AAI AMERICAN ANTITRUST INSTITUTE

Class Action Issues Update
Summer 2023

The American Antitrust Institute (AAI) seeks to preserve the effectiveness of antitrust class actions as a central component of ensuring the vitality of private antitrust enforcement.[1] As part of its efforts, AAI issues periodic updates on developments in the courts and elsewhere that may affect this important device for protecting competition, consumers, and workers. This update covers developments since our Fall/Winter 2022 update.

CLASS ACTION SUMMARY (SUMMER 2023)

Our Summer Class Action Update includes coverage of several new decisions from the first part of 2023, including:

- **Uninjured Class Members:** *Van v. LLR, Inc.,* 61 F.4th 1053 (9th Cir. 2023), *Black v. Occidental Petro. Corp.,* 69 F.4th 1161 (10th Cir. 2023)
- **Ascertainability:** *In re Niaspan Antitrust Litig.* 67 F.4th 118 (3d Cir. 2023).
- **Incentive Payments:** *Fikes Wholesale, Inc. v. Visa U.S.A., Inc.*, 52 F.4th 704 (2d Cir. 2023); *Maribel Moses v. The New York Times Company*, Docket No. 21-2556-cv (2d Cir. August 17, 2023).
- **Mandatory Arbitration Clauses:** *Fraga v. Premium Retail Services, Inc.,* 61 F. 4th 228 (1st Cir. 2023).
- **Motions to Intervene:** *SEC v. LBRY, Inc.*, 26 F.4th 96 (1st Cir. 2023)
- **Attorney's Fees:** *Lowery v. Rhapsody Int'l Inc.*, 69 F.4th 994 (9th Cir. 2023): *Maribel Moses v. The New York Times Company*, Docket No. 21-2556-cv (2d Cir. August 17, 2023).

I. CLASSES CONTAINING UNINJURED CLASS MEMBERS

In our past several updates, we noted the recurring debate in the federal courts over the certification of classes containing uninjured class members. The landscape has not changed significantly since we last reported on the issue in Fall/Winter 2022, but recent Ninth Circuit decisions and current 23(f) appeals may result in new developments in the second half of this year.

As we noted in the **Fall/Winter 2022** update, the Supreme Court denied *certiorari* of *StarKist Co. v. Olean Wholesale Grocery Coop., Inc*, leaving intact the Ninth Circuit decision granting class certification. The Ninth Circuit rejected a "per se" rule that there can only be a *de minimis* number of uninjured members in favor of a case-by-case analysis of the impact of uninjured class members for class certification. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022).

[1] The American Antitrust Institute is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. We serve the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. For more information, see http://www.antitrustinstitute.org. Comments on this update or suggestions for AAI amicus participation should be directed to Kathleen Bradish, kbradish@antitrustinstitute.org, (202) 828-1226.

Panels in the Ninth Circuit probed what is a sufficient case-by-case analysis under *Olean Wholesale* in two appeals decided earlier this year. In *Bowerman v. Field Asset Services, Inc.,* 39 F. 4th 652 (9th Cir. 2022), the court decertified a class of workers claiming withheld overtime pay, noting that it had taken eight days to determine damages for only 11 plaintiffs. It concluded that individualized issues on damage were "prohibitively cumbersome," and plaintiffs failed to prove that class issues predominated over individualized ones. In *Van v. LLR, Inc.,* 61 F.4th 1053 (9th Cir. 2023), the Ninth Circuit reached differing conclusions on three arguments the defendant made for decertification based on uninjured class members. In a case involving improper sales tax charges, the panel rejected an argument that individual damages could be too small to support Article III standing, and it found the defendant had not substantiated arguments that some class members voluntarily paid the incorrect sales tax. On the other hand, the court found that the defendant had substantiated its argument that some class members received discounts that offset their sales tax payments. Noting these potentially uninjured class members, it remanded the case to the district court to analyze whether "a class member by member analysis [would] be unnecessary or workable."

