Selected Recent Developments in Class Action Law and Practice
Bartlett Lecture, June 30, 2023

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I. PERSONAL JURISDICTION

A. Specific Jurisdiction: "In order for a court to exercise specific jurisdiction over a claim, there must be an 'affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State.' … When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. C'nty*, 137 S. Ct. 1773, 1781 (2017) (citation and brackets omitted).

A. *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. C'nty (Bristol-Myers)*, 137 S. Ct. 1773 (2017)

1. 678 plaintiffs, only 86 of whom were California residents, brought eight separate mass actions in California state court against Bristol-Myers Squibb (BMS) alleging injuries caused by BMS's drug, Plavix. The California courts did not have general jurisdiction over BMS, which is incorporated in Delaware and has its principal place of business in New York. The issue was whether the non-California plaintiffs could maintain a suit in California because specific jurisdiction over BMS existed with respect to the California plaintiffs. None of the non-California residents obtained Plavix in California, and none were injured in California or treated for injuries in California. Plavix was not developed, manufactured, labeled, or packaged in California, and the work to obtain regulatory approval and develop a marketing strategy for the drug after approval was also not done in California.

2. The Supreme Court held "that the California courts could not claim specific jurisdiction" over the non-California plaintiffs because "[t]he relevant plaintiffs are not California residents and do not claim to have suffered harm in the State. In addition … all the conduct giving rise to the non-residents' claims occurred elsewhere." *Id.* at 1782.

3. Justice Sotomayor dissented, noting that "[a] core concern in [the Supreme Court's] personal jurisdiction cases is fairness. And there is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike." *Id.* at 1784 (Sotomayor, J., dissenting).

B. Recent application to class actions

1. Some Circuits have held that *Bristol-Myers* is not applicable to putative class members in nationwide class actions.

a. *Lyngaas v. Curaden AG*, 992 F.3d 412 (6th Cir. 2021)

i. Relying on *Mussat*, discussed below, the court held that *Bristol-Myers* did not apply to unnamed class members.

ii. Judge Thapar, dissenting, would have held that *Bristol-Myers* did apply to unnamed class members. In doing so he noted that because federal jurisdiction, authorized by Rule 4(k)(1)(A), incorporates the Fourteenth Amendment's protections, a federal court, just like state courts, "cannot bind citizens of another state … unless those citizens had some relevant contact with the forum state." *Id.* at 439 (Thapar, J., dissenting).

b. *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020), *cert. denied*, 141 S. Ct 1126 (2021)

i. The plaintiff received an unsolicited fax from the defendant and filed a nationwide class action in federal court in Illinois under the Telephone Consumer Protection Act. The plaintiff filed suit on behalf of herself and all other persons who received similar junk faxes. The defendant argued that under *Bristol-Myers,* the district court did not have personal jurisdiction over the non-resident unnamed class members.

ii. The Seventh Circuit disagreed. The court noted that in *Bristol-Myers*, all the plaintiffs were named parties who had to demonstrate personal jurisdiction; however, in a Rule 23 class action, "absent class members are not full parties to the case for many purposes." *Id.* at 447. Examples that the court noted included venue and both the diversity-of-citizenship and amount-in-controversy requirements of 28 U.S.C. § 1332. The court saw "no reason why personal jurisdiction should be treated any differently from subject matter jurisdiction and venue." *Id.* Thus, it held that "named representatives must be able to demonstrate … [personal] jurisdiction, but the unnamed class members are not required to do so." *Id.*

2. Other Circuits have held that it is premature to apply *Bristol-Myers* when there is only a putative class action.

a. *Moser v. Benefytt, Inc.*, 8 F.4th 872 (9th Cir. 2021)

i. Relying on *Cruson* and *Molock*, discussed below, the Ninth Circuit held that a personal jurisdiction defense under *Bristol-Myers* was not available to the defendant as to the non-resident unnamed class members unless and until a class was certified.

ii. Judge Cardone, dissenting, would have held that Rule 23(f) did not permit the court to review the personal jurisdiction issue, as "class certification is 'logically antecedent' to, and therefore a separate issue from, personal jurisdiction." *Id.* at 883 (Cardone, J., dissenting) (citation omitted).

b. *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240 (5th Cir. 2020)

i. Relying on *Molock*, discussed below, the Fifth Circuit held that prior to class certification, putative class members are not parties; thus, the defendant did not waive a personal jurisdiction defense as to non-resident putative class members' claims by failing to raise it in its Rule 12(b) motions.

c. *Molock v. Whole Foods Mkt. Grp.*, 952 F.3d 293 (D.C. Cir. 2020)

i. Current and former employees of the defendant brought a putative class action under state law, alleging that the defendant manipulated its incentive-based bonus program. They sought to represent a nationwide putative class of past and present employees. The defendant moved to dismiss as to the non-resident putative class members, arguing that under *Bristol-Myers* the court lacked personal jurisdiction over their claims. The district court denied the motion and certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

ii. The D.C. Circuit granted the appeal and affirmed. It reasoned that "[i]t is class certification that brings unnamed class members into the action and triggers due process limitations on a court's exercise of personal jurisdiction." *Id.* at 298. Prior to class certification, putative class members are not parties before the court; thus, the court held that "[o]nly after the … 'action is certified as a class under Rule 23,' … should the district court entertain [the defendant's]

motion to dismiss the nonnamed class members." *Id.* (citation omitted).

iii. Judge Silberman, dissenting, would have held that *Bristol-Myers* was applicable to the claims of putative non-resident class members and thus would have dismissed these claims. In coming to this conclusion, the dissent noted that "the class action mechanism … is not a license for courts to enter judgments on claims over which they have no power." *Id.* at 307 (Silberman, J., dissenting) (citation omitted).

3. Not all courts agree that *Bristol-Myers* is inapplicable to putative class members in nationwide class actions. For example:

   a. *In re Dicamba Herbicides Litig.*, 359 F.Supp.3d 711 (E.D. Mo. 2019)

      i. The plaintiffs brought a nationwide class action alleging that the defendant commercialized dicamba (a pesticide) resistant seeds before dicamba was approved by the EPA. Farmers who bought the seeds then used the unapproved pesticide, which drifted onto the plaintiffs' fields and ultimately diminished their crops. The defendant moved to dismiss the claims of non-resident putative class members for lack of personal jurisdiction under *Bristol-Myers*.

      ii. The district court granted the motion, noting that *Bristol-Myers* "announced a general principle—that due process requires a 'connection between the forum and the specific claims at issue.'" *Id.* at 723 (citation omitted). Thus, "[m]embers of a nation-wide class action … [must] have a connection between the forum and the specific claims at issue." *Id.* at 724.

   b. *But see* *Lyngaas v. Curaden AG*, 992 F.3d 412, 434 (6th Cir. 2021) (noting that the "vast majority of lower courts" have declined to apply *Bristol-Myers* to unnamed class members).

4. Some Circuits have held that *Bristol-Myers* is applicable to nationwide collective actions under the Fair Labor Standards Act ("FLSA").

   a. *Fischer v. Fed. Express Corp.*, 42 F.4th 366 (3d Cir. 2022)

i. Relying on *Canaday* and *Vallone*, discussed below, the Third Circuit held that *Bristol-Myers* applies to opt-in plaintiffs in an FLSA collective action.

b. *Canaday v. Anthem Cos., Inc.*, 9 F.4th 392 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 2777 (2022)

i. The plaintiff brought a collective action under the FLSA claiming that her employer misclassified her and others as exempt from overtime pay provisions. Several non-resident employees opted into the collective action. The defendant moved under *Bristol-Myers* to dismiss all non-resident employees for lack of personal jurisdiction.

ii. The Sixth Circuit held that *Bristol-Myers* applies in FLSA opt-in cases because opt-in plaintiffs become parties to the suit, "enjoying 'the same status in relation to the claims of the lawsuit as do the named plaintiffs.'" *Id.* at 402–03 (citation omitted). The court also noted that, although the claims were filed in federal court, Rule 4(k) "t[ies] [the district court's] jurisdiction over a defendant to the host State's jurisdiction" as set out in the host State's long-arm statute. *Id.* at 399. Thus, unless the statute forming the basis of the claim provides for nationwide service, *Bristol-Myers* applies to suits brought in federal courts under a federal statute.

iii. Judge Donald, dissenting, would have held that *Bristol-Myers* is inapplicable to FLSA collective actions that are filed in federal court, as they are "based on a *federal* statute that permits [a] representative action." *Id.* at 404 (Donald, J., dissenting) (emphasis in original).

c. *Vallone v. CJS Sols. Grp., LLC*, 9 F.4th 861 (8th Cir. 2021)

i. Also holding that *Bristol-Myers* applies to opt-in plaintiffs in an FLSA collective action.

5. One Circuit has held that *Bristol-Myers* is inapplicable to nationwide collective actions under the FLSA.

a. *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84 (1st Cir.), *cert. denied*, 142 S. Ct. 2777 (2022)

i. The plaintiff brought a nationwide collective action against the defendant under the FLSA alleging that it failed to pay him and other similarly situated employees their FLSA-required overtime wages. More than 100 current and former employees opted into the suit. The plaintiff moved to dismiss the claims of the non-resident opt-in plaintiffs for lack of personal jurisdiction under *Bristol-Myers*. The district court denied the motion and certified its order for interlocutory appeal pursuant to 28 U.S.C § 1292(b).

ii. The First Circuit granted the appeal and held that *Bristol-Myers* does not apply in FLSA opt-in cases. The court reasoned that "a federal court's jurisdiction over federal law claims [is] drawn in the first instance with reference to the Due Process Clause of the Fifth Amendment," not the Fourteenth Amendment. *Id.* at 92 (cleaned up). Under the Fifth Amendment's Due Process Clause, a non-resident plaintiff suing to enforce rights under a federal statute in federal court need only show that the "defendant maintained the 'requisite 'minimum contacts' with the United States,'" as opposed to requiring minimum contacts with the forum state. *Id.* (citation omitted).

iii. Judge Barron, dissenting, would have dismissed the appeal and opted for a "wait-and-see approach," which would "ensur[e] that [the Court] would not be deciding a major question about the meaning of the Federal Rules of Civil Procedure in a case in which it may turn out not to be necessary." *Id.* at 105 (Barron, J., dissenting).

B. Comments

Appellate courts thus far have not applied *Bristol-Myers* to unnamed class members in nationwide class actions, but several appellate courts have yet to review the issue. There is a Circuit split regarding whether *Bristol-Myers* is applicable to opt-in plaintiffs in FLSA collective actions, suggesting that this issue may require Supreme Court review.

II. ARTICLE III STANDING

A. Plaintiff must show–

1. An injury-in-fact that is concrete, particularized, and actual or imminent;

2. The injury was likely caused by the defendant; and

3. The injury would likely be redressed by judicial relief

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–561 (1992)

B. Injury-in-fact

1. TransUnion

a. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021)

i. Plaintiff sued TransUnion for Fair Credit Reporting Act ("FCRA") violations after a credit report incorrectly identified him as potentially being on a terrorist watch list. Plaintiff represented a class of 8,185 individuals whose credit reports contained similar errors, resulting in a jury award of over $60 million, which was reduced by the Ninth Circuit to about $40 million. TransUnion challenged the award on both standing and typicality grounds. (Typicality is discussed separately in Section V). The crux of TransUnion's standing argument was that most class members did not have Article III standing because they did not suffer a "concrete harm" sufficient to satisfy the injury-in-fact requirement.

ii. "Central to assessing concreteness is whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm." *Id.* at 2200 (citation omitted).

iii. In analyzing standing, the Court differentiated between the 1,853 class members whose credit reports had been disseminated to third-party creditors and the 6,332 members whose credit files had not been so disseminated, holding that only the former category of class members had sufficiently alleged a concrete injury-in-fact. The Court reasoned that

the distribution of incorrect reports constituted a harm closely related to the tort of defamation, but that there was no historical analogue for the mere existence of inaccurate information absent dissemination. The Court further held that, without an additional concrete harm, such as emotional distress, the risk of future dissemination failed to satisfy Article III standing.

iv. Justice Thomas dissented, arguing that Congress had created an enforceable private right. He further noted that as a matter of common sense, "receiving a letter identifying you as a potential drug trafficker or terrorist is harmful." *Id.* at 2223 (Thomas, J., dissenting).

v. Justice Kagan also dissented, noting agreement with Justice Thomas's conclusion but emphasizing that a concrete injury is still required in the context of a statutory violation.

