

Class Action Litigation Newsletter | Autumn 2025



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

Highlights from this issue include:

- Second Circuit affirms denial of a motion to compel arbitration when plaintiff received notice after the transaction through a “welcome kit,” which did not make the terms clear and conspicuous.
- Second Circuit reminds district courts that class settlement approval under CAFA requires them to consider allocation of recovery between class counsel and the class.
- Third Circuit, Fourth Circuit, and Ninth Circuit affirm denial of class certification in cases alleging that insurers underestimated the actual cash value of totaled vehicles because the fact of damages was individualized.
- Fourth Circuit affirms remand based on CAFA’s local-controversy exception, clarifying standard for showing that more than two-thirds of putative class members are citizens.
- Fourth Circuit holds that South Carolina’s “door closing statute” does not control over Rule 23 in a putative class action involving proposed nationwide class allegations.
- Fourth Circuit affirms denial of certification in a TCPA based on plaintiff’s failure to prove an ascertainable class of call recipients.
- Fifth Circuit holds that only the named plaintiff’s standing is to be considered at the class certification stage.
- Ninth Circuit holds that plaintiff’s lack of equitable standing is grounds for remand, but defendant can waive this issue to keep case in federal court.

U. S. Supreme Court

Dep't of Homeland Sec. v. D. V. D., 145 S. Ct. 2627 (2025)

In putative class action for declaratory and injunctive relief, district court's remedial order could not be used to enforce an injunction that the Supreme Court had stayed.

Five noncitizens with final removal orders filed a putative class action for declaratory and injunctive relief against the Department of Homeland Security (DHS) and others (together, the Government). Plaintiffs alleged defendants violated procedural due process by planning to remove noncitizens to a third country without first providing notice and opportunity to apply for protection from removal. The District of Massachusetts granted class certification and preliminarily enjoined the Government from removing “any alien” to a “country not explicitly provided for on the alien’s order of removal” without following certain procedures designed to enable the alien to seek relief under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

The Government appealed to the First Circuit. While the appeal was pending, the district court found that the Government violated the injunction by failing to provide six class members a “meaningful opportunity” to assert CAT claims before such removal. Subsequently, the district court issued an “order on remedy,” directing the Government to follow specified procedures with respect to those individuals, tailored to the circumstances. The Government sought a stay of the injunction before the Supreme Court.

The Supreme Court stayed the preliminary injunction pending disposition of the Government’s appeal to the First Circuit and petition for writ of certiorari. The district court then issued a minute order stating that the remedial order remained in full force and effect, notwithstanding the Supreme Court’s stay. The Government moved for an order clarifying the Supreme Court’s stay.

The Supreme Court granted the motion for clarification, holding that its order stayed the preliminary injunction in full, and that the district court’s remedial order could not be used to enforce an injunction that the Supreme Court’s stay rendered unenforceable.

First Circuit

In Re Amitiza Antitrust Litigation, No. 21-11057, 2025 WL 2690871 (D. Mass. Sept. 19, 2025)

Massachusetts federal court certifies class in Amitiza Antitrust Litigation.

The United States District Court for the District of Massachusetts certified a Direct Purchaser and an End-Payor class in *In re Amitiza Antitrust Litigation*. The case centers on allegations that Takeda delayed the introduction of a lower-cost generic version of Amitiza to maintain inflated prices.

Takeda challenged the Direct Purchaser class on several grounds:

- Thirteen proposed class members were indirect purchasers and, under the Illinois Brick Doctrine, ineligible to participate in the class;
- Ten proposed class members purchased only the name-brand Amitiza and were thus not injured;
- Seven members were subsidiaries of other class members and not eligible to be a class member; and

- Three entities were subject to arbitration.

The court agreed with some of these objections. Indirect purchasers were barred from being members of the class. But brand-only purchasers were still injured as they were forced to pay supra-competitive prices for the brand-named drug. Corporate subsidiaries could remain as individual class members, provided their injury was separate and distinct from other related entities. As for arbitration, only the proposed class representative subject to a prior motion to compel arbitration was excluded; the other two were allowed to remain as Takeda waived the argument by not seeking to compel arbitration.

The court found commonality satisfied as all class members were allegedly overcharged due to Takeda's anti-competitive conduct.

Takeda argued that unique defenses for certain class representatives undermined typicality and adequacy. The court disagreed, finding that unique defenses for one class representative did not defeat typicality if the defense did not affect the central issues of the litigation.

The court concluded that common issues predominated because all class members were subject to overcharges resulting from the alleged suppression of generic competition, and aggregate calculations of monetary relief were deemed appropriate at this stage.

The End Payor class consisted of thousands of third-party payors, including private health insurers and self-insured employers. The Rule 23(a) factors were not disputed. Takeda instead challenged ascertainability, predominance, and superiority. The court rejected these arguments, finding plaintiff's methodology—using readily available pharmaceutical transaction data—was administratively feasible. The court also found injury at the point of sale where the overage was charged, ensuring there were common questions of law and fact that predominated. Finally, concerns over duplicative claims from parallel state actions were mitigated by available data that would assist with identifying and removing duplicate claims.

Second Circuit

Flores v. New York Football Giants, Inc., 150 F.4th 172 (2d Cir. 2025)

Court affirms denial of motion to compel arbitration when agreement lacked Federal Arbitration Act protection and was unenforceable under effective vindication doctrine.