We also note that the Ninth Circuit has certified a 23(f) appeal on class certification in the *In re Google Play Antitrust Litigation*. As part of this appeal, the Ninth Circuit will address questions of how to measure the impact of uninjured class members. Defendant claims that the lower court did not conduct a "rigorous analysis" of the impact of uninjured class members as required by *Olean Wholesale*. Defendant's petition claims that "rigorous analysis" means (1) plaintiffs bear the burden of proving that there are not a "great number" of uninjured class members and (2) the court must identify what individualized injury issues may exist and how they apply to class members. Briefing is expected to be completed this summer.

Other circuits have adopted more bright-line tests. The First, Fourth, Seventh, Eleventh, and D.C. Circuits stated that a district court should not certify a class if uninjured putative class members exceeded a *de minimis* number. *See e.g., In re Asacol Antitrust Litig.*, 907 F.3d 42, 47, 54 (1st Cir. 2018); *Krakauer v. Dish Network Network, L.L.C.*, 925 F.3d 643, 658 (4th Cir. 2019); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624-25 (D.C. Cir. 2019).

Meanwhile, the Second, Third, Fifth, Sixth and Eighth have held that courts should not certify a class with any uninjured class members. *See e.g.*, *Barrows v. Becerra*, 24 F.4th 116, 128 (2d Cir. 2022); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003); *Rikos v. Procter & Gamble Co.,* 799 F.3d 497, 505 (6th Cir. 2015); *Johannessohn v. Polaris Indus.*, 9 F.4th 981, 987 (8th Cir. 2021).

Since our last update, the Tenth Circuit has also weighed in on the issue of uninjured class members. In *Black v. Occidental Petro. Corp.,* the court upheld certification of a class of private landowners holding mineral and oil interests, explicitly rejecting the "no uninjured class member" standard. 69 F.4th 1161, 1185 (10th Cir. 2023) (noting that "[t]he presence of class members who experienced varying degrees of injury, including some who were altogether uninjured, does not bar class certification.") The *Black v. Occidental Petro* opinion cites favorably to the Seventh Circuit decision in *Messer v. Northshore Unitv. HealthSystem* describing a *de minimis* standard, but the Tenth Circuit did not unambiguously adopt that criterion.

II. ASCERTAINABILITY

In our previous several updates, we also discussed the circuit split over whether Rule 23 contains a heightened ascertainability requirement that demands class plaintiffs plead and prove an administratively feasible mechanism for identifying absent class members. As detailed in our **Spring/Summer 2021** update, the First and the Fourth Circuits have continued to impose an ascertainability requirement. On the other hand, the Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have rejected an administrative feasibility prerequisite. As referenced in our **Fall/Winter 2022** update, the Fifth, Tenth, and D.C. Circuits have yet to explicitly adopt a position over heightened ascertainability.

Since our last update, the Third Circuit revisited the ascertainability requirement in *In re Niaspan Antitrust Litig.* 67 F.4th 118 (3d Cir. 2023). The decision confirms that administrative feasibility remains a prerequisite of ascertainability in the Circuit, despite the apparent softening of the Circuit's approach in recent decisions. Those earlier decisions are described in detail in our **Fall 2020** and **Fall 2017** updates. In the *Niaspan* decision, the Third Circuit panel wrote that "[t]he ascertainability standard, including the administrative feasibility principle it contains, is true to the text, structure, and purpose of Rule 23 . . . What we call 'ascertainability' and 'administrative feasibility' is merely the way courts perform that role, a practice familiar under the civil rules." *Id.* at 132. The decision further rejected Appellants' arguments that other circuits, including the Sixth, Seventh, Eighth, and Ninth Circuits, have dropped the ascertainabilty requirement. Instead, the decision interpreted those circuit courts as adopting "a separate administrative feasibility requirement . . . through a rigorous analysis of Rule 23's 'superiority' requirement." *Id.* at 133-34 n.10.

The plaintiffs in *Niaspan* have petitioned for reconsideration *en banc*, and AAI has filed an *amicus* brief in support of their position. AAI's brief argues that the Third Circuit panel erred by departing from the Third Circuit's practical approach to the "administrative feasibility" requirement.

