

Class Action Litigation Newsletter | 4th Quarter 2024



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

Highlights from this issue include:

- First Circuit addresses four questions of first impression relating to CAFA jurisdiction and “home state” and “local controversy” exceptions.
- Second Circuit holds class representative’s susceptibility to unique defenses is not a basis for finding lack of adequacy, though it may go to typicality.
- Fourth Circuit reverses certification of FLSA class action, finding conclusory allegations of company policies were insufficient to satisfy commonality requirement.
- Sixth Circuit vacates class certification based on individualized questions in automotive defect case.
- Seventh Circuit affirms decertification of Rule 23(c)(4) issues class for lack of superiority.
- Ninth Circuit holds unexecuted damages model sufficient to demonstrate damages are susceptible to common proof at the class certification stage.

First Circuit

Kress Stores of P.R., Inc. v. Wal-Mart P.R., Inc., No. 23-1060, 2024 WL 4750774 (1st Cir. Nov. 12, 2024)

First Circuit addresses four questions of first impression under CAFA.

In an action by local Puerto Rico merchants claiming unfair competition by national retailer defendants, the First Circuit Court of Appeals resolved four Class Action Fairness Act (CAFA) jurisdictional questions of “first impression.” This appeal arose out of a putative class action filed against various big-box retailers in a Puerto Rico court, which defendants removed to federal court under CAFA. Among other things, the First Circuit reviewed the district court’s denial of plaintiff’s remand motion and plaintiff’s arguments that the district court lacked jurisdiction under CAFA’s “home state” and “local controversy” exceptions. After denying remand, the district court denied plaintiff’s motion for class certification and granted defendants’ motion for summary judgment.

First, the First Circuit addressed whether CAFA jurisdiction continued after the district court’s denial of class certification, which the First Circuit viewed as a question of first impression in the circuit. The Court of Appeals held jurisdiction does extend beyond the denial of class certification because, primarily, CAFA provides that jurisdiction “shall apply to any class action before or after the entry of a class certification order[.]” In reaching this conclusion, the First Circuit noted that all other circuits answering this question interpret CAFA’s language the same way and, therefore, the First Circuit joined the Second, Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits on this issue.

Second, the First Circuit agreed with the district court that CAFA’s “home state” exception did not apply to the facts of the case because the exception requires all the “primary defendants” to be citizens of the state in which the lawsuit is pending. CAFA does not define “primary defendants” and the question of whether primary defendants meant “all” as opposed to “one” primary defendant also was a question of first impression in the First Circuit. The court recognized that courts in other jurisdictions use different definitions and approaches.

After reviewing the possibilities, the First Circuit adopted the approach taken by the Ninth Circuit in *Singh v. American Honda Finance Corp.*, 925 F.3d 1052, 1068 (9th Cir. 2019), which focuses on whether a defendant is a “principal, fundamental, or direct” defendant, and concludes that CAFA’s use of “the” as opposed to “a” before “primary defendants” means that *all* primary defendants must be citizens of the forum state for the exception to apply. As for the specific analysis required, the Ninth Circuit (and now the First Circuit) looks at the following factors, which are not exclusive and should not be applied “mechanistically”:

1. a court should assume all defendants will be found liable;
2. a court should consider whether the defendant is sued directly or alleged to be directly responsible for the harm to the putative class, as opposed to being vicariously or secondarily liable; and
3. a court should consider a defendant’s potential exposure to the putative class relative to the exposure of the other defendants.

Applying the test to the facts of the case, the First Circuit concluded the exception did not apply because one of the defendants was not a local defendant, the claims against that defendant were direct and not secondary, and plaintiff had failed to show that the non-local defendant’s comparative liability took the

defendant out of the definition of “primary defendant.” In so concluding, the First Circuit made clear that it was plaintiff’s burden to show the “home state” exception applied, which the plaintiff failed to do.

Third, the First Circuit disagreed with the district court’s conclusion that CAFA’s “local controversy” exception did not apply to the facts of the case. That exception requires a district court to decline jurisdiction if, among other things, a local defendant’s alleged conduct forms a “significant basis” for the claims the putative class asserts. CAFA does not define “significant basis” and that definition presented the third question of first impression for the First Circuit. The First Circuit observed that other circuits took different approaches to defining what is meant by a “significant basis.”

After reviewing the various approaches, the First Circuit adopted the approach taken by the Third Circuit in *Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144, 157 (3d Cir. 2009). A local defendant’s conduct cannot be deemed “significant” without comparing it to the alleged conduct of all defendants and, if the local defendant’s conduct is a significant part of the alleged conduct of all defendants, then the “significant basis” definition is met. The First Circuit noted, however, that although other circuits generally followed *Kaufman* as the “leading” case on the definition, those courts took different approaches in cases, such as the one before the First Circuit, where a plaintiff asserts that the local and non-local defendants “all engaged in the same conduct.” Among those approaches, certain courts have required a “plus factor” when a complaint fails to indicate any substantive distinctions between the defendant’s conduct and that of other defendants. This presented the fourth question of first impression for the First Circuit.