Current and former coaches brought a putative class action against the National Football League (NFL) and six teams alleging racial discrimination with respect to hiring practices for head coaching positions. The NFL and teams moved to compel arbitration, arguing that the claims were subject to arbitration as agreed to in plaintiffs' employment agreements. The employment agreements included an express agreement to arbitrate disputes with the relevant member club and incorporated by reference the NFL Constitution, which includes a broad arbitration provision. Defendants argued that the NFL was entitled to enforce plaintiffs' arbitration agreements with respect to their claims against the NFL under the doctrine of equitable estoppel. The district court granted the motion in part, with respect to teams whose employment agreements with plaintiffs had club-specific arbitration provisions. The district court denied the motion as to plaintiffs' claims against certain teams and the NFL where the claims fell outside of any club-specific arbitration provisions and only the NFL Constitution's general arbitration provision could arguably apply. The district court held the arbitration provision in the NFL Constitution was unenforceable as to one team because the NFL was not required to provide plaintiffs notice of any changes to the NFL Constitution, and thus the agreement to arbitrate was illusory and unenforceable, and held the provision was not in effect as to the other teams because the agreement incorporating the provision

required the approval of the NFL commissioner, who never signed the agreement. The defendants appealed.

The Second Circuit affirmed the district court's ruling but on other grounds. The NFL Constitution required plaintiff to submit his statutory claims to the unilateral substantive and procedural discretion of the NFL commissioner (the principal executive of one of plaintiff's adverse parties). The Second Circuit held that this provided for arbitration in name only and lacked the protections of the Federal Arbitration Act, as it "fails to bear even a passing resemblance to 'traditional arbitral practice'" because it failed to provide an independent arbitral forum for bilateral dispute resolution, and because it failed to provide the procedure to be used in resolving the dispute. The Second Circuit also held that the employment agreement's arbitration provision was unenforceable under the principle of the effective vindication doctrine. Under that principle, an arbitration agreement is only enforceable as long as a litigant effectively may vindicate its statutory cause of action in the arbitral forum.

Sudakow v. CleanChoice Energy, Inc., No. 24-1988-CV, 2025 WL 2457656 (2d Cir. Aug. 27, 2025)

Court affirms denial of motion to compel arbitration because plaintiff did not have notice of the arbitration provision.

Consumer brought a putative class action against an electric utility company, alleging breach of contract and violation of New York deceptive business practices law. The utility company moved to compel arbitration, based on an arbitration provision included in a form sent to the plaintiff several weeks after she contracted with the utility company. The district court denied the utility company's motion to compel arbitration, finding that the plaintiff did not have notice of the terms and conditions of the arbitration provision, or an opportunity to consent to it, because the utility company did not notify her that the additional form would amend or supersede the terms of her initial enrollment form, and did not specifically call attention to the presence of the arbitration provision in the customer agreement. The utility company appealed, arguing that the plaintiff had inquiry notice of the terms and implicitly assented to them by making service payments.

The Second Circuit held that the plaintiff did not have inquiry notice. Plaintiff had agreed to an enrollment agreement, which was binding, but was later sent a "welcome package" that enclosed subsequent terms, including the arbitration provision, without requiring plaintiff to sign her name. The Second Circuit held there was no inquiry notice because the subsequent terms were "temporally and spatially decoupled" from plaintiff's enrollment in the service and did not call attention to the possibility of a change in the terms. Further, the arbitration provision was not presented in a "clear and conspicuous way."

The Second Circuit also rejected the argument that plaintiff implicitly assented to the arbitration provision by paying her utility bills. The subsequent terms specified that "by signing this Agreement" plaintiff agreed to the terms and referred to "the undersigned customer." The court found such language would leave a reasonable consumer to conclude that assent can be manifested only through a signature. The subsequent terms did not, however, prompt the plaintiff to sign her name, and she did not do so. The Second Circuit further held that a reasonable person would not understand the act of mailing scheduled payment (i.e., paying her utility bills under the original enrollment agreement) to constitute assent to the subsequent terms.

Kurtz v. Kimberly-Clark Corp., 142 F.4th 112 (2d Cir. 2025)

Court holds district court applied wrong legal standard in evaluating settlement fairness.

Purchasers of bathroom wipes brought a putative class action, alleging the manufacturer falsely advertised wipes as flushable, leading purchasers to pay an unjustified price premium and causing plumbing damage. After class certification and preliminary approval of settlement agreement, the district court granted the purchasers' motion for final approval of settlement agreement and granted class counsel's motion for attorney fees. A class member who had objected to the settlement agreement appealed final approval, arguing it was unfair under Rule 23(e) because it granted a disproportionate share of the total recovery to class counsel: over \$3 million to counsel compared to the \$1 million the class recovered.

Rule 23(e) asks courts analyzing class action settlement fairness to consider whether "the relief provided for the class is adequate, taking into account ... the terms of any proposed award of attorney's fees." The Second Circuit noted that, in discussing the fees' impact on class relief, the district court had focused on a single feature of the settlement: the segregation of the fee funds from the class recovery funds. Because the two were separately funded (though both derived from the defendant's treasury), the district court had reasoned the size of the fee award could not impact class relief because there was no risk of an "inverse correlation" between class recovery and attorney payout. But the Second Circuit held that, regardless of whether a settlement is structured as two separate funds, Rule 23(e) requires courts to consider the allocation of recovery between class counsel and the class before approving a settlement. Thus, the Second Circuit held the district court erred when it failed to consider the allocation of recovery between the class and class counsel in assessing fairness.

