitration agreements nor signed them or clicked that they agreed to them. The district court denied the motion without prejudice, finding it could not grant the motion based on the allegations in the complaint, and plaintiffs then submitted additional factual evidence regarding the validity and enforceability of the arbitration agreements. Therefore, the court entered an order permitting limited discovery regarding the validity of the arbitration agreements and granting leave to file a renewed motion to compel arbitration to be decided under a summary judgment standard, in accordance with *Guidotti v. Legal Helpers Debt Resolution LLC*, 716 F.3d 764, 774 (3d Cir. 2013). Defendants appealed, arguing that the district court only was permitted to defer ruling on the motion where plaintiffs unequivocally denied entering into the arbitration agreements and that discovery was unnecessary because plaintiffs failed to request it or point to any disputed material facts.

The Third Circuit affirmed the order. The panel first clarified when a motion to dismiss or a summary judgment standard should apply to a motion to compel arbitration. Based on *Guidotti*, a motion to dismiss standard should be applied only when the face of the complaint and documents relied upon in the complaint make it apparent that certain claims are subject to arbitration. But if the complaint and supporting documents are unclear, or if the plaintiff has responded to the motion with additional facts, the parties should be entitled to discovery, and any subsequent motion would apply the summary judgment standard. Because both of these circumstances existed, the district court's decision to defer

ruling on the motions and to permit limited discovery was not clearly erroneous. Plaintiffs denied entering into any arbitration agreements, and even though plaintiffs did not request any discovery, the district court was within its discretion to order it given the genuine issues of material fact.

In re Niaspan Antitrust Litig., 67 F.4th 118 (3d Cir. 2023)

Third Circuit reaffirms ascertainability requirement.

In a multidistrict litigation (MDL) alleging that a branded manufacturer for Niaspan paid a generic manufacturer to delay market entry, the district court denied class certification because plaintiff union health and welfare insurance plans did not develop an adequate methodology for determining whether the proposed classes were ascertainable. On appeal, plaintiffs argued that the district court misconstrued the evidence on ascertainability as well as their proposed methodology for how to deal with the prevalence of intermediaries in the drug distribution system. Plaintiffs also argued that if their proposed classes could not meet the ascertainability standard, the Third Circuit should reconsider whether the ascertainability requirement is consistent with Rule 23 given that ascertainability has been rejected by other circuit courts.

The panel rejected plaintiffs' arguments and affirmed the denial of class certification. First, the panel found that the ascertainability requirement is "true to the text, structure and purpose of Rule 23" because without it "courts could not meaningfully apply the Rule." The panel also recognized that the Ninth, Eighth, Seventh and Sixth Circuits have adopted an ascertainability requirement and other circuits apply an administrative feasibility standard. Next, the panel found that the district court's application of the ascertainability standard was not clearly erroneous. Specifically, the court's finding that the prevalence of intermediaries was a "significant problem" was supported by the evidence, and plaintiffs had waived their argument that the court could use affidavits to resolve ambiguities in the data because they did not raise the issue before the district court.

Williams v. Tech. Mahindra (Ams.) Inc., 70 F.4th 646 (3d Cir. 2023)

Wrong forum tolling is not necessarily precluded when *American Pipe* tolling is unavailable.

Plaintiff filed a race discrimination class action against his former employer in the District of New Jersey more than four years after his employment was terminated. In response to defendant's motion to dismiss on statute of limitations grounds, plaintiff argued that the statute was tolled by the wrong forum and *American Pipe* tolling doctrines. A previous race discrimination class action had been filed against defendant in the District of North Dakota, and plaintiff moved to be added as a class representative in that action; however, that action was dismissed in favor of arbitration. The District of New Jersey found that *American Pipe* tolling did not apply to a successive class action, relying on *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018). The court did not consider wrong forum tolling, finding it precluded on the same grounds as *American Pipe* tolling.

The Third Circuit reversed. The panel did not disturb the district court's finding that *American Pipe* tolling did not apply to a successive class action. But the panel also found that the same rationale did not necessarily preclude wrong forum tolling. The *China Agritech* rule serves "several salutary purposes," namely it discourages duplicative lawsuits and avoids the perpetual stacking of repetitive claims. But those rationales do not necessarily undermine the application of other equitable tolling principles because, for those principles to apply, a plaintiff must show that they pursued their claim with diligence and that extraordinary circumstances beyond their control prevented them from timely filing their claim.

While a successive class action would not be permitted under equitable tolling if a plaintiff made no effort to seek lead-plaintiff status or bring their own claim during the limitations period, the unavailability of *American Pipe* tolling does not necessarily preclude the application of other forms of equitable tolling. Therefore, the panel remanded for consideration of plaintiff's wrong forum tolling argument.

Sixth Circuit

Fox v. Saginaw Cnty., Mich., 67 F.4th 284 (6th Cir. 2023)

Sixth Circuit vacates class certification, rejecting the "juridical link" doctrine for Article III standing in class actions.

In this putative class action lawsuit, 27 Michigan counties were sued for their foreclosure practices. In Michigan, a foreclosing county may obtain ownership of a delinquent taxpayer's property outright, even if the property is worth more than the taxes owed. Plaintiff alleged that this amounted to an unconstitutional taking, qualified as an excessive fine, violated procedural and substantive due process, and unjustly enriched the counties.

