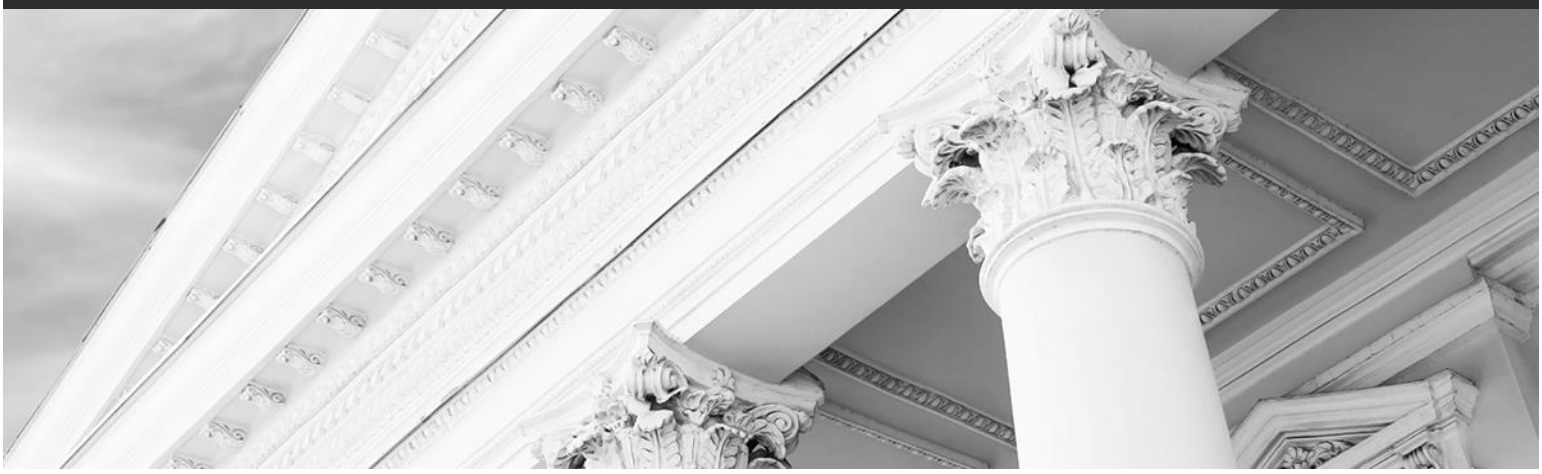
GT GreenbergTraurig

Class Action Litigation Newsletter | 1st Quarter 2024



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

Highlights from this issue include:

- Southern District of New York denies class certification, finding significant credibility issues make proposed class representatives inadequate.
- Fourth Circuit reverses denial of motion to dismiss interconnected to class certification on interlocutory appeal under Rule 23(f).
- Fourth Circuit reaffirms ascertainability requirement based on prior panel rulings.
- Seventh Circuit affirms sanctions against defendants for interfering with the class notice process by communicating directly with class members and urging them to opt out.
- Ninth Circuit issues two opinions addressing "express aiming" of interactive websites for purposes of personal jurisdiction.
- Eleventh Circuit reverses denial of class certification, finding predominance requirement could be met because Fair Credit Reporting Act does not require plaintiffs to show actual damages.

First Circuit

Ruiz v. NEI General Contracting, Inc., No. 21-11722, 2024 WL 869445 (D. Mass. Feb. 29, 2024)

District court modifies proposed subclass definitions to avoid fail-safe issues.

Construction workers brought a putative class action against contractors alleging state law unpaid overtime, unpaid wages, and retaliatory termination claims arising from two separate phases of a construction project. The construction workers sought to certify three subclasses. The district court modified the proposed subclass definitions to avoid fail-safe classes and address commonality issues between Phase I and Phase II, and ultimately certified both an overtime subclass and an unpaid wages subclass but declined to certify a retaliation subclass.

The court found that the retaliatory termination subclass was originally defined too broadly, as timesheets reflected only 11 impacted workers. Thus, a definition based on the impacted workers would not be sufficient to meet the numerosity requirement. But if the class was not narrowed to the impacted workers, the fluctuating nature of the workforce made it impracticable to generate a common answer as to the reason for termination or departure. Thus, when defined appropriately the subclass lacked numerosity, and when indefinitely defined it failed to meet other class requirements under Rule 23.

The court redefined the overtime subclass and the unpaid overtime premium subclass so that class membership was based on objective terms that did not rely on the merits of the claim and to only concern Phase II of the project. Based on the redefined subclass, even though the overtime class included only 35 individuals, a class was still a superior method for adjudication. As to the unpaid overtime premiums subclass, common questions predominated over the individual issue of the different amount of damages.

Second Circuit

Woodhams v. GlaxoSmithKline Consumer Healthcare Holdings (US) LLC, No. 18-cv-3990, 2024 WL 1216595 (S.D.N.Y. Mar. 21, 2024)

Class certification denied where proposed class representatives inadequate to represent the putative class given significant credibility issues.

Plaintiffs brought a putative nationwide class action asserting consumer protection and unjust enrichment claims alleging defendant GlaxoSmithKline Consumer Healthcare Holdings (US) LLC charged more for “Maximum Strength” Robitussin cough syrup than for the “Regular Strength” version of the same product, even though the “Maximum Strength” syrup allegedly had half the concentration of active ingredients following a reformulation effort as well as half the number of doses. Plaintiffs further pointed to a summer 2018 reformulation of the “Regular Strength” syrup leaving the quantity of active ingredients per dose unchanged but doubling the liquid volume of the dose. Plaintiffs based their claims on purchases of the “Maximum Strength” syrup during the time period between when the “Maximum Strength” syrup was reformulated and when the “Regular Strength” syrup was reformulated, i.e., mid-2016 to mid-2018. Defendant filed a motion to dismiss (which was granted in part), denied the allegations concerning its reformulation efforts, and following discovery, moved for summary judgment, whereas plaintiffs moved for class certification.

