AAI AMERICAN ANTITRUST INSTITUTE

Class Action Issues Update
Fall 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 Spring 2024 update and includes the following new decisions:

***American Pipe* Tolling:** *DeFries v. Union Pac. R.R. Co.*, 104 F.4th 1091 (9th Cir. 2024), *Zaragoza v. Union Pac. R.R. Co.*, 112 F.4th 313 (5th Cir. 2024), *DeGeer v. Union Pac. R.R. Co.*, 113 F.4th 1035 (8th Cir. 2024).

Ascertainability: *Freund v. McDonough*, 114 F.4th 1371 (Fed. Cir. 2024).

Calculating Attorney's Fees: *In re Broiler Chicken Antitrust Litig.*, No. 16 C 8637, 2024 U.S. Dist. LEXIS 117527 (N.D. Ill. July 3, 2024), *Drazen v. Pinto*, 106 F.4th 1302 (11th Cir. 2024), *In re T-Mobile Customer Data Sec. Breach Litig.*, 111 F.4th 849 (8th Cir. 2024), *Chieftain Royalty Co. v. SM Energy Co.*, 100 F.4th 1147 (10th Cir. 2024).

Class Action Waivers in Mandatory Arbitration Clauses: *Lopez v. Aircraft Serv. Int'l*, 107 F.4th 1096 (9th Cir. 2024), *Nair v. Medline Indus., Ltd. P'ship*, No. 23-15582, 2024 U.S. App. LEXIS 23094, at *5 (9th Cir. 2024), *Ortiz v. Randstad Inhouse Servs., LLC*, 95 F.4th 1152, 1162 (9th Cir. 2024), *Montoya v. Nat'l R.R. Passenger Corp.*, 2024 U.S. App. LEXIS 25057 (7th Cir. Oct. 3, 2024), *Fli-Lo Falcon, LLC v. Amazon.com, Inc.*, 97 F.4th 1190 (9th Cir. 2024), *Thomas v. Pawn America Minnesota, LLC*, 108 F.4th 610 (8th Cir. 2024).

Discretionary Appealability Under Rule 23(f): *Forsythe v. Teva Pharm. Indus.*, 102 F.4th 152 (3d Cir. 2024).

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[1] AAI 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 David O. Fisher, dfisher@antitrustinstitute.org.

"Fail-Safe" Class Definitions: *Staley v. FSR Int'l Hotel Inc.*, 2024 U.S. Dist. LEXIS 132641 (S.D.N.Y. July 25, 2024).

Incentive Awards for Class Members: *Scott v. Dart*, 99 F.4th 1076 (7th Cir. 2024).

Predominance in Rule 23(c)(4) Issue Classes: *Jacks v. Directsat USA, LLC*, No. 23-3166, 2024 U.S. App. LEXIS 25099 (7th Cir. Oct. 3, 2024).

Specific Personal Jurisdiction: *Vanegas v. Signet Builders, Inc.*, 113 F.4th 718 (7th Cir. 2024).

§ 1291 Appeals: *Allen v. AT&T Mobility Servs., LLC*, 104 F.4th 212 (11th Cir. 2024).

I. *American Pipe* Tolling

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the Supreme Court held that the commencement of a class action tolls the applicable statute of limitations for putative class members' individual claims. This equitable doctrine preserves would-be class members' ability to file independent claims or revised class claims that would otherwise be time-barred, relieving pressure on them to intervene or file independent actions during the pendency of class certification. The doctrine is intended to further both the efficiency goals of class actions and the reliance interests underlying statutes of limitations.

In general, *American Pipe* tolling lasts "until class certification is denied," at which point class members are free to "file their own suits or to intervene as plaintiffs in the pending action."[2] But when the class definition is narrowed to exclude certain class members, does *American Pipe* tolling automatically end for those class members? Three recent opinions from the Fifth, Eighth, and Ninth Circuits answered this question in the negative. They hold that where it is ambiguous whether a narrowed class definition excludes a plaintiff, the plaintiff continues to enjoy *American Pipe* tolling.

All three cases arise out of *Harris v. Union Pac. R.R. Co.*, 953 F.3d 1030 (8th Cir. 2020), a class action brought by railroad workers who claimed that Union Pacific's employee-health screening system violated the Americans with Disabilities Act (ADA). In February 2019, after class counsel voluntarily narrowed the class definition to include only those plaintiffs who were screened due to a "reportable health event," a Nebraska district court certified the narrower class. However, the Eighth Circuit reversed for lack of commonality, and the asserted class members filed individual complaints in courts around the country.