Plaintiff sued not only the county that allegedly injured him but also other counties, arguing they had engaged in the same conduct against other delinquent taxpayers. After denying a motion to dismiss, the district court certified the class, holding that the named plaintiff had standing to sue other counties based on a "juridical link." Courts adopting this doctrine recognize that a named plaintiff in a putative class action has standing to sue defendants who have not injured plaintiff if these defendants have injured absent class members. The Sixth Circuit granted defendants leave to appeal the class certification order under Rule 23(f) and ultimately reversed the district court's order.

Recognizing a circuit split between the Second and Seventh Circuits over the "juridical link" doctrine, the Sixth Circuit sided with the Second Circuit's position and rejected the doctrine. The court explained that the named plaintiff must have standing to sue each defendant at the outset, even at the class certification stage. The court explained that the juridical link doctrine conflicts with Supreme Court precedent in three ways: first, a named plaintiff in a putative class action must have standing to sue the defendants and cannot "piggyback off the injuries" of absent class members; second, a named plaintiff must have standing at the outset of the litigation and cannot rely on factual changes as the case develops; and third, adopting the doctrine would create an exception to standing that would violate separation of powers. The court further criticized the district court's application of Rule 23's predominance requirement to the plaintiff's alleged damages. The Sixth Circuit thus vacated the class certification order and remanded for further proceedings.

Ohio Pub. Emps. Ret. Sys. v. Fed. Home Loan Mortg. Corp, 64 F.4th 731 (6th Cir. 2023)

Plaintiff-manufactured judgment may not circumvent final judgment rule of 28 U.S.C. § 1291.

The Ohio Public Employees Retirement System (OPERS), a state pension system, filed a class action against the Federal Home Loan Mortgage Corporation (Freddy Mac), alleging securities fraud. The district court denied OPERS's motion for class certification, OPERS sought leave to appeal the decision under Rule 23(f), and the Sixth Circuit denied review. To create an avenue for appeal, OPERS then asked the district court to enter summary judgment sua sponte for Freddy Mac, arguing the class certification

decision prevented OPERS from proceeding. Persuaded, the district court entered summary judgment, and OPERS again appealed the denial of class certification.

Freddy Mac moved to dismiss the appeal for the lack of jurisdiction, While a divided panel initially denied the motion, the Sixth Circuit reconsidered its assessment of jurisdiction. The court considered the interplay between the final judgment rule of 28 U.S.C. § 1291 and its "unfettered discretion" under Rule 23(f) "to permit an appeal from an order granting or denying class-action certification, even though a class certification decision is not a final order." The Court of Appeals held that it lacked jurisdiction in the class action suit because, under 28 U.S.C. § 1291, the district court's denial of class certification was not final because OPERS had manufactured the district court's summary judgment decision to circumvent Rule 23(f).

Relying on the Supreme Court's decision in *Microsoft Corp. v. Baker*, the Sixth Circuit explained that a plaintiff's "voluntary-dismissal tactic did not lead to a final judgment as it: (1) invited protracted litigation and piecemeal appeals; (2) created a one-sided appeal right for plaintiffs; and (3) undermined the discretionary regime created by Rule 23(f)." The court concluded that OPERS's effort to manufacture a final judgment implicated each of these concerns. The court explained, "[w]e can think of no situation where a class action *defendant* would ask a district court to enter summary judgment against itself; therefore, finding jurisdiction here would create the one-sided appeal right for plaintiffs that Microsoft aimed to avoid." The court further concluded that OPERS's "tactical choice here undermines Rule 23(f)'s scheme." The Court of Appeals thus found it lacked jurisdiction over the appeal, and reversed and remanded for further proceedings.

Seventh Circuit

Eddlemon v. Bradley University, 65 F.4th 335 (7th Cir. 2023)

Seventh Circuit vacates student tuition and fee refund class certification.

A student filed a class action complaint against Bradley University for its transition to remote learning during the Spring 2020 semester in light of the COVID-19 pandemic and Governor's mandate prohibiting in-person learning. Plaintiff claimed breach of contract and unjust enrichment seeking (a) a refund of one week's worth of tuition due to the university's decision to cancel a week of classes to effectuate the transition to remote learning; and (b) a refund of seven weeks' worth of an activity fee due to the university's transition that resulted in no in-person activities for the remainder of the semester. The district court granted plaintiff's motion for class certification. The Seventh Circuit granted the university leave to appeal under Rule 23(f).

On appeal, the Seventh Circuit vacated the district court's class certification order. Finding that the district court abused its discretion, the Seventh Circuit noted that the lower court had failed to conduct the necessary rigorous analysis required by Rule 23. Specifically, the Seventh Circuit determined that the district court failed to adequately assess commonality and predominance on a claim-by-claim, element-by-element basis. It also found that the district court did not appropriately analyze whether the plaintiff had a viable classwide damages model for both claims. Because the district court primarily relied instead on the plaintiff's allegations, as well as an out-of-jurisdiction case that assessed class certification under a different standard than the Seventh Circuit, the appellate court held that the district court abused its discretion. The court remanded the case for further proceedings.