2. Post-*TransUnion* cases finding sufficient injury-in-fact

a. *Clemens v. ExecuPharm Inc.*, 48 F.4th 146 (3d Cir. 2022)

i. A class of current and former employees had standing to sue an employer for damages following a hack of the employer's servers resulting in the plaintiffs' private information being stolen and published on the dark web.

ii. The court held that the alleged harm, the exposure of private and sensitive information that employees would reasonably not want to be made public, was "sufficiently analogous to harms long recognized at common law[,] like the 'disclosure of private information[,]'" to satisfy the injury-in-fact requirement. *Id.* at 157.

iii. Moreover, the court noted that the risk of future harm led to emotional distress, therapy costs, and mitigation measures, and that the named plaintiff "cannot be required to wait until she has experienced actual identity theft or fraud before she can sue[;] the 'substantial risk' that she has established is enough" to satisfy the standing requirements. *Id.* at 159.

iv. Judge Phipps concurred in the result but believed that the majority erred in suggesting that "the modern test replaces the original understanding of what constitutes a case or controversy subject to resolution in federal court." *Id.* at 161 (Phipps, J., concurring).

b. *Kelly v. RealPage Inc.*, 47 F.4th 202 (3d Cir. 2022)

i. The Third Circuit held that plaintiffs, who were allegedly prevented from correcting errors in their credit reports because a consumer reporting agency failed to disclose the third-party vendor sources of information, had Article III standing to sue under the FCRA. The court stated that, under *TransUnion* and *Spokeo*, to state a cognizable informational injury, plaintiffs must assert first, that "they failed to receive… [the] required information"; second, that "the omission led to 'adverse effects' or other downstream consequences"; and third, that "such consequences have a nexus to the interest Congress sought to protect." *Id*. at 214 (cleaned up).

ii. The court held that the plaintiffs satisfied these three standing requirements because the defendant failed to disclose the third-party vendor information required under the FCRA. That omission adversely affected the plaintiffs' ability to correct the errors in their consumer reports, and this result "frustrat[ed] Congress's goal of empowering consumers to 'correct inaccurate information' in their credit files and preventing them from being unjustly damaged because of inaccurate or arbitrary information in their credit reports." *Id.* at 215 (cleaned up).

c. *Tailford v. Experian Info. Sols.*, Inc., 26 F.4th 1092 (9th Cir. 2022)

i. Allegations that a credit reporting agency failed to disclose all of the required information to consumers who requested their credit reports were sufficient to establish Article III standing because the alleged non-disclosure presented a material risk of harm to the consumers' privacy interests.

ii. The court noted that the plaintiffs had standing because the consumers' interests in accessing and verifying the accuracy of the information being disclosed to third-parties was a "principal reason[] for enactment of the FCRA" and "resembles other reputational and privacy interests that have long been protected in the law." *Id.* at 1099 (cleaned up).

d. *Persinger v. Sw. Credit Sys., L.P.*, 20 F.4th 1184 (7th Cir. 2021)

i. The Seventh Circuit held that the plaintiff had Article III standing to sue for damages resulting from a debt collector's allegedly unauthorized inquiries into consumer's "propensity-to-pay score" under the FCRA. *Id.* at 1188.

ii. The court concluded that the alleged privacy harm was sufficiently concrete because "an unauthorized inquiry into a consumer's propensity-to-pay score is analogous to the unlawful inspection of one's mail, wallet or bank account … and resembles the harm associated with [the tort of] intrusion upon seclusion." *Id.* at 1191–92.

e. *Cothron v. White Castle Sys.*, Inc., 20 F.4th 1156 (7th Cir. 2021)

i. The Seventh Circuit held that the alleged collection and dissemination of class members' biometric data without consent in violation of the Illinois Biometric Information Privacy Act was a sufficient injury-in-fact to confer Article III standing.

ii. The court reasoned that such conduct amounted to an invasion of an individual's "'private domain, much like an act of trespass.'" *Id.* at 1161 (citation omitted).

3. Post-*TransUnion* cases finding no injury-in-fact

a. *Hunstein v. Preferred Collection & Mgmt. Servs.*, Inc., 48 F.4th 1236 (11th Cir. 2022) (en banc)

i. In an individual (non-class) case, the Eleventh Circuit (en banc) dismissed a consumer's claims against a debt collector that allegedly disclosed his personal information to a mail vendor in violation of the Fair Debt Collection Practices Act, for lack of standing. The court explained that, like the plaintiffs in *TransUnion*, the plaintiff here did not have standing because he failed to allege that his personal information was made public. An element of the analogous common law tort at issue, public disclosure of private facts, is the disclosure of the information to the public. The defendant's alleged disclosure was to its mail vendor to create an automated collection letter. The court held that the alleged harm did not have a sufficiently "close relationship" with the harm traditionally recognized at common law to support standing because there was no allegation that "anyone read or perceived" the information: "[t]ransmitting information that no one reads or perceives is not publicity." *Id.* at 1247.

ii. Chief Judge William Pryor, joined by Judge Tjoflat, concurred. Chief Judge Pryor joined the majority opinion in full, but wrote separately to argue that the plaintiff did not have standing because, not only did he not allege publicity, he failed to adequately allege any of the three elements of public disclosure of private facts. Chief Judge Pryor further argued that the mail vendor theory of publication that the plaintiff and dissent relied on was expressly rejected by the Supreme Court in *TransUnion*.

iii. Judge Newsom, joined by Judges Jordan, Rosenbaum, and J. Pryor, dissented, arguing that the dissemination of the information to a third-party mail vendor was "close enough" to the required publication to establish standing under Article III. *Id.* at 1260 (Newson, J., dissenting). The dissent stated that several circuits have agreed that the standing analysis under *TransUnion* requires only allegations of a harm "similar *in kind* to the harm addressed by a common-law cause of action, but not that it is identical in *degree*." *Id.* at 1264 (emphasis in the original). Criticizing the majority for requiring what amounts to an "exact duplicate" of a

common law claim for Article III standing, Judge Newsom warned that the majority opinion "denies Congress any meaningful ability to innovate, leaving it only to replicate and codify existing common-law causes of action." *Id.* at 1272.

b. *Perez v. McCreary, Veselka, Bragg & Allen, P.C.*, 45 F.4th 816 (5th Cir. 2022)

i. A class of Texans who received collection letters from a law firm relating to time-barred debts failed to satisfy the injury-in-fact requirement of Article III in a suit under the Fair Debt Collection Practices Act ("FDCPA") because they failed to allege any concrete harm similar in kind to a harm traditionally recognized under the common law.

ii. The court rejected plaintiff's five theories of injury, holding that the plaintiff failed to allege a sufficient injury-in-fact. First, the alleged violation of the statute alone was insufficient because it was a purely procedural violation devoid of any concrete harm. Second, the allegations of a material risk of financial harm cannot sustain claims for damages unless "the risk materializes or causes a separate injury-in-fact, such as emotional distress." *Id.* at 824 (citing *TransUnion*, 141 S. Ct. at 2210–11). Third, the plaintiff's confusion resulting from the letter was not a concrete injury because there was no resulting pecuniary loss, so it was different "in kind" from any confusion harm recognized at common law. *Id.* at 824–25. Fourth, the plaintiff failed to allege that she paid her attorney any fees resulting from the initial consultation relating to the letter, so the allegation that the consultation caused her injury was also not analogous to any harm traditionally recognized at common law. Finally, the court disagreed with the plaintiff's argument that her allegations were sufficiently similar to the tort of intrusion upon seclusion, noting that she brought her claims under the antifraud provision of the FDCPA, which was primarily concerned with aggressive and unfair attempts to collect debt, not consumer privacy.

c. *Drazen v. Pinto*, 41 F.4th 1354 (11th Cir. 2022)

i. The Eleventh Circuit reversed and remanded the district court's certification of a class for settlement relating to claims that the defendant violated the Telephone Consumer Protection Act ("TCPA") by calling and texting consumers to market its products and services, finding that the class definition included individuals who lacked Article III standing.

ii. The class was defined to include all persons who received a voice or text message call to their cell phones as part of the defendant's marketing campaign over a two-year period.

iii. The court held that the class representatives had standing, but the class could not be certified for settlement because unnamed class members who received only a single text message did not have Article III standing. Certifying the proposed class for settlement would impermissibly allow "individuals without standing" to receive "what is effectively damages in violation of *TransUnion*." *Id.* at 1362

d. *Schumacher v. SC Data Ctr., Inc.*, 33 F.4th 504 (8th Cir. 2022)

i. A proposed class alleged that an employer violated the FCRA by: (1) taking adverse employment action based on consumer reports without first providing the reports to the job applicants, (2) failing to include all of the necessary information in the notice to applicants, and (3) obtaining more information through background checks than is authorized by the statute. The defendant only provided the plaintiff with a copy of her report, which uncovered felony criminal convictions that she had failed to disclose, after the employer rescinded its offer of employment.

ii. Discussing a split among the circuits, the court joined the Third and Seventh Circuits in holding that the failure to provide a copy of the report before rescinding the offer was merely an injury in law, not an injury-in-fact because the

information in the report was accurate. The court explained that the goal of the FCRA was to ensure the accuracy of credit reports, not to allow job applicants to explain to prospective employers the negative information in their reports. As for the other claims, the court held that the plaintiff failed to allege any harm at all, tangible or intangible, from the alleged violations.

iii. Judge Kelly filed a concurring opinion emphasizing that the critical fact in the case was that the information in the report was undisputed, noting that "Congress identified and elevated only intangible harms that involve *disputed* information …." *Id.* at 515 (Kelly, J., concurring) (emphasis in original).

e. *Pierre v. Midland Credit Mgmt.*, Inc., 29 F.4th 934 (7th Cir. 2022)

i. The Seventh Circuit remanded for dismissal claims against a debt collector who sent letters requesting payment of time-barred debt, reasoning that the alleged risk of harm that the letters created was not enough to establish Article III standing. The letters disclosed that the debt was time-barred and that the collector would not sue to collect the debt or report the debt to a credit agency. The plaintiff did not make any payment, promise to do so, or act to her detriment in any way in response to the letter.

ii. The court held that plaintiff failed to allege a concrete injury because her psychological responses to the letter were "insufficient to confer standing." *Id.* at 939 (citation omitted). It further reasoned that responding to the debt collection letter and seeking legal advice were "not closely related to an injury that our legal tradition recognized as providing a basis for a lawsuit." *Id.*

iii. Judge Hamilton dissented, arguing that the majority failed to give "due respect" to Congress, fundamentally misunderstood *TransUnion* and *Spokeo,* and was on the extreme end of a Circuit conflict. *Id.* at 944–45, 955 (Hamilton, J., dissenting).

f. *Laufer v. Looper*, 22 F.4th 871 (10th Cir. 2022)

i. A self-proclaimed "tester" and disability rights advocate failed to establish Article III standing to sue a hotel whose online reservation system allegedly failed to provide all of the information required under the Americans with Disabilities Act ("ADA").

ii. The plaintiff failed to allege an adequate injury-in-fact because she had "no concrete plans to visit [the town] or book a room at the [defendants' hotel]. She therefore has not alleged any concrete harm resulting from the [defendants'] alleged violation of [the ADA]." *Id.* at 878.

g. *Maddox v. Bank of N.Y. Mellon Tr. Co., N.A.*, 19 F.4th 58 (2d Cir. 2021)

i. Allegations of a bank's failure to timely record the satisfaction of a mortgage in violation of state statutes were inadequate to establish Article III standing because the plaintiffs suffered no concrete harm as a result of the alleged violation.

ii. The court held that the injury-in-fact requirement was not satisfied because the plaintiffs' allegations of emotional distress were implausible. The alleged reputational harm was inadequate because, despite the misleading record being public, there was no evidence that any third party actually read it. Moreover, any risk of harm caused by the error never materialized and was therefore inadequate to confer standing.

C. The injury was likely caused by the defendant

1. Fairly traceable to defendant's conduct

a. *Albert v. Oshkosh Corp.*, 47 F.4th 570 (7th Cir. 2022)

i. A plaintiff had standing to pursue claims on behalf of a class of employees and beneficiaries of an employer's retirement plan for allegedly breaching its fiduciary duties under ERISA by failing to prudently manage the plan's fees, investment options, and service providers. The defendant argued that the plaintiff lacked standing to pursue claims challenging investment options that he never held because each investment option charged different fees.

ii. The appellate court held that it was uncontested that the plaintiff "invested in at least some actively managed funds … [which] is sufficient at this juncture to conclude that [he] has standing for his investment-management fee claims." *Id.* at 578 (citation omitted).

b. *Boley v. Universal Health Servs., Inc.*, 36 F.4th 124 (3d Cir. 2022)

i. Rejecting lack-of-standing arguments, the Third Circuit affirmed an order certifying a class of employees alleging that the defendant breached its fiduciary duty under ERISA by charging excessive recordkeeping and administrative fees and utilizing a flawed process for selecting and monitoring the plan's investment options. Defendant argued that the class representatives did not have standing to bring claims relating to the various funds in which they did not personally invest.

ii. The appellate court held that the class representatives had standing to pursue all of the claims because they were alleging "several broader failures by [the defendant] affecting multiple funds in the same way …. To establish standing, class representatives need only show a constitutionally adequate injury flowing from those decisions …. The Named Plaintiffs allege[d] such an injury for each claim." *Id.* at 132.