In answering the question, the First Circuit again looked to CAFA’s text, which requires a local defendant’s alleged conduct to form “a” significant basis as opposed to “the most” significant basis for the claims. Therefore, although agreeing with *Kaufman*’s comparative approach, the First Circuit rejected any “plus factor” concept and concluded that more than one defendant’s conduct could form a significant basis for the putative class members’ claims. Accordingly, the First Circuit held that the district court erred in applying a “plus factor” test and thus concluding plaintiff had not met its burden to show that the non-local defendant’s conduct was not a significant basis for the claim merely because plaintiff had alleged “undifferentiated wrongful conduct” on the part of all defendants. In other words, “undifferentiated wrongful conduct” does not automatically render a local defendant’s conduct “insignificant.” In this case, the “local controversy” exception applied based because plaintiff’s substantive allegations applied equally to all defendants and formed the basis of the putative class members’ claims against all defendants. Consequently, the First Circuit vacated the judgment for defendants and remanded the case to the district court with instructions to remand the case back to the court in Puerto Rico.

Ortiz v. Saba Univ. Sch. of Med., Civil Action 23-12002-WGY (D. Mass. Nov. 26, 2024)

Failure to address differences in state laws limits nationwide class action.

In a putative class action alleging deceptive advertising of a medical school’s exam pass rates, the district court originally certified a nationwide class from the bench, but then decertified the class in a written decision. The court held class certification was not appropriate based on plaintiff’s failure to demonstrate predominance under Federal Rule of Civil Procedure 23, which requires that “the questions of law or fact common to class members predominate over any questions affecting only individual members[.]”

Specifically, after conducting a choice of law analysis, the court determined that Massachusetts had the most significant relationship to plaintiff’s claims and, therefore, Massachusetts law (Massachusetts General Laws Chapter 93A, the Massachusetts Consumer Protection Act) should apply. Because each state involved had an interest in applying its own consumer protection laws within its own borders, the district court recognized the risk of conflicting with other states’ policies and declined to extend the statute to a

multi-state class. Therefore, applying Chapter 93A to putative class members in other states could undermine “local interests by limiting each state’s ability to enforce its standards.” Plaintiff had failed to conduct any analysis of state law variations. As a result, the district court found that plaintiff failed to meet her burden of demonstrating that variations in state laws do not overcome common legal issues. Therefore, the differences in state laws posed significant barriers to a uniform Chapter 93A application, precluding a finding of predominance.

The district court distinguished two of its own cases (*Bezdek v. Vibram U.S. Inc.* and *In re M3 Power Razor Syst. Mktg. Sales Practice Litig.*) where the district court permitted nationwide class certification under Chapter 93A. Those cases involved an agreed-to settlement class as opposed to a disputed class. Also, the district court in those cases carefully evaluated the applicable consumer protection laws (as briefed by the parties) and found that the variations in state law relating to the plaintiffs’ claims did not “overcome the common factual and legal issues shared by the potential class members.”

Second Circuit

Cheng v. HSBC Bank USA, N.A., No. 23-7383, 2024 WL 4835268 (2d Cir. Nov. 20, 2024)

Class representative’s susceptibility to unique defenses is not a basis for finding lack of adequacy.

Plaintiff filed a putative class action against a bank, alleging breach of contract and deceptive practices under New York General Business Law § 349 for failing to pay interest on the same day an automated clearing house transfer was processed. The district court denied class certification for lack of adequacy because plaintiff made a series of phone calls that suggested he did not actually expect to receive interest on the day he made a transfer, and thus his “path to recovery [was] obstructed by a key problem that other members of the prospective class [did] not share.”

On appeal, the Second Circuit vacated the district court’s judgment and remanded. The Second Circuit held the district court had misapplied the adequacy test under Rule 23(a)(4) by considering plaintiff’s susceptibility to unique defenses, which did not prevent him from “fairly and adequately protect[ing] the interests of the class.” Rather, this issue would be more appropriately considered in the context of the typicality requirement under Rule 23(a)(3). The Second Circuit declined to rule on whether the proposed class satisfied the typicality requirement, however, because neither party argued the issue on appeal. With respect to the breach of contract claim, the court ruled that plaintiff’s subjective understanding was irrelevant to interpreting a uniform contract.

The court remanded the case to the district court to further consider whether the named plaintiff satisfied adequacy, typicality, or the other Rule 23 requirements.

Pappas v. Qutoutiao Inc., No. 23-1233, 2024 WL 4588491 (2d Cir. Oct. 28, 2024)

Court vacates dismissal of Securities Act claims, holding that Rule 8—not Rule 9(b)—pleading standard applies.

The lead plaintiff in this consolidated class action against Chinese mobile content aggregator Qutoutiao Inc. (QTT) and its officers, directors, and underwriters, alleged QTT flouted Chinese laws and regulations to profit from illegal advertisements. Plaintiff alleged QTT’s offering documents in connection with its

initial public offering and secondary public offering contained numerous misstatements and omissions actionable under the 1933 Securities Act and 1934 Securities Exchange Act in connection with the advertisements. The district court granted defendants' motions to dismiss all claims pursuant to Rule 12(b)(6), holding that the Securities Act claims sounded in fraud and failed to plead facts with particularity as required by Rule 9(b). On appeal, plaintiff challenged the dismissal as to only the Securities Act claims.

The Second Circuit held the district court erred in applying the heightened pleading requirements of Rule 9(b) to the Securities Act claims because those claims sounded in negligence and strict liability rather than fraud. Claims under Sections 11 and 12(a)(2) of the Securities Act require no more than negligence to proceed and may be governed by Rule 8, but if the claims rely upon averments of fraud, they are governed by Rule 9(b).

