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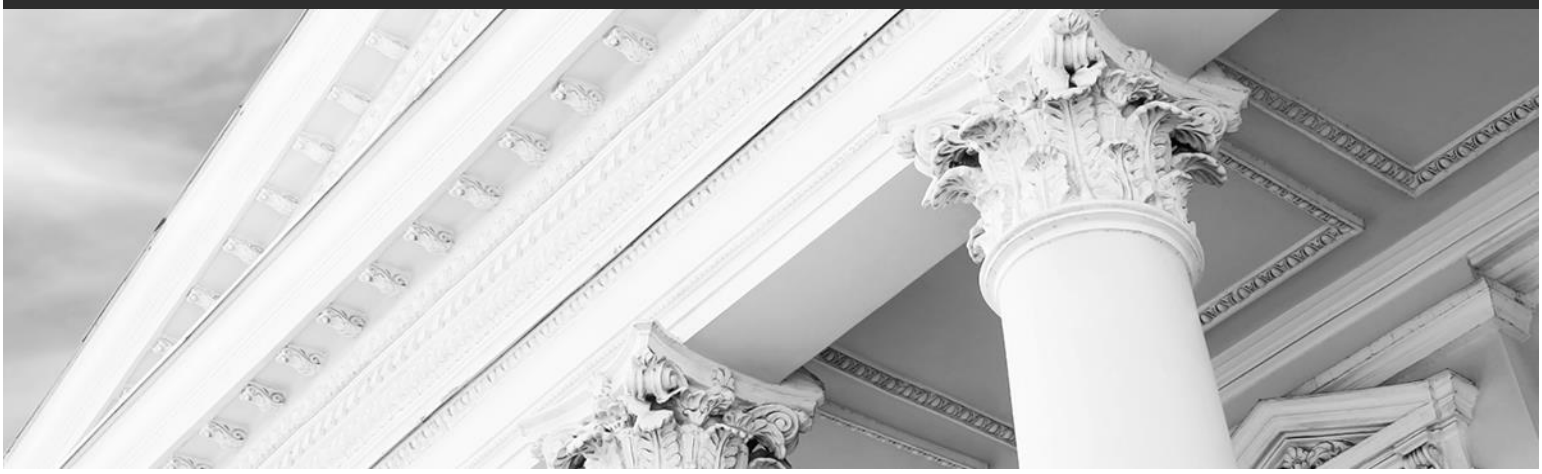

This GT Newsletter summarizes recent class-action decisions from across the United States.

Highlights from this issue include:

- Second Circuit reverses denial of motion to compel arbitration based on uncluttered user interface providing "reasonably conspicuous notice."
- Second Circuit decertifies long-running securities fraud class action finding link between corrective disclosures and the alleged misrepresentations insufficient.
- Third Circuit finds plaintiff has standing to pursue FDCPA claim but remands for determination whether individualized inquiry needed to ascertain if individual class members had standing predominates over common issues.
- Fifth Circuit vacates class certification in breach of contract case because plaintiffs failed to show class-wide injury.
- Sixth Circuit vacates order certifying issue-classes in design defect case for deficient analysis of Rule 23's commonality requirement.
- Seventh Circuit remands insurance policyholder class action to state court based on CAFA's internal-affairs and home-state exceptions.
- Eleventh Circuit holds that 2018 Amendment to Fed. R. Civ. P. 23(e)(2) does not displace *Bennett* factor analysis to determine whether a proposed settlement is "fair, reasonable, and adequate."
- Eleventh Circuit (*en banc*) rules that receipt of an unwanted text message causes a concrete injury and can establish standing for a class representative bringing TCPA claim.

First Circuit

DiCroce v. McNeil Nutritionals LLC, 82 F.4th 35 (1st Cir. 2023)

Consumer's state-law claims based on federal labeling law dismissed as preempted by Food, Drug, and Cosmetic Act.

Plaintiff Kristin DiCroce appealed from the district court's dismissal of her complaint for allegedly misleading labeling and marketing of Lactaid supplements. The district court held that DiCroce's false advertising and deceptive trade practices claims both failed because "no reasonable consumer could find Lactaid's product labels deceptive, nor has DiCroce identified a misrepresentation of fact." The First Circuit did not address the claims substantively and instead affirmed the dismissal on grounds that the state law claims were preempted by federal law.

Specifically, DiCroce's legal action hinged on her assumption that Lactaid's labels violated the federal Food, Drug, and Cosmetic Act (FDCA) labeling requirements and therefore were misleading to consumers. However, only the Food and Drug Administration (FDA) may enforce the FDCA; there is no private right of action. The FDCA preempts any state-law claim that exists "solely by virtue" of an FDCA infraction. Unless a plaintiff pleads that conduct (1) violates FDCA labeling requirements and (2) would also violate chapter 93A even if the FDCA did not exist, the claim is preempted. DiCroce did not contend that Lactaid did not perform as promised, nor did she provide any basis, independent of federal labeling laws, from which the court could conclude that a consumer would be misled by Lactaid's label. In fact, DiCroce's complaint acknowledged that Lactaid's disclaimer statements were "literally true," arguing only that the labels are nevertheless misleading because they violate the FDCA. The First Circuit concluded that when Congress enacted the FDCA, it tasked the FDA, not private citizens, with addressing such alleged violations.

Alves v. Goodyear Tire & Rubber Company, No. 22-11820, 2023 WL 4706585 (D. Mass. July 24, 2023)

Operation of an interactive website is not sufficient to demonstrate defendant availed itself of minimum contacts necessary to warrant personal jurisdiction.

Plaintiff brought a putative class action against Goodyear Tire & Rubber Company alleging the company's use of Session Replay Code technology on its website violated Massachusetts privacy laws. Goodyear moved to dismiss for lack of personal jurisdiction in Massachusetts. Plaintiff argued the court had personal jurisdiction over Goodyear because through Goodyear's website the injury occurred in and was felt in Massachusetts. Specifically, plaintiff alleged defendant knew that its practices would directly result in collection of information from Massachusetts citizens while those citizens browsed *www.goodyear.com*. Nevertheless, plaintiff claimed, defendant chose to avail itself of the business opportunities of marketing and selling its goods and services in Massachusetts and collecting real-time data from website visit sessions Massachusetts citizens initiated while in Massachusetts. The court found Goodyear's *intentional* activities, including the operation of *www.goodyear.com*, the licensing and procurement of Session Replay Code technology, and the gathering and use of user data, undisputedly all took place outside Massachusetts. Indeed, the only intentional contact between Goodyear and Massachusetts that is relevant to the claims at issue was the accessibility of *www.goodyear.com* in Massachusetts.

The district court reasoned that the proper question was not where plaintiff experienced a particular injury or effect but whether the defendant's intentional conduct connected it to the forum. The court held that the facts alleged in the complaint did not establish a sufficiently strong relationship between Goodyear's intentional activities in Massachusetts and the dispute to warrant exercise of personal jurisdiction. The operation of an interactive website did not show that the defendant formed a contact with Massachusetts. The court concluded that without defendant creating a sufficient connection with the forum state itself, personal jurisdiction was not proper.

John Doe v. Atrius Health, Inc., C.A. No. 22-12196, 2023 WL 6961905 (D. Mass. Oct. 20, 2023)

Private entity that voluntarily participates in federal incentive programs for financial gain does not fall within ambit of federal-officer removal statute.

Plaintiff filed a putative class action against non-governmental health care provider Atrius Health alleging systematic violation of patients' state-law privacy rights. The complaint alleged that Atrius Health's websites used a visitor tracking tool, allowing that information to be processed and shared with third-party advertisers. Atrius Health removed the action to federal court under 28 U.S.C. § 1442(a)(1), the federal-officer removal statute. Plaintiffs moved to remand, contending that federal subject-matter jurisdiction was lacking because defendant failed to meet the requirements of § 1442(a)(1).

The removing party "bears the burden under § 1442(a)(1) to establish: (1) that it was acting under a federal officer's authority; (2) that the charged conduct was carried out for or relating to the asserted official authority; and (3) that it will assert a colorable federal defense to the suit." Atrius contended its alleged use of the computer code was to comply with regulations that assist the government with enhancing patient engagement and supporting the creation of infrastructure to promote adoption of nationwide interoperable health-information technology. The court found that argument insufficient to support federal-officer removal, because a private firm's compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase "acting under" a federal official.

Second Circuit

Edmundson v. Klarna, Inc., 85 F.4th 695 (2d Cir. 2023)

Second Circuit reverses denial of motion to compel arbitration where uncluttered user interface, spatially coupled with the mechanism and language for manifesting assent, provides reasonably conspicuous notice of arbitration terms.

Defendant Klarna, Inc. provides a "buy now, pay later" service that allows shoppers to buy a product and pay for it over time without incurring interest or fees. Shortly after plaintiff used Klarna to pay for online purchases, Klarna automatically deducted partial payments from plaintiff's checking account. Because plaintiff's account lacked sufficient funds, plaintiff incurred overdraft fees that were assessed by the third-party financial institution associated with her bank account (not Klarna). Plaintiff brought a putative class action alleging that Klarna misrepresents and conceals the risk of bank overdraft fees, asserting claims for common law fraud and violation of the Connecticut Unfair Trade Practices Act. The district court denied Klarna's motion to compel arbitration, but the Second Circuit reversed and remanded with instructions to grant Klarna's motion.