In opposing class certification, defendant argued that the named plaintiffs could not meet the prerequisites of Fed. R. Civ. P. 23(a) because their claims are subject to "unique defenses" that "threaten to become the focus of the litigation." Among other things, defendant pointed to the fact that four plaintiffs lacked evidence that they purchased the "Maximum Strength" product during the relevant time period and offered contradictory and inconsistent deposition testimony as to when and how many times they purchased it. These plaintiffs did not offer receipts reflecting their purchases, and their purchases were not reflected on store loyalty accounts. Further, defendant contended that the plaintiffs' testimony suggested they did not purchase the "Maximum Strength" product believing that the bottle had a higher concentration of active ingredients than "Regular Strength," so a jury could find there was no causal connection between defendant's alleged misrepresentations and plaintiffs' purchases.

In denying class certification, the court found that defendant "raised credible concerns about the central factual predicate of" plaintiffs' claim that they purchased the product during the relevant period, and that this defense is "meritorious enough to require [plaintiffs] to devote considerable time to rebut" it.

Necessarily, as plaintiffs "would have to devote substantial attention to overcoming their damaging deposition testimony and addressing concerns regarding their credibility on material facts, including whether they even purchased Maximum Strength Robitussin during the relevant time period," they are inadequate class representatives, rendering certification inappropriate. The court granted the parties' request for more time to discuss next steps.

Hastings v. Nifty Gateway, LLC, No. 22-cv-10517, 2024 WL 1175196 (S.D.N.Y. Mar. 19, 2024)

Motion to compel arbitration granted in putative class action where online account sign-up page gave reasonably conspicuous notice, and court declines to find PSLRA statutorily preempts arbitration.

Plaintiff John Hastings brought a putative class action against defendants Nifty Gateway, LLC and the Gemini Trust Company, LLC (collectively, "Nifty") alleging that Nifty violated federal securities law by selling non-fungible tokens (NFTs) on its platform, Nifty Gateway. Nifty moved to compel arbitration and stay the action pending the outcome of the arbitration under the Federal Arbitration Act (FAA). The court granted the motion to compel arbitration based on plaintiff's "unambiguous" assent to the arbitration clause in opening his three Nifty Gateway accounts.

First, the court analyzed Nifty's terms and conditions for users who used the Nifty Gateway platform. To use the platform, a user must first create an account through the website's sign-up page. Above the "sign up" button on that page, there is a blue and underlined "Terms and Conditions" hyperlink, and text notifying the user that "By signing up, you agree to the Term[s] and Conditions and Privacy Policy." By clicking the "Terms and Conditions," a user is taken to a webpage containing the terms and conditions of the user agreement, which include a broad arbitration clause governing disputes going to the "access, use, or attempted access or use of" the gateway, "any products sold or distributed through" the gateway, or "any aspect of the [users'] relationship with" the gateway. Nifty claimed that by creating three different user accounts, plaintiff unambiguously accepted the Terms and Conditions on different occasions, and necessarily manifested his assent to the arbitration clause.

The court found that the parties had entered into a valid agreement to arbitrate, as Nifty's sign-up page contained "reasonably conspicuous notice of the arbitration agreement." Among other things, the court looked to the fact that the account sign-up webpage stated that, "[b]y signing up, you agree to the Terms and Conditions and Privacy Policy" and the title "Terms and Conditions" is directly above the "sign up"

button in blue, underlined, and hyperlinks to the Nifty Terms. Moreover, the paragraph titled "Disputes" in the Terms themselves is in large font and begins by instructing users to "[p]lease read the following agreement to arbitrate . . . in its entirety." The court explained that because a "reasonably prudent [ ] user would have constructive notice of [Nifty's] terms," plaintiff had inquiry notice of those terms. In reaching this conclusion, the court found that the Nifty account sign-up page "mirrors that in" *Meyer v. Uber Techs., Inc.*, 868 F.3d 66 (2d. Cir. 2017), which the Second Circuit deemed valid.

Finally, the court rejected plaintiff's argument that his pursuit of Private Securities Litigation Reform Act (PSLRA) claims somehow preempted the invocation of the arbitration clause, noting that "the PSLRA does not mention arbitration, [and so] the Court declines to intuit a statutory preemption—over the parties' agreement—where one does not explicitly exist."

Set Capital LLC v. Credit Suisse Grp. AG, 18-cv-2268, 2024 WL 895084 (S.D.N.Y. Mar. 1, 2024)

Court denies renewed motion for class certification, finding lack of lead plaintiff to represent third, smaller subclass meant uncertainty as to adequate representation of all class members.

Plaintiffs brought this putative class action lawsuit on behalf of themselves and purchasers, acquirers, sellers, and redeemers of VelocityShares Inverse VIX Short Term Exchange Traded Notes (XIV Notes), alleging violations of the federal securities laws. In early 2023 the court granted plaintiffs' motion to certify one proposed subclass and denied certification of two other subclasses, without prejudice to renew. In this recent order, the court denied both defendants' motion for reconsideration of the certification decision and plaintiffs' renewed motion for certification.

By way of background, plaintiffs previously moved to certify three classes, styled as a "Misrepresentation Class," a "Manipulation Class," and a "Securities Act Class." Plaintiffs also moved to appoint four Lead Plaintiffs as class representatives and to appoint co-lead counsel as class counsel. The court certified the Securities Act Class but denied certification as to the other two, finding that only this subclass satisfied the requirements of Rule 23 and rejecting the argument that "individualized proof of tracing" predominated over the class-wide issues. *See Set Capital LLC v. Credit Suisse Group AG*, 2023 WL 2535175 (S.D.N.Y. Mar. 16, 2023). As to the other subclasses, the court found that plaintiffs' theories of liability were in direct conflict with each other, precluding certification.