The Securities Act allegations at issue included that defendants failed to satisfy their "duty to make [a] reasonable and diligent investigation" to ensure the offering documents did not contain misstatements or omissions, and that "[n]one of the Underwriter Defendants made a reasonable investigation into the truthfulness and accuracy of the IPO and/or SPO Documents." The Second Circuit held that such allegations would be evaluated under Rule 8 if contained in a stand-alone complaint alleging violations of the Securities Act and would not be held to a higher standard because plaintiff also exercised the right to sue defendants under the Exchange Act. The Second Circuit further held that, despite plaintiff's allegations that QTT intentionally designed and implemented underlying strategies, plaintiff's Securities Act claims charged defendants with negligently failing to disclose those strategies and their results and did not allege the failure to disclose was either intentional or reckless, and thus the claims did not sound in fraud. The Second Circuit vacated the district court's judgment and remanded.

Kelly-Starkebaum v. Papaya Gaming Ltd., No. 24CV2310 (DLC), 2024 WL 5135799 (S.D.N.Y. Dec. 17, 2024)

District court grants motion to compel arbitration, holding that plaintiff's agreement to terms of use constituted agreement to arbitration provision and that agreement was not unconscionable.

Plaintiff sued an online gaming platform alleging violation of New York consumer protection law through defendant's allegedly deceptive operation of online games. Defendant moved to compel arbitration and stay the case, on the basis that plaintiff had agreed to defendant's terms of use, which included a mandatory arbitration provision and class action waiver applicable to her claims in this action.

First, the district court rejected plaintiff's argument that she did not agree to the arbitration provision, holding that because plaintiff agreed to the terms of use when she selected a payment type on the deposit screen, she agreed to the class action waiver and arbitration clause it contained. The district court held that the deposit screen met the criteria for inquiry notice and plaintiff "unambiguously assented" to the terms of use by proceeding through the deposit screen numerous times over the two years that she used the platform. The district court also rejected plaintiff's argument that an earlier version of the terms of use arbitration agreement required registering an account for the agreement to take effect. Plaintiff did register an account, and also agreed to later versions of the terms of use that did not contain the limiting language.

Second, the district court rejected plaintiff's argument that the agreement was unconscionable and thus unenforceable. The district court held the terms of use was not an adhesion contract because it allowed

her to opt out of the class action waiver and arbitration agreement by sending an email to an address provided in the agreement, and further held that the terms of use were not substantively unconscionable.

The district court granted the motion to compel arbitration and stayed the action pending the outcome of the arbitration proceedings.

In re Oral Phenylephrine Mktg. & Sales Pracs. Litig., No. 23-MD-3089-BMC, 2024 WL 4606818 (E.D.N.Y. Oct. 29, 2024)

As a matter of first impression, “indirect purchaser” plaintiffs lack standing to bring civil RICO claim.

Plaintiffs brought separate putative class actions against retailers and manufacturers of over-the-counter cough and cold medicines containing phenylephrine, alleging defendants knew phenylephrine was ineffective as a nasal and sinus decongestant, but produced, marketed, and sold the products anyway. Following consolidation in multidistrict litigation, defendants moved to dismiss the bellwether complaint, asserting claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) (asserted against the manufacturers only), New York’s consumer-protection and false-advertising statutes, the New York commercial code, and New York common law. Defendants argued the Federal Food, Drug, and Cosmetic Act (FDCA) preempted the state claims, that plaintiffs lacked standing to assert the RICO claim, and that the FDCA precluded the RICO claim.

The district court held the FDCA preempted the state claims, explaining that federal regulations governing over-the-counter drug labeling set uniform national standards that state law could not expand or change. Because the claims for mislabeling, false advertising, concealment, and express warranty would have required defendants to change the labels in ways contrary to what the FDA required, or otherwise to stop selling the products altogether, these claims were preempted in their entirety.

In addition to their state law claims, plaintiffs alleged that the RICO defendants violated RICO by engaging in numerous acts of mail and wire fraud to further a scheme to defraud the public and mislead the FDA into believing that the product was an effective decongestant. Defendants moved to dismiss plaintiffs’ civil RICO claim for lack of statutory standing and FDCA preclusion. As a matter of first impression, the district court held that, as indirect purchasers of the products, plaintiffs lacked standing to bring a RICO claim. In doing so, the district court applied the “direct purchaser” rule the Supreme Court applied in interpreting federal antitrust law, a standing doctrine that bars downstream indirect purchasers from bringing an antitrust claim. The district court further held that the case law did not support plaintiffs’ argument that the direct-purchaser requirement would usurp the proximate cause standard. Applying the direct-purchaser rule to plaintiffs’ civil RICO claim, the district court dismissed plaintiffs’ claim for lack of standing. Because plaintiffs lacked standing, the court did not reach the issue of preclusion.

Hernandez v. Wonderful Co. LLC, No. 23-CV-1242 (ER), 2024 WL 4882180 (S.D.N.Y. Nov. 25, 2024)

District court holds plaintiffs adequately pleaded New York General Business Law and negligence per se claims alleging presence of PFAS in “all natural” juice product.

