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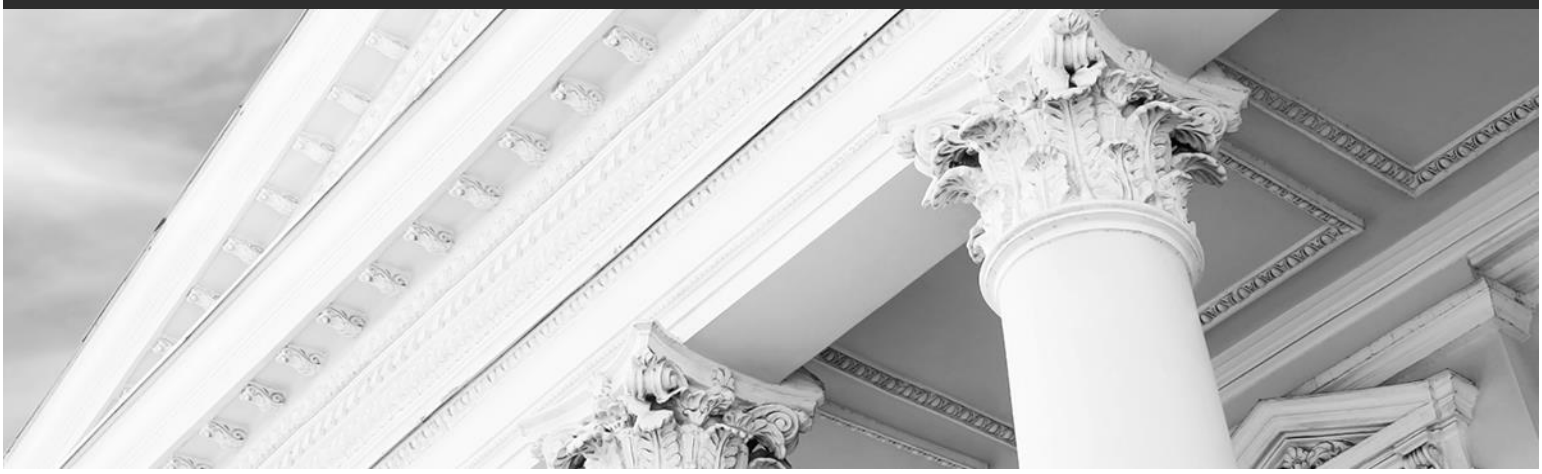

This GT Newsletter summarizes recent class-action decisions from across the United States.

Highlights from this issue include:

- U.S. Supreme Court holds determination of whether a subsequent agreement to arbitrate supersedes a prior agreement is for a court, not an arbitrator, to decide.
- Third Circuit rejects certification of class for lack of standing.
- Fourth Circuit holds ascertainability requirement does not apply to Rule 23(b)(2) class seeking injunctive relief.
- Fifth Circuit reverses class certification for failure to engage in proper *Daubert* analysis.
- Eighth Circuit vacates class certification for failure to engage in rigorous analysis of predominance requirement.
- Ninth Circuit holds plaintiffs may rely on as-yet unexecuted damages model in showing that damages are susceptible to common proof on a class-wide basis.
- Eleventh Circuit vacates approval of class settlement in TCPA case.

U.S. Supreme Court

Bissonnette v. LePage Bakeries Park St., LLC, 601 U.S. 246 (2024)

Transportation workers do not need to work for a company in the transportation industry to be exempt from arbitration under Section 1 of the Federal Arbitration Act (FAA).

Plaintiffs were franchisees who owned the rights to distribute baked goods in certain parts of Connecticut for Flower Foods, Inc. (Flower), a producer and marketer of baked goods. Plaintiffs' job responsibilities consisted of more than picking up and distributing baked goods to local shops. They also found new retail outlets, advertised, set up promotional displays, and maintained their customers' inventories. In this lawsuit, plaintiffs brought claims against Flower for alleged violations of state and federal wage laws, alleging that it had taken unlawful deductions from their wages, failed to pay them overtime, and purportedly unjustly enriched itself by requiring plaintiffs to pay for distribution rights and operating expenses. In response, Flower moved to compel arbitration, contending that the parties' distributor agreements required "any claim, dispute, and/or controversy to be arbitrated" individually under the FAA. Plaintiffs argued that they fell within the FAA's § 1 exemption and thus could not be compelled to arbitrate as the law does not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

The district court found in favor of arbitration, ruling that plaintiffs had a "much broader scope of responsibility" than a transportation worker and thus were not exempt. The Second Circuit affirmed on alternative grounds, holding that plaintiffs "are in the bakery industry" and not the transportation industry. The Supreme Court granted certiorari to determine "whether a transportation worker must work for a company in the transportation industry to be exempt under § 1 of the FAA."

The Supreme Court determined that the Second Circuit erred in compelling arbitration on the basis that Flower is in the bakery industry and not the transportation industry and remanded for further proceedings. The Court looked to past precedent on Section 1 and other statutes that protect the movement of goods in commerce. The Court explained that an exempt worker "must at least play a direct and necessary role in the free flow of goods across borders," but that he or she "need not work in the transportation industry" to fall within the FAA's § 1 exemption.

Coinbase, Inc. v. Suski, 144 S. Ct. 1186 (2024)

Determining whether a subsequent agreement supersedes a prior agreement to compel arbitration is for the court, not an arbitrator, to decide.

Users of the online cryptocurrency platform Coinbase brought a putative class action related to a sweepstakes for purported violations of California's False Advertising Law, Unfair Competition Law, and the Consumer Legal Remedies Act. Before filing suit, these users entered into a user agreement with Coinbase to create accounts on the platform (User Agreement), which contained an arbitration provision with a delegation clause stating that it "includes, without limitation, disputes arising out of or related to the interpretation or application of the Arbitration Agreement . . .. All such matters shall be decided by an arbitrator and not by a court or judge." The users also entered into subsequent agreements when they submitted entries to a Coinbase sweepstakes (Sweepstakes Agreement), and by consenting to the sweepstakes' official rules, agreed that "[t]he California courts (state and federal) shall have sole jurisdiction of any controversies regarding the [sweepstakes] promotion . . . Each entrant . . . hereby submits to the jurisdiction of those courts."

Coinbase moved to compel individual arbitration of plaintiffs' claims based on the User Agreement. The district court denied the motion, reasoning that courts must decide which contract governed and that the Sweepstakes Agreement superseded the User Agreement. The Ninth Circuit affirmed, and the Supreme Court granted certiorari to answer the question, "[w]hen two such contracts exist, who decides the arbitrability of a contract-related dispute between the parties—an arbitrator or the court?"

