



Class Action Issues Update Fall 2025

The American Antitrust Institute (AAI) seeks to preserve the effectiveness of antitrust class actions as a central and vital component of private antitrust enforcement. 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 2024](#) update and includes the following new decisions:

- **Uninjured Class Members and Article III Standing at Class Certification:** *Mr. Dee's Inc. v. Inmar, Inc.*, 127 F.4th 925 (4th Cir. 2025); *Wilson v. Centene Mgmt. Co., L.L.C.*, 144 F.4th 780 (5th Cir. 2025); *Speerly v. GM*, 143 F.4th 306 (6th Cir. 2025); *Lab. Corp. of Am. Holdings v. Davis*, 145 S. Ct. 1608 (2025)
- **Daubert at Class Certification:** *In re Nissan N. Am.*, 122 F.4th 239 (6th Cir. 2024)
- **Mandatory Arbitration Agreements:** *Davitashvili v. Grubhub*, 131 F.4th 109 (2d Cir. 2025); *Flores v. N.Y. Football Giants*, 150 F.4th 172 (2d Cir. 2025); *Heckman v. Live Nation Ent.*, 120 F.4th 670 (9th Cir. 2024) ; *Brock v. Flowers Foods*, 121 F.4th 753 (10th Cir. 2024); *Lackie Drug Store v. OptumRx*, 143 F.4th 985 (8th Cir. 2025)
- **Attorney's Fees:** *In re Wawa Data Sec. Litig.*, 141 F.4th 456 (3d Cir. 2025); *In re Broiler Chicken Antitrust Litig.*, 142 F.4th 568 (7th Cir. 2025); *Kurtz v. Kimberly-Clark Corp.*, 142 F.4th 112 (2d Cir. 2025); *Paredes v. Zen Nails Studio*, 134 F.4th 750 (4th Cir. 2025); *Morrow v. Jones*, 2025 U.S. App. LEXIS 14230 (5th Cir. Jun. 10, 2025)

I. Uninjured Class Members and Article III Standing at Class Certification

We have long been following the recurring debate in the federal courts over the rules and standards that govern the certification of classes that may contain some class members who were not injured by the defendant's conduct.

The Second and Eighth Circuits have adopted rules against classes that contain uninjured class members. The Second Circuit has framed the issue as a question of standing, holding that “no class may be certified that contains members lacking Article III standing,” and requiring that a class “be defined in such a way that anyone within it

would have standing.”¹ Basing its analysis not on Article III but on the predominance requirement of Rule 23(b)(3), the Eighth Circuit has denied class certification where the “individual inquiries” necessary to determine which class members were uninjured would “overwhelm questions common to the class.”²

Also relying on Rule 23, the First and D.C. Circuits have indicated that a district court should not certify a class if uninjured class members exceed a de minimis number,³ while the Seventh, Ninth and Eleventh Circuits have stated that certification is imperiled only when the number of uninjured class members is “great.”⁴ Reviewing the issue in the context of an antitrust class action, the Tenth Circuit has affirmed that certification of an issue class on the question of antitrust liability under Rule 23(c)(4) is appropriate even in the presence of an untold number of uninjured class members, as damages determinations in such cases are left for individual determination.⁵

The Ninth and Eleventh Circuits have squarely held that the presence of uninjured class members does not present an Article III standing issue. As explained in our [Spring 2020](#) update, the Eleventh Circuit in *Cordoba v. DIRECTV*, 942 F.3d 1259 (11th Cir. 2019), held that, although individualized questions of standing can be relevant to the predominance inquiry, the presence of uninjured class members does not defeat class certification on the grounds that the allegedly uninjured members lack Article III standing.

The Ninth Circuit later agreed, holding in *Ramirez v. TransUnion*, 951 F.3d 1008 (9th Cir. 2020)—which dealt with the similar question of standing at the money damages stage of a TCPA class action—that every class member must have Article III standing “at the final judgment stage of a class action in order to recover monetary damages,” but it reiterated its previous holdings that “only the representative plaintiff need allege standing at the motion to dismiss and class certification stages . . . and even at the final judgment stage in class actions involving only injunctive relief.” A sharply divided Supreme Court subsequently reversed on the separate question of whether each plaintiff had standing in that case, 594 U.S. 413 (2021). In doing so, the Court held that “every class member must have Article III standing to recover individual damages,” explicitly declining to reach

¹ *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006).