Plaintiffs brought a putative class action against The Wonderful Company LLC and its wholly owned subsidiary, POM Wonderful LLC, alleging violations of consumer protection laws based on the presence of

per- and polyfluoroalkyl substances (PFAS) in pomegranate juice defendants produced, marketed, and sold. Plaintiff alleged that, contrary to defendants' representations that the product was "all natural," it contained undisclosed PFAS. Plaintiffs brought claims for violations of New York General Business Law sections 349 and 350, negligence per se, and unjust enrichment. Defendants moved to dismiss, arguing plaintiffs failed to state a claim.

Defendants argued that plaintiffs' theory of deception should be rejected because, "nothing about the challenged representations promises the absolute absence of PFAS, which are not an ingredient, and which are recognized to be ubiquitous microcontaminants in our food and environment." Additionally, defendants argued that "cases that have challenged 'natural' labeling claims based on the alleged presence of unintended microcontaminants have routinely been dismissed as a matter of law at the pleadings stage." The district court rejected these arguments, finding that plaintiffs had sufficiently pleaded that a reasonable consumer could be misled. The district court held that, given the allegedly known serious health issues associated with PFAS exposure, as well as the tension between those health issues and the various representations on the product packaging, the plaintiffs sufficiently pleaded allegations that support an objective expectation that the product did not contain a detectable level of PFAS.

With respect to the negligence per se claim, which alleged the product was adulterated and misbranded under federal and state laws, the district court held plaintiffs adequately pleaded the products were adulterated by pleading that the presence of PFAS "may render" the product injurious to health. The district court found there remained questions of fact concerning whether the product was misbranded, specifically regarding whether the PFAS was added intentionally or incidentally, whether it was present at insignificant levels, and whether it was used in conformity with regulations.

The district court dismissed plaintiffs' unjust enrichment claim as duplicative of the other claims.

Dorris v. Danone Waters of Am., No. 22 CIV. 8717 (NSR), 2024 WL 4792048 (S.D.N.Y. Nov. 14, 2024)

On reconsideration, district court holds plaintiffs inadequately alleged false advertising claims based on "carbon neutral" labeling claim.

Plaintiffs brought a putative class action against defendant alleging false and misleading advertising and marketing of defendant's "Evian Natural Spring" bottled water. Plaintiffs alleged that Evian's practice of labeling its products "carbon neutral" despite producing carbon emissions is a form of "greenwashing," and brought claims for violations of the consumer protection statutes of New York, Massachusetts, and California, breach of express and implied warranties, unjust enrichment, and fraud. Defendant brought a partial motion to reconsider the prior ruling on its motion to dismiss, which was granted in part and denied in part.

On the motion to dismiss the Massachusetts unfair acts claim, the district court originally held that it was premature to determine if "carbon neutral" was not misleading to a reasonable consumer as a matter of law, and that defendant's back label and website, which contained a fuller explanation of what "carbon neutral" meant, did not cure the ambiguity. Upon reconsideration, the district court concluded that a reasonable consumer would be expected to look beyond the front label to learn more about the representation and consult other additional information available. The district court also held "carbon neutral" was a more specific term than those the Federal Trade Commission's Green Guides caution marketers not to make. The district court further held plaintiff's consumer survey was not sufficient to support its claims because, though it did provide some evidence that consumers might not understand

what “carbon neutral” meant, an objectively reasonable consumer would have inquired further and consulted the additional information available.

The district court also reconsidered its holding on the California Consumers Legal Remedies Act claim. On reconsideration, the district court held plaintiffs failed to properly state a claim because any ambiguity as to what “carbon neutral” meant would have been cured by context clues contained on the front of the product, its packaging, and on its back label, which would have prompted a reasonable consumer to learn more about defendant’s “carbon neutral claim.”

With respect to the breach of express warranty claim, on reconsideration the district court found there was no breach of warranty because there was no misrepresentation, for the reasons explained above. The district court also dismissed the claim for unjust enrichment because there was no fraud, coercion, or request underlying the claim. The district court further dismissed plaintiffs’ fraud claim because plaintiffs failed to plead specific motives with concrete benefits, alleging only generalized motives of increased sales and profits.

The district court dismissed plaintiffs’ claims without prejudice, granting leave to amend.

Third Circuit

Huertas v. Bayer US LLC, 120 F.4th 1169 (3d Cir. 2024)

Third Circuit remands putative class action for further findings related to plaintiffs’ standing.

Plaintiffs filed a putative class action alleging state law claims against Bayer related to their purchases of Lotrimin and Tinactin after Bayer recalled millions of dollars’ worth of those products due to potential benzene contamination. Plaintiffs did not allege any bodily injury. Rather, they alleged economic injury because the products they purchased were allegedly worthless after the recall. The district court dismissed the complaint for failure to allege sufficient facts to support the conclusion that plaintiffs suffered economic loss.

The Third Circuit reversed and remanded for additional proceedings based upon additional evidence plaintiffs proffered during the pendency of the appeal. First, the panel found that plaintiffs plausibly alleged that the products they purchased were worth less than a product that was properly manufactured, reasoning “if a product contains a manufacturing flaw so severe that it cannot be used, it is not worth the full price purchasers paid with the understanding they would be able to use all of the product.”