In this new order, the court denied the motion to reconsider (as defendants did not identify any controlling decisions that the court overlooked or other clear error) and denied the renewed motion for class certification, notwithstanding plaintiffs' argument that the additional separate and independent representatives and counsel obviate the court's concerns from the original motion concerning adequacy and typicality. In so ruling, the court looked to the Second Circuit's decision in *In re Literary Works in Elec. Databases Copyright Litigation*, 654 F.3d 242 (2d Cir. 2011), where the court rejected a single class settlement that divided claims into three categories, with the class representatives holding combinations of all three categories of claims. This was because the third category was the weakest and received the least generous damages, so the interest of the class members with only claims in the third category "were antagonistic to the others on a matter of critical importance—how the money would be distributed."

Similarly in this case, while the new proposed class representative was only a member of the so-called "Manipulation Class," the lead plaintiffs were members of both this class and the "Misrepresentation Class," such that they would be "functionally indifferent to whether damages are allocated to Defendants' alleged inflationary representations or deflationary manipulations." This rendered them inadequate

advocates for "those holding only misrepresentations claims" as they "theoretically [could be] interested exclusively in maximizing the compensation for [] one category of claim" and thus could chose to sacrifice their misrepresentation claims "in exchange for more favorable compensation" on their manipulation claims. While the court recognized that the number of misrepresentation-only plaintiffs may be few, and many – if not most – individuals could fall into both classes, it still had to independently ask whether the interests of "all class members" were adequately represented. And ultimately, "[w]ithout a lead plaintiff to represent and advocate for the misrepresentation-only claimants, the Court cannot find this standard is met."

The renewed class certification motion was denied without prejudice to refiling with alternative class representation. Alternatively, the court held that "if Plaintiffs elect to proceed with the same class representatives, Plaintiffs shall provide evidence to support their statement that the pool of misrepresentation-only plaintiffs is '*de minimis*, if they exist at all.'"

Fourth Circuit

Elegant Massage, LLC v. State Farm Mutual Auto. Ins. Co., 95 F.4th 181 (4th Cir. 2024)

Fourth Circuit reverses denial of motion to dismiss on appeal under Rule 23(f), and thus vacates certification of class seeking damages for COVID-19 losses.

Plaintiff filed a putative class action against State Farm seeking a declaratory judgment that the "virus exclusion" in its business interruption policy did not exclude coverage for COVID-19 losses, and seeking damages for breach of contract and breach of the duty of good faith and fair dealing. State Farm moved to dismiss those claims because plaintiff had not alleged any "accidental direct physical loss" to the covered property as required by the policy, but the district court denied plaintiff's motion to dismiss, concluding that the term was ambiguous. The district court then certified a class of all persons or entities in Virginia who were denied coverage under the policy and endorsement held by plaintiff.

The Fourth Circuit accepted State Farm's interlocutory appeal of the class certification decision under Federal Rule of Civil Procedure 23(f). State Farm urged the panel to review the district court's motion to dismiss decision under the doctrine of pendent appellate jurisdiction. Although the panel recognized that it exercises pendent appellate jurisdiction sparingly, it held that the denial of the motion to dismiss and the class certification order were "so interconnected" as to require concurrent review because the class certification decision was guided by the district court's prior holding regarding the meaning of "direct physical loss."

As to the merits of the appeal, the panel found that the district court's interpretation of "direct physical loss" was legal error because, consistent with the decision in *Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926 (4th Cir. 2022), that term was not ambiguous and requires "present or impending material destruction or material harm," which the executive orders mandating closure during COVID-19 did not do. Because plaintiff's claims were subject to dismissal, the panel found there was no basis for class certification.

Career Counseling, Inc. v. AmeriFactors Fin. Grp., LLC, 91 F.4th 202 (4th Cir. 2024)

Fourth Circuit reaffirms ascertainability requirement and affirms denial of certification of TCPA class.

In this Telephone Consumer Protection Act (TCPA) case, the Fourth Circuit affirmed the district court's determination that the proposed class of 59,000 fax recipients did not meet the ascertainability requirement for class certification because there was no efficient way to determine which recipients used a "telephone facsimile machine" (which is encompassed by the TCPA) as opposed to an "online fax service" (which is not encompassed by the TCPA).

The Fourth Circuit rejected plaintiff's invitation that the court abandon its prior precedents recognizing that Rule 23 contains an implicit ascertainability requirement. The panel concluded that other panels of the Fourth Circuit have acknowledged and enforced an ascertainability requirement, and it has no power to overrule those panels.

The panel agreed with the district court's interpretation of the TCPA, finding that the plain language of the definition of "stand-alone fax machine" in the TCPA only encompasses unsolicited advertisements sent to a "telephone facsimile machine," not to an "online fax service." That definition was consistent with Federal Communications Commission interpretations of the TCPA, although the panel declined to rule whether the agency's interpretations were entitled to deference.

Plaintiff contended that even under this definition the evidence submitted to the district court proved that the class of "telephone facsimile machine" recipients was ascertainable. Specifically, plaintiff sent subpoenas to the telephone carriers for each of the 59,000 recipients of the advertisement and received responses demonstrating that more than 20,000 of the recipients were not – and 206 recipients were – online fax services. Defendant submitted evidence, including a declaration from a telephone carrier, showing there was no way to determine whether the recipient was using a "telephone facsimile machine" as opposed to an "online fax service." The district court found the defendant's evidence more credible, and the Fourth Circuit concluded that decision was not an abuse of discretion.

Fifth Circuit

Cheapside Mins., Ltd. v. Devon Energy Prod. Co., L.P., 94 F.4th 492 (5th Cir. 2024)

Fifth Circuit reverses district court's interpretation of the place of "principal injury" prong in CAFA's local-controversy exception.