Bakov v. Consol. World Travel, Inc., 68 F.4th 1053 (7th Cir. 2023)

Seventh Circuit imposes cost of class notice on defendant found liable to class.

Plaintiffs filed a class action alleging defendant violated the Telephone Consumer Protection Act (TCPA) by calling class members using prerecorded messages. The district court denied certification of a nationwide class but certified a class of Illinois residents. Plaintiffs then covered the cost of sending notice through a third-party administrator to the nearly 30,000-member class. After notice was sent, the parties filed cross-motions for summary judgment. The district court granted the plaintiffs' summary judgment motion and held the defendant's TCPA violations were willful and warranted treble damages. However, after summary judgment had been decided, the district court reopened the question of whether a nationwide class would be appropriate in light of a recent Seventh Circuit opinion indicating it could be. The court ultimately revised the class certification order, permitting the nationwide class. The court held that the nationwide class must be given notice and opportunity to opt out, and the court shifted the cost of notice from the now million-plus member class to the defendant, who appealed that decision.

The Seventh Circuit affirmed. Reviewing under the abuse of discretion standard, the Seventh Circuit determined that, while the typical rule is to require the plaintiff to bear the cost of class notice, the district court retains discretion to shift the burden of a class-related task to the defendant if it would be less difficult or expensive for the defendant to perform the task. Although it would be unfair to shift costs to a defendant based only on bare allegations of wrongdoing, where – as here – liability had already been established, cost-shifting to the liable defendant was appropriate. The Seventh Circuit's decision aligns with a rule adopted by the Ninth Circuit and recognized by several treatises. Noting that this case was unusual, and that cost-shifting is not required even where liability is found, the Seventh Circuit confirmed it is within the district court's discretion to make such a determination in appropriate circumstances. The court further cautioned that this decision is not intended to justify delay in ruling on class certification in favor of resolving merits issues first in order to determine who may be responsible for notice costs.

Eighth Circuit

Brunts v. Walmart, Inc., 68 F.4th 1091 (8th Cir. 2023)

Eighth Circuit rules amount in controversy on a petition for jurisdiction under the Class Action Fairness Act (CAFA) is based not on what plaintiff argues he will ask for but on what a fact finder could legally award.

Plaintiff brought a class action against Walmart in the Circuit Court for St. Louis County, Missouri, asserting that cough suppressants containing dextromethorphan hydrobromide and labeled with the phrase "non-drowsy" were mislabeled. Walmart removed the action to the Eastern District of Missouri on the basis of CAFA jurisdiction, asserting that the amount in controversy exceeded $5 million. Walmart provided a declaration that its sales of the products during the relevant time period exceeded $5 million. Plaintiff argued that Walmart did not provide enough details regarding sales and that the complaint limited recovery to an amount less than the entire sales price.

The Eastern District of Missouri remanded the case to state court, holding that "Walmart did not show the amount in controversy is greater than $5 million because Walmart did not provide enough detail to show total sales exceeded $5 million or that plaintiffs could recover the full cost of the sales."

The Eighth Circuit reversed, holding that the removing party's burden to show that the amount in controversy exceeds $5 million "constitutes a pleading requirement" and that "[d]iscovery and trial come later." The court also noted that because a named plaintiff cannot legally bind members of a proposed class before the class is certified, the standard for determining damages is not what the plaintiff asserts he will request, "but what a fact finder could legally award." As a result, the Eighth Circuit found that Walmart's "declaration was sufficient to support a finding that sales exceeded $5 million."

Benda v. Prairie Meadows Racetrack & Casino, Inc., 989 N.W.2d 184, 186 (Iowa 2023)

Trial court did not err in holding that plaintiff was not an adequate class representative where organizations representing hundreds of purported class members opposed his claims both on the merits and on class certification.

Plaintiff is a horse breeder and owner of horses that performed well enough in races at Prairie Meadows Racetrack to be entitled to breeder's awards and purse supplements. Plaintiff claimed that Prairie Meadows miscalculated these awards and, as a result, underpaid breeders or owners eligible to receive purse supplements for Iowa-foaled horses by $1.8 million. The Iowa Horsemen's Benevolent and Protective Association (HBPA), which contracts with Prairie Meadows regarding the award purses, and the Iowa Thoroughbred Breeders and Owners Association (ITBOA) both intervened in the case. The Iowa HBPA filed motions to dismiss and for summary judgment against plaintiff.

While the motion for summary judgment was pending, plaintiff filed a motion for class certification, which Prairie Meadows, the Iowa HBPA, and ITBOA opposed. The trial court dismissed each claim except plaintiff's claim for breach of contract. The court also denied plaintiff's motion for class certification, finding plaintiff was not an adequate representative to protect the interests of the putative class members.

The Iowa Supreme Court affirmed the denial of class certification, noting that the Iowa HBPA is the legal representative of horsemen for the purposes of negotiating purse agreements with Prairie Meadows—the contracts at issue in this case. The Court thus found it significant that the Iowa HBPA did not believe Prairie Meadows breached the contracts. Moreover, the Iowa HBPA opposed class certification, as horseracing requires the cooperation of Prairie Meadows, and this lawsuit would have a negative impact on the industry as a whole. The Iowa Supreme Court also noted that the ITBOA, a membership organization representing Iowa-bred thoroughbred owners and breeders, opposed class certification and believed that the requested relief would damage Iowa's racing industry.