Collins v. Ne. Grocery, Inc., 149 F.4th 163 (2d Cir. 2025)

Court affirms dismissal of ERISA claims for lack of Article III and standing.

Participants in an employer-sponsored defined contribution retirement benefit plan brought a putative class action against various plan fiduciaries on behalf of the plan and similarly situated plan participants, alleging that the fiduciaries mismanaged participants' retirement savings in violation of Employee Retirement Income Security Act (ERISA) by failing to follow a prudent process for administering the plan, and by failing to act in participants' exclusive interest, among other claims. The district court granted the defendants' motion to dismiss for lack of Article III standing, and the participants appealed.

The Second Circuit held that participants in a defined contribution benefit plan governed by ERISA must plausibly plead a constitutionally cognizable individual injury to establish that they have Article III standing to obtain monetary relief for alleged ERISA violations. The court held that plaintiffs lacked Article III standing because they did not allege that they suffered any financial loss affecting their individual retirement accounts arising from the defendants' allegedly imprudent share class selection and failure to investigate the availability of alternative funds, or from the defendants' alleged breach of fiduciary duty in providing indirect compensation to the plan's recordkeeper. Plaintiffs did not allege they directed their retirement contributions into the allegedly imprudently or disloyally managed investment options and thus did not allege any individual injury arising from the defendants' management of those options.

Because plaintiffs did not plausibly allege that they personally suffered any injury, the court held they also lacked standing to assert their share-class claim, alternative fund claim, and indirect compensation claims

on behalf of the class. The Second Circuit held that ERISA plaintiffs cannot rectify a deficient showing of an injury-in-fact by asserting that they have standing as representatives of the plan.

Third Circuit

Perrigo Institutional Investor Group v. Papa, 150 F.4th 206 (3d Cir. Aug. 12, 2025)

Third Circuit affirms New Jersey District Court’s denial of class members’ belated effort to be excluded from certified class.

Perrigo shareholders brought a putative class action for alleged securities law violations. The district court certified the class and specified procedures for class members to opt out, which Sculptor failed to follow, despite intending to do so. Sculptor later sought to be excluded from the class nearly three-and-a-half years after the opt-out deadline, arguing that their conduct (which included litigating a separate individual action against Perrigo) provided a “reasonable indication” of their intent to opt out and that their failure to formally opt out of the class constituted “excusable neglect.” The district court denied Sculptor’s belated effort to be excluded from the class and Sculptor appealed.

The Third Circuit affirmed, finding that Rule 23 does not support a “reasonable indication” standard for opting out, emphasizing that class members must follow the specific opt-out procedures the district court sets. The court also found that the district court did not abuse its discretion in denying Sculptor’s late opt-out request, as the factors for excusable neglect, including the danger of prejudice, length of delay, and reason for delay, weighed against Sculptor. Finally, the court found the class action notice satisfied due-process requirements, providing sufficient information for class members to make informed decisions about their rights.

Drummond v. Progressive Specialty Insurance Co., 142 F.4th 149 (3d Cir. July 7, 2025)

Third Circuit reverses class certification based on failure to satisfy predominance requirement.

Plaintiffs (insureds) brought a putative class action against their automobile insurer, alleging that Progressive systematically underestimated the actual cash value (ACV) of insureds’ totaled vehicles, thereby breaching insurance agreements. The District Court for the Eastern District of Pennsylvania certified two damages classes, and Progressive appealed. On appeal, the Third Circuit reversed, finding the proposed classes failed to satisfy the predominance requirement because proving whether Progressive undercompensated each class member—which the court identified as “the core issue ... on which both breach and damages in [Plaintiffs’] breach-of-contract claim turn[ed]”—was an individual issue that could not be resolved on a class-wide basis.

Fourth Circuit

Skyline Tower Painting, Inc. v. Goldberg, 148 F. 4th 209 (4th Cir. Aug. 1, 2025)

Fourth Circuit affirms Maryland district court’s remand of class action based on CAFA’s local-controversy exception.

Plaintiffs brought a putative class action against Television Tower, Inc. (TTI) and Skyline Tower Painting, Inc., alleging that Skyline’s hydroblasting of a TV tower dispersed lead-based paint onto their properties.

The putative class was defined to include all property owners located within a 4,000-foot radius of the TV tower. Defendants removed under the Class Action Fairness Act (CAFA) and plaintiffs moved to remand under the mandatory local-controversy exception. The court granted the remand motion, and defendants appealed.

The Fourth Circuit affirmed. As a preliminary matter, the court found that two statutes provide avenues for appeal from decisions granting motions to remand—28 U.S.C. § 1291 (which generally governs appeals from final decisions from district courts) and 28 U.S.C. § 1453(c) (which specifically governs appeals from remand orders). In so holding, the Fourth Circuit joined the three other courts of appeals that have squarely addressed this issue (the Fifth, Eighth, and Eleventh Circuits).

The court then considered CAFA’s local-controversy exception, which requires that (1) more than two-thirds of the putative class are citizens of the state where the suit was originally filed, (2) at least one defendant is a significant local defendant, (3) the principal injuries occurred in the state, and (4) no other similar class action was filed against any defendants in the past three years. The parties agreed that factors 3 and 4 were satisfied but disagreed as to factors 1 and 2.

