

Class Action Issues Update Spring 2026

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 2025](#) update and includes the following new decisions:

- **Mandatory Arbitration Agreements:** *Flores v. NFL*, No. 1:22-cv-871, 2026 U.S. Dist. LEXIS 30015 (S.D.N.Y. Feb. 13, 2026); *Avery v. TEKsystems*, 165 F.4th 1219 (9th Cir. 2026); *Flower Foods, Inc. v. Brock*, ___ U.S. ___, No. 24-935, 2026 U.S. LEXIS 2297 (May 28, 2026) (slip op.); *Silva v. Schmidt Baking Distrib., LLC*, 162 F.4th 354 (2d Cir. 2025); *Valli v. Avis Budget Grp. Inc.*, 162 F.4th 396 (3d Cir. 2026); *Greystone Mortg., Inc. v. Equifax Workforce Sols. LLC*, No. 24-cv-2260, 2026 U.S. Dist. LEXIS 31200 (E.D. Pa. Feb. 17, 2026)
- **Uninjured Class Members and Article III Standing at Class Certification:** *Healy v. Milliman*, 164 F.4th 701 (9th Cir. 2026); *Clippinger v. State Farm Auto. Ins. Co.*, 173 F.4th 817 (6th Cir. 2026); *Generation Changers Church v. Church Mut. Ins. Co.*, 168 F.4th 354 (6th Cir. 2026)
- **Ascertainability:** *Cline v. Sunoco, Inc. (R&M)*, 159 F.4th 1171 (10th Cir. 2025); *Rider v. OXY USA, Inc.*, ___ F.4th ___, 2026 U.S. Dist. LEXIS 12992 (10th Cir. May 5, 2026)
- **Attorney’s Fees:** *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 166 F.4th 34 (10th Cir. 2026)
- **Incentive Awards for Class Members:** *Nat’l Veterans Legal Servs. Program v. United States*, 170 F.4th 1353 (Fed. Cir. 2026)
- **Timing of Class Certification Determination:** *Oliver v. Navy Fed. Credit Union*, 167 F.4th 106 (4th Cir. 2026)

I. 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 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.

Italian Colors dealt with the judge-made “effective vindication” exception to the Federal Arbitration Act (“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 exceed its potential recovery, the Court did not invalidate the exception, and plaintiffs can still challenge an arbitration provision under *Mitsubishi* if it prevents them from effectively pursuing statutory remedies.

In our [Fall 2025](#) update, we examined *Flores v. N.Y. Football Giants*, 150 F.4th 172 (2d Cir. 2025), in which the Second Circuit invalidated a professional football player’s arbitration agreement with his team and 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. On remand, in *Flores v. NFL*, No. 1:22-cv-871, 2026 U.S. Dist. LEXIS 30015 (S.D.N.Y. Feb. 13, 2026), the Southern District of New York held that the Second Circuit’s opinion also invalidates other class members’ arbitration agreements with their respective teams, and ordered the case to proceed in federal court.

Also, earlier this year the Ninth Circuit held in *Avery v. TEKsystems*, 165 F.4th 1219 (9th Cir. 2026), that Rule 23(d)’s grant of “broad authority” includes the ability to decline to enforce an arbitration agreement. In *Avery*, just after the close of class certification briefing, the defendant employer sent successive emails to plaintiff employees imposing a mandatory arbitration agreement but informing them that they had a right to opt out of the agreement for the limited purpose of maintaining their ability to participate in the instant lawsuit. Reasoning that the defendant’s emails attempted to effectively convert Rule 23’s opt-out process into an opt-in process, the district court denied the defendant’s motion to compel arbitration and declined to enforce the agreement. The Ninth Circuit affirmed, explaining that, under Rule 23(c), class members are included within a certified class unless they “request[] exclusion,” and circuit precedent recognizes district courts’ “power to regulate the notice and opt-out processes and to impose limitations when a party engages in behavior that threatens the fairness of the litigation.”

