

Class Action Litigation Newsletter | 3rd 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 decertifies class on “eve-of-trial” due to plaintiffs’ counsel’s inadequacy to represent class.
- New Jersey Supreme Court holds class action waiver enforceable even though not linked to arbitration clause.
- Fourth Circuit vacates class certification in FCRA case for lack of standing in absence of evidence of concrete injury.
- Sixth Circuit upholds class certification, ruling that all class members had an overpayment or diminished value injury even if not all vehicles had manifested the alleged defect.
- Eighth Circuit reverses attorneys’ fee award as unreasonable in large data breach settlement.
- Ninth Circuit vacates district court’s reduction of \$91 million statutory damages award under New York’s General Business Law, and remands for determination of whether award violated substantive due process by applying seven factors for when an award is extremely disproportionate to the offense and obviously unreasonable.

Second Circuit

Aley v. Lightfire Partners LLC, No. 5:22-cv-00330, 2024 WL 4007345 (N.D.N.Y. Aug. 30, 2024)

TCPA class certified when phone numbers were sold to defendant through third party and defendant sought to rely on consents obtained on third-party website.

Plaintiff brought a putative class action alleging that Lightfire Partners, a telemarketing company, violated the Telephone Consumer Protection Act (TCPA) by calling plaintiff and the putative class members even though these individuals were registered on the national do-not-call registry (DNCR). There was no dispute that Lightfire obtained the phone numbers from Connexus Digital (a separate entity that sold the relevant information to Lightfire) and that Connexus Digital collected the telephone numbers from the website Myjobscorner.com. Through that website, Connexus Digital recorded consumers that entered phone numbers and checked a box indicating consent to being called despite registration on the DNCR. Lightfire argued that it placed the calls relying on the consent obtained by Connexus Digital, but plaintiff swore that she never visited that website. Plaintiff moved to certify a class of all persons in the United States whose telephone numbers were on the DNCR for at least 31 days, but who received more than one telemarketing call from Lightfire within a 12-month period as part of the “Auto Protectors” campaign during the four years prior to filing the complaint.

In opposing class certification, Lightfire asserted that plaintiff did not meet the adequacy requirement under Rule 23(a) and that the proposed class did not satisfy the predominance requirement of Rule 23(b). As to adequacy, Lightfire criticized plaintiff’s reliability, pointing to her deposition where she suggested she “did not review her engagement letter, the pleadings, or her sworn statements issued in discovery.” Lightfire also argued plaintiff lacked credibility because recordings of phone calls revealed no request from plaintiff to be left alone, contradicting the complaint. Lightfire further argued that plaintiff’s assertion that she never visited the Myjobscorner.com website made her inadequate. The court disagreed, explaining that, even if she visited the website, “her claims would be no more vulnerable than most of the Proposed Class Members, who rely instead on the insufficiency of the consent procedures on Myjobscorner.com.”

Lightfire argued that the proposed class did not satisfy the predominance requirement under Rule 23(b)(3) because “separate and individualized issues threaten to ensure Proposed Class Members will have ‘interests in controlling the prosecution or defense of separate actions.’” Lightfire argued that other Proposed Class Members might also assert—like the named plaintiff—that they never visited Myjobscorner.com, which would require individual assessments of browsing histories, the use of proxy networks to disguise IP addresses, and ascertaining whether the names entered with Proposed Class Member phone numbers matched the subscribers of those phone numbers. The court opined that while it was a “close call,” these individual questions did not predominate because “should the Court subsequently rule that the consent procedures were inadequate under the law, such a determination would render moot the individualized assessments” of which Proposed Class Members visited Myjobscorner.com.

On Sept. 13, 2024, defendant moved to reconsider the order granting class certification, arguing that the court erred by misapplying or failing to recognize controlling precedent. The court denied the motion.

Pauli v. Ollie’s Bargain Outlet, Inc., No. 5:22-cv-00279, 2024 WL 4007379 (N.D.N.Y. Aug. 30, 2024)

With no “significant anecdotal evidence from which the Court can infer a de facto policy” requiring the proposed class to perform non-exempt work, court declines to certify proposed class of exempt workers, finding a lack of commonality.

Plaintiff filed a putative class action against his former employer and bargain retail chain Ollie’s Bargain Outlet, Inc. alleging violations of the Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL). Plaintiff previously moved to conditionally certify a nationwide collective of those currently or formerly employed by Ollie’s as Co-Team Leaders (CTLs), which the court denied. Plaintiff then moved to certify a class of current and former CTLs in Ollie’s New York stores based on his second and third causes of action for unpaid overtime “spread of hours” compensation and “wage notice and pay statement violations” under NYLL. The Northern District of New York denied certification and found that plaintiff failed to satisfy the commonality requirement of Rule 23.

In denying certification, the court explained that plaintiffs “may satisfy the commonality requirement with ‘significant proof’ that a general policy or practice caused the alleged violations of class members’ rights” and when “the same conduct or practice . . . gives rise to the same kind of claims from all class members, there is a common question.” But a “common contention” is not sufficient. The court noted that in his declarations and testimony, plaintiff did not appear to attack the company policy, but instead, attacked its implementation, “suggesting that there was a de facto policy of requiring CTLs to perform non-exempt work.” But without evidence of an “explicit policy requiring CTLs to perform work ‘virtually identical to non-exempt employees,’” plaintiff needed to produce “significant anecdotal evidence from which the Court can infer a de facto policy.” The court ultimately held that plaintiff failed to provide such evidence, rendering certification inappropriate.