2. Not fairly traceable to defendant's conduct

a. *Marion Diagnostic Ctr., LLC v. Becton Dickinson & Co.*, 29 F.4th 337 (7th Cir. 2022)

i. The Seventh Circuit affirmed the dismissal of claims by a putative class of medical providers alleging a conspiracy between product manufacturers and distributors because the named plaintiffs did not have standing to sue the distributors from whom they bought no products. Plaintiffs argued that they had standing against all of the defendants because they were forced to buy products at escalated market prices resulting from all defendants' participation in the conspiracy.

ii. The court disagreed, reasoning that the plaintiffs failed to allege an injury fairly traceable to the conduct of the distributors from whom they made no purchases, and that plaintiffs could not "piggy-back" on the injuries of unnamed class members to establish standing. *Id.* at 346.

D. Other standing-related issues

1. Unnamed class members' standing is required at certification stage: *TransUnion*

a. The Supreme Court left open the question of whether standing is required for all class members at the class certification stage

i. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021)

ii. "We do not here address the distinct question of whether every class member must demonstrate standing *before* a court certifies a class." *Id.* at 2208 n.4 (emphasis in original).

2. Unnamed class members' standing (or at least similar scrutiny under Rule 23(b)(3)) required at the certification stage

a. *Johannessohn v. Polaris Industries Inc.*, 9 F.4th 981 (8th Cir. 2021)

i. The Eighth Circuit affirmed the district court's order denying certification of a putative class of purchasers alleging that an all-terrain vehicle manufacturer failed to

disclose a heat defect in certain vehicle models. The class definition included purchasers whose vehicles had not manifested the alleged heat defect, and therefore could not show injury. Without an actual injury from the defect, the court held, purchasers did not have Article III standing, and "a class cannot be certified where it is defined in such a way to include individuals who lack standing." *Id.* at 988 n.3.

ii. Judge Kelly concurred, agreeing with the outcome but criticizing the majority for requiring *evidence* of standing (as opposed to allegations) at the class certification stage.

b. *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259 (11th Cir. 2019)

i. The Eleventh Circuit vacated and remanded the certification of a class including all individuals who received more than one call by the defendant telemarketer who allegedly failed to maintain a statutorily required "do-not-call" list because the district court failed to consider unnamed class members' standing before certifying the class.

ii. The court explained that the class definition included individuals who did not request to be on the "do-not-call" list and therefore did not have Article III standing. Determining whether each class member had standing required individualized inquiries.

iii. Remanding for reconsideration, the court held that "the district court must consider under Rule 23(b)(3) before certification whether the individualized issue of standing will predominate over common issues … when it appears that a large portion of the class does not have standing, as it seems at first blush here, and making that determination for these members of the class will require individualized inquiries." *Id.* at 1277.

3. Unnamed class members' standing not required at certification stage

a. *Olean Wholesale Grocery Coop., Inc., v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022) (en banc), *petition for cert. docketed*, No. 22-131 (Aug. 10, 2022)

i. Limiting a prior Circuit rule that no class may be certified if the class contains members lacking Article III standing, the court held that the previous rule "does not apply when a court is certifying a class seeking injunctive or other equitable relief." *Id.* at 682 n. 32.

E. Comments

Standing has been raised frequently in light of *TransUnion*, and there is already a split in the Circuits on how to apply the case. Indeed, there are severe disagreements among judges within some circuits. The Supreme Court will ultimately need to resolve these conflicting cases. It will also need to resolve the conflict of whether unnamed class members must have standing at the class certification stage.

III. CLASS DEFINITION

A. Rule 23 does not articulate what constitutes an adequate class definition. Courts agree, however, that the definition must be sufficiently precise so that membership is capable of determination. Some Circuits also have a heightened ascertainability requirement focusing on whether it is administratively feasible to identify the specific members of the class without significant effort.

1. Recent developments

a. *Rensel v. Centra Tech, Inc.*, 2 F.4th 1359 (11th Cir. 2021)

i. The Eleventh Circuit reiterated its holding in *Cherry*, discussed below, that there is no heightened ascertainability standard.

b. *Cherry v. Dometic Corp.*, 986 F.3d 1296 (11th Cir. 2021)

i. Plaintiffs sued Dometic Corporation for alleged defects in the company's refrigerators. The proposed class was "all persons who purchased in selected states certain models of

Dometic refrigerators that were built since 1997." *Id.* at 1300. The district court denied class certification on the ground that Plaintiffs failed to prove an administratively feasible method of identifying the class.

ii. The Eleventh Circuit reversed, stating that "administrative feasibility is not a requirement for certification under Rule 23." *Id.* at 1304. According to the court, "a proposed class is ascertainable if it is adequately defined such that its membership is capable of determination." *Id.* The court recognized that administrative feasibility might be relevant to the manageability criterion of Rule 23(b)(3)(D), but that it is not a freestanding threshold requirement. The court noted the conflict among the Circuits, indicating that the Third, Fourth, and Fifth Circuits apply an administrative feasibility standard (requiring that individual class members can be identified without significant individual inquiry), while the Second, Sixth, Seventh, Eighth, Ninth, and (now) Eleventh Circuits reject that approach.

B. Comments

Most Circuits have rejected heightened ascertainability, but a few still require it. Those that require it cannot point to specific language in the rule but instead hold that the requirement is "implied." Those rejecting administrative feasibility do acknowledge that similar concerns may be a reason why a class is not manageable under Rule 23(b)(3)(D).

IV. NUMEROSITY

A. Rule 23(a)(1): "One or more members of a class may sue or be sued as representative parties on behalf of all members only if the class is so numerous that joinder of all members is impracticable."

1. Recent cases have focused not just on sheer numbers but also on the practicability of joinder and on the sufficiency of plaintiffs' evidentiary record.

a. *A. B. v. Hawaii State Dept. of Educ.*, 30 F.4th 828 (9th Cir. 2022)

i. Plaintiffs moved to certify a class consisting of present and future female high school student-athletes against defendant for alleged lack of equal treatment, benefits, and participation under Title IX of the Education Amendments of 1972. The district court declined to certify the class because, although the proposed number of class members exceeded 300, "proposed class members [were] limited to the female student population," were "geographically tied to one area of Hawai'i," and therefore joinder of class members was not impracticable. *Id.* at 833–34. Furthermore, the district court declined to consider future or potential class members, stating that "'subgroups' were irrelevant to the numerosity analysis because neither was readily identifiable." *Id.* at 834.

ii. The Ninth Circuit reversed, noting that "the standard under Rule 23(a) is not … whether joinder is a literal impossibility. Rather, the question is whether joinder of all class members is '*practicable*'—*i.e.,* '*reasonably* capable of being accomplished.'" *Id.* at 837 (emphasis in original; citations omitted). The court noted that the equitable nature of the claims weighed in favor of finding numerosity because "continually joining, or potentially dismissing, large numbers" of class members carried little benefit. *Id.* at 838. The court concluded that "the estimate of the *current* [class] membership is well over 300 persons" and that as many as 25 percent of that number would need to be joined each year. *Id.* at 839 (emphasis added). These factors tipped the balance in favor of finding that numerosity was satisfied.

b. *Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890 (3d Cir. 2022)

i. Plaintiffs moved to certify a class of wheelchair-bound customers against a retail chain for violating Title III of the Americans with Disabilities Act (ADA). In arguing that numerosity was satisfied, plaintiffs relied on statistical evidence from the U.S. Census Bureau, emails to the retailer from (twelve) customers with mobility issues, and a "declaration stating that over seven days, sixteen persons using wheelchairs or scooters were recorded by video at two

[retail] locations." *Id.* at 894. The district court concluded that "the circumstantial evidence of thirty potentially disabled persons, together with the community survey estimates, was enough." *Id.* at 895.

ii. The Third Circuit reversed, stating that "[w]hen plaintiffs cannot directly identify class members, they 'must show sufficient circumstantial evidence specific to the products, problems, parties, and geographic areas actually covered by the class definition.' … Only then may the court rely on 'common sense' to forgo precise calculations and exact numbers." *Id.* at 896 (citations omitted). Plaintiffs' survey evidence focused on a national survey measuring individuals who reported difficulty walking or climbing steps, extrapolating from those figures what percentage of individuals would use a wheelchair. The court rejected plaintiffs' extrapolation theory, noting that plaintiffs must provide "concrete evidence of class members who have patronized a public accommodation and have suffered or will likely suffer common ADA injuries." *Id.* at 897. The court similarly rejected plaintiffs' declaration, stating that the video did not provide evidence as to (1) which of the wheelchair-bound individuals were actually disabled under the ADA, and (2) how many individuals had actually suffered a common ADA injury. Finally, the court rejected the customer complaint emails as being "far too few" with not all emails supporting the existence of class members. *Id.* at 899.

iii. In a concurring opinion, Judge Porter discussed an issue not resolved by the majority. He noted that the court should rule that all of the Federal Rules of Evidence, including those rules regarding hearsay and the admissibility of affidavits, should apply to Rule 23 proceedings. The concurrence addressed the split of authority, noting that the Sixth, Eighth, and Ninth Circuits rejected the application of the Federal Rules of Evidence to class certification hearings, while the First and Fifth Circuits required that evidence must be admissible to be used in class certification hearings.

c. *Anderson v. Weinert Enterprises, Inc.*, 986 F.3d 773 (7th Cir. 2021)

i. Plaintiff filed a putative class action against Weinert Enterprises for alleged violations of state and federal overtime wage laws. Plaintiff was unable to gain enough support from other employees to sustain his federal claims and proceeded to seek class certification based on only the state claims. The district court rejected class certification, stating that because the proposed class would at most include 37 members, plaintiff failed to meet the numerosity requirements under Rule 23(a)(1).

ii. The Seventh Circuit affirmed, noting the key inquiry is whether the class size makes joinder impracticable. The court stated that "[w]hile 'impracticable' does not mean 'impossible,' a class representative must show 'that it is extremely difficult or inconvenient to join all the members of the class.'" *Id.* at 777 (citations omitted). "Mere allegations that a class action would make litigation easier for a plaintiff are not enough to satisfy Rule 23(a)(1). … [The plaintiff] bears the burden of proving by a preponderance of evidence that his proposed class is sufficiently numerous." *Id.* (citations omitted). The court concluded that "[t]hough … 40 class members will often be enough to satisfy numerosity, in no way is that number etched in stone. The controlling inquiry remains the practicability of joinder. Some classes may involve such large numbers of potential members that volume alone will make joinder impracticable. In other circumstances, it may be that smaller classes than the one proposed here will face such high barriers to joinder that the impracticability required by Rule 23(a)(1) will exist. The inquiry is fact and circumstance dependent, and future cases will require this careful line drawing." *Id.* at 778. Here, the district court applied the correct framework.

d. *In re Zetia (Ezetimibe) Antitrust Litig.*, 7 F.4th 227 (4th Cir. 2021)

i. Plaintiffs, a collection of drug purchaser companies, sued two drug manufacturers for alleged violations of federal

antitrust laws arising out of the manufacture and sale of a generic version of a name-brand drug. Plaintiffs moved to certify a class of direct purchasers consisting of more than thirty companies. The district court found that numerosity was satisfied.

ii. The Fourth Circuit reversed. "[T]he district court's numerosity analysis improperly looked to the impracticability of individual suits rather than joinder[.]" *Id.* at 235.

iii. Judge Niemeyer wrote a concurring opinion, identifying factors that district courts might use in assessing numerosity. First, when focusing on the number of members alone, "courts have presumed that a class with more than 40 members is sufficiently numerous, while a class that numbers 20 or fewer is presumably too small." *Id.* at 239 (Neimeyer, J., concurring). Other factors that are typically considered are "(1) judicial economy resulting from avoidance of joined or independent actions, (2) geographic dispersion of putative class members, and (3) the ability and motivation of class members to bring suit absent class certification." *Id.* Judicial economy, therefore, should focus on docket management, courtroom space and staffing, costs of discovery, and the identifiability of class members.