The Court held that the issue of whether the parties' subsequent agreement superseded a prior agreement was for the court to decide, not an arbitrator. In deciding this question, the Supreme Court looked to the Federal Arbitration Act and its fundamental principle that "arbitration is a matter of contract," explaining that "[a]s always, traditional contract principles apply." The Court explained that parties "can form multiple levels of agreements concerning arbitration" and an agreement to allow an arbitrator to decide arbitrability "is simply an additional, antecedent agreement" which operates just as any other contract. The Court referred to its prior precedent and found that courts "should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." Before referring a dispute to an arbitrator, "the court determines whether a valid arbitration agreement exists." The Court explained that the question of whether the parties did in fact agree to arbitrate can only be decided by determining which of the two contracts applied—and because the "substance of the parties' supersession dispute is 'whether there is an agreement to arbitrate,'" a court must answer that question.

Food & Drug Admin. v. All. for Hippocratic Med., 144 S. Ct. 1540 (2024)

Pro-life plaintiffs who had moral and policy objections to abortion but who did not suffer any injury from the FDA's regulation of mifepristone, a drug used to terminate pregnancy, did not have Article III standing.

Plaintiffs, a group of "pro-life" doctors and medical associations, sued FDA in the Northern District of Texas, seeking preliminary injunctions against FDA's approvals of mifepristone, a progesterone blocker used to terminate pregnancies, as well as against later FDA decisions to relax restrictions around how health care professionals prescribe and how patients use the drug. The district court agreed with plaintiffs and effectively enjoined FDA's approval, thereby ordering that mifepristone be taken off the market. After FDA and Danco Laboratories (mifepristone's sponsor) appealed, the Fifth Circuit held that, although plaintiffs had standing, they were unlikely to succeed in challenging FDA's approval (but might succeed in challenging FDA's later softening of restrictions). The Supreme Court granted certiorari as to FDA's later decisions, finding "[t]he threshold question is whether the plaintiffs have standing to sue."

In a unanimous opinion, the Court held that plaintiffs lacked Article III standing to challenge FDA's regulation of mifepristone. Noting that plaintiffs do not themselves prescribe or use mifepristone but are unregulated persons attempting "to challenge FDA's regulation of *others*," the Court rejected their "complicated causation theories to connect FDA's actions to the plaintiffs' alleged injuries."

The doctor-plaintiffs argued that relaxed regulation of mifepristone caused downstream "conscience" injuries to doctors by causing more women to suffer mifepristone-related complications and require emergency abortions, and that some of these women may seek treatment from plaintiffs, who are doctors. Even assuming that were true, the Court found that these plaintiffs could not show they had been forced to participate in any abortion or related treatment over their "conscience" objections, as federal law protects doctors from having to perform any medical treatment over their objections. Further, these plaintiffs asserted that they would suffer (1) monetary injuries from having to take time and resources from other patients to treat mifepristone complications, (2) a higher risk of liability lawsuits from those other patients, and (3) greater insurance costs. The Court rejected this argument too, finding the causal link between FDA's actions and the purported injuries too speculative to support standing. Even though

FDA's deregulatory actions took place in 2016 and 2021, plaintiffs could not show evidence of both an increased number of pregnant women seeking treatment and a consequent diversion of resources from other patients. Further, the Court noted that there has never been such thing as "doctor standing" to challenge government regulations simply because more people may show up for treatment for follow-on injuries.

The Supreme Court went on to explain that the medical association plaintiffs could not demonstrate organizational standing because an organization, like any individual, must show some concrete harm for Article III standing. The Court noted that "[s]trong opposition to the government's conduct" does not meet this burden, and rejected the medical association plaintiffs' argument that they suffered costs, finding that an organization cannot "spend its way" into standing simply by expending money to gather information and advocate against a defendant's action. Endorsing such a theory, the Court explained, would lead to the absurd result that any organization would have standing, so long as they spent a nominal amount of money in opposition to that policy.

Second Circuit

Reynolds v. Mercy Inv. Servs., Inc., 2:24-cv-02636 (NJC) (JMW), 2024 WL 1740870 (E.D.N.Y. Apr. 23, 2024)

A plaintiff cannot proceed pro se as both the sole named putative class representative and class counsel.

Plaintiff, an attorney, brought a putative class action asserting New York common law claims on behalf of herself and others, alleging that several defendants engaged in a purported fraudulent scheme to bankrupt Our Lady of Mercy Academy, a private Catholic high school for girls, as well as other Catholic schools across the country. Plaintiff was the only named plaintiff and sought to name herself both as the class counsel and as the sole class representative. Plaintiff claimed that the court had subject matter jurisdiction over the action under 28 U.S.C. § 1331 (claiming that federal questions of law "will be further revealed during the course of discovery"), 28 U.S.C § 1332(a) (claiming diversity jurisdiction), and 28 U.S.C § 1332(d) (invoking jurisdiction under the Class Action Fairness Act (CAFA)).

The Eastern District of New York dismissed plaintiff's complaint without prejudice for lack of subject matter jurisdiction, finding that she failed to establish any of the claimed bases for jurisdiction. Specifically, the court found there was no federal question jurisdiction under 28 U.S.C. § 1331 because plaintiff alleged only state law violations, did not identify a federal cause of action, and failed to plead any state law action which would "'necessarily' raise[] a federal issue." The court also determined that plaintiff failed to establish diversity jurisdiction under CAFA, but even if she did, plaintiff could not "proceed pro se as the sole named representative of several proposed classes" and "as counsel for the proposed classes."

The district court's conclusion was based upon "longstanding" Second Circuit precedent that prohibits a plaintiff from proceeding pro se as the class representative and class counsel. Permitting a pro se plaintiff to act as both class representative and class counsel would create "too close a relationship between the class representative and class counsel," which is a "disqualifying conflict of interest" because "an attorney should not have a personal interest in the outcome of the litigation," and "while a class representative must be personally invested in this outcome," such "dual priorities cannot be reconciled in the same person." The court dismissed plaintiff's class allegations, construing her complaint as asserting only individual claims. The court also concluded that it did not have diversity jurisdiction over plaintiff's

individual claims under 28 U.S.C § 1332(a) because she and several defendants were all citizens of New York, and necessarily, dismissed the individual claims, too.

