AAI AMERICAN ANTITRUST INSTITUTE

Class Action Issues Update
Spring 2024

The American Antitrust Institute (AAI) seeks to preserve the effectiveness of antitrust class actions as a central and vital component 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 Summer 2023 update and includes the following new decisions:

Ascertainability: *Evans v. Brigham Young University (BYU)*, No. 22-4050, 2023 WL 3262012 (10th Cir. May 5, 2023), *In re White,* 64 F.4th 302 (D.C. Cir. 2023).

"Fail-Safe" Class Definitions: *In re White,* 64 F.4th 302 (D.C. Cir. 2023), *Fitzmorris v. Weaver*, 2023 DNH 144 (D.N.H. 2023).

Incentive Payments: *Hawes v. Macy's Inc.*, No. 1:17-CV-754, 2023 U.S. Dist. LEXIS 226617 (S.D. Ohio Dec. 20, 2023).

Mandatory Arbitration Clauses: *Fraga v. Premium Retail Services, Inc.*, No. 21-10751-WGY, 2023 U.S. Dist. LEXIS 215862 (D. Mass. Dec. 5, 2023), *Bissonnette v. LePage Bakeries Park St., LLC,* 144 S. Ct. 905 (2024).

Motions to Intervene: *Habelt v. iRhythm Techs., Inc.*, 83 F.4th 1162 (9th Cir. 2023).

Attorney's Fees: *In re Wawa, Inc. Data Sec. Litig.*, 85 F.4th 712 (3d Cir. 2023), *Plaintiff-Appellee v. Fieldale Farms Corp. (In re Broiler Chicken Antitrust Litig. End User Consumer)*, 80 F.4th 797 (7th Cir. 2023).

***Cy Pres*: *Hyland v. Navient Corp.*, 48 F.4th 110 (2d Cir. 2022), *Jones v. Monsanto Co.*, 38 F.4th 693 (8th Cir. 2022), *Joffe v. Google, Inc. (In re Google Inc. St. View Elec. Communs. Litig.)*, 21 F.4th 1102 (9th Cir. 2021).

[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 https://www.antitrustinstitute.org. Comments on this update or suggestions for AAI amicus participation should be directed to Kathleen Bradish, kbradish@antitrustinstitute.org.

I. CLASSES CONTAINING UNINJURED CLASS MEMBERS

For several years, we have been following an ongoing debate in the federal courts over the certification of classes containing uninjured class members. In our Summer 2023 update, we noted that Google successfully petitioned for interlocutory appeal of a district court order certifying a class containing uninjured members in *In re Google Play Antitrust Litigation,* No. 23-15285 (9th Cir. 2023). Google claimed that the district court failed to conduct a "rigorous analysis" to determine whether the presence of uninjured class members defeats predominance under Rule 23. Google argued that, under a rigorous analysis, (1) the plaintiffs must carry the burden of proving the class does not include a "great number" of uninjured class members, and (2) the court must identify and evaluate any individualized issues.

The appeal will not be heard because the parties have settled. Google has agreed to pay Android users $700 million.

II. ASCERTAINABILITY

For several years, we have followed a circuit split over whether Rule 23 contains a heightened ascertainability requirement under which class plaintiffs must plead and prove an administratively feasible mechanism for identifying class members. In our Winter 2022 update, we noted that the Third Circuit, where the heightened ascertainability requirement first gained credence, had been steadily eroding the requirement in a series of cases. However, in our Summer 2023 update, we noted that the court in *In re Niaspan Antitrust Litig.,* 67 F.4th 119 (3d Cir. 2023), reaffirmed its heightened ascertainability requirement and upheld a denial of class certification on ascertainability grounds. Since that update, the Third Circuit has rejected a petition for *en banc* rehearing in *Niaspan*.

As we noted in our Winter 2022 update, the First and Fourth Circuits have joined the Third Circuit in adopting a heightened ascertainablity requirement.[2] The Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, in contrast, have rejected any heightened ascertainability requirement.[3] The Fifth, Tenth, and D.C. Circuits have yet to explicitly adopt a position.

