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Class Actions 2026 Third Quarter Update

This update provides an overview of key class action-related developments from the third quarter of 2026 (July through September).

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I. Third and Seventh Circuits Clarify How to Preserve Arbitration Rights Against Absent Class Members in Class Actions

This past quarter, two courts of appeals issued three decisions shedding light on how defendants may preserve (or waive) their rights to demand arbitration in class actions, including against absent class members.

1. In *Salvatora v. XTO Energy, Inc.*, 188 F.4th 666 (3d Cir. 2026), the Third Circuit rejected waiver in a dispute over royalties under oil and gas leases. None of the named plaintiffs' leases contained arbitration clauses, but some putative class members' leases did. XTO omitted arbitration from its answers but opposed including leaseholders with arbitration clauses in any

class and expressly reserved its right to enforce those clauses in opposing class certification. *Id.* at 670-71.

The Third Circuit held that the fact that XTO did not move to compel arbitration against absent class members before class certification did not constitute waiver because no named plaintiff had an arbitrable claim and the unnamed leaseholders were not yet parties. It explained, however, that although a defendant's pre-certification conduct may still give rise to waiver of arbitration rights in certain circumstances, there was no such waiver here. *Salvatora*, 188 F.4th at 674. As the court of appeals detailed, XTO had expressly reserved its rights to seek to compel arbitration as to absent class members, which set a "very high bar" for finding waiver based on other litigation conduct. *Id.* at 675. XTO had also promptly moved to compel arbitration weeks after class membership was finalized following the opt-out period. *Id.* at 676.

2. In *Parkin v. Avis Rent A Car System, LLC*, 188 F.4th 677, 686 (3d Cir. 2026), the Third Circuit rejected waiver where defendants needed discovery to support a motion to compel arbitration. Two customers alleged that a rental car company had failed to obtain promised supplemental liability insurance. They received the arbitration clause after signing their rental forms, so under Third Circuit precedent, their obligation to arbitrate would depend on evidence that they knew of the clause at the time of signing. *Id.* at 680-81.

Before obtaining such evidence, the defendants moved to dismiss the complaint. The Third Circuit held that their seeking dismissal did not establish waiver because the complaint lacked the facts needed to compel arbitration. The defendants' immediate choice was thus "not whether to litigate or to seek arbitration, but rather how to litigate." *Parkin*, 188 F.4th at 685.

The defendants' conduct during discovery also was not inconsistent with an intent to arbitrate. The defendants reserved arbitration in their answer, discovery plan, and initial disclosures, and then moved to compel about two months after the customers testified that they understood the separately provided terms to be part of their rental agreements. *Parkin*, 188 F.4th at 682. The Third Circuit held that the defendants were entitled to a "meaningful opportunity to investigate facts related to arbitrability" and did not need to request separate preliminary discovery on arbitration. *Id.* at 686.

As *Parkin* demonstrates, seeking discovery needed to support a motion to compel arbitration does not itself show that a defendant prefers litigation. But defendants engaged in litigation should consider making their intent to arbitrate clear on the record, ensure that all litigation conduct thereafter is in pursuit of or consistent with arbitration, and move promptly once they obtain the necessary evidence. *Parkin*, 188 F.4th at 686. Taken together, *Salvatora* and *Parkin* suggest defendants would do well to reserve their rights to compel arbitration against absent class members as appropriate and should promptly move to compel arbitration once absent class members' claims are before the court.

3. The Seventh Circuit held that a defendant waived its arbitration rights against absent class members by failing to raise the issue pre-certification. In *Moore v. Club Exploria, LLC*, 187 F.4th 970 (7th Cir. 2026), Exploria faced claims over allegedly unauthorized telemarketing calls. Its telemarketing vendors had obtained phone numbers through "opt-in" websites, where users purportedly agreed to receive sales calls. Exploria spent two years developing evidence of that consent as a defense to the plaintiffs' claims. Those same websites also contained arbitration

agreements that could have required class members to pursue their claims in arbitration. But Exploria did not develop evidence showing which members had agreed to arbitrate or argue that those agreements warranted excluding them from the proposed class. *Id.* at 973, 979-80.

In finding waiver, the Seventh Circuit explained that a defendant "need not file premature motions," for instance by moving to compel arbitration against absent class members before a class is certified. *Moore*, 187 F.4th at 979. But failing to raise arbitration during class discovery and the briefing on class certification "implies [the defendant] intends to litigate class claims in court." *Id.* Motions directed only at the named plaintiff's claims, by contrast, do not establish waiver against unnamed members. *Id.* at 981.

These three decisions are the latest in a flurry of opinions across the courts of appeals addressing waiver of arbitration rights in the context of class actions.