In discussing the formation of a web-based contract—and whether a "reasonably prudent" user will be on inquiry notice of arbitration terms if they are presented in a "clear and conspicuous way"—the Second Circuit reiterated its prior statements in *Meyer v. Uber Techs, Inc.*, 868 F.3d 66 (2d Cir. 2017) about how a "reasonably prudent" internet or smartphone user is "not a complete stranger to computers or smartphones, having some familiarity with how to navigate to a website or download an app," and knows what a hyperlink looks like and that it links "to another webpage where additional information will be found." The Second Circuit also reiterated the importance of a company's interface presentation, noting that "when terms are linked on an 'uncluttered' interface and temporally and 'spatially coupled with the mechanism for manifesting assent,'" and no scrolling is required, that is sufficient to qualify as reasonably conspicuous notice as a matter of law. The Second Circuit also reiterated that an explicit reference to the words "I agree" is not necessary for a user to manifest assent, and that various other factors are to be considered, including whether the interface clearly warned the user that taking a specific action would constitute assent (e.g., creating an account and agreeing to be bound to the linked terms) and the timing and location of being presented with the terms.

The Second Circuit concluded that Klarna provided "reasonably conspicuous notice" of its arbitration terms and that plaintiff manifested assent thereto. First, the court found "reasonably conspicuous notice" of the terms because, among other things, (1) Klarna's widget interface is "uncluttered"; (2) the only link provided is to Klarna's terms, and the user is presented with only one button to click—"Confirm and continue"—so the content is "visible at once, and the user does not need to scroll beyond what is immediately visible to find notice" of the terms; (3) even though the hyperlink to the terms is in a smaller font, it is "set apart from surrounding information by being underlined and in a color that stands in sharp contrast to the color of the interfaces' backgrounds" and is therefore sufficiently conspicuous in light of the interface as a whole; (4) the timing of the presentation of the terms of service—namely, at purchase or enrollment—would indicate to a "reasonably prudent user" that "the terms presented on the interface govern the user's future relationship with Klarna"; and (5) the interface contained language that "signal[ed] to users that they will be agreeing to Klarna's terms through their conduct" by proceeding further. As for the user's manifestation of assent by selecting "Confirm and continue," the Second Circuit ruled that plaintiff could not avoid notice of the terms, which were hyperlinked, as the statement in which the hyperlink was embedded was placed directly above the button she herself had to click. The Second Circuit also added that there is no requirement for the company to explicitly advise the user of what the act of clicking to proceed means, and that the interface itself need only make clear to the reasonable user "that a specific 'click' signifies assent."

Ark. Teacher Retirement Sys. v. Goldman Sachs Grp., Inc., 77 F.4th 74 (2d Cir. 2023)

Second Circuit decertifies securities fraud class, finding link between "corrective disclosures and the alleged misrepresentations" insufficient.

In this longstanding putative class action, Goldman Sachs shareholders alleged that from 2006-2010 the company made misstatements in public filings about its conflict-of-interest policies. Although these statements were generic, plaintiffs alleged they artificially inflated the company stock price. Plaintiffs further alleged that when the existence of certain company conflicts came to light, that inflation purportedly dissipated, causing them to suffer losses. Whether class certification was appropriate has been a question on appeal for years and was the subject of a 2021 Supreme Court decision. See December 2020 and June 2021 GT Alerts.

Following the Supreme Court's vacatur of class certification and remand for further proceedings, the district court again certified the class, finding the company failed to rebut the *Basic* presumption invoked by plaintiffs and thus failed to sufficiently show that an alleged misstatement did not affect the stock price (i.e., that it had no "price impact"). On appeal once again, the Second Circuit found the district court abused its discretion by certifying the shareholder class and reversed and remanded for decertification.

The Second Circuit concluded that the district court's price impact analysis was based on an erroneous application of the "inflation maintenance" theory and the district court erroneously applied a "truthful substitute" inquiry. In particular, the court found that there was an insufficient link between the corrective disclosures and the alleged misrepresentations, and the defense *did* demonstrate that the misrepresentations did not impact Goldman's stock price—thereby rebutting the *Basic* presumption of reliance.

For future cases, the decision includes a section at the end captioned "Guidance moving forward" that explains how a "searching price impact analysis must be conducted" in instances where there is a "considerable gap" in front-end-back-end genericness, the corrective disclosure does not directly refer to the alleged misstatements, and the plaintiffs claim the company's generic risk-disclosure is misleading by omission. In these instances, "case law bearing on materiality can help guide courts in considering, as a factual matter, the generic nature of the alleged misrepresentation." The Second Circuit goes on to note that "courts should consider other indirect evidence of price impact, directed at either the inflation-maintaining nature of the generic misstatement, or the price-dropping capacity of an equally generic corrective disclosure."

Aleksanian v. Uber Techs. Inc., No. 22-98-cv, 2023 WL 7537627 (2d Cir. Nov. 14, 2023)

Second Circuit permits limited discovery into arbitrability, finding it could not determine whether FAA exemption for workers engaged in interstate commerce applied based solely on pleading.

Uber rideshare drivers filed a putative class action alleging that Uber breached its contracts with the drivers by unlawfully deducting certain amounts from their earnings. Uber moved to compel arbitration pursuant to the arbitration agreements contained in the Software License Agreement the drivers accepted when they agreed to download the driver version of the Uber App and drive for Uber. The drivers opposed the motion, arguing they were exempt from the Federal Arbitration Act (FAA) by being part of a class of workers engaged in interstate commerce. The district court granted Uber's motion to compel arbitration and declined the drivers' request for limited discovery to rebut the statistics and data Uber relied upon in its motion. The drivers moved for reconsideration under Fed. R. Civ. P. 59(e); that motion was denied, and they appealed.

The Second Circuit vacated and remanded, finding it could not determine whether the FAA exemption applied based solely on the complaint and incorporated documents because the pleading said "little about whether the class of transportation workers . . . are engaged in interstate commerce or sufficiently related work." In ruling that plaintiffs should have been permitted the limited discovery they had requested to determine if the FAA exemption applied, the Second Circuit noted it may include information related to "Uber's policies regarding interstate trips; the potential penalties and costs of declining interstate trips; Uber's revenue from interstate trips; the average number of interstate trips Uber drivers take over various time periods . . . ; the median number of interstate trips for Uber drivers over various time periods; what percentage of Uber drivers take interstate trips over various time periods; how often Uber drivers decline interstate trips; and any other relevant information."

Third Circuit

Huber v. Simon's Agency, Inc., 84 F.4th 132 (3d Cir. 2023)

Third Circuit finds plaintiff has standing to pursue FDCPA claim but remands for further fact-finding on predominance inquiry.

In a Fair Debt Collection Practices Act (FDCPA) case, the district court agreed with plaintiff that the debt collection letters were "misleading and deceptive" in violation of the FDCPA, held that plaintiff had standing under the informational injury doctrine because she suffered concrete financial harm as a result of the letter, and certified a class of people who received the letters.

The Third Circuit agreed that plaintiff had standing, but not under the informational standing doctrine. The panel found that doctrine only applies if plaintiff failed to receive all information required by the statute. The informational standing doctrine does not apply to misleading or confusing communications, even if, as in this case, plaintiff suffered concrete financial harm from the confusion.

The panel, however, found plaintiff had standing on a different basis: the financial harm plaintiff sustained bore a "close relationship" to the harm associated with the tort of fraudulent misrepresentation. Because plaintiff had standing, she could act as class representative for the putative class regardless of whether other putative class members had standing.

Nevertheless, the Third Circuit remanded the case to the district court for further fact-finding to determine whether the individualized inquiry needed to ascertain whether individual class members had standing predominated over issues common to the class. It was not sufficient for the district court to assume that financial harm was an "inevitable consequence" to every class member.

Fifth Circuit

Sampson v. United Servs. Auto. Ass'n, 83 F.4th 414 (5th Cir. 2023)

Fifth Circuit vacates class certification order because plaintiffs failed to show class-wide injury.

Insureds brought a class action against USAA for miscalculating the actual cash value (ACV) of totaled vehicles by using the CCC One Market Valuation Report (CCC) rather than the National Automobile Dealers Association (NADA) guidebook. Plaintiffs claimed breach of contract and violation of good faith, alleging that CCC was not a recognized valuation source and estimated a lower total-loss ACV than NADA would have provided. The district court certified a Rule 23(b)(3) class of insureds. USAA appealed the certification order under Rule 23(f).

The Fifth Circuit vacated the district court's certification order, finding plaintiffs had not shown their breach of contract claims could be proven on a class-wide basis, and so they had not shown that common issues of law and fact predominated. To prove a breach of contract claim, a plaintiff must show damages or injury, which meant that plaintiffs here could only certify the class if they could show injury on a class-wide basis. But NADA was only one source to determine actual cash value, and other methodologies were legitimate alternatives. The Fifth Circuit explained that plaintiffs had not shown that NADA was "the measure" of ACV. Although the district court had wide discretion to choose an imperfect estimative damages model at certification, the district court's discretion did not extend to the context of liability.

