AAI AMERICAN ANTITRUST INSTITUTE

Class Action Issues Update Fall 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 Spring 2026 update and includes the following new decisions:

- **Mandatory Arbitration Clauses & Class Action Waivers:** *Salvatora v. XTO Energy, Inc.*, 188 F.4th 666 (3d Cir. 2026); *Moore v. Club Exploria, LLC*, 187 F.4th 970 (7th Cir. 2026); *5-Star General Store v. Am. Express Co.*, 189 F.4th 5 (1st Cir. 2026); *Metroplex Commc'ns, Inc. v. Meta Platforms, Inc.*, 189 F.4th 616 (7th Cir. 2026); *O'Dell v. Aya Healthcare Servs., Inc.*, 171 F.4th 1173, 1174 (9th Cir. 2026)
- **Uninjured Class Members:** *Wilson v. Centene Mgmt. Co., LLC*, 168 F.4th 217 (5th Cir. 2026); *Spurlock v. Wexford Health Sources, Inc.*, 175 F.4th 232 (4th Cir. 2026); *Kroger Co. v. Solano*, No. 26-244 (U.S. cert petition filed Aug. 17, 2026)
- **Administrative Feasibility:** *Dunn v. Santa Fe Nat. Tobacco Co.,* 185 F.4th 999 (10th Cir. 2026)
- **Attorney's Fees:** *Gelis v. BMW of N. Am., LLC*, 178 F.4th 810 (3d Cir. 2026); *Burnett v. Nat'l Ass'n of Realtors,* 187 F.4th 1051 (8th Cir. 2026)
- **Cy Pres:** *In re Google Location Hist. Litig.*, 189 F.4th 850 (9th Cir. 2026)
- **Nationwide Classes Involving Varying State Laws:** *Generation Changers Church v. Church Mut. Ins. Co.*, 168 F.4th 354 (6th Cir. 2026); *In re Juul Labs, Inc. Antitrust Litig.*, No. 26-2626 (9th Cir. petition to appeal granted Mar. 18, 2026)
- **Rule 23(f) Appeals:** *Jonathan R. by Next Friend Dixon v. Morrisey*, 178 F.4th 139 (4th Cir. 2026); *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 183 F.4th 178 (3d Cir. 2026)
- **§ 1291 Appeals:** *Air-Con, Inc. v. Daikin Applied Latin Am., LLC*, No. 24-1863, 2026 WL 2454286 (1st Cir. Aug. 21, 2026)

I. Mandatory Arbitration Clauses & Class Action Waivers

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." *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 the Court held in *Italian Colors* that an antitrust plaintiff cannot invoke the exception to invalidate a class-action waiver where the costs of individually arbitrating a federal statutory claim exceed the plaintiff's potential recovery, it did not invalidate the exception, and plaintiffs can still challenge an arbitration provision under *Mitsubishi* if it prevents them from effectively vindicating statutory remedies.

In the last few years, we have also been tracking cases that address circumstances under which a defendant waives its right to enforce an arbitration agreement. In our Fall 2024 update, we examined the Eighth Circuit's ruling in *Thomas v. Pawn Am., Minn., LLC* (*In re Pawn Am. Consumer Data Breach Litig.*), 108 F.4th 610 (8th Cir. 2024), where the court held 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 *Lackie Drug Store v. OptumRx*, 143 F.4th 985 (8th Cir. 2025), where the Eighth Circuit held that a defendant's 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.

In our Spring 2026 update, we reported on *Valli v. Avis Budget Grp. Inc.*, 162 F.4th 396 (3d. Cir. 2026), in which the Third Circuit held that defendant Avis did not waive its right to arbitrate unnamed class members' claims because it consistently asserted arbitration as an affirmative defense, raised arbitration issues in opposing class certification, and promptly moved to compel arbitration after certification. *Valli* established a caveat to the general waiver standard in the Third Circuit: when an arbitration agreement does not apply to named class members' claims but does apply to unnamed class members' claims, a defendant may reasonably wait until after class certification to move to compel arbitration of the unnamed class members' claims.

The Third Circuit relied on this "*Valli* caveat" in *Salvatora v. XTO Energy, Inc.*, 188 F.4th 666 (3d Cir. 2026), to hold that defendant XTO did not waive its right to compel arbitration of unnamed class members' claims when it indicated its intention to compel arbitration for the first time in its opposition to class certification and did not move to compel arbitration until after the opt-out period. The court noted, however, that the *Valli* caveat "is not all-encompassing"; a defendant may still waive the right to compel arbitration by demonstrating "an unambiguous preference for litigation over arbitration." But given that XTO had "stated its intention to preserve arbitration rights" in its opposition to class certification, moving to compel arbitration only after the opt-out period merely exhibited "a preference to avoid litigation with members of the class."