Finally, the contract at issue provided a remedy that any underpaid purses or supplements should be set aside to enhance purses and supplements in future years, but plaintiff opposed that relief because he was no longer a participant in races at Prairie Meadows. The Court held that this showed a fundamental conflict with the interests of putative class members. This element alone was sufficient to demonstrate that the trial court's denial of class certification was not an abuse of its broad discretion.

Ninth Circuit

Lowery v. Rhapsody International, Inc., 69 F.4th 994 (9th Cir. 2023)

In awarding attorney's fees, the court must consider the actual benefit awarded to the class, i.e., the actual settlement payment paid to the class, and not the settlement cap set forth in the settlement agreement.

Plaintiffs, copyright holders of musical compositions, filed a class action lawsuit for copyright infringement against defendant Rhapsody International (Napster). By the time plaintiffs sued, Napster had started negotiating with the National Music Publishers Association (NMPA) to resolve the same broad copyright issue plaintiffs had raised. Napster and the NMPA reached a settlement, and to receive payment under that settlement, individual copyright owners had to waive their right to make claims in plaintiffs' lawsuit. Napster informed plaintiffs about this settlement and the fact that 98% of the copyright owners of the musical works available on Napster's streaming service had opted to participate in the NMPA settlement, "effectively decimating" the putative class in this lawsuit. Plaintiffs' attorneys thus focused their efforts on obtaining a class action settlement. But because the NMPA settlement had "gutted" the class claims, few class members submitted claims in the lawsuit. In the end, Napster only paid approximately $50,000 to satisfy class members' claims. When it came to an award of attorney's fees, plaintiffs' attorneys used the lodestar method to calculate their fees, which resulted in $2.1 million. The attorneys requested a 2.87 multiplier, claiming that they achieved "exceptional" results in a "difficult" and "complex" case, and asked the court to award over $6 million in fees. The magistrate judge reduced the lodestar to $1.7 million, noting that almost 20% of the hours spent on the case were unreasonable or improperly block-billed. She then rejected the requested 2.87 multiplier and instead applied a negative 0.5 multiplier to the lodestar, given the minor benefit to the class, which resulted in a recommended award of $860,000. The district court accepted the lodestar calculation of $1.7 million but rejected the 0.5 negative multiplier, as it declined to place a value on the benefit to the class, and instead considered that the settlement cap here would have been $20 million. The district court thus awarded over $1.7 million in attorneys' fees. On appeal, the Ninth Circuit held the district court erred in failing to consider the actual benefit to the class and instead considering the "illusory" $20 million settlement cap. The court held that because plaintiffs' counsel knew the redemption rate—and thus the ultimate class recovery—would be extremely low and that there was no way the class settlement would approach "anywhere near $20 million" given the NMPA settlement, the district court should not have considered the settlement cap. The court held that "[a]ny other approach would allow parties to concoct a high phantom settlement cap to justify excessive fees, even though class members receive nothing close to that amount." The court reversed and remanded, and ordered the district court to consider the fee award in the context of the $50,000 benefit actually paid to the class, not the $20 million.

Johnson v. R&L Carriers Shared Services, LLC, No. 2:22-cv-01619-MCS-JPR, 2023 WL 3299709 (C.D. Cal. Apr. 10, 2023)

Based on consistently defective pleadings, court strikes class allegations under Rule 12(f).

After challenges to her prior pleadings, plaintiff filed a fourth amended complaint in a proposed class action asserting multiple wage and hour claims. The court noted that Rule 23 requires a party seeking class certification to prove the necessary elements. However, a "defendant may move to deny class certification before a plaintiff files a motion to certify a class," and "[d]istrict courts have broad discretion to control the class certification process, and whether or not discovery will be permitted lies within the sound discretion of the trial court." Acknowledging that motions to strike under Rule 12(f) are disfavored,

the court nevertheless struck plaintiff's class allegations. For example, the court found with respect to commonality that plaintiff offered no reasonable means to prove timekeeping claims (because defendant's system did not store sufficient data) and business expense reimbursement claims for cell phone calls (because the purpose of a particular call would have to be evaluated as personal or business related). Based on this lack of classwide proof and individualized inquiry, the court also found that plaintiff could not establish superiority and typicality. The court further found that discovery would not aid plaintiff in making the Rule 23 showings.

Summer Whiteside v. Kimberly-Clark Corp., No. EDCV 22-1988 (SPx), 2023 WL 4328175 (C.D. Cal. June 1, 2023)

Use of terms "plant-based" and "natural care" on "asterisked" baby wipe packaging not misleading as a matter of law where wipes in fact contain at least 70% plant-based ingredients by weight.