B. Comments

The numerosity requirement has become an important component of class certification. Appellate courts expect district judges to engage in a rigorous analysis that focuses not just on sheer numbers but also on the impracticability of joinder.

V. TYPICALITY

A. Rule 23(a)(3): "One or more members of a class may sue or be sued as representative parties on behalf of all members only if the claims or defenses of the representative parties are typical of the claims or defenses of the class"

1. *TransUnion* and typicality

TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021)

i. Plaintiff sued TransUnion for Fair Credit Reporting Act violations after his credit report incorrectly flagged him as being on a terrorist watch list. Plaintiff successfully represented a class of 8,185 individuals whose credit reports contained similar errors, resulting in a jury award of more than $60 million, which was reduced by the Ninth Circuit to about $40 million. TransUnion challenged the award on both standing and typicality grounds. (The Court's holding on standing is discussed in Section II). The crux of TransUnion's typicality argument was that most class members had not been denied credit because of errors on their credit reports, whereas the named plaintiff *had* been denied credit because of the errors. Because plaintiff's claims were stronger than most class members' claims, TransUnion argued that his claims were atypical, and he could not represent the class.

ii. The Court reversed the award for more than 6,000 class members on Article III standing grounds and did not reach the issue of typicality. In his dissent, joined by three other Justices, Justice Thomas specifically addressed typicality, noting that, "[i]n my view, the District Court did not abuse its discretion in certifying the class given the similarities among the claims and defenses at issue." *Id.* at 2216 n.1 (Thomas, J., dissenting).

2. Factual variations

a. *Boley v. Universal Health Servs., Inc.*, 36 F.4th 124 (3d Cir. 2022)

i. Plaintiffs sued the managers of a retirement fund on behalf of a class of investors alleging breach of fiduciary duty. Defendants argued that the class representatives did not meet the typicality requirement because they had not invested in all of the funds at issue in the case. According to defendants, plaintiffs lacked the incentive to litigate with respect to funds in which they did not personally invest.

ii. The court rejected the proposition that plaintiffs' claims were atypical, noting that "[t]ypicality does not require the class representatives' claims be coterminous with those of the class[,] and that the Third Circuit has "held that typicality may be satisfied even if the class representative must introduce additional evidence to support the claims of absent class members." *Id.* at 134.

b. *Custom Hair Designs by Sandy v. Cent. Payment Co.* 984 F.3d 595 (8th Cir. 2020), *cert. denied* 142 S. Ct. 426 (2021)

i. Plaintiffs sued a credit card processing company on behalf of more than 160,000 class members relating to the company's assessment of merchant fees. Plaintiffs alleged state law claims for breach of contract and fraudulent concealment and federal claims for RICO violations. Defendant challenged class certification on several grounds, including that named plaintiffs were atypical because class members operated under different contracts with different terms and rates for assessing fees.

ii. Upholding the district court's certification of the class, the court noted that meeting the typicality standard is "fairly easy" provided that "other class members have claims similar to the named plaintiff." *Id.* at 604 (cleaned up). Moreover, the "[f]actual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Id.* (cleaned up). The court concluded that "[s]ince plaintiffs' claims resemble the theories applicable to all class members, minor factual variations such as differences in rates do not defeat typicality." *Id.*

3. Unique defenses

a. *Duncan v. Governor of Virgin Islands*, 48 F.4th 195 (3d Cir. 2022)

i. Plaintiff moved to certify a class of individuals whose tax refunds had been delayed, alleging that other parties received favorable treatment and expedited refund returns. The district court denied class certification, in part, because plaintiff received a refund check during litigation proceedings; as a result, she was merely disputing the amount of refund she received as incorrect. The district court, thus, found that plaintiff failed typicality.

ii. The Third Circuit agreed that plaintiff was atypical with respect to the refund claims because her subsequent receipt of a refund placed her "in a substantially different position than the class she [sought] to represent." *Id.* at 207. Therefore, there was some meaningful risk plaintiff would "have to 'devote time and effort' to facts unique to her claim, which would come 'at the expense of issues that are common and controlling for the class."' *Id* at 208 (citation omitted). However, the court disagreed that plaintiff lacked typicality with respect to the equitable claims, noting that "the central point with respect to the claims … is the question of systemic, arbitrary and indefinite withholding of refunds, which is 'essentially the same' for every class member," regardless of whether an individual class member eventually received a refund. *Id.* at 209 (citation omitted).

iii. Judge Matey, dissenting, argued that plaintiff was not typical with respect to any of the claims because she received a refund.

B. Comments

In general, typicality has not been a strong ground for challenging class representatives, and the Justices in *TransUnion* who addressed the issue showed little interest in making the test more difficult to satisfy. Yet, the requirement does provide a basis for denying class certification when representatives truly have unique issues that potentially interfere with proper representation.

VI. ADEQUACY OF REPRESENTATION

A. Rule 23(a)(4): "One or more members of a class may sue or be sued as representative parties on behalf of all members only if the representative parties will fairly and adequately protect the interests of the class." Adequacy applies to both class representatives and class counsel. Additional adequacy requirements for class counsel are set forth in Rule 23(g), adopted in 2003. Specifically, Rule 23(g)(1)(A) states that the court must consider:

> "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class."

1. Adequacy of the class representative

    a. *1988 Tr. for Allen Child. Dated 8/8/88 v. Banner Life Ins. Co.*, 28 F.4th 513 (4th Cir. 2022)

        i. In a complicated life insurance case, an objector claimed that there was a conflict of interest under the settlement because its insured would have to make a large balloon payment upon reaching age 96. The district court rejected that argument.

        ii. The Fourth Circuit affirmed, finding it "speculative" that the insured would even live to age 96, and noting that the case involved "esoteric principles of life insurance accounting" and was a "poster child" for the need to give the district court "substantial deference." *Id.* at 524–25.

        iii. Judge Rushing, concurring in part and concurring in the judgment, would have held that the class objectors waived their adequacy argument by raising it for the first time on appeal.

    b. *Santiago v. City of Chicago*, 19 F.4th 1010 (7th Cir. 2021)

        i. Plaintiff, a disabled resident, filed a class action against the City of Chicago, challenging the constitutionality of various aspects of the city's municipal code after her van was towed

and subsequently destroyed. The district court granted class certification for two classes: one composed of residents whose vehicles were towed, and another composed of residents whose vehicles were towed and subsequently disposed of by the City. In certifying the classes, the district court found plaintiff to be an adequate class representative. The City appealed, arguing that plaintiff was inadequate because she was subject to unique defenses. Specifically, defendant argued that plaintiff had received actual notice that her vehicle was subject to tow and disposal. The district court, however, found that "actual notice does not preclude a plaintiff from challenging the notice's procedural sufficiency." *Id.* at 1019.

ii. The Seventh Circuit vacated the class certification order because, among other things, the district court failed to provide a rigorous analysis as to the adequacy of the representative plaintiff. The district court failed to address how the actual notice defense affected plaintiff's adequacy. In particular, the district court did not meaningfully address the possible class conflict between named plaintiff's claims of insufficient notice and those class members who had received no notice of any kind. "Because the classes and claims are not clearly defined and because the district court [did] not attach its arguments to specific elements of the claims, [the Seventh Circuit was] not confident that the district court has conducted a rigorous analysis." *Id*.

c. *Cohen v. Brown Univ.*, 16 F.4th 935 (1st Cir. 2021)

i. Plaintiffs, on behalf of female student-athletes, filed a Title IX class action alleging gender discrimination in funding of athletic programs. Plaintiffs and the university ultimately reached a settlement, which the district court approved. Twenty years later the university violated that settlement; thus, the class asked the district court to enforce the settlement. The parties ultimately reached a new settlement. Class objectors appealed, claiming that because the representative plaintiffs (who had graduated years before the

second settlement) were no longer class members, they could not adequately represent the class.

ii. The First Circuit disagreed, stating that "an inquiring court should not invoke any presumption against allowing a plaintiff whose own claim has become moot to continue in place as a class representative but, rather, should consider the adequacy-of-representation issue on the facts of the particular case." *Id.* at 947. The court noted that the correct inquiry is "whether the representatives' interests meaningfully conflict with those of the class and whether the representatives are competent champions of the cause." *Id.* The court then went on to find that representatives had been "competent champions of the class's cause." *Id.* at 948.

d. *Orr v. Shicker*, 953 F.3d 490 (7th Cir. 2020)

i. Plaintiff inmates filed a class action against inmate medical providers for alleged inadequate medical treatment in their places of incarceration. The district court granted class certification and defendants appealed.

ii. The Seventh Circuit reversed class certification, noting that adequacy and typicality were not met because no named plaintiffs had been identified. The appellate court was "stymied at the outset because, despite its certification of the two classes, the district court failed to name a representative for either class or to explain this omission. [The appellate court] thus [had] no way to assess adequacy of representation." *Id.* at 499–500. The appellate court noted that plaintiffs merely put forward a list of possible class representatives, but that was not sufficient, as none had been selected.

2. Adequacy of class counsel

a. *Jin v. Shanghai Original, Inc.*, 990 F.3d 251 (2d Cir. 2021)

i. The class representative challenged the district court's *sua sponte* decision to decertify a class, based on a finding that

class counsel was no longer adequately representing the class. The district court identified the following defects in class counsel's representation:

> "class counsel (1) attempted numerous times to delay trial without any meritorious basis; (2) had the court reopen discovery to conduct twenty-eight depositions … but conducted only three ...; (3) repeatedly failed to submit a witness list that complied with [the court's] instructions; and (4) in [the] final revised list, indicated they would only call two class members as witnesses despite … [prior] indications … of the significance of class-member testimony."

Id. at 263.

ii. The Second Circuit affirmed, noting that "[w]hen Congress enacted Rule 23(g) governing the appointment of class counsel, it codified [the judicial practice of assessing the adequacy of class counsel], taking 'a step towards the fuller acknowledgment that it is class counsel, not the class representatives, who are truly litigating the class's claims.'" *Id.* (citation omitted). As the court explained, "[c]ompetent representation by class counsel is crucial to the prosecution of a class action." *Id.* at 262. In this case, given the record of class counsel's shortcomings, "[c]ounsel's representation of the class fell woefully short of the skilled and zealous representation expected of class counsel under Rule 23(g), justifying decertification." *Id.* at 263.

b. *Sharp Farms v. Speaks*, 917 F.3d 276 (4th Cir. 2019)

i. Class objectors challenged a class settlement, arguing that class counsel was inadequate based on evidence of collusion in a parallel state action. Specifically, defendants alleged that the district court did not properly consider the state court's report detailing a series of violations when negotiating the settlement, including conducting settlement

negotiations without permission, having improper communication with parties and attorneys, manipulating facts, and making false statements.

ii. The Fourth Circuit reversed the district court's granting of class certification, noting that evidence of class counsel's improper collusion during settlement negotiations had been largely ignored in the certification analysis. "[T]he district court abused its discretion in rejecting the possibility of collusion … and concluding [that] … class counsel was adequate under Rule 23(a)(4) without sufficiently grappling with the state court's detailed order setting forth the allegedly collusive conduct." *Id.* at 292.

iii. Judge Quattlebaum, in a concurring opinion, agreed with the majority's decision to reject the class settlement but based his reasoning on the fact that the class was improperly certified as a result of intra-class conflicts.

B. Comments

In recent years, appellate courts have been more rigorous in reviewing the adequacy of class representatives and class counsel. Rule 23(g) has reinforced this approach with respect to class counsel. To avoid reversal, district courts must carefully analyze any plausible claim of inadequacy.

VII. PREDOMINANCE AND SUPERIORITY

A. Rule 23(b)(3) (predominance):

To certify a Rule 23(b)(3) class, **"**the court [must find] that the questions of law or fact common to class members predominate over any questions affecting only individual members …."