² *Halvorson v. Auto-Owners Life Ins. Co.*, 718 F.3d 773 (8th Cir. 2013).

³ *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619 (D.C. Cir. 2019).

⁴ *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802 (7th Cir. 2012); *Cordoba v. DIRECTV*, 942 F.3d 1259 (11th Cir. 2019); *Olean Wholesale Grocery Coop. v. Bumble Bee Foods*, 31 F.4th 651 (9th Cir. 2022) (en banc).

⁵ *Black v. Occidental Petro. Corp.*, 69 F.4th 1161 (10th Cir. 2023).

“the distinct question whether every class member must demonstrate standing before a court certifies a class.”

As we reported in our [Fall 2016](#) update, the Supreme Court did not squarely reach the issue in either *Tyson Foods v. Bouaphakeo*, 577 U.S. 442 (2016) or *Spokeo v. Robbins*, 578 U.S. 330 (2016), although both opinions included language suggesting the presence of uninjured class members does not necessarily defeat class certification.

AAI has been actively involved in this issue. As we wrote in our [Summer 2015](#) update, AAI first [briefed](#) the issue *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015), in which the First Circuit recognized that “objections to certifying a class including uninjured members run counter to fundamental class action policies” because “excluding all uninjured class members at the certification stage is almost impossible in many cases, given the inappropriateness of certifying what is known as a ‘fail-safe class’—a class defined in terms of the legal injury.” As we discussed in our [Fall 2018](#) update, the First Circuit narrowly cabined *Nexium* in its subsequent ruling in *In re Asacol*, 907 F.3d 42 (1st Cir. 2018), in which it held that, without a classwide method to sort among injured and uninjured class members, individual questions may predominate over common questions absent un rebutted evidence of individual injury that renders the class sufficiently manageable.

As we wrote in our [Spring/Summer 2022](#) update, we also [briefed](#) the issue before an *en banc* panel of the Ninth Circuit, which held in *Olean Wholesale Grocery Coop. v. Bumble Bee Foods*, 31 F.4th 651 (9th Cir. 2022), that “courts must apply Rule 23(b)(3) on a case-by-case basis, rather than rely on a per se rule that a class cannot be certified if it includes more than a de minimis number of uninjured class members,” and that the proper inquiry is whether the plaintiffs’ evidence is capable of establishing antitrust impact on a classwide basis.

Courts have also grappled with the question of whether a defendant’s due process rights are implicated by a class that may include uninjured class members. As we wrote in our [Spring 2020](#) update, the Seventh Circuit held in *Physicians Healthsource v. A-S Medication Sols.*, 950 F.3d 959 (7th Cir. 2020), that the defendant’s due process rights were indeed implicated, but only in the unique context of a claim under the Telephone Consumer Protection Act (TCPA) because unclaimed money can revert to the defendant in TCPA cases. In its amicus briefs on this issue, AAI has argued that, in cases where damages are calculated as the total sum of overcharges—which is true of most antitrust cases—a defendant does not have a due process interest in challenging the inclusion of a class member that may have suffered no damages.

Earlier this year, the Fourth Circuit addressed the Article III standing issue in *Mr. Dee’s Inc. v. Inmar, Inc.*, 127 F.4th 925 (4th Cir. 2025), in which the court affirmed the district court’s refusal to certify a class of manufacturers who allegedly overpaid for coupon

processing services due to the defendants' price-fixing conspiracy because nearly a third of the class members did not pay higher prices. After finding that the high share of uninjured class members presented a predominance problem, the court relied on the Supreme Court's opinion in *TransUnion* to conclude that "such a high share of uninjured members also raises Article III standing concerns."