In May 2023, in an unpublished decision, the Tenth Circuit signaled its awareness of the issue in *Evans v. Brigham Young University (BYU)*, No. 22-4050, 2023 WL 3262012 (10th Cir. May 5, 2023). In upholding a district's refusal to certify a class of 2020 BYU students who were required to pay the full price of in-person classes despite being forced to attend online during the COVID-19 pandemic, the court alluded to the circuit split on heightened ascertainability. Because the class definition failed with or without a heightened ascertainability standard, however, the court declined to decide the applicable standard.

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[2] *See In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014).

[3] *See In re Petrobas Sec. Litig.*, 862 F.3d 250, 265 (2d Cir. 2017); *Rikos v. The Proctor & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015); *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015); *Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.*, 821 F.3d 992, 996 (8th Cir. 2016); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1132-33 (9th Cir. 2017); *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1304 (11th Cir. 2021).

The D.C. Circuit, in *In re White,* 64 F.4th 302 (D.C. Cir. 2023), also alluded to the heightened ascertainability requirement without addressing it. The court recognized a connection between the alleged requirement and the issue of so-called "fail-safe" classes, discussed below in Part III. The lower court had denied class certification for an allegedly fail-safe class of hotel workers who claimed they were improperly denied vested retirement interests, where the merits of the case turned on whether the interests were in fact vested. Citing to *Afghan & Iraqi Allies Under Serious Threat Because of Their Faithful Service to the United States v. Pompeo*, 334 F.R.D. 449 (D.D.C. 2020), the court observed that defendants' arguments urging condemnation of fail-safe classes may "strain" against their arguments for adopting the "implied ascertainability requirement that this circuit has never addressed."

III. "FAIL-SAFE" CLASS DEFINITIONS

In *In re White*, the D.C. Circuit also breathed new life into a longstanding circuit split over the viability of fail-safe classes under Rule 23. A class is typically said to be fail-safe if a merits determination is required to determine class membership. Such classes create a risk of unfairness to defendants because individual class members may either win, or, by virtue of losing, be defined out of the class, thereby escaping the bars of res judicata and collateral estoppel.

Many circuits have expressed skepticism of fail-safe classes, but they differ in their treatment. Some, as in *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015), have implied there is a rule against fail-safe classes; some, as in *Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez)*, 695 F.3d 360 (5th Cir. 2012), reject a rule against fail-safe classes as atextual; and some, as in *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802 (7th Cir. 2012), recognize problems with fail-safe classes but encourage lower courts to cure them rather than deny class certification.

In *In re White*, the D.C. Circuit rejected a rule against fail-safe classes, citing the text of Rule 23. The court explained that "the textual requirements of Rule 23 are fully capable of guarding against unwise uses of the class action mechanism." It also encouraged courts to cure fail-safe classes, explaining that "the solution for cases like these is for the district court either to work with counsel to eliminate the problem or for the district court to simply define the class itself." Quoting the Seventh Circuit's decision in *Messner*, the court held that "the problem can and often should be solved by refining the class definition rather than by flatly denying class certification." It continued, "rather than reject a proposed class definition for a readily curable defect based on an unwritten criterion, a district court should either define the class itself or, perhaps most productively, simply suggest an alternate class definition and allow the parties to object or revise as needed."

In November 2023, a district court in the First Circuit, which some have characterized as maintaining a rule against fail-safe classes, held that this rule, if it exists, does not apply to Rule 23(b)(2) classes in suits for injunctive or declaratory relief. In *Fitzmorris v. Weaver*, 2023 DNH 144 (D.N.H. 2023), the district court said, "the First Circuit has commented in dicta on the 'inappropriateness of certifying what is known as a "fail-safe class,"' but has never held that class certification can be denied on this basis where the requirements of Rule 23 are otherwise satisfied." The court continued, "Regardless, even if there is an implied prohibition against fail-

safe classes, there is no indication that such a prohibition would extend to (b)(2) classes." The court noted that it could not find any circuit court cases "denying certification of a (b)(2) class that otherwise satisfies the requirements of Rule 23 solely because it constitutes a fail-safe class." Although it recognized that certifying fail-safe (b)(2) classes can raise fairness concerns, the court held that "the way to guard against these concerns is to 'apply the terms of Rule 23 as written,' which are carefully designed to confer sufficient guarantees of fairness on class action defendants."