1. Recent cases finding common questions predominate

a. *Owino v. CoreCivic, Inc.*, 36 F.4th 839 (9th Cir. 2022)

i. Agreeing with the district court, the Ninth Circuit held that common questions predominated an action in which

detainees alleged that immigration detention facilities forced them to work against their will without adequate compensation in violation of state and federal law. The U.S. Immigration and Customs Enforcement (ICE) prohibits detainees who have not been charged with a crime from being forced to work beyond standard personal housekeeping duties.

ii. The appellate court reasoned that all class claims depended on common questions, susceptible to classwide proof, concerning whether the detainees were compelled to work in violation of state and federal law. Furthermore, the plaintiffs demonstrated that damages were "capable of measurement on a classwide basis" because "[t]here is a clear line of causation between the alleged misclassification of detainee employees … and the deprivation of earnings …." *Id.* at 848.

b. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022) (en banc), *petition for cert. docketed*, No. 22-131 (Aug. 10, 2022)

i. The Ninth Circuit (en banc) affirmed certification of a class of purchasers alleging that the primary suppliers of tuna in the United States conspired to fix prices in violation of state and federal antitrust laws. The court held that the district court did not abuse its discretion in finding common issues predominated. After rigorously analyzing the competing experts' evidence, the district court properly found that the plaintiffs' experts' testimony and statistical analysis were "sufficient to sustain a jury verdict on the question of antitrust impact for the entire class." *Id.* at 685. That is all that is required at the certification stage. Whether the statistical model is persuasive enough to conclusively establish class-wide injury, the court explained, is a question for the jury at trial.

ii. Judge Lee dissented, arguing that the court erred in failing to resolve the competing views of the experts relating to the potentially large number of class members being uninjured.

2. Recent cases finding individual questions predominate

    a. *Gorss Motels, Inc. v. Brigadoon Fitness, Inc.*, 29 F.4th 839 (7th Cir. 2022)

        i. The Seventh Circuit affirmed the denial of class certification for a putative class alleging a violation of the Telephone Consumer Protection Act because whether particular class members consented to receive fax advertisements from an exercise equipment distributor presented individualized questions that predominated over common questions. The district court did not abuse its discretion in considering the affirmative defense of consent at the certification stage because the predominance analysis "applies not only to the elements that plaintiffs must prove but also to affirmative defenses like prior express permission." *Id.* at 845.

    b. *Tarrify Props., LLC v. Cuyahoga Cnty., Ohio*, 37 F.4th 1101 (6th Cir. 2022)

        i. A putative class of property owners alleged that Cuyahoga County's land-bank transfer foreclosure process failed to compensate them for surplus equity in their properties in violation of the Takings Clauses of the state and federal constitutions. The Sixth Circuit held that the district court did not abuse its discretion in denying class certification.

        ii. With respect to predominance, the appellate court found that the claims would require determining the fair market value of each member's property to analyze whether a particular property includes surplus equity, a process that would likely "dominate the proceedings … and run the risk of undercutting the efficiencies and ease of administration that otherwise might favor classwide resolution of the claims." *Id.* at 1107.

    c. *Bais Yaakov of Spring Valley v. ACT, Inc.*, 12 F.4th 81 (1st Cir. 2021)

i. The First Circuit affirmed an order denying certification of a class of faxed advertisement recipients from ACT, Inc., a non-profit entity that develops and administers the ACT college admissions test. The appellate court reasoned that individual issues predominated over common issues on the question of whether a particular recipient gave ACT permission to send the advertisements. ACT presented evidence that a number of recipients gave the requisite permission and desired to receive the advertisements at issue. The court held that, because there was no way that "the court could cull from the class the consenting schools in an administratively feasible way," the district court had "reasonably determined that individual issues of permission would predominate …." *Id.* at 92.

ii. Judge Barron filed a concurring opinion to emphasize that the predominance standard must be flexible enough to permit certification notwithstanding the presence of significant individualized issues.

d. *Prantil v. Arkema Inc.*, 986 F.3d 570 (5th Cir. 2021)

i. Record floods in Texas during Hurricane Harvey caused a combustion event at a chemical facility, releasing toxic ash and smoke into the surrounding communities. Residents who lived within a seven-mile radius of the factory were forced to evacuate and later brought class claims seeking injunctive relief and damages against the owner of the facility.

ii. The Fifth Circuit vacated and remanded an order certifying the proposed class in part because the district court held that predominance was satisfied without adequately addressing the defendant's arguments that highly individualized inquiries would be required. The court explained that "the district court must consider how a trial on the merits would be conducted if the class were certified." *Id.* at 574 (cleaned up). The court held that the district court's failure to analyze "the considerations affecting the administration of trial" warranted vacating certification, instructing future courts to "detail[] the evidence the parties may use to prove or defend

against liability and its commonality to all class members." *Id.* at 578, 580.

e. *Howard v. Cook Cnty. Sheriff's Off.*, 989 F.3d 587 (7th Cir. 2021)

i. The Seventh Circuit held that the district court abused its discretion in certifying a class of women employees of a county jail who alleged that their employers, Cook County and the Sheriff's Office, failed to prevent male inmates from sexually harassing them. The appellate court held that individual issues predominated because "the jail is not a homogenous workplace …. Whether preventative measures are reasonable for a given employee depends on the 'gravity' of harassment that she endures … and the gravity of harassment, in turn, depends on where she works." *Id.* at 609.

ii. Furthermore, the court held that the district court improperly relied on expert testimony, which had previously been excluded as unreliable, in its certification of the class. The appellate court held that "[b]efore relying on [expert] opinions … the court should have ensured that they lived up to the standards of *Daubert* and Rule 702." *Id.* at 601 (citation omitted). *See* Section VIII below for other *Daubert* case law.

f. *Hudock v. LG Electronics U.S.A., Inc.*, 12 F. 4th 773 (8th Cir. 2021)

i. The Eighth Circuit reversed an order certifying a class, based on claims of unjust enrichment and state consumer protection act statutes, alleging that the defendants misrepresented the refresh rates of their televisions. The appellate court concluded that individual issues predominated; defendants presented evidence that consumers differed in the extent to which they considered a defendant's representations about a television's refresh rate in making their television purchases. "Because determination of the companies' liability would require individualized determinations on causation and reliance,

common issues will not predominate in this case." *Id.* at 777 (cleaned up).

B. Rule 23(b)(3) (superiority):

To certify a Rule 23(b)(3) class, "the court [must find] that … a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action."

1. Recent cases finding class action superior

a. *In re Google Inc. St. View Elec. Commc'ns Litig.*, 21 F.4th 1102 (9th Cir. 2021), *cert. denied*, 2022 WL 4651933 (Oct. 3, 2022)

i. The Ninth Circuit affirmed a class settlement providing *cy* pres payments, injunctive relief, attorneys' fees, and class representative service awards relating to claims that Google illegally collected consumers' Wi-Fi data. An objector to the settlement argued "that if it is practically impossible to identify absent class members at the time of certification, then a class action cannot be a superior method of adjudicating the controversy because there is no possibility of providing meaningful relief." *Id.* at 1116 (cleaned up). The Ninth Circuit rejected the argument, holding that it has "repeatedly recognized that class members *do* benefit—albeit indirectly—from a defendant's payment of funds to an appropriate third party." *Id.* (emphasis in original).

b. *Bernstein v. Virgin America, Inc.*, 3 F.4th 1127 (9th Cir. 2021)

i. A class was certified consisting of California-based flight attendants suing Virgin America, claiming wage and hour violations under the California Labor Code. Virgin argued that class certification was inappropriate because "choice-of-law analyses will be required for each plaintiff." *Id.* at 1144. The appellate court affirmed the district court's ruling that class adjudication was the superior method of adjudicating the claims, having found that California law applied to the entire class, and "thus no individual choice-of-law analysis [was] necessary." *Id.*

2. Recent case finding class action not superior

a. *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981 (8th Cir. 2021)

i. The Eighth Circuit affirmed the district court's order denying certification of a putative class of purchasers alleging an all-terrain vehicle manufacturer failed to disclose a heat defect in certain vehicle models. The district court held that a class would not be superior because the "proposed classes will require application of the laws of four different states to forty-three different vehicle configurations, including at least four different engines, with changing exhaust standards through the years, and various attempts by [defendant] to remedy the problem." *Id.* at 986. The appellate court affirmed in light of the "monumental manageability concerns" that the case presented. *Id.*

C. Comments

Appellate courts have rigorously examined predominance and superiority and have reversed class certification (or upheld the denial of class certification) in the face of difficult and complicated individualized issues.

VIII. APPLICATION OF *DAUBERT*

A. *Daubert* issues arise at class certification and trial

1. Class certification stage

a. *Prantil v. Arkema Inc.*, 986 F.3d 570 (5th Cir. 2021)

i. The facts are discussed in Section VII(2)(d). The Fifth Circuit vacated and remanded an order certifying the

proposed class in part because the district court failed to properly apply the *Daubert* standard to expert reports at the class certification stage. The court noted that the district court "did not disregard its gate-keeping role, but its analysis of the expert reports reflect hesitation to apply *Daubert*'s reliability standard with full force." *Id.* at 576. Acknowledging the previous ambiguity of the issue, the court joined the Third, Seventh, and Eleventh Circuits in explicitly holding that "if an expert's opinion would not be admissible at trial, it should not pave the way for certifying a proposed class. ... [A]n assessment of the reliability of Plaintiffs' scientific evidence for certification cannot be deferred." *Id*.

b. *Grodzitsky v. Am. Honda Motor Co., Inc.*, 957 F.3d 979 (9th Cir. 2020)

   i. The Ninth Circuit affirmed the exclusion of the plaintiff's expert's testimony and the denial of class certification for a putative class of vehicle owners claiming that the 2003–2008 Honda Pilots' window regulators were defectively designed. Plaintiff's expert sought to testify to common defects in over 400,000 vehicles after examining only 26 regulators, not conducting any comparison with other manufacturers, acknowledging no direct correlation between the defect and the alleged cause, and not offering any opinion as to the proper manufacturing method that should have been utilized. Under *Daubert*, "[t]he district court properly held [the expert]'s opinion was unreliable due to [his] failure to utilize a workable standard supporting his design defect theory; the lack of supporting studies or testing to demonstrate a common design defect; and deficiencies in [his] methodology." *Id.* at 987.

   ii. Judge Murguia dissented, arguing that excluding portions of the testimony was proper, but the district court's exclusion of all of the testimony was an abuse of discretion.

c. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022) (en banc), *petition for cert. docketed*, No. 22-131 (Aug. 10, 2022)

i. "Where, as here, a defendant did not raise a *Daubert* challenge to the expert evidence before the district court, the defendant forfeits the ability to argue on appeal that the evidence was inadmissible, but may still argue that the evidence is not capable of answering a common question on a class-wide basis." *Id.* at 665.

2. Summary Judgment and trial stage

a. *Choi v. Tower Rsch. Cap. LLC*, 2 F.4th 10 (2d. Cir. 2021)

i. The Second Circuit affirmed the district court's grant of summary judgment against a class of South Korean citizens alleging that the defendants violated the anti-manipulation provisions of the Commodity Exchange Act. The plaintiffs' expert opined that the defendant was subject to the Chicago Mercantile Exchange rules.

ii. The appellate court held that excluding the plaintiffs' expert's report was not an abuse of discretion because the report "function[ed] as little more than a legal brief that parrots plaintiffs' arguments." *Id.* at 20. The court explained that the expert report primarily advanced policy arguments, "offer[ed] scant input on the issues appealed[,] and … would not alter the outcome on summary judgment." *Id.* (cleaned up).

b. *Ramos v. Banner Health*, 1 F.4th 769 (10th Cir. 2021)

i. The Tenth Circuit affirmed the district court's findings during a bench trial relating to a class claiming that the defendant and others breached their fiduciary duties under ERISA. It held that the district court's acceptance of the plaintiffs' expert testimony with respect to identifying the underlying breach, but not with respect to the damages calculation, was not an abuse of discretion. The expert cited only his personal experience in the industry as the basis for his damages calculation, which the district court properly found to be unreliable under *Daubert* because the analysis was "unquantifiable and non-replicable …." *Id.* at 779 (cleaned up).

c. *Lyngaas v. Ag*, 992 F.3d 412 (6th Cir. 2021)

i. On cross-appeal following a bench trial, the Sixth Circuit refused to disturb the district court's exclusion of expert testimony relating to the number of alleged unlawful fax transmissions. The plaintiffs' expert premised his entire opinion on unauthenticated information and an affidavit filed in a different case addressing unrelated data. The court explained that, under *Daubert*, an expert's opinion must be premised on "'good grounds' based on what is known," and held that the expert's opinion failed to satisfy that standard because it was "both speculative and unpersuasive." *Id.* at 431 (citation omitted).

B. Comments

Appellate courts have held plaintiffs in class actions to a high standard regarding expert testimony and will carefully scrutinize district court *Daubert* findings. Most courts hold that a full *Daubert* analysis applies at the class certification stage.

IX. ISSUE CLASSES

A. Rule 23(c)(4): "When appropriate, an action may be brought or maintained as a class action with respect to particular issues."

