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GIBSON DUNN

Class Actions Update February 26, 2026

Class Actions 2025 Fourth Quarter Update

This update provides an overview of key class action–related developments from the fourth quarter of 2025 (October through December), plus a look ahead to issues in 2026.

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I. The Sixth and Eighth Circuits Take Up Predominance Issues, Including in Rare En Banc Proceeding

Predominance under Rule 23(b)(3) continues to be a significant focus for appellate review of class-certification decisions. We report on two notable developments from the Sixth and Eighth Circuits that will be of interest to class-action practitioners in those circuits.

In a previous update, we highlighted the Sixth Circuit's divided decision in *Clippinger v. State Farm Automobile Insurance Co.*, 156 F.4th 724 (6th Cir. 2025), which created a 5–1 circuit split involving class certification in "total loss" auto-insurance cases. There, the panel majority affirmed certification of a Tennessee insured's class challenging the defendant's practice of adjusting advertised prices of used vehicles to account for typical negotiation, treating many valuation- and injury-related disputes as mere damages issues that could be deferred until later in the litigation. *Id.* at 738-45.

Late last month, the Sixth Circuit granted rehearing en banc and vacated the panel opinion, restoring the case to the docket and directing supplemental briefing and argument. 165 F.4th 1028 (6th Cir. 2026). The Sixth Circuit's grant of rehearing en banc suggests the court may be willing to engage with the Rule 23 issues at the heart of "total loss" cases—particularly predominance disputes over whether individualized vehicle valuation questions can be resolved on a classwide basis. The Sixth Circuit's grant of rehearing en banc, which remains relatively rare for that circuit, comes on the heels of its en banc opinion in *Speerly v. General Motors, LLC*, 143 F.4th 306 (6th Cir. 2025), another notable class-action decision we covered in a prior update. The *Clippinger* en banc argument is scheduled for mid-March. (Gibson Dunn represents the defendant in *Clippinger*.)

Elsewhere, a recent Eighth Circuit decision underscored the challenges plaintiffs face in satisfying Rule 23(b)(3)'s predominance requirement when liability and injury turn on what individual consumers saw, understood, and relied on. In *In re Folgers Coffee Marketing,* 159 F.4th 1151 (8th Cir. 2025), the Eighth Circuit reversed certification of a Missouri consumer-fraud class challenging statements on canisters of Folgers that the canisters would produce "up to" a certain number of cups of coffee. The court of appeals held that individualized questions of causation, consumer interpretation, and consumer experience would overwhelm any common issues, recognizing that many consumers likely did not read, rely on, or care about the "up to" statements. *Id.* at 1156.

The Eighth Circuit reiterated that consumer-fraud claims are often insusceptible to class treatment because proof varies as to what representations consumers received and whether the consumers relied on them. *Folgers*, 159 F.4th at 1155. The court of appeals also rejected a "price premium" theory that would have allowed consumers who were not deceived to recover on the ground that other consumers' deception increased overall demand and prices, reasoning that such an approach would permit uninjured purchasers to "piggyback" on others' injuries. *Id.* at 1157-58.

Folgers demonstrates that Rule 23(b)(3)'s predominance requirement often will not be satisfied even when the case involves products with uniform statements on their labels or packaging, particularly where the claims present issues relating to exposure, interpretation, causation, and injury. (Gibson Dunn represented The J. M. Smucker Company, which sells Folgers coffee, on appeal.)

II. Ninth Circuit Clarifies Absent Class Members' Article III Burden at Summary Judgment

Last month, the Ninth Circuit issued a significant decision holding that absent class members must demonstrate Article III standing before trial, at least as early as summary judgment. *Healy v. Milliman, Inc.,* 164 F.4th 701, 710 (9th Cir. 2026). The decision confirms that Article III standing is relevant not only at the final judgment phase, when class members would stand to recover individual damages, but also at earlier stages of litigation.

In reaching that holding, the Ninth Circuit explicitly rejected the idea that "the standing inquiry for unnamed class members" could be deferred until the final stage of a damages action. *Healy*, 164 F.4th at 708. The court of appeals clarified, however, that although absent class members must present evidence of Article III standing at summary judgment, this evidence is assessed under traditional summary-judgment standards, and the burden may be satisfied through circumstantial as well as direct evidence. *Id.* At 710.

Because *Healy* directly addresses only summary judgment, parties in 2026 likely will debate its consequences for class certification (or decertification). What is certain is that *Healy* will remain on the books—no petition for rehearing en banc was filed there.

III. Tenth Circuit Joins Majority View on "Ascertainability"

For years, federal courts of appeals have been grappling with whether Rule 23 embodies an implicit requirement of "ascertainability" or "administrative feasibility"—i.e., that a class should not be certified unless the plaintiff proves that it will be possible to identify class members in an objective, manageable manner. The courts have splintered into three camps. On one end is the Ninth Circuit, which has held that Rule 23 does not embody any freestanding ascertainability requirement (although questions relating to individual class members may well affect other Rule 23 requirements). *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1123 (9th Cir. 2017). On the other end is the Third Circuit, which has recognized a strong version of the ascertainability requirement, requiring a showing of administrative feasibility using objective evidence. *E.g.*, *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015). Between those poles are the majority of circuits to have addressed the question—including the Second, Seventh, and Eighth—which recognize an ascertainability requirement but reject the sort of administrative-feasibility formulation endorsed by the Third Circuit. *E.g.*, *In re Petrobras Sec.*, 862 F.3d 250, 265 (2d Cir. 2017); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 658 (7th Cir. 2015); *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016).