Over 200 plaintiffs filed a putative class action against Devon Energy and other entities in Texas state court, alleging underpayment of royalties for hydrocarbon production. Devon Energy removed the case to the Southern District of Texas under the Class Action Fairness Act (CAFA). Plaintiffs moved to remand under CAFA's "local controversy" exception, as more than two-thirds of the class members were Texas citizens. The district court agreed and ordered remand to state court. Devon Energy appealed the remand order to the Fifth Circuit.

The Fifth Circuit reversed. The Court of Appeals began by analyzing the local-controversy exception's requirement that "principal injuries resulting from the alleged conduct" be "incurred in the State in which the action was originally filed." Plaintiffs argued their injuries were incurred in Texas because that was where Devon Energy failed to satisfy its obligations. But Devon Energy argued that plaintiffs sustained their alleged injuries where they reside, and the Fifth Circuit agreed. Even though more than two-thirds of

the putative class members were Texas citizens, not all were. As such, some plaintiffs sustained their injuries outside of Texas, and the local-controversy exception did not apply. Rejecting plaintiffs' interpretation of "principal injury" as meaning the place where "most" of plaintiffs had been injured, the court ruled that the "principal injuries" had to apply to "the *entire* class, not just a subset of it." The Fifth Circuit reasoned that "to remand a case to state court when some plaintiffs sustained the principal injuries outside of the forum state would essentially rewrite the statute, which we may not do." The Court of Appeals thus vacated the district court's ruling and remanded the case to the district court.

Seventh Circuit

Mullen v. Butler, 91 F.4th 1243 (7th Cir. 2024)

Sanctions affirmed against defendants for interfering with class-notice process by communicating directly with class members and urging them to opt out.

Plaintiff filed a putative class action against defendants alleging that defendants fraudulently concealed claims of sexual abuse made against defendants. Plaintiff asserted that had she and other members of the class known about the allegations, they would not have participated in any volleyball programs associated with defendants. The district court certified the class, then subsequently granted summary judgment to defendants.

After the class was certified, but before summary judgment was granted to defendants, defendants communicated with potential class members urging them to opt out of the class action. This included repeatedly communicating that the case was likely to be dismissed if parents opt out of the lawsuit. In a status hearing, counsel for defendants denied that defendants had been communicating with class members regarding opting out. When the district court questioned counsel regarding defendants' communications in a subsequent status hearing, she admitted that defendants had engaged in inappropriate communications with class members and asserted that while she had received at least one of those communications before the prior status hearing, she had not read it. The district court imposed a civil sanction of $5,000 against each of the defendants and $20,998.10 in attorneys' fees against defendants, and reprimanded counsel for defendants – ordering that she complete twice the required amount of professional responsibility hours for her next continuing legal education cycle.

The Seventh Circuit affirmed these sanctions, noting that the Eleventh Circuit has held that where "the class and the class opponent are involved in an ongoing business relationship, communications from the class opponent to the class may be coercive." As a result, the Seventh Circuit found that the district court had not abused its discretion. The Seventh Circuit found that the attorneys' fees award was appropriate, as those fees would not have been incurred but for the misconduct. The court also found that the civil penalty was appropriate to penalize unacceptable litigation conduct. The Seventh Circuit found that it did not have jurisdiction to address the sanctions against defendants' counsel, as the notice of appeal did not demonstrate that she intended to appeal her sanctions.

Coatney v. Ancestry.com DNA, LLC, 93 F.4th 1014 (7th Cir. 2024)

Seventh Circuit affirms district court ruling denying motion to compel arbitration and holding that children are not bound by arbitration agreements entered into by their parents.

Defendant offers DNA test kits whereby individuals collect their saliva, which defendant analyzes and returns genealogical and health information to the individual. Individuals using this service must agree to defendant's terms. The plaintiffs here are minors whose guardians agreed to the terms and submitted plaintiffs' genetic material.

The Seventh Circuit held that plaintiffs were not express parties to the terms to which their guardians agreed. Nothing in the relevant terms suggested the guardians were agreeing to them on behalf of their children; rather, the terms explicitly stated that they were personal to the signatory. Similarly, the Seventh Circuit held that plaintiffs cannot be bound as closely related parties or third-party beneficiaries unless there is an express provision in the contract identifying the plaintiffs as third-party beneficiaries by name or description.

Finally, the Seventh Circuit addressed whether direct benefits estoppel could provide a mechanism for binding plaintiffs to the terms where the only benefit flowing to plaintiffs is that the analysis of their DNA is available through their guardians. The court held that because it is a potential benefit flowing from plaintiffs' relationship with one of the parties to the terms, not a direct benefit, it is not sufficiently direct to trigger direct benefits estoppel.

Campos v. Tubi, Inc., No. 23-CV-3843, 2024 WL 496234 (E.D. Ill. Feb. 8, 2024)

Plaintiff did not form a valid contract by registering to use defendant's online video streaming platform because defendant did not reasonably communicate existence of terms.

Plaintiff brought a class action complaint alleging a violation of the Video Privacy Protection Act. Defendant moved to compel arbitration based on the terms of use and, in the alternative, moved to dismiss. Plaintiff registered with defendant on her phone through defendant's Android application. The court cited the factors set forth in *Domer v. Menard, Inc.*, No. 22-CV-444-JDP, 2023 WL 4762593 at *3 (W.D. Wis. July 26, 2023), for determining whether a reasonable person would have realized they were assenting to the terms of use:

> (1) whether there is a clear prompt directing the purchaser to read the terms; (2) the size of the prompt; (3) use of a bold font or contrasting colors; (4) the visual clarity of the website's layout; (5) whether the user can see the link to the terms without having to scroll; and (6) the spatial proximity between the notice and the mechanism for manifesting assent, such as a purchase button.