1. Recent developments

a. *In re Med. Transportation Mgmt., Inc.*, 2022 WL 829169 (D.C. Cir. Mar. 17, 2022) (order granting Rule 23(f) review; oral argument is scheduled for Nov. 8, 2022; this is a case to watch)

i. Plaintiffs filed a collective and class action against a private medical transportation company for unpaid wages. Plaintiffs moved to certify an issue class under Rule 23(c)(4) focusing on whether defendant qualified as a joint employer of class members, whether defendant was strictly liable for wage law violations of subcontractors, whether travel time between medical transports qualified as compensable work, and whether wages set by the Living Wage Act and Service

Contract Act applied to defendant's contracts. *See* *Harris v. Med. Transportation Mgmt., Inc.*, 2021 WL 3472381, at *9 (D.D.C. Aug. 6, 2021). Defendant argued that certification of a Rule 23(c)(4) class is "appropriate only when the requirements of both 23(a) and one subsection of 23(b) are satisfied with respect to the entire action or a specific cause of action." *Id*. The district court relied on the "broad view" of Rule 23(c)(4), which "permits certification under Rule 23(c)(4) even when … predominance has not been satisfied for the cause of action as a whole." *Id.* at *7.

ii. The D.C. Circuit granted defendant's petition for Rule 23(f) review. *See* March 17, 2022 order above. Oral argument is scheduled for November 8, 2022.

b. *Russell v. Educ. Comm'n for Foreign Med. Graduates*, 15 F.4th 259 (3d Cir. 2021), *cert. denied,* 142 S. Ct. 2706 (2022)

i. Plaintiffs were patients of a medical provider who had been certified despite using falsified credentials. Plaintiffs sued the medical certification board, alleging negligent infliction of emotional distress arising from being treated by the doctor who was later found to have been improperly certified. Plaintiffs moved to certify a class of similarly situated patients, and the district court granted class certification under Rule 23(c)(4) as to the issues of whether "the Commission owed a relevant legal duty … that it subsequently breached …; whether the Commission's breach of the relevant duty actually and proximately caused those injuries; whether those injuries are due … damages; and whether the Commission's affirmative defenses … can refute Plaintiffs' claim." *Id*. at 270–71.

ii. The Third Circuit reversed class certification, stating that the district court had not properly applied the nine factors identified in prior case law when determining if issue class certification was appropriate. Those factors—which are easier to satisfy than predominance for the case as a whole—include:

"1. the type of claim(s) and issue(s) in question;

2. the overall complexity of the case;

3. the efficiencies to be gained by granting partial certification in light of realistic procedural alternatives;

4. the substantive law underlying the claim(s), including any choice-of-law questions it may present and whether the substantive law separates the issue(s) from other issues concerning liability or remedy;

5. the impact partial certification will have on the constitutional and statutory rights of both the class members and the defendant(s);

6. the potential preclusive effect or lack thereof that resolution of the proposed issue class will have;

7. the repercussions certification of an issue(s) class will have on the effectiveness and fairness of resolution of remaining issues;

8. the impact individual proceedings may have upon one another, including whether remedies are indivisible such that granting or not granting relief to any claimant as a practical matter determines the claims of others;

9. and the kind of evidence presented on the issue(s) certified and potentially presented on the remaining issues, including the risk subsequent triers of fact will need to reexamine evidence and findings from resolution of the common issue(s)."

Id. at 268 (citing *Gates v. Rohm and Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011)).

iii. The appellate court held that the district court did not properly apply those factors. The court failed to "rigorously consider" several *Gates* factors, such as "the effect certification of the issue class will have on the effectiveness and fairness of resolution of remaining issues." *Id.* at 272. Additionally, the district court did not rigorously consider the efficiencies that would be gained by resolution of the certified issues. Because the district court only certified issues relating to duty and breach, the issues of injury, proximate cause, damages, and affirmative defenses would be left to subsequent individual proceedings; thus, it was unclear "what efficiencies would be gained by resolution of the certified issues." *Id.*

c. *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664 (6th Cir. 2020)

i. The district court certified a "negotiation class" under Rule 23(b)(3) and Rule 23(c)(4) of "all cities and counties throughout the United States for purposes of negotiating a settlement between class members and opioid manufacturers, distributors, and pharmacies." *Id.* at 667. Certain defendants and class members objected to the negotiation class, claiming that it created pressure to negotiate and settle with the class, while having no textual basis within Rule 23. Plaintiffs responded that, although Rules 23(b)(3) and 23(c)(4) did not explicitly establish negotiation classes, they did not explicitly prohibit them either, and novel forms of class action mechanisms fell within the discretion of the district court.

ii. The Sixth Circuit rejected plaintiffs' argument, finding the use of the issue class device was problematic because the predominance analysis was not adequately addressed. "The issue class device permits a court to split common issues off for class treatment; it does not provide an end-run around the weighty requirements of Rule 23(b)(3)." *Id.* at 675. Ultimately, the court concluded that a negotiation class

could not be squared with Rule 23, and reversed certification.

iii. Judge Moore wrote in dissent that the Sixth Circuit "has already addressed the relationship between Rule 23(b)(3)'s predominance inquiry and Rule 23(c)(4)," choosing to adopt the broad view that permits use of Rule 23(c)(4) "even where predominance has not been satisfied for the cause of action as a whole." *Id.* at 689 (Moore, J., dissenting) (cleaned up). To do otherwise "would undercut the purpose of Rule 23(c)(4) and nullify its intended benefits[.]" *Id.* (citations omitted).

d. *Reitman v. Champion Petfoods USA, Inc.*, 830 F. App'x 880 (9th Cir. 2020)

i. Plaintiffs filed a putative class action on behalf of consumers who purchased allegedly mislabeled dog food sold by defendants. Plaintiffs sought certification under Rules 23(b)(3) and 23(c)(4). The district court denied certification, first for failing to satisfy the 23(b)(3) predominance requirement and second for failing to meet the standard for a Rule 23(c)(4) liability-only class. Plaintiffs appealed.

ii. The Ninth Circuit affirmed the denial of certification. It noted that, while overall case predominance is not required to certify a Rule 23(c)(4) class, the existence of many individualized issues can defeat the efficiency a 23(c)(4) class is meant to create. Additionally, the court emphasized that "Rule 23(c)(4) enables a district court to certify an issue class 'when appropriate,' but a court does not abuse its discretion when it declines to do so because certifying a class does not 'materially advance the disposition of the litigation as a whole.'" *Id*. at 882 (cleaned up). The court concluded that because plaintiffs "failed to show that Rule 23(c)(4) certification was 'appropriate,' the district court did not abuse its discretion when it denied certification." *Id.*

e. *Martin v. Behr Dayton Thermal Prod. LLC*, 896 F.3d 405 (6th Cir. 2018), *cert. denied,* 139 S. Ct. 1319 (2019)

i. Plaintiffs, a group of property owners in a low-income area, alleged defendants released hazardous substances into the groundwater, thereby contaminating the properties in question. The district court determined that, although plaintiffs did not meet Rule 23(b)(3)'s predominance requirement for the case as a whole, predominance for the case as a whole was not required for certification of certain issues under Rule 23(c)(4). The district court certified seven issues for class treatment under Rule 23(c)(4). Defendants appealed, arguing that the district court had incorrectly applied Rule 23(c)(4).

ii. The Sixth Circuit affirmed the district court's certification of the issues, upholding the "broad" view of issue class certification, which permits certification under Rule 23(c)(4) "even where predominance has not been satisfied for the cause of action as a whole." *Id.* at 411. The court explained that the broad view was more persuasive because "Rule 23(c)(4) contemplates using issue certification to retain a case's class character where common questions predominate *within certain issues* and where class treatment of those issues is the superior method of resolution." *Id.* at 413 (emphasis added). The court then applied the predominance and superiority *to the issues as certified,* not to the case as a whole. The court found that predominance was satisfied "[b]ecause each issue may be resolved with common proof and because individualized inquiries [did] not outweigh common questions," and it found that superiority was satisfied because "trying these common questions to a single jury" would "conserve resources of both the court and the parties." *Id.* at 415, 416.

iii. The Sixth Circuit noted that, at one time, the Fifth Circuit prohibited certification of issues classes if predominance was not met "for the cause of action as a whole." *Id.* at 412 (citing *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996)). However, the Sixth Circuit pointed out that no other Circuit has expressly adopted that interpretation, and "subsequent caselaw from within the Fifth Circuit itself

indicates that any potency the narrow view once held there has dwindled." *Id.*

B. Comments

Although the Fifth Circuit at one time stated that overall predominance was required for an issue class under Rule 23(c)(4), the court has retreated from that position, as the Sixth Circuit noted in *Martin.* The other Circuits that have addressed the issue agree that predominance for the case as a whole is not required. The Sixth Circuit so held in *Martin,* although certain language in the *National Prescription Opiate* case arguably conflicts with *Martin,* as Judge Moore noted in dissent. The D.C. Circuit will soon have the opportunity to weigh in on the standards for an issue class under Rule 23(c)(4).

X. CLASS SETTLEMENTS

A. Rule 23(e): "The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval …. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate."

1. Reasonableness of the settlement

a. *1988 Tr. for Allen Child. Dated 8/8/88 v. Banner Life Ins. Co.*, 28 F.4th 513 (4th Cir. 2022)

i. A class of life insurance holders sued the defendants alleging that they fraudulently increased their cost-of-insurance each year. After years of litigation and protracted discovery, the parties agreed on a settlement. The settlement included minimum refunds of $100 to class members and some nonmonetary benefits, with a total value of approximately $40 million. The district court approved the settlement, and one objector appealed.

ii. The Fourth Circuit affirmed the district court's finding that the settlement was fair, reasonable, and adequate. The district court had "carefully weighed the size of the proposed settlement against the claims at issue and found that this

settlement compare[d] favorably to other similar settlements." *Id.* at 527.

b. *McAdams v. Robinson*, 26 F.4th 149 (4th Cir. 2022)

i. Plaintiffs filed a class action against Nationstar Mortgage LLC alleging that it violated state and federal consumer protection laws when servicing the class members' loans. After nearly six years of litigation, the parties reached a settlement that created a fund of $3 million. A class member objected, arguing the settlement was inadequate. The magistrate judge approved the settlement, and the objector appealed.

ii. The Fourth Circuit affirmed the approval of the settlement. The objector argued that the magistrate judge failed to make an estimate of what class members would have received had they prevailed at trial; thus, there was no way for the magistrate judge to determine if the settlement was adequate. The Fourth Circuit, however, noted that its case law did not "require[] such an estimate … [a]nd [the court was] not persuaded to impose this new requirement here." *Id.* at 160 (citations omitted).

c. *Kim v. Allison*, 8 F.4th 1170 (9th Cir. 2021)

i. Plaintiff brought a class action against Tinder, Inc. under California's Unruh Civil Rights Act, alleging age discrimination based on Tinder allegedly charging her a higher monthly rate than Tinder charged to subscribers under 30 years old. The parties reached a pre-certification settlement. It provided for $50 worth of in-app benefits to class members, and a choice of $25 cash, $25 worth of in-app benefits, or a one-month premium Tinder subscription. The settlement also contained injunctive relief, an incentive award for the named plaintiff, and a clear sailing provision, allowing class counsel to request up to $1.2 million in fees without objection from the defendant. Several class members objected, arguing, among other things, that the settlement was of little value, that it was collusive, and that it was inadequate because class members had meritorious claims. The district court approved the settlement and the objectors appealed.

ii. The Ninth Circuit reversed. First, the court noted that the district court underestimated the strength and value of the class members' claims. Next, the court noted that the settlement value was overstated, explaining that "the [district] court accepted class counsel's unsupported representation that the injunctive relief was worth $6 million to the class"; that the in-app benefits provided for in the settlement were of little value to the class because 44% of class members no longer had a Tinder account; and that "the district court grossly overstated the value of the claims that Tinder would actually pay as being $6 million," when, given the claims rate, "Tinder stood to pay less than $45,000." *Id.* at 1179. Finally, the court noted that "the district court did not adequately scrutinize the combination of a clear-sailing provision and an attorneys' fee award that outstripped the likely financial benefit to the class." *Id.* Thus, the court found "that the district court so underrated the strength of the plaintiff's case, so overstated the settlement value, and so overlooked the suggestions of collusion present as to collectively constitute an abuse of discretion." *Id.*

iii. Judge Callahan dissented. In her opinion "the district court … reasonably evaluated the settlement class's relatively weak claims"; thus, even though the settlement may have been somewhat overvalued, it was still fair, reasonable, and adequate. *Id.* at 1182 (Callahan, J., dissenting).