Several such plaintiffs were former railroad conductors who were removed from their posts after failing a routine color-vision test. In each case, the district court granted summary judgment for Union Pacific. Each court held that the plaintiffs were not members of the certified *Harris* class because their routine color-vision exams were not due to a "reportable health event." Accordingly, they ceased to enjoy *American Pipe* tolling, either when class counsel moved to certify the narrowed class or when the narrowed class was certified. Each district court based its decision on the Tenth Circuit's opinion in *Sawtell v. E.I. du Pont de Nemours & Co., Inc.*, 22 F.3d 248 (10th Cir. 1994), and the Fourth Circuit's opinion in *Smith v. Pennington*, 352 F.3d 884 (4th Cir. 2003), which held that *American Pipe* tolling ends when class counsel moves to certify a class whose definition has been narrowed to exclude the plaintiff.

On appeal from one of the summary judgment orders, the Ninth Circuit in *DeFries v. Union Pac. R.R. Co.*, 104 F.4th 1091 (9th Cir. 2024), reversed on grounds that it was ambiguous whether the plaintiff was excluded from the class definition. Reading *Sawtell* and *Pennington* in conjunction with *American Pipe*, the court held that ambiguity

[2] *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 354 (1983).

in the scope of the class definition should be resolved in favor of the putative class plaintiff. To end *American Pipe* tolling, the court held, the narrowed class definition must exclude the plaintiff unambiguously. The court considered this outcome necessary to preserve the balance struck by *American Pipe*.

The Fifth Circuit in *Zaragoza v. Union Pac. R.R. Co.*, 112 F.4th 313 (5th Cir. 2024), agreed with *DeFries* and relied on it to reach the same conclusion. However, the court also went further. "[C]onsidering the matter afresh," it determined that the color-vision plaintiffs were in fact included in the *Harris* class. And regardless, the scope of the class was a disputed question of fact, meaning a reasonable inference should have been drawn in favor of the non-moving party at summary judgment.

The Eighth Circuit in *DeGeer v. Union Pac. R.R. Co.*, 113 F.4th 1035 (8th Cir. 2024), cited approvingly to both *DeFries* and *Zaragoza* but declined to consider whether the plaintiff was in fact included in the class or entitled to a reasonable inference on summary judgment. "What matters is the 'genuine ambiguity' in the definition's scope," the court held. "Because the *Harris* class did not unambiguously exclude DeGeer when the district court certified it under a narrowed definition, he was entitled to *American Pipe* tolling. To hold otherwise would frustrate the purposes of the rule."

II. Ascertainability

We have been following 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 reaffirmed its heightened ascertainability requirement in *In re Niaspan Antitrust Litig.*, 67 F.4th 119 (3d Cir. 2023), upholding a denial of class certification on administrative-feasibility grounds. The court later denied a petition for rehearing *en banc*.

In our Winter 2022 update, we noted that the First and Fourth Circuits had joined the Third Circuit in adopting a heightened ascertainability requirement.[3] The Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, in contrast, had rejected any heightened ascertainability requirement.[4] The Fifth, Tenth, D.C., and Federal Circuits had not yet adopted an explicit position, although the Tenth and D.C. Circuits had

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

[4] *See In re Petrobas Sec. Litig.*, 862 F.3d 250 (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 (8th Cir. 2016); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017); *Cherry v. Dometic Corp.*, 986 F.3d 1296 (11th Cir. 2021).

acknowledged the issue.[5] This August, the Federal Circuit joined the majority of circuits by rejecting a heightened ascertainability requirement.

In *Freund v. McDonough*, 114 F.4th 1371 (Fed. Cir. 2024), the Veteran's Court had denied class certification to veterans who were refused Veterans Administration (VA) benefits and whose benefits appeals were erroneously deleted due to a computer error. On appeal to the Federal Circuit, the Secretary of the VA argued that the class should not be certified because the VA computer system did not afford an administratively feasible mechanism for identifying class members who filed their claims before 2017. The VA's coding system was adopted in 2017, and claims predating that year would have to be reviewed manually to determine whether their appeals had been erroneously deleted. The court explicitly rejected the administrative-feasibility requirement adopted by the minority of circuits, holding that "there is no basis for finding a lack of ascertainability because it is difficult to identify class members." The court clarified that administrative feasibility may bear on the superiority of class resolution, but the Veteran's Court had not addressed that issue.