III. SPECIFIC PERSONAL JURISDICTION

Since 2017, we have been tracking the lower federal courts' application of the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017) ("*BMS*"). That decision requires specific jurisdiction over all plaintiffs' claims in the forum state for a mass action to proceed if there is otherwise no general jurisdiction. This has raised questions as to whether the same standard will apply to class actions. If so, plaintiffs may be required to bring suits on behalf of nationwide or multi-state classes in a defendant's home state. This would result in significant litigation advantages for corporate antitrust defendants, as well as inefficiencies.

In our **Spring 2020** update, we noted that the Fifth, Seventh, and D.C. Circuits all held that *BMS* did not bar nationwide class actions prior to class certification, notwithstanding that specific jurisdiction may be lacking for unnamed class members. The Seventh Circuit, in an opinion by Chief Judge Wood in *Mussat v. IQVIA*, went further than previous circuit courts' rulings in holding affirmatively that *BMS* does not apply to class actions. The Supreme Court denied *certiorari* in that case.

In our **Fall 2021** update, we noted that the Sixth Circuit, in *Lyngaas v. Curaden AG*, 992 F.3d 412 (6th Cir. 2021), had joined the Seventh Circuit in holding that "*Bristol-Myers Squibb* does not extend to federal class actions." Quoting extensively from Chief Judge Wood's opinion in *Mussat*, the circuit

court noted that a class action is formally a single suit in which a defendant litigates against only the class representative, and the absent class members are therefore not "parties." The court distinguished *BMS* by explaining that "[t]he different procedures underlying a mass-tort action and a class action demand diverging specific personal jurisdiction analyses." *Id.* at 435.

As described in our **Spring/Summer 2022** update, the First Circuit adopted the logic of the Sixth and the Seventh Circuit's in its decision in *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84 (1st Cir. 2022). The *Waters* decision found that *BMS*'s jurisdictional requirement did not apply to collective actions under the federal Fair Labor Standards Act (FLSA). Such actions differ somewhat from Rule 23 class actions because they are "opt-in" rather than "opt-out" collective actions. But the court cited favorably to the Sixth Circuit's opinion in *Lyngaas*, adopting the logic that only the named plaintiff has "party" status. This strongly suggests the First Circuit will follow *Mussat* and *Lyngaas* in refusing to extend *BMS* to class actions.

As discussed in our **last** update, the Third Circuit has joined with the First, Sixth and Seventh Circuit in stating that *BMS* does not apply to Rule 23 class actions, noting that the Supreme Court has "regularly entertained nationwide classes where the [named] plaintiffs relied on specific personal jurisdiction, without taking note of any procedural defects." *Fischer v. Fed. Express Corp.*, 42 F.4th 366, 375 (3d Cir. 2022). But in the same decision, the Third Circuit split from the First Circuit to find that *BMS did* apply to FLSA collective actions. It reasoned that the FLSA's text, the FLSA's legislative history, and the weight of caselaw favored treating FLSA collective actions "as ordinary in personam suits for purposes of personal jurisdiction" requiring "opt-in plaintiffs […] demonstrate the court has personal jurisdiction with respect to each of their claims *Id.* at 375.

The Ninth Circuit's decisions in *Moser v. Benefytt,* 8 F.4th 872 (9th Cir. 2021) and *Owino v. CoreCivic, Inc.*, 36 F.4th 839 (9th Cir. 2022), have created some confusion in this area with their rulings on waiver of personal jurisdiction when a class is certified. A divided panel decision in *Moser* held that personal jurisdiction objections cannot be waived prior to class certification because it is only after certification that defendant can object to absent class members' claims. Over the dissent of Judge Cardone, the panel majority left open the possibility that personal jurisdiction objections could be available at the class certification stage under Rule 23. *Moser* was remanded, and plaintiffs filed a notice of settlement.