2. Signs of collusion

a. *Saucillo v. Peck*, 25 F.4th 1118 (9th Cir. 2022)

i. Plaintiff brought a class action against the defendant alleging various wage and hour violations under state and federal laws. After years of litigation, and before class certification, the parties reached a class settlement that provided for $7.25 million for the class claims, and roughly $2.4 million in attorneys' fees. Rejecting challenges by two objectors, the district court approved the final settlement. The objectors appealed, arguing that the district court improperly applied a presumption of fairness.

ii. The Ninth Circuit reversed the approval of the settlement. The court first noted that its case law has established a bright line rule that "a settlement agreement before the class has been certified … requires a higher standard of fairness and a more probing inquiry." *Id.* at 1130 (cleaned up). Here, the district court failed to apply the correct legal standard and to conduct the searching inquiry required. Instead, it improperly applied a presumption of fairness to the settlement. That presumption "cast a shadow on the entirety of the district court's order"; thus, the error was not harmless, and remand was proper. *Id.* at 1133.

b. *McKinney-Drobnis v. Oreshack*, 16 F.4th 594 (9th Cir. 2021)

i. Plaintiffs brought an action against Massage Envy alleging that it periodically increased membership fees in violation of their membership agreements. Before class certification, the parties reached a settlement that provided for vouchers worth a minimum of $10 million to reimburse class members for the increases they paid. The settlement also provided for injunctive relief, and an incentive award for each named plaintiff up to $10,000. Finally, the settlement included a clear sailing provision allowing class counsel to request $3.3 million without objection from the defendant, and a kicker provision, in which the defendant retained the difference between the maximum permissible fee award ($3.3 million) and the amount actually awarded. The district court approved the settlement and granted roughly $2.6 million to class counsel as fees; thus, approximately $600,000 in unawarded fees would revert to the defendant. A class objector appealed.

ii. The Ninth Circuit reversed. It first held that the voucher relief was a coupon within the Class Action Fairness Act; thus, the district court erred in not using the value of the redeemed vouchers in awarding attorneys' fees. Next, the court held that the district court abused its discretion because it "did not conduct the required heightened inquiry …." *Id.* at 611. In doing so, the court noted that in pre-certification settlements, district courts must "look[] for and scrutinize[] any subtle signs that class counsel have allowed pursuit of their own self-interests to infect the negotiations." *Id.* at 607 (cleaned up). Here, the settlement had two of the three subtle

signs of collusion recognized by the Circuit's case law: it included both a clear sailing agreement and a kicker provision. Furthermore, while it was not clear whether the third sign (a disproportionate distribution of the settlement to class counsel) was present; settlements that provide non-cash relief and contain a kicker provision should put the district court on alert.

iii. Judge Miller concurred separately "to note [his] disagreement with [the] [C]ircuit's approach to determining when vouchers are 'coupons' under the Class Action Fairness Act …." *Id.* at 612 (Miller, J., concurring).

c. *Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021)

i. Several plaintiffs sued ConAgra alleging that it labeled its product Wesson Oil "100% Natural" when it in fact contained ingredients made from genetically modified organisms. Ultimately, the district court certified a class, and the parties began settlement negotiations. Before a settlement was reached, ConAgra voluntarily removed the disputed label. In the settlement that was reached, ConAgra agreed to reimburse those with valid claims at $0.15 per unit of Wesson Oil purchased, set aside additional funds to compensate class members in two states under those states' consumer protection laws, and set aside $10,000 to compensate class members with more than 30 valid claims. By the time of the settlement ConAgra had already sold the Wesson Oil brand, but the settlement also provided for injunctive relief, in which ConAgra agreed not to market Wesson Oil as natural without FDA approval if it ever decided to reacquire the brand. The parties valued the injunctive relief at $27 million and the claim liability at $67.5 million. Additionally, the settlement contained a clear sailing provision for a $6.85 million request of attorneys' fees and expenses. The district court approved the settlement and the attorneys' fees request. Ultimately, only about $1 million worth of claims were filed. One class objector appealed.

ii. The Ninth Circuit found that the settlement "feature[d] all three red flags of potential collusion": disproportionate distribution of the settlement to class counsel, a clear sailing

agreement, and a kicker provision. *Id.* at 1026. Given these red flags, the district court erred by not taking a hard look at the settlement. Next, the court found that the district court erred by placing some value on the injunctive relief; the relief was "virtually worthless" because ConAgra already sold the Wesson Oil brand; thus, it was "not obligate[d] … to do anything it was not already doing voluntarily for its own business reasons …." *Id.* at 1028 (cleaned up). The court thus reversed the approval of the settlement and remanded the case for further proceedings consistent with its judgment.

d. *In re Samsung Top-Load Washing Mach. Mktg., Sales Pracs. & Prod. Liab. Litig.*, 997 F.3d 1077 (10th Cir. 2021)

i. Consumers owning top-load washing machines manufactured by the defendant brought multiple class actions alleging that the top-load door detached mid-cycle. Before class certification, the parties reached a settlement that the district court valued at between $6.55 million and $11.42 million. The settlement contained a clear sailing agreement in which the defendant agreed not to contest a fee request up to $6.55 million; additionally, it contained a kicker provision in which the defendant would retain the difference between the maximum permissible fee award ($6.55 million) and the amount actually awarded. The district court approved the settlement and awarded class counsel just over $3.8 million. A class objector appealed, arguing that the district court's approval of a settlement containing both clear sailing and kicker agreements was an abuse of discretion.

ii. The Tenth Circuit affirmed the approval of the settlement. It first held that settlements containing both kicker and clear sailing agreements required heightened scrutiny, noting that while both provisions "may serve a purpose in the negotiation process, the presence of both agreements in a settlement agreement also suggests the class members may not be receiving all reasonable benefits." *Id.* at 1088. Having set forth that standard and listing several considerations that district courts should make when applying this heightened scrutiny, the court found that "the district court applied sufficient scrutiny and did not abuse its discretion by

granting final approval of the Settlement Agreement." *Id.* at 1091.

3. Cy pres settlements

    a. *Jones v. Monsanto Co.*, 38 F.4th 693 (8th Cir. 2022)

        i. Plaintiffs sued the defendant alleging deceptive labeling of its Roundup products. The parties reached a classwide settlement that created a $39.55 million common fund. Class members who filed claims would receive 50% of the retail price for products they bought, with any remaining funds being distributed to three cy pres recipients. Furthermore, the defendant agreed that it would not object to an incentive payment to each named plaintiff, nor would it object to class counsel's request of 25% of the fund in attorney's fees. One class member objected to the proposed settlement on three grounds: (1) there were further steps the parties could take to identify more class members, or at the very least, payments to class members who made claims should be increased to 100% the price of purchased products before the proceeds are distributed to the cy pres recipients; (2) the cy pres donation constituted compelled speech in violation of the First Amendment; and (3) the cy pres amount should be excluded from the total value of the common fund for the purpose of calculating attorney's fees. Despite these objections, the district court approved the settlement. The objector appealed.

        ii. The Eighth Circuit affirmed the approval of the class settlement and the fee award. It first noted that "in light of the comprehensive notice plan" the district court did not abuse its discretion in concluding that sufficient efforts were made to reach class members. *Id.* at 698. Furthermore, the court found "no abuse of discretion in [the district court's] conclusion that a payment to class members of 50% of the average weighted retail price for the items they purchased 'fully compensated' the class members and that they had no equitable claim to the remaining funds"; thus, because the class members were fully compensated, distribution of the remaining funds to cy pres recipients was not improper. *Id.* at 699. As to the objector's First Amendment argument, the court held that "class members have not been compelled to

subsidize speech when residual funds are distributed cy pres … [because] class members who have filed claims are 'fully compensated'" and have no entitlement to the remaining funds. *Id.* (citation omitted). And those who did not file claims had no claim to the remaining funds; thus, they were also not subsidizing compelled speech. Finally, the court held that "[b]ecause the cy pres is 'distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit and the interests of class members,' … the district court did not abuse its discretion in including the amount allocated cy pres in calculating the attorney's fee." *Id.* at 700 (cleaned up).

b. *In re Google Inc. St. View Elec. Comm'ns Litig.*, 21 F.4th 1102 (9th Cir. 2021), *cert. denied*, 2022 WL 4651933 (Oct. 3, 2022)

i. Plaintiffs filed a class action alleging that the defendant had improperly collected data from the plaintiffs' Wi-Fi networks. The parties reached a classwide settlement agreement that included approximately 60 million members. The settlement provided for injunctive relief and a $13 million settlement fund; after attorneys' fees and other costs, the remainder of the fund was to be divided equally among various internet advocacy groups as cy pres payments. Two putative class members as well as a group of states' attorneys general objected to the settlement agreement and the award of attorneys' fees. The district court approved the settlement and granted the fee request. One objector appealed, arguing that the district court abused its discretion in approving a settlement fund that distributed all of the funds to cy pres recipients when it was feasible to distribute funds to class members. Furthermore, he argued that the settlement violated the First Amendment's prohibition on compelled speech, that the settlement did not provide sufficient value to the class, and that the cy pres recipients had improper relationships with the parties and class counsel.

ii. The Ninth Circuit affirmed the district court's order approving the settlement agreement. In doing so, the court "reject[ed] the suggestion that a district court may not approve a class action settlement that provides monetary relief only in the form of cy pres payments to third parties." *Id.* at 1113. Furthermore, the court noted that "verification

of claims would be prohibitively costly and time-consuming"; thus, the district court did not err in finding that it was not feasible to distribute funds to class members. *Id.* at 1115. Next, the court held that, given the injunctive relief, which included changes the defendant would not have made without the settlement, and "the indirect benefits the class members enjoy though the cy pres provision," the district court did not err in finding the settlement fair, reasonable, and adequate. *Id.* at 1118. Additionally, the court found that because a plaintiff can opt out of a class action settlement, the settlement here did not violate the First Amendment's prohibition on compelled speech. Lastly, the court noted that it had affirmed cy pres settlements "involving much closer relationships between recipients and parties than anything [the objector] allege[d] here"; thus, the district court did not abuse its discretion in approving the settlement. *Id.* at 1119.

iii. Judge Bade, who also authored the majority opinion, wrote a separate concurrence noting that, although he was bound by precedent, he had "concerns about cy pres awards." *Id.* at 1122 (Bade, J., concurring) (quoting, *e.g.*, Chief Justice Roberts and Justice Thomas).

4. Incentive awards

a. *In re Apple Inc. Device Performance Litig.*, --F.4th--, 2022 WL 4492078 (9th Cir. 2022)

i. Consumers filed class action lawsuits under state and federal laws against Apple relating to unexpected shutdowns and software updates to their iPhones. The cases were consolidated, and the parties ultimately reached a pre-certification settlement. Apple agreed to pay each class member $25 for his or her eligible phones. Apple would pay the class a minimum of $310 million and a maximum of $500 million. Class counsel requested $87.73 million of the fund in fees. Additionally, the settlement provided incentive awards for the named plaintiffs. The district court approved the settlement and the incentive awards, but only granted class counsel $80.6 million in fees. Several objectors appealed.

ii. The Ninth Circuit reversed approval of the settlement and the fee award. The court agreed with objectors that the district court applied the wrong legal standard—a presumption of fairness—when reviewing the settlement. According to the Ninth Circuit, "longstanding [C]ircuit precedent require[ed] a heightened fairness inquiry prior to class certification." *Id.* at *9 (cleaned up). "[T]his type of error is not subject to review for harmlessness"; thus, the court vacated the settlement, fee award, and incentive payments. *Id.* Nonetheless, contrary to the Eleventh Circuit (see below), the court rejected the objectors' argument that incentive awards were per se invalid. It noted that it has "held that 'reasonable incentive awards' to class representatives 'are permitted.'" *Id.* at *11 (citation omitted). However, "[a]n incentive payment cannot be so large that it amounts to 'a preferred position in the settlement.'" *Id.* at *12.

b. *Johnson v. NPAS Sol., LLC*, 975 F.3d 1244 (11th Cir. 2020), *reh'g en banc denied*, 43 F.4th 1138 (11th Cir. 2022)

i. Plaintiff brought a putative class action against the defendant, alleging violations of the Telephone Consumer Protection Act. The parties reached a class settlement, which provided for a $1,432,000 fund, 30% of which would go to attorneys' fees. The settlement also provided for a $6,000 incentive payment to the named plaintiff. One class member objected to the settlement. The district court approved the settlement, and the objector appealed.

ii. The Eleventh Circuit reversed the approval of the settlement. The court first found that "by requiring class members to object to an award of attorneys' fees before class counsel had filed their fee petition, the district court violated Rule 23(h)." *Id.* at 1253. However, this error was harmless because the objector lodged a detailed objection to the attorneys' fee award before the fee petition was filed, and her objections did not substantially change after it was filed; thus, she was not prejudiced. Next, based on what the court deemed analogous Supreme Court case law from the 1800s, it held that class representatives are categorically barred from receiving incentive payments for their time and effort spent serving as a class representative. Because the settlement

here included such an incentive payment, the district court's approval of the settlement was an abuse of discretion. Finally, the court determined that the district court had abused its discretion because it did not adequately explain its award of attorneys' fees, its denial of the objections, and its approval of the settlement.

iii. Judge Martin concurred in part and dissented in part. Specifically, she "disagree[d] with the majority's decision to take away the incentive award approved by the District Court for the named plaintiff" because it "will have the practical effect of requiring named plaintiffs to incur costs well beyond any benefits they receive from their role in leading the class." *Id.* at 1264 (Martin, J., concurring in part and dissenting in part).