The issue of uninjured class members is arguably analogous to the issue of "disjuncture," which focuses on whether a disparity between the named plaintiffs' injuries and the injuries of prospective class members presents standing issues under Article III. In assessing disjuncture, the First, Third, Sixth, and Ninth Circuits employ the "class-certification approach," which requires only that the named plaintiffs have standing,⁶ while the Second and Eleventh Circuits have adopted the more intensive "standing approach," which requires that the named plaintiff must have suffered harms that are analogous to those suffered by the rest of the class.⁷

Earlier this year, the Fifth Circuit joined the First, Third, Sixth, and Ninth Circuits in adopting the class-certification approach. In *Wilson v. Centene Mgmt. Co.*, 144 F.4th 780 (5th Cir. 2025), the plaintiff health insurance purchasers alleged that they overpaid for premiums because the defendant overrepresented the size of its insurance network. The district court denied class certification on the basis that the named plaintiffs failed to establish that the class members would have paid lower premiums if the defendant had adequately represented the size of its network. Framing the issue as "the manner and degree of proof required to establish injury-in-fact at the class-certification stage," the Fifth Circuit vacated and remanded with instructions to apply the class-certification approach, reasoning that the standing approach "prematurely and unnecessarily muddies the waters for the threshold constitutional issue of justiciability."

Although the Sixth Circuit has squarely adopted the standing approach, a recent concurrence indicates some disagreement among judges on this point. In *Speerly v. GM*, 143 F.4th 306 (6th Cir. 2025), an *en banc* panel of the Sixth Circuit vacated the district court's certification of 26 state-wide subclasses in an automobile defect case for failure to satisfy Rule 23's commonality and predominance requirements. Judges Thamar and Nalbandian each wrote separate concurrences on the issue of Article III standing in class cases. Judge Nalbandian wrote that the court "should have resolved the standing question by holding that a class cannot be certified with members who have not suffered an injury in fact." Disagreeing, Judge Thamar wrote that "[c]ourts should look to Rule 23, not

⁶ *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410 (6th Cir. 1998); *Melendres v. Arpaio*, 784 F.3d 1254 (9th Cir. 2015); *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018); *Boley v. Universal Health Servs.*, 36 F.4th 124 (3d Cir. 2022).

⁷ *Fox v. Ritz-Carlton Hotel Co.*, 977 F.3d 1039 (11th Cir. 2020); *Barrows v. Becerra*, 24 F.4th 116 (2d Cir. 2022).

Article III, in determining whether a named plaintiff may represent a class of members who assert different injuries—or no injury at all.”

This summer, the Supreme Court was poised to reach the role of Article III and predominance at class certification in *Lab. Corp. of Am. Holdings (“Labcorp”) v. Davis*, 145 S. Ct. 1608 (2025). Petitioners in *Labcorp* challenged a Ninth Circuit order certifying a class of blind patients seeking statutory damages under the ADA and California state law on the basis that the class contained uninjured class members, which they contended both violated Article III and prevented plaintiffs from satisfying Rule 23’s predominance requirement. The Court had granted certiorari on the question of “[w]hether a federal court may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III Injury.”

AAI submitted an [amicus brief](#) explaining, among other things, that Article III injury can be a common question that supports a finding of predominance, that Labcorp elided important differences in the standards for establishing Article III injury and for establishing antitrust injury on the merits, and that, in antitrust cases, the presence of uninjured class members usually does not alter the amount of damages. But the Court did not reach the merits. After oral argument—at which it became clear that the class certification order at issue had been superseded below and was no longer in effect—the Court dismissed certiorari as improvidently granted.

Justice Kavanaugh dissented, writing that he would have reached the merits and would have held that “federal courts may not certify a damages class pursuant to Rule 23 when the class includes both injured and uninjured class members.” In his reasoning, Justice Kavanaugh mentioned only the predominance requirement and did not address Article III standing; he based his view on the risk that classes that are “overinflated” with uninjured class members “raise the stakes for businesses that are the targets of class actions,” allowing “coerced settlements” which “substantially raise the costs of doing business.”

Justice Kavanaugh’s dissent in *Labcorp* and the ongoing circuit splits suggest that the issue of classes containing uninjured members and other issues related to Rule 23’s relationship to Article III are likely to be raised in the Court again.

