GIBSON DUNN

Emerging Issues and Trends in Class Actions: Three Splits and Four Issues on the Horizon for 2024

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Class action filings continue to rise and present substantial exposure to companies. This article previews several issues that will impact these cases in the year ahead, including significant circuit splits and procedural disputes. **I. Three Circuit Splits to Watch …** There are several emerging circuit splits that may be ripe for Supreme Court review, including on ascertainability, "fail-safe" classes, and personal jurisdiction.

A. Ascertainability—What Good Is a Class If You Can't Tell Who's In It?

For years, courts have grappled with whether a Rule 23(b)(3) class can be certified if it's not ascertainable. After all, what good does it do to certify a class if there's no easy way to tell who is part of it? Most circuits agree that at a minimum, Rule 23 requires that a class be defined using objective criteria. Many practical-minded judges have further recognized that the text, structure, and purpose of Rule 23 also require a reliable and administratively feasible way to determine who is, and who is not, part of a certified class. The Third Circuit recently joined the First and Fourth Circuits in adopting this heightened ascertainability requirement as a formal Rule 23(b)(3) prerequisite. *In re Niaspan Antitrust Litig.*, 67 F.4th 118, 133–34 (3d Cir. 2023); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014). But not all courts agree, with some holding that there is no heightened requirement to "ascertain" class members before certification. For example, in *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1304 (11th Cir. 2021), the Eleventh Circuit reasoned that "administrative feasibility" is just one of many factors that courts can consider when assessing certification. In this decision, the Eleventh Circuit joined the Second, Sixth, Seventh, Eighth, and Ninth Circuits in rejecting a strict "ascertainability" requirement in Rule 23(b)(3). *See id.* at 1302. In the Eleventh Circuit's view, "administrative difficulties … do not alone doom a motion for certification," and "manageability problems will rarely, if ever, be in themselves sufficient to prevent certification." *Id.* at 1304 (cleaned up). But is the Eleventh Circuit right? As the Third Circuit observed, if "members of a Rule 23(b)(3) class cannot be identified in an economical and administratively feasible manner, the very purpose of the rule is thwarted." *Niaspan*, 67 F.4th at 132. Ascertainability thus goes part in parcel with the objectives that rule makers had in mind when drafting Rule 23. Being able to actually identify class members protects absent class members by ensuring a way to disseminate the "best notice practicable" under Rule 23(c)(2) and helping them understand who is, and is not, bound by a class judgment. *See id.* at 132 (citing *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012)). The purpose of the class device is to "save[] the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). Even in circuits that may not recognize formal ascertainability as a prerequisite to certification, defendants should continue to raise these issues because the Supreme Court may eventually weigh in.

B. Fail-Safe Classes—Do They Fail Rule 23?

Can a class be defined based on the merits of the claim? One problem with a "fail-safe" class is that it creates a "heads I win, tails you lose" proposition for defendants: by

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defining a class as including only those entitled to relief, such a class would "shield[] the putative class members from receiving an adverse judgment," because "[e]ither the class members win or, by virtue of losing, they are not in the class and, therefore, not bound by the judgment." *Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011). Several circuits—including the First, Third, Sixth, Seventh, and Eighth—have adopted a bright-line rule prohibiting fail-safe classes. *See Orduno v. Pietrzak*, 932 F.3d 710, 716 (8th Cir. 2019); *McCaster v. Darden Rests., Inc.*, 845 F.3d 794, 799 (7th Cir. 2017); *Byrd v. Aaron's Inc.*, 784 F.3d 154, 167 (3d Cir. 2015); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 (1st Cir. 2015); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012). Other circuits stop short of a per se prohibition, but have recognized that such classes are inherently suspect. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 n.14 (9th Cir. 2022) (en banc); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1276–77 (11th Cir. 2019); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 360 n.9 (4th Cir. 2014). But a minority of circuits have rejected such a prohibition. *See In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012). Earlier this year, the D.C. Circuit declined to impose a prohibition against fail-safe classes. *In re White*, 64 F.4th 302 (D.C. Cir. 2023). Although it recognized the majority of circuits forbid (or at the very least, strongly discourage) "fail-safe" classes, the D.C. Circuit reasoned that the existing Rule 23 framework adequately addresses these problems. *Id.* at 312. However, the court did recognize that the issue "is an important, recurring, and unsettled question of class action law." *Id.* at 310. The Supreme Court denied a petition for writ of certiorari from this decision, but it may be only a matter of time before this issue reaches the High Court.