III. Calculating Attorney's Fees

Since our Fall 2020 update, we have been tracking notable developments involving the calculation of attorney's fees awards in class-action settlements, which have important implications for private enforcement incentives. In our Spring 2024 update, we noted that the Seventh Circuit in *Plaintiff-Appellee v. Fieldale Farms Corp. (In re Broiler Chicken Antitrust Litig. End User Consumer)*, 80 F.4th 797 (7th Cir. 2023), addressed novel questions involving fee awards when class counsel is appointed after litigation is well underway. The court endorsed a district court's methodology of "estimating the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case," and to consider bids made by class counsel in other cases, including cases subject to the Ninth Circuit's "megafund rule," which limits fees when recovery exceeds a certain size threshold.

Recently, the district court issued its opinion on remand in *In re Broiler Chicken Antitrust Litig.*, No. 16 C 8637, 2024 U.S. Dist. LEXIS 117527 (N.D. Ill. July 3, 2024). Where the Seventh Circuit had rejected a 33% award on appeal and an objector had proposed a 26% award on remand, the district court awarded 30% of the settlement fund. Citing empirical data compiled by Huntington Bank and the Center for Litigation and Courts at UC Law SF, which we discussed in our Winter 2022 update, the court noted that 30% is the mean award for recoveries between $100 and $249 million. The court also addressed the Seventh Circuit's admonition that it should not categorically assign less weight to Ninth Circuit megafund-rule cases because "continued participation in litigation in the Ninth Circuit is an economic choice that informs the price of class counsel's legal services." It observed that "the existence of, or need for, the Ninth Circuit's megafund rule is evidence that 25% is likely *not* the market rate. . . . If 25% was

[5] *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).

the market rate, there would not be a need for the Ninth Circuit to artificially control the price." The court concluded that "while awards in the Ninth Circuit are relevant data regarding the functioning of the market . . ., they are not particularly good indicators of what the market would bear" when the case is filed in a jurisdiction that is not bound by the megafund rule.

We have been tracking a series of recent holdings by circuit courts that attorneys' fees must be reasonable relative to the actual benefit provided to the class, as opposed to the hypothetical amount available to it. In our Summer 2023 update, we noted that the Ninth Circuit in *Lowery v. Rhapsody Int'l Inc.*, 75 F.4th 985 (9th Cir. 2023), reversed approval of a fee award that was more than thirty times the amount that the class received, instructing the district court to cross-check its lodestar analysis against the actual benefit provided to the class. Similarly, in our Spring 2024 update, we noted that the Third Circuit in *In re Wawa, Inc. Data Sec. Litig.*, 85 F.4th 712 (3d Cir. 2023), instructed the lower court to consider a potentially smaller class benefit based on the actual "amounts distributed to and expected to be claimed by the class," and to determine whether side agreements between class and opposing counsel suggested "coordinated rather than zealous advocacy."

The Eleventh Circuit recently followed a similar approach in *Drazen v. Pinto*, 106 F.4th 1302 (11th Cir. 2024). The court reversed a district court's opinion calculating attorney's fees in a coupon settlement for failing to consider the value of coupons the class members actually redeemed. The court first held that the Class Action Fairness Act ("CAFA") applied because the settlement was a coupon settlement, despite the choice offered class members between a $35 cash settlement and a $150 services voucher. Analyzing the statutory text, the court joined the Second and Fourth Circuits in defining "a coupon for the purposes of CAFA as a voucher, certificate, or form that can be exchanged for one or more goods or services, or for a discount on one or more goods or services."

The *Drazen* court went on to hold that "attorney's fees for coupon settlements under CAFA may be based on the value of the coupons that are redeemed, the lodestar method, or a combination of both," with a focus on "the value of coupons that are actually redeemed." In determining that value, it is reasonable for courts to hear expert testimony to estimate the coupon redemption rate or to wait until after the coupons' expiration date before awarding attorneys' fees, "so that it knows for certain the value of the coupons that *were* actually redeemed."

We have also been following cases that provide guidance on reasonable lodestar calculations. In our Fall 2020 update, we noted that the Sixth Circuit in *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, and provided guidance on how courts should review such awards. More recently, the Eighth Circuit in *In re T-Mobile Customer Data Sec. Breach Litig.*, 111 F.4th 849 (8th Cir. 2024), found that class counsel's $8.17 million fee, using a 9.6 lodestar multiplier, was unreasonable

because counsel only worked on the case for "a matter of months" before it settled, "conducted relatively little discovery, and engaged in no substantial motions practice."