II. *Daubert* at Class Certification

When plaintiffs rely on expert testimony at the class certification stage, courts are split as to whether a court should perform a full *Daubert* analysis of the expert testimony or instead apply a tailored approach specific to the “rigorous analysis” required to satisfy Rule 23. In antitrust class actions, plaintiffs often rely on expert testimony to establish that common questions will predominate over individualized questions when they attempt to prove impact and damages at trial.

Since at least 2015, the Third, Seventh, and Eleventh Circuits have held that *Daubert* applies in full at class certification.⁸ Because Rule 23 must be satisfied with admissible evidence, they reason, courts may not certify a class without first resolving disputes about the reliability of expert testimony that a plaintiff uses to support certification. In our [Spring/Summer 2021](#) update, we reported that the Fifth Circuit joined these courts, holding in *Prantil v. Arkema Inc.*, 986 F.3d 570 (5th Cir. 2021), that “the *Daubert* hurdle must be cleared when scientific evidence is relevant to the decision to certify.”

In contrast, the Eighth and Ninth Circuits have held that a plaintiff need not clear the *Daubert* hurdle until after class certification.⁹ These courts reason that a plaintiff’s class-certification evidence need not be admissible, as certification is not outcome-determinative and is often decided when merits discovery is incomplete, and that the purpose of *Daubert*—preventing unreliable evidence from swaying a jury—is not yet relevant. Under this approach, a court does not err by either conducting a “focused *Daubert* analysis” to determine the persuasiveness of expert testimony or by ruling on a *Daubert* challenge after class certification.¹⁰

Since our last update, the Sixth Circuit has joined the Third, Seventh, and Eleventh Circuits in *In re Nissan N. Am.*, 122 F.4th 239 (6th Cir. 2024). Plaintiffs from 10 states sought to certify a class of drivers of Nissan cars with an allegedly defective automatic braking system. The district court certified the class without ruling on Nissan’s *Daubert* challenge to the drivers’ expert testimony that each model in the class had the same defect. The Sixth Circuit reversed, holding that, if challenged testimony is “material” to a class certification motion, the district court must demonstrate the expert’s credibility under *Daubert*. In doing so, it explicitly rejected plaintiffs’ arguments that the purpose of *Daubert* is to keep unreliable evidence from swaying a jury, reasoning that class certification is “a fact-based inquiry” and Rule 702—which *Daubert* interpreted—“does not distinguish between jury and bench trials.”

III. Mandatory Arbitration Agreements

We have long been following the antitrust implications of mandatory arbitration agreements in adhesion contracts. Mandatory arbitration agreements often include forced class action waivers that may prevent class litigation and class arbitration. In our [Summer 2015](#) update, we examined the impact of *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013), in which the Supreme Court instructed lower courts to “rigorously

⁸ *Am. Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010); *Sher v. Raytheon Co.*, 419 F. App’x 887 (11th Cir. 2011); *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183 (3d Cir. 2015).

⁹ *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604 (8th Cir. 2011); *Sali v. Corona Reg’l Med. Ctr.*, 909 F.3d 996 (9th Cir. 2018).

¹⁰ *Cody v. City of St. Louis*, 103 F.4th 523 (8th Cir. 2024).

enforce arbitration agreements according to their terms,” even when that meant forcing federal antitrust plaintiffs into individual arbitrations that would make their claims prohibitively costly.

This spring, the Second Circuit ruled that an arbitration agreement between antitrust plaintiffs and defendants did not bar the plaintiffs’ class claims because there was an insufficient nexus between the arbitration agreement and the claims. In *Davitashvili v. Grubhub*, 131 F.4th 109 (2d Cir. 2025), the plaintiff diners alleged that no-price-competition clauses used by food-delivery platforms Grubhub, Postmates, and Uber—under which restaurants agree not to sell meals at lower prices off the platforms—violate federal and state antitrust laws. Relying on *Italian Colors*, Grubhub moved to compel arbitration of claims brought by plaintiffs who used its platform, the terms of which require arbitration of claims arising out of users’ “access and use” of the platform. The district court denied the motion, finding that the arbitration agreements lacked any nexus to plaintiffs’ claims.