Plaintiff filed a putative class action alleging that defendant violated California's UCL, FAL, and CLRA by advertising its baby wipes using the terms "plant-based" and "natural care." Plaintiff claimed that such representations misled reasonable consumers to believe that the wipes were composed only of water, natural ingredients, and ingredients that come from plants and were not subject to chemical modification or processing. The court found that as a matter of law, reasonable consumers would not be misled by versions of packaging defendant used containing an asterisk next to the term "plant-based," which discloses on the front of the label that the wipes are made of "70+ [plant-based materials] by weight." The court cited a number of other district court decisions dismissing similar claims where an asterisk is employed to direct consumers to other statements on the front or back of packaging clarifying the use of the term in question. With respect to packaging where an asterisk was not used, the court found the question to be a closer one on a motion to dismiss. However, ultimately the court determined that plaintiff's interpretation was contrary to the disclaimer on the back of the label, which expressly states that the wipes contain "natural and synthetic ingredients." And while the Ninth Circuit held in *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939 (9th Cir. 2008) that if defendant commits an act of deception, the presence of fine print revealing that truth is insufficient to dispel that deception, there was no deceptive act to be dispelled because defendant's packaging was accurate. This is because the wipes, with or without the asterisk on the package, in fact contained at least 70% plant-based ingredients by weight, and in the court's view, "plant-based" reasonably means mostly derived from plants, which is what the wipes were. The court therefore dismissed plaintiff's claims with prejudice because plaintiff could not amend the complaint to claim in good faith that reasonable consumers would believe the wipes were 100% plant-based.

Kulp v. Munchkin, Inc., No. 2:22-cv-09381-WLH-E, 2023 U.S. Dist. LEXIS 108383 (C.D. Cal. June 21, 2023)

Plaintiffs lacked standing to seek injunctive relief for products with safety risks they became aware of through their purchases.

Plaintiffs in this putative class action against the manufacturer of an infant and toddler potty seat alleged that plaintiffs' children were hurt by the lip and "pee guard" of the seat, respectively. Based on these allegations, plaintiffs alleged claims under California's UCL, FAL, CLRA, and other consumer protection statutes. The court held that plaintiffs lack standing to seek injunctive relief because they did not establish that they would be wronged again in a similar way because they now had knowledge of the alleged safety risks inherent in a potty-training seat with a high lip design. The court found that plaintiffs would be able

to inspect potty-training seats in the future and determine whether there is a raised "pee guard." Thus, plaintiffs did not face a threat of imminent or actual harm as required to confer standing. The court did hold, however, that plaintiffs adequately alleged fraudulent omission claims under the UCL and CLRA because defendants allegedly had exclusive knowledge of the defects in the potty seats based on information not available to the public. The court noted, however, that FAL claims cannot be based on omissions.

Myra Steen v. American National Ins. Co., No. 2:20-cv-11226-ODW (SKx), 2023 WL 4004192 (C.D. Cal. June 14, 2023)

Court denies class certification to insureds whose policies lapsed because claims were not typical of insureds and issues relating to alleged Insurance Code violations involved individualized money damages primary to any declaratory or injunctive relief, and raised individual issues not suitable for class treatment.

Plaintiffs moved to certify a class based on defendant's alleged failure to comply with the pretermination safeguards set forth in California Insurance Code sections 10113.71 and 10113.72 before terminating insureds' life insurance policies. Those statutes require insurers to provide policyholders with a 60-day grace period prior to terminating a policy, as well as an opportunity to designate at least one additional person to receive notice of an overdue premium pending termination and an annual reminder of the right to do so, written notice of nonpayment, and written notice before termination.

In ruling on plaintiff's motion, the court first disagreed with a suggestion in an unpublished Ninth Circuit opinion and by other district courts that when an insurer fails to provide any one of the several safeguards the statutes require, the policy at issue cannot and does not lapse as a matter of law. The court then found the proposed class did not meet the requirements for typicality, and neither Rule 23(b)(2) nor Rule 23(b)(3) provides a basis for certifying the class. With respect to typicality, the court found that there was too much variety among class members as to exactly which of the statute's four pretermination protections defendant provided before terminating the policies. The court also found that plaintiffs intended for their policies to lapse, making their claims atypical of those class members who did not so intend, and of those who affirmatively canceled their policies (as opposed to letting them lapse). The court also found that certifying a Rule 23(b)(2) injunction class was not appropriate because fully vested class members – that is, beneficiaries of policies insuring the lives of those no longer living – have claims for individualized money damages that are primary to any declaratory or injunctive relief such class members seek. And the court found that certifying a damages class under Rule 23(b)(3) was not appropriate because a class, if certified in the case, would consist solely of fully vested beneficiaries, who would have breach of contract claims, not viable declaratory relief claims. Because parsing out the putative class's damages claims according to the four separate requirements set forth in the insurance statutes in question would involve individualized inquiries that would predominate because it would require detailed examination of communications between putative class members and their insurance agents, among other things, the court found certifying the class was not appropriate.

Ochoa v. Zeroo Gravity Games LLC, No. CV 22-5896-GW-ASx, 2023 WL 7291650 (C.D. Cal. May 24, 2023)

Plaintiffs cannot recover gambling losses under the UCL, FAL, or CLRA, but can seek public injunctive relief, and purchase of in-game currency involves a "good or service" under the CLRA.