C. Personal Jurisdiction in Class Actions—Does the Bristol-Myers Squibb *Rule Apply to Nationwide Classes?*

Bristol-Myers Squibb Co. v. Superior Court, 582 U.S. 255 (2017), ruled that a California state court could not assert jurisdiction over the tort claims of non-California plaintiffs against a non-California defendant. Since that decision, lower courts have considered whether this "mass tort" rule applies in class actions. In recent years, the Third, Sixth, and Seventh Circuits have held that *Bristol-Myers Squibb* does not apply in this context, because defendants litigate only against named plaintiffs and not absent class members. *See Fischer v. Fed. Express Corp.*, 42 F.4th 366 (3d Cir. 2022); *Lyngaas v. Curaden AG*, 992 F.3d 412 (6th Cir. 2021); *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020). These courts reason that "the named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so." *Mussatt*, 953 F.3d at 447. These holdings have drawn dissents. In *Lyngaas*, Judge Thapar argued that courts "cannot just assume that jurisdiction over the class representative's claims confers jurisdiction over the claims of the class" because, under *Bristol-Myers*, courts "lack[] the power to decide the absent class members' claims if they arise from wholly out-of-state activity." 992 F.3d at 441 (Thapar, J., concurring in part and dissenting in part). Likewise, Judge Silberman dissented from a D.C. Circuit decision holding that this question was not ripe at the pleadings stage: "the class action mechanism … is not a license for courts to enter judgments over claims which they have no power." *Molock v. Whole Foods Mkt. Grp. Inc.*, 952 F.3d 293, 307 (D.C. Cir. 2020) (Silberman J., dissenting). Although no court has held that *Bristol-Myers* expressly applies in the class action context, some courts have applied it to FLSA claims. *See, e.g.*, *Fischer*, 42 F.4th at 380; *Canaday v. Anthem Cos.*, 9 F.4th 392 (6th Cir. 2021); *Vallone v. CJS Sols. Grp., LLC*, 9 F.4th 861 (8th Cir. 2021); *but see Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84 (1st Cir. 2022) (holding that *Bristol-Myers* does not apply to collective actions). In March, the Supreme Court declined a cert petition raising the FLSA issue. *Fischer v. Fed. Express Corp.*, 143 S. Ct. 1001 (2023). **II. … and Four Trends We're Watching** The following issues involving Article III, "mass" arbitrations, arbitration waiver, and class settlements also continue to percolate in the courts.

A. Article III Injury and Standing in Class Actions

While the Supreme Court has provided guidance on the interplay between class actions and Article III standing, lower courts continue to delineate the metes and bounds of

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standing for statutory violations—as we have discussed in prior quarterly updates here, here, and here. This question of statutory standing dovetails with another trend we have observed in recent years, which is the continued prevalence of privacy class actions (e.g., class actions alleging data breach, data collection/tracking, statutory privacy claims). *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), has proved to be a significant decision. In that case, the Supreme Court held that every member of a class certified under Rule 23 must establish Article III standing to be awarded individual damages. It further explained that "an injury in law is not an injury in fact," and "[o]nly those plaintiffs who have been *concretely harmed* by a defendant's statutory violation" have standing. *Id*. at 427. Although all class members had suffered a statutory violation (for inaccurate information on their credit reports and the company's failure to disclose information required under the Fair Credit Reporting Act), most did not experience a "physical, monetary, or cognizable intangible harm" necessary to establish a concrete injury under Article III (because the inaccurate credit information was not disclosed to third parties). *Id*. While *TransUnion* requires absent class members demonstrate standing to receive monetary damages, that case involved a jury verdict awarding each class member (including those who were not concretely harmed) both statutory and punitive damages. The Supreme Court did not address how courts should treat motions to certify where the class contains some number of uninjured absent class members, but instead stated that "[p]laintiffs must maintain their personal interest in the dispute at all stages of litigation" and a plaintiff "must demonstrate standing 'with the manner and degree of evidence required at the successive stages of the litigation.'" *TransUnion*, 592 U.S. at 431. Courts have disagreed on whether a class may be certified when a single absent class member cannot prove Article III standing. The majority of courts have held that classes with absent class members who lack standing may be certified, but only if the number of uninjured class members is "de minimis"—though the precise limits remain unsettled. While these cases generally predate *TransUnion*, they are currently still seen as good law, though *TransUnion*'s impact is still uncertain. For example, the D.C. Circuit acknowledged that the few decisions involving uninjured class members "suggest that 5% to 6% constitutes the outer limits of a *de minimis* number" of class members who are uninjured. *In re Rail Freight Fuel Surcharge Antitrust Litig.- MDL No. 1869*, 934 F.3d 619, 625 (D.C. Cir. 2019). Other courts have similarly held that a class may be certified when the class includes a small number of uninjured class members, but not when the number is so large to defeat predominance.[1] The Ninth Circuit, on the other hand, rejected the D.C. and First Circuits' categorical rule precluding certification of a class that includes more than a de minimis number of uninjured class members. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (en banc) ("[W]e reject the dissent's argument that Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members."). The en banc court reversed a panel decision adopting the "de minimis" requirement, though it emphasized that individual questions of class members' injury—both as an element of the underlying claim and as a requirement of Article III—can sometimes predominate over common questions, precluding certification under Rule 23(b)(3). *Id*. Similarly, courts have applied the standing requirement inconsistently in the settlement context. In *Drazen v. Pinto*, the Eleventh Circuit held that every settlement class member must have standing before settlement class can be certified. 41 F.4th 1354, 1359 (11th Cir. 2022), *rev'd on other grounds*, 74 F.4th 1336 (11th Cir. 2023) (en banc); *id*. at 1362 ("when a class seeks certification for the sole purpose of a damages settlement under Rule 23(e), the class definition must be limited to those individuals who have Article III standing"). The Second Circuit, on the other hand, certified a Rule 23(b)(2) class where absent class members lacked standing, reasoning that "[s]tanding is satisfied so long as at least one named plaintiff can demonstrate the requisite injury." *Hyland v. Navient Corp.*, 48 F.4th 110, 117 (2d Cir. 2022).