B. Comments

Objectors have focused heavily on settlement agreements in recent years, and they have had considerable success in appealing these agreements when the district court has not applied the level of scrutiny required. Courts have highlighted various red flags, including clear sailing agreements, kicker clauses, and disproportionate attorneys' fees awards. Although courts have frequently approved cy pres awards, such awards remain controversial. The Eleventh Circuit has banned incentive payments, but no other Circuit has taken that approach, and it is unlikely that other Circuits will follow the Eleventh Circuit.

XI. ATTORNEYS' FEES

C. Rule 23(h): "In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."

1. Documentation

a. *Gelis v. BMW of N. Am., LLC*, 49 F.4th 371 (3d Cir. 2022)

i. After negotiating a class settlement worth at least $27 million, the plaintiff's attorneys came to a "high-low" agreement with the defendant regarding attorneys' fees. Under the agreement, the defendant would not object to an award of up to $1,500,000, and class counsel would not request more than $3,700,000. Class counsel sought, and

was granted, the maximum amount under the agreement. The defendant appealed, arguing that class counsel did not provide enough documentation to support the requested lodestar amount and that the lodestar multiplier was unwarranted.

ii. The Third Circuit reversed. It held that the lodestar award was based on an insufficient record, as class counsel's charts detailing at a summary level the time devoted to various categories of legal work were "so condensed, high-level, and lacking in specific detail" that they did not give the district court the ability to determine if the hours claimed were reasonable for the work performed. *Id.* at 381.

2. Reasonableness of the percentage sought

a. *McAdams v. Robinson*, 26 F.4th 149 (4th Cir. 2022)

i. Named plaintiffs filed a class action against Nationstar Mortgage LLC alleging that it violated state and federal consumer protection laws when servicing the class members' loans. After nearly six years of litigation, the parties came to a settlement that created a relief fund of $3 million. As a part of the settlement, Nationstar agreed not to oppose class counsel's fee request so long as it did not exceed $1.3 million. Class counsel submitted records accounting for $1,479,204.76 in billable hours and unreimbursed expenses, but it requested only $1.3 million. An objector argued, among other things, that the attorneys' fee award was improper. The magistrate judge approved the settlement, and the objector appealed.

ii. The Fourth Circuit affirmed the magistrate judge's fee award. The court noted that although the fee award accounted for 43% of the total cash settlement, which "approache[d] the upper limit of permissible recovery[,]" there is a strong presumption that the lodestar figure is reasonable. *Id.* at 162. Thus, because counsel requested roughly $179,000 less than the lodestar figure, and the fee award was not so out of proportion to a standard percentage recovery, the strong presumption that the lodestar award was reasonable was not outweighed by the percentage-of-recovery calculation. Furthermore, the court noted that clear

sailing agreements "are not per se unreasonable. Rather, courts are directed to give extra scrutiny to such agreements[,]'" and because the magistrate judge did precisely that, he did not abuse his discretion. *Id.* at 162–63 (cleaned up).

b. *In re Google Inc. St. View Elec. Comm'ns Litig.*, 21 F.4th 1102 (9th Cir. 2021), *cert. denied*, 2022 WL 4651933 (Oct. 3, 2022)

i. In this case, discussed above (Section X(3)(b)), objectors argued that the 25% fee awarded by the district court was excessive.

ii. The Ninth Circuit affirmed the attorneys' fee award. In doing so, the court first noted that "in the Ninth Circuit, the 'benchmark' fee award is 25%, which can be adjusted upward or downward based on the circumstances of the case." *Id.* at 1120 (cleaned up). Furthermore, the court noted that the district court did not mechanically apply the benchmark to the circumstances of the case, but instead noted several factors that supported the benchmark, including the skills and expertise required, the novel issues the case presented, the ten years of work that were required, and the risk counsel took on. Additionally, the court noted that "there is no uniform rule that district courts must discount the value of any cy pres relief" from the attorneys' fee award, and "the district court properly considered all relevant circumstances ...." *Id.* at 1121–22 (citation omitted).

3. Megafund settlements

a. *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 431 (2021), and *cert. denied*, 142 S. Ct. 765 (2022).

i. Following a massive data breach in 2017, many plaintiffs filed class actions against Equifax Inc., which were subsequently consolidated in the Northern District of Georgia. The parties ultimately came to a settlement representing 147 million class members. The settlement provided for a $380.5 million payment into a fund for the benefit of class members; $77.5 million of that fund (20.36%) was to pay for attorneys' fees. In the face of 388

objectors, the district court approved the settlement, certified the class, and awarded attorneys' fees. Several objectors appealed, arguing, among other things, that the district court should have used the lodestar method instead of the percentage method, and that the district court should have considered the economies of scale because the settlement was a "megafund" case involving a settlement of hundreds of millions of dollars.

ii. The Eleventh Circuit affirmed the district court's attorneys' fee award. The court reaffirmed the use of the percentage method in common fund cases. The court reasoned that the use of the percentage method was not at odds with any Supreme Court precedent and noted that the Supreme Court has applied the percentage method in common fund cases. The court "decline[d] to add an additional factor requiring the District Court to expressly consider the economies of scale in a megafund case." *Id.* at 1280 (citation omitted). Finally, the court held that the district court did not abuse its discretion when awarding attorneys' fees because it properly considered the necessary factors (*Johnson* factors), and it held the 20.36% fee award was "well within the percentages permitted in other common fund cases, and even in other megafund cases." *Id.* at 1281 (citation omitted).

b. *In re Optical Disk Drive Prod. Antitrust Litig.*, 959 F.3d 922 (9th Cir. 2020)

i. In a classwide settlement of antitrust claims, the combined settlements totaled $180 million. The attorneys' fees awarded by the district court amounted to $42,905,000 in attorneys' fees (and more than $5 million in expenses). Objectors appealed.

ii. The Ninth Circuit recognized that the district court was required to consider the size of the settlements, "but the record [did] not support the objectors' assertion that the district court overlooked this factor." *Id.* at 933. The court noted that the Ninth Circuit has "declined to adopt a bright-line rule requiring the use of sliding-scale fee awards for class counsel in megafund cases." *Id.* The court ultimately remanded the fee awards to the district court for further consideration on other case-specific grounds.

4. Multipliers in lodestar awards

    a. *In re Home Depot Inc.*, 931 F.3d 1065 (11th Cir. 2019)

        i. A data breach at Home Depot caused the information of tens of millions of credit cards to be stolen. A class of banks that issued credit cards brought state law claims against Home Depot to recover their resulting losses. The parties eventually settled, and as a part of the settlement, Home Depot agreed to pay reasonable attorneys' fees. The fees would be paid separately from the class fund. The district court awarded class counsel $15.3 million in fees. The district court used the lodestar method, finding class counsel's hours reasonable and applying a 1.3 multiplier to account for the risk of the case. Home Depot appealed, arguing that the use of the multiplier was improper, and that class counsel should not have been compensated for time spent litigating a private dispute resolution process separate from the claims. Class counsel brought a cross appeal arguing that the percentage cross-check that the district court applied was improper because it did not include attorneys' fees as part of the class benefit.

        ii. The Eleventh Circuit held that it was an abuse of discretion to use a multiplier to account for risk in a fee-shifting-case. In coming to this holding, the court stated that "the [Supreme] Court's prohibition on enhancements for risk applies to contractual fee-shifting cases when courts use the lodestar method." *Id.* at 1086. Thus, the district court abused its discretion when applying a multiplier to account for risk. Additionally, the court found that class counsel's time spent litigating the private dispute resolution process and time spent soliciting class representatives was reasonable, and, thus compensable. Finally, because this was a fee-shifting case, and not a common fund, the district court properly excluded attorneys' fees in its percentage cross-check.

5. Market-based approach (Seventh Circuit approach)

    a. *In re Stericycle Sec. Litig.*, 35 F.4th 555 (7th Cir. 2022)

i. The defendant, a waste management company, settled with the state of New York following an investigation relating to allegations that it illegally increased prices on fixed-price government contracts. As a result of this settlement, other parties brought claims making similar allegations. As these claims mounted, the price of the company's shares decreased significantly. Two pension funds filed a securities fraud class action against the company, alleging that it inflated its stock price by making misleading statements about the company's billing practices. The parties agreed to settle for $45 million, and lead counsel moved for a fee award of 25%. An objector argued that the award was unreasonably high given the low risk to class counsel in litigating the case and the early stage at which the case was settled. The district court approved the settlement and the fee award; in doing so, it found the fee reasonable based on the contingent nature of the litigation and the positive outcome for the class. The objector appealed.

ii. The Seventh Circuit reversed. The court first noted that when assessing the reasonableness of a fee request "a district court must attempt to approximate the fee that the parties would have agreed to at the outset of the litigation without the benefit of hindsight." *Id.* at 559. This approximation should consider the risk of nonpayment that class counsel assumed and the market rate of compensation at the time. The court then noted that the district court's approximation did not consider an actual *ex ante* fee agreement between one of the named plaintiffs and its counsel, which "is a particularly useful guidepost for determining the market rate." *Id.* at 560 (citation omitted). The court also noted that the district court did not give sufficient weight to the early stage at which the case was settled, and the reduced risk of nonpayment considering the prior successful settlement achieved by the state of New York. Given the "cumulative effect of these issues," the court concluded that "the district court's analysis did not sufficiently reflect the market-based approach for determining fee awards that [was] required by [Seventh Circuit] precedent." *Id.* (cleaned up).

6. Compensation for work performed by non-class counsel

a. *Arkin v. Pressman, Inc.*, 38 F.4th 1001 (11th Cir. 2022)

i. Non-class counsel identified potential Telephone Consumer Protection Act claims but was not selected to be class counsel, who ultimately settled the case. The district court denied any fees to non-class counsel.

ii. The Eleventh Circuit recognized that non-class counsel is entitled to a portion of a common fund recovered in a class action "if non-class counsel confers a substantial and independent benefit to the class that aids in the recovery or improvement of the common fund." *Id.* at 1009 (citation omitted). Here, non-class counsel did provide some benefit by identifying the claim and the potential for a class action. However, non-class counsel had taken actions in the litigation that put class members at risk. Thus, the district court did not err in declining to award fees to non-class counsel.

7. Mixed coupon settlements

a. *Chambers v. Whirlpool Corp.*, 980 F.3d 645 (9th Cir. 2020)

i. The Ninth Circuit affirmed the district court's approval of a putative class action settlement of state and federal law claims relating to faulty electronic control boards in dishwashers manufactured by the defendant. However, it reversed the attorneys' fees award. In doing so, the court first held that the rebate portion of the parties' settlement was a coupon. Next, the court held that "[t]he plain language of [the Class Action Fairness Act] makes clear that a court should ordinarily use the percentage-of-value, not lodestar, methodology for the portion of the settlement involving coupons." *Id.* at 658. Here, "the district court erred by applying a lodestar-only methodology to calculate the fees even though potentially unredeemed coupons represent most of the settlement value." *Id.* at 659 (emphasis omitted).

D. Comments

Objectors have focused heavily on attorneys' fees in recent years, and they have achieved some success in challenging fee awards. Courts have scrutinized fee

percentages carefully, and they have demanded extensive documentation in awarding fees.

* * *

For additional analysis of class action trends, including historical perspectives, *see* Klonoff, *The Decline of Class Actions,* 90 Wash. U. (St. Louis) L. Rev. 729 (2013): https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6004&context=law_lawreview