Ni v. Red Tiger Dumpling House Inc., No. 19-cv-3269 (GRB)(SIL), 2024 WL 3387260 (E.D.N.Y. May 29, 2024), *rep. and rec. adopted*, 2024 U.S. Dist. LEXIS 110175 (E.D.N.Y. June 21, 2024)

District court denies class certification when plaintiff failed to satisfy any of Rule 23(a)'s requirements and deems putative class counsel inadequate to represent the class.

Plaintiff brought a putative class action alleging that defendant Red Tiger Dumpling House Inc. violated the Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL) by not adhering to minimum and overtime wage requirements, illegally retaining tips, and failing to provide wage notices and statements to its employees. Plaintiff sought to certify a class for his NYLL claims, consisting of all front and back of the house workers employed by Red Tiger between June 6, 2013, and the date of the court's decision. Within this proposed class, plaintiff designated nine categories of employees: oil woks, dishwashers, dumpling chefs, packers, fry woks, fry wok assistants, deliverymen, waiters and receptionists, and other miscellaneous workers. Plaintiff also requested that the court certify a sub-class of employees who were tip-eligible strictly in relation to the allegation that defendants illegally retained restaurant tips.

In recommending denial of class certification, the magistrate judge found that plaintiff failed to satisfy any of Rule 23(a)'s prerequisites. First, although plaintiff demonstrated that 48 people worked for Red Tiger between 2015-2022, he did not identify which employees fit into the delineated job categories. Thus, the court could not determine the size of the proposed class, and plaintiff could not establish numerosity. Next, after noting that wage cases usually satisfy commonality when defendants have a "common policy or practice of unlawful labor practices," the court determined that plaintiff could not establish commonality because plaintiff's own affidavits showing that defendant paid some employees on tips, some on a daily rate, and others on a monthly rate undercut the claim that employees across all categories received a daily flat rate. As a result, plaintiff could not show that the members of the proposed class "were subject to a common policy or practice to violate their rights under the NYLL." Likewise, the class did not meet typicality because defendant paid plaintiff in tips alone, whereas defendant paid other employees pursuant to a daily or monthly rate, and so plaintiff's claims were not typical of the proposed class.

Finally, the court concluded that plaintiff's motion did not satisfy the requirements of Rule 23(g) for appointing adequate class counsel. Noting the lack of depositions that putative class counsel had taken during years of discovery, its failure to file the present motion according to the original briefing schedule, and "counsel's history in this Circuit, in which various courts have denied motions for class certification on the basis that [counsel] was inadequate to serve as class counsel," the magistrate judge recommended that counsel not be appointed as class counsel. Thus, the magistrate judge recommended that plaintiff's motion for class certification be denied.

On June 21, 2024, Judge Gary R. Brown adopted the report and recommendations denying class certification.

In re Chantix (Varenicline) Marketing, Sales Practices and Products Liability Litigation (No. II), No. 22-MD-3050 (KPF), 2024 WL 2784234 (S.D.N.Y May 28, 2024)

Plaintiffs have standing to represent out-of-state class members on damages claims due to common purchase of the same product, but no standing to seek injunctive relief.

In this multidistrict litigation, plaintiffs sued Pfizer in connection with its manufacture and marketing of the prescription drug Chantix, which Pfizer voluntarily recalled in 2021. Plaintiffs brought claims for fraudulent and negligent misrepresentation as to Chantix's ingredients and manufacturing process, breach of express and implied warranties, violation of consumer protection laws, and negligence, negligence per se, and unjust enrichment. Pfizer moved to dismiss all claims, generally contending that plaintiffs failed to plead a compensable injury and lacked standing to represent a nationwide class or seek injunctive relief, that certain claims were preempted by the FDCA, and that plaintiffs failed to establish any misrepresentation in connection with the drug's manufacture and sale.

The court denied the motion to dismiss as to most claims, finding that plaintiffs sufficiently alleged injury under a "benefit-of-the-bargain" theory and established standing to represent out of state class members. In so doing, the court rejected Pfizer's argument that plaintiffs lacked standing to assert claims under the laws of other states where plaintiffs did not fill their prescriptions. Rather, at the motion to dismiss stage, plaintiffs adequately alleged class standing by alleging that their injuries arose from their common purchase of Chantix, that Pfizer was the sole source of the misconduct, and that the proof for each claim would be sufficiently similar. While agreeing with Pfizer that choice-of-law issues might ultimately prevent plaintiffs from representing certain out-of-state class members, those concerns were to be addressed at a later juncture, namely at the class certification stage. On the other hand, the court found that plaintiffs did not have standing to pursue injunctive relief. Given that plaintiffs already knew about the alleged contamination and that all unsold Chantix had been recalled, any risk of future harm on which to base a claim for injunctive relief was *de minimis*; thus, plaintiffs could not establish standing for injunctive relief.

The court also dismissed claims under the Magnuson-Moss Warranty Act, fraud claims, and certain unjust enrichment claims, limited the express warranty claims, and ordered supplemental briefing on the pre-suit notice requirement of plaintiffs' warranty claims and the economic loss rule as to plaintiffs' various tort claims. The court also denied defendants' motion with respect to plaintiffs' implied warranty of merchantability claims.

Third Circuit

Lewis v. Government Employees Insurance Company, 98 F.4th 452 (3d Cir. 2024)

Third Circuit rejects certification of one class for lack of standing and affirms certification of a second class because it is ascertainable.

Plaintiff filed a putative class action against GEICO, asserting two distinct theories: (1) that GEICO applied an adjustment to artificially lower its valuation of their car, and (2) that GEICO failed to compensate them for taxes and fees as required by their contract and New Jersey law. The district court certified two classes: (1) those who received a settlement offer on their totaled car that did not include taxes and fees (taxes-and-fees class); and (2) those who received a settlement offer on their totaled car that was "based in whole or in part on the price of comparable vehicles reduced by a condition adjustment" (condition-adjustment class). The court granted GEICO's Rule 23(f) appeal.

The Third Circuit first analyzed whether plaintiff had standing to assert a claim as a representative of the condition-adjustment class. Plaintiff argued that they were financially harmed because GEICO paid them less than what their car was worth. The panel rejected that argument because, although GEICO used a condition adjustment to reduce the value of their car, GEICO ultimately increased the amount paid to compensate for the downward adjustment. Because plaintiff avoided any financial injury, the panel found that they lacked standing to assert the condition-adjustment claim.