Next, the panel considered whether plaintiffs sufficiently alleged that the products they purchased contained benzene. To do so, plaintiffs need not assert with specificity that all products were contaminated but must provide sufficient detail to allege plausibly that their products were contaminated. The panel agreed with the district court that the mere existence of the product recall was insufficient to meet this burden. Plaintiffs, however, introduced on appeal a complaint in a separate case Bayer filed against the manufacturer of the product component that contained benzene, alleging millions of dollars in damages associated with the product recall. Plaintiffs asserted that this complaint, which was not available at the time the district court dismissed their complaint, lent support to the plausibility of their allegation that their products contained benzene. The panel remanded the case to the district court for further application of the plausibility standard and to consider this new evidence.

Fourth Circuit

Stafford v. Bojangles' Restaurants, Inc., 123 F.4th 671 (4th Cir. 2024)

Fourth Circuit overturns class certification on commonality grounds and rejects overly general class definitions.

Shift managers at Bojangles restaurants in seven states filed a putative class action alleging that Bojangles violated its own policies by requiring shift managers to work off the clock and editing time records to avoid exceeding state and federal overtime thresholds. The district court denied class certification for the Alabama, Georgia, Kentucky, Tennessee, and Virginia classes based on inadequate representation, but granted certification of the North Carolina and South Carolina classes. As to commonality, the district court found that 80% of prospective class members were subject to Bojangles' opening checklist, which allegedly mandates that certain tasks be performed prior to clocking in, and the district court found that this fact created commonality because, despite the differences in character of the off-the-clock work, all claims stemmed from the same alleged policies and procedures.

The Fourth Circuit reversed, finding that plaintiffs had not met the commonality requirement and the class definitions were overly general. The panel observed that allegations of "generalized policies" typically are insufficient to satisfy commonality because "it is circular logic for plaintiffs to create a laundry list of factually diverse claims and then assert that these claims, in turn, prove the existence of a uniform company policy." Plaintiffs pointed to no documentation of an overarching policy, and the panel concluded that "something more than conclusory assertions of some highly generalized company policy to have shift managers work without pay" was required to satisfy the commonality element.

The panel also reversed because of the class definitions, which encompassed all shift managers who worked at Bojangles in North Carolina and South Carolina during a three-year period. The panel criticized the class definition because it included no limiting parameters, such as whether the class member performed off-the-clock work, was denied overtime pay, or was subject to time-shaving. The panel concluded that "[a]n appropriate class definition should provide proper detail to identify whether or not a prospective class member was injured and whether their claim coheres with the rest of the certified class" and the overly general class definitions the district court certified failed that test.

Sixth Circuit

Neri v. Nissan N. Am., Inc., 122 F.4th 239 (6th Cir. 2024)

Sixth Circuit vacates class certification in "phantom activation" case, citing individualized claims and unreliable expert evidence.

Plaintiffs filed a putative class action against Nissan, alleging that the automatic electronic braking systems in certain models were defective. The systems were designed to prevent collisions by alerting drivers and automatically applying the brakes, if necessary. Plaintiffs claimed the systems malfunctioned, causing "phantom activations" in non-threatening situations. Plaintiffs claimed the alleged defect breached warranties, constituted fraud, violated consumer protection laws, and resulted in Nissan being unjustly enriched.

Plaintiffs moved to certify 10 statewide classes of vehicle owners under Rule 23(b)(3). Plaintiffs argued that class treatment was appropriate because a problem in the system's radar resulted in a uniform defect

in each vehicle. Nissan challenged class certification, contending that variations in the putative class and differences in claims across the states overwhelmed commonalities. Nissan further argued that individualized factors, such as warranty terms, reliance, and damages varied across plaintiffs, making class-wide resolution inappropriate. Accepting plaintiffs' contention that common evidence could resolve the claims, the district court certified the 10 classes.

Nissan appealed, and the Sixth Circuit vacated the certification for lack of commonality and predominance. Regarding commonality, the court of appeals explained that a district court must examine the material elements of each claim asserted, and allegations of a single defect are insufficient. The court noted that plaintiffs' claims raised individualized questions, like reliance and causation. As for predominance, the court explained that the district court had failed to consider individualized determinations that would preclude class-wide proof. Without analyzing these elements, the district court improperly assumed that common questions predominated.

The Sixth Circuit also faulted the district court's consideration of expert testimony. It recognized that, under *Daubert*, courts must ensure the credibility of expert evidence when it is relevant to class certification. Here, plaintiffs' expert had not tested vehicles with updated software, and thus the expert's evidence could not show a defect in all vehicles, undermining his conclusion that the defect was consistent across the class. Concluding that plaintiffs had failed to satisfy Rule 23, the court vacated certification and remanded for further proceedings.

Seventh Circuit

Jacks v. Directsat USA, LLC, 118 F.4th 888 (7th Cir. 2024)

Seventh Circuit affirms decertification of Rule 23(c)(4) class for lack of superiority.

Former employees filed a class action against their employer for violations of the Illinois Minimum Wage Law and the Fair Labor Standards Act. In June 2012, the district court certified the proposed class under Rule 23(b)(3). However, after two other courts decertified similar classes in other actions, the district court vacated its previous certification order and instead certified a Rule 23(c)(4) class to resolve fifteen questions related to the employer's alleged liability. A few months before the case was scheduled for trial, the court (under a newly assigned judge) decertified the Rule 23(c)(4) class as well. The plaintiffs appealed the decertification decision.