First, the court noted that the party seeking remand bears the burden of demonstrating the exception applies by a preponderance of the evidence. Next, the court found plaintiffs satisfied their burden to demonstrate the first factor—that more than two-thirds of the putative class members are Maryland citizens—through reliance upon the Maryland State Department of Assessments and Taxation’s data, which demonstrated that about 84% of the putative class members were Maryland citizens. The court also held that an individual’s residency suffices to create a rebuttable presumption of citizenship in the context of CAFA’s local-controversy exception.

Regarding the “at least one defendant” rule, the court concluded that TTI, a Maryland corporation, was a significant local defendant. TTI’s conduct, including allegedly contracting with Skyline for hydroblasting without proper accreditation or permits, formed a significant basis for plaintiffs’ claims, and plaintiffs sought significant relief from TTI. The court clarified that the local defendant need not be the most significant defendant, but rather a significant one among others.

Grice v. Independent Bank, 147 F.4th 440 (4th Cir. Aug. 7, 2025)

Fourth Circuit reverses district court’s denial of class certification based on South Carolina’s “Door Closing Statute.”

Plaintiff, a South Carolina resident, filed a putative class action against Independent Bank, alleging wrongful overdraft fee practices. Plaintiff sought to certify three nationwide classes, and court denied her motion, finding that South Carolina’s “Door Closing Statute” (S.C. Code Ann. § 15-5-150)—which restricts non-residents from suing foreign corporations in South Carolina for claims not arising within the state—prohibited plaintiff from representing a nationwide class. Plaintiff appealed.

The Fourth Circuit reversed, finding that requiring plaintiff to satisfy both Rule 23’s class action requirements and South Carolina’s Door Closing Statute would violate the U.S. Supreme Court’s decision in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), which held that Rule 23 permits all class actions that meet its requirements to proceed. Because Rule 23 and the Door Closing Statute “directly conflict,” Rule 23 alone controls.

Glover v. EQT Corporation, 2025 WL 2405514 (4th Cir. Aug. 20, 2025)

Fourth Circuit reverses class certification, finding reliance cannot be presumed for all class members.

Plaintiffs, lessors of oil, natural gas, and natural gas liquid interests, brought a putative class action against EQT, alleging failure to pay royalties owed to lessors. The court granted plaintiffs' motion to certify breach-of-contract and fraudulent-concealment classes. EQT sought leave to appeal, which was granted.

On appeal, the Fourth Circuit affirmed the decision to certify the breach-of-contract class, finding the district court did not abuse its discretion in determining that the proposed class was ascertainable and that common questions of law and fact predominated over individual issues. But the Fourth Circuit reversed certification of the fraudulent-concealment class, holding that the district court erred in finding that reliance, a necessary element of fraudulent concealment under West Virginia law, could be presumed for all class members. The need for individualized inquiries into each class member's reliance on EQT's alleged misrepresentations meant that individual questions would predominate, making class certification inappropriate for this claim.

Freeman v. Progressive Direct Insurance Company, 149 F.4th 461 (4th Cir. Aug. 25, 2025)

Fourth Circuit reverses class certification due to lack of standing and failure to satisfy the predominance requirement.

Plaintiff (insured) brought a putative class action against her automobile insurer, Progressive, alleging that Progressive breached its insurance agreement by underestimating the actual cash value (ACV) of her totaled vehicle. Plaintiff sought to represent all similarly situated persons in South Carolina. The District Court for the Southern District of Carolina certified the class and Progressive sought interlocutory review, pursuant to Rule 23(f).

The Fourth Circuit granted interlocutory review and reversed class certification. First, the court found that plaintiff lacked standing because she did not demonstrate a personal injury from the alleged breach of her insurance agreement, as she accepted Progressive's valuation and did not pursue further appraisal or negotiation. Without standing, her claim could not be typical. The court also found that predominance was not satisfied because determining whether Progressive breached its obligation required individualized inquiries into the ACV of each class member's vehicle, considering unique characteristics and market conditions. This precluded class-wide treatment of the contract claims.

Davis v. Capital One N.A., 2025 WL 2445880 (4th Cir. Aug. 26, 2025)

Fourth Circuit affirms denial of class certification for failure to satisfy ascertainability requirement.

Plaintiff brought a putative class action against Capital One, alleging violations of the Telephone Consumer Protection Act (TCPA) due to receiving unsolicited prerecorded messages on his cell phone without consent. Plaintiff sought to certify a class of individuals who were not Capital One customers but received such calls. The district court denied certification, primarily because the proposed class failed to meet the ascertainability and predominance requirements.

To show ascertainability, plaintiff relied solely on his expert’s report and testimony, which purportedly used a four-part methodology to identify whether Capital One had called a non-customer. But the district court excluded this testimony, finding it unreliable under Rule 702, since the expert failed to fully implement the methodology and because it had a high rate of error (as demonstrated by Capital One’s expert). Because plaintiff offered no other explanation of how the putative class members could be ascertained, the district court found plaintiff failed to satisfy the ascertainability requirement. The Fourth Circuit found the district court did not abuse its discretion in reaching either conclusion and affirmed.