Plaintiffs filed a putative class action alleging that defendant's online games violate California's gambling laws, and that in-game promotions constitute false and deceptive advertisements in violation of the UCL, FAL, and CLRA. In granting in part and denying in part defendant's motion to dismiss, the court first held that California public policy prevented plaintiffs from seeking restitution of gambling losses, although the California plaintiff could seek public injunctive relief. The court dismissed the Arkansas plaintiff's claims because he lacked standing to assert claims under California law. The court also held that the California plaintiff stated claims for false advertising under the UCL and FAL, and agreed that plaintiff should not be required at the pleading stage to "time travel to get screenshots from their devices" on or before the dates they made their purchases. Recognizing a split of authority among district courts on the issue, the court also held that the purchase of in-game currency involved a "good or service" under the CLRA, and that the California plaintiff stated a claim under that statute.

Amado v. Procter & Gamble Co., No. 22-cv-05427-MMC, 2023 WL 3898984 (N.D. Cal. June 8, 2023)

False advertising claim based on statements on fiber powder labels that the product supported digestive health and promoted heart health, healthy blood sugar levels, and appetite control preempted by FDCA.

Plaintiffs alleged that they and putative class members were misled into believing that defendant's Metamucil fiber powders were healthy to consume despite containing sugar, based on purportedly false and misleading front and back label statements including that the products "help support digestive health by promoting regularity," promote "heart health by lowering cholesterol," and promote "healthy blood sugar levels" and "appetite control. Based on these allegations, plaintiffs claimed the product's labels are false and misleading under the UCL, FAL, and CLRA because they (1) affirmatively state the product can provide health benefits they cannot provide due to the presence of sugar, (2) omit material facts regarding the effects of consuming sugar on said health benefits, and (3) fail to warn of the risks associated with sugar consumption. In granting defendant's motion to dismiss, the court first determined that the federal Food, Drug and Cosmetic Act (FDCA) preempted plaintiffs' claims of affirmative misrepresentations because they seek to challenge structure/function representations about fiber that describe the role of a nutrient or dietary ingredient intended to affect the structure or function in humans, which the FDCA expressly permits. The court noted that the Metamucil label makes clear that its statements refer to the benefits of psyllium fiber on the human body. The court concluded that defendant had placed requisite disclaimers on the product's label, and had adequate substantiation for its claims. The court also held that plaintiff failed to state a claim on an omission theory because the FDCA did not impose a duty to warn under these facts.

Moreland v. The Prudential Insurance Company of America, No. 20-cv-04336-RS, 2023 U.S. Dist. LEXIS 88101 (N.D. Cal. May 19, 2023)

Complete resolution of individual's claim likely prevents a class from being certified.

After plaintiff filed a putative class action claiming Prudential alleged failed to provide a notice of termination or lapse of policy, Prudential offered plaintiff a full settlement of his claims by offering to reinstate his policy without requiring payment for premiums owed during the lapsed period. Plaintiff accepted Prudential's offer, settling his claims. Plaintiff nonetheless moved for class certification, arguing he could seek certification for the class despite receiving complete relief on his individual claims. The court held that all of the cases plaintiff cited were inapposite because in those cases the courts only held that a defendant could not moot a named plaintiff's individual claims by simply offering settlement in the plaintiff's favor. The court ordered further briefing on the issue, but noted it was leaning towards denial of class certification in light of plaintiff's settlement.

Byrne v. Oregon One, Inc., No. 3:16-cv-01910-SB, 2023 WL 2755301 (D. Or. Apr. 3, 2023)

Court allows relief from class action settlement under Rule 60(b)(5) following bankruptcy filing.

After almost two years of litigation of claims under the Fair Debt Collection Practices Act, the parties reached a class action settlement, and the court granted plaintiff's motion for preliminary approval, directing notice to the class. Subsequently, the court granted final approval of the settlement, providing that the court "retain[ed] continuing jurisdiction over" the settlement for all material purposes.

Following entry of final judgment, defendant filed a Chapter 7 bankruptcy petition. Class counsel filed proofs of claim for themselves, plaintiff, and the class members. The bankruptcy proceeding significantly reduced the ultimate payment defendant made in connection with the settlement, and plaintiff moved for relief from the final judgment in the class action. Rule 60(b)(5) states, in relevant part, that a court "may relieve a party or its legal representative from a final judgment, order, or proceeding . . . [when] the judgment [applied prospectively] is no longer equitable[.]" The court noted that the Ninth Circuit has held that Rule 60 may be used only in the limited circumstances described, but granted plaintiff's motion. The court reasoned that defendant's settlement contribution had been significantly diminished – to approximately $2,000. Given this, the court found that the judgment was no longer equitable as applied on a prospective basis, and allowed plaintiff himself to take that amount.

Jack v. Ring, 91 Cal.App.5th 1186 (2023)

Court denies motion to compel arbitration where clause "pointed in two directions" on the issue of delegation of authority to arbitrator.