Lawrence v. Goals Aesthetics & Plastic Surgery, No. 1:18-cv-8649, 2024 WL 374398 (S.D.N.Y. Aug. 9, 2024)

Putative class decertified after six years of litigation due to plaintiffs’ counsel’s inadequacy to represent class given lack of prosecution and failure to comply with Federal Rules of Civil Procedure.

Former employees of defendant Goals Aesthetic and Plastic Surgery, a New York cosmetic surgery practice, pursued NYLL and FLSA claims on a class basis for purported failure to pay overtime. In May 2021, the court certified a class and collective action consisting of defendant’s receptionists and patient coordinators who were denied overtime pay. The class was subsequently redefined to exclude employees paid a salary rather than hourly wages. The case proceeded through discovery, mediation, and various discovery-related motions. Then, on April 23, 2024, defendants moved to preclude plaintiffs’ damages computation under Rule 37 and to decertify the class. As to decertification, defendants argued that plaintiffs’ class counsel was inadequate under Rule 23(g).

The court first determined that plaintiffs’ class-wide damages computations should be precluded at trial based on counsel falling “woefully short” of meeting their obligations under Rule 26. For example, counsel waited until after the initial fact discovery period closed to produce their first damages computation and did not submit calculations of class-wide damages until “years after the close of discovery.” The court noted that the untimely disclosure was not “substantially justified or harmless.”

As to the adequacy of class counsel, the court found that it was “no longer satisfied that Plaintiffs’ counsel [could] adequately represent the interests of the class under Rule 23(g).” The court detailed counsel’s deficiencies over the nearly six-year litigation, including counsel’s (1) failures to comply with disclosure obligations under Rule 26 that resulted in preclusion of plaintiffs’ class-wide damages calculations—especially because damages were the only relief sought in this case; and (2) pattern of deficient representation throughout the litigation. The court admonished counsel for its failure to pursue class-wide time and payroll records—after acknowledging in their initial disclosures that such materials were “minimally” required to prove plaintiffs’ claims—and how counsel appeared to have a “persistent lack of awareness of the discovery format and schedule in this case” as well as failing to diligently pursue any other materials they requested. The court ultimately held that even though this decertification was on the “eve-of-trial,” the risk “of prejudice to class members due to class counsel’s inadequate representation . . . outweigh[ed] the risk of prejudice due to decertifying the class just before trial.”

On Sept. 24, 2024, the court granted counsel’s motions to withdraw, and stayed the case until Oct. 24, 2024, for plaintiffs to find new counsel.

B&R Supermarket, Inc. v. Visa, Inc., No. 17-cv-2738, 2024 WL 3823096 (E.D.N.Y. Aug. 14, 2024), appeal filed, No. 24-2344 (2d Cir. Sept. 6, 2024), and *B&R Supermarket, Inc. v. Visa, Inc.*, No. 17-cv-2738, 2024 WL 3949977 (E.D.N.Y. Aug. 27, 2024)

Court denies motion to compel arbitration, finding claims related to “chargebacks” exempt from relevant arbitration provisions, while also denying motions to decertify class, finding no reason to disturb prior certification decision.

In this long-running litigation, plaintiffs filed this action against certain financial services companies alleging violations of the Sherman Act, state antitrust and consumer protection laws, and unjust enrichment. Plaintiffs’ claims arise out of defendants’ processes for adopting the “Europay, Mastercard & Visa” (EMV technology) standard for card transactions, which uses computer chips and chip readers to authenticate chip-card transactions and transmit card information by creating a unique electronic signature for each transaction. Specifically, plaintiffs alleged that, to facilitate the transition to EMV technology, defendants conspired to establish October 1, 2015, as the date by which merchants had to have installed and certified the EMV technology. If a merchant did not transition to EMV technology by that date, the merchant became liable for any fraudulent charges (chargebacks) incurred (Fraud Liability Shift). Plaintiffs brought these claims on behalf of a purported class of merchants who paid chargebacks due to the Fraud Liability Shift.

Amex and another financial services company moved to compel arbitration, and certain defendants also moved to decertify the class. The other financial services company moved to compel arbitration as to merchants that directly contracted with it through Merchant Service Agreements (MSAs). All the MSAs incorporated the company’s Operating Regulations, which included an arbitration provision requiring resolutions of “Disagreement[s]” to be first attempted by the appropriate executives at the merchant and company, then to be submitted to mediation and then binding arbitration, if the parties failed to resolve the disagreement through mediation. The court reviewed the financial services company’s Operating Regulations and concluded that plaintiffs’ claims fell within the exception to arbitration because “the parties did not agree to arbitrate arbitrability with respect to this question” and plaintiffs’ claims were “claims relating to . . . Chargebacks,” and thus carved out of the definition of “Disagreement[s]” to which the arbitration provision applied.

Amex also moved to compel arbitration of claims brought by class members who accepted Amex card products and were bound by Amex's Card Acceptance Agreements (CAAs). The agreements provided that any "Claims" brought against Amex were "subject to arbitration if either party so chooses" and each claim would be "arbitrated on an individual basis." The court found that defendant adequately demonstrated the existence of the arbitration agreements in the CAAs, even if Amex did not specify all bound merchants who were parties to the CAAs. Thus, the burden shifted to plaintiffs to show the agreement was "inapplicable or invalid," which plaintiffs failed to do.