A divided panel of the Second Circuit affirmed. In an opinion authored by Judge Cabranes and joined in full by Judge Pérez, the majority found that, because plaintiffs allege that they pay higher prices when ordering from other platforms and restaurants due to Grubhub’s agreements with restaurants, their claims do not “arise out of” their use of Grubhub under the Federal Arbitration Act (“FAA”). In a separate opinion concurring in part but dissenting on this point, Judge Sullivan agreed that a defendant may not compel arbitration of claims that are “completely unrelated” to the underlying transaction in which the arbitration agreement was made. But he considered the FAA’s “arising out of” language to be satisfied because plaintiffs’ “use of Grubhub’s platform is what gave Grubhub the market power to commit the alleged antitrust violations.” The panel unanimously agreed that plaintiffs’ claims against Postmates and Uber must be sent to an arbitrator because their arbitration provisions, unlike Grubhub’s arbitration provision, delegated the threshold question of arbitrability to the arbitrator rather than the court.

Italian Colors dealt with the judge-made “effective vindication” exception to the FAA, which the Court first recognized in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), and which establishes that even FAA-protected arbitration agreements are subject to invalidation when they operate as a prospective waiver of a party’s right to pursue statutory remedies. Although it held in *Italian Colors* that an antitrust plaintiff cannot invoke the exception to invalidate a class-action waiver merely because the costs of individually arbitrating a federal statutory claim exceeded its potential recovery, the Court did not invalidate the exception, and a plaintiff can still challenge an arbitration provision under *Mitsubishi* if it prevents them from pursuing statutory remedies. Earlier this year, the Second Circuit in *Flores v. N.Y. Football Giants*, 150 F.4th 172 (2d Cir. 2025), invalidated a professional football player’s arbitration agreement with the NFL under the effective-vindication exception after finding that it

required him to submit his claims to the “unilateral discretion” of the NFL Commissioner, without providing an independent arbitral forum or a process for bilateral dispute resolution.

We have also been following cases addressing preemption of the FAA under state law. The general rule, adopted by the Supreme Court in *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), is that the FAA preempts any state law that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in passing the FAA. *Concepcion* dealt with the California Supreme Court’s decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), which held that class action waivers in consumer contracts of adhesion are unconscionable under California law. The Court has since interpreted *Concepcion* expansively. In our [Spring 2016](#) update, for example, we discussed *DIRECTV v. Imburgia*, 136 S. Ct. 463 (2015), in which the Court enforced an arbitration agreement that expressly incorporated California law, which, under *Discover Bank*, would have barred enforcement at the time of the contract but which was subsequently held preempted in *Concepcion*.

Notwithstanding *Concepcion*, courts have sometimes found class-action waivers in mandatory arbitration clauses to be invalid under state law. In our [Fall 2020](#) update, we reported on *Waithaka v. Amazon.com*, 966 F.3d 10 (1st Cir. 2020), in which the First Circuit, upon finding that the plaintiffs were excluded from the FAA’s coverage, held that the statutory right to proceed as a class articulated in the employment statutes under scrutiny “represent[s] the fundamental public policy of Massachusetts” and that the class action waiver was therefore invalid under state law. The Supreme Court later denied a petition for certiorari of that opinion.

Last fall, the Ninth Circuit held in *Heckman v. Live Nation Ent.*, 120 F.4th 670 (9th Cir. 2024), that the FAA did not preempt California unconscionability law as applied to a mass-arbitration agreement, invalidated the agreement as unconscionable, and allowed plaintiffs to proceed with their antitrust class action. The plaintiffs bought tickets to events promoted by Live Nation and sold through Ticketmaster and, in doing so, agreed to bring any claims against them in a mass arbitration. The district court denied defendants’ motion to compel arbitration in the plaintiffs’ antitrust case, finding that the mass-arbitration agreement was procedurally and substantively unconscionable as a matter of California law.