The court held that the defendant did not establish that it reasonably communicated the existence of its terms of use to plaintiff because the prompt to assent to the terms was in the smallest font on the screen, almost at the bottom of the screen, and in a gray font that contrasted poorly with the background. The court specifically noted that because the prompt referred to "registering" and each button indicated that a user could "continue with" email, Google, or Facebook, a user would not know that it was agreeing to the terms of use by clicking one of the above buttons.

In addition, the court denied defendant's motion to dismiss, holding that plaintiff's allegations were sufficient to state a Video Privacy Protection Act claim where she alleged defendant collected personally identifiable information about its users, collected users' viewing history, and shared that data to target ads to users.

Castiel v. Dyson, Inc., No. 23 C 3477, 2024 WL 580061 (N.D. Ill. Feb. 13, 2024)

Written warranty flatly contradicted plaintiff's allegations that it violated the Magnuson-Moss Warranty Act.

Plaintiff brought a putative class action alleging a violation of the anti-tying provisions of the Magnuson-Moss Warranty Act. Plaintiff asserted that defendant's warranty required using only authorized repair services and authorized replacement parts for non-warranty service and maintenance. The court, however, reviewed the text of the warranty itself and found that the cited provisions simply dictated what was not covered (e.g., faults caused by the use of unauthorized parts or repair services) and what services defendant would offer (e.g., work carried out by authorized repair services). None of the cited provisions conditioned the warranty on the use of authorized parts or services.

The court specifically noted that plaintiff never alleged that anyone speaking on behalf of defendant told her that her warranty was voided. Instead, plaintiff simply asserted that defendant would have denied any covered claim that plaintiff might have made and, as a result, the product was worth less at the time of purchase. The court referred to this theory as "speculation" and "conjecture in the extreme." While the court found that plaintiff pleaded an injury sufficient to assert Article III standing because the type of price premium injury she asserted was concrete and particularized, the court held that plaintiff failed to plead that she actually suffered such an injury. In reaching that conclusion, the court noted that plaintiff failed to adequately allege that she relied on implicit representations about the lawfulness of the manufacturer's warranty in purchasing the product.

Sloan v. Anker Innovations Ltd., No. 22 C 7174, 2024 WL 935426 (N.D. Ill. Jan. 9, 2024)

Plaintiffs stated a claim under Illinois Biometric Information Privacy Act related to home security cameras and video doorbells that apply a facial recognition program.

Plaintiffs asserted claims including under the Illinois Biometric Information Privacy Act (BIPA) and the Federal Wiretap Act based on defendants' line of home security cameras and video doorbells that use facial recognition software to allow users to identify who is in view of the camera-equipped devices. Plaintiffs alleged that defendants' devices upload thumbnail images to defendants' cloud storage and allow access to unencrypted video streams.

The court dismissed plaintiffs' claims under the Wiretap Act, holding that because plaintiffs used defendants' applications to access the video, defendants were a party to the communications and, as a result, did not violate the Wiretap Act.

The court denied defendants' motion to dismiss Illinois plaintiffs' BIPA claims, holding that photographs used by a system that can take a geometric scan of a person qualify as biometric data. The court did, however, dismiss all non-Illinois residents' BIPA claims because BIPA does not have any extraterritorial effect and the non-Illinois plaintiffs had not alleged any facts tying their transactions or any other related conduct to Illinois.

The court also denied defendants' motion to dismiss various state statutory claims with regard to statements relating to the storage and streaming of data, facial recognition, and encryption. Defendants argued these statements were true – while plaintiffs alleged they were false. While the court held that defendants may ultimately prove that the statements were true at some later date, on a motion to dismiss plaintiffs are simply required to allege that these statements may have misled a reasonable consumer.

Land v. IU Credit Union, 226 N.E.3d 194 (Ind. 2024)

Indiana Supreme Court held that customer did not assent to amendment to account agreements containing an agreement to arbitrate and waive class action status.

Defendant sent plaintiff an addendum to her account agreement and online services agreement which would have permitted either party to demand arbitration for the resolution of any dispute and would have waived the right to initiate or join a class action lawsuit. This addendum purported to become effective unless plaintiff opted out within 30 days. On this basis, defendant moved to compel arbitration and enforce the waiver of class action status. The circuit court granted the motion to compel arbitration and plaintiff appealed. On appeal, the Indiana Supreme Court reversed and remanded, holding that plaintiff did not consent to the addendum.

The Court specifically held that while defendant provided plaintiff with reasonable notice of its offer to amend the original agreements, plaintiff's silence and inaction did not constitute assent to that offer under Section 69 of the Restatement (Second) of Contracts. While defendant argued that plaintiff's assent should be found under Section 3 of the Restatement of Consumer Contracts, the Indiana Supreme Court held that because defendant repeatedly argued that these were bilateral agreements, the Restatement of Consumer Contracts – which applies to unilateral contracts – did not apply.

Eighth Circuit

Chicoine v. Wellmark, Inc., 2 N.W.3d 276 (Iowa Sup. Ct. 2024)

Iowa Supreme Court affirms denial of class certification due to lack of expert testimony or viable model to address threshold classwide issue.

Chiropractor-plaintiffs filed a putative class action alleging the health insurer and claims administrator defendant violated the Iowa Competition Law based on defendant's administrative services agreements governing health care benefits. Plaintiffs alleged these agreements prevented self-funded employers from competing independently, negatively impacting chiropractor profits. Plaintiffs moved to certify a class of approximately 1,300 Iowa chiropractors. The district court denied plaintiffs' motion. Plaintiffs appealed to the Iowa Supreme Court.