B. The Continued Rise in "Mass" Arbitrations

In recent years, the Supreme Court has repeatedly recognized that arbitration clauses and class action waivers must be enforced according to their terms. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339-344 (2011); *Lamps Plus, Inc. v. Varela*, 139 S. Ct.

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1407, 1415 (2019); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1630-32 (2018). Many plaintiffs' lawyers have responded to these decisions by filing "mass" arbitrations, often on behalf of claimants who have had no business dealings with the respondents. The strategy is to rack up thousands or millions of dollars in filing fees (which typically are borne solely by the respondents), and to extort a windfall settlement from a company. This issue recently came to a head in an Illinois case now on appeal, *Wallrich v. Samsung Electronics America Inc.*, No. 22-C-5506, 2023 WL 5935024 (N.D. Ill. Sept. 12, 2023). The plaintiffs filed petitions to compel arbitration on behalf of nearly 50,000 consumers, resulting in an assessment of ***$4.125 million*** in initial filing fees by the American Arbitration Association (AAA). *Id*. at *3. When the defendant declined to pay, plaintiffs filed an action to compel the defendant to arbitration and pay the fees. After dismissing the portion of claimants who failed to properly allege venue, the district court ordered Samsung to pay the filing fees for the 35,000 remaining claimants. *Id.* at *13. This ruling disregarded evidence that the claimants were leveraging the court and arbitration proceedings to extract a windfall settlement, as well as the fact that compelling arbitration was improper, given that the claimants could either pursue their claims in court or proceed in arbitration by fronting the filing fees. *See* Mot. to Dismiss Petition to Compel Arbitration, *Wallrich v. Samsung Electronics America Inc.*, No. 22-C-5506 (N.D. Ill.). The court also refused to engage with the question of whether claimants' filing of mass arbitration was inconsistent with the arbitration agreement's prohibition on collective actions. *Wallrich*, 2023 WL 5935024 at *9. This case is now on appeal and is one to watch in 2024. *Wallrich* demonstrates that mass arbitration can sometimes impose significant costs on defendants. The risk on both sides of the coin seems to have led to a somewhat slower rise in mass arbitrations than some expected. One survey—the 2023 Carlton Fields Class Action Survey—found that only 3.9% of companies had experienced mass arbitrations in the prior 12 months. *See* Carlton Fields, *2023 Carlton Fields Class Action Survey*, at 29, https://www.carltonfields.com/getmedia/d71bff8d-56f9-4448-89e1-2d7ee3f8fe6a/2023-carlton-fields-class-action-survey.pdf. Nevertheless, practitioners have observed a growth of mass arbitrations, particularly in the consumer and privacy areas, and it is important for defendants to carefully consider how their arbitration agreements may be implemented in the mass arbitration context.