IV. INCENTIVE AWARDS FOR CLASS MEMBERS

Since our Fall 2020 update, we have been following unusual developments surrounding the legality of incentive awards for lead plaintiffs in class action settlements. In 2020, the Eleventh Circuit in *Johnson v. NPAS Sols., LLC*, 875 F.3d 1244 (11th Cir. 2020), unexpectedly held that incentive awards paid to lead class plaintiffs—a mainstay of antitrust and other class actions for decades—are unlawful under 19th century Supreme Court precedent. As discussed in our Fall 2022 and Summer 2023 updates, the Ninth Circuit rejected the Eleventh Circuit's analysis and affirmed the legality of incentive awards in *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769 (9th Cir. 2022).

The First Circuit in *Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340 (1st Cir. 2022), also allowed for incentive payments, explaining that it was "follow[ing] the collective wisdom of courts over the past several decades." The court reasoned that "incentive payments remove an impediment to bringing meritorious class actions and fit snugly into the requirement of Rule 23(e)(2)(D) that the settlement 'treats class members equitably relative to each other.'"

As noted in our Summer 2023 update, the Second Circuit has also upheld the legality of incentive awards in the wake of *Johnson*, although at least one panel appeared to be persuaded by the Eleventh Circuit's reasoning. In *Fikes Wholesale, Inc. v. Visa U.S.A., Inc.,* 52 F.4th 704 (2d Cir. 2023), the panel found the challenged incentive payment legal under binding Second Circuit precedent but suggested the circuit should reconsider *en banc* whether incentive payments are legal in light of the precedent cited in *Johnson*. But in *Moses v. The New York Times Company*, 79 F.4th 235 (2d Cir. 2023), a different panel rejected the rationale of *Johnson* and affirmed the legality of an incentive award. Since our last update, the Second Circuit has not addressed the issue *en banc*. Other district courts in the Second Circuit have followed *Moses* and rejected *Fikes*, continuing to allow incentive awards.[4]

The Sixth Circuit has not considered incentive awards since the Eleventh Circuit's *Johnson* ruling. However, the district court in *Hawes v. Macy's Inc.*, No. 1:17-CV-754, 2023 U.S. Dist. LEXIS 226617 (S.D. Ohio Dec. 20, 2023), recently rejected arguments that incentive awards lead to inequitable plaintiff treatment in violation of Rule 23. After surveying other circuit decisions, including *Johnson*, the court was "persuaded by the consensus of authority" that incentive awards

[4] *See, e.g., Reyes v. Summit Health Mgmt., LLC*, No. 22-CV-9916 (VSB), 2024 U.S. Dist. LEXIS 21061 (S.D.N.Y. Feb. 6, 2024); *Kurtz v. Kimberly-Clark Corp.*, No. 14-CV-1142 (PKC) (RML), 2024 U.S. Dist. LEXIS 8711 (E.D.N.Y. Jan. 17, 2024); *Reynolds v. Marymount Manhattan Coll.*, No. 1:22-CV-06846-LGS, 2023 U.S. Dist. LEXIS 191993 (S.D.N.Y. Oct. 23, 2023).

are legal. The district court cited "pragmatic reasons" supporting the use of incentive awards, including inducing named plaintiffs to participate in suits when they would otherwise be economically disincentivized from bringing a legally valid claim.

The Supreme Court has declined to review cases involving the legality of incentive awards three times.