In *Cline v. Sunoco, Inc. (R&M)*, 159 F.4th 1171 (10th Cir. 2025), the Tenth Circuit joined the majority view. *Cline* involved a certified class of people entitled to royalties who received late payments. The defendant argued that the proposed class flunked the administrative-feasibility test because not all class members who were entitled to royalties could be identified from its records. The Tenth Circuit rejected this argument, holding that Rule 23 requires only that the class be defined clearly and objectively (rather than being based on subjective criteria, such as a person's state of mind). *Id.* At 1196. As the court of appeals put it, under that view, ascertainability under Rule 23 requires "reasonable—but not perfect—accuracy" in identifying class members. *Id*.

IV. Sixth Circuit Issues Rare Peek into Standards for Rule 23(f) Review

Rule 23(f) permits litigants to seek permission from the court of appeals to challenge interlocutory orders granting or denying class certification. Rule 23(f) itself does not cabin how courts of appeals should exercise their discretion to grant or deny review. And since Rule 23(f)'s adoption in 1998, commentary from the courts of appeals on the standards for Rule 23(f) review has remained relatively rare, especially since most courts decide Rule 23(f) petitions through unreasoned or nonprecedential orders.

A recent decision by the Sixth Circuit provides helpful guidance. In *In re Humana, Inc.*, 163 F.4th 376 (6th Cir. 2025), the defendant filed a Rule 23(f) petition seeking to appeal the district court's order certifying a class under the Telephone Consumer Protection Act. The defendant urged review because, among other arguments, the class-certification decision was a "death knell," meaning "the costs of continuing litigation … present such a barrier that later review is hampered." *Id.* at 380. In support, the defendant pointed to "hundreds of millions of dollars in damages" it faced and cited "other TCPA class action suits" as evidence that it faced "undue pressure to settle." *Id.* at 384. But the Sixth Circuit was not persuaded and faulted the defendant for failing to "submit any financial data to support its claim of potential financial harm." *Id.* The defendant also cited a split among lower courts on whether "consent can be established on a class-wide basis in a TCPA." *Id.* That too did not support an interlocutory appeal, the Sixth Circuit explained, because the defendant did not establish that "a one-size-fits-all approach" to "fact-specific" issues of certification in TCPA cases would be possible. *Id.*

After *Humana*, petitioners seeking review under Rule 23(f) in the Sixth Circuit should consider submitting evidence of the magnitude of financial harm that a certification order is likely to cause. *Humana* also suggests petitioners would benefit from showing not only the existence of an intra-circuit split, but also that an interlocutory ruling from the court of appeals would provide clear and useful "guidance" to other courts facing similar issues. *Id.*

V. Courts Continue to Debate the Scope of the FAA Section 1 Exemption

The Federal Arbitration Act contains a broad mandate requiring agreements to arbitrate to be enforced like any other contract. But section 1 of the FAA exempts from the Act's arbitration-enforcement mandate "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The scope of this exemption has been hotly contested in recent years, and that trend continues with recent and upcoming decisions by the Second Circuit and the U.S. Supreme Court.

In *Silva v. Schmidt Baking Distribution LLC*, 162 F.4th 354 (2d Cir. 2025), a truck driver originally employed by a baked goods company later formed his own corporation and entered into a distributor agreement with his former employer. The agreement included a mandatory arbitration clause and class action waiver. *Id.* at 357. When a dispute arose, the driver sought to evade arbitration based on the exemption in FAA section 1, which has been construed to cover "transportation workers" akin to seamen and railroad employees. *Id.* at 358.

The Second Circuit in *Silva* reversed the district court's order compelling arbitration. In doing so, it highlighted a less frequently litigated aspect of the section 1 exemption—whether the contract containing the obligation to arbitrate is one "of employment." 162 F.4th at 360. In the court of appeals' view, the mere fact that the distributor agreement was "signed by business entities" did not mean it was "not a 'contract of employment.'" *Id.* Instead, the employment nature of the agreement was evidenced by the nature of the duties performed under the contract—i.e., the arranged pickup and delivery of goods by the driver. *Id.* at 362-63.

The Supreme Court, which has had two cases in recent years addressing section 1's exemption for transportation workers, is also poised to return to the issue in a third case. In *Flowers Foods v. Brock*, No. 24-935, the Court will consider whether drivers "who deliver locally goods that travel in interstate commerce" but who "do not transport the goods across borders nor interact with vehicles that cross borders" are exempt under section 1. Cert. Pet. at i, *Brock*, 2025 WL 3555100 (U.S. Dec. 4, 2025). Oral argument in *Brock* is scheduled for March 25, 2026. (Gibson Dunn represented the Independent Bakers Association and the American Bakers Association in filing a brief as amici curiae in *Brock* in support of the petitioners.)

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