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GIBSON DUNN

Class Actions Update November 6, 2025

Class Actions 2025 Third Quarter Update

This update provides an overview of key class action-related developments from the third quarter of 2025 (July to September).

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I. The Seventh and Ninth Circuits Address District Court Engagement with Expert Evidence on Damages

For over a decade, the federal courts of appeals have split on whether expert evidence offered in support of (or opposition to) class certification must be admissible. In dueling decisions over this last quarter, the Seventh and Ninth Circuits took different approaches to how district courts should analyze expert evidence at certification, including with respect to whether a full *Daubert* analysis is appropriate and when the court must go beyond merely determining admissibility.

In *Arandell Corp. v. Xcel Energy Inc.*, 149 F.4th 883 (7th Cir. 2025), the plaintiffs sought certification of a statewide class of industrial and commercial buyers of natural gas in a state-law price-fixing case. The parties submitted extensive expert evidence addressing whether the plaintiffs could prove antitrust impact with common evidence. The district court certified the class after ruling that the experts' opinions were admissible, but it "did not expressly address or make findings about the defense arguments that the plaintiffs' models were inadequate so as to defeat predominance." *Id.* at 891. On interlocutory appeal under Rule 23(f), the Seventh Circuit vacated the certification order, emphasizing that "expert evidence can be admissible . . . but still fall short of proving the Rule 23 requirements for class certification." *Id.* at 894. Accordingly, "where the defendants have offered admissible evidence that, if credited, would mean that individual questions would predominate over common questions," courts must investigate and resolve those disputes, rather than punting them to the merits phase. *Id.* "Otherwise, any party would be able to obtain (or defeat) class certification just by hiring a competent expert." *Id.*

The Ninth Circuit has previously held that district courts may rely on expert evidence in ruling on class certification even where the evidence is inadmissible. *Lytle v. Nutramax Laby's, Inc.*, 99 F.4th 557, 570-71 (9th Cir. 2024). The Ninth Circuit reaffirmed that approach this quarter in *Noohi v. Johnson & Johnson Consumer Inc.*, 146 F.4th 854 (9th Cir. 2025), a consumer class action in which the plaintiffs claimed that a skin-care product was misleadingly labeled as "oil free." In support of class certification, the plaintiffs offered testimony from an expert who proposed a survey to prove classwide damages—but by the time of certification, the expert still had not formulated questions for the survey, executed the survey, or calculated damages. *Id.* at 861. The district court certified the class anyway, and the Ninth Circuit affirmed. *Id.* The Ninth Circuit reasoned that plaintiffs need only "demonstrate that the proposed method will be viable as applied to the facts of" their case, and that the defendant's challenges to the expert's proposed model were "not ripe at the class certification stage." *Id.* at 864.

Noohi also illustrates ongoing tension in Ninth Circuit case law. It arguably conflicts with the Ninth Circuit's prior decision in *Olean Wholesale Grocery v. Bumble Bee Foods*, 31 F.4th 651 (9th Cir. 2022) (en banc), which held that plaintiffs "may use any *admissible* evidence" to satisfy their burden at class certification. *Id.* at 665 (emphasis added). More broadly, the Ninth Circuit's recent decisions also conflict with case law from the Third, Fifth, and Seventh Circuits, which require admissible evidence in order to sustain class certification. *Prantil v. Arkema Inc.*, 986 F.3d 570, 575-76 (5th Cir. 2021); *In re Blood Reagents Antitrust Litig.*, 783 F3d 183, 186-88 (3d Cir. 2015); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010). The Supreme Court granted review on this issue in *Comcast Corp. v. Behrend*, 567 U.S. 933 (2012), but did not resolve it, 569 U.S. 27 (2013).

II. Quartet of Decisions on Waiver or Default of Arbitration Rights

Four courts of appeals issued decisions this quarter addressing parties' waiver or default of arbitration rights. These decisions provide invaluable guidance for parties looking to enforce arbitration agreements, including with respect to claims that might otherwise be lumped into class actions.

Beware of pressing forward with litigation. In *Schnatter v. 247 Group, LLC*, — F.4th —, 2025 WL 2612017 (6th Cir. 2025), the Sixth Circuit affirmed the denial of a motion to compel on the grounds that the defendant had defaulted on its right to arbitrate by litigating extensively in federal court before moving to compel.