The court also denied Amex, Visa, and Mastercard's motions to decertify the class. Among other arguments, Amex argued that if the CAA-bound class members were compelled to arbitrate, then the predominance requirement would no longer be met because the court would need to conduct an "individualized inquiry into whether class members are bound to a CAA." The court rejected this argument, stating that it "extensively analyzed whether the predominance requirement had been met" and concluded common questions predominated over individual issues. To the extent further proceedings are needed to determine which class members are bound by the CAA, this does not defeat class certification, as such identification is possible with reference to Amex's "regular office procedures" which would not require "case-by-case determinations" to defeat class certification.

Among other arguments against certification, Visa and Mastercard argued the certified class no longer met the "typicality" requirement based on expert reports demonstrating "divergent interests between large and small merchants," suggesting that large merchants were in favor of an earlier implementation date for the Fraud Liability Shift and that larger merchants could transition to EMV more easily than smaller merchants. The court concluded that the class representatives remained typical of the class and even if large absent merchants were more easily able to transition to EMV, the "alleged effect" of the Fraud Liability Shifts remained the same. Similarly, the court held that the class representatives were still adequate, especially because all representatives "assert claims arising out of the same conduct and result in the same type of injuries." The court also concluded that the predominance requirement was still met, explaining that the relevant inquiry was not whether any given merchant was or could be ready for the Fraud Liability Shift prior to October 2015, but plaintiffs "merely need to prove a conspiracy in restraint of trade."

Third Circuit

Pace v. Hamilton Cove, 317 A.3d 477 (N.J. 2024)

Class action waiver enforceable even though not linked to an arbitration clause.

Plaintiffs – tenants in defendant's apartment complex – filed a putative class action under the New Jersey Consumer Fraud Act when they discovered that the complex did not have 24-hour security, as they alleged had been represented to them. The lease agreement included a class action waiver provision but not an arbitration clause. The trial court denied defendant's motion to dismiss, and the appellate court affirmed, finding that a class action waiver in a contract that does not contain a mandatory arbitration clause is unenforceable as a matter of law and public policy.

The New Jersey Supreme Court reversed, finding that the appellate court's bright-line rule was inappropriate. Although class action waivers and arbitration clauses often are linked, they are distinct provisions and must be considered separately. U. S. Supreme Court precedent upholding class action waivers does not suggest that class waivers cannot be enforced outside the arbitration context. Nor does the fact that class actions advance important policy goals mean that they cannot be waived; important

rights, such as the right to a jury trial, may be waived by contract. Thus, the Court held that class action waivers, standing alone and apart from a mandatory arbitration clause, are not per se unenforceable. Nevertheless, a class action waiver may be unenforceable if found to be unconscionable or invalid under general contract principles, just as with an arbitration clause.

The Court upheld the class action waiver, finding that plaintiffs knowingly and voluntarily waived their right to bring a class action by signing the lease, and that the waiver was not unconscionable.

George v. Rushmore Service Center, LLC, 114 F.4th 226 (3d Cir. 2024)

Putative class representative lacks standing under FDCPA.

In a Fair Debt Collection Practices Act (FDCPA) case, plaintiff sought to represent a class of individuals who received from the defendant a collection letter that mistakenly named the collection arm of the plaintiff's credit card company, rather than the credit card company itself, as the creditor. The district court previously ordered plaintiff to individual arbitration of his claim. After the arbitrator ruled in defendant's favor, plaintiff sought to vacate the arbitration award, which the district court declined to do.

On appeal, the Third Circuit, on its own initiative, directed the district court to dismiss plaintiff's claims for lack of standing. The complaint asserted that plaintiff sustained informational injury—lack of information to which he was entitled—and traditional injury—the receipt of false and misleading information. The Third Circuit found that plaintiff did not satisfy Article III under either theory, because he sustained no adverse effects from the informational injury, and the mere receipt of misleading information, without any confusion or harm flowing from the confusion, was insufficient to provide traditional injury.

Fourth Circuit

G.T. v. Board of Education of County of Kanawha, 117 F.4th 193 (4th Cir. 2024)

Class certification reversed on commonality grounds for lack of uniformly applied policy.

Parents of students receiving special-education services brought a putative class action for declaratory and injunctive relief against a county school board, county schools, and superintendent of county schools, alleging that the failure to provide effective behavior supports for certain students with disabilities led to their unjustified disciplinary removal from the classroom in violation of the Individuals with Disabilities Education Act (IDEA), among other statutes. Although the district court recognized that plaintiffs did not point to a single problematic policy that led to the various statutory violations, it nevertheless certified a class because expert evidence revealed a lack of an effective system for developing and implementing behavioral supports for students with disabilities.

The Fourth Circuit reversed. Although the Fourth Circuit had not previously addressed the certification of an IDEA class, three other circuits had found that, to satisfy Rule 23(a)'s commonality requirement, plaintiffs must point to a uniformly applied, official policy of a school district or an unofficial yet well-defined practice. Here, plaintiffs failed to point to such a policy or practice. Although they alleged that all students suffered a violation of the same provision of the IDEA, each student's circumstances were highly individualized. The absence of a common practice prohibited class certification.

Fernandez v. RentGrow, Inc., 116 F. 4th 288 (4th Cir. 2024)

Class certification vacated in FCRA case for lack of standing.

In a Fair Credit Reporting Act (FCRA) case, plaintiff asserted that defendant included incorrect information on the tenant screening report provided by defendant to plaintiff's prospective landlord. During discovery, the landlord testified that it did not see or rely upon the incorrect information when reviewing plaintiff's application. Nevertheless, in certifying a class, the district court rejected defendant's argument that plaintiff lacked standing, reasoning that dissemination of incorrect information sufficed to demonstrate an injury in fact.