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*, 584 U.S. 497 (2018). In our [Spring 2019](#) update, we reviewed the Supreme Court’s decision in *New Prime, Inc. v. Oliveira*, 586 U.S. 105 (2019), which held that an FAA exception for “contracts of employment” with “transportation workers” who are “engaged in foreign or interstate commerce” excludes such contracts from the Act’s coverage and that its application turns on the nature of the contract rather than whether the contract purports to create an employer-employee relationship. In our [Summer 2022](#) update, we examined the Supreme Court’s unanimous holding in *Sw. Airlines v. Saxon*, 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., LLC*, 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 who do not cross state lines, with the First, Ninth, and Tenth Circuits holding that they fall within the transportation-worker exclusion and the Fifth Circuit holding that they are subject to the FAA.¹

As we discussed in our [Fall 2025](#) update, the Tenth Circuit in *Brock v. Flowers Foods*, 121 F.4th 753 (10th Cir. 2024), examined the case of a franchisee delivery driver who distributes baked goods from a national baker to in-state retail stores, following the First and Ninth Circuit’s approaches to hold that he is directly engaged in interstate commerce under *Saxon* such that he falls within the exclusion. The Supreme Court recently affirmed that holding in a unanimous opinion in *Flower Foods, Inc. v. Brock*, ___ U.S. ___, No. 24-935, 2026 U.S. LEXIS 2297 (May 28, 2026), ending the circuit split and confirming, based on the statutory text and the court’s Commerce Clause jurisprudence, that delivery drivers may be “engaged in interstate commerce” under *Saxon* even if they do not cross state lines or interact with a vehicle that does.

In December, the Second Circuit addressed the separate question of what constitutes a “contract of employment” under the exclusion, holding that the language includes contracts between business entities. In *Silva v. Schmidt Baking Distrib., LLC*, 162 F.4th 354 (2d Cir. 2025), plaintiff delivery drivers worked as W-2 employees through a staffing agency until their employer required them to form single-employee corporations and sign mandatory arbitration clauses to continue their work. Reversing the district court’s order forcing arbitration, the Second Circuit distinguished the drivers’ single-entity corporations from large logistics companies, emphasizing that the drivers incorporated at their employer’s behest, maintained the same work duties before and after incorporation, and personally guaranteed performance under the contracts. The case stands for the proposition that employers cannot circumvent the FAA’s transportation-worker exclusion by forcing workers to incorporate.

Beyond the employment context, we have also been tracking cases addressing circumstances under which a defendant waives 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. LLC (In re Pawn Am. Consumer Data Breach Litig)*, 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. In our [Fall 2025](#) update, we reported on the Eighth Circuit’s holding in *Lackie Drug Store v. OptumRx*, 143 F.4th 985 (8th Cir. 2025), 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.

¹ *Rittmann v. Amazon.com*, 971 F.3d 904 (9th Cir. 2020); *Waithaka v. Amazon.com*, 966 F.3d 10 (1st Cir. 2020); *Lopez v. Cintas Corp.*, 47 F.4th 428 (5th Cir. 2022); *Brock v. Flowers Foods*, 121 F.4th 753 (10th Cir. 2024).

Earlier this year, the Third Circuit addressed the issue in *Valli v. Avis Budget Grp. Inc.*, 162 F.4th 396 (3d Cir. 2026), holding that defendant Avis did not waive its right to compel arbitration of certain class claims when it litigated those claims before certification because it consistently asserted arbitration as an affirmative defense, raised arbitration issues in opposing class certification, and promptly moved to compel arbitration after certification. In February, the Eastern District of Pennsylvania distinguished the facts of *Valli* in an antitrust class action, *Greystone Mortg., Inc. v. Equifax Workforce Sols. LLC*, No. 24-cv-2260, 2026 U.S. Dist. LEXIS 31200 (E.D. Pa. Feb. 17, 2026). The court relied on the Ninth Circuit’s opinion in *Avery* to exercise its Rule 23(d) authority to deny arbitration, holding that defendants waived their right to arbitrate by engaging in discovery and failing to raise an arbitration agreement that it had imposed on plaintiffs after the complaint was filed. Defendants’ appeal of that decision is currently pending before the Third Circuit.

II. 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. As we explained in our [Fall 2025](#) update, there is a persistent circuit split on this issue, and the Supreme Court has repeatedly declined to address it. As covered in our [Spring-Summer 2021](#) update, a sharply divided Court ruled in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), that “every class member must have Article III standing to recover individual damages,” but explicitly declined to reach “the distinct question whether every class member must demonstrate standing before a court certifies a class.”