The Seventh Circuit recently refused to apply the *Valli* caveat in *Moore v. Club Exploria, LLC*, 187 F.4th 970 (7th Cir. 2026). Although the court agreed with the Third Circuit that a defendant need not move to compel arbitration of unnamed class members' claims before class certification, it found that defendant Exploria waived its right to compel arbitration because its "conduct at each stage of litigation was inconsistent with an intent to arbitrate." The court noted that Exploria's pleadings and opposition to class certification failed to mention arbitration and its class-related discovery efforts showed no attempt to develop evidence related to arbitration agreements.

In *5-Star General Store v. Am. Express Co.*, 189 F.4th 5 (1st Cir. 2026), the First Circuit addressed waiver of the right to compel arbitration through conduct prior to filing in federal court, holding that a party's refusal to pay arbitration fees amounts to a waiver of its right to compel arbitration in subsequent related litigation. In *5-Star*, defendant Amex refused to pay its part of the arbitrator's filing fee when 5-Star filed 5,155 arbitration demands against it, leading the arbitrator to close the claims. 5-Star later filed suit, and Amex moved to stay the litigation and compel arbitration. The district court held that, by failing to pay the mandatory fees, Amex had precluded a stay of litigation by defaulting under § 3 of the FAA and had waived its right to compel arbitration. The First Circuit affirmed, reasoning that Amex's refusal to pay arbitration fees was a form of litigation-related activity because it arose out of "the very same litigation in which the party attempts to now compel arbitration," and giving Amex a "do-over" in arbitration would undermine the FAA's goal of facilitating the "speedy resolution of disputes." Moreover, the finding that the refusal to pay was a form of litigation-related activity brought the question of whether the refusal constitutes waiver within the district court's authority to decide.

We have also been tracking cases that consider whether class claims have a sufficient nexus to the arbitration agreement. In our Fall 2025 update, we reported on *Davitashvili v. Grubhub*, 131 F.4th 109 (2d Cir. 2025), in which a divided Second Circuit held that there was an insufficient nexus between the arbitration agreements among Grubhub and its users—which required arbitration of claims arising out of users' "access and use" of the platform—and users' antitrust claims related to Grubhub's agreements with restaurants that required the restaurant not to charge lower prices off the platform. Because the users alleged that they pay higher prices when ordering from other platforms and restaurants due to Grubhub's agreements with restaurants, their claims did not "arise out of" their use of Grubhub under the FAA.

The Seventh Circuit also recently addressed the "sufficient nexus" issue in *Metroplex Commc'ns, Inc. v. Meta Platforms, Inc.*, 189 F.4th 616 (7th Cir. 2026), in which the court held that claims arising out of Metroplex's "status as a competitor" of Meta were beyond the scope of an arbitration agreement it consented to as a consumer of Meta's services. Metroplex had agreed to arbitrate "'any dispute' that 'arises out of' or 'relates to any' commercial use of Meta's products," but allegations that false advertising by Meta harmed Metroplex in its role as a competitor lacked a sufficient nexus to that agreement such that its false-advertising claims were not subject to arbitration.

Some arbitration agreements contain clauses delegating questions of the agreement's validity to the arbitrator, which the Supreme Court held in *Rent-A-Center v. Jackson*, 561 U.S. 63 (2010), prohibits a court from making the validity determination itself unless the plaintiff specifically challenges the validity of the delegation clause rather than the validity of the agreement as a whole. The Ninth Circuit recently examined the issue in the context of an FLSA collective action in *O'Dell v. Aya Healthcare Servs., Inc.*, 171 F.4th 1173 (9th Cir. 2026), holding that, absent an agreement to the contrary, a court cannot apply an arbitrator's determination that one agreement is invalid to other identical agreements. In *O'Dell*, Plaintiff O'Dell and three other traveling nurses had signed arbitration agreements with the defendant, their former employer, specifying that an arbitrator would determine the agreement's validity. The arbitrator found two of their

arbitration agreements valid and two of them invalid. Applying collateral estoppel, the district court held that the identical arbitration agreements of 255 other employees who had opted into the suit were also invalid. The Ninth Circuit reversed, reasoning that the use of collateral estoppel to invalidate the 255 opt-in plaintiffs' arbitration agreements "frustrate[d] an arbitration that the parties had agreed to undertake" on an "individualized" basis, undermining the parties' consent to arbitration and contravening the FAA's purpose to enforce arbitration agreements by their terms and subject only to contract defenses. The court also reasoned that the district court's approach would create "something akin to a bellwether class action" regarding the validity of the arbitration agreements, with neither the parties' consent nor the "procedural safeguards" of a class action.