Courts also require fair notice and the opportunity to object to attorneys' fee requests. The Eighth Circuit in *T-Mobile* reversed the district court's decision striking an unnamed class member's fee objection on the sole basis that she and her counsel were "serial objectors." Also on the issue of notice, the Tenth Circuit ruled in *Chieftain Royalty Co. v. SM Energy Co.*, 100 F.4th 1147 (10th Cir. 2024), that Rule 23(h) required class-wide notice of a revised motion for attorneys' fees, which class counsel submitted in district court after its initial fee award was reversed. The three-judge panel ruled over the dissent of Judge Timothy M. Tymkovich, who considered the error harmless because one class member objected to the revised fee motion, which amounted to a smaller portion of the settlement funds than the first.

IV. 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 reviewed the Supreme Court's decision in *New Prime, Inc. v. Oliveria*, 139 S. Ct. 532 (2019), which held that the Federal Arbitration Act (FAA) does not compel courts to enforce private arbitration agreements involving "contracts of employment" with "transportation workers." The text of the FAA expressly excludes these workers from the statute's coverage provided they 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 FAA's transportation-worker exclusion, particularly as applied to gig economy workers. In our Summer 2022 update, we noted that the Supreme Court in *Saxon v. Southwest Airlines*, 142 S. Ct. 1783 (2022), unanimously held that a class of workers 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 recognized that it was creating some uncertainty, noting "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."

In the aftermath of *Saxon*, the Fifth and Ninth Circuits have split on whether last-mile delivery drivers are involved in "interstate commerce." The Fifth Circuit in *Lopez v.*

Cintas Corp., 47 F.4th 428 (5th Cir. 2022), held that they were not, reasoning 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." The Ninth Circuit, in contrast, held in *Carmona v. Domino's Pizza, LLC*, 73 F.4th 1135 (9th Cir. 2023), that Domino's drivers were engaged in interstate commerce because they "transport [interstate] goods for the last leg to their final destinations."

The First and Second Circuits also split on the related question of what constitutes a "transportation worker." As first discussed in our Winter 2022 update, the Second Circuit in *Bissonnette v. LePage Bakeries Park St.*, 49 F.4th 655 (2d Cir. 2022), held that truck drivers transporting baked goods were not "in the transportation industry" for purposes of the FAA exclusion because the purchasers of the products at issue were buying the goods, not the movement of them. And as we noted in our Summer 2023 update, the First Circuit in *Fraga v. Premium Retail Services, Inc.*, 61 F. 4th 228 (1st Cir. 2023), rejected *Bissonnette* and held that working in the transportation industry is not a threshold requirement to qualify for the FAA exclusion. The court reasoned 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.

In our Spring 2024 update, we noted that the Supreme Court resolved the latter split in favor of *Fraga* and against *Bissonnette*. In *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246 (2024), the Court rejected the Second Circuit's reasoning and held 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, "[a] transportation worker need not work in the transportation industry to fall within" the exclusion.

In July, the Ninth Circuit in *Lopez v. Aircraft Serv. Int'l*, 107 F.4th 1096 (9th Cir. 2024), held that an airplane fuel technician is a transportation worker under the FAA because he "play[s] a direct and necessary role in the free flow of goods across borders" under *Saxon*. The court reasoned that neither *Saxon* nor *Bissonnette* nor intra-circuit precedent "impose[d] a requirement … that the worker must have hands-on contact with goods and cargo or be directly involved in the transportation of the goods." The fueling of the airplane was "a vital component of [the employer's] ability to engage in the interstate and foreign transportation of goods" and was "so closely related to interstate and foreign commerce as to be in practical effect part of it."

Shortly thereafter, the Ninth Circuit in *Nair v. Medline Indus., Ltd. P'ship*, No. 23-15582, 2024 U.S. App. LEXIS 23094 (9th Cir. Sep. 11, 2024), also held that a warehouse worker was within the exclusion "because she packaged and loaded goods that traveled in interstate commerce." And in *Ortiz v. Randstad Inhouse Servs., Ltd. Liab. Co.*, 95 F.4th 1152 (9th Cir. 2024), it held that another warehouse worker "fulfilled an admittedly small but nevertheless 'direct and necessary' role in the interstate commerce of goods," because he "ensured that goods would reach their final destination by processing and storing them while they awaited further interstate transport."