Even if the plaintiffs could show that using CCC was unlawful, they could not establish underpayment with class-wide proof. Some class members may have been underpaid using CCC compared with NADA, while some may not have been. The Fifth Circuit held that the choice of NADA as a class-wide liability model was arbitrary, and thus vacated the district court's order and remanded the case for further proceedings.

In re Jefferson Parish, 81 F.4th 403 (5th Circ. 2023)

Mandamus relief under All Writs Act could not be used to prevent individual trials pending determination of class certification in parallel class litigation.

A landfill owner and operators were sued both in a putative class action and also in a 500-plaintiff mass action. Both lawsuits alleged the landfill's noxious gases and odors made the plaintiffs ill, decreased their quality of life, and caused the loss of enjoyment and use of their property. Defendants objected to the district court's scheduling of a trial for a small group of plaintiffs from the mass action before a determination of class certification in the class action.

Defendants sought mandamus relief from the Fifth Circuit through the All Writs Act to stop the mass action trial and to order the district court to rule on class certification before allowing any proceedings in the mass action case. Defendants argued that, under Rule 23, the filing of a putative class action bars any potential class members from reaching the merits of their own separate suits until class certification proceedings conclude in the putative class action.

Applying its three-prong test for mandamus relief, the Fifth Circuit rejected defendants' petition. First, the court examined whether there is a "clear and indisputable" right to the writ and concluded there was not. Defendants' novel legal theory—that Rule 23 applies to parallel litigation related to a putative class action—did not present a clear right to relief. Second, the Fifth Circuit looked at whether there were "no other adequate means to attain the relief" requested. This prong likewise weighed against mandamus relief, as defendants failed to show that any harm or prejudice could not be corrected on appeal. And third, the court considered whether exercising discretion to issue the writ would be "appropriate under the circumstances." The court concluded defendants had not shown the circumstances were so unique as to warrant extraordinary relief.

The Fifth Circuit emphasized that mandamus relief should be reserved for the rare case of usurpation of judicial power or clear abuse of discretion, not for testing novel legal theories. The court explained that defendants' theory "is not merely new; it is also wrong." The court recognized that Rule 23 does not cause the filing of putative class action to universally estop all separate but related actions from proceeding to the merits until the class-certification process concludes.

Sixth Circuit

In re Ford Motor Co., 86 F.4th 723 (6th Cir. 2023)

Class certification order vacated for deficient analysis of Rule 23's commonality requirement.

Consumers sued Ford Motor Company, alleging a design defect in the brake cylinders of 2013 to 2018 F-150 pickups. Plaintiffs moved to certify injunction and damages classes under Rule 23(b)(2) and (b)(3), or issue classes under Rule 23(c)(4). The district court denied certification for the injunction and damages classes but certified statewide issue classes over (1) whether the brakes were defective; (2) whether Ford

had pre-sale knowledge of the defect; and (3) whether information about the defect would be material to a reasonable buyer.

On appeal under Rule 23(f), the Sixth Circuit determined the district court's analysis was "insufficiently rigorous" in deciding whether plaintiffs had satisfied Rule 23(a)'s commonality requirement. Finding the district court's reasoning "cursory," the court of appeals explained that it was unclear whether the three certified issues could be answered "in one stroke." To that end, the Sixth Circuit determined that the district court had also ignored Ford's arguments and evidence that the case lacked common issues of law and fact, and instead abused its discretion by applying a "surface-level approach." The court of appeals noted that the district court had not considered several of Ford's arguments that evidence of design changes and knowledge prevented certification of these issues. The court of appeals was careful to avoid any ruling on the merits but noted that the arguments had to be considered. The Sixth Circuit thus vacated the class certification order and remanded the case for further proceedings.

Seventh Circuit

Sudholt v. Country Mutual Insurance Co., 83 F.4th 621 (7th Cir. 2023)

Class action remanded to state court based on Class Action Fairness Act exceptions.

Plaintiff-insurance policyholders filed a class action in state court alleging defendants accumulated and retained excess surplus of over $3.5 billion and failed to supply the corresponding policies at cost. Plaintiffs attributed this failure to the company's officers and directors, whom they claimed violated fiduciary duties and sought to improperly enrich themselves. Defendants removed the case to federal court, asserting federal jurisdiction under the Class Action Fairness Act (CAFA). Plaintiffs moved to remand based on several exceptions under CAFA. The district court denied plaintiffs' motion, and plaintiffs sought and were granted an interlocutory appeal.

Reversing and remanding to state court, the Seventh Circuit held that the case belongs in state court under two CAFA exceptions: the internal-affairs exception and the home-state controversy exception. The Seventh Circuit observed that the internal-affairs exception aims to exclude jurisdiction over claims that "concern the governance of a corporate enterprise," which primarily are resolved under state law. Because each of plaintiffs' four claims related to corporate mismanagement, all of which were grounded squarely in Illinois law applicable to officers and directors of a mutual insurance company, the internal-affairs exception to CAFA applied and required remand. The Seventh Circuit also held that the home-state exception provided an independent basis for remand. This exception applies where two-thirds or more of the proposed plaintiff classes, and the primary defendants, are citizens of the state where the action was filed. Here, the singular defendant of the 46 named officers and directors whose citizenship created minimal diversity was not considered a "primary defendant" in the overall litigation, and his diverse citizenship could not justify federal jurisdiction under CAFA.

In re Broiler Chicken Antitrust Litigation: End User Consumer Plaintiff Class v. Fieldale Farms Corp., 80 F.4th 797 (7th Cir. 2023)

Fee award vacated because district court abused its discretion by failing to adequately consider evidence of bids with declining fee structures and fee awards from the Ninth Circuit.

Several class action lawsuits alleged price fixing in the broiler chicken market. This appeal arose from the $181 million settlement of one class of end users. The district court considered (1) the actual agreements between the parties and fee agreements in the market for legal services, (2) the risk of nonpayment at the outset of the case and class counsel's performance, and (3) fee awards in comparable cases. The Seventh Circuit agreed this was the appropriate methodology for determining the fee award and, as a result, reviewed the district court's opinion for abuse of discretion.

The Seventh Circuit found the district court abused its discretion in ruling that bids with declining fee structures should categorically be given little weight in assessing fees. In particular, the bids in this case—to which the district court gave little weight—were made by co-class counsel in pursuit of appointment and represented the price of co-class counsel's legal services in an antitrust class action case. The Seventh Circuit also held that the district court abused its discretion by excluding fee awards to class counsel in cases within the Ninth Circuit under a megafund rule because class counsel continued to bid for appointment in the Ninth Circuit, suggesting that the fee awards granted by the Ninth Circuit fall within what class counsel considers an economically reasonable fee award.

Finally, the Seventh Circuit found that the district court abused its discretion by failing to provide a rationale for not permitting discovery from the experts who opined on the appropriateness of class counsel's fee award.

Sherwood v. Marchiori, 76 F.4th 688 (7th Cir. 2023)

Seventh Circuit affirms dismissal of claims where mandamus action provided meaningful redress for plaintiffs' injuries.

Plaintiffs brought a putative class action alleging equal protection and procedural due process violations under the Fourteenth Amendment against the Illinois Department of Employment Security (IDES) arising from its conduct during the pandemic in spring 2020. The Seventh Circuit affirmed the district court's dismissal of plaintiffs' equal protection claims, holding that the *Ex parte Young* doctrine does not apply when there is no continuing conduct that violates federal law.

The Seventh Circuit found that, based on plaintiffs' allegations, plaintiffs were eligible for benefits when they applied and that plaintiffs would still have a property interest in those benefits today. As a result, plaintiffs did have standing to assert a procedural due process claim. Unlike the equal protection claim, the procedural due process claim concerned an ongoing wrong, as plaintiffs never had a chance to tell their side of the story—that is to say, plaintiffs did not receive any post-deprivation hearing that complied with due process requirements.

Nonetheless, the Seventh Circuit dismissed plaintiffs' procedural due process claim for failure to state a claim on the ground that an adequate post-deprivation state process existed that they could have pursued instead of coming to federal court. The court held that plaintiffs could have brought a mandamus action under Illinois law to require IDES to provide them with a determination of their eligibility for unemployment benefits, and plaintiffs did not allege they lacked the means to file a mandamus action on

their own behalf. Plaintiffs argued that a mandamus action is an inadequate remedy because many applicants for unemployment benefits will be unable to afford counsel to file a mandamus action on an individual basis. The Seventh Circuit noted that until class certification is granted the court can only consider the claims of the named plaintiffs in making its ruling.

Hansen v. Country Mut. Ins. Co., 18 C 244, 2023 WL 6291629 (N.D. Ill. Sept. 25, 2023)

Court denies class certification because plaintiffs' motion failed to identify an actionable common question.

Plaintiffs brought a class action against defendant Country Mutual Insurance Co. asserting claims for breach of contract and unreasonable and vexatious practices in violation of the Illinois Insurance Code. While the court noted that the class easily met the numerosity threshold, it could not identify a common question that would resolve an issue central to each of the putative class members' claims in one stroke.