Plaintiffs filed a putative class action suit claiming defendant did not inform them at the time of their purchase of Ring security systems that key components would only operate if plaintiffs paid an additional fee on a monthly or annual basis. Based on this allegation, plaintiffs alleged claims under California's Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumer Legal Remedies Act (CLRA). Defendant moved to compel arbitration of plaintiffs' claims based on the arbitration clause in defendant's terms of service. The trial court denied the motion, finding that the clause ran afoul of the California Supreme Court's holding in *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 961 (2017) that a predispute

arbitration agreement is invalid and unenforceable under state law insofar as it purports to waive a party's statutory right to seek public injunctive relief. The Court of Appeal affirmed, rejecting defendant's argument that the trial court erred in deciding the threshold issue of whether the arbitration provision is enforceable under *McGill* because the parties clearly and unmistakably delegated authority to decide this issue to the arbitrator. The court noted that while the arbitration clause at issue provided that the arbitrator "shall have exclusive authority to resolve all disputes" relating to the enforceability of the clause's terms, including "any claim that all or any part of these Terms are void or voidable," the same clause contained a "poison pill" provision. That provision contemplated that "a court" may decide the enforceability of the subsection of the provision that requires arbitration to "be conducted only on an individual basis and not in a class, representative or private attorney general action." Thus, the court concluded that the arbitration provision "points in two directions" on the question of whether a court or an arbitrator is to decide the enforceability of the agreement to arbitrate, at least with respect to challenges to the "subsection's limitations as to a particular claim for relief," such as plaintiffs' claim that the limitations are unenforceable under *McGill*. The court also found that JAMS's rules did not "cure the ambiguity created by the severability clause/'poison pill.'"

Tenth Circuit

Black v. Occidental Petro. Corp., 69 F.4th 1161 (10th Cir. 2023)

District court applied correct legal standard in deciding whether class satisfied Rule 23 requirements, and did not abuse its discretion in certifying the class.

Plaintiffs filed a putative class action against a surface and mineral interest owner and operator, alleging defendant's intracompany practice of leasing its mineral interests to its affiliated operating company, including its 30% royalty rate, had the intent and effect of reducing the value of plaintiffs' mineral interests. Plaintiffs claimed defendant thereby maintained and furthered its dominant position in the market for leasing oil and gas mineral interests in violation of the section 2 of the Sherman Act and Wyoming antitrust laws. The Wyoming district court granted plaintiffs' class certification motion. On appeal, the Tenth Circuit affirmed. With respect to the district court's application of the Rule 23(b)(3) predominance requirement, the Court of Appeals found no abuse of discretion in the district court's conclusion that market power presents a common question susceptible to generalized class-wide proof as to the two submarkets at issue. With regard to antitrust impact, the court found the district court did not abuse its discretion in concluding that plaintiffs could demonstrate through class-wide proof that defendant's alleged anticompetitive conduct lowered the baseline value of all neighboring mineral interests to such an extent that class members were unable to lease their interests. With regard to certification of a liability issue class, the Court of Appeals noted that the Tenth Circuit had not yet opined on how it would apply Rule 23(c)(4). The court concluded that it would join sister circuits in holding that certification of an issue class under Rule 23(c)(4) is appropriate if the issue class itself satisfies the requirements of Rules 23(a) and 23(b). Therefore, when a class action is pursued under Rule 23(b)(3) in the Tenth Circuit, the contemplated issue class must meet all the requirements of Rule 23(a) and the predominance and superiority requirements of Rule 23(b)(3). The Court of Appeal then found that the district court did not abuse its discretion in certifying a liability issue class when individualized issues of damages persist, and in concluding that resolution of the issue class would generate common answers that determine liability in a "single stroke."

McAuliffe v. Vail Corp., 69 F.4th 1130 (10th Cir. 2023)

Plaintiffs not entitled to refunds when ski resorts shut down during COVID-19 when their purchase contracts barred such relief.

Plaintiffs purchased Epic Passes to access defendants' ski resorts during the 2019-2020 season, but were not issued refunds when the resorts closed for the season in March 2020 during the COVID-19 pandemic. Plaintiffs alleged contractual, quasi-contractual, and state consumer protection law claims on behalf of themselves and a putative class. Upholding the district court's order granting defendants' motion to dismiss, the Tenth Circuit held that plaintiffs failed to state a claim for breach of contract because they sought only one form of relief – refunds of the costs of their passes – but the purchase agreement for the passes provided that they were not eligible for refunds of any kind. The court determined that no Colorado authority justified interpreting the agreement in any way other than according to the plain meaning of the words it contained, and held that authority in other jurisdictions limiting the application of no-refund clauses depending on which party terminates a contract were either unpublished or distinguishable because those cases involved different state laws, a complete failure to perform by defendant (which plaintiffs in this case did not allege), and/or contracts with express provisions calling for repayment of advances through discounts on goods provided by the recipient over time. The Tenth Circuit also upheld the district court's ruling dismissing plaintiffs' breach of warranty claims for similar reasons.

D.C. Circuit

In re White, No. 22-8001, 2023 WL 2763812 (D.C. Cir. Apr. 4, 2023)

D.C. Circuit widens circuit split by rejecting rule against "fail-safe" classes as a per se basis for denying class certification.