Earlier this month, in *Montoya v. Nat'l R.R. Passenger Corp*., 2024 U.S. App. LEXIS 25057 (7th Cir. Oct. 3, 2024), which involved a factual dispute over whether an Amtrak worker performed a desk job or was involved in loading and unloading cargo, Judge Easterbrook introduced yet another potentially relevant distinction when workers are not directly involved in the transportation of goods. Whereas the Supreme Court in *Bisonnette* determined that working in the transportation industry is not *necessary* to claim the protections of the FAA exclusion, Judge Easterbrook suggested that it may be *sufficient*, at least for railroad employees. He explained that while the Court in *Saxon* stated that "seamen" are a subset of all persons employed in maritime industries, both *Saxon* and *Bissonnette* reserved the possibility that "railroad employees" may be an industry-wide designation under the statute. "'Seamen' refers to a set of related *tasks*," Easterbrook explained, "while 'railroad employee' is a *status*." On this reading, any railroad employee would fall within the protections of the FAA exclusion, including those who hold office jobs, but the protections also would extend to workers who are not in the transportation industry if they are involved in transporting goods interstate, like the truck drivers in *Bissonnette*.

The *Montoya* court did not decide the case on the merits because it held that the appeal must be dismissed for lack of appellate jurisdiction under the FAA. Section 16(a)(1) of the FAA authorizes an interlocutory appeal from any judicial order to bypass arbitration. Here, however, Amtrak filed for appeal based only upon the district judge's determination that the evidence provided to date did not yet allow her to decide whether an arbitration agreement was in force. Because the enforceability of the arbitration agreement went unresolved below, the appeal could not proceed. Section 16 applies only to arbitration agreements covered by the FAA, and if the Amtrak worker is in fact protected by the FAA exclusion, the agreement is not covered. The court's reasoning suggests a district court's finding that a worker falls within the FAA exclusion should not be immediately appealable under 16(a)(1).

This April, the Ninth Circuit held that the FAA exclusion does not extend to business entities. In *Fli-Lo Falcon, LLC v. Amazon.com, Inc.*, 97 F.4th 1190 (9th Cir. 2024), the plaintiffs were delivery service partners (DSPs) of Amazon, which are business entities that contract with Amazon to provide local delivery services. Applying the *ejusdem generis* canon to the statutory text, the court held that the FAA exclusion's residual clause cannot be expanded beyond natural persons who are individual workers to cover non-natural persons such as business entities. The court also held that commercial contracts like the DSP agreements are not "contracts of employment" under the FAA exclusion.

The three-judge panel in *Fli-Lo Falcon* noted that its decision comported with the Fourth Circuit's decision in *Amos v. Amazon Logistics, Inc.*, 74 F.4th 591 (4th Cir. 2023), and the Sixth Circuit's decision in *Tillman Transp., LLC v. MI Bus. Inc.*, 95 F.4th 1057, (6th Cir. 2024), both of which held that the transportation-worker exemption did not cover the corporate plaintiffs in those cases. It rejected the plaintiffs' concern that categorically exempting businesses from the exemption "would allow companies to

contract around the FAA's exemption by forcing their transportation workers to create sham corporations, then contracting with those corporations rather than employing the workers directly."

Judge Holly A. Thomas wrote separately, concurring with the judgment but noting that she would have reseved the question "whether there are any circumstances under which a business entity could qualify for the transportation worker exemption." Judge Thomas wrote that both the Fourth Circuit in *Amos* and the Sixth Circuit in *Tillman* stopped short of that determination, instead focusing, as she would have done, on whether plaintiffs are sham corporations or bona fide business entities, and whether their relationship with Amazon was an employment relationship or a commercial one.

In July, the Eighth Circuit in *Thomas v. Pawn America Minnesota, LLC*, 108 F.4th 610 (8th Cir. 2024), applied the rule that a defendant waives its right to compel arbitration by "substantially invoking the litigation machinery." Where the defendants waited three months until after a pretrial conference, participated in an hour-long motion-to-dismiss hearing, stipulated to a discovery plan, and scheduled a mediation before moving to compel discovery, their actions "substantially invoke[d] the litigation machinery," such that they waived their arbitration rights. The defendants' behavior suggested they delayed moving to compel arbitration because they sought to "preview the district court's thinking," which was "gamesmanship" and "the worst possible reason for failing to move for arbitration sooner."

V. Discretionary Appealability Under Rule 23(f)

In our Summer 2022 update, we noted that empirical studies showed 75% of Rule 23(f) petitions to appeal class certification decisions are denied by the appellate court, and most of the denials are accomplished via summary orders. A published or unpublished opinion made available in an electronic database, explaining the reasons for the denial, was reportedly issued in only 10% of cases. In the span of about a month, however, the Sixth Circuit issued four opinions explaining denials of Rule 23(f) petitions on the merits, and the Eleventh Circuit issued an opinion as well.