In *Owino*, three plaintiff-classes of immigrant detainees who alleged federal statutory and state labor code violations against the overseer of a private detention facility were certified by the district court. On appeal, the panel applied *Moser* to find that the district court erred in holding that its personal jurisdiction defense had been waived. The panel declined to vacate the district court's class certification order, however, holding that, on remand, the district court may consider the personal jurisdiction defense at the appropriate time. The Ninth Circuit denied rehearing *en banc.*

To date, no circuit court has held that *BMS* bars nationwide class actions in forum states that lack personal jurisdiction over absent class members.

IV. INCENTIVE AWARDS FOR CLASS REPRESENTATIVES

In our **Fall/Winter 2022** update, we continued to follow developments related to the Eleventh Circuit's decision *Johnson v. NPAS Sols., LLC.* 875 F.3d 1244 (11th Cir. 2020). *Johnson* held that incentive awards paid to lead class plaintiffs—a longstanding feature of antitrust and other actions—

are unlawful under nineteenth-century Supreme Court precedent. In our **Spring/Summer 2021**, **Fall 2021**, and **Spring/Summer 2022** updates, we noted that numerous district courts both within and outside the Eleventh Circuit, and numerous appellate panels outside the Eleventh Circuit, have rejected, distinguished, or narrowly construed *Johnson* to allow payment of incentive awards.

In August 2022, the Eleventh Circuit denied *en banc* rehearing in *Johnson*. Judge Pryor, joined by Judges Wilson, Jordan and Rosenbaum, authored a lengthy dissent, concluding that "[t]he panel majority opinion fundamentally undermined class action law based on a misinterpretation of two Supreme Court cases," and "by denying rehearing *en banc*, our court has struck a lasting blow to class actions as a device for righting wrongs in this circuit." The dissent also urged that, "[g]iven our failure to act, it will be up to the Supreme Court to overrule or clarify [the 1880s Supreme Court cases] to undo this problem of our making. If the Supreme Court does not act, then I urge either the Advisory Committee on Civil Rules to amend Rule 23 or Congress to enact a statute that explicitly authorizes incentive awards." Over the dissent for rehearing *en banc*, the order staying the mandate in *Johnson* was lifted on October 17, 2022. Although the plaintiff petitioned the Supreme Court for *certiorari*, the Court denied *certiorari* in April 2023. As a result, *Johnson* remains the binding precedent in the Eleventh Circuit.

As we discussed in our **Fall/Winter 2022** update, the Ninth Circuit rejected *Johnson* in *In re Apple Inc. Device Performance Litig.* 50 F.4th 769, 785 n.13 (9th Cir. 2022). The Ninth Circuit considered the same nineteenth-century cases and held that they did not bar incentive awards. *Id.* at 785. Rather, the court held that "incentive awards cannot categorically be rejected or approved," and "[s]o long as they are reasonable, they can be awarded." *Id.* at 787. The Ninth Circuit was joined by the First Circuit in affirming the permissibility of incentive awards. *See Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340, 353–54 (1st Cir. 2022).

Recently, the picture was complicated by the Second Circuit's decision in *Fikes Wholesale, Inc. v. Visa U.S.A., Inc.*, 52 F.4th 704 (2d Cir. 2023). While the court refused to bar the class representative incentive awards, it did so only because it was compelled to follow its own precedents in *Melito v. Experian Mktg. Sols. Inc.* and *Hyland v. Navient Co.* The Second Circuit panel instead agreed in principle with the Eleventh Circuit position, and it concluded that "[s]ervice awards are likely impermissible under Supreme Court precedent," setting the stage for future challenges. *Id.*

A different panel in the Second Circuit, however, affirmed the legality of incentive rewards in *Maribel Moses v. The New York Times Company*, Docket No. 21-2556-cv (2d Cir. August 17, 2023). That panel rejected an argument based on the Eleventh Circuit decision in *Johnson* not just because of the Circuit's binding precedent in *Melito,* but also because it found the Eleventh Circuit's reasoning unconvincing. The *Moses* panel wrote that the nineteenth century precedent relied on by the Eleventh Circuit "ha[s] been superseded, not merely by practice and usage, but by Rule 23, which creates a much broader and more muscular class action device than the common law predecessor that spawned the [earlier precedent.]" at 45. Further, it noted that its decision is consistent with the "overwhelming majority" of circuits in agreeing that district courts are permitted to grant incentive awards.