Fifth Circuit

Wilson v. Centene Mgmt. Co., L.L.C., 144 F.4th 780 (5th Cir. 2025)

Fifth Circuit holds that only a named plaintiff’s Article III standing is relevant for class certification.

Plaintiffs in Texas sued their insurance health plan, alleging that the plan’s healthcare directories included providers unable to provide medical care and thus caused policyholders to pay inflated premiums. To support class certification, plaintiffs presented expert opinion to show that all policyholders had been overcharged. The district court denied class certification, concluding that the expert opinion showed only correlation, rather than causation, between the plan’s network size and higher premiums. Thus, the putative class lacked an injury and Article III standing. Plaintiffs appealed, and the Fifth Circuit reversed.

The Fifth Circuit began by identifying the appropriate test for standing at the class certification stage. The court of appeals ruled that only the named plaintiff’s individual standing matters for class certification and formally adopted the “class certification approach,” which the court noted the First, Third, Sixth, and Ninth Circuits follow. This approach requires courts to evaluate only the individual standing of named plaintiffs, rather than the standing of the entire putative class, before addressing Rule 23’s requirements. Rejecting the “standing approach” applied by the district court that considered the putative class’s standing, the Fifth Circuit reasoned that the district court’s merits-based analysis was outside the scope of the Rule 23 inquiry.

Sixth Circuit

In re FirstEnergy Corp. Sec. Litig., 149 F.4th 587 (6th Cir. 2025)

Sixth Circuit reverses class certification ruling in securities fraud case and outlines proper predominance analysis in “mixed claim” cases.

Stock- and bondholders sued FirstEnergy for securities fraud under the Securities Exchange Act of 1934 and the Securities Act of 1933, alleging defendants had made materially false and misleading statements and concealed material information from public disclosure about an alleged public corruption scheme. The district court determined that the case was primarily omissions-based and certified a class under the Supreme Court’s *Affiliated Ute Citizens of Utah v. United States* decision, which permits a presumption of reliance for omissions-based claims. The trial court also ruled that plaintiffs had shown predominance with respect to damages for the Exchange Act claims in the same way as their Securities Act claims.

The Sixth Circuit reversed. The court first ruled that the district court had erred in characterizing the case as being primarily omissions-based and thus erroneously presumed reliance under *Affiliated Ute*. The panel laid out a roadmap for identifying the primary nature of mixed claims and ruled that when claims

are primarily based on misrepresentations, the proper presumption of reliance is set forth in *Basic Inc. v. Levinson*. The court also ruled that the district court had failed to follow *Comcast Corp. v. Behrend* and conduct a “rigorous analysis” of whether “damages are susceptible of measurement across the entire class.” Instead, the district court relied on its Securities Act damages analysis in analyzing Exchange Act claims.

Eighth Circuit

EEOC v. BNSF Railway Co., No. 24-2082, 2025 WL 2473483 (Aug. 28, 2025)

Eighth Circuit reverses dismissal of discrimination claims.

The Equal Employment Opportunity Commission (EEOC) filed a putative class action on behalf of a group of female employees, asserting hostile work environment claims. The district court granted the defendant’s motion to dismiss the class allegations, holding that the EEOC’s complaint was deficient because it had failed to allege the class size and did not assert that the class of women has suffered the same type of harassment as the lead plaintiff. The district court also granted defendant’s motion for summary judgment on the lead plaintiff’s claims, holding that the alleged harassment was not severe or pervasive enough. The EEOC appealed.

The Eighth Circuit reversed both rulings. On the class dismissal, the court noted that ordinary pleading standards still apply to enforcement actions the EEOC brings. Under this standard, it was error for the district court to require the EEOC to plead that all women in the proposed class suffered similar acts of discrimination by the same actors during the same time frame. The EEOC’s enforcement authority is not limited in this manner. The court also held that the EEOC had adequately pled facts to support the approximate class size. While the EEOC had not pled a specific number, it had sufficiently identified facts to limit the class to women working in specific positions at a specific location of defendant during the relevant period. Finally, the court rejected the defendant’s assertion that the EEOC had failed to state a claim on behalf of the class members where it did not allege facts of a hostile work environment specific to each member. The EEOC was not required to identify each individual at the pleading stage, including the facts specific to their individual circumstances. On the summary judgment ruling, the Eighth Circuit held that the district court should have considered evidence outside of the limitations period to assess the EEOC’s continuing violation argument. It also held that the district court erred in finding that the conduct at issue was not sufficiently severe or pervasive and erroneously considered each incident in isolation.

Ninth Circuit

Ambrosio v. Progressive Preferred Ins. Co., 2025 WL 2628179 (9th Cir. Sept. 12, 2025)

Ninth Circuit affirms denial of class certification because an individualized assessment to prove the fact of harm defeats predominance.

Plaintiffs were former customers of Progressive that made property damage claims on their vehicles that the defendant insurance company determined to be covered as total losses. Under their insurance policy, Progressive was required to pay the actual cash value (ACV) of their totaled losses. The ACV was defined under the policy as “the market value, age, and condition of the vehicle” at the time of the loss.

Progressive calculated the “market value” using a “projected sold adjustment” (PSA), which was intended to reflect comparable list prices factoring consumer purchasing behavior (negotiating a different price than the listed price).