In May, the Third Circuit, which has described itself as applying a "more liberal standard" in allowing Rule 23(f) petitions than other circuits, issued an opinion limiting the circumstances in which a Rule 23(f) petition may be taken based on a claim that the appeal "implicates novel or unsettled questions of law." In *Forsythe v. Teva Pharm. Indus*., 102 F.4th 152 (3d Cir. 2024), the court held that permission to appeal should be granted "when the *certification decision* turns on a novel or unsettled question of law," but not when the "merits of a particular case" may turn on such a question. Citing the Supreme Court's holding in *Amgen v. Conn. Ret. Plans and Trust Funds*, 568 U.S. 455 (2013), the court explained that "[the latter] questions are best resolved through dispositive motions, including motions for partial summary judgment," since "an evaluation of the probable outcome on the merits is not properly part of the certification decision," and "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class

certification are satisfied." Where the defendant argued that its petition implicated a novel question about the reach of Section 10(b) of the Securities Exchange Act, the court held that this was "a merits question" that, "novel as it may be, . . . does not directly relate to the requirements of Rule 23(a) or (b), and thus need not be decided at the class certification stage. Review under 23(f) is therefore not appropriate."

VI. "Fail-Safe" Class Definitions

As we noted in our Spring 2024 update, recent cases have 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.

Circuits have differed widely in their treatment of fail-safe classes. The Sixth and Eighth Circuits have adopted a bright-line rule against fail-safe classes.[6] The First Circuit has suggested that it would also prohibit fail-safe classes.[7] Meanwhile, the Fifth Circuit has rejected a rule against fail-safe classes as atextual.[8] Other circuits have taken a middle path. The Seventh Circuit, for example, has recognized problems with fail-safe classes but encouraged lower courts to cure them rather than deny class certification.[9]

As we described in our Spring 2024 update, the D.C. Circuit rejected a rule against fail-safe classes in *In re White* (D.C. Cir. 2023), 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."

As we noted in our Spring 2024 update, 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 wrote that "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 that, "[r]egardless, 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

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[6] *Young v. Nationwide Mut. Ins. Co.*, 693 F. 3d 532 (6th Cir. 2012); *Orduno v. Pietrzak*, 932 F.3d 710 (8th Cir. 2019).
[7] *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015).
[8] *Rodriguez v. Countrywide Home Loans, Inc.* (*In re Rodriguez*), 695 F.3d 360 (5th Cir. 2012).
[9] *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802 (7th Cir. 2012).

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."

While the Second Circuit has not addressed the fail-safe class rule, the district court for the Southern District of New York recently rejected a rule against fail-safe classes in *Staley v. FSR Int'l Hotel Inc.*, 2024 U.S. Dist. LEXIS 132641 (S.D.N.Y. July 25, 2024). Noting the lack of precedent in the Second Circuit and the split among other circuits on the rule, the district court identified the D.C. Circuit's rationale as the most persuasive. It agreed with the D.C. Circuit that a separate fail-safe rule is not textually supported by Rule 23 and thus "a fail-safe class definition poses a problem for class certification only to the extent that the proposed class does not satisfy the requirements of Rule 23." The court further explained that, even if the D.C. Circuit were wrong on the fail-safe rule, "this does not mean the end of the road for class certification" because the court has discretion to redefine the class. In this case, where the outcome of the case turned on whether employees had been terminated or just furloughed, the court redefined the class to delete "former" before "employee" and other references to lay-offs to avoid any potential fail-safe issues. It concluded the fail-safe doctrine was no barrier to certifying the proposed classes as redefined.

VII. 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 nineteenth-century Supreme Court precedent. As discussed in our Winter 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).

Since then, several other circuits have also rejected the Eleventh Circuit's analysis of incentive payments. The First Circuit in *Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340 (1st Cir. 2022), upheld the legality of incentive payments, explaining that it was "follow[ing] the collective wisdom of courts over the past several decades." As noted in our Spring 2024 update, the Second Circuit in *Moses v. The New York Times Co.*, 79 F.4th 235 (2d Cir. 2023), also rejected *Johnson* and allowed incentive awards. Although a different Second Circuit panel suggested in *Fikes Wholesale, Inc. v. Visa U.S.A., Inc.*, 52 F.4th 704 (2d Cir. 2023) that the circuit might reconsider *en banc* whether incentive payments are legal in light of the precedent cited in *Johnson*, it upheld incentive payments under binding circuit precedent. The Second Circuit has not taken up the suggestion for *en banc* rehearing.