The Iowa Supreme Court affirmed the denial of class certification. For the plaintiffs to establish their antitrust claim, they were required to identify the defendant's anticompetitive practice and show how they were in a worse position because of the defendant's practice. In their class certification papers, the plaintiffs failed to offer any expert testimony or model for proving, on a classwide basis, how all class members would have been better off but for the defendant's agreements. The defendant, on the other hand, raised significant individualized issues to assess this element of the plaintiff's case, including, among others, differences in insurance rates, coverage gaps, differences in patient factors, and the impact of the chiropractors' location in the state. The Iowa Supreme Court agreed with the district court that the plaintiffs' inability to provide any support for a classwide resolution on this threshold liability issue

doomed their request for class certification. The court also rejected the plaintiffs' attempt to revive a prior theory of liability that did not present the same individualized issues to save their class certification claims. Because the plaintiffs had previously abandoned this prior theory to survive the responsive pleading stage, the court confirmed that the plaintiffs were judicially estopped from relying on the theory at this late stage of the case.

Ninth Circuit

Doe v. WebGroup Czech Republic, a.s., 93 F.4th 442 (9th Cir. 2024)

Ninth Circuit reverses denial of dismissal for lack of personal jurisdiction over two foreign web operator defendants because defendants' use of "content delivery networks" located within the United States to better serve their U.S.-based users showed express targeting of forum.

Plaintiff Jane Doe brought a putative class action against 11 foreign-based defendants for violations of federal and California law based on their alleged participation or distribution of online videos depicting sexual abuse or child pornography posted on defendants' pornography websites. Analyzing personal jurisdiction over numerous foreign-based entities under Federal Rule of Civil Procedure 4(k)(2), which analyzes whether the defendant is subject to jurisdiction "in any state's court" and not just the forum state in particular, the district court dismissed the claims against the foreign defendants because plaintiff had not shown defendant had "minimum contacts" with the relevant forum, the United States.

The Ninth Circuit reversed the dismissal. Applying the "effects" test first espoused in *Calder v. Jones*, 465 U.S. 783 (1984), the court concluded that WGCZ and NKL, the two Czech-domiciled defendants who operated the pornography websites, "expressly aimed" those websites into the United States. The court recognized that the maintenance of a passive website alone could not satisfy *Calder*'s express aiming prong. In evaluating whether the foreign defendants' operation of the website went beyond passively benefiting from U.S. users and instead constituted the sort of targeting or differentiation of the forum market required to show express aiming, the Ninth Circuit focused particularly on defendants' utilization of content delivery networks (CDNs) that allowed improved speed and functionality of their website in the United States, in turn evidencing differentiated targeting of the U.S. market. Beyond the defendants actively tailoring the website to their U.S.-based audience, evidence also showed that U.S. users accounted for 12% to 19% of all traffic on the websites, making the U.S. market a substantial component of defendants' financial success.

The Ninth Circuit also saw defendants' forum-related activities within the United States – the operation and active promotion of the website towards their American market – sufficiently related to plaintiff's publication-based claims under *Calder*'s second prong.

Briskin v. Shopify, Inc., 87 F.4th 404 (9th Cir. 2023)

Ninth Circuit limits *Herbal Brands, Inc. v. Photoplaza, Inc.* and clarifies 'express aiming' for purposes of personal jurisdiction in the context of interactive websites.

Plaintiff brought a putative class action against online payment processor Shopify for several privacy violations based on allegations that it obtained his personal data, including his payment information entered onto Shopify's platform, without his permission for use by Shopify's merchant partners. Plaintiff asserted Shopify had expressly aimed its conduct into California (the forum state) and was thus subject to

personal jurisdiction in the forum. He relied on Shopify's brick-and-mortar store in Los Angeles, its California fulfillment center, and its contracts with California merchants as activity directed at the forum. The Ninth Circuit, however, found these activities were not relevant to its analysis because plaintiff's injuries were based on Shopify's extraction of his personal information and had nothing to do with Shopify's brick-and-mortar operations in California or Shopify's contracts with California merchants. Because plaintiff would have suffered the same injury regardless of whether he purchased items from a California merchant or was physically present in California when he did so, only Shopify's collection and use of plaintiff's data was relevant to the court's personal jurisdiction analysis.

The Ninth Circuit next addressed plaintiff's reliance on Shopify's online payment platform's interactivity (i.e., users' ability to make purchases through the platform), which plaintiff argued sufficed to show express aiming. Addressing the scope of its earlier decision *Herbal Brands, Inc. v. Photoplaza*, Inc., 72 F.4th 1085 (9th Cir. 2023), which affirmed personal jurisdiction over a foreign defendant in a trademark infringement case where the defendant's interactive website permitted online sales and resulted in the shipment of allegedly infringing products into California, the Ninth Circuit made plain that the holding of *Herbal Brands* – that the interactive nature of a defendant's website can establish express aiming into the forum – is limited to claims arising from a defendant's sale of a physical product to a consumer in the forum state via an interactive website and not claims arising from the extraction of consumer data. Requiring plaintiff to show "something more" besides the fact that the online platform was interactive, the Ninth Circuit found Shopify's online platform lacked a California-specific focus since it did not actively target California, and personal jurisdiction was thus lacking.

Mikulsky v. Noom, Inc., No. 3:23-CV-00285-H-MSB, 2024 WL 251171 (S.D. Cal. Jan. 22, 2024)

Court dismisses complaint for lack of Article III standing because plaintiff did not allege that any of the allegedly sensitive information collected from her by tracking technology embedded on a health and wellness platform could be connected to her personal identity.

After her original complaint was dismissed for lack of Article III standing with leave to amend, plaintiff filed an amended class action complaint on behalf of a putative California class pleading claims under section 631 of the California Invasion of Privacy Act (CIPA) and for intrusion upon seclusion and invasion of privacy. Plaintiff alleged that defendant, an online wellness platform, allegedly used, without user consent, third-party tracking technology to collect the allegedly sensitive personal and health information she entered into a survey. The survey specifically requested her current weight, ideal weight, sex, gender identity, and age and to answer questions about her fitness goals, eating and exercise habits, medical and family history, mental health, home environment, marital status, weight loss motivations and struggles, and personal lifestyle, information plaintiff claimed was actionable "personal health information" under the CIPA. While plaintiff corrected her original complaint's omission of the specific types or categories of allegedly personal information collected from her survey answers by third-party "session replay" software, the court ultimately found these categories of information, even if sensitive, did not give rise to a concrete injury sufficient to confer standing. Rejecting the argument that the bare assertion of a statutory violation could suffice under recent Supreme Court precedent, the court found no cognizable harm based solely on the collection and disclosure of the specific health information plaintiff entered into a survey where she did not also allege that any of the survey information could in any way be connected to her identity, like her name, credit card details, or other identifiers. Because the information collected did not give rise to anything resembling a protectible privacy interest, the court dismissed for lack of Article III standing and found leave to further amend futile.