Plaintiffs brought a putative class action alleging that Progressive's use of the PSA always resulted in an inherently flawed negative line-item adjustment, amounting to a breach of Progressive's uniform automobile insurance policy because it prevents an ACV from being determined by the true "market value" of the vehicle. The district court found plaintiffs met the numerosity, commonality, typicality, and adequacy requirements under Rule 23(a). But the district court found that individual questions surrounding the calculation of each plaintiffs' ACV predominated. Plaintiffs appealed.

The Ninth Circuit had "wrestled" with similar predominance inquiries in the auto insurance context. In *Lara v. First National Insurance Company of America*, 25 F.4th 1134 (9th Cir. 2022), an auto insurer applied a downward "condition adjustment" to account for the difference in price between the average condition of privately sold cars and those sold at dealerships. The plaintiffs disputed the adjustment as a breach of contract and argued the adjustment violated Washington's insurance regulations requiring itemization of deductions. The Ninth Circuit found certification was inappropriate because proving injury would require individualized determinations. Because the insurer only owed each putative class member the actual cash value of their car, and if a putative class member was given that amount or more, they could not win on the merits. As to Washington's insurance regulations, the Ninth Circuit held that a mere violation of the regulation was not a breach of contract, which also required an injury.

The Ninth Circuit contrasted *Jama v. State Farm Mutual Insurance Company*, 113 F. 4th 924 (9th Cir. 2024). There, the insurer applied a "negotiation adjustment" designed to capture the price difference between the list price at the dealership and the actual negotiated price a customer might typically pay. The Ninth Circuit held certification was proper there because liability for the plaintiffs' claim was not predicated on individual assessments. Washington state law explicitly prohibited use of "negotiation adjustments." Thus, the dispositive issue was not that the insurer "failed to follow the correct procedure for making permissible adjustments," but that "Washington law did not permit the insurer to apply a discount for typical negotiation *at all*." Thus, in *Jama*, the plaintiffs could measure their injuries on a class-wide basis by adding back the amount of the facially unlawful deduction.

The Ninth Circuit held Progressive's PSA was more like the "condition adjustment" in *Lara* where certification was improper. The PSA was not facially unlawful. Thus, the existence of the PSA did not necessarily indicate measurable damages to prove a breach of contract. If the appraisal resulted in a fair "market value" assessment, despite using the PSA, the ACV could be accurate, and plaintiffs would have no injury. This would doom a potential class members' claim.

The Ninth Circuit emphasized this was not a dispute over the amount of any individual's damages, which would be insufficient to prevent certification. This dispute was over an essential element of each individual's claim.

Ultimately, the Ninth Circuit held that because the PSA could not serve as common evidence of liability, each individual would need to compare their flawed "market value" with a correct one to win on the merits. This was the exact type of aggregation-defeating, individual issue on which members of a proposed class would need to present evidence that varied from one member to member.

Cordero v. Stemilt AG Servs., LLC, 142 F. 4th 1201 (9th Cir. 2025)

Ninth Circuit vacates district court’s protective order in a settled class action barring counsel’s use of discovery in other advocacy for failing to find good cause for the protective order.

Appellant was a legal services provider for farm workers that filed a class action against a fruit grower, alleging forced labor and trafficking. A discovery dispute arose concerning the fruit grower’s financial and employment records, resulting in a protective order. As part of that dispute, the fruit grower argued that the Appellant used the grower’s data another lawsuit. The district court’s order granting the protective order concluded that appellant “should not have free reign to utilize the information and documents discovered in this action in other advocacy with which Plaintiffs are not involved.” The district court also ordered that “Plaintiffs must seek leave of this [c]ourt before they—or counsel—utilize discovery from this action in other advocacy.”

The class action eventually settled. The settlement explicitly waived the plaintiffs’ right to appeal in their individual capacities. Appellant appealed to challenge the district court’s protective order. The issue on appeal was whether the district court’s protective order was overly broad. The Ninth Circuit vacated the district court’s protective order and remanded for further proceedings.

First, the Ninth Circuit addressed whether appellant had standing. Generally, only parties at the time of judgment have standing to appeal. But an exception exists for “aggrieved” nonparty attorneys. To meet this standing, attorneys must show injury to themselves rather than their clients. In the class action, the district court’s order was specifically directed to appellant. Appellant stated this had a “tremendous chilling effect” on its advocacy efforts in other matters. The Ninth Circuit held appellant “clearly” had an interest in using information discovered in the class action, and, given the district court’s order, the only way it could vindicate its interest was to appeal.

Second, the court addressed whether appellant had waived its right to appeal because of language in the settlement agreement. But the plain language of the settlement agreement only waived the underlying plaintiffs’ right to appeal. Nothing in the agreement referred to any release by appellant.

Third, the court addressed the protective order, focusing on the sentence “[b]efore Plaintiffs or Plaintiffs’ counsel utilize discovery from this matter in other advocacy, Plaintiffs must seek leave of this Court.” The Ninth Circuit started with the “well-established” view that discovery is presumptively public, unless a party can show “good cause” why a protective order is necessary. The district court, however, only provided a brief explanation and made no finding of good cause to support its prohibition. The district court also did not identify any prejudice or harm that would result in public access to particular documents or information, and it did not balance the relevant interests against any potential harm. As a result, the Ninth Circuit vacated the district court’s order and remanded for further proceedings.

Ruiz v. Bradford Exch., Ltd., __ F.4th __ (9th Cir. 2025)

District courts may remand cases to state court for lack of equitable jurisdiction under *Sonner* but must first allow defendants to waive the issue and keep the case in federal court.