The panel found that plaintiff had standing to assert their taxes and fees claim based on the allegation that GEICO did not pay them sufficient taxes and fees to replace their totaled vehicle. The panel rejected GEICO's argument that the taxes and fees class was not ascertainable, reasoning that it could be determined based upon objective criteria. The panel did not accept GEICO's argument that an individualized review of claim files was administratively unfeasible, stating that "matching of records is precisely the sort of exercise we have found sufficiently administrable to satisfy ascertainability in other cases." Accordingly, the panel affirmed the certification of the taxes and fees class.

Fourth Circuit

Kadel v. Folwell, 100 F.4th 122 (4th Cir. 2024)

Fourth Circuit holds ascertainability requirement inapplicable to Rule 23(b)(2) class.

Plaintiff argued that West Virginia violated the Equal Protection Clause and other provisions of federal law for treating gender affirming care differently than other treatments under state-funded health care plans. The district court certified a class of enrollees in the West Virginia Medicaid Program and enjoined West Virginia from enforcing an exclusion for gender affirming care. The state appealed the class certification ruling, as well as other decisions in the case.

West Virginia argued that the certified class was not ascertainable because only one of the three criteria for membership in the class was objective. The panel rejected this argument because "courts of appeals have consistently declined to impose an ascertainability requirement in 23(b)(2) cases requesting that a party be enjoined from certain actions." The panel found this conclusion to be supported by the Rule 23 Advisory Committee's Notes, which state that 23(b)(2) classes typically include "members [who] are incapable of specific enumeration." Thus, the panel held that "[t]here is no threshold ascertainability requirement in this Rule 23(b)(2) case, which seeks only declaratory and injunctive relief from a discriminatory policy."

Canteen v. Charlotte Metro Credit Union, 900 S.E.2d 890 (N.C. 2024)

North Carolina Supreme Court clarifies enforceability of "change-of-terms" provisions to include arbitration clause.

Plaintiff filed a putative class action alleging that the defendant credit union charged overdraft fees for accounts that had not been overdrawn. The credit union filed a motion to stay and compel arbitration based on an arbitration clause and class action waiver provision included in an amendment to its account agreements made two months before plaintiff filed the lawsuit. The trial court denied the motion, reasoning that the "change-of-terms" provision did not permit the credit union to include a new arbitration provision and then to enforce it based upon plaintiff's tacit agreement. The intermediate appellate court reversed, and the North Carolina Supreme Court affirmed that decision.

The court stated that, when parties have mutually agreed to a unilateral change-of-terms provision, the provision must be enforced as written subject to certain limitations. But the court rejected plaintiff's argument that there must be mutual assent and separate consideration for changes stemming from a valid unilateral change-of-terms provision in an existing contract. The court reasoned that "[g]iven the nature of the modern economy, change-of-terms provisions are a necessary and efficient way for companies to update contractual provisions without canceling accounts and renegotiating contractual terms every time modification may be required."

The change in terms, however, must comply with the covenant of good faith and fair dealing, which requires that "[i]f the original agreement includes any provisions relating to forums or methods for dispute resolution, then a modification to include an arbitration agreement is within the same universe of terms and therefore permissible under a change-of-terms provisions." Therefore, modifications made pursuant to change-of-terms provisions comply with the covenant of good faith and fair dealing if the changes reasonably relate to subjects discussed and reasonably anticipated in the original agreement." Based on this legal framework, the court held that the amendment to include an arbitration clause and class action waiver was valid under the covenant of good faith and fair dealing because the contract already contained a governing law and forum selection clause.

Fifth Circuit

Ga. Firefighters' Pension Fund v. Anadarko Petro. Corp., 99 F.4th 770 (5th Cir. 2024)

Fifth Circuit reverses district court's class certification order that considered expert opinion evidence presented by reply brief and did not engage in appropriate *Daubert* analysis.

Plaintiffs filed a putative class action against Anadarko Petroleum Corporation, alleging that the company fraudulently misrepresented the potential value of an oil field project in the Gulf of Mexico. Plaintiffs claimed Anadarko's stock price declined because of an after-hours disclosure that an oil well was dry and that the company was taking a $902 million write-off and suspending the project. The plaintiffs moved for class certification based on an assumption that investors relied on public material misrepresentations if specific criteria are met. In response, Anadarko argued the stock price decline stemmed from a separate incident, not its disclosure. Plaintiffs then offered new expert opinion through their reply brief. The district court rejected Andarko's request to file a sur-reply and its efforts to exclude the expert opinion, granting class certification.

On appeal, the Fifth Circuit agreed that the district court had abused its discretion by relying on new evidence without allowing Anadarko to respond and for failing to conduct a proper *Daubert* analysis. The expert report in the reply brief was new evidence directly related to the central class certification dispute, and the court of appeals emphasized that when a party raises new arguments or evidence for the first time in a reply, the opposing party must be allowed to respond. The Fifth Circuit also concluded that the district court did not sufficiently analyze plaintiffs' expert opinion under *Daubert*. The district court's order did not consider *Daubert's* reliability standard and Andarko's other *Daubert* arguments against plaintiffs' expert report. The Fifth Circuit thus vacated the class certification order and remanded for further proceedings.

Frisco Med. Ctr., L.L.P. v. Chestnut, No. 23-0039, 2024 WL 2226273 (Tex. 2024)

Texas Supreme Court holds that Texas Rule of Civil Procedure 42(d) does not permit certification of discrete issue classes when predominance under Rule 42(b) would otherwise be lacking.

A pair of emergency room patients sued two hospitals in Texas state court for charging undisclosed evaluation-and management-services fees. The trial court certified a class, ruling that plaintiffs had satisfied Texas Rule of Civil Procedure 42(a) and 42(b), which mirror Federal Rules of Civil Procedure 23(a) and 23(b). The trial court also severed four issues under Rule 42(d)(1), which is identical to Federal Rule 23(c)(4) and provides that "an action may be brought or maintained as a class action with respect to particular issues."

The hospitals appealed the class certification order. The court of appeals ruled that the trial court's predominance inquiry into the class's claims was improper under Rule 42(b), but it determined that three of the severed issues, standing alone, satisfied Rules 42(a) and (b) and thus could be certified. The court of appeals certified separate "issue classes," even though those classes would not have been certified had they not been severed.