Doe v. Amgen, Inc., No. 223CV07448MCSSSC, 2024 WL 575248 (C.D. Cal. Jan. 29, 2024)

Plaintiff failed to state California statutory privacy claims where she did not allege defendant's use of third-party advertising pixels on its website resulted in the collection and disclosure of her personal information.

Plaintiff Jane Doe brought a putative class action against drug manufacturer Amgen after allegedly visiting Amgen's website and signing up for the company's SupportPlus program, which assisted patients taking the drug Enbrel. Plaintiff alleged a search engine's tracking pixels were present on Amgen's website when she re-enrolled several times between 2020 through 2022. She further alleged she was required to input her "personal information" and verify her use of Enbrel during those visits. She also claimed other tracking pixels were present on Amgen's website. Plaintiff asserted claims under the California Invasion of Privacy Act, the California Confidentiality of Medical Information Act, California Unfair Competition Law, and the Federal Electronic Communications Privacy Act.

The court dismissed the complaint for failure to state a claim, finding it insufficient for plaintiff to plead conclusory allegations that the website-operator defendant violated her privacy without offering any facts that information was collected from her personally. Plaintiff's overarching theory of her case, which grounded all her claims, was that Amgen collected her "personal information" and improperly disclosed it to third-party adtech software providers without her consent. But plaintiff failed to explain with salient facts how Amgen transmitted her data to these third parties. Rather than analyze each of the claims pleaded, the court summarily dismissed for failure to comply with Federal Rule of Civil Procedure 8, requiring a complaint to contain "sufficient factual content" to state a claim for relief.

Tenth Circuit

Roig v. Alder Holdings, LLC, No. 2:23-CV-721-TC-JCB, 2024 WL 664717 (D. Utah Feb. 16, 2024)

Court indicates right to FLSA collective action is waivable when combined with arbitration provision, an issue not yet decided by the Tenth Circuit.

Plaintiff alleged that Alder Holdings, a home security door-to-door sales company, had misclassified its field service technicians (FSTs) as independent contractors, thus denying these employees overtime wages in violation of the Fair Labor Standards Act (FLSA). Plaintiff sought certification of a "Nationwide Collective" under 29 U.S.C. section 216(b).

Alder moved to dismiss the action or, alternatively, to strike any reference to a nationwide collective on the ground that plaintiff waived his right to participate in or be a member of any class or collective action. Alder's motion was based on a sales finishing representative (SFR) agreement dated Jan. 16, 2023, signed by plaintiff, in which plaintiff purportedly waived this right. Alder also submitted a declaration from one of Alder's managers attesting that plaintiff was hired to work as an FST and that he had signed an SFR agreement. In response, plaintiff presented an employment letter dated Feb. 9, 2023, which offered him a position as an FST. He contended that this document, which was signed after the SFR agreement and specifically referred to his employment as an FST, called into question whether the waiver in the SFR agreement remained, or was ever binding in the first place.

The court noted it is not yet settled in the Tenth Circuit whether the right to participate in a collective action is waivable, and it thus analyzed other circuit courts' positions on the issue of waivability of the FLSA's collective action right. After summarizing the split in authority, the court concluded that, based on a 2018 Supreme Court decision, the FLSA collective action right is waivable at least when combined with an arbitration clause. Nevertheless, it found the Supreme Court has not yet squarely addressed whether the FLSA collective action right is waivable when it is not tied to an arbitration provision. As a result, it was necessary for the court to determine which documents governed the employment relationship between Alder and plaintiff since plaintiff had raised a genuine issue of material fact about whether the SFR agreement governed his employment with Alder. Limited, expedited discovery into the circumstances surrounding plaintiff's purported agreement was required.

F.S. v. Captify Health, Inc., No. 23-1142-DDC-BGS, 2024 WL 1282437 (D. Kan. Mar. 26, 2024)

Court holds that merely being a victim of a data breach is insufficient to sustain an Article III injury in fact.

Plaintiff filed a putative class action in Kansas state court alleging his personal data was compromised in defendant Captify Health's data breach and asserting seven tort and contract claims. Specifically, plaintiff alleged Captify flagrantly disregarded his privacy and property rights by intentionally, willfully, and recklessly failing to take the necessary precautions to protect plaintiff's personal health information and personally identifying information from unauthorized disclosure. After Captify removed the state court action to federal court under the Class Action Fairness Act, the court sua sponte raised the issue of whether it had subject-matter jurisdiction to hear the case and whether plaintiff had adequately alleged his standing to sue in federal court, focusing on Article III's injury-in-fact requirement. The court concluded that plaintiff failed to allege a concrete injury and, as a result, he lacked standing, and therefore remanded the case to state court, dismissing defendant's motion to dismiss.

The court began by acknowledging that the Tenth Circuit has not yet reached the issue of whether merely being subject to a data breach suffices as an injury in fact, or whether a plaintiff must further show the breach put them at an increased risk of identity theft or fraud following the unauthorized disclosure of their data, such as by alleging their data was intentionally targeted or obtained by a third party or was in any way misused. The court found that plaintiff had not alleged his data was misused at all, i.e., that there were any fraudulent charges or unauthorized access of his bank accounts or that his sensitive data had been sold on the dark web. Likewise, the court rejected plaintiff's "benefit of the bargain" theory for showing a concrete harm, finding the alleged overpayment of medical services has been rejected by the court numerous times. While recognizing that the nature of the specific data compromised here (plaintiff's Social Security number, name, and date of birth) was one factor that favored plaintiff, the court ultimately concluded this could not overcome the absence of facts suggesting this data would imminently be misused. At most, plaintiff alleged a speculative risk of a future harm such as identity theft, which alone cannot confer Article III standing.