Since our last update, the Seventh Circuit in *Scott v. Dart*, 99 F.4th 1076 (7th Cir. 2024), called the Eleventh Circuit's *Johnson* decision "anomalous" and joined the First, Second, and Ninth Circuits in reaffirming the legality of incentive payments. Examining at length the early Supreme Court cases cited in *Johnson*, the court concluded that the nineteenth-century precedent had 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" considered in the earlier cases. Modern incentive payments, it explained, are consistent with the core purpose of Rule 23 to "encourage claimants with small claims to vindicate their rights." A ban on incentive payments "would undermine that purpose." Moreover, it found that the Eleventh Circuit's concerns that an incentive payment would be an impermissible "salary" or "bounty" for bringing litigation are adequately addressed by court-developed tests that measure the appropriateness of incentive payments on a case-by-case basis. The court concluded that, "consistent with historical practice, [applicable] precedent, and the majority view on the issue," incentive payments are permitted so long as they comply with the requirements of Rule 23.

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

VIII. Predominance in Rule 23(c)(4) Issue Classes

Rule 23(c)(4) provides that, "when appropriate, an action may be brought or maintained as a class action with respect to particular issues." The Second, Third, Fourth, Sixth, Ninth, and D.C. Circuits permit class certification for the litigation of individual issues—rather than entire claims—under Rule 23(c)(4) provided that common questions predominate in resolving the individual issues to be certified.[10] The Fifth Circuit, by contrast, holds that to certify an issue class, "the cause of action, taken as a whole," must satisfy the predominance requirement.[11] Earlier this month, the Seventh Circuit joined the majority of its sister courts on the issue in *Jacks v. Directsat USA, LLC*, No. 23-3166, 2024 U.S. App. LEXIS 25099 (7th Cir. Oct. 3, 2024).

The *Jacks* court held that "a party seeking certification of an issue class under Rule 23(c)(4) must show that common questions predominate in the resolution of the specific issue or issues that are the subject of the certification motion and not as to 'the cause of action, taken as a whole.'" It determined (1) that the text of the rule supports this reading, (2) that strong evidence shows the Advisory Committee on Civil Rules intended

[10] *See Augustin v. Jablonsky (In re Nassau Cty. Strip Search Cases),* 461 F.3d 219, (2d Cir. 2006); *Russell v. Educ. Comm'n for Foreign Med. Graduates*, 15 F.4th 259 (3d Cir. 2021); *Gunnells v. Healthplan Servs.*, 348 F.3d 417 (4th Cir. 2003); *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405 (6th Cir. 2018); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996); *Harris v. Med. Transp. Mgmt., Inc.*, 77 F.4th 746 (D.C. Cir. 2023).

[11] *Corley v. Orangefield Indep. Sch. Dist.*, 152 F. App'x 350, 355 (5th Cir. 2005).

the requirements of Rule 23 (including Rule 23(b)(3)) to be applied only after the issues appropriate for certification have been identified, and (3) that the Fifth Circuit's reading would render Rule 23(c)(4) superfluous. Thus, the court held, "a district court can certify an issue under Rule 23(c)(4) so long as the resolution of that issue is driven predominantly by common questions."

The court nonetheless denied class certification because of certain "unique facts." Where the plaintiffs sought to certify 14 individual issues for class treatment under Rule 23(c)(4) but hundreds of individual trials would still be necessary to determine liability and damages, the court believed class certification should be denied on superiority grounds. "[E]ven if the fourteen certified issues were answered," the court reasoned, "doing so would not materially advance Plaintiffs' claims given the magnitude of what remains." As a result, the court concluded, "a class action, as currently certified, is not a superior device to resolve this controversy."

IX. Specific Personal Jurisdiction

Since 2017, we have been tracking the courts' application of the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017) ("*BMS*"), which requires specific jurisdiction over all plaintiffs' claims in the forum state for a mass action to proceed if there is otherwise no general jurisdiction. If this decision also extends to Rule 23 class actions, it would result in significant litigation advantages for corporate antitrust defendants, as well as inefficiencies. Importantly, no circuit court has held that *BMS* bars nationwide class actions in forum states that lack personal jurisdiction over class members.