Although the circuit split appears to be widening, the Supreme Court in April 2023 denied petitions for *certiorari* to review either the Eleventh Circuit or the Second Circuit's *Fikes* decisions on incentive awards.

V. CLASS ACTION WAIVERS IN MANDATORY ARBITRATION CLAUSES

Beginning with our **Fall 2016** update, we have been tracking the use of mandatory arbitration clauses in employment agreements, which the Supreme Court upheld in a 5-4 decision in *Epic Systems Corp. v. Lewis*. 138 S. Ct. 1612 (2018). Mandatory arbitration agreements often include forced-class action waivers that may prevent class litigation and class arbitration. In our **Spring 2019** update, we addressed that the Supreme Court's decision in *New Prime, Inc. v. Oliveria* held that the Federal Arbitration Act (FAA) does not compel courts to enforce private arbitration agreements involving "contracts of employment" with transportation workers, which are expressly excluded from the FAA's coverage provided the workers are "engaged in foreign or interstate commerce." 139 S. Ct. 532 (2019).

Since our **Fall 2020** update, we have been tracking a circuit split over how the "foreign or interstate commerce" requirement affects the scope of the transportation-worker exclusion, particularly as applied to gig economy workers. In our **Spring/Summer 2022** update, we noted that the Supreme Court unanimously affirmed the Seventh Circuit in *Saxon v. Southwest Airlines*. 142 S.Ct. 1783 (2022). Justice Thomas, writing for the Supreme Court, held that a "class of workers" under the FAA is defined by the work the workers perform, not the business their employer is in. *Id.* at 1788–89. And the class is "engaged in foreign or interstate commerce" for purposes of the FAA exclusion if the work renders the workers "directly involved in transporting goods across state or international borders." *Id.* at 1789–90. The analysis, the Court held, requires a contextual inquiry into whether the employees "are actually engaged in interstate commerce in their day-to-day work." *Id.* at 1788. To be "engaged in foreign or interstate commerce" under § 1, the class of workers must "play a direct and 'necessary role in the free flow of goods' across borders," which is to say the workers must "be actively 'engaged in transportation' of those goods across borders via the channels of foreign or interstate commerce." *Id.* at 1790. The Court said only that "[w]e recognize that the answer will not always be so plain when the class of workers carries out duties further removed from the channels of interstate commerce or the actual crossing of borders." *Id.* at 1789 n.2.

Our **Spring/Summer 2022** update noted that the Ninth Circuit's *Carmona v. Domino's Pizza, LLC* held that Domino's delivery drivers qualify for the FAA exclusion because they are "engaged in a 'single, unbroken stream of interstate commerce' that renders interstate commerce a 'central part' of their job description." 21 F.4th 627 (9th Cir. 2021). The losing defendant petitioned for *certiorari*. In October 2022, the Supreme Court granted the petition but immediately vacated and remanded back to the circuit court for further consideration in light of *Saxon*. Just recently, the Ninth Circuit ruled on the remanded case, . U.S. App. LEXIS 18578, at *1, *3 (9th Cir. July, 21 2023. The court again rejected defendant-appellee Domino's motion to compel arbitration, finding that the Supreme Court's decision in *Saxon* was not irreconcilable with its circuit precedent, *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020). As a result, the Ninth Circuit reaffirmed its view that the Domino's drivers, "like the Amazon package delivery drivers [in *Rittmann*], transport [interstate] goods for the last leg to their final destinations," thereby engaging them in interstate commerce. No, 21-55009 2023 U.S. App. LEXIS 18578 at *7

In our **Fall/Winter 2022** update, we discussed three decisions that narrowed the kinds of employees covered by the FAA exclusion in light of *Saxon*.