The Texas Supreme Court reversed, clarifying that this certification of issue classes was improper. The court explained that Rule 42(d)(1) is a "housekeeping rule" designed to manage already certified classes. It is not a standalone, substantive rule to "manufacture compliance with Rule 42(b)(2) after determining that the Rule 42(b) criteria are not satisfied when applied to the claims as a whole." Put differently, the Supreme Court explained that "[s]evering an issue does not save the class action because courts cannot manufacture predominance through the nimble use of Rule 42(d)(1)[.]" The court thus reversed the certification of a Rule 42(b)(2) class for the three discrete issues, affirmed the rest of the court of appeals' judgment, and remanded the case to the trial court for further proceedings.

Seventh Circuit

Scott v. Dart, No. 23-1312, 2024 WL 1889533 (7th Cir. 2024)

Seventh Circuit holds plaintiff incentive award sufficient to confer standing to appeal and reverses denial of class certification of proposed detainee class.

The pretrial detainee-plaintiffs filed a putative class action against the county-defendant for Fourteenth Amendment violations related to the county's allegedly unconstitutional dental care provided to the class. The district court denied class certification, finding that the class lacked the requirements under Rule 23. Following this order, the lone named plaintiff settled his individual claim, but reserved his right to appeal the adverse class certification ruling and to seek an incentive award for his role as named plaintiff if the class claims were to proceed.

The Seventh Circuit reversed and remanded. The court first held that, despite his individual settlement, the named plaintiff had standing to challenge the class certification denial. Although he no longer had a direct interest in the overall outcome of the case, the court determined that the incentive award that he sought as named plaintiff amounted to "damages" sufficient to convey standing. The court further noted that preventing a settling plaintiff from appealing would defeat judicial economy, as a replacement class member may simply take their place. The county urged the court to adopt the Eleventh Circuit's viewpoint on incentive awards, which considers such awards as an inappropriate "salary" or "bounty" to named

plaintiffs, but the Seventh Circuit declined. Instead, the court reaffirmed that incentive awards are permissible and grant standing, provided that the awards comply with the requirements of Rule 23.

After confirming the named plaintiff had standing to appeal, the Seventh Circuit held that the district court had abused its discretion in denying class certification. Because all class members suffered the same type of injury – delay in dental care provided by an oral surgeon – from the same alleged misconduct of the defendant – the decision not to have an oral surgeon on staff at the jail – the court held that plaintiffs satisfied the commonality requirement. The court specifically noted that the district court had misread the Seventh Circuit's prior decision in *McFields v. Dart*, 982 F.3d 511 (7th Cir. 2020), to incorrectly determine that any claim related to inadequate dental care for detainees must be incapable of class certification. Relatedly, the court held that the plaintiff had established typicality because the claims of the class members were all related to a single policy – arranging for off-site oral surgery procedures, regardless of the degree of pain or type of dental issue. For similar reasons, the court found that plaintiffs also satisfied predominance and superiority criteria.

Judge Kirsch dissented from the court's class certification holding, noting primarily that the "abuse of discretion" standard had not been met in this case – even if the majority would have come to a different opinion. Judge Kirsch highlighted the importance of the varying degree and type of procedures, stating that these distinctions support that no such abuse of discretion occurred.

Eighth Circuit

Varela v. State Farm Mut. Auto. Ins. Co., 98 F.4th 902 (8th Cir. 2024)

Eighth Circuit holds that it lacks jurisdiction over interlocutory appeal of denial of a motion to dismiss based upon the mandatory arbitration provision in Minnesota's No-Fault Automobile Insurance Act.

Plaintiff filed a class action against defendant insurer, alleging that defendant failed to appropriately calculate the "actual cash value" of cars that it deemed totaled under Minnesota law. Plaintiff brought claims for breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, and violation of the Minnesota Consumer Fraud Act (MCFA). Defendant moved to dismiss, arguing that the insurance policy at issue mandated arbitration in compliance with Minnesota's No-Fault Automobile Insurance Act (No-Fault Act), which requires binding arbitration of any claims amounting to $10,000 or less and which relate to no-fault benefits or comprehensive or collision damage coverage.

The district court dismissed plaintiff's claims for breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment, holding that these claims fell within the No-Fault Act's arbitration provision as they related to the actual cash value of plaintiff's claim under her insurance policy. The district court, however, denied defendant's motion to dismiss plaintiff's MCFA claim, holding that it did not seek relief under plaintiff's comprehensive or collision damage coverage and, as a result, was not the type of claim covered by the No-Fault Act's mandatory arbitration provision.

Defendant appealed and plaintiff moved to dismiss the appeal, asserting that the Eighth Circuit lacked jurisdiction over an interlocutory appeal of the denial of a motion to dismiss. The Eighth Circuit noted that while the Federal Arbitration Act (FAA) provides for interlocutory appeals from the denial of certain motions to compel arbitration, the FAA is not applicable where the contract invokes state-mandated arbitration under the No-Fault Act. Here, the insurance policy did not contain a bargained-for arbitration provision governed by the Uniform Arbitration Act or the FAA. Because the insurance policy lacked any bargained-for arbitration provision, the Eighth Circuit lacked jurisdiction to hear the appeal.

Cody v. City of St. Louis for & on behalf of Medium Sec. Inst., 103 F.4th 523 (8th Cir. 2024)

Eighth Circuit reverses and remands order certifying a class where district court failed to conduct an adequately rigorous analysis in determining whether plaintiffs met the predominance requirement.

Plaintiffs filed a class action seeking damages for being subjected to allegedly inhumane conditions, in violation of their Eighth and Fourteenth Amendment rights. Plaintiffs moved to certify four classes under Fed. R. Civ. P. 23(b)(3). Two classes related to all detainees released on or after November 23, 2012, and two sub-classes related specifically to detainees assigned to dormitories which exceeded 88 degrees Fahrenheit. The district court granted plaintiff's motion for class certification.

The Eight Circuit granted defendant's petition for permission to appeal the district court's order certifying classes. On appeal, defendant argued that the district court erred by failing to analyze the commonality and predominance inquiries considering the legal standards for conditions-of-confinement and heat-based claims and failing to analyze how *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), factored into the class certification analysis.

The Eighth Circuit held that the district court erred, as it failed to rigorously analyze the predominance requirement where it relied on isolated language from a single binding authority. Where a district court fails to engage in a rigorous analysis when certifying a class under Rule 23(b)(3), it abuses its discretion. In addition, the Eighth Circuit found that the district court erred in describing the standard for liability and certifying a class definition which lacked any reference to specific conditions—or a combination of conditions—which rose to the level of a constitutional violation. In reversing the district court's ruling, the Eighth Circuit held that liability for plaintiffs' claims will turn on both the severity of the conditions each plaintiff faced and the length of time each plaintiff was exposed to those conditions.