The Fourth Circuit vacated the class certification order, finding that reputational harm can be a concrete injury, but only if the incorrect information was brought to the attention of a third party who understood its significance. Relying on Supreme Court precedent, the panel explained that plaintiff must produce evidence that a third-party actually read and understood the incorrect information, not that they merely received it. It is not enough for a plaintiff to infer that the third-party read and understood the information based upon receipt of the information.

Here, plaintiff introduced no such evidence. Accordingly, the panel vacated the class certification order and directed the district court to reconsider its class certification analysis.

Cheng v. Liu, No. 23-1806, 2024 WL 3579606 (4th Cir. July 29, 2024)

Proposed Rule 23(b)(2) class not certifiable because complaint predominantly sought monetary relief.

Plaintiffs were two of approximately 95,000 individuals who were alleged victims of a real estate Ponzi scheme orchestrated by defendants in China. Plaintiffs primarily sought monetary damages, but also sought the creation of a constructive trust (to hold and sell the real properties at issue and distribute the proceeds to the class) and a receivership (to control and manage the real properties). The district court denied class certification (i) under Rule 23(b)(2) because the complaint predominantly sought monetary relief, and (ii) under Rule 23(b)(3) on superiority grounds.

The Fourth Circuit affirmed. Although a Rule 23(b)(2) class may be certified where monetary relief is at issue, certification is inappropriate where monetary relief predominates. The panel observed that seven of the 10 claims sought damages, and even the constructive trust and receivership claims sought that relief so that the proceeds of the sale of the real property could be distributed to plaintiffs and the putative class. Also, a single injunction would not be appropriate because distribution of the proceeds would require an individualized determination for each class member.

As for Rule 23(b)(3), the panel affirmed the district court's determination that a class action was not a superior means of adjudicating the dispute, given that nearly all of the investors were Chinese citizens who invested in Chinese companies with Chinese money, the material evidence was located in China, and it was unlikely that the Chinese government would allow for, or cooperate in, American-type discovery.

Fifth Circuit

Chavez v. Plan Ben. Servs., Inc. 108 F.4th 297 (5th Cir. 2024)

Named plaintiff's standing to sue affirmed under ERISA on behalf of unnamed class members from different contribution plans.

On behalf of a class of over 290,000 workers, plaintiffs sued employee-benefits administration companies, alleging that defendants violated the Employee Retirement Income Security Act (ERISA) by mismanaging employee-benefit plans and charging excessive fees. Named plaintiffs moved to certify a class that included unnamed class members from different contribution plans. After concluding that the named plaintiffs had standing, the Western District of Texas certified the class under Federal Rules of Civil Procedure 12(b)(1) and (b)(3), and defendants appealed.

On appeal, defendants argued that (i) named plaintiffs lacked standing to represent members of plans with which they were not involved and (ii) class certification was improper because individualized issues in plan diversity and individualized fee structures would overwhelm common issues.

On the question of standing, the court of appeals recognized a circuit split. The First, Third, Sixth, and Ninth Circuits follow the “class certification approach,” which recognizes standing if the named plaintiffs’ claims are similar to those of the putative class. The Second and Eleventh Circuits, in contrast, follow the “standing approach,” which requires plaintiffs’ harm to align closely with class members’ harms. Declining to take a side in the circuit split, the Fifth Circuit held that plaintiffs had standing under either approach.

On the class certification question, the Fifth Circuit reversed the district court’s Rule 23(b)(1) certification but affirmed the Rule 23(b)(3) certification. The court of appeals explained that certifying a mandatory class was not proper under Rule 23(b)(1) because the action was primarily for damages, and it was not evident that individual adjudications would substantially impair the interests of other class members. But the court affirmed the district court’s Rule 23(b)(3) certification, recognizing that common questions would predominate over individualized inquiries, and rejected defendants’ argument that the district court had improperly considered plaintiffs’ statistical evidence. Finally, the Fifth Circuit remanded for the district court to consider whether the case might benefit from further subclassing or bifurcation of issues under Rule 23(c) to ensure manageability given varied damages among class members.

Sixth Circuit

Speerly v. Gen. Motors, LLC, 115 F.4th 680 (6th Cir. 2024)

Plaintiffs need not show all class vehicles had manifested defect to establish standing.

Vehicle purchasers from 26 states sued defendant for alleged “shudder” defects in defendant-manufactured transmissions and moved under Rule 23(b)(3) to certify 26 state subclasses. The Eastern District of Michigan granted the motion for class certification, and defendant appealed.

Defendant’s appeal raised two primary issues. Defendant first argued that plaintiffs lacked standing because most class members had not experienced transmission issues in their vehicles. Affirming the district court, the Sixth Circuit rejected defendant’s standing argument. The court reasoned that all the named plaintiffs had experienced the alleged defect, and even if all vehicles had not manifested the

alleged defect, class members still had an overpayment or diminished value injury. This diminished value injury, the court ruled, was sufficient for Article III standing.

Defendant next argued that the district court should not have certified a class because individualized issues—such as variations in state laws, defect differences, differences between current and former owners, and potential arbitration proceedings—would predominate over common ones. Analyzing each of defendant’s arguments, the Sixth Circuit held that common issues outweighed each of the variations defendant had identified and affirmed the district court’s class certification order.

Parker v. Tenneco, Inc., 114 F.4th 786 (6th Cir. 2024)

Class-waiver provision in ERISA plan ruled unenforceable.

Plaintiffs filed a putative class action against retirement plan fiduciaries. The fiduciaries moved to compel individual, rather than class-wide, arbitration under the retirement plans. The Eastern District of Michigan denied the motion, ruling that the class-waiver provisions were unenforceable because they effectively waived the participants’ right to seek statutory remedies under ERISA. Defendants appealed, and the Sixth Circuit affirmed.