The defendant (Laundry Service) moved to compel arbitration based on a nondisclosure agreement between the parties after litigating the case for four years and losing its motion for summary judgment, but the Sixth Circuit affirmed the district court's ruling that Laundry Service had acted "inconsistently" with an intent to arbitrate. *Id*. at *8. The court of appeals emphasized that (1) Laundry Service had acknowledged its right to arbitrate in its second motion to dismiss; (2) the district court had warned Laundry Service at the hearing on that motion that, given how far the suit had progressed, it was at risk of forfeiting its right to compel arbitration; and (3) Laundry Service knew it could have moved to compel arbitration in the alternative to dismissal or summary judgment. *Id*. The court held that by "seeking complete victory on the merits in the district court without invoking its arbitration rights even in the alternative, Laundry Service manifested its intent to litigate rather than arbitrate this dispute." *Id*.

No waiver unless the party knows or should have known that the right exists. The Sixth Circuit in *In re Chrysler Pacifica Fire Recall Products Liability Litigation*, 143 F.4th 718 (6th Cir. 2025), reversed the district court's *sua sponte* ruling that Chrysler had waived its right to arbitrate through its participation in litigation.

After moving to dismiss, Chrysler discovered that 18 of the 69 relevant purchase agreements between the plaintiffs and car dealerships contained arbitration agreements and promptly moved to compel arbitration as to those plaintiffs. In opposing the motion to compel, the plaintiffs did not raise waiver as a ground for denial. The district court, however, denied the motion, ruling *sua sponte* that FCA had waived any right to arbitrate by acting "inconsistently" with its arbitration rights by first moving to dismiss. *Id*. at 722.

The Sixth Circuit reversed. *Id*. at 725. While the court acknowledged that constructive knowledge may give rise to a claim of waiver, it rejected the notion "that a party can waive its arbitration rights without first knowing those rights exist." *Id*. at 724. To find waiver, "the district court first needed to determine that [Chrysler] knew or should have known that its arbitration rights existed when it moved to dismiss, but the district court believed that such knowledge was irrelevant." *Id*. at 725. As a result, the Sixth Circuit concluded that the district court could not have found waiver because it had not attempted "to determine that [Chrysler] knew or should have known that its arbitration rights existed when it moved to dismiss." *Id*.

Newly asserted claims can revive waived arbitration rights. In *Lackie Drug Store, Inc. v. OptumRx, Inc.*, 144 F.4th 985 (8th Cir. 2025), the Eighth Circuit partially reversed a district court ruling denying OptumRx's motion to compel arbitration, concluding that OptumRx had waived arbitration of three claims that had been pending before the district court for over two years. But the Eighth Circuit reversed as to two claims that had been recently added to the case via an amended complaint, holding that an arbitrator must determine whether those new claims were arbitrable. *Id*. at 999.

As to the newly pled claims, the Eighth Circuit held that because "a waiver of arbitral rights only applies to claims that were actually pled, not hypothetical ones not yet raised," OptumRx could seek to compel arbitration as to the two newly added claims. *Id*. at 995. The Eighth Circuit also held, with respect to those claims, that any threshold disputes about arbitrability had been validly delegated to the arbitrators because the parties had included a clear and unmistakable delegation provision in their agreement. *Id*. at 998.

Lackie serves as a reminder not only that a party seeking to arbitrate should move to compel arbitration as early as possible (even if in the alternative), but also that a previous waiver of the right to arbitrate will not destroy arbitration rights with respect to claims that have not yet been asserted.

Use unmistakable language to delegate waiver issues to arbitration. Finally, in *Lamonaco v. Experian Information Solutions, Inc.*, 141 F.4th 1343 (11th Cir. 2025), the Eleventh Circuit reversed the district court's denial of Experian's motion to compel arbitration under an online "clickwrap" agreement, which not only committed users to arbitration but also delegated threshold questions of arbitrability to the arbitrator.

The court of appeals first held that the district court erred in finding no obligation to arbitrate because Experian had presented a detailed declaration outlining the enrollment process that resulted in the asserted agreement. *Id*. at 1348. The Eleventh Circuit also reversed the district court's alternative ruling that Experian had waived its right to compel arbitration, concluding that the parties had "clearly and unmistakably agreed to arbitrate" threshold arbitrability questions, including any issues with respect to waiver. *Id*. at 1349.