Plaintiffs identified four questions they argued defined the whole class. The court conducted a question-by-question analysis and determined that none of the questions would resolve any question relating to liability on a class-wide basis. Plaintiffs' first question related to defendant's alleged use of superficial inspections, but the court noted that plaintiffs failed to identify any evidence or authority supporting the assertion that the use of visual inspections would be unreasonable or illegal. Plaintiffs' second question related to the allegation that defendant tells its adjusters to reject contractor proposals and to rely on internal estimates, but the court found that plaintiffs cited no evidence that the alleged conduct was common to the class—instead relying solely on their own declaration—and that plaintiffs had not shown the alleged conduct would violate Illinois law. Plaintiffs' third question related to the underpayment of claims, but plaintiffs' evidence suggested that this occurred in less than half the claims and, as a result, was not a question capable of class-wide resolution. Plaintiffs' fourth question related to defendants' alleged practice of over-depreciating personal property values for contents claims, but because many putative class members only submitted structure claims the court held that this question necessarily failed to establish commonality while further noting that plaintiffs had failed to establish that the uniform use of an "average" condition when estimating depreciation resulted in a breach of contract.

Because plaintiffs failed to establish a common question, the court did not analyze typicality or adequacy. The court did note that the predominance standard under Rule 23(b)(3) was harder to satisfy than the commonality standard and that plaintiffs' motion for class certification failed on those grounds as well.

Finally, the court noted that plaintiffs did not present evidence of a class-wide injury. The presence of a high number of uninjured class members would prompt serious predominance concerns and could be a further reason not to grant a motion for class certification.

Mellowitz v. Ball State University, 221 N.E.3d 1214 (Sup. Ct. Ind. 2023)

Indiana Supreme Court rejects class certification of student's pandemic-related claim for tuition and fee refunds, upholding constitutionality of Indiana statute.

The student-plaintiff filed a class action against the defendant-university, claiming breach of contract and unjust enrichment, seeking refunds of tuition and fees after the university switched to remote instruction in spring 2020 due to the COVID-19 pandemic. After plaintiff filed suit, the General Assembly, as approved by Indiana's governor, passed a law prohibiting class action lawsuits against postsecondary educational institutions for contract or unjust enrichment claims to recover losses stemming from COVID-19. The law was retroactive to March 2020. Accordingly, the trial court rejected plaintiff's class

claims. Plaintiff appealed, asserting that the new law was unconstitutional, and the Indiana Court of Appeals agreed. The university appealed to the Indiana Supreme Court, which vacated the Court of Appeals' opinion and affirmed the trial court.

The Indiana Supreme Court held that the law was not unconstitutional. First, the law did not violate the separation of powers clause because the law is limited in scope, applying only to a narrow category of cases for a specific period of time. Because of this limited scope, the law "predominantly furthers a public policy objective—reducing postsecondary educational institutions' litigation exposure for their emergency response to the pandemic[.]" The Indiana Supreme Court also rejected plaintiff's argument that the law violated his property rights because plaintiff has no constitutional right to sue on behalf of others, and the law does not prohibit plaintiff from pursuing relief for his own individual claims. Finally, and also because the law did not limit plaintiff's individual claims, the Indiana Supreme Court held that the law did not relieve the university of any of its contractual obligations.

Eighth Circuit

Burnett v. Nat'l Assn. of Realtors, 75 F.4th 975 (8th Cir. 2023)

Eighth Circuit rejects application of arbitration clause to unnamed class members.

Plaintiffs filed a putative class action against a group of realtors, alleging enforcement of anticompetitive rules they claimed result in damages. Through their real estate transactions, certain class members were parties to listing agreements with wholly owned subsidiaries of one of the defendant-realtors (HomeServices). These listing agreements included similar versions of arbitration clauses that, per the agreements' language, required "the parties to [the] Contract" or the "Agreement" to arbitrate any dispute between them. After nearly a year of litigating the case, HomeServices moved to compel arbitration of the plaintiffs' claims based on the arbitration clauses in the listing agreements. The district court denied the motion, noting the subsidiaries–not HomeServices–were parties to the agreements and thus the arbitration clauses did not apply. HomeServices appealed to the Eighth Circuit, which affirmed the district court, further holding that if any such right to arbitrate did exist, HomeServices had waived that right by litigating the case "in federal court for close to a year." Following this appeal, the district court granted the plaintiffs' motion for class certification.

After the certification decision, HomeServices filed a second motion to compel arbitration, this time with respect to the unnamed class members. Once again, the district court denied the motion, holding that HomeServices had "ample opportunity" to raise this defense prior to class certification. Further, even if HomeServices had not waived its right to this defense, HomeServices was still prohibited from enforcing the listing agreements. Because HomeServices' relationship with the subsidiaries was not "sufficiently close" and the listing agreements were not "so intertwined" with plaintiffs' claims, HomeServices could not step into the subsidiaries' shoes as a party to those agreements. HomeServices also appealed this decision.

The Eighth Circuit affirmed. Holding that even if HomeServices had not waived this defense against the unnamed class members, the court determined that HomeServices could not enforce the listing agreements. The court first determined that, because the agreements were limited to the subsidiaries and the unnamed class members–not HomeServices–the provision allowing an arbitrator to resolve disputes of arbitrability between "the parties" did not apply. Thus, the district court properly determined how the arbitration clauses applied to HomeServices in this case. After confirming the district court's authority to interpret the listing agreements, the Eighth Circuit held that HomeServices could not enforce the

arbitration clauses. The agreements narrowly defined who the parties were, and HomeServices conceded it was not a party to the agreements and was not listed anywhere in them, let alone as a third-party beneficiary. The court was not convinced by HomeServices' estoppel-based arguments that, given its close relationship to the subsidiaries and the parties' conduct, failure to enforce the arbitration clauses would "eviscerate" the agreement.

Hennessey v. Gap, Inc., 86 F.4th 823 (8th Cir. 2023)

In putative class action asserting claims under the Missouri Merchandising Practices Act (MMPA) and for unjust enrichment, plaintiff failed to adequately allege an ascertainable loss or that it would be inequitable for defendants to retain money plaintiff paid for products purchased.

Plaintiff brought a class action against defendants The Gap, Inc. and Old Navy, LLC asserting the products she purchased at discount prices were deceptively advertised, as defendants had not sold a substantial quantity of these products at the advertised "regular" prices. Plaintiff brought claims under the MMPA and for unjust enrichment, based her damages on the common-law benefit of the bargain rule under which she argued she should be entitled to recover the difference between the actual value of the shirt she purchased and the represented "regular" price of the shirt.

The Eighth Circuit held that the benefit of the bargain rule is based not on the difference between the actual value of the product purchased and the represented price but rather on a difference in quality between the product as represented and the product received. Plaintiff did not allege the product she received was different in quality than the product as advertised and, as a result, she failed to allege an ascertainable loss as required to assert a claim under the MMPA. Plaintiff's allegations, on information and belief, that the actual fair market value of some of the products she purchased was less than the sale price she paid could support an MMPA claim, but allegations on information and belief are generally insufficient to plead a claim under Rule 9(b). Plaintiff was required to plead with particularity facts showing both the value of the products as represented and the actual value of the products as received. Because she failed to do so, her MMPA claim was properly dismissed.

Plaintiff's unjust enrichment claims similarly failed because she received the products she intended to purchase at the price she intended to pay. Moreover, the Eighth Circuit held that each of plaintiff's purchases was an express contract (memorialized by the receipt) and that the existence of an express contract precludes a claim of unjust enrichment.

The Eighth Circuit also affirmed the district court's decision to dismiss the amended complaint with prejudice, noting plaintiff failed to file a motion for leave to amend between her filing of the initial complaint and either the defendants' motion to dismiss or the district court's order on the motion to dismiss. The Eighth Circuit held that the district court is not required to invite a motion for leave to amend if the plaintiff never filed one. Moreover, plaintiff had not properly preserved the issue of whether dismissal with prejudice was appropriate, as she raised it for the first time on appeal rather than on a post-judgment motion to vacate under Rule 60(b).

Brown v. GoJet Airlines, LLC, 677 S.W.3d 514 (Mo. 2023)

The Missouri Supreme Court vacated a circuit court order denying GoJet's motion to compel arbitration and remanded, requiring arbitration of the putative class action filed on behalf of GoJet employees under the Missouri Uniform Arbitration Act (MUAA).

Plaintiff filed a putative class action on behalf of GoJet employees, alleging GoJet breached its bonus agreement by failing to issue bonuses to him and to other employees. GoJet moved to compel arbitration under the Federal Arbitration Act (FAA) and the MUAA. The circuit court denied the motion, holding that the FAA exempts from its application workers engaged in interstate commerce and that the arbitration agreement did not include the statutory notice provision required under Section 435.460 of the MUAA.

As an initial matter, the Missouri Supreme Court declined to consider plaintiff's argument that GoJet had failed to establish the existence of an arbitration agreement, as plaintiff failed to raise that argument before the circuit court and proceeded as if the agreement existed. Moreover, because plaintiff qualifies as a worker engaged in interstate commerce, he is excluded from application of the FAA. The Missouri Supreme Court, however, held that all arbitration agreements in Missouri, unless they are contracts of insurance or adhesion, are subject to MUAA Section 435.350 so long as the matter is not preempted by the FAA. And nothing in the MUAA states that it only applies if the parties agree the MUAA applies to their arbitration agreement.