Plaintiff filed a putative class action against defendant retailer of snow globes, alleging various claims based on the allegation that he was charged for multiple purchases of globes without his permission or knowledge. As part of a strategy to try to avoid removal to federal court, plaintiff’s complaint in state court

sought only equitable relief, specifically equitable restitution, but not the legal remedy of damages. When defendant removed the case to federal court under CAFA, plaintiff moved to remand based on the federal court's lack of "equitable jurisdiction" under *Sonner v. Premier Nutrition Corpo.*, 971 F.3d 834 (9th Cir. 2020), which precludes federal courts from granting equitable relief when the plaintiff has an adequate remedy at law. Plaintiff argued that California law provided him with legal remedies that he could have sought, but that he chose to seek only an equitable remedy. Since he failed to plead he lacked an adequate remedy at law, plaintiff argued that the district court lacked equitable jurisdiction, and that this is a non-waivable defect. The Ninth Circuit held that under these circumstances where plaintiff initially filed in state court, district courts are empowered (but not required) to remand a removed case to state court for lack of equitable jurisdiction, but only after the removing defendant is given the opportunity to waive the adequate-remedy-at-law issues to keep the case in federal court.

LeGrand v. Abbott Labs, 22-cv-05815-TSH, 2025 WL 2323352 (N.D. Cal. Aug. 12, 2025)

Illustrative price premium model based on surveying just one of several challenged products leads to denial of class certification.

Plaintiff brought a putative class action against Abbott alleging certain statements on the labels of its Ensure® nutrition drinks were false and misleading. Plaintiff moved for class certification involving three different Ensure® nutrition drinks, challenging several labeling statements on each product. The challenged statements included health-related claims, but plaintiff claimed scientific evidence showed that sugar-sweetened beverages harm, rather than support, overall health.

The district court first excluded plaintiff's experts' opinions used to support their price premium damages model. Abbott argued that their proposed damages model was underdeveloped because it relied on an "illustrative survey" focused on only two of the challenged statements on only one of the challenged Ensure® products. The court agreed with Abbott, finding plaintiff had not shown that the price premium damages model was capable of reliably calculating class wide damages. There was no dispute that a conjoint analysis might be used in a price premium damages model. The issue was whether the model would properly apply the method to the facts of the case. Because plaintiff's proposed damages model could not practically account for all the challenged statements, they failed to show that the model would be able to reliably calculate damages in a manner common to the class at trial. Thus, the court struck the experts' price premium damages model.

The district court then denied class certification. Although the court found plaintiff met the requirements of Rule 23(a), it found plaintiff had not met Rule 23(b)(3)'s predominance requirement as to damages. Plaintiff must show that damages are capable of being measured on a class wide basis. In support, they proffered two class wide damages models—a full-refund model and a price premium model.

The district court found plaintiff's proposed full-refund damages model was not capable of measuring class wide damages. Plaintiff argued the challenged products had no value to putative class members, and she had proof of the cost of the products. But it was undisputed that the challenged products had some nutrition, so the products were not worthless. Because the district court struck the testimony of plaintiff's experts on their price premium model, plaintiff had no evidence that a price premium model could establish predominance.

Krantz v. Old Copper Co., ___ F. Supp. 3d ___, No. 2:24-cv-10031-SPG-BFM, 2025 WL 2326840 (C.D. Cal. Aug. 11, 2005)

***American Pipe* tolling does not apply when plaintiff voluntarily dismisses prior action, and court dismisses nationwide class allegations on a Rule 12 motion.**

Plaintiff filed a putative class action against the entity formerly known as JC Penney, Inc., alleging that defendant engaged in “false reference pricing” by allegedly using false reference prices for products and listing those products for sale, when they supposedly had not been offered at the reference price during a 99-day period prior to plaintiffs’ purchases. JC Penney moved to dismiss on several grounds, including that plaintiff’s claims for fraud, negligent misrepresentation, unjust enrichment, and violations of California’s Consumer Legal Remedies Act and False Advertising Law were time barred. JC Penney argued that these claims each carry a three-year statute of limitations, and the action was initiated more than three years after plaintiff made her purchases. Relying on *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974), plaintiff argued that the statute of limitations was tolled, first by a prior complaint plaintiffs filed in the Northern District of California, and then by the present complaint in the Central District. The court rejected plaintiffs’ argument, noting that plaintiff’s voluntary dismissal of her first complaint acted as a bar to enforcement of *American Pipe* tolling, and that “[b]y voluntarily dismissing her class action complaint in the Northern District, [plaintiff] negated any tolling effect of that suit, ‘leaving the situation the same as if the suit had never been brought in the first place.’” The court also found that plaintiff could not rely on the relation back doctrine because the “original complaint” was deemed the later complaint since the earlier one was dismissed. Nor could plaintiff rely on the discovery rule because her complaint identified other lawsuits filed against JC Penney. Thus, the court dismissed these particular claims with prejudice. The court also found that plaintiff lacked standing to assert nationwide class allegations and agreed with courts that are split on the issue in the Ninth Circuit that this determination could be made at the motion to dismiss stage.

Cobos v. National Gen. Ins. Co., 112 Cal. App. 5th 1272 (2025)

California Court of Appeal reverses denial of class certification where trial court considered improper grounds for denial.