First, the Second Circuit vacated a May 2022 panel opinion in light of *Saxon* and granted panel rehearing in *Bissonnette v. LePage Bakeries Park St., LLC*. 49 F.4th 655 (2d Cir. 2022). On panel

rehearing, the Second Circuit affirmed that the truck drivers did not qualify for the FAA exclusion. *Bissonnette v. LePage Bakeries Park St., LLC*, No. 20-1681, 2022 U.S. App. LEXIS 27628, at *1 (2d Cir. 2022). The Second Circuit reasoned that, "[a]lthough the plaintiffs spend appreciable parts of their working days moving goods from place to place by truck, the decisive fact is that the stores and restaurants are not buying the movement of the baked goods, so long as they arrive. Customers pay for the baked goods themselves; the movement of those goods is at most a component of total price. The commerce is in breads, buns, rolls, and snack cakes—not transportation services." *Id.* at *13.

Second, the Fifth Circuit applied *Saxon* to limit the scope of the FAA exclusion in *Lopez v. Cintas Corp.* 47 F.4th 428 (5th Cir. 2022). The Fifth Circuit held that once the goods at issue arrived at a Houston warehouse and were unloaded, "anyone interacting with those goods was no longer engaged in interstate commerce." *Id.* at 433. The Fifth Circuit also noted that, unlike either seamen or railroad employees, "the local delivery drivers here have a more consumer-facing role." *Id.*

Finally, we reported on the First Circuit's decision in *Immediato v. Postmates, Inc.* 54 F.4th 67 (1st Cir. 2022). The First Circuit held that couriers who deliver goods from local restaurants and retailers in trips that typically span a few miles are not exempt under the FAA. *Id.* at 76. Applying First Circuit precedent and considering Supreme Court precedent contemporary with congressional enactment of the FAA, the First Circuit held that "once an interstate shipment arrives at a local retailer and is 'there held solely for local disposition and use,' the goods are no longer considered to be 'in interstate commerce.'" *Id.* The court also explained that "engaged in interstate commerce" does not "extend to the intrastate sale of locally manufactured goods." *Id.* at 77.

Since our last update, there has been some pushback on this trend, with the 1st and 9th circuits adopting a widened view of the FAA exclusion post-*Saxon*. The First Circuit recently issued a decision that breaks with the Second Circuit to clarify that, post-*Saxon*, a worker need not be in a transportation industry to qualify as a transportation worker for purposes of the FAA exclusion. In *Fraga v. Premium Retail Services, Inc.,* 61 F. 4th 228 (1st Cir. 2023), the First Circuit emphasized that "the contractual relationships among the various actors play an important role in determining whether an intrastate trip is part of an integrated interstate journey." It distinguished between FAA excluded workers involved in "last mile" deliveries for Amazon, where Amazon had a contractual relationship with both the transportation service and the end customer, and non-excluded Lyft drivers transporting passengers from Logan Airport, where there was no contractual relationship between the airlines and Lyft. The Ninth Circuit decision in *Caroma v. Domino's Pizza, LLC* is described above.

Since *Epic Systems* was decided in 2018, several legislative proposals that would fully or partially overturn the decision have circulated, including the Forced Arbitration Injustice Repeal Act (**FAIR Act**). The FAIR Act was reintroduced in the 118th Congress on April 27, 2023 and is substantially similar to the FAIR Act introduced by Sen. Richard Blumenthal (D-CT) and Rep. Hank Johnson (D-GA) in February 2019, and which we discussed in our **Spring 2019** update. Our **Spring/Summer 2022** update noted that the FAIR Act was reported out of the House Judiciary Committee on March 11, 2022, and a week later, on March 17, it passed the House 220-209, with one Republican, Rep. Matt Gaetz (FL), joining House Democrats in the majority. The 117th Congress's FAIR Act was not acted upon in the Senate. The recent iteration of the FAIR Act remains in committee awaiting action.