In examining the arbitration provision in the plan, the Sixth Circuit agreed that it was invalid under the effective vindication doctrine, which prevents contractual agreements from waiving substantive statutory rights. Four other circuits—the Second, Third, Seventh, and Tenth—had addressed similar provisions and concluded that class or representative action waivers in ERISA-governed plans that precluded plan-wide remedies were unenforceable. The Sixth Circuit concluded that the arbitration provision functioned as a “prospective waiver” of plan-member rights to pursue ERISA-mandated remedies by limiting relief to only individual account losses and excluding any plan-wide benefits. The Sixth Circuit clarified that its ruling did not imply that ERISA claims are incompatible with arbitration, only that any arbitration agreement applicable to ERISA claims must allow the full exercise of statutory rights.

Seventh Circuit

In re Turkey Antitrust Litigation, No. 1:2019cv08318, 2024 WL 3848560 (N.D. Ill. Aug. 16, 2024)

***American Pipe* tolling available for putative class member who files an individual action before a class certification decision.**

Plaintiff was part of a putative class of direct purchasers in a pending class action alleging antitrust claims against a group of turkey processors. Plaintiff filed an individual action asserting similar antitrust claims, and defendants moved to dismiss, arguing that plaintiff’s complaint was untimely under the statute of limitations. Plaintiff argued that the statute of limitations was tolled by the earlier class action filing.

The Northern District of Illinois agreed, holding that it would follow the majority view, which applies *American Pipe* tolling to plaintiffs who file individual suits before a certification decision issues in the class action. The district court reasoned that this approach is consistent with the purpose of statutes of limitations, which is to ensure that defendants are on notice of claims.

Murtoff v. My Eye Doctor, LLC, No. 1:21-CV-02607, 2024 WL 4278033 (N.D. Ill. Sept. 24, 2024)

Court denies summary judgment on TCPA claim, finding application of health care exemption to defendant’s automated calls unclear; denies class certification for failure to meet predominance and typicality requirements.

Plaintiff filed a class action alleging a TCPA violation related to prerecorded messages informing her that it was time for her next eye exam and telling her to call defendant for an appointment. The court denied defendant’s motion to dismiss, holding that the complaint plausibly alleged that the automated messages fell outside the TCPA’s healthcare exception. Defendant renewed its argument on a motion for partial summary judgment, but the court held that because plaintiff never received any services or purchased any goods from defendant, a reasonable jury could find no treatment relationship existed. Similarly, the court held that since plaintiff had never had an eye exam with defendant, the company did not have a complete picture of her eye health and did not tailor its reminder calls to match her individual needs.

In addition, the court denied plaintiff’s motion for class certification. The court held that the predominance requirement under Fed. R. Civ. P. 23(b)(3) was not satisfied, as an individual liability determination would be necessary for each putative class member, which would require an individual, manual review of defendant’s records relating to that individual. Similarly, the typicality requirement under Fed. R. Civ. P. 23(a)(3) was not met, as the individual facts underlying plaintiff’s claim distinguished her claim from the putative class members’ claims, as she had significantly less interaction with defendant than other putative class members who may have either purchased glasses from defendant or had an eye exam performed at one of defendant’s locations.

Rowe v. Papa John’s International, Inc., No. 23-cv-2082, 2024 WL 3925411 (N.D. Ill. Aug. 23, 2024)

Action adequately alleges Article III injury and knowing noncompliance with BIPA; statute of limitations does not bar lawsuit due to tolling from prior class action.

Plaintiffs filed a class action alleging a violation of the Illinois Biometric Information Privacy Act (BIPA) based on defendant’s use of a fingerprint scanner to have plaintiff and putative class members clock-in, clock-out, and input delivery information.

Defendant asserted that plaintiffs alleged a mere statutory aggrievement, but the court held that plaintiffs sufficiently alleged BIPA Article III standing under Sections 15(a) (unlawful retention of a plaintiff’s biometric data), 15(b) (failure to obtain written consent before collecting plaintiff’s biometric data), and 15(d) (defendant’s transfer of the biometric data).

Defendant moved to dismiss, arguing that plaintiffs’ claims were time-barred, but the court held that they were equitably tolled as a result of a previously filed class action where plaintiffs were members of the putative class. While the Seventh Circuit has not weighed in on the question of *American Pipe* tolling, the court sided with the majority, holding that claims are tolled when a class action is filed and that putative class members need not wait for resolution of a motion for class certification before filing separate claims.

Defendant also moved to dismiss on the grounds that plaintiffs failed to adequately plead defendant’s state of mind regarding the BIPA claim. The court held, however, that allegations that defendants knew about BIPA’s requirements but did not take steps to comply with them sufficiently support a claim.

Finally, the court refused to resolve a constitutional challenge to the requested fines for a technical BIPA violation. The court held that an award that would be unconstitutionally excessive can be reduced later in the litigation, rather than requiring dismissal of the case outright.

Eighth Circuit

Ford v. TD Ameritrade Holding Corp., No. 22-3232, 2024 WL 4021358 (8th Cir. Sept. 3, 2024)

Class certification reversed in securities case for lack of predominance in economic loss assessment.