In addition, the sole defendant in this case is the city and, as a result, under *Monell*, plaintiff must demonstrate that the violation resulted from an official municipal policy. Because different *Monell* theories have different elements, a proper analysis of plaintiff's claims under Rule 23(b)(3) must consider those elements and which elements of those claims can be established on a class-wide basis. The Eighth Circuit held that the district court erred by failing to analyze plaintiffs' claims under *Monell*.

Mohsen v. Veridian Credit Union, C23-2048-LTS-KEM, 2024 WL 2080177 (N.D. Iowa May 9, 2024)

Northern District of Iowa holds that a putative data breach class action can proceed on claims for breach of an implied contract, violation of the California Consumer Records Act, and violation of the Iowa Consumer Fraud Act.

Plaintiff filed a putative class action arising from a data breach, asserting claims for negligence, breach of implied contract, breach of confidence, invasion of privacy of intrusion upon seclusion, violation of the California Consumer Records Act (CCRA), and violation of the Iowa Consumer Fraud Act (ICFA). Defendant moved to dismiss each of these claims.

Because plaintiff alleged that he provided his personal identifying information (PII) and payments in exchange for banking services with the expectation that this PII would be protected, the court held that plaintiff stated claims for breach of implied contract and unjust enrichment.

The court also allowed plaintiff's ICFA claim to proceed based on allegations that defendant represented it would protect PII from unauthorized access and use but failed to live up to these representations. Although the court holds that plaintiff plausibly alleged an ICFA claim, it noted that the exact nature of plaintiff's relationship with defendant was unclear, as he has alleged that he was a borrower whose loan was purchased by defendant. The court found that it would be appropriate to address that issue later in the litigation.

The court also held that plaintiff adequately alleged a violation of the CCRA—a California statute—based on an allegation that defendant serves all 50 states digitally. Defendant argued that a one month delay did not constitute an unreasonable delay of notice of the data breach under the CCRA. But the court held that whether the delay in disclosing the data breach was unreasonable was an issue of fact that could not be resolved on a motion to dismiss. The court did, however, dismiss plaintiff's request for punitive damages under the CCRA, holding that plaintiff failed to allege an act of oppression, fraud, or malice by a director, officer, or managing agent of defendant.

Finally, the court held that, although defendant had a duty to take reasonable measures to safeguard plaintiff's PII, plaintiff's negligence claim was barred by the economic loss rule. Plaintiff argued that diminution in value of his PII constituted a direct harm to property and that he suffered non-economic damages in the form of emotional distress. The court held that, although plaintiff's PII may have value, any diminution in its value is an economic loss, rather than physical damage to property. Outside of certain limited exceptions, Iowa law does not recognize an independent claim for emotional distress without some physical harm. The court also dismissed plaintiff's claim for breach of confidence holding that Iowa law does not recognize a common law claim for breach of confidence as well as plaintiff's claim for intrusion upon seclusion, as plaintiff failed to allege that defendant acted with intent.

Harris v. Medtronic Inc., 23-CV-2273 (JMB/DLM), 2024 WL 1747385 (D. Minn. Apr. 3, 2024)

District court dismisses putative class action based on alleged defect in a medical device, holding that plaintiff failed to allege an injury-in-fact and that the Food, Drug, and Cosmetic Act preempted plaintiff's claims.

Plaintiff brought a class action complaint relating to an implantable cardioverter defibrillator (ICD), which he had implanted in June 2018. Plaintiff asserted state law consumer and product liability claims based on a voluntary recall of ICDs due to the potential for them to malfunction.

The court held that plaintiff failed to allege any economic injury, as purchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested in the product they own. The court held that plaintiff failed to adequately allege an injury, as he asserted at most that his ICD has a rare potential to manifest a defect and not that this ICD has, in fact, manifested the defect. The court also held that plaintiff failed to identify any causal connection between his alleged personal injury—severe discomfort and blood clots in his arm—and defendant's allegedly wrongful conduct—the purported defect in the ICD.

The court further held that even if plaintiff had standing, the Food, Drug, and Cosmetic Act (FDCA) preempts all his claims. The ICD at issue in plaintiff's complaint was subject to pre-market approval (PMA) by the Food and Drug Administration (FDA). As the court noted, the PMA process is intended to provide the FDA with reasonable assurance that the device is safe and effective and, as a result, effectively results in federal requirements for the ICD which preempt any state requirements to the extent they are different from or in addition to the federal requirements.

Ninth Circuit

Lytle v. Nutramax Labs, Inc., 99 F. 4th 557 (9th Cir. 2024)

Plaintiffs may rely on an unexecuted damages model involving a survey that had not yet been conducted to show that damages are susceptible to common proof, so long as the model is reliable and can calculate damages on a class-wide basis.

Plaintiffs brought a putative class action against defendant, a manufacturer of dog food and dog nutritional supplements, alleging that defendant violated the California Consumers Legal Remedies Act (CLRA) by marketing its Cosequin brand nutritional product as promoting healthy joints in dogs, when in fact Cosequin provides no such benefit. Nutramax challenged the district court's reliance on the proposed damages model of plaintiff's expert and the conjoint survey he proposed to conduct but had not yet actually executed. The Ninth Circuit held that there was no general requirement than an expert actually apply to the proposed class an otherwise reliable damages model in order to demonstrate that damages are susceptible to common proof at the class certification stage. Rather, the panel held that plaintiffs may rely on an unexecuted damages model as long as it is reliable and susceptible to common proof, because he had fully designed the conjoint analysis and the methodology behind it, including by identifying the target population, analyzing economic data to determine the structure of the market, and specifying the mathematical analysis he will perform on the survey results. The panel held that plaintiffs' expert's model was sufficiently sound and developed to satisfy this standard. The panel also found the district court properly determined that class-wide reliance may be established under the CLRA through proof of a material misrepresentation.

White v. Symetra Assigned Bens. Serv., 104 F.4th 1182 (9th Cir. 2024)

Apparent variations in state law on the enforceability of anti-assignment provisions in structured settlement annuities raised substantial questions as to whether individual issues predominate.