This January, the Ninth Circuit relied on *TransUnion* to hold in *Healy v. Milliman, Inc.*, 164 F.4th 701 (9th Cir. 2026), that unnamed class members must demonstrate evidence of Article III standing at the summary judgment stage, not just when individual damages are awarded. Drawing on *TransUnion*’s language that plaintiffs “must demonstrate standing with the manner and degree of evidence required at the successive stages of the litigation,” the court reversed the district court’s order for failing to allow circumstantial evidence of standing and declining to make reasonable inferences based on that evidence, as required at summary judgment.

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. As we explained in our [Fall 2025](#) update, the First, Third, Fifth, Sixth, and Ninth Circuits have employed the “class-certification approach,” which requires only that the named plaintiffs have standing,² while the Second and Eleventh Circuits have adopted the more intensive

² *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); *Wilson v. Centene Mgmt. Co.*, 144 F.4th 780 (5th Cir. 2025).

“standing approach,” which requires that the named plaintiff must have suffered harms that are analogous to those suffered by the rest of the class.³

As we explained in our [Fall 2025](#) update, there has recently been significant debate between judges on the Sixth Circuit about which approach to follow, with Judges Thamar and Nalbandian issuing warring concurrences on the issue in *Speerly v. GM*, 143 F.4th 306 (6th Cir. 2025). The debate continued earlier this year, when a three-judge panel in *Generation Changers Church v. Church Mut. Ins. Co.*, 168 F.4th 354 (6th Cir. 2026), declined to adopt either the class-certification or standing approach after finding that plaintiffs’ class claims could continue under either approach. Calling into question Judge Thamar’s characterization in his *Speerly* concurrence that the court adopted the class certification approach in its 1998 opinion in *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410 (6th Cir. 1998), the panel in *Generation Changers* stated that the court has “yet to explicitly endorse this view in a published opinion.” Last month, Judge Bush expanded the debate in his concurrence in *Clippinger v. State Farm Auto. Ins. Co.*, 173 F.4th 817 (6th Cir. 2026), in which he argued that some classes may only include only a handful of injured plaintiffs such that district courts should also consider unnamed plaintiffs’ Article III standing as part of their numerosity analysis.

III. 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 an antitrust class action, *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*.

As explained in our [Fall 2024](#) update, the First and Fourth Circuits have joined the Third Circuit in adopting a heightened ascertainability requirement,⁴ while the Second, Sixth, Seventh, Eighth, Ninth, Eleventh, and Federal Circuits have rejected any heightened ascertainability requirement.⁵ The Fifth, Tenth, D.C., and Federal Circuits had not yet adopted an explicit position, although the Tenth and D.C. Circuits had acknowledged the

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

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

⁵ *In re Petrobas Sec. Litig.*, 862 F.3d 250 (2d Cir. 2017); *Rikos v. Proctor & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015); *Mullins v. Direct Digit., LLC*, 795 F.3d 654 (7th Cir. 2015); *Sandusky Wellness Ctr., LLC v. Medtox Sci., 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); *Freund v. McDonough*, 114 F.4th 1371 (Fed. Cir. 2024).

issue. Last November, the Tenth Circuit joined the majority of circuits in rejecting a heightened ascertainability requirement.

In *Cline v. Sunoco, Inc. R&M*, 159 F.4th 1171 (10th Cir. 2025), Sunoco appealed the district court’s certification order and award of over \$170 million in damages to a class of landowners who failed to receive interest on late oil and gas royalty payments as required by Oklahoma law. Sunoco appealed, arguing that the class members were not ascertainable because they were not identified by name. The Tenth Circuit rejected that argument, explicitly adopting the Seventh Circuit’s ascertainability test as articulated in *Mullins* and rejecting the heightened ascertainability requirement because it would allow Sunoco to “defeat class certification either by failing to keep proper records or failing to produce them.” The court held that “administrative feasibility may bear on whether class resolution is superior to individual resolution, but it should not operate as a trump card that outweighs all other factors under Rule 23.”