Plaintiff sought to represent himself and a group of investors who purchased and sold securities through defendant. Plaintiff alleged that defendant's order-routing practices violated the company's "duty of best execution" in violation of securities laws. Plaintiff moved to certify the class in 2017, which the district court granted, despite a recommendation to deny from the magistrate judge. The Eighth Circuit reversed because individual questions of economic loss defeated the predominance requirement of Rule 23. Plaintiff subsequently refiled for class certification in 2021, revising his class definition and theories to support certification. The district court once again granted class certification, and defendant appealed.

The Eighth Circuit reversed the district court for a second time. While the court declined to assess the merits at this stage, it did note that plaintiff's claims would require him and the class to establish economic loss that defendant's alleged misconduct caused. The plaintiff first asserted that all class members suffered economic loss through the commission paid to the defendant. The court rejected this argument because it did not align with the requisite definition and did not factor into assessing "loss" in a best-execution case. The court further noted that commission as a measure of loss would still raise individualized questions that would defeat predominance in resolving the economic loss requirement on a class-wide basis. This same limitation applied to the district court's alternative holding that class certification would have been proper under Rule 23(b)(2) for an injunctive class or Rule 23(c)(4) for particular issues because too many individualized issues would have remained even if certain issues were resolved for the class. Consequently, the Eighth Circuit reversed the class certification ruling and remanded for further proceedings.

DeGeer v. Union Pacific R.R. Co., 113 F.3d 1035 (8th Cir. 2024)

Tolling on individual employee claim permitted after class certification reversed on appeal.

Plaintiff attempted to assert individual claims one year after an employee class had filed similar claims against defendant over one year after a group of employees had filed a class action against defendant for alleged violations of the Americans with Disabilities Act (ADA) based on a "fitness-for-duty" program defendant instituted. Plaintiffs had relied on a broader class definition in their complaint, but narrowed it when they moved to certify the class following some discovery. The *DeGreer* plaintiff believed he was a member of the class both as pled in the complaint and as defined in the class certification motion. The district court granted class certification under a definition that would have included *DeGeer*. The Eighth Circuit reversed and remanded.

With certification reversed, the *DeGeer* plaintiff filed suit individually against defendant, alleging ADA violations under the same theory of liability. To avoid a statute of limitations defense, plaintiff asserted

that his limitations period was tolled during the pendency of the class certification appeal because he was a class member. The district court disagreed, holding that plaintiff was not a member of the class as defined in the class certification motion. The Eighth Circuit reversed, holding that the tolling period for the *DeGeer* plaintiff did not end until the class certification ruling was reversed—as opposed to when the district court certified the narrower class. Noting that bystander class members are not required to follow the class action closely, the court held that plaintiff could not be said to have slept on his rights when he indisputably was a member of the class as defined in the complaint.

In re T-Mobile Customer Data Sec. Breach Litig., 111 F.4th 849 (8th Cir. 2024)

Unreasonable attorneys' fee award reversed in large data breach settlement.

Defendant settled a lawsuit with a customer class after defendant's computer systems were hacked and customers' personal information was stolen. The class was the product of approximately 40 class actions, involving millions of class members, which had been filed nationwide and subsequently consolidated. Following settlement, class counsel sought \$78.75 million in attorneys' fees, totaling 22.5% of the total settlement fund. Two class members objected to the request as excessive, but the district court struck the objections and overruled them on the merits. The first objector was an unnamed class member who, according to appointed class counsel, was represented by a serial objector who repeatedly attempted to delay settlement payments for his own benefit. The district court agreed with class counsel and struck the objection as being brought in bad faith. The second objector was an unnamed class member who class counsel suspected only objected at her son's request. Her son allegedly also had a pattern of filing frivolous objections to class settlements on behalf of his family members. The court ultimately struck her objection after she refused to appear for a deposition focused on her objections. Both class members appealed.

The Eighth Circuit reversed the district court's order striking the class members' objections. The court noted that to justify striking the objections, the district court improperly relied on Federal Rule of Civil Procedure 12(f), which governs striking matters from pleading, and held that objections to a class settlement did not fall into that category. Despite this, the Eighth Circuit noted that the district court did have inherent authority to issue sanctions for misconduct. The court further held that there was no evidence in the instant case supporting a conclusion that the first objector had asserted her objections in bad faith, regardless of what her counsel's history might indicate. Yet the court determined that striking the second objector's objections was appropriate given her refusal to cooperate.

Because one class member's objections did stand, that class member was a proper party to challenge the court's award of attorneys' fees. The class member asserted that the fee award was disproportionate to the work performed and thus unreasonable, arguing that it was the size of the class, and not counsel's effort, that resulted in the extraordinarily large settlement fund. While the Eighth Circuit declined to advance a *per se* rule requiring a lower fee percentage in large settlements, it did hold that courts should not ignore the "empirical reality that the percentage of fee awards tend[s] to decrease as the size of a settlement fund increases, perhaps because of the potential that attorneys might receive an undeserved windfall." After carefully reviewing the district court's considerations, the Eighth Circuit held that the district court had abused its discretion in ordering an unreasonable fee. Class counsel sought a multiplier that was twice as high as what courts have already considered high, and the case resolved quickly before any significant work had been done. To crosscheck the percentage selected, the court also conducted a lodestar analysis, which further supported its decision that class counsel's fee award was unreasonable. The case was remanded to the district court for further proceedings consistent with the opinion.

Ninth Circuit

Montera v. Premier Nutrition Corp., 111 F.4th 1018 (9th Cir. 2024)

Following a rare class-action trial, court vacates reduction of \$91 million statutory damages award and remands for determination of whether award violates substantive due process.