Having determined that an arbitration agreement existed and that the MUAA applied, the Missouri Supreme Court considered *de novo* whether the motion to compel arbitration should have been granted. Because the arbitration agreement delegates threshold issues of arbitrability to the arbitrator, the Missouri Supreme Court held that the arbitrator must decide any challenges to the enforceability of the arbitration agreement—including plaintiff's challenge regarding the statutory notice provision under Section 435.460 of the MUAA.

Ninth Circuit

Madeira v. Converse, Inc., No. 22-55161, 2023 US App Lexis 21393 (9th Cir. Aug. 16, 2023)

Legality of employer rounding policy undetermined pending California Supreme Court's review of *Camp v. Home Depot U.S.A., Inc.*

Plaintiff filed a class action against Converse for various wage and hour claims. The district court denied plaintiff's motion for class certification and granted Converse's motion for summary judgment, and plaintiff appealed. The Ninth Circuit affirmed the district court's denial of the motion for class certification as to one subclass for failure to establish predominance, but reversed as to the other subclass, the "rounding subclass." In reversing, the court of appeal held that the district court erred in relying on *See's Candy Shops, Inc. v. Superior Ct.*, 210 Cal. App. 4th 889, 907 (2012) for the proposition that an employer's rounding policy is legal if it is "fair and neutral on its face and it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." The court found that since the district court's ruling, the California Court of Appeal questioned *See's'* holding in *Camp v. Home Depot U.S.A., Inc.*, 84 Cal. App. 5th 638 (2022), which held that "if an employer . . . can capture and has captured the exact amount of time an employee has worked during a shift, the employer must pay the employee for 'all the time' worked." The *Camp* court prompted the California Supreme Court to grant review to decide the validity of the *See's* rounding

holding. The Ninth Circuit thus remanded, ordering the district court to delay its ruling pending the California Supreme Court's ruling in *Camp*. Separately, the court reversed the district court's grant of Converse's motion for summary judgment as to the rounding claim, which was based on the theory that Converse did not have notice of the rounding claim because it was not alleged in plaintiff's complaint. The court held that because Converse had notice of the rounding claim through plaintiff's class certification motion, and because discovery did not close until a year later, allowing Converse to take discovery on the theory and oppose it on the merits in opposition to class certification, Converse was on sufficient notice and was not prejudiced.

Scheibe v. Livwell Prods., LLC, No. 23-cv-216-MMA (BLM), 2023 WL 4414580 (S.D. Cal. July 7, 2023)

Claim based on use of term "malic acid" preempted by federal law, but claims based on use of term "nothing artificial" despite use of malic acid in product adequately plead.

Plaintiff brought a putative class action against the manufacturer of Keto K1000 powder, a dietary supplement. Plaintiff alleged that defendant's labeling claims were false and violated California and Maryland false advertising laws because the front labels stated that the products contained "nothing artificial" or that they contained "clean ingredients" while they actually contained "DL malic acid, a synthetic substance derived from petrochemicals." Plaintiff also claimed that using the term "malic acid" instead of "DL malic acid" violated state and federal law. The court ruled that plaintiff's claim regarding the use of the term "malic acid" was preempted because it was used in accordance with federal law. Regarding the false advertising claims concerning the use of the term "nothing artificial" even though the product at issue contained malic acid, the court found plaintiff adequately alleged the "who, what, when, where and how" of the alleged deception under Rule 9(b). The court also found that plaintiff adequately alleged reliance because he alleged he relied on the statement "nothing artificial" in making his purchasing decision, not the ingredient list or the words "malic acid" specifically. However, the court granted defendant's motion to dismiss plaintiff's claims for equitable relief because he did not allege he was likely to purchase the product at issue in future.

Garcia v. Build.com, Inc., No. 22-cv-01985-DMS-KSC, 2023 WL 4535531 (S.D. Cal. July 13, 2023)

Court rules plaintiff has standing to sue under CIPA for alleged surreptitious recording of online chat conversations, but defendant cannot be liable under CIPA section 631 because one cannot eavesdrop on a conversation to which it is a party.

Plaintiff brought individual and putative class claims based on alleged violations of two provisions of the California Invasion of Privacy Act (CIPA) – Penal Code section 631 and 632.7 – based on the allegation that defendant Build.com, an online home improvement retailer, secretly recorded a chat with plaintiff on defendant's website, which allows customers to ask questions about Build.com's products and services. In granting defendant's motion to dismiss, the district court recognized a split of authority in federal courts in California on the issue of whether plaintiffs bringing similar CIPA claims based on interactions with a website's chat feature have demonstrated standing. The court sided with the cases holding that plaintiff had standing at this stage because she alleged that defendant secretly intercepted and recorded plaintiff's chat messages without informing her and without her consent, and thus sufficiently alleged injury-in-fact necessary to have standing to sue, even though plaintiff did not allege that she disclosed any confidential information. However, on the merits, the court held that defendant could not be liable under section 631 of CIPA, which prohibits eavesdropping on conversations, because a defendant cannot eavesdrop on a

conversation to which it is a party. The court also held that defendant could not be liable under section 632.7 of CIPA, which prohibits intercepting telephone conversations, because that statute does not apply to online chats.

Zimmerman v. L'Oreal USA, Inc., No. 22-cv-07609-HSG, 2023 WL 4564552 (N.D. Cal. July 17, 2023)

Plaintiff failed to state claims relating to products she did not purchase from defendant that were materially different from products she did buy.

Plaintiff brought individual and putative class claims based on the allegation that she purchased L'Oreal Infallible Fresh Wear 24HR Foundation, believing that front label statements that the product provides "Up to 24HR Breathable Texture," "Up to 24H Fresh Wear," and "Sunscreen Broad Spectrum SPF 25" led her to believe that the foundation provided 24 hours of sunscreen protection when it allegedly only lasted two hours. Plaintiff also challenged labels on products she did not purchase. Defendant moved to dismiss in part on the ground that plaintiff lacked standing to sue based on products she did not purchase. The district court noted there is no controlling authority on this issue in the Ninth Circuit, but the majority of district courts have held a plaintiff may have standing to assert claims for unnamed class members based on products he or she did not purchase so long as the products and alleged misrepresentations are substantially similar. The court found the two identified products plaintiff did not purchase were not substantially similar because the allegedly misleading statements on their packaging were materially different. Thus, resolution of plaintiff's claims would not be identical across the purchased and unpurchased products. The court denied defendant's motion regarding injunctive relief, however, because plaintiff alleged she would likely purchase products in the future if they were not mislabeled. And the court held that plaintiff's claims were not preempted by the Federal Food, Drug and Cosmetic Act because the FDCA does not require manufacturers to include any durational statement on front labels of sunscreen products.

Mikulsky v. Noom, Inc., No. 3:23-cv-00285-H-MSB, 2023 WL 4567096 (S.D. Cal. July 17, 2023)

Court lacks subject matter jurisdiction over plaintiff's claims because she did not allege injury in fact required under Article III to have standing to sue.

Plaintiff brought individual and putative class claims for violation of the California Invasion of Privacy Act (CIPA) and invasion of privacy – intrusion upon seclusion based on the allegation that defendant used session replay code to record, save, and replay a website visitor's interactions with its website, and send such code to various third parties. The district court held that plaintiff's conclusory allegation that she disclosed "personal information" did not allow the court to determine whether plaintiff had a protectible privacy interest in that information, and thus the court lacked subject matter jurisdiction over plaintiff's claims because she did not allege injury in fact required under Article III to have standing to sue. The district court also held that plaintiff did not adequately allege specific jurisdiction over defendant because she did not allege that defendant's use of replay code targeted any Californians specifically, and because she did not allege that any portion of defendant's website targeted users in California.

Moreno v. Vi-Jon, LLC, No. 20cv1446 JM (BGS), 2023 WL 4611823 (S.D. Cal. July 18, 2023)

Consumers who believed defendant's hand sanitizer was capable of killing 99.9% of germs "in general and without limitation" were misled because of their own unreasonable assumptions.

Plaintiff brought individual and putative class claims under the UCL, FAL, and CLRA and for breach of warranty based on the allegation that defendant's representations on packaging for its hand sanitizer that its products "kill[] 99.99% of germs" or "kill[] more than 99% of germs" were false and misleading. An asterisk on the front panel led to a statement on the back panel that the products are "[e]ffective at eliminating more than 99.9% of many *common* harmful germs and bacteria in as little as 15 seconds." (Emphasis added). Plaintiff alleged that reasonable consumers would understand these representations to mean that the products "kill all or almost all of the germs on their hands," or more specifically, that the product "completely kills 99.9% of the germs on their hands." In dismissing plaintiff's claims without leave to amend after several rounds of pleading, the district court held that plaintiff's allegations failed the reasonable consumer test because it is "not necessary for a reasonable consumer to have any specialized knowledge of pathogenic diseases to understand that hand sanitizers are not designed to kill 99.9% of every conceivable variety of germs that could be found on an individual's hands." The court also found that the asterisks on the front label of the products at issue led to clear statements on the back label that the products were effective at eliminating "common" germs and bacteria, not all germs and bacteria. The court found as a matter of law that plaintiff and any other consumers who believed defendant was selling a product capable of killing 99.9% of germs "in general and without limitation" were not deceived because of defendant's advertising but misled because of their own unreasonable assumptions.