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 went further in *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020), in which it affirmatively held that *BMS* does not apply to class actions. As noted in our Fall 2021 update, the Sixth Circuit later joined the Seventh Circuit in *Lyngaas v. Curaden AG*, 992 F.3d 412 (6th Cir. 2021), holding that *BMS* did not extend to federal class actions.

As described in our Summer 2022 update, the First Circuit followed suit in *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84 (1st Cir. 2022), in which it adopted the logic of the Sixth and Seventh Circuits when it came to collective actions under the Fair Labor Standards Act (FLSA). While the case in question did not relate to Rule 23 class actions, the court cited favorably to the Sixth Circuit's reasoning that only the named plaintiff has "party" status, strongly suggesting that the First Circuit would also decline to extend *BMS* to Rule 23 class actions.

In our Winter 2022 update, we noted that the Third Circuit had joined with the Sixth and Seventh Circuits in *Fischer v. Fed. Express Corp.*, 42 F.4th 366 (3d Cir. 2022), in which it refused to extend *BMS* to 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." Interestingly, it split from the reasoning in the First Circuit in that it held that *BMS* applies to FLSA collective actions.

Most recently, the Seventh Circuit in *Vanegas v. Signet Builders, Inc.*, 113 F.4th 718 (7th Cir. 2024), reiterated its holding in *Lyngaas* and expanded its reasoning to highlight another distinction. The court explained that Rule 23 class actions undergo significant analysis to confirm that the named plaintiff will fairly represent the absent class members. Unlike Rule 23 class actions, however, mass actions are merely individual cases brought by individual plaintiffs and therefore require the claim-by-claim jurisdictional analysis contemplated in *BMS*.

X. § 1291 Appeals After Class Certification Denials

In our Fall 2017 update, we discussed the Supreme Court's holding in *Microsoft v. Baker*, 137 S. Ct. 1702 (2017), which prohibited plaintiffs who lose on class certification from converting a district court's interlocutory order into a final judgment within the meaning of § 1291 by voluntarily dismissing their individual claims with prejudice. The Court held that the final-judgment rule codified in §1291 requires that finality "be given a practical rather than a technical construction." Permitting the plaintiffs to convert an interlocutory order into a final judgment through voluntary dismissal would subvert the final-judgment rule and Congress's solution for determining when non-final orders may be immediately appealed. The Court believed the tactic invites protracted litigation and piecemeal appeals, undercuts Rule 23(f)'s discretionary regime, and is one-sided in that it allows plaintiffs, but never defendants, to force immediate appeal of an adverse ruling.

In our Summer 2022 update, we described how the Sixth Circuit distinguished *Baker* in *Ohio Pub. Empls. Ret. Sys. v. Fed. Home Loan Mortg. Corp*., No. 20-4082, 2022 U.S. App. LEXIS 488 (6th Cir. Jan. 6, 2022), in which plaintiffs requested that the district court enter summary judgment for defendants *sua sponte* in order to create an appealable final order. After the defendants indicated their intent to delay summary judgment proceedings for 18 months and failed to proffer a discovery request for over a year, the district court complied with the plaintiffs' request. On appeal, the *Ohio* defendants argued that the court's *sua sponte* summary judgment grant amounted to "manufactured finality" prohibited by *Baker*. The Sixth Circuit held that a dismissal solicited by appellants is nonetheless final even if "solicitation of the formal dismissal was designed only to expedite review of an order which had in effect dismissed appellants' complaint." The court could find no cases in any federal circuit "that have held that [*Baker*] prohibits a district court from *sua sponte* entering summary judgment in similar factual circumstances."

More recently, the Eleventh Circuit in *Allen v. AT&T Mobility Servs., LLC*, 104 F.4th 212 (11th Cir. 2024), applied *Baker* to rule that an intervenor-plaintiff could not appeal a class certification denial. In *Allen*, the district court denied class certification

and, after the Eleventh Circuit denied a petition for interlocutory review, the plaintiffs settled with AT&T and voluntarily dismissed their case. Class member Amanda Curlee intervened and appealed the class certification denial. Curlee acknowledged that, under *Baker*, the original plaintiffs would not have been able to appeal the class-certification denial. She argued instead that their settlement with AT&T created an appealable final judgment because it resolved all pending claims. AT&T argued that Curlee's intervention effectively reopened the once-resolved action, requiring her to get a new final judgment before she could appeal. The Eleventh Circuit sided with AT&T, noting that an intervenor should be treated in the same way an original party would be treated. Just as the original plaintiffs could not have revoked their settlement and tried to appeal the certification denial, Curlee could not step into their shoes and claim that the settlement was a final judgment.

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