V. CLASS ACTION WAIVERS IN MANDATORY ARBITRATION CLAUSES

Since 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 the Supreme Court's decision in *New Prime, Inc. v. Oliveria* holding 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."

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 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 Court, held that a "class of workers" under the FAA is defined by the work the workers perform, not the business of their employer. And the class is "engaged in foreign or interstate commerce" for purposes of the FAA exclusion if the workers are "directly involved in transporting goods across state or international borders." 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." 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." 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."

The First, Second, Fifth and Ninth Circuits have applied *Saxon's* guidance on the FAA exclusion with varying outcomes. The Fifth Circuit in *Lopez v. Cintas Corp.*, 47 F.4th 428 (5th Cir. 2022), held that last-mile delivery drivers did not qualify for the FAA exclusion because they were not involved in "interstate commerce." The court reasoned 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."

In contrast, the Ninth Circuit, in *Carmona v. Domino's Pizza, LLC*, 21 F.4th 627 (9th Cir. 2021), held that Domino's last-mile delivery drivers qualified 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." In October 2022, the Supreme Court vacated

and remanded *Carmona* for further consideration in light of *Saxon*. Since our last update, the Ninth Circuit, on remand, 73 F.4th 1135 (9th Cir. 2023), has again rejected Domino's motion to compel arbitration, finding no conflict between the Supreme Court's decision in *Saxon* and a previous Ninth Circuit precedent, *Rittmann v. Amazon.com, Inc.,* 971 F.3d 904 (9th Cir. 2020), which had informed the since-vacated opinion. The Ninth Circuit reasoned that the Domino's drivers were engaged in interstate commerce because they, "like the Amazon package delivery drivers [in *Rittmann*], transport [interstate] goods for the last leg to their final destinations."

As discussed in our Fall 2022 update, the Second Circuit in *Bissonnette v. LePage Bakeries Park St.,*, 49 F.4th 655 (2d Cir. 2022), on rehearing after *Saxon*, used a different rationale to hold that truck drivers transporting baked goods did not qualify for the FAA exclusion. The court found that moving goods between locations did not qualify the driver as a "transportation worker" under the FAA. According to the court, the decisive fact was that the purchasers of the products at issue were buying the goods, not the movement of them. Employment "in the transportation industry," according to the Second Circuit, was a necessary (albeit not sufficient) condition for plaintiffs to successfully claim the FAA exclusion.

In March 2023, the First Circuit in *Fraga v. Premium Retail Services, Inc.*, 61 F. 4th 228 (1st Cir. 2023), rejected *Bissonnette*, creating a circuit split. The court reversed and remanded a lower court decision compelling arbitration for a putative class of merchandisers who delivered their employer's marketing materials to client stores. The court did not agree that working in the transportation industry is a threshold requirement to qualify for the FAA exclusion. Instead, it emphasized that *Saxon* focuses on the kind of work done, not the employer. An intrastate trip may be "part of an integrated interstate journey," and "the contractual relationships among the various actors play an important role in determining" whether that is so.

This approach, the First Circuit explained, is consistent with circuit precedent. In *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 26 (1st Cir. 2020), where the last mile delivery drivers had a contractual relationship with Amazon (i.e. the entity engaged in interstate commerce), the deliveries were part of an "integrated" interstate journey. By contrast, in *Cunningham v. Lyft, Inc*., 17 F.4th 244 (1st Cir. 2021), where Lyft drivers transporting airline passengers from Logan Airport had no contractual relationship with the airlines, the drivers did not participate in an integrated interstate journey.

Since our last update, the district court on remand in *Fraga*, No. 21-10751-WGY, 2023 U.S. Dist. LEXIS 215862 (D. Mass. Dec. 5, 2023), in an opinion by former Chief Judge William G. Young, held that the plaintiff class was not protected by the FAA exclusion. Applying the appellate court's framework, the district court held that the frequency with which workers perform activities closely related to interstate transportation, as well as the intrastate or interstate character of the work, are both relevant. Here, the plaintiffs failed to prove they participated in such activities with "anywhere near the frequency" of the plaintiffs in *Saxon*, who performed up to three shifts per week, or in *Canales v. CK Sales Co., LLC*, 67 F.4th 38 (1st Cir. 2023), where the plaintiffs performed at least 50 hours per week. Moreover, the merchandisers' transportation of advertising materials was an "incidental aspect of their job," and accordingly it was "not 'so closely related to interstate transportation as to be practically a part of it.'"