Bryan v. Del Monte Foods, Inc., No. 23-cv-00865-MMC, 2023 WL 4758452 (N.D. Cal. July 25, 2023)

Plaintiff lacked standing to seek injunctive relief once aware of true facts regarding alleged false advertising, but stated claims under California's UCL and FAL despite living in Oregon because advertising purportedly emanated from California.

Plaintiff filed individual and putative class claims for violation of the UCL, FAL, Oregon's Unlawful Trade Practices Act (UTPA), and other state consumer protection statutes based on the allegation that defendant's packaging for its "Mango Chunks and Peach Chunks" contained the phrase "fruit naturals" on the front, with a bolded emphasis on the phrase "naturals," when the products allegedly contained synthetic ingredients including citric acid, potassium sorbate, sodium benzoate, and methylcellulose gum. Defendant moved to dismiss all claims.

With respect to the claim for injunctive relief, the court agreed with defendant that plaintiff lacked standing because she could not be deceived by the allegedly misleading labeling again because she had learned information during litigation that enabled her to evaluate product claims and make appropriate purchasing decisions going forward. The court also held that plaintiff had no standing to assert claims under non-Oregon consumer protection statutes except California's, because she did not allege she made any purchases in or interacted with those states. Regarding her claims under the UCL and FAL, however, the court held that because defendant had its principal place of business in California, and plaintiff's claim was based on alleged misrepresentations disseminating from California, plaintiff had standing to allege claims under those statutes. The court also held plaintiff had standing to allege claims concerning other "Fruit Naturals" products she did not buy herself because they were allegedly similarly deceptively

marketed. On the merits, the court rejected defendant's argument that all syrups contain artificial ingredients. And the court rejected defendant's argument that the ingredient list's inclusion of synthetic ingredients on the back of the product packaging required dismissal because "[r]easonable consumers are not 'expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box.'"

Swartz v. Coca-Cola Company, No. 21-cv-04643-JD, 2023 WL 4828680 (N.D. Cal. July 27, 2023)

Statements that bottles are "100% recyclable" were not actionable where possible for products to be recycled, most consumers had access to recycling facilities, and the inability to recycle was due in part to factors beyond defendants' control.

Plaintiffs filed individual, organizational, and putative class claims against defendants based on the allegation that defendants misled consumers about the recyclability of their beverage bottles by labeling them "100% recyclable." Defendants moved to dismiss based on standing and plausibility. The district court held that the individual plaintiffs had standing because they alleged they paid a premium for the products at issue based on the "100% recyclable" representation, and had standing to seek injunctive relief because they alleged they would purchase defendants' products in the future if the representations regarding recyclability were accurate. The court also found the Sierra Club had standing to sue because it alleged it was within the domain of the organization to "protect the planet" and educate consumers about the consequences of purchasing single-use plastic. With regard to plausibility, however, the court held that plaintiffs failed to state a claim because California's recycling facilities are available to consumers or communities where the bottles are sold, which is the pertinent question under California's Green Guides. The court also rejected plaintiffs' argument that the "100%" language defendants used was misleading because it supposedly communicated to consumers that the entirety of the products, including minor components, could be recycled. The court found that nothing in plaintiffs' complaint demonstrated it was impossible to recycle the caps or labels or any other component, which is again the pertinent question under the Green Guides, and noted that the complaint acknowledged that economic, processing and contamination issues are the reasons such items are sometimes not ultimately converted into recyclable materials. The court also noted that the consumer deception alleged in the complaint is tied to forces and circumstances well beyond defendants' control, such as changes in waste importation policy in China and the economics of the recycling business.

Peterson v. Glad Prods. Co., No. 23-cv-00491-TSH, 2023 WL 4600404 (N.D. Cal. July 17, 2023)

Reasonable consumers are not required to engage in exhaustive research before purchasing items to have standing to seek injunctive relief relating to false advertising.

Plaintiff filed individual and class claims against defendant manufacturer of a line of GLAD® brand trash bags which included the brand name "RECYCLING" with blue "recycling" arrows and the words "DESIGNED FOR MUNICIPAL USE" and "PLEASE CHECK YOUR LOCAL FACILITIES" on the front of the packaging. Plaintiff alleged those statements were false and misleading because the bags were, in reality, not accepted for use in recycling programs in virtually any municipality in California. Plaintiff alleged claims under the UCL, FAL, CLRA, and various common-law claims. Defendant moved to dismiss for lack of standing to seek injunctive relief, arguing plaintiff cannot seek injunctive relief when his complaint demonstrates he can readily determine, on his own, whether the bags are accepted at his local recycling facility. The district court rejected this argument and denied the motion to dismiss, noting that

while courts have found that the threat of future harm is not sufficiently imminent where a plaintiff could easily discover whether a previous misrepresentation has been cured without first buying the product at issue, courts have rejected the notion that reasonable consumers engage in exhaustive research before purchasing items or that the reasonable consumer standard should require purchasers to do so.

Henry So v. HP, Inc., No. 22-cv-02327, 2023 WL 4596778 (N.D. Cal. July 17, 2023)

Court declines to take judicial notice of product packaging in connection with a motion to dismiss, even where statements on packaging contradicted plaintiff's allegations, but agrees to take judicial notice of websites, including archived versions on the Wayback Machine.

Plaintiff filed individual and putative class claims against defendant-manufacturer of computer printers, alleging that defendant periodically pushed out firmware updates to its printers that prevented consumers from using third-party cartridges, and that the firmware also caused the printer to display a false error message stating there was a "supply problem, cartridge communication error, or cartridge problem." Plaintiff also alleged that defendant installed technology in its printers that collects data about the consumer's printing habits and transmits it back to defendant without the consumer's knowledge and consent. Among other claims, plaintiff alleged claims under the UCL, FAL, and CLRA. Granting defendant's motion to dismiss in part and denying it in part, the district court held it could not take judicial notice of and consider the printer's packaging that was not included in the operative complaint on a motion to dismiss, even if statements on the packaging contradicted plaintiff's allegations. In contrast, the court held it could take judicial notice of statements on websites, including archived versions from the Wayback Machine. After doing so in connection with defendant's motion, the court found that plaintiff did not state a claim based on affirmative misrepresentations because the error messages were not false in that the printer did have a supply problem because third-party cartridges did not in fact work. However, the court held that plaintiff did state a claim based on omissions based on the allegation that defendant failed to disclose an alleged defect central to the printer's function – namely, that the printer would stop working until defendant's cartridges were used.

Schippell v. Johnson & Johnson Consumer Inc., No. EDCV 23-410 JGB, 2023 WL 6178485 (SHKx) (C.D. Cal. Aug. 7, 2023)

Plaintiff not required to allege awareness of representations made on "adult" products as compared to "baby" versions of products to seek injunctive relief on false advertising claims; however, plaintiff failed to allege facts to support Article III standing based on her contention that she paid a premium for "baby" products over "adult" equivalents.

Plaintiff filed individual and putative class claims against defendant-manufacturer of AVEENO® brand "Baby" products. Plaintiff alleged claims under the UCL, FAL, and CLRA, as well as common-law claims, based on the contention that defendant marketed and sold the baby products with labeling, packaging, and advertising that led consumers to believe they were specially made for babies, or otherwise uniquely suited for babies, when in fact they were not. In deciding whether plaintiff had standing to seek injunctive relief, the district court found that plaintiff was not required to scrutinize the packaging of adult versions of the products at issue to reason that a comparable product for non-babies likely exists, and to rely to her detriment on the representations made on the baby products themselves, from which she could reasonably infer that the baby products are specially formulated for babies. However, the court found that plaintiff failed to allege facts showing she suffered actual injury sufficient to have Article III standing, because the only allegations in her complaint regarding her "price premium" theory were conclusory, and

she never identified the price she paid for the "baby" products or the comparable prices for the "adult" versions of those products, and failed to provide nonconclusory allegations to demonstrate that the "baby" versions retailed for a higher price. Because the court granted defendant's motion to dismiss with leave to amend, the court went on to address the substance of plaintiff's claims, finding that plaintiff stated claims because while the "baby" products may well be suited for use by babies by virtue of their ingredients, many of those same characteristics make them just as suitable for adults, which is why defendant sells the exact same product as an "adult" version for less money. And the court found that defendant failed to disclose that the "baby" and "adult" products were identical.

Perez v. MEC Holding Co., No. 5:23-cv-00279-SSS-KKx, 2023 WL 4865538 (C.D. Cal. July 31, 2023)

The factors set forth in *Diaz v. Tr. Territory of Pac. Islands* remain applicable to precertification settlements and do not abrogate Fed. R. Civ. P. 23(e).