Plaintiff, an alleged New York-based consumer of defendant's dietary supplement drink, brought a class action against the drink manufacturer alleging deceptive conduct and false advertising in violation of New York's General Business Law (GBL) sections 349 and 350. Plaintiff claimed defendant made false representations on the drink's packaging label advertising an ability to relieve joint pain. Following a jury trial that resulted in a verdict for the customer class, the Northern District of California denied defendant's motion for judgment as a matter of law, but reduced the award from \$91.4 million to \$8.3 million finding that it violated substantive due process. Both sides appealed.

The Ninth Circuit held that that the statutory damages award must be reconsidered in light of the Ninth Circuit's intervening decision in *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109 (9th Cir. 2022), and that the prejudgment interest award was error. The jury found defendant liable for deceptively marketing the juice products, awarding \$1.49 million in actual damages as well as \$550 in statutory damages for each sale, for a total of \$91.4 million, plus prejudgment interest. The district court found each sale was a violation, although it lowered the per-violation statutory damages amount to \$50 for a total award of \$8.3 million plus prejudgment interest. Relying on the Supreme Court's factors for assessing the substantive reasonableness of punitive damages awards delineated in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the district court concluded that awarding \$550 per violation would be so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable.

Two months after the district court entered the final judgment, the Ninth Circuit published its decision in *Wakefield*, which involved a company that placed over 1.8 million robocalls in violation of the Telephone Consumer Protection Act (TCPA). Based on the TCPA's fixed statutory penalty of \$500 for each violation, the district court ordered the defendant to pay \$925.2 million. But the Ninth Circuit declined to endorse application of the *State Farm* reasonableness factors outside of the punitive damages context, instead instructing the district court to use seven factors for deciding when an award is extremely disproportionate to the offense and obviously unreasonable. In light of *Wakefield*, the Ninth Circuit remanded for the district court to consider in the first instance whether the \$91.4 million statutory damages award violates due process under *Wakefield*. The court also reversed the award of prejudgment interest, holding it would constitute a windfall because the statutory damages award in this case was not compensatory.

Heerde v. Learfield Commc'ns, LLC, No. 2:23-CV-04493-FLA (MAAX), 2024 WL 3573874 (C.D. Cal. July 19, 2024).

Website operator's Rule 12(b)(6) motion to dismiss California Invasion of Privacy Act claims under the CIPA Section 631's "party" exemption, which bars liability for the intended recipient of a website visitor's electronic communications, rejected because website failed to disclose the operator's identity.

Plaintiffs brought claims on behalf of a class against defendant, the operator of the University of Southern California (USC) Trojans' website, usctrojans.com. The court denied the motion to dismiss the California

Invasion of Privacy Act (CIPA) Section 631 claim, declining to apply CIPA’s “party” exemption to liability available under CIPA’s electronic eavesdropping provision, Section 631(a). As alleged by plaintiffs, the USC Trojans’ website was operated not by USC, but by an allegedly unknown third-party defendant. Plaintiffs alleged the operator was not disclosed to them or to other website visitors when they interacted with the website by entering search terms into the website’s search bar, and plaintiffs alleged that they believed instead they were communicating their website interactions only to USC.

Under Section 631, a party to a communication can record the communication without the other party’s knowledge without incurring liability. Courts in the Ninth Circuit have previously found that, when an internet user knowingly communicates with the owner or operator of the website, the owner or operator is a “party” to the communication, and hence cannot be liable as a third-party eavesdropper, as prohibited by the statute. In this case, the district court found that defendant was an unannounced second auditor in violation of Section 631, even though it operates the website allegedly visited by plaintiffs, since plaintiffs allegedly believed their interactions were being communicated only to USC, and not defendant.

Gutierrez v. Converse Inc., No. CV 23-6547-KK-MARX, 2024 WL 3511648 (C.D. Cal. July 12, 2024)

Court grants summary judgment to website operator accused of violating Section 631 of the California Invasion of Privacy Act.

Plaintiff sued defendant on behalf of a class, alleging unauthorized and undisclosed collection of visitor chats between them and the website’s chatbot feature, which allowed customers and prospective customers to ask questions in a text field. Defendant showed that it used nonparty cloud services, accessed through a unique URL hosted on the nonparty’s servers. When a website visitor initiated a chat, messages were sent to this service cloud application and encrypted during transmission, meaning only defendant, the website operator, could view the chat messages.

After the court denied defendant’s motion to dismiss plaintiff’s CIPA section 631 claim, defendant brought a Rule 56 motion on the ground, among others, that no “interception” of plaintiff’s alleged chat communications occurred, as required by Section 631. Defendant moved for dismissal based on its evidence that chat data is stored on the nonparty’s servers but is accessible only through a password-protected dashboard known to defendant. Defendant claimed the nonparty gains access to the dashboard only upon defendant’s direction and only when technical support is necessary.

The court found no material dispute regarding the nonparty’s access to, or ability to read, visitors’ chat messages while those messages are “in transit,” i.e., before the messages are placed into digital storage and not still en route to the recipient of visitor communication. Relying on the uncontroverted expert declaration defendant submitted, the court granted summary judgment in defendant’s favor since the nonparty could not read visitors’ chats while the chats were being sent to defendant and its website’s server in real time, which plaintiff must prove. The court rejected plaintiff’s evidence that raised only the mere possibility that the cloud-provider may be able to read the chats contemporaneously as they were being sent from visitors’ computers.

Tenth Circuit

Downs v. Robinson Hoover & Fudge, PLLC, No. CIV-23-00064-PRW, 2024 WL 4363326 (W.D. Okla. Sept. 30, 2024).

Individual FDCPA claim adequately alleged, but complaint dismissed with leave to amend given overbroad class definition.