The Ninth Circuit agreed. First, as a matter of procedural unconscionability, defendants’ dominance in the live entertainment ticket market meant that plaintiffs had little choice but to purchase tickets from them. Second, the agreements’ terms were materially misleading and permitted unilateral and retroactive changes without notice. Finally, the mass arbitration rules were “so dense, convoluted and internally contradictory to be borderline unintelligible.” The court also found the mass-arbitration rules substantively

unconscionable because they made bellwether decisions binding on all other claimants without notice or an opportunity to be heard, failed to provide a right to discovery, and gave defendants—but not plaintiffs—a right to appeal.

As an alternative and independent basis for affirming the district court’s decision, the Ninth Circuit held that the FAA did not preempt application of the *Discover Bank* rule to the mass-arbitration agreement because it required classwide, rather than bilateral, arbitration. Distinguishing *Concepcion*, the court concluded that “Congress did not have class-wide arbitration in mind when it passed the FAA,” since “[c]lass-wide arbitration did not exist in 1925” when the FAA was passed, and “FAA precedents treat *bilateral arbitration* as the prototype of the *individualized* and informal form of arbitration protected from undue state interference by the FAA.” Accordingly, it concluded that the application of California law to the mass-arbitration rules was not preempted by the FAA.” The U.S. Supreme Court subsequently denied a petition for certiorari.

We have long been tracking the use of mandatory arbitration clauses in employment agreements, which the Supreme Court upheld in a 5-4 decision in *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018). In our [Spring 2019](#) update, we reviewed the Supreme Court’s decision in *New Prime v. Oliveria*, 139 S. Ct. 532 (2019), which held that the FAA does not compel courts to enforce private arbitration agreements involving employment contracts with “transportation workers,” which Section 1 of the FAA expressly excludes from the Act’s coverage provided they are “engaged in foreign or interstate commerce.”

Since *Oliveria*, courts have been grappling with the scope of the FAA’s transportation-worker exclusion. In our [Summer 2022](#) update, we examined the Supreme Court’s unanimous holding in *Saxon v. Sw. Airlines*, 142 S. Ct. 1783 (2022), that a class of workers is “engaged in foreign or interstate commerce” for purposes of the FAA exclusion if they are “directly involved in transporting goods across state or international borders.” In our [Spring 2024](#) update, we examined the Supreme Court’s holding in *Bissonnette v. LePage Bakeries Park St.*, 601 U.S. 246 (2024), that a worker need not work in the transportation industry to fall within the exclusion, and that courts should focus on workers’ duties rather than the industry they work in. We also explained that a circuit split has formed regarding last-mile delivery drivers, with the First and Ninth Circuits holding that they fall within the transportation-worker exclusion and the Fifth Circuit holding that they are subject to the FAA.¹¹

The Supreme Court is poised to weigh in. Earlier this year the Tenth Circuit joined the First and Ninth Circuits in holding that last-mile delivery drivers fall within the

¹¹ *Rittmann v. Amazon.com*, 971 F.3d 904 (9th Cir. 2020); *Waithaka v. Amazon.com*, 966 F.3d 10, 26 (1st Cir. 2020); *Lopez v. Cintas Corp.*, 47 F.4th 428 (5th Cir. 2022).

transportation-worker exclusion even if they do not cross state lines. In *Brock v. Flowers Foods*, 121 F.4th 753 (10th Cir. 2024), the court examined whether a delivery driver who distributes baked goods from a national baker to in-state retail stores fell within the transportation-worker exclusion under *Bissonnette*. Adopting the First and Ninth Circuit’s approaches in *Waithaka* and *Rittman*, and distinguishing cases in which rideshare and food-delivery drivers were found not to fall within the exclusion, the Tenth Circuit based its conclusion on the buyer-seller relationship between the driver’s customers and his employer. Because the driver places orders for baked goods from out-of-state bakeries owned by the national baker, picks them up at an in-state warehouse owned by the baker, and delivers them to in-state retailers under the continuous control of the baker, the court concluded that he was directly engaged in interstate commerce under *Saxon*. The baker appealed, and the Supreme Court granted *certiorari* on October 20.