Plaintiff brought a putative class action against MEC Holding Company. The parties settled the case and requested dismissal via a joint stipulation of dismissal before the class had been certified. In the joint stipulation, the parties contended that the 2003 amendment to Fed. R. Civ. P. 23(e) abrogated and/or alleviated the need for the requirements in *Diaz v. Tr. Territory of Pac. Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989). The court noted the differing views of several courts on the issue and acknowledged that some courts have held that *Diaz* is inapplicable to precertification settlements. However, the court found that "unless and until" the Ninth Circuit holds that Rule 23(e) has abrogated *Diaz*, the court will apply the *Diaz* factors in its review of precertification settlements and dismissals "to ensure that the interests of the class members…are protected." The court held that the *Diaz* factors were important to determine (1) whether "the class members are [] being harmed by the settlement of an individual initially acting as the class's representative," (2) "whether other class members have paused or abandoned their own pursuits of litigation due to their reliance on the potential class action," and (3) whether "the settlement is fair and does not abandon the interests of the class for the sake of the individual's own personal interests."

Keller v. Chegg, Inc., No. 22-cv-06986-JD, 2023 WL 5279649 (N.D. Cal. Aug. 15, 2023)

Arbitration agreement valid even though plaintiff was a minor at the time he agreed to terms of use containing arbitration provision because minority is only a defense to contract enforcement, not contract formation.

Plaintiff brought a putative class action against Chegg, an online platform that provides educational products to students. Chegg moved to compel arbitration based on an arbitration clause in Chegg's terms of use (TOU). Plaintiff argued he did not consent to arbitration because, among other reasons, he was a minor at the time he signed up for Chegg and accepted the TOU. The court held that because California law considers minority a defense to contract enforcement, and not contract formation, it was not a viable defense to formation of an arbitration agreement. The court subsequently granted Chegg's motion to compel arbitration.

Chavez Valdez v. Field Asset Servs., Inc., No. 23-CV-1085 W (KSC), 2023 WL 286937 (S.D. Cal. Aug. 17, 2023)

Court does not retain subject matter jurisdiction over unnamed class member's individual claims after class is decertified.

Plaintiff was a class member in a putative class action in the Northern District of California entitled *Bowerman v. Field Asset Servs., Inc., et al*. The district court in *Bowerman* granted class certification, but the Ninth Circuit later decertified the class on appeal. After the class was decertified, plaintiff Valdez filed an individual lawsuit in California state court. Defendants attempted to remove it to federal court, citing CAFA as the basis for subject matter jurisdiction. Although plaintiff's lawsuit did not meet the requirements for CAFA jurisdiction because plaintiff's action was not a class action, defendants argued that the district court retained jurisdiction over plaintiff's claims at issue in the *Bowerman* action. Defendants cited cases in which a district court retained jurisdiction over a named plaintiff's individual claims post-decertification, but the court held that these cases were inapposite as they only applied to named plaintiffs, not other class members. Thus, the court held it lacked subject matter jurisdiction and remanded the action to state court.

Pittmon v. CACI International, Inc., No. CV 21-02044-CJC, 2023 WL 8168834 (C.D. Cal. Oct. 26, 2023)

Court denies motion to strike PAGA claims without prejudice to refiling, pending California Supreme Court review of inherent authority to strike unmanageable claims.

Plaintiffs alleged that defendants, among the largest background investigation firms in the world, improperly required investigator employees to work unpaid hours and without required breaks. Plaintiffs brought claims under FLSA, PAGA, and California's Industrial Welfare Commission Wage Orders. Defendants filed multiple challenges to the claims, including a motion to strike or dismiss the representative PAGA claims under Rules 12(f) and 12(b)(6) and the court's inherent authority to manage litigation. Defendants argued that, under plaintiffs' theory of liability, which involved numerous, complex claims, evidence as to the experience of each investigator would be required, rendering trial unmanageable. The court agreed that mini-trials would be necessary, but noted that the law as to the applicability of inherent authority in the PAGA context is unsettled. Some courts have found the exercise of inherent authority to strike unmanageable PAGA clams to be appropriate, but the court of appeal in *Estrada v. Royalty Carpet Mills, Inc.* found that "[a]llowing dismissal of unmanageable PAGA claims would effectively graft a class action requirement onto PAGA claims." The California Supreme Court has granted review of *Estrada*. The court therefore denied defendants' motion to strike, but without prejudice to re-filing after the decision in *Estrada*.

Baggs v. Matco Tools Corp., et al., 5:23-cv-00852-SSS-SPx, 2023 U.S. Dist. LEXIS 190237 (C.D. Cal., Oct. 23, 2023)

District Court requires named plaintiff settling individual claim to submit information in satisfaction of *Diaz* factors.

The named plaintiff in a putative class action filed a notice of settlement of his individual claim in a proposed class action. Citing *Diaz v. Tr. Territory of Pac. Islands*, 876 F. 2d 1401 (9th Cir. 1989), the court stated that, when reviewing such a notice, it must ensure that the named plaintiff has fulfilled his fiduciary duty to the proposed class and, thus, must have sufficient information to rule out collusion or

prejudice. A court would consider, in particular, if (1) putative class members' potential knowledge of the pending action through publicity or other sources has resulted in reliance on the pendency of the action; (2) whether there would be a lack of time to file another action, given statutes of limitations; and (3) whether there was any compromise of the members' interests in favor of named plaintiff's own interests. Also, the court noted that, under Rule 23(e)(1)(A), the parties must provide information allowing a determination of whether notice of the settlement should be provided to the class. The court acknowledged that, based on a 2003 amendment to Rule 23(e), some courts within the Ninth Circuit have not continued to apply *Diaz*. But this court, among others, does. Accordingly, the court ordered the named plaintiff to submit information in satisfaction of all of the *Diaz* factors.

Cung Le v. Zuffa, LLC, No. 2:15-cv-01045-RFB-BNW, 2023 WL 5085064 (D. Nev. Aug. 9, 2023)

Court certifies 23(b)(3) class of MMA fighters in antitrust case based on extensive expert testimony and modeling demonstrating predominance.

Plaintiffs filed claims against defendant under the Sherman Antitrust Act based on the allegation that defendant's widespread success and dominance in Mixed Martial Arts (MMA) is due to anticompetitive behavior, including defendant (a) using exclusive contracts with specific provisions to retain fighters within the Ultimate Fighting Championship (UFC); (b) using its market power in both the input and output markets to render its fighter contracts effectively perpetual, and (c) acquiring or driving out rival promoters. The alleged effect of defendant's conduct was to establish such overwhelming market dominance that it could pay its fighters substantially less than they would have been paid in a competitive market for their services. Under Federal Rule of Civil Procedure 23(b)(3), the district court granted plaintiffs' motion to certify a "Bout Class" comprised of one or more live professional UFC-promoted MMA bouts taking place within a specified period.

The court and the parties focused primarily on predominance, and the court found that plaintiffs adequately demonstrated the impact of the alleged anticompetitive behavior using common evidence involving common questions of law. Specifically, the court found that plaintiffs provided sufficient evidence that defendant maintained monopsony/market power in the relevant input market; that plaintiffs adequately defined the relevant markets; that plaintiffs adequately demonstrated market dominance through extensive expert testimony and statistical modeling; and that plaintiffs showed significant barriers to entry such that existing competitors lack the capacity to increase their output in the short run. The court also found that plaintiffs showed that defendant maintained its dominant fighter position in the fighter input market through anticompetitive conduct, that defendant used exclusionary contracts that effectively negated a fighter's mobility to competitors and to meaningfully negotiate with defendant's rivals, and that defendant used coercive tactics derived from contract clauses. The court found that plaintiffs showed a common application of this scheme to class members and common impact/injury through expert testimony and modeling.

The district court denied plaintiffs' motion to certify an "Identity Class" comprised of each and every UFC fighter whose identity was allegedly expropriated or exploited by the UFC in connection with UFC merchandise or promotional materials, however. The court found that there was a multiplicity of potential revenue streams encompassed in the Identity Class, a lack of evidence as to what funding streams applied to which fighters, and a lack of evidence creating a measurable connection between the alleged antitrust conduct of defendant and the purportedly suppressed compensation for use of fighter's identities.

Quintero v. Apria Healthcare LLC, No. B316463, 2023 CA App Unpub Lexis 3902 (Cal. App. 2d Dist. July 05, 2023)

Defendant waived right to compel arbitration by opposing class certification on merits and participating in discovery.

Plaintiff filed a putative class action alleging various wage and hour claims. Defendant filed a motion to compel arbitration 10 months after plaintiff filed suit and shortly after the trial court certified the class. The trial court denied the motion to compel arbitration, holding that defendant took actions inconsistent with arbitration. On appeal, the California Court of Appeal affirmed the trial court's holding, finding that defendant only moved to compel arbitration to secure a litigation advantage, to the prejudice of plaintiff. Defendant learned of the existence of the arbitration agreement shortly after plaintiff filed the complaint but did not include arbitration as an affirmative defense in its answer. Further, defendant participated in ample discovery, including taking plaintiff's deposition, during which plaintiff testified that he signed the arbitration agreement. Even after plaintiff's deposition, defendant waited months before bringing its motion, and only brought it after defendant opposed class certification on the merits and after the trial court's adverse certification ruling. The court further found that these delays prejudiced plaintiff, because but for defendant's delay, plaintiff would not have brought several "substantive and expensive motions."