The Seventh Circuit affirmed, upholding the second decertification. The court rejected plaintiffs' argument that the district court should have deferred to the original judge's order certifying the Rule 23(c)(4) class, noting that Rule 23 orders "may be altered or amended before final judgment." Thus, the district court was within its authority to decertify the class. The court also denied plaintiffs' assertion that the district court had inappropriately encroached on the merits in its decertification decision. Noting that the district court reviewed evidence pertaining to uniform policies and differences in supervisor discretion, the Seventh Circuit confirmed that the district court only considered merits issues to the extent necessary to determine whether plaintiffs had met their burden on class certification.

Highlighting a circuit split, the Seventh Circuit held that to maintain a Rule 23(c)(4) class, plaintiffs must show that common questions predominate in the resolution of each specific issue that is the subject of the certification motion – as opposed to resolution of the entire claim. While the district court erred in considering commonality and predominance as to the entire cause of action, the Seventh Circuit held that it reached the same conclusion as the district court because the Rule 23(c)(4) class did not meet the superiority requirement. In addition to establishing commonality and predominance on the issues

requested, the plaintiffs must also still establish that a class under Rule 23(c)(4) is the most practical and efficient way to resolve the litigation. Imposing the superiority requirement under Rule 23(b)(3) on Rule 23(c)(4) classes acts as a backstop to prevent certification where only minor or insignificant common questions exist. The Seventh Circuit agreed with the district court that too many individualized issues – such as the piece-rate compensation system, the variation in amount and type of work performed, and which employees actually performed the work involved in several of the issues certified – defeated superiority. Because answering the certified issues on a class-wide basis would not materially advance what remained of the case, the Seventh Circuit affirmed.

Judge Easterbrook authored a concurring opinion, noting that the decertification should stand because the named plaintiffs had settled their individual claims but sought to continue to represent the class. The plaintiffs argued that they maintained standing because, if a class were recertified, they would stand to receive incentive awards. Judge Easterbrook rejected this argument because incentive awards would not redress any of plaintiffs’ asserted injuries – an essential element of standing – and because a settling defendant should not be required to pay a settling plaintiff extra after the claims have been resolved.

Ninth Circuit

Batis v. Dun & Bradstreet Holdings, Inc., 106 F. 4th 932 (9th Cir. 2024)

Seeking damages does not necessarily preclude a plaintiff from relying on the public interest exemption to California’s anti-SLAPP statute.

Plaintiff brought a putative class action against a defendant who operated a searchable business-to-business database that contains information about businesses and professionals. Plaintiff challenged the defendant’s use of her name and contact information in a free trial of the database, alleging the use violated her right of publicity under California law. Plaintiff sought injunctive relief, restitution, and damages. Defendant filed a motion to strike under California’s anti-SLAPP statute—which protects against lawsuits designed to chill free speech—arguing plaintiff’s claims arose from defendant’s acts in furtherance of its free speech right. The district court denied the motion to strike, holding plaintiff’s claims did not target protected speech.

A Ninth Circuit panel agreed with the district court, holding plaintiff’s lawsuit was immune from California’s anti-SLAPP statute under a codified public interest exemption. Under the public interest exemption, lawsuits that meet certain conditions, including that a plaintiff not seek relief different from the rest of any class of which she is a member, are exempt from California’s anti-SLAPP statute.

The Ninth Circuit rejected the defendant’s primary argument on appeal that because plaintiff sought damages, she was seeking individualized damages that could differ from the rest of the class, so the public interest exemption did not apply. The panel held that the defendant’s interpretation was “overly restrictive,” and that “the fact that a litigant may receive money from a suit does not inherently bar the application of the public interest exemption.” To meet the public interest exemption, it only matters that nothing in the complaint inherently precludes putative class members from seeking the same types of relief.

Sweet v. Cardona, 121 F.4th 32 (9th Cir. 2024)

Intervenors lacked prudential standing to challenge class action settlement because they could not show formal legal prejudice because of the settlement.

Plaintiffs sued the Department of Education on behalf of a putative class for failure to adjudicate applications under the Student Loan Reform Act. As authorized under the Act, the Secretary of Education developed a program for discharging federal educational loan debts based on the wrongful acts or omissions of the schools attended by borrowers. Under the program, when a borrower applies, the Department engages in factfinding and decides whether and to what extent to grant the borrower repayment relief. If the Department approves the application, it can seek recoupment of funds from the school in a separate adjudicatory proceeding. By June 2019, a backlog of applications had grown to more than 210,000 and the Department had stopped adjudicating applications. The parties eventually reached a settlement. The settlement divided the class into three groups, one of which was an automatic debt forgiveness group for borrowers associated with a list of 151 schools, based on the Department’s finding of “strong indicia regarding substantial misconduct by the listed schools.”

Shortly after the parties moved for preliminary approval of the settlement, four schools on the automatic debt forgiveness list moved to intervene, which plaintiffs and the Department opposed. The district court ultimately permissively allowed the schools to intervene to allow them to object to the class action settlement at the final approval fairness hearing. After the district court considered the schools’ written objections and they were heard at the final fairness hearing, the district court rejected the objections and granted final approval of the settlement. The schools timely appealed.

The Ninth Circuit agreed with the intervening schools that inclusion on the list could cause reputational injury that supports Article III standing. The Ninth Circuit also agreed with the intervenors that their reputational injury was redressable, for example, by requiring that certain statements be retracted from the settlement.