Plaintiff allegedly owed a debt to a nonparty, which contracted with defendant to collect the debt. Defendant filed a collection lawsuit against plaintiff, but the process server could not locate her at any of the addresses provided. Defendant allegedly instructed the process server to serve plaintiff at an address affirmatively known not to belong to her, leading to a default judgment. Plaintiff later discovered the judgment and claimed defendant had wrongfully and purposefully used an incorrect address to serve her, violating the Fair Debt Collection Practices Act (FDCPA) and its provisions on misleading representation in a debt collection and failure to provide proper notice of a debt. The court dismissed the class allegations because plaintiff had not adequately alleged the class action requirements of Rule 23(a). Specifically, the plaintiff's class definition was overbroad because it included individuals who had not been harmed. As alleged, the definition would include unharmed individuals, as it included individuals who defendant failed to serve at the right address for any number of reasons.

Phillips v. Riverside Transportation, Inc., No. 23-2440-EFM-ADM, 2024 WL 3400252 (D. Kan. July 12, 2024)

Plaintiffs may contractually waive their right to participate in FLSA collective action, notwithstanding circuit split and absence of Tenth Circuit authority on the issue.

Defendants Riverside Transportation, Inc. and Missouri Capital and Leasing, Inc. filed a motion to partially dismiss or strike plaintiffs' class action complaint. Plaintiffs are lease drivers who alleged that Riverside violated the Fair Labor Standards Act (FLSA) by failing to pay the federal minimum wage owed under the law, and that both defendants violated Truth-in-Leasing (TIL) regulations regarding deductions and escrow fund management by taking chargebacks and deductions from plaintiffs' compensation without providing the necessary disclosures, and by failing to properly manage plaintiffs' escrow funds.

Defendants sought to dismiss plaintiffs' class allegations, arguing they were barred by a contractual waiver. The court examined the waiver's enforceability under both the FLSA and Rule 23. Whether a plaintiff may contractually waive their right to participate in a FLSA collective action is unsettled in the Tenth Circuit. After reviewing the leading approaches, the court concluded that the waivers were not *per se* unenforceable, and a plaintiff can waive their rights to participate in collective actions under the FLSA. Applying Kansas law, the court found that the waiver language explicitly prevented plaintiffs from pursuing any collective or class actions, and thus dismissed their FLSA claims.

Eleventh Circuit

Carter v. City of Montgomery, 108 F.4th 1334 (11th Cir. 2024)

Denial of class certification of jailed traffic offenders affirmed for lack of predominance, typicality, and commonality.

Montgomery, Alabama residents brought two putative class actions alleging they were wrongfully jailed for failing to pay fines related to traffic offenses. Plaintiffs had pled or were found guilty of traffic offenses, fined, and were placed on probation for their inability to pay the fines. Plaintiffs alleged their fines were later revoked by a municipal court but that they were then instead sentenced to jail time. Plaintiffs sued the city of Montgomery, a private contractor that oversaw the probation process (Judicial Correction Services (JCS)), and a lawyer appointed to represent traffic probationers in the municipal court. Plaintiffs alleged that the process of converting fines into jail sentences violated the Fourteenth Amendment and Alabama law. The district court denied class certification in its entirety in both actions. The Eleventh Circuit consolidated the cases and affirmed the denial of class certification.

Plaintiffs sought to certify multiple classes based essentially on the asserted claims, which included (1) claims for violation of the Fourteenth Amendment under *Bearden v. Georgia*, 461 U.S. 600 (1983), which held that before a court converts a sentence for failure to pay a fine from probation to jailtime the court must determine whether the individual made “reasonable efforts” to pay or whether “adequate alternative methods of punishment” were available (Bearden claims); (2) Sixth Amendment ineffective assistance of counsel claims; (3) state law false imprisonment claims; and (4) state law abuse of process claims.

The Eleventh Circuit, in affirming the district court’s denial of class certification, ruled that plaintiffs had failed to satisfy Rule 23’s requirements of predominance for their proposed classes and that plaintiffs had also failed to show typicality or commonality with respect to some of their proposed classes.

On predominance, the court found that plaintiffs failed to demonstrate that common questions of law or fact predominated over individual issues because the claims required individualized inquiries into what happened to each probationer during the hearings when their probation was revoked, which could not be resolved with common evidence. For the *Bearden* claims, the court noted that determining whether the municipal court conducted adequate inquiries into probationers’ ability to pay required individual assessments. The court also clarified its decision in *Klay v. Humana, Inc.* 382 F.3d 1241 (11th Cir. 2004), permitting common evidence to establish liability, and finding that, in this case, it was not clear that the evidence was “common” and that although circumstantial evidence could be used in some simple, straightforward class actions to establish liability, such reasonable inferences were not present here. Further, the court ruled that the state law abuse of process and false imprisonment claims also required individualized evidence, such as each probationer’s payment history and the actions of the contractor defendant.

For typicality, the court found that the class representative’s claims in one of the two cases were not typical of the class because the representative’s situation involved a total deprivation of counsel (counsel never showed up for the hearing), unlike other class members who alleged ineffective assistance.

As to commonality, the court concluded that the state law false imprisonment claims lacked commonality because they required individualized determinations about each probationer’s experience and the actions of JCS.

In sum, the Eleventh Circuit affirmed the district court's decision to deny class certification, holding that plaintiffs' proposed classes did not satisfy Rule 23 requirements. The court emphasized the need for individualized proof and the lack of predominance of common issues, which made class action an inappropriate vehicle for the claims.

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