II. Seventh and Ninth Circuits Address Intra-Class Conflicts and Cy Pres–Only Settlements

The Seventh and Ninth Circuits issued two consequential opinions this quarter in appeals reviewing class-action settlements. The Seventh Circuit case addresses the circumstances in which different subsets of classes may require separate representation. The Ninth Circuit case addresses cy pres–only settlements that do not directly benefit any class members.

1. In *In re Clearview AI, Inc. Consumer Privacy Litigation*, 181 F.4th 785 (7th Cir. 2026), the Seventh Circuit set aside a class settlement because class members receiving the smallest payments lacked their own representatives and lawyers. *Id.* at 797.

The plaintiffs challenged Clearview's use of online photographs to build a facial-recognition database. *Clearview*, 181 F.4th at 789. Unable to afford a large up-front payment, Clearview offered payments tied to its future value if it went public or was sold, with other cash options. Under that payment structure, Illinois class members would receive ten shares each, members of three other state groups five shares, and the remaining members just one share. *Id.* at 790. All representatives supporting the settlement belonged to groups receiving larger shares. *Id.* at 791.

The court of appeals accepted the overall payment structure because continued litigation risked bankruptcy, potentially leaving the class with "only cents on the dollar or perhaps nothing at all." *Clearview*, 181 F.4th at 794. The problem was who had negotiated the split. A class member from Illinois was promised ten shares, but one from, say, Ohio was promised just one. Yet no representative or lawyer negotiated solely for the one-share group. 181 F.4th at 797. To be sure, stronger claims could justify paying Illinois members more, but the court could not assess whether the ten-to-one split was fair unless each side had its own advocates negotiating that division. *Id.* at 800. The Seventh Circuit concluded that Rule 23 requires separate representatives and lawyers when groups have this kind of "fundamental" conflict. *Id.* at 798.

Clearview provides a cautionary tale: if a settlement class includes class members with real differences in what they stand to recover, separate representation may be the safest way to protect the settlement and ensure fair recovery.

2. In *In re Google Location History Litigation*, 189 F.4th 850 (9th Cir. 2026), a divided Ninth Circuit panel affirmed the approval of a $62 million privacy settlement that paid the entire monetary fund, after attorneys' fees and costs, to privacy-focused nonprofits rather than to any of the roughly 248 million class members. (A distribution of funds to such third parties, rather than to class members, is known as a "cy pres" distribution.) The majority held that direct payments were infeasible because each class member's share would have been under $0.25 before fees. *Id.* at 858. (Notably, the majority also explained that Google was unable to identify class members and that there were risks in relying on "self-identification" affidavits in any claims process: "an individual who might not be an actual class member is able to submit a claim and affidavit, which cannot be independently verified by scientifically sound methods." *Id.* at 859.)

The decision confirms that cy pres–only settlements remain available in the Ninth Circuit for large classes with small per-person recoveries. However, the majority relied heavily on evidence that projected claims-administration costs at various claims rates would be prohibitively expensive and the defendant's showing that its systems could not identify or verify class members. *Google Location*, 189 F.4th at 858-60. Thus, parties seeking approval of cy pres–only settlements could benefit from similar evidence, rather than resting their request on the size of the class alone.

In dissent, Judge Forrest argued that cy pres "is not properly employed merely because the members of a class may be difficult to identify or are likely to receive only a small sum." *Google Location*, 189 F.4th at 861-62. In her view, neither small individual payments nor administrative costs that consume a fraction of the fund justify skipping a claims process altogether. *Id.* at 866-69.

The majority in *Google Location* also declined to reach the objectors' argument that cy pres–only settlements exceed federal courts' authority under Article III, leaving that question open for a future case. The Supreme Court took up the propriety of cy pres in *Frank v. Gaos*, 586 U.S. 485 (2019), but did not reach the merits because of concerns that the named plaintiffs may have lacked standing.

III. Fourth, Seventh, and Ninth Circuits Reject Class Certification Built on Unreliable Experts and Unspecified Damages

Over the last few months, three courts of appeals issued decisions rejecting class certification for lack of adequate proof. The first, from the Fourth Circuit, held that securities plaintiffs must commit to a specific damages methodology that matches their theory of liability. The second, from the Ninth Circuit, held that *Daubert* applies at certification and that common questions on materiality and damages cannot make up for a lack of classwide proof of deception. The third, from the Seventh Circuit, shows that excluding a plaintiff's key expert can end not only certification but the case itself.