C. Arbitration Waivers After Morgan v. Sundance

Courts continue to grapple with the question of when defendants waive their right to arbitration following the Supreme Court's 2022 decision in *Morgan v. Sundance*, 142 S. Ct. 1708, 1714 (2022), which eliminated the longstanding requirement that a party opposing arbitration on the grounds of waiver needed to demonstrate prejudice. Since that decision, while the waiver analysis remains highly fact specific, we have seen that courts are more willing to find waiver. For example, in *Hill v. Xerox Business Servs*., 59 F.4th 457 (9th Cir. 2023), the Ninth Circuit in a 2-1 decision found that the defendant waived its right to arbitration against absent class members by not moving to compel at outset of the case—even though those absent class members were not yet parties to the proceeding, as no class had been certified. Other circuits have also been more inclined to find waiver. *See*, *e.g.*, *White v. Samsung*, 61 F.4th 334 (3d Cir. 2023). Other circuits are less so willing to find waiver, particularly as to absent class members. For example, the Eighth Circuit concluded that defendant did not waive its right to compel arbitration against absent class members because there were no arbitration agreements with the named plaintiffs, and the defendant moved to compel arbitration promptly after the class was certified. *See H&T Fair Hills, Ltd. v. Alliance Pipeline L.P.*, 76 F.4th 1093 (8th Cir. 2023). The issue of waiver, particularly as to absent class members, thus remains an issue we are actively monitoring going into the next year.

D. Continued Judicial Scrutiny of Class Settlements

Many class actions are ultimately resolved through settlement. Perhaps sparked by vocal objectors—and fueled by high-profile class settlements that are larger than ever—we have continued to see courts taking on active roles in scrutinizing class settlements. *See, e.g.*, *Kim v. Allison*, 87 F.4th 994 (9th Cir. 2023) (scrutinizing adequacy of named plaintiff).

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Some of the more frequently litigated issues concern the scope of releases in class settlement agreements; potential conflicts of interest between the lead plaintiffs, counsel, and absent settlement class members; and plans of distribution. *See, e.g.*, *In re Blue Cross Blue Shield Antitrust Litig.*, 85 F.4th 1070 (11th Cir. 2023) (analyzing class releases, adequacy of representation, and fairness of distribution plan). Awards of attorney fees in connection with class settlements also continue to draw objections, with courts keeping a close eye on whether such awards are justified and reasonable. *See, e.g.*, *In re Broiler Chicken Antitrust Litig.*, 80 F.4th 797 (7th Cir. 2023) (vacating fee award and remanding for "greater explanation" to justify award); *Lowery v. Rhapsody Int'l, Inc.*, 75 F.4th 985 (9th Cir. 2023) (holding fees should be based on actual, not theoretical, recovery by class). Because parties should expect potential objectors to scour settlements for potential weaknesses, settling parties review settlement terms carefully to ensure they withstand the watchful eye of objectors and judges alike. Defects in class settlements can result in increased administrative expenses, undermine the certainty and finality that class settlements afford to all parties, and delay the distribution of settlement benefits to the class. Another issue receiving attention is the practice of awarding incentive awards to named plaintiffs in class settlements. These awards arose several decades ago, and have been increasingly common in class settlements. The theory is that the named plaintiff and class representative should be compensated above and beyond the class recovery, to "incentivize" people to serve as class representatives and to recognize the time and effort spent in discovery and for lending their names to the lawsuit. These awards had been largely non-controversial until a few years ago, when the Eleventh Circuit held that such incentive awards are impermissible under a century-old Supreme Court case prohibiting payment of salaries or expenses for a plaintiff that initiated litigation to preserve securities owed to himself and other creditors. *See Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2020) (citing *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885)). So far, it does not appear there's much appetite for other circuits to follow the Eleventh Circuit's approach, and incentive awards remain permissible in all other circuits. The Supreme Court also denied a petition for review of the Eleventh Circuit's *Johnson* decision, suggesting that the Eleventh Circuit will remain the outlier for the foreseeable future. One final issue that bears watching is the rise of fraud in class settlement administration. In recent years, there have been reports of fraudulent claims activity in connection with some class settlements, including the use of automated "bots" to submit fraudulent claims en masse from suspicious IP addresses or email domains. These efforts have picked up considerably over the last year. This type of sophisticated fraud jeopardizes settlement approval, harms legitimate class members, and undermines trust in the process. While these criminals are using increasingly sophisticated technology to perpetrate fraud, settlement administrators are developing new tools to detect and weed out fraud during settlement administration. Parties should ensure that administrators are capable to handle these sophisticated fraud efforts.

_____ [1] *See, e.g.*, *In re Asacol Antitrust Litig.*, 907 F.3d 42, 47, 51-58 (1st Cir. 2018) (denying class certification when thousands of class members suffered no injury); *see also Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 657–59 (4th Cir. 2019) (rejecting argument that uninjured class members should preclude certification because "there is simply not a large number of uninjured persons"); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (recognizing "'a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant,'" but acknowledging "[t]here is no precise measure for 'a great many'"); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019) (stating that when a large portion of the class does not have standing, individualized issues may predominate).

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