Lamonaco confirms that while waiver is presumptively a question for courts, the parties can commit the issue to arbitration, provided they do so in clear and unmistakable terms.

III. Circuit Split Deepens over Certification in "Total Loss" Cases

Plaintiffs around the country have brought class actions challenging how auto insurers resolve claims after a car is totaled. This quarter, the Third, Seventh, and Ninth Circuits rejected class certification in such "total loss" cases on the ground that individualized issues about to the fair market value of putative class members' cars would overwhelm common questions—only for the Sixth Circuit to then depart from those courts' reasoning in a divided opinion. These cases illustrate a persistent tension in class-action law about Rule 23's rigorous requirements in cases involving valuation disputes.

In a trio of cases—*Drummond v. Progressive Specialty Insurance Co.*, 142 F.4th 149 (3rd Cir. 2025), *Schroeder v. Progressive Paloverde Ins. Co.*, 146 F.4th 567 (7th Cir. 2025), and *Ambrosio v. Progressive Preferred Ins. Co*., —F.4th—, 2025 WL 2628179 (9th Cir. 2025)—the Third, Seventh, and Ninth Circuits rejected class certification in cases challenging Progressive's use of Projected Sold Adjustments (PSA), which are reductions to the advertised prices of comparable vehicles to account for the fact that dealers and buyers typically negotiate down to a lower sales

price, in estimating the fair market value of their totaled vehicles. In each case, Progressive opposed class treatment on the ground that their policies promised to pay only the totaled car's "actual cash value," meaning each case would hinge on individualized proof as to the fair market value of each class member's vehicle compared to the total payout they received.

The Third, Seventh, and Ninth Circuits sided with the insurer. In *Drummond*, the Third Circuit explained that because the plaintiffs' theory of liability centered on Progressive's "breach[ing] its insurance agreement with insureds by underpaying them," 142 F.4th at 155, resolving the claims of all claims members would necessarily require the court to take highly individualized evidence of "the *true [value]* of the totaled vehicle" for each class member, *id*. at 158-62. Similarly, in *Schroeder*, the Seventh Circuit held that "individual questions overwhelm any common ones" because the insurer still could have paid class members the actual cash value for their cars, no matter the assertedly improper method used to reach that result. 146 F.4th at 571. The Ninth Circuit in *Ambrosio* expanded on this reasoning, holding that Progressive's use of PSAs could not serve as common evidence because: (1) the insurance policies did not prohibit the use of PSAs; and (2) valuations based in part on PSAs could still result in an insurance payout that matched or exceeded the car's true value, resulting in no injury. 2025 WL 2628179, at *10-12.

Then, a divided Sixth Circuit panel departed from those decisions in *Clippinger v. State Farm Automobile Insurance Co*., — F.4th —, 2025 WL 2861217 (6th Cir. 2025). As in the cases against Progressive, *Clippinger* involved an adjustment to account for typical dealer negotiation. Acknowledging that its decision conflicted with those of other circuits, the majority affirmed class certification, characterizing all individualized issues about whether the payments the policyholders received were less than the fair market value of their totaled cars as merely damages issues that could be tried separately. *Id.* at *10.

In dissent, Judge Murphy objected that the majority was creating a circuit split because five courts of appeals (the Fourth and Fifth Circuits, along with the Third, Seventh, and Ninth Circuits) rejected class certification in precisely this type of case. *Id*. at *14; *see also Freeman v. Progressive Direct Ins. Co.*, 149 F.4th 461, 468-71 (4th Cir. 2025); *Sampson v. USAA*, 83 F.4th 414, 421-23 (5th Cir. 2023). Judge Murphy explained that a "jury would have to identify [each car's] fair market value *for each class member* before it could resolve the primary two elements of that class member's breach-of-contract claim," including "whether State Farm *breached* the policy" at all. *Clippinger*, 2025 WL 2861217 at *20.

Gibson Dunn represents State Farm in connection with *Clippinger v. State Farm Automobile Insurance Co*., — F.4th —, 2025 WL 2861217 (6th Cir. 2025). Gibson Dunn also represents OptumRx in connection with *Lackie Drug Store, Inc. v. OptumRx, Inc.*, 144 F.4th 985 (8th Cir. 2025).

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