Tenth Circuit

Confer v. Milwaukee Electric Tool Corp., 2:23-cv-2028, 2023 WL 4420220 (D. Kan. July 10, 2023)

District court rules that due process principles do not prohibit a plaintiff from seeking to represent a nationwide class in federal court, even if the federal court does not have general jurisdiction over defendant.

Plaintiff brought a putative class action against defendant tool manufacturer for violation of the Kansas Consumer Protection Act based on the allegation that defendant did not include a clear expiration warning or label on its organic bonded abrasive discs, so plaintiff could not tell if his discs had expired and were worthless. Defendant sought to strike plaintiff's class allegations, arguing that under *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. 255 (2017), the court lacked personal jurisdiction over claims by putative class members who purchased the products at issue outside Kansas. The court denied the motion to strike, declining to follow what it characterized as a minority rule that the due process concerns in *Bristol-Myers* applied to defendants in a class action. Instead, the court embraced "the majority approach taken by the Sixth and Seventh Circuits" and held that due process principles do not prohibit a plaintiff from seeking to represent a nationwide class in federal court, even if the federal court did not have general jurisdiction over defendant. The court also held that with respect to specific jurisdiction, the court would assess minimum contacts, purposeful availment, and relation to the claim only with respect to the named plaintiffs.

Eleventh Circuit

Ponzio v. Pinon, 87 F.4th 487 (11th Cir. 2023)

2018 Amendment to Fed. R. Civ. P. 23(e)(2) does not displace *Bennett* factor analysis.

Car owners and lessees brought a class action against Mercedes-Benz and Daimler in the Northern District of Georgia alleging the red paint on their cars was defective. The parties reached a settlement on behalf of themselves and a proposed nationwide class. However, plaintiffs in a similar action pending in the District of New Jersey filed a motion to intervene and objected to the proposed settlement. The district court denied the motion to intervene. Later, following a hearing, the district court approved the settlement agreement, and in doing so, rejected the New Jersey plaintiffs' argument that the settlement agreement failed to provide benefits to the great majority of class members.

The Eleventh Circuit reviewed the district court's approval of the settlement. In doing so, the circuit court analyzed what impact the 2018 amendment to Federal Rule of Civil Procedure 23(e)(2) had on longstanding Eleventh Circuit precedent. Rule 23(e)(2) requires a court to conduct a hearing on a proposed settlement and only approve the settlement if it is "fair, reasonable, and adequate." Since 1984, the Eleventh Circuit has considered six factors—the so-called *Bennett* factors—to determine whether a proposed settlement is "fair, reasonable, and adequate." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). In 2018, Rule 23(e)(2) was amended to include four factors for a court to consider in determining whether to approve the settlement. The Eleventh Circuit concluded that the 2018 amendment does not displace the *Bennett* factors. Rather, *Bennett* factors 1, 2, 4, and 6 are relevant to analyzing the "core concern" codified in Rule 23(e)(2)(C)—whether "relief provided for the class is adequate"—and *Bennett* factors 3 and 5 are relevant to analyzing the "core concern" stated in Rule 23(e)(2)(d)—whether "the proposal treats class members equitably relative to each other." In affirming the district court's decision, the Eleventh Circuit specifically discussed each *Bennett* factor, not just the "core concerns" enumerated in Rule 23(e)(2).

Drazen v. Pinto, 74 F.4th 1336 (11th Cir. 2023)

Receipt of a single unwanted text message can establish standing for a class representative.

Plaintiff filed a class action complaint against Go-Daddy, alleging the company embarked on an unlawful telemarketing campaign in violation of the Telephone Consumer Protection Act (TCPA). The parties eventually entered into a settlement agreement in which the class was defined to include "all persons within the United States who received a call or text message to his or her cellular phone." The district court issued a *sua sponte* order to examine its own jurisdiction and concluded that under Eleventh Circuit precedent individuals who received only one text message did not suffer a concrete injury and, therefore, did not have Article III standing. On rehearing *en banc* of the appeal that followed, the Eleventh Circuit reversed, concluding that "the receipt of an unwanted text message causes a concrete injury."

In doing so, the *en banc* panel reversed Eleventh Circuit precedent in *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019) and held that receipt of an unwanted text message had a close relationship to the kind of harm that traditionally has been regarded as providing a basis for a lawsuit (in this case the tort of intrusion upon seclusion). Go-Daddy had argued that no such relationship exists because the common law tort of intrusion upon seclusion requires highly offensive conduct, and that no reasonable person could consider receipt of a single text message to be highly offensive. The Eleventh Circuit disagreed. The *en banc* panel followed the approach adopted by the Second, Third, Fourth, Sixth, Seventh, Ninth, and Tenth

circuits, which considers only whether the conduct resembles the *type* of harm—and not the severity or degree of harm—that can serve as the basis for a lawsuit. Applying this approach, the court accepted plaintiffs' argument that receipt of an unwanted text message is the type of harm recognized by the tort of intrusion upon seclusion and concluded that it constitutes a concrete injury sufficient to confer Article III standing.

Tershakovec v. Ford Motor Co., Inc., 79 F.4th 1299 (11th Cir. 2023)

Fraud-based causes of action cannot be brought on behalf of a class where individual plaintiffs are required to prove reliance.

Claiming their Ford Shelby GT350 Mustangs did not live up to expectations, plaintiffs filed a class action lawsuit against Ford, bringing various state statutory and common law fraud claims. The district court granted plaintiffs' request for class certification, choosing to create multiple state-law classes within a single class action case. Ford appealed, arguing that plaintiffs' proposed classes did not satisfy Rule 23's predominance prong because plaintiffs' state fraud-based causes of action meaningfully differed in terms of (1) whether proof of reliance is necessary and (2), if it is, how it is established. The Eleventh Circuit agreed, concluding that Rule 23(b)(3)'s predominance requirement will bar class treatment of claims that require individual plaintiffs to prove reliance affirmatively. The court also concluded that class certification may be appropriate in instances where a fraud-based cause of action requires reliance but allows reliance to be presumed in certain circumstances.

D.C. Circuit

Nat'l ATM Council, Inc. v. Visa Inc., No. 21-7109, 2023 WL 4743013 (D.C. Cir. July 25, 2023), *reh'g denied*, 2023 WL 6319404 (D.C. Cir. Sept. 27, 2023)

Class certification affirmed in over decade-long ATM antitrust fee dispute against Visa and Mastercard.

Plaintiffs filed this litigation in 2011, alleging Visa and Mastercard's ATM fee rules violated antitrust laws and caused unlawful overcharges for access fees at ATM terminals. On July 25, 2023, the D.C. Circuit affirmed the district court's order certifying three classes of plaintiffs: a class of ATM operators comprising thousands of businesses and two consumer classes numbering in the millions. The district court had held that the plaintiffs' class-wide injury theories were "colorable" and that further inquiry as to damages was proper on the merits and not at class certification. Visa and Mastercard challenged the decision as erroneous and inconsistent with *In re: Rail Freight Fuel Surcharge Antitrust Litigation* (D.C. Cir. 2019) because the district court did not determine the presence of uninjured class members in assessing the predominance requirement for certification. Arguing that the classes cannot be certified because they are composed of a significant number of uninjured members, Visa and Mastercard contended that these questions must be answered at the class certification stage. They also argued that immediate appeal is proper because, if the certification decision stands, it could "sound the death-knell" for the litigation. The D.C. Circuit granted permission to appeal in October 2021, agreeing that the "certification decision was, at least, 'questionable' and is accompanied by a potential 'death-knell,'" citing *In re: Rail Freight*.

After examining the parties' arguments on interlocutory appeal, however, the three-judge panel of the D.C. Circuit issued a *per curiam* opinion affirming the district court's order. The D.C. Circuit reaffirmed its jurisdiction to hear the appeal, stating that although it believed the district court's decision did "not

pose an important and unsettled, class action-related legal question," the circuit was exercising discretionary jurisdiction because the decision's "statements of law were not entirely clear, its citations were not current, and its record analysis was notably terse," in addition to the decision likely sounding the "death-knell" for the litigation. Nevertheless, the circuit court found the district court's order did "not rest on an incorrect legal standard," and that, in context, the district court's comment that plaintiffs' theories of class-wide injury were "'colorable'" was used "to denote not merely non-frivolousness, but evidence 'appearing to be true, valid, or right.'" Further, the court of appeals disagreed with Visa and Mastercard's arguments that the predominance requirement was not met based on defendants' theories that classes included uninjured members. Rather, the district court had acted within its discretion in holding that plaintiffs had presented sufficient evidence of class-wide injury susceptible to common proof, including through submission of expert reports. Visa and Mastercard simply had presented their own different models and theories in which the classes included uninjured members. That is, both sides "have a theory that a factfinder could credit as to why their data selection [or model] is superior." According to the circuit court this is "precisely the kind of material factual dispute that is 'better suited for adjudication of plaintiffs' injury and damages on the merits.'" The circuit court thus held that the district court did not abuse its discretion in finding that the predominance requirement for class certification was met, concluding that "[t]he district court was not required at class certification to make the ultimate determination which of two dueling experts to accept."

Visa and Mastercard filed a petition for rehearing *en banc* of the circuit court's decision which was denied.

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