The Ninth Circuit, however, concluded that the intervenors lacked prudential standing to object to the settlement because they would not “sustain some formal legal prejudice as a result of the settlement.” Formal legal prejudice only occurs in rare circumstances when, for example, the settlement agreement formally strips a non-settling party of a legal claim or cause of action. The Ninth Circuit held that the schools did not identify any provision in the settlement agreement or approval order that formally stripped them of any legal claim, defense, or contractual right. Although reputational harm was enough to support Article III standing, it did not give rise to the level of plain legal prejudice. Because nothing in the district court’s order approving the settlement prevented the schools from bringing a separate lawsuit to remedy their alleged reputational harm, the intervening schools lacked prudential standing to object to the settlement. Thus, the Ninth Circuit ultimately affirmed the district court’s ruling.

Black Lives Matter L.A. v. City of Los Angeles, 113 F.4th 1249 (9th Cir. 2024)

Ninth Circuit holds that a court must still rigorously analyze Rule 23 requirements even where a plaintiff asserting a putative class action challenges a government policy that applies class wide.

Plaintiffs brought a class action against the Los Angeles Police Department (LAPD) arising from protests after George Floyd’s death in 2020. The lawsuit included four classes: (1) a direct force class, which sought damages on behalf of every person hit by less-lethal force of any kind; (2) an arrest class, which sought damages on behalf of persons who were arrested for protest activity; (3) an infraction class, which sought damages on behalf of every person arrested for an infraction; and (4) an injunctive relief class.

The direct force, arrest, and infraction classes sought damages under *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658 (1978) (*Monell*). To hold a municipality liable under *Monell*, plaintiffs must prove that a municipal policy or practice caused constitutional violations. Plaintiffs alleged a host of

actions that purportedly implicated *Monell* liability, each of which applied to different class members. To start, plaintiffs alleged that constitutional violations, such as the use of force or overcrowded or otherwise objectionable arrest conditions, were so “repeated” and “widespread” that they amounted to LAPD customs. Next, plaintiffs alleged that Chief Moore—a person with final decision-making authority for the city—was present at some protests and issued some arrest orders himself. Plaintiffs also claimed that some officers were not properly trained. Finally, plaintiffs asserted that Chief Moore learned of some violations after they occurred but chose not to discipline the offending officers.

The injunctive relief class sought to enjoin the LAPD from violating the putative class members’ rights. The plaintiffs contend that these violations include:

1. using unreasonable force on protestors;
2. imposing curfews without “accommodat[ing] the right to peaceably assemble and protest”;
3. declaring assemblies unlawful without “adequate amplification,” “directions,” “means,” and safe opportunities to disperse;
4. arresting people for infractions;
5. detaining arrestees for prolonged periods;
6. using tight handcuffs;
7. denying arrestees bathroom access or food and water;
8. placing arrestees “at great risk of exposure to COVID-19”; and
9. “booking and collecting information” on arrestees.

The district court certified all four classes, concluding that because the damages classes brought *Monell* claims, there were common questions about whether LAPD customs or policies injuries protesters. The district court did not analyze whether those questions predominated, and it did not identify any question common to the injunctive relief class.

The Ninth Circuit vacated the class certification and remanded for the district court to fully address Rule 23’s requirements, holding the district court did not rigorously analyze commonality, nor did it address whether common questions predominate over individual ones. The court added that the omissions were “magnified in [the] case because the plaintiffs seek damages for a plethora of circumstance-dependent and fact-specific constitutional violations.” Plaintiffs argued that *Monell* claims necessarily satisfy Rule 23 because they challenged the defendant’s policies, which applied class wide. The Ninth Circuit disagreed, holding “plaintiffs cannot certify a class by merely alleging that a policy applies class-wide” without showing how common evidence can prove their claims across class members. Although they had identified potentially common questions in the abstract, they had not shown how common evidence could prove the claims of the thousands of members in the classes who had diverging experiences.

Lytle v. Nutramax Labs., Inc., 114 F.4th 1011 (9th Cir. 2024)

Ninth Circuit holds that an unexecuted damages model can demonstrate that damages are susceptible to common proof at the class certification stage.

Plaintiffs filed a consumer class action against Nutramax, claiming violations of the California Consumer Legal Remedies Act (CLRA) for marketing a pet supplement as promoting healthy joints in dogs, when it allegedly provided no such health benefit. The district court certified a class of California purchasers of

the pet supplement who were exposed to the alleged misleading statements. The Ninth Circuit affirmed the decision.

Nutramax appealed the class certification order on two grounds: (1) it challenged the court's reliance on a proposed damages model; and (2) it challenged the court's conclusion that reliance was susceptible to common proof.

First, the Ninth Circuit rejected Nutramax's argument that a plaintiffs' damages model based on a proposed "conjoint survey" that had not actually been performed could not support class certification. A conjoint survey allows a researcher to test the economic value a consumer places on a given product feature, such as a particular statement on a package, by showing the product to individual survey participants with and without certain features, and then using the survey responses to calculate the economic value consumers place upon the feature. Nutramax argued that because plaintiffs' expert had not applied the conjoint analysis (he had only proposed how he would do the analysis at the time of class certification), plaintiffs failed to demonstrate predominance. The Ninth Circuit held there is no requirement that the evidence plaintiffs relied upon to support class certification be presented in an admissible form at the class certification stage, nor is there a requirement that class action plaintiffs prove that class wide damages exist for class certification. The Ninth Circuit ultimately held that plaintiffs may rely on an unexecuted damages model to demonstrate that damages are susceptible to common proof.