Despite ruling for the employer, the court criticized the current state of U.S. arbitration policy, observing that "[a] majority of the Supreme Court has barred the lower courts from any

meaningful role in adjudicating most employer-employee disputes where there is an employer-imposed mandatory arbitration agreement." The court further lamented that "[w]hat ought be a quick preliminary determination is becoming the main event," and "[n]o principled distinction exists today among those rights which have unfettered access to courts and juries." The court observed a "sad irony" insofar as two and one half years of "extensive judicial activity" have passed, none of which have addressed the merits of the dispute, yet "this case would long since have been resolved" if not for the "'myth' that arbitration is either faster or cheaper than a well-run federal district court where employees have access to a jury of their peers."

On April 12, 2024, the Supreme Court ruled in *Bissonnette.* In a unanimous opinion by Justice Roberts, the Court rejected the Second Circuit's reasoning, resolving the circuit split in favor of *Fraga*. Quoting from *Saxon*, the Court reiterated that the language of Section 1 of the FAA "focuses on 'the *performance* of work' rather than the industry of the employer," and classes of workers "are connected by what they do, not for whom they do it." Accordingly, the Court held, "A transportation worker need not work in the transportation industry to fall within the exemption from the FAA provided by §1 of the Act." The Court vacated the Second Circuit's opinion and remanded for consideration of alternative grounds raised in favor of arbitration.

VI. CLASS MEMBER MOTIONS TO INTERVENE IN CLASS PROCEEDINGS

In our Fall 2022 update, we discussed the Fifth Circuit's holding in *Guenther v. BP Ret. Accumulation Plan*, 50 F.4th 536 (5th Cir. 2022), which addressed grounds for intervention by class members who disagree with the litigation strategy of lead counsel for class plaintiffs. The court found that a successful motion to intervene under FRCP 24(a)(2) depended on overcoming a presumption that the movant and the class plaintiffs "share the same ultimate objective," and strategic differences were insufficient to mount a successful challenge to the adequacy of the representation.

Since our last update, the Ninth Circuit in *Habelt v. iRhythm Techs., Inc.*, 83 F.4th 1162 (9th Cir. 2023), also addressed the issue of class member standing to intervene. Habelt was the first filer and original named plaintiff in a securities fraud class action brought under the Private Securities Litigation Reform Act (PLSA). Under the PLSA, the district court selects the lead plaintiff after determining which plaintiff is most capable of adequately representing the interests of the class members, and the court need not select the first filer or original named plaintiff. Here, the district court chose another plaintiff, the Public Employees' Retirement System of Mississippi (PERSM), over Habelt, and PERSM subsequently amended the complaint. The case was dismissed prior to class certification, and PERSM did not appeal. Habelt then sought to intervene to file an appeal on behalf of the class.

The Ninth Circuit dismissed Habelt's appeal for lack of jurisdiction. The court held that Habelt lacked standing because the class had not yet been certified, meaning Habelt was not a party when the case was dismissed. After a class is certified, the court explained, "an unnamed member of a certified class may be considered a party for the [particular] purpos[e] of appealing an adverse judgment." But, the court held, "'the definition of the term "party"' does not cover an unnamed class member 'before the class is certified.'"

Habelt also maintained he was a party insofar as he filed the initial complaint and was listed in the case caption, but the court disagreed. "[T]he caption of an action is only the handle to identify it," the court explained, and "[f]or that reason, '[a] person or entity can be named in the caption of a complaint without necessarily becoming a party to the action.'" Habelt's having filed the initial complaint was unavailing because the initial complaint was extinguished by PERSM's amended complaint, which made clear that PERSM was the only operative plaintiff prior to class certification.