Plaintiffs brought a putative class action against insurance companies, alleging they retroactively denied claims after auto accidents, rescinded their policies, and returned paid premiums based on plaintiffs’ failure to disclose family members of their household. Based on these allegations, the complaint asserted 79 causes of action, including for insurance bad faith, unfair business practices, and breach of contract.

Plaintiffs moved for class certification. Defendants opposed, arguing plaintiffs’ claims required individualized proof and were not proper for class certification. The trial court denied the motion for class certification for two reasons. First, it “found it troubling that plaintiffs conceded much of the damage assessment would need to be individualized.” Second, the trial court took issue with plaintiffs’ plan to forego six categories of damages to make the case more manageable, concluding that plaintiffs did not set forth a “palpable plan” for practically resolving damages.

The Court of Appeal held the trial court erred by relying on improper criteria to deny class certification. Although damages were individualized, it was well established in California that an individual determination of damages does not preclude class certification when issues of liability predominate. The Court of Appeal noted the trial court could have certified a class action to determine liability followed by individual hearings on damages. The trial court also appeared to have been concerned that some

individuals might forfeit potentially available damages if they participated in the proposed class action with pared down damages categories. But the Court of Appeal emphasized that the trial court overlooked that those class members could simply opt out of the class. The possibility that some class members might prefer to assert individualized claims was not a valid basis for denying certification. Finally, the Court of Appeal noted that the trial court overlooked the possible benefits of a class action in the case. Thus, the Court of Appeal reversed the denial of the motion for class certification.

[Click here to read previous issues of Greenberg Traurig's Class Action Litigation Newsletter.](#)

Editors

Robert J. Herrington

Shareholder

+1 310.586.7816

Robert.Herrington@gtlaw.com

Stephen L. Saxl

Shareholder

+1 212.801.2184

saxls@gtlaw.com

Contributors

Christopher S. Dodrill

Shareholder

+1 214.665.3681

Christopher.Dodrill@gtlaw.com

Nilda M. Isidro

Shareholder

+1 212.801.9335

Nilda.Isidro@gtlaw.com

Gregory A. Nylén

Shareholder

+1 949.732.6504

nyleng@gtlaw.com

Richard Tabura

Shareholder

+1 310.586.7770

Richard.Tabura@gtlaw.com

David G. Thomas

Shareholder

+1 617.310.6040

David.Thomas@gtlaw.com

Rebecca Garibotto Zisek

Of Counsel

+1 973.443. 3242

Rebecca.Zisek@gtlaw.com

Kara E. Angeletti

Associate

+1 312.456.1057

angelettik@gtlaw.com

Angela C. Bunnell

Associate

+1 617.310.5202

bunnella@gtlaw.com

Gina Faldetta

Associate

+1 212.801.9253

Gina.Faldetta@gtlaw.com

Gregory Franklin

Associate

+1 214.665.3708

Gregory.Franklin@gtlaw.com

Abu Dhabi^{*}. Albany. Amsterdam. Atlanta. Austin. Berlin[~]. Boston. Charlotte. Chicago. Dallas. Delaware. Denver. Dubai[<]. Fort Lauderdale. Houston. Kingdom of Saudi Arabia^{*}. Las Vegas. London^{*}. Long Island. Los Angeles. Mexico City^{*}. Miami. Milan^{*}. Minneapolis. Munich[~]. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Portland. Sacramento. Salt Lake City. San Diego. San Francisco. São Paulo[>]. Seoul[∞]. Shanghai. Silicon Valley. Singapore[~]. Tallahassee. Tampa. Tel Aviv[^]. Tokyo^{*}. Warsaw[~]. Washington, D.C. West Palm Beach. Westchester County.

This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ^{}Greenberg Traurig's Abu Dhabi office is a branch of Greenberg Traurig, P.A., which is registered with the Abu Dhabi Global Market Registration Authority (Registration No. 29906) and licensed to carry out legal services and regulated as a DNFBP by the ADGM Financial Services Regulatory Authority. [~]Greenberg Traurig's Berlin and Munich offices are operated by Greenberg Traurig Germany, LLP, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. [<]Greenberg Traurig's Dubai office is operated by Greenberg Traurig Limited, a company registered in the Dubai International Financial Centre (Registration No.*

CL7238), regulated as a DNFBP by the Dubai Financial Services Authority and licensed by The Government of Dubai Legal Affairs Department. «Greenberg Traurig operates in the Kingdom of Saudi Arabia through Greenberg Traurig Khalid Al-Thebity Law Firm, a professional limited liability company, licensed to practice law by the Ministry of Justice. *Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig's Milan office is operated by Greenberg Traurig Studio Legal Associato, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ›Greenberg Traurig's São Paulo office is operated by Greenberg Traurig Brazil Consultores em Direito Estrangeiro – Direito Estadunidense, incorporated in Brazil as a foreign legal consulting firm. Attorneys in the São Paulo office do not practice Brazilian law. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ¯Greenberg Traurig's Singapore office is operated by Greenberg Traurig Singapore LLP which is licensed as a foreign law practice in Singapore. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ¨Greenberg Traurig's Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojimubengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by GREENBERG TRAURIG Nowakowska-Zimoch Wysokiński sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in GREENBERG TRAURIG Nowakowska-Zimoch Wysokiński sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2025 Greenberg Traurig, LLP. All rights reserved.