Plaintiffs brought a putative class action on behalf of approximately 2,000 payees who received structured settlement annuities to resolve personal injury claims. Plaintiffs alleged that defendants wrongfully induced them to cash out their annuities in individualized factoring arrangements, whereby they gave up their rights to periodic payments in return for discounted lump sums. The panel held that the district court erred in certifying a nationwide subclass of plaintiffs whose original settlement agreements with their personal injury tortfeasors contained structured settlement annuity anti-assignment provisions. The panel found that the annuitants hailed from a wide array of different states, and some of the settlement agreements had choice of law provisions denoting the law of a state other than the one where the contract was executed. The panel found that the apparent variations in state law on the enforceability of anti-assignment provisions in structured settlement annuities and the need to apply multiple state laws to the subclass raised substantial questions as to whether individual issues predominate and how the matter can fairly be managed as a class action.

Davidson v. Sprout Foods, Inc., 106 F.4th 842 (9th Cir. 2024)

The Ninth Circuit allows claims under California's analogue to the federal Food Drug and Cosmetic Act, finding the California law not impliedly preempted where the law incorporated by reference all federal food labeling standards.

Plaintiffs alleged defendant produced pouches of baby food with labels on the front of the package conspicuously stating the amount of nutrients, bringing claims under California's Unfair Competition Law (UCL) for violations of California's Sherman Law, the state's analogue to the federal Food Drug and Cosmetic Act (FDCA). The district court dismissed the claim, holding it is impliedly preempted because the state law claim is derived from the FDCA, and the federal law calls for federal government enforcement. In this case, plaintiffs' claims attempt to enforce standards identical to those in the FDCA.

The Ninth Circuit reversed. An appellate panel held that, although the Nutrition Labeling and Education Act (NLEA), the federal food labelling statute promulgated under the FDCA, contains an express preemption provision that forbids states from enforcing laws regulating food labeling that differ from federal law, it permits states to adopt standards for food labeling that are identical to federal law. In cases where private plaintiffs claimed violations of state law, as opposed to federal standards, the Supreme Court and Ninth Circuit have historically held the claims are not preempted. Defendant's argument, the Ninth Circuit held, "ignores that Congress permitted identical state laws and offers no explanation for why Congress would want states to enact laws that its citizens cannot enforce."

Defries v. Union Pacific RR Co., 104 F.4th 1091 (9th Cir.)

The Ninth Circuit holds when there is ambiguity about the scope of a class, *American Pipe* statute of limitations tolling should generally apply to toll the claims of potentially excluded class members.

Plaintiff, a conductor who worked for defendant, alleges he failed Union Pacific's color-vision tests and was ultimately fired from his job. At the time defendant removed him from duty, a group of Union Pacific employees, not including plaintiff, had already filed a putative class action alleging that Union Pacific administered its fitness and medical testing program in ways that violated the Americans with Disabilities Act (ADA). Although plaintiff qualified as a putative class member under the class definition brought in the original complaint, the proposed class definition was later narrowed and, in March 2020, the Eighth Circuit reversed certification of the class for lack of commonality. After the Eighth Circuit decision, plaintiff filed an individual lawsuit raising claims similar to those in the since-decertified class action. Defendant moved for summary judgment, arguing plaintiff's claims are time-barred and not tolled and plaintiff asserted tolling under the Supreme Court's *American Pipe* decision, which establishes that commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class.

In a case of first impression, the Ninth Circuit decided when the narrowing of a class definition ends *American Pipe* tolling for members of a putative or certified class. To accomplish the purpose of *American Pipe* tolling, bystander plaintiffs should be able to "take that passive approach" of waiting on the named plaintiffs and class counsel to protect their interests until an unambiguous action from the court removes them from the putative or certified class definition. To end *American Pipe* tolling for a specific passive or bystander plaintiff based upon revision to the class definition, a court must adopt a new class definition that "unambiguously" excludes that bystander plaintiff. The court reasoned that ambiguity about the scope of a putative or certified class should be resolved in favor of tolling so that bystander members of the class need not rush to file separate actions to protect their rights.

Yagy v. Tetra Tech., Inc., No. CV 24-1394-JFW (ASx), 2024 WL 2715900 (C.D. Cal. May 17, 2024)

FAA's vindication exception does not apply to arbitration agreement that does not operate as an impermissible prospective waiver of plaintiff's statutory remedies under ERISA.

Plaintiffs brought a putative class action alleging that defendants' retirement plan fiduciaries violated ERISA in managing plaintiffs' assets because the plan allocated forfeited funds (defendant's contributions to the plan accounts of participants who terminate their employment before contributions are vested) to reduce defendant's future contributions to the plan instead of applying them to plan expenses. Defendants moved to compel arbitration on an individual basis. The court granted the motion, finding that FAA applied to the agreement and rejected plaintiffs' contention that the "effective vindication" exception applies. Under that doctrine, an arbitration agreement cannot be enforced if it operates to prospectively waive plaintiffs' right to pursue statutory remedies. The court found that the arbitration agreement expressly provided that it did not limit a claimant's right to seek remedies under ERISA.

Tenth Circuit

Chieftain Royalty Co. v. SM Energy Co., 100 F.4th 1147 (10th Cir. May 1, 2024)

Tenth Circuit holds district court was obligated to provide class-wide notice of second motion for attorney fees because class members had an interest in arrangements for paying class counsel.

Following settlement of various tort, contract, and fiduciary claims brought by a class allegedly affected by the underpayment of oil and gas royalties due on wells in Oklahoma, class counsel moved for attorney fees with an incentive award for the class representative. Two class members objected and appealed the awards. The Tenth Circuit affirmed the settlement for approximately $52 million but reversed the district court's award of attorneys' fees and the named plaintiff's incentive award. Oklahoma state law, not federal law, governed whether attorneys' fees or an incentive award were warranted and how they should be calculated. The parties did not dispute that the class received notice of the first attorneys' fee motion made in 2015 and did not receive notice of the second attorneys' fee motion in 2018 following the Tenth Circuit's prior order remanding the case for re-calculation of an award of reasonable attorney fees.

Finding Rule 23(h) obligated the district court to direct class-wide notice of the 2018 attorneys' fees motion, the Tenth Circuit found, under the plain text of Rule 23(h)(1), class members were entitled to notice of the motion filed in 2018 since members of the class have an interest in the arrangements for paying class counsel, including whether that payment comes from the class fund or is made directly by another party. The Tenth Circuit held the class-wide notice of the 2015 motion did not sufficiently provide notice of the later 2018 motion since the 2018 motion did not merely "renew" the 2015 motion, but instead modified the fee to be awarded to class counsel from 40% to 33% percent. Even though class counsel's fee was higher in the first motion, that did not alleviate the court from its obligation to provide notice.