VII. CALCULATING ATTORNEYS' FEES

In our last several updates, we have been following notable circuit court decisions addressing attorney fee awards in class action settlements. In our Fall 2020 update, we noted that the Sixth Circuit n *Linneman v. Vita-Mix Corp.*, 970 F.3d 621 (6th Cir. 2020), aligned itself with the majority of jurisdictions in permitting lodestar calculations of attorney's fees in coupon settlements. It nevertheless found several flaws with the district court's approval of such an award. First, the district court gave too much weight to counsels' affidavits describing their backgrounds, billing rates, and involvement in the case and too little weight to the pre-calculated local billing rates and requested rates claimed by class counsel. In addition, the Sixth Circuit faulted the district court for awarding a multiplier without the appropriate finding of exceptional circumstances, inappropriately including hours class counsel worked after rejecting an arguably reasonable settlement offer and failing to make specific findings about the value of the settlement.

In our Summer 2023 update, we noted that the Ninth Circuit in *Lowery v. Rhapsody Int'l Inc.*, 69 F.4th 994 (9th Cir. 2023), held that a district court must assess an award of attorney fees relative to the "the actual benefit provided to the class," not the "maximum that hypothetically could have been paid." By that metric, a fee award that was thirty times larger than the benefits received by plaintiffs, after adjustments, was unreasonable. In addition, the Second Circuit in *Moses v. The New York Times Company*, Docket No. 21-2556-cv (2d Cir. August 17, 2023), reversed a district court for finding attorney fees negotiated at arm's length presumptively fair without due consideration of other independent factors.

Since our last update, the Third Circuit in *In re Wawa, Inc. Data Sec. Litig.*, 85 F.4th 712 (3d Cir. 2023) offered "refreshed guidance" on fee petitions when it vacated a district court's grant of a fee award based on an inadequate "reasonableness" determination. First, the court determined that the district court was incorrect in assuming that the reasonableness of the fee award must be measured against the entirety of the funds made available to the class. It instructed the lower court to consider a potentially smaller class benefit based on the "amounts distributed to and expected to be claimed by the class." While the Third Circuit acknowledged that the practice of assessing actual recovery is not required by Rule 23, the court characterized it is a "sensible starting line to begin the fee award analysis."

Second, the Third Circuit criticized the district court for insufficient scrutiny of side agreements between class counsel and the opposing party. A clear sailing provision that prevented Wawa from challenging class counsels' fee request, while not an automatic bar to settlement, deserved a "closer look" because it raised concerns about collusion between defendants and class counsel. A fee reversion provision which would have allowed Wawa to reclaim any funds not

distributed to the class also should have been investigated even though the provision was removed in the final settlement. The court instructed the lower court to explore whether the provision, even if temporary, "suggests coordinated rather than zealous advocacy."

In *Plaintiff-Appellee v. Fieldale Farms Corp. (In re Broiler Chicken Antitrust Litig. End User Consumer)*, 80 F.4th 797 (7th Cir. 2023), the Seventh Circuit endorsed a district court's methodology for determining fee awards by "estimating the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed)." However, the court disagreed with the lower court's factual evaluation of "what [fee] bargain would have been struck *ex ante*." First, the court reasoned, the district court should not have discounted bids by class counsel in other cases on grounds that the bids (1) were made more than seven years prior and (2) were based on declining fee structures disfavored in the circuit. The court said that bids at the start of the litigation are "ordinarily good predictors" of an *ex ante* bargain. Moreover, it stated that the circuit "has never categorically rejected […] declining fee scale award structures." Rather, it has maintained that "the appropriateness of a declining fee scale award structure may depend on the particulars of the case."