We have also been tracking cases holding that a defendant has waived its right to enforce an arbitration agreement. In our [Fall 2024](#) update, we examined the Eighth Circuit’s holding in *Thomas v. Pawn Am. Minn.*, 108 F.4th 610 (8th Cir. 2024), that a defendant waived its right to compel arbitration by “substantially invoking the litigation machinery” when it participated in a motion-to-dismiss hearing, stipulated to a discovery plan, and scheduled a mediation before moving to compel discovery. Earlier this year, the Eighth Circuit in *Lackie Drug Store v. OptumRx*, 143 F.4th 985 (8th Cir. 2025), held that a waived right to arbitration was “revived” with respect to newly added claims in an amended complaint such that a defendant could move to compel arbitration of those claims, but the defendant could not compel arbitration of the pre-existing claims insofar as the amendments did not expand their scope.

IV. Attorney’s Fees

Over the past several years, we have been tracking notable developments involving the fairness and reasonableness of fee awards in class-action settlements under Rule 23(e)(2), which has important implications for private enforcement incentives. In our [Spring 2024](#) update, we examined *In re Wawa Data Sec. Litig.*, 85 F.4th 712 (3d Cir. 2023) (“*Wawa P*”), in which the Third Circuit vacated a \$3.2 million settlement fee award and remanded with instructions to reconsider the reasonableness of the award. The panel instructed the district court to consider the award not only relative to the total funds made available to the class but also to the amounts distributed and expected to be claimed. It also instructed the district court to consider whether the fee agreement’s terms reflected the existence of a side agreement between plaintiffs’ counsel and the opposing party.

On remand, the district court again approved the fee award, finding that each class member received considerable value in the form of coupons and injunctive relief compared to the relatively small damages they suffered, and that a side agreement was unlikely. Earlier this year, the Third Circuit affirmed in *In re Wawa Data Sec. Litig.*, 141

F.4th 456 (3d Cir. 2025) (“*Wawa II*”). Reiterating its “flexible approach toward analyzing fee awards,” the court held that the district court’s remand opinion did not violate its opinion in *Wawa I*.

Also in our [Spring 2024](#) update, we examined *In re Broiler Chicken Antitrust Litig.*, 80 F.4th 797 (7th Cir. 2023) (“*Broiler I*”), where the Seventh Circuit endorsed the district court’s approach of evaluating the fairness of fee awards by considering how the plaintiffs would have negotiated with the attorneys had the bargain occurred at the outset of the case when the risk of losing the litigation existed. The panel reversed the district court’s fee award—amounting to 33% of the settlement fund—because the court failed to consider auction bids made by counsel in other litigation.

On remand, the district court decreased the fee award from 33% to 30% based on court-compiled statistical data from comparable cases. Earlier this year, in *In re Broiler Chicken Antitrust Litig.*, 142 F.4th 568 (7th Cir. 2025) (“*Broiler II*”), a Seventh Circuit panel modified the award, affirming the district court’s analysis but finding that it had erroneously included a skewed sample of cases with higher-than-average fees. The panel adopted 26.6% as the properly calculated median—and therefore a suitable attorney’s fee award—after removing the skewed sample.

This July, the Second Circuit clarified the standards applicable to attorney’s fees in settlements where fee funds are segregated from class settlement funds. In *Kurtz v. Kimberly-Clark Corp.*, 142 F.4th 112 (2d Cir. 2025), the court reversed an attorney’s fee award in a segregated-funds settlement because the court failed to consider the proportion of relief provided “for the class” under Rule 23(e)(2)(C)(iii), relying on Eighth and Ninth Circuit authority holding that class recovery and attorneys’ fees should be reviewed together even when the two are structurally segregated.¹² It also held that whether the appropriate benchmark for the proportionality analysis under Rule 23(e)(2)(C) is the hypothetical maximum recovery to the class or the actual class recovery is a fact-bound question that the district court has discretion to resolve.

The court in *Kurtz* also elaborated on the relationship between the proportionality analysis of a settlement fee agreement under Rule 23(e) and the reasonableness of an attorney’s fee under Rule 23(h): Although both rules ask courts to weigh class recovery against attorney’s fees, Rule 23(h) uses class recovery as a proxy for attorney success to determine whether fees are reasonably calculated and genuinely earned, while Rule 23(e) safeguards the fairness of a settlement for the class by asking whether the proportion of attorney’s fees compared to the total recovery allocated to the class raises any questions about the settlement’s adequacy.