VI. CLASS MEMBER MOTIONS TO INTERVENE IN CLASS PROCEEDINGS

In our **Fall/Winter 2022** update, we addressed the Fifth Circuit's standard for resolving motions to intervene by class members who disagree with the litigation strategy of counsel for class representatives.

In *Guenther v. BP Ret. Accumulation Plan*, class plaintiffs sued BP Corporation alleging ERISA violations stemming from BP's acquisition of Standard Oil and the subsequent conversion of Standard Oil's employee retirement benefits to BP retirement benefits. 50 F.4th 536 (5th Cir. 2022). After five years of litigation, on the eve of class certification, a class member who had also been involved in separate litigation against BP moved to intervene as of right. The district court, applying the circuit's four-factor test for evaluating intervention as of right under FRCP 24(a)(2), denied the motion. The class member appealed, challenging only the district court's finding that the fourth factor—inadequate representation—was unsatisfied. The Fifth Circuit affirmed the district court's denial of the intervention of right.

The Fifth Circuit explained that the that the movant's burden in satisfying the fourth factor is "minimal." *Id.* at 543. The movant "must only show that the existing representation '*may* be inadequate.'" *Id.* Here, however, the movant did not make the requisite showing. To ensure that the fourth factor "has some teeth," the movant "must establish 'adversity of interest, collusion, or nonfeasance on the part of the existing party.'" *Id.* To establish adversity of interest, the movant must establish that "its interests diverge from the putative representative's interests in a manner germane to the case.'" *Id.* As relevant here, "[d]ifferences of opinion regarding an existing party's litigation strategy or tactics used in pursuit thereof, without more, do not rise to an adversity of interest." *Id.* The court held that intervention as of right was inappropriate because the movant and the class plaintiffs "shared the same ultimate objective" and the movant "lack[ed] a distinct interest that is at risk of being adversely represented." *Id.*

The Ninth Circuit in *W. Watersheds Project v. Haaland* held that the presumption of adequate representation when the intervenor shares the same "ultimate objective" as a party is overcome by a showing "that an existing party cannot or will not make 'any reasonable argument' that the intervenor would make if it were a party." 22 F.4th 828, 841 (9th Cir. 2022). In that case, the intervenor was able to identify three relevant arguments that the parties had not addressed.

Similar logic was used by the First Circuit to opposite effect in *SEC v. LBRY, Inc.* Upholding the denial of a motion to intervene, the court held that "[w]hen a proposed intervenor's objective aligns seamlessly with that of an existing party [,] a rebuttable presumption of adequate representation attaches." 26 F.4th 96, 99 (1st Cir. 2023). Other circuit courts generally require some showing of conflict to warrant intervention. *See e.g.*, *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019); *Wineries of the Old Mission Peninsula Ass'n v. Twp. Of Peninsula, Michigan*, 41 F.4th 767, 774 (6th Cir. 2022).

Across circuits, it is generally the norm that class members seeking to intervene must make a showing of "conflict" or "adversity" to demonstrate that the existing representation is inadequate.

VII. CALCULATING ATTORNEYS' FEES

In our **Fall 2020** update, we discussed recent case developments governing calculation of attorneys' fees. The Sixth Circuit's decision in *Linneman v. Vita-Mix Corp.*, 970 F.3d 621 (6th Cir. 2020) considered several questions regarding the calculation of attorneys' fees in class-action settlements. In *Linneman*, the district court used a lodestar calculation to award $3.9 million ($2.2 million plus a 75 percent upward multiplier) in coupon settlement.

On appeal, defendant argued that district court erred by using a lodestar calculation to calculate fees under a coupon settlement because of § 1712 of the Class Action Fairness Act ("CAFA"). CAFA requires that, "[i]f a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed." The Sixth Circuit disagreed and held that the CAFA inquiry "centers on the meaning of the phrase 'attributable to the award of the coupons' because only that 'portion' of the fees award must be 'based on the value to class members of the coupons that are redeemed.'" The court recognized a circuit split but noted that the majority of circuits construe the "attributable to" language narrowly and allow lodestar calculations in coupon settlements. A minority view is expressed by the Ninth Circuit which holds that lodestar calculations are not permissible.