Second, the Ninth Circuit rejected Nutramax's argument that the district court erred in concluding that common questions predominated as to reliance. Although plaintiffs had to show Nutramax engaged in deceptive conduct and that the deception caused them harm, under the CLRA, causation can be established presumptively on a class-wide basis if the statement was material. The Ninth Circuit held that district court did not err in finding that Nutramax failed to rebut the presumption.

Krayzman v. Yalla Ventures, Inc., 2:24-cv-03610-AB-AS, 2024 WL 4536761 (C.D. Cal. Oct. 16, 2024)

Reliance requirements for common-law fraud claims make nationwide claim certifications difficult.

Plaintiff brought a putative nationwide class allegation against an air purifier manufacturer asserting consumer protection and fraud claims related to the manufacturer's online representations about an air purifier's efficacy. The manufacturer moved to dismiss all claims and strike plaintiff's class allegations. The district court dismissed the plaintiff's equitable claims for failure to allege an inadequate legal remedy. Although the district court denied the motion to dismiss as to plaintiff's common-law fraud claim, it struck plaintiff's nationwide class allegations because reliance is a necessary element of the claim. Not only would proof of reliance require individualized inquiries, but variations in state law as to reliance requirements also precluded nationwide class allegations.

Groff v. Keurig Green Mt., Inc., 5:23-cv-01492-SSS-SPx, 2024 WL 4414768 (C.D. Cal. Sept. 25, 2024)

A misrepresentation claim based on a Magnusson-Moss Warranty Act violation cannot by itself support a UCL claim—a plaintiff must also allege the violation caused the injury.

Plaintiff filed a putative class action alleging Keurig violated California's Unlawful Competition Law (UCL) by misrepresenting to her that a warranty for her coffeemaker was valid only if she used an authorized

provider to perform repairs on her coffeemaker. Even if such a condition violates the Magnuson-Moss Warranty Act's anti-tying provisions, Keurig argued plaintiff lacked statutory standing under the UCL because she failed to allege her economic injury was "as a result of" Keurig's alleged unlawful or unfair business practices. The court agreed, holding plaintiff failed to allege that she read the warranty at issue in the case. Because plaintiff had been given leave to amend and plaintiff only added "scant allegations," the court dismissed the second amended complaint without leave to amend. Plaintiff appealed and the matter is pending.

Campbell v. Sunshine Behav. Health, LLC, 105 Cal. App. 5th, 325 Cal. Rptr. 3d 832 (2024)

A defendant waives its right to compel arbitration when it inexplicably delays in moving to compel arbitration nine months after answering.

A former employee of defendant filed a putative class action for wage and hour violations. The defendant proceeded with litigation, including entering a joint stipulation to participate in mediation. Three months after answering, the defendant asserted it located, for the first time, an arbitration agreement in the plaintiff's personnel file, with no explanation for why the document was not or could not have been located earlier. Four months after that, the defendant advised plaintiff it would not participate in mediation and planned to move to compel arbitration. The defendant then moved to compel arbitration more than a month after that (nine months after answering). The Court of Appeal affirmed the trial court's ruling that the defendant had waived any right to arbitration, concluding it was "highly probable" that the defendant knew of its right to compel arbitration.

Tenth Circuit

Melnick v. TAMKO Bldg. Prods. LLC, 19-cv-2630-JAR-BGS, 2024 U.S. Dist. LEXIS 131600 (D. Kan. July 25, 2024)

Traditional product liability claims present too many individualized inquiries to be certified as a class action.

A married couple, an individual, and a corporation brought a putative class action based on various product liability and warranty claims, alleging defendant's roofing shingles were defective and failed before their expected or warrantied service life. The district court denied plaintiffs' motion for class certification.

As to the Rule 23(a) requirements, the court found plaintiffs did not meet typicality or adequacy requirements because their claims were subject to unique defenses.

The court also found that plaintiffs failed to meet Rule 23(b) requirements because individualized inquiries outweighed any common questions. The court found, for example, that individualized inquiries into the shingles' production precluded a finding that plaintiffs' defect claims were susceptible to class wide proof. The court also found individualized causation issues predominated because there were many reasons why a roof could fail, including ordinary wear and tear. Likewise, the court found that individualized issues and variations in state law precluded a finding of superiority.

The court also rejected plaintiffs' request for issue certification. First, plaintiffs' "cursory reference" as to which issues they sought to certify was insufficient. Second, plaintiffs failed to show how any issue class

would satisfy predominance and how it would be superior to other adjudication methods. Third, plaintiffs did not adequately explain how certifying any issues would materially advance the litigation.

Finally, the court denied plaintiffs' request for certification of a class under Rule 23(b)(2), which sought to require defendant to establish an inspection program requiring it to inspect upon request a class member's shingles to determine whether the product exhibited product deterioration or failures, with the ultimate result of replacing or repairing the allegedly defective product. The court rejected plaintiffs' argument that any monetary damages defendant may have to pay because of injunctive relief was incidental, because plaintiffs' request effectively resulted in individualized monetary damages.

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