Earlier this month, the Tenth Circuit applied *Cline* to plaintiffs’ appeal of a district court’s pre-*Cline* order denying certification of another class of landowners with oil and gas leases. In *Rider v. Oxy USA, Inc.*, No. 25-3142, 2026 U.S. App. LEXIS 12992 (10th Cir. 2026), the district court found that the class definition was not administratively feasible because it required the court to “individually consider” payment, lease, and acquisition records to determine whether class members own mineral interests in land leased to the defendant. The Tenth Circuit reversed, noting that it had since rejected the administrative feasibility requirement in *Cline*, that the defendant could identify class members through its own records, and that, “[r]egardless, *Cline* clarified that neither gaps in a defendant’s record-keeping nor the large number of records to be reviewed can defeat class certification.”

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 million fee award—amounting to 25% of the recovery amount—and remanded with instructions to reconsider the reasonableness of the award. In our [Fall 2025](#) update, we examined *In re Wawa Data Sec. Litig.*, 141 F.4th 456 (3d Cir. 2025) (“*Wawa IP*”), in which the court affirmed the same fee award, reiterating its “flexible approach toward analyzing fee awards.”

Also in our [Spring 2024](#) update, we examined *In re Broiler Chicken Antitrust Litig.*, 80 F.4th 797 (7th Cir. 2023) (“*Broiler P*”), in which the Seventh Circuit reversed a district court’s \$57.4 million fee award—amounting to 33% of the settlement fund—because the court failed to consider auction bids made by counsel in other litigation. In our [Fall 2025](#) update, we examined *In re Broiler Chicken Antitrust Litig.*, 142 F.4th 568 (7th Cir. 2025) (“*Broiler IP*”), in which the court reduced the district court’s revised award from 30% to 26.6% after comparing it to the fees in other cases.

In our [Fall 2025](#) update we also examined *Kurtz v. Kimberly-Clark Corp.*, 142 F.4th 112 (2d Cir. 2025), in which the Second Circuit clarified that 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, and that courts must weigh attorney’s fees settlements against the relief provided “for the class” under Rule 23(e)(2)(C)(iii).

In January, the Tenth Circuit in *Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.*, 166 F.4th 34 (10th Cir. 2026), affirmed the district courts \$17.3 million fee award—amounting to 33% of the settlement fund—as substantively reasonable. The court affirmed the district court’s inclusion of time class counsel spent on appeals in calculating the lodestar, emphasizing that the district court had reduced the 40% fee that counsel originally requested and had credited class counsel with winning a greater per-member recovery than a comparable case during a period when “controlling law regarding class certification was in flux.”

V. 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*, 975 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 disallowing salaried class representatives. As discussed in our [Fall/Winter 2022](#), [Summer 2023](#), [Spring 2024](#), and [Fall 2024](#) updates, the First, Second, Seventh, and Ninth Circuit have rejected the Eleventh Circuit’s “anomalous” analysis and affirmed the legality of incentive awards.⁶

In March, the Federal Circuit joined the “overwhelming majority” of circuits to reject the Eleventh Circuit’s holding in *Johnson* and hold that incentive awards are legal. In *Nat’l Veterans Legal Servs. Program v. United States*, 170 F.4th 1353 (Fed. Cir. 2026), the court upheld the district court’s approval of \$10,000 incentive awards to three nonprofit class representatives who litigated a PACER fee case on behalf of the class for eight years. In doing so, the court observed that, far from the salaries that were prohibited under the nineteenth century precedent reviewed in *Johnson*, incentive amounts are “token amounts to encourage the participation of representative plaintiffs,” who “step up, often at significant personal and financial cost, to vindicate the rights of others.”

VI. Empirical Data on Class Actions

In April, Huntington Bank (Huntington) and the UC Hastings Center for Litigation and Courts (UCHCLC) published the [2025 Annual Antitrust Report: Class Actions in Federal Court](#), their ninth annual antitrust report examining empirical information involving the

⁶ *Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340 (1st Cir. 2022); *Moses v. The New York Times Co.*, 79 F.4th 235 (2d Cir. 2023); *Scott v. Dart*, 99 F.4th 1076 (7th Cir. 2024); *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769 (9th Cir. 2022).

filing and resolution of private antitrust class action lawsuits. The new report covers the years 2009–2025.

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 attorney’s 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 2009-2025, a mean number of 124 consolidated complaints were filed per year, with outlier years as low as 72 and as high as 220.
- From 2009-2025, there were Defendant Wins in 158 cases as a result of judgments on the pleadings, summary judgment, judgment as a matter of law, or trial.
- From 2009-2025, 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 \$51.8 billion from 2009-2025.

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