¹² *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011); *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241 (8th Cir. 1996).

This April, the Fourth Circuit ruled that a district court may not treat as presumptively reasonable an attorney's fee provision that complies with a fee matrix in the court's local rules. After winning a bench trial, plaintiffs in *Paredes v. Zen Nails Studio*, 134 F.4th 750 (4th Cir. 2025), moved for attorney's fees under the fee-shifting provision of the Fair Labor Standards Act ("FLSA") which, like Rule 23, requires that an attorney's fee award be "reasonable." The Maryland district court granted the motion but at reduced hourly rates, based on a fee matrix in the court's local rules, which the court treated as presumptively reasonable. The Fourth Circuit reversed, holding that the district court erred in treating the matrix rates as presumptively correct and higher rates as requiring special justification. While a fee matrix in a court's local rules can be a useful starting point to determine fees, a court must consider it alongside other relevant evidence including lawyer affidavits, fee awards in similar cases, general surveys, and the court's own experience.

We have also been following opinions on Rule 23(h)'s requirement that class members have notice and the opportunity to object to fee awards. In our [Fall 2024](#) update, we reported on *In re T-Mobile Customer Data Sec. Breach Litig.*, 111 F.4th 849 (8th Cir. 2024), in which the Eighth Circuit reversed a district court's decision striking an unnamed class member's fee objection on the sole basis that she and her counsel were "serial objectors." We also reported on *Chieftain Royalty Co. v. SM Energy Co.*, 100 F.4th 1147 (10th Cir. 2024), in which the Tenth Circuit ruled that Rule 23(h) required classwide notice of a revised motion for attorneys' fees that class counsel had submitted in district court after its initial fee award was reversed.

The Fifth Circuit recently ruled that a district court must ensure that class members have actual notice and an opportunity to object to a fee motion under Rule 23(h), even if no class member objects. In *Morrow v. Jones*, 2025 U.S. App. LEXIS 14230 (5th Cir. Jun. 10, 2025), the court reversed a fee award for failure to provide proper notice. In a prior opinion, the court had vacated the district court's denial of the motion, which the district court then granted on remand. Defendants appealed, contending that they had no opportunity to object to the motion because the district court stayed the case while it was on appeal and decided the motion without lifting the stay. In its non-precedential opinion reversing the fee award, a Fifth Circuit panel relied on Rule 23(h) and the accompanying Advisory Committee Notes to conclude that, because courts have an independent obligation to protect the interests of the class, failing to enforce Rule 23(h)'s notice requirement was an abuse of discretion regardless of whether a class member had raised the issue.

V. Empirical Data on Class Actions

In July, Huntington Bank (Huntington) and the UC Hastings Center for Litigation and Courts (UCHCLC) published the [2024 Antitrust Annual Report: Class Action Filings in](#)

[Federal Court](#), their seventh annual antitrust report examining empirical information involving the filing and resolution of private antitrust class action lawsuits. The new report covers the years 2009–2024.

The Report shows the number of antitrust class action complaints filed each year, the amount of time they took on average to reach a settlement, the mean and median recoveries, the attorneys’ fees and costs awarded, and the total settlement amounts in each year and overall. It also analyzes the law firms that represented plaintiffs and defendants in antitrust class action settlements, describes cumulative results, and tabulates cumulative totals for claims administrators involved in the settlement process. The report also distinguishes private antitrust enforcement by particular industries, by type of claim, and by type of plaintiff. Key findings include the following:

- From 2009–2024, a mean number of 123 consolidated complaints were filed per year, with outlier years as low as 72 and as high as 220.
- From 2009–2024 there were Defendant Wins in 146 cases as a result of judgments on the pleadings, summary judgment, judgment as a matter of law, or trial.
- From 2009–2024, most antitrust class actions that reached final approval did so within 5–7 years.
- The mean settlement amount varied by year from \$6 million to \$184 million, and the median amount varied by year from \$2 million to \$18.5 million.
- The total annual settlements ranged from \$225 million to \$9.6 billion per year.
- The cumulative total of settlements was \$44.8 billion.

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