In this ERISA class action, former employees of Hilton Hotels sought for a third time to certify three sub-classes consisting of persons that "[h]ave been denied vested rights to retirement benefits" by the Hilton Hotel Retirement Plan. The district court denied class certification, finding the proposed classes violated the rule against certifying "fail-safe" classes. A "fail-safe" class is one in which, by the terms of the class definition, "membership can only be ascertained through a determination of the merits of the case." In this instance, the class members could not be determined until there was a merits determination as to what constituted "vested" rights under the plan – for example, whether fractional years of employment with Hilton should be rounded up in determining whether rights to benefits vest. The rule against "fail-safe" classes is applied to address the administrative difficulty of determining class membership early in the case and the lose-lose situation defendants face if such classes are certified (i.e., class members either win on the merits or fall out of the class and are not bound by the judgment). The circuits are split on application of the "fail-safe" rule to bar class certification, with the First, Sixth, Seventh, and Eighth Circuits adopting a rule against "fail-safe" classes, the Fifth Circuit rejecting the rule, and the Third, Fourth, Ninth, and Eleventh Circuits not adopting a per se rule regarding "fail-safe" classes one way or the other. By its opinion, the D.C. Circuit appears to have joined the Fifth Circuit.

The D.C. Circuit reversed and remanded the district court's denial of class certification, specifically "reject[ing] a rule against 'fail-safe' classes as a freestanding bar to class certification ungrounded in Rule 23's prescribed criteria [for certification]." In doing so, the D.C. Circuit acknowledged the concerns raised by the certification of "fail-safe" classes but held that these concerns were more properly addressed by applying Federal Rule of Civil Procedure Rule 23 than by denying certification based on a "stand-alone

and extra-textual rule." The D.C. Circuit explained that "stick[ing]" to Rule 23's specified criteria (e.g., numerosity, commonality, and typicality) "should eliminate most, if not all, genuinely fail-safe class definitions." For the rare "fail-safe" class definition that is not weeded out through Rule 23's criteria, "then the problem will in all likelihood be one of wording, not substance." For example, a class of "workers unlawfully denied promotion" might be remedied by striking the word "unlawfully" from the definition. In such cases the "fail-safe" issue should be cured by refining the class definition rather than denying certification. The court pointed out that Rule 23(c)(1)(B) ultimately charges the district court with defining the class, and the district court should either work with counsel to address the problem or "simply define the class itself." Finding that the district court here had "bypassed Rule 23's requirements" in favor of applying the now rejected "fail-safe" rule, the D.C. Circuit remanded for further proceedings.

In re: Rail Freight Fuel Surcharge Antitrust Litigation (No. II), Misc. No. 20-00008 (BAH), MDL No. 2925, 2023 WL 4105105 (D.D.C. June 21, 2023)

Assessment of plaintiff's reasonable diligence in filing suit not required for applying *American Pipe* tolling of the statute of limitations.

In this multidistrict litigation (MDL), plaintiff rail-freight shippers brought claims against the four largest U.S. railroads, alleging antitrust violations involving price-fixing and inflating freight rates between 2003 and 2008. The claim was originally asserted in another multidistrict litigation (*MDL I*) commenced in 2007 where class certification was denied and affirmed on appeal in August 2019. Shortly after denial of class certification, a number of unnamed putative class members from *MDL I* commenced their own suits, resulting in the present multidistrict litigation (*MDL II*). The latest suit to be consolidated in *MDL II* was brought by Environmental Protection & Improvement Co., LLC (EPIC) in July 2022, almost three years after affirmance of denial of class certification in *MDL I*. Defendants moved to dismiss EPIC's complaint, arguing that EPIC's claim was time-barred because EPIC was not entitled to tolling of the statute of limitations under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). Under *American Pipe*, "commencement of a class action suspends the applicable statute of limitations as to all putative class members through the class certification stage." Defendants argued that because EPIC had not acted with reasonable diligence and "slept on its claim" after class certification denial in *MDL I*, EPIC could not avail itself of *American Pipe*'s tolling doctrine. The district court disagreed and denied defendants' motion to dismiss.

The court addressed two relevant inquiries: (1) whether the availability of *American Pipe* tolling first requires an inquiry into whether a particular plaintiff acted with reasonable diligence in filing its suit in order for the doctrine to apply, and (2) whether *American Pipe* only tolls the statute of limitations for a reasonable time after denial of class certification, thus requiring plaintiff to act with reasonable diligence in filing its subsequent complaint. As to the first issue, the district court examined the history of *American Pipe* and found that while *American Pipe* is an equitable tolling doctrine, its progeny establishes that it does not follow formal equitable tolling principles requiring a determination of the plaintiff's diligence. Rather, in the class action context, unnamed plaintiffs "reasonably relied on their class representative to protect their interests during the tolling period . . . ." Thus, "the *American Pipe* doctrine reflects a categorical determination that all potential class members who wait to file individual lawsuits until after the denial of class certification . . . are not careless in belatedly pursuing their claims." Accordingly, a plaintiff is not required to demonstrate that they acted with reasonable diligence to benefit from *American Pipe's* tolling doctrine. Second, the district court found that contrary to defendants' assertion, assessment of the plaintiff's diligence is similarly not required for determining whether a plaintiff has timely filed after *American Pipe* tolling occurs. Rather, the large weight of jurisprudence holds that *American Pipe* operates as a "stop-clock," temporarily stopping the limitations clock through the class

action and then "picking up where it left off." The district court noted that the U.S. Supreme Court recently had held that "the time to file individual actions once a class action ends is finite, extended only by the time the class suit was pending." Thus, a plaintiff is entitled to the full remaining time on the clock after applying *American Pipe* tolling to timely file its claim. As EPIC had filed its complaint within the four-year period remaining on its clock after denial of class certification, its complaint was timely.

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