1. The Fourth Circuit reversed certification of a securities class because the plaintiffs failed to tie their damages model to a specific theory of how the alleged misstatements affected the stock price. Under *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), a plaintiff seeking certification of a Rule 23(b)(3) class must present a damages methodology that is consistent with her theory of liability. But what happens when a securities plaintiff invokes the standard "out of pocket" measure of damages and promises to work out the details later? In *Rhode Island Office of the*

General Treasurer v. Boeing Co., 182 F.4th 422 (4th Cir. 2026), the Fourth Circuit held that this is not enough. It reversed the certification of a shareholder class alleging dozens of misleading statements over three years. *Id*. at 428. (Gibson Dunn represents Boeing in this matter.)

Boeing resolved the issue in three analytical steps, each of which will prove valuable in future cases. First, the Fourth Circuit emphasized that, under *Comcast*, plaintiffs seeking class certification must offer an actual methodology for proving damages on a classwide basis—and a general reference to an "out of pocket" measure or a similar high-level description of a category of available damages is not enough. 182 F.4th at 440. Second, plaintiffs must articulate their theory of liability with specificity so that, again under *Comcast*, the court can ensure that there is no mismatch between damages methodology and liability theory. *Id.* at 441. Third, the court of appeals emphasized that these steps must be taken *before* any class is certified. *Id.* at 441-42. The Fourth Circuit's decision provides a useful roadmap for future litigation over expert damages models in class certification.

The Fourth Circuit denied rehearing en banc on October 28, 2026.

2. In *Rusoff v. Happy Group, Inc*., 187 F.4th 1182 (9th Cir. 2026), plaintiffs sought certification of California and New York classes of purchasers of eggs labeled "pasture raised on over 8 acres." *Id.* at 1188. They argued that consumers understand "pasture raised" to mean compliance with certain private certification standards, and that the defendant's eggs fell short of those standards. *Id.* The district court excluded the plaintiffs' industry-standards expert as unreliable, but it certified the classes anyway on the theory that materiality and damages were common questions that predominated. *Id.* at 1190. The Ninth Circuit reversed. The court first rejected the plaintiffs' argument that *Daubert* plays no role at class certification. Plaintiffs may not obtain certification (and defendants may not block it) with unreliable expert testimony. *Id*. at 1192. The court then held that the plaintiffs lacked classwide proof of deception, a key element of plaintiffs' substantive claims. *Id.* at 1195.

Rusoff offers several lessons for companies facing consumer class actions. The first is to craft a careful expert strategy combining traditional *Daubert* arguments with arguments based on Rule 23's requirements. The decision also offers a roadmap for defending claims that a label implies compliance with an unstated standard. Many popular marketing terms, including "natural," "sustainable," "humane," and "clean," are defined differently by different certifiers, retailers, and trade groups, or not defined at all. Under *Rusoff*, that fragmentation may supply a valuable argument against certification: plaintiffs must prove both (1) a single or dominant standard and (2) a common consumer understanding tied to it. *Rusoff* also makes clear that an objective "reasonable consumer" test does not relieve plaintiffs of the need to show, with common evidence, what the alleged deception was. Plaintiffs also cannot satisfy Rule 23(b)(3) by pointing to common answers on secondary elements while the central element of liability remains unproven.

3. Finally, in *Koehler v. Infosys Technologies Ltd.*, 181 F.4th 769 (7th Cir. 2026), the Seventh Circuit held that an expert's untested method for inferring ethnicity from surnames alone could not support class certification. The *Koehler* plaintiffs were four former employees and applicants who alleged their employer racially discriminated against workers, even though the company did not track its workers' and applicants' ethnicity. *Id.* at 774. The plaintiffs' expert inferred ethnicity from surnames using a "name-matching" method, which was little more than the expert's guessing

about which names sounded South Asian. *Id.* at 775. After finding the expert's opinions unreliable under *Daubert*, the district court excluded the expert's opinions, denied certification, and granted summary judgment to the defendant. *Id.* The Seventh Circuit affirmed. The court of appeals held that the expert was unqualified because he admitted he had no experience identifying South Asian names. *Id.* at 779. The panel also held his method was unreliable because the plaintiffs offered no evidence of its testing, error rate, peer review, or acceptance in the field. *Id.* The Seventh Circuit also held that the plaintiffs could not fill that gap for the first time on appeal. *Id.* at 780.

Koehler is a reminder that courts will hold parties to their litigation choices. Here, for example, the Seventh Circuit upheld the district court's refusal to let the plaintiffs belatedly supplement their briefing with demographic data they had obtained from a third party because a magistrate judge had offered them that very opportunity years earlier and they had declined it. *Koehler*, 181 F.4th at 776, 781. The decision also made clear that the proxies experts use to fill gaps in demographic data, such as inferring ethnicity from names, are a key point of attack, both as to the expert's qualifications and as to whether the method has been validated.

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