Eleventh Circuit

Santos v. Healthcare Revenue Recovery Grp., LLC, 90 F.4th 1144 (11th Cir. 2024)

Eleventh Circuit reverses denial of class certification in Fair Credit Reporting Act case, finding Rule 23(b)(c)'s predominance requirement could be met because the Act does not require plaintiffs to show actual damages.

Individual consumers filed a class action complaint against consumer reporting agency Experian Information Solutions, alleging claims under the Fair Credit Reporting Act (FCRA) that a mistake in how Experian processed certain data led to errors affecting certain individuals' credit scores. After close of discovery, plaintiffs moved to certify the class. The district court denied class certification, reasoning that section 1681n(a)(1)(A) of the FCRA required all class members to prove they suffered actual damages, and so individual questions would predominate over common issues such that plaintiffs could not meet Rule 23(b)(3)'s predominance requirement.

Plaintiffs appealed. In a *per curiam* opinion on panel rehearing, the Eleventh Circuit found the district court abused its discretion in denying class certification. The Eleventh Circuit noted that section 1681n(a)(1)(A) of the FCRA provided two options for recovery: (1) recovering damages a plaintiff actually suffers, and (2) recovering statutory damages of $100 to $1,000. The Eleventh Circuit interpreted section 1681n(a)(1)(A) to mean the second option did not require a plaintiff to show they suffered any actual damages, concluding the district court erred in finding otherwise and vacating the district court's denial of plaintiffs' motion for class certification. In doing so, the Eleventh Circuit joined all other circuits that have addressed the issue. Because the parties made additional arguments that the district court did not address, the Eleventh Circuit remanded the matter back to the district court to consider all of Experian's arguments against class certification.

Smith v. Miorelli, 93 F.4th 1206 (11th Cir. 2024)

Eleventh Circuit vacates and remands district court's approval of class settlement where district court considered value of injunctive relief in analysis, notwithstanding that the named plaintiffs lacked Article III standing to pursue injunctive relief.

Three plaintiffs initiated separate putative class actions against sunglass manufacturer Costa Del Mar., Inc., alleging violations of the Magnuson-Moss Warranty Act and the Florida Deceptive and Unfair Trade Practices Act. Each plaintiff alleged they purchased sunglasses backed by lifetime warranties requiring Costa to repair their sunglasses either free-of-charge or for a nominal fee. Plaintiffs alleged that, despite the warranty, they were charged significant amounts when they had their sunglasses repaired. None of the plaintiffs alleged they were likely to suffer future injury.

After extensive litigation in all three lawsuits, one plaintiff moved to file an amended complaint to facilitate a settlement agreement that would resolve the claims in all three cases. The parties represented that the settlement resulted in over $60 million of value to the class in the form of product vouchers, attorneys' fees, and injunctive relief requiring Costa to change consumer-facing marketing materials and product packaging. The district court deemed the settlement fair, reasonable, and adequate because it was worth approximately $32 million – with the value of the vouchers totaling $27.2 million and the value of the injunctive relief totaling $5 million. The district court considered, but ultimately overruled, objections to the settlement.

The objectors appealed the district court's approval of the settlement. The Eleventh Circuit found that none of the named plaintiffs alleged any threat of future injury, such that the plaintiffs did not have Article III standing to pursue injunctive relief. Based on this, the Eleventh Circuit vacated the district court's order approving the settlement, explaining that "[b]ecause the district court lacked the power to grant the injunctive relief in the parties' settlement agreement, it abused its discretion by considering the injunctive relief's value in its determination that the settlement was fair, reasonable, and adequate."

Duran v. Bragg Live Food Prods., No. 23-CV-60812, 2024 WL 756131 (S.D. Fla. Feb. 23, 2024)

Florida district court rules defendant is entitled to production of class action settlement to determine whether plaintiff is an adequate class representative.

Plaintiff filed a class action complaint against Bragg Live Food Products alleging a violation of Florida's Deceptive and Unfair Trade Practices Act (FDUTPA) and a claim for unjust enrichment. Following a discovery dispute, Bragg filed a motion to compel production of the settlement agreement from another case involving the same named plaintiff and similar FDUTPA claims against a different corporate defendant who produced similar food products. Plaintiff had produced other documents involving the previous class action but refused to produce the settlement agreement.

The district court granted the motion to compel, determining that Bragg was entitled to production of the class settlement agreement because the case involved (1) the same attorneys as plaintiffs' counsel, (2) the same plaintiff as a named party, and (3) similar FDUTPA allegations concerning a similar product. The district court specifically noted that the court must "undertake a stringent and continuing examination of the adequacy of representation," especially where the class representative has previous associations with class counsel.

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

Gregory A. Nylen
Shareholder
+1 949.732.6504
nyleng@gtlaw.com

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

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

Ashley A. LeBlanc
Of Counsel
+1 212.801.2285
leblanca@gtlaw.com

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

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

Blake M. Bailus
Associate
+1 212.801.9200
bailusb@gtlaw.com

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

Andrea N. Chidyllo
Associate
+1 212.801.9207
chidylloa@gtlaw.com

Quinn Ford
Associate
+1 312.476.5080
fordq@gtlaw.com

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

Sean C. O'Bryan
Associate
+1 212.801.9369
Sean.OBryan@gtlaw.com

Tyler L. Salway
Associate
+1 312.476.5086
salwayt@gtlaw.com

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