Defendant further argued that the district court abused its discretion in calculating the billing rate. The Sixth Circuit agreed. The Sixth Circuit follows the "community market rule," under which the billing rate "should not exceed what is necessary to encourage competent lawyers within the relevant community to undertake legal representation." The court held that the district court ran afoul of the community market rule by relying on counsels' affidavits describing their backgrounds, billing rates, and involvement in the case, and opting to split the difference between pre-calculated local billing rates and requested rates claimed to "reflect [ ] the national practice and experience" of class counsel.

The Sixth Circuit also concluded that the district court erred in three other respects. First, the district court awarded a multiplier without making a finding of "rare and exceptional circumstances" as required by *Perdue v. Kenny A. ex rel. Winn*, 599 U.S. 542 (2010). Second, the district court did not exclude hours that class counsel worked after they rejected an arguably reasonable settlement offer. Third, the district court did not make any specific findings about the value of the settlement. Finally, the Sixth Circuit found that awarding counsel post-judgment interest pursuant to 28 U.S.C. § 1961 was not error.

Since our last update, the Ninth Circuit clarified its position on attorney's fees in *Lowery v. Rhapsody Int'l Inc.*, 69 F.4th 994 (9th Cir. 2023). On appeal, the Ninth Circuit reversed and remanded to the district court that it "should rigorously evaluate the actual benefit provided to the class and award reasonable attorneys' fees considering that benefit." *Id.* at 997. The Ninth Circuit stated that district court "should consider [the] actual or anticipated value to the class members, not the maximum that hypothetically could have been paid to the class." *Id.* Furthermore, district courts "should also consider engaging in a 'cross-check' analysis of the lodestar method to ensure that the fees are reasonably proportional to the benefit received by the class members." *Id.* Ultimately, the Ninth Circuit reminded that "the key factor" is "assessing the reasonableness of the attorneys' fees" to the benefit to the class members, not that "class action attorneys may devote hundreds or even thousands to a case." *Id.* at 1002.

In *Lowery*, a plaintiffs-class of copyright owners sued defendant for infringement of their musical compositions. As settlement negotiations progressed, the amount the plaintiffs-class would receive decreased to $52,841.05. Assessing class counsel's request for $6 million in fees using the lodestar method, the magistrate judge decided to lower fees to $1.7 million. The Ninth Circuit rejected the $1.7 million in attorneys' fees because it was thirty times larger than the benefit received by plaintiffs, making it unreasonable in light of FRCP 23. The appeals court also instructed the district court to disregard the "illusory $20 million settlement cap" and instead base its lodestar calculation of attorneys' fees on the actual $52,841.05 received.

The Second Circuit in the *Moses* case discussed above also addressed attorney's fees. *See Maribel Moses v. The New York Times Company*, Docket No. 21-2556-cv (2d Cir. August 17, 2023. Several class members there objected to the award of attorney's fees in a settlement by the New York Times of claims that its subscription renewal practices violated California disclosure law. The Second Circuit remanded to the district court for failure to conduct a review of the substantive fairness of the attorney's fees as required by (1) the 2018 revision of Rule 23(e)(2) and (2) the traditional factors outlined by *City of Detroit v. Grinnell Corp.*, 495 F. 2d 448 (2d Cir. 1974). The Second Circuit concluded that the district court erred specifically in presuming fairness based on the settlement's arm's-length negotiation, and in "not considering the attorneys' and incentive awards in evaluating the fairness of the settlement."

Further, the Second Circuit found, contrary to the district court, that CAFA's coupon settlement provisions applied to the free "access codes" for NYT subscriptions provided to certain class members. It reasoned that the codes were akin to coupons because (1) they required the class members to continue to do business with the defendant, (2) they are valid only for "select products or services," and (3) lacked the flexibility and the transferability of cash payments.