Even bids made by class counsel in the Ninth Circuit, which maintains a "megafund rule," should not be ignored, according to the court. The Ninth Circuit's megafund rule automatically limits fees when recovery exceeds a certain size threshold, and the district court found Ninth Circuit bids irrelevant because the Seventh Circuit rejects the megafund fule. The court found that, notwithstanding the artificial fee limits created by the rule, class counsels' "economic choice" to bid for Ninth Circuit cases reflects a willingness to accept compensation levels that may be probative of the bargain class counsel would have struck *ex ante*.

VIII. *CY PRES*

We last addressed courts' treatment of *cy pres* awards in our Fall 2019 update, where we discussed the Supreme Court's per curium decision in *Frank v. Gaos*, 139 S. Ct. 1041 (2019). The *Gaos* case presented the question of whether a settlement is compliant with FRCP 23(e)(2) if it includes a *cy pres* award but no direct compensation to unnamed class members. The Court did not reach the merits. Rather, it vacated and remanded for a determination whether the plaintiffs had standing. Justice Thomas, dissenting, would have reached the merits and reversed the Ninth Circuit decision approving the *cy pres*-only settlement. He argued that *cy pres*-only settlement classes should not be certified because *cy pres* payments do not benefit the class.

Since then, the Court has declined to take up the issue. In April and May of 2023, it denied cert in two cases raising the same issue, *Hyland v. Navient Corp.*, 48 F.4th 110 (2d Cir. 2022) and *Jones v. Monsanto Co.*, 38 F.4th 693 (8th Cir. 2022). In *Hyland,* the Second Circuit affirmed the district court's approval of a class action settlement that provided no monetary relief other than a *cy pres* award. The court rejected appellants' arguments that *cy pres* awards have no benefit to class members. It followed the First, Third, and Ninth Circuits, which recognize and credit an indirect benefit to the class provided there is an appropriate "nexus" between the *cy pres* award and the plaintiff's claims. Here, the court held, the nexus requirement was met.

The court also rejected appellants' arguments that (1) the funds should have been distributed to the class insofar as the class members suffered damages, and (2) the award violates the First Amendment. Here, because the class members did not provide monetary damages releases, they remained free to pursue individual damage actions against the defendant. And this settlement between private parties lacked the requisite state action to support a First Amendment claim.

In *Jones v. Monsanto Co.*, 38 F.4th 693 (8th Cir. 2022), the Eighth Circuit addressed challenges to a *cy pres* award based on the size of the award, First Amendment concerns, and the effect of the award on attorney fee calculations. The court rejected the size-based challenged because (1) sufficient efforts were made to locate more class members and (2) leftover funds need not go to existing class members. Here, the lower court had satisfied its obligation to determine "the measure of class members' damages and whether they had been fully compensated before granting a *cy pres* distribution."

As to the First Amendment challenge, the Eighth Circuit used different reasoning to reach the same result as the Second Circuit in *Hyland*. The court found that since the residual funds in the settlement did not belong to any individual class members, the distribution of these funds through a *cy pres* award did not constitute speech.

Finally, the court held that the *cy pres* award was appropriately included in the total settlement amount for purposes of calculating attorney fees. These funds were available to the class, and the attorneys should not be faulted because some class members did not file claims.

In the aftermath of the Supreme Court's per curium opinion, the Ninth Circuit has maintained the same approach it adopted in *Gaos*. In 2021, in *Joffe v. Google, Inc. (In re Google Inc. St. View Elec. Communs. Litig.)*, 21 F.4th 1102 (9th Cir. 2021), the court held that the "indirect benefits the class members enjoy through the *cy pres* provision," together with injunctive relief, were sufficient for the district court to find the settlement 'fair, reasonable, and adequate.'" The court categorically "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."

In *Joffe,* the Ninth Circuit also rejected a First Amendment objection. The court held that *cy pres* awards do not compel class member speech because any member who disagrees may opt-out of the class. The opt-outs have no further claim on the settlement funds, so the award is not their speech. The court also held that *cy pres* awards may be properly included in the analysis for determining attorney's fees.

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