Wollenberg v. Blue Cross & Blue Shield of Kansas, Inc., No. 23-CV-04029-TC-TJJ, 2024 WL 1485891 (D. Kan. Apr. 5, 2024)

Court holds differences between named plaintiffs' injuries and the injuries of some members of the putative class should be addressed at the class certification stage, not on a motion to dismiss challenging the putative class's Article III standing.

Plaintiffs are teachers with Blue Cross Blue Shield of Kansas health insurance policies. Their policies cover preventive health services and refer to preventive service policy guidance from the United States Preventive Services Task Force and from federal agencies such as the Centers for Disease Control and the Health Resources and Services Administration. The policy guidance is periodically updated, and thus plaintiffs' policies evolve as external guidance changes. Under defendant's policy, it does not immediately begin covering preventive services when guidance is updated. Rather, it incorporates new opinions "within one year of the date they are published," to be effective by the beginning of the benefit period following one year from the release of the guidance. Plaintiffs brought class claims, alleging this delay breaches a portion of their insurance contracts requiring immediate coverage.

The district court rejected Blue Cross's standing argument regarding the composition of the named plaintiffs' putative class. According to defendant, the named plaintiffs, who exhausted the administrative process under their contracts for their colonoscopy requests, did not do so for other requested procedures that the putative class seeks recovery on. In other words, the named plaintiffs have not suffered the same injury suffered by some of the members of their putative class, and thus the plaintiffs have no standing to assert class claims on behalf of potential class members who sought other services besides colonoscopies. The court held that this argument was premature, and that Federal Rule of Civil Procedure 23—not Article III—more appropriately addresses the purported mismatch between the named plaintiffs and some members of the putative class. Courts should apply Rule 23 to determine whether a putative class includes people with dissimilar injuries, and this analysis does not implicate Article III and its standing requirement. That some members of the putative class have unexhausted, non-colonoscopy-related claims might exclude them from the class and undermine the class's numerosity or create a typicality issue.

Eleventh Circuit

Drazen v. Pinto, 101 F.4th 1223 (11th Cir. 2024)

Eleventh Circuit vacates judgment approving class settlement, finding that the district court erred by 1) failing to apply the factors set forth in Rule 23(e)(2); 2) failing to ensure class members were informed of relevant Supreme Court proceedings in accordance with Rule 23(c); and 3) failing to calculate attorneys' fees under CAFA when class members were permitted to choose between receiving a cash payout or coupon.

Several plaintiffs representing putative classes sued GoDaddy in separate actions under the Telephone Consumer Protection Act of 1991 (TCPA), alleging that GoDaddy violated the Act by sending plaintiffs one or more unsolicited text messages or phone calls using an automatic telephone dialing system. While plaintiffs' claims were pending, the Supreme Court granted certiorari in another case to resolve a circuit split regarding the same dispositive issue in this case concerning whether the type of autodialing equipment used fell within the definition of an automatic telephone dialing system covered by the TCPA. Class counsel realized that the Supreme Court's decision in the other case could render the class claims worthless and began negotiating with GoDaddy to reach a settlement. Ultimately, the lawsuits against GoDaddy were consolidated and a class settlement was submitted to the district court.

The parties proposed a settlement where GoDaddy would make up to $35 million available to pay class members' claims (in the form of a $150 voucher award or a $35 cash award), cover settlement administrations costs, pay attorneys' fees up to 30% of $35 million ($10.5 million), and pay a $5,000 service award to each of the named plaintiffs. The settlement was a claims-made settlement, where class members would have to submit claims to obtain payment, and, depending on the number of claims received, the class members' payout could be reduced on a pro rata basis to ensure attorneys' fees and service awards could be paid. Class members who did not opt out of the settlement, regardless of whether they submitted a claim, would release their claims against GoDaddy. The district court, applying *Bennet v. Behring Corp.*, 737 F.3d 982 (11th Cir. 1984), determined that the settlement agreement was fair, reasonable, and adequate and approved the agreement.

On appeal, the Eleventh Circuit vacated the district court's judgment after concluding that the district court committed several errors, abused its discretion, and failed to meet its fiduciary obligations to absent class members in approving the settlement agreement.

First, the district court erred in failing to apply Federal Rule of Civil Procedure 23(e). In the first instance, the district court erred in determining whether the settlement agreement was appropriate because it solely considered the *Bennet* factors without also considering the standards set forth in Rule 23(e)(2)(A)-(D). The Eleventh Circuit explained that, although the Rule 23(e)(2)(A)-(D) factors are not intended to displace the factors established by common law precedent, the factors *must* be considered when determining whether a settlement agreement is fair, reasonable, and adequate. Further, the district court improperly amended the release provisions in the settlement agreement—which were overly broad and would have released not only GoDaddy, but also any of its affiliates, employees, contractors, agents, or their affiliates— instead of disapproving of the settlement agreement. Moreover, the Eleventh Circuit concluded that the district court breached its duties to the absent class members by approving a class settlement that prioritized payment of attorneys' fees and service awards over maximizing awards to class members. Only 1.9% of the class members had submitted claims or opted out, likely given the agreement's onerous opt-out provisions, leaving 98.1% of class members without any relief while broadly releasing GoDaddy and its affiliates and ensuring payment to class counsel and the named plaintiffs.

Second, the district court failed to fulfill its obligations under Rule 23(c)(2)(B)(iii) by approving a class notice that violated the Rule and due process because it did not inform the class members of the *Facebook* case pending before the Supreme Court, which would have helped class members determine the true value of the award. In reaching this conclusion, the Eleventh Circuit interpreted Rule 23(c)(2)(B)(iii) to require notices to clearly and concisely state the class claims, issues, and defenses that are applicable to the case.

Finally, the Eleventh Circuit concluded that the district court erred with respect to its award of attorneys' fees. As an initial matter, the district court failed to give absent class members sufficient notice to object to the motion for attorneys' fees. Further, the district court failed to appropriately assess the reasonableness of the requested attorneys' fees because it erroneously found that the settlement was a common-fund settlement, when in fact it was a claims-made settlement. Moreover, the district court erred because it did not determine the appropriate attorneys' fees award pursuant to the Class Action Fairness Act (CAFA). Although the class settlement allowed class members to select between receiving a cash payout or a voucher, the Eleventh Circuit held that the voucher is "something that is not cash but can be exchanged for some or all of a product," and thus qualified as a "coupon" under CAFA. Accordingly, the district court was required to apply CAFA in determining the appropriate award of attorneys' fees, which it failed to do.

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