II. Uninjured Class Members

We have long followed the recurring debate in federal courts over the rules and standards governing certification of classes that may contain members who were not injured by the defendant's conduct. There are two general approaches to resolving these issues: (1) the standing approach, under which no class containing uninjured members may be certified; and (2) the class certification approach, which considers only whether the potential presence of uninjured class members defeats the requirements of Rule 23.

As we reported in our Fall 2025 and Spring 2026 updates, the Second and Eighth Circuits have expressly adopted the standing approach.[1] On the other hand, the First, Third, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits have adopted the class certification approach. Among those circuits, the First and D.C. Circuits have held that a district court should not certify a class if uninjured class members exceed a *de minimis* number,[2] while the Third, Seventh, Ninth, Tenth, and Eleventh Circuits have stated that certification is imperiled only when the number of uninjured class members is "great."[3]

In our Fall 2025 update, we reported that the Fifth Circuit had adopted the class certification approach in *Wilson v. Centene Mgmt. Co.*, 144 F.4th 780 (5th Cir. 2025). However, the Fifth Circuit recently revised its previous opinion, 168 F.4th 217 (5th Cir. 2026), explicitly declining to adopt an approach and holding that the proposed class satisfied both approaches. Similarly, in our Spring 2026 update, we reported that the Sixth Circuit has declined to adopt an approach despite considerable intra-circuit debate.

In our Fall 2025 update, we explained how the Fourth Circuit's statement in *Mr. Dee's Inc. v. Inmar, Inc.*, 127 F.4th 925 (4th Cir. 2025), that "a high share of uninjured members also raises Article III standing concerns" suggested that the Fourth Circuit may

[1] *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006); *Johannessohn v. Polaris Indus.*, 9 F.4th 981 (8th Cir. 2021).
[2] *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).
[3] *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802 (7th Cir. 2012); *Cordoba v. DIRECTV*, 942 F.3d 1259 (11th Cir. 2019); *Huber v. Simon's Agency, Inc.*, 84 F.4th 132 (3d Cir. 2023); *Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022) (en banc); *Black v. Occidental Petrol. Corp.*, 69 F.4th 1161 (10th Cir. 2023).

adopt the standing approach. More recently, however, the Fourth Circuit clarified in *Spurlock v. Wexford Health Sources, Inc.*, 175 F.4th 232 (4th Cir. 2026), that a district court need not "find that every potential class member possesses Article III standing before certifying a class." Instead, the court based its analysis on Rule 23, reasoning that the presence of uninjured class members did not defeat predominance because these class members were "outliers," but instructing the district court to revisit the issue if discovery revealed that the uninjured class members were "more than mere outliers."

As we reported in our Fall 2016, Spring-Summer 2021, and Fall 2025 updates, the Supreme Court has come close to resolving this issue on several occasions.[4] Most recently, in *Lab. Corp. of Am. Holdings v. Davis*, 145 S. Ct. 1608 (2025), the Court 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." In its amicus brief advocating for the class certification approach, AAI urged the Court to be mindful of the differences between the standard for establishing Article III injury and the standard for establishing antitrust injury on the merits. AAI also argued that, unlike the statutory damages at issue in *Labcorp*, antitrust damages are calculated based on overall market impact, not on how many plaintiffs are in the class, meaning that the inclusion of class members with no calculable damages does not inflate class recovery in antitrust cases. Without reaching the issue presented, the Court dismissed certiorari as improvidently granted shortly after oral argument. Dissenting in the dismissal, Justice Kavanaugh suggested that "federal courts may not certify a damages class pursuant to Rule 23 when the class includes both injured and uninjured class members." The same question from *Labcorp* has now been brought to the Supreme Court again in *Kroger Co. v. Solano*, No. 26-244 (U.S. cert petition filed Aug. 17, 2026), which is a statutory damages case. As of this writing, the petition for certiorari remains pending, and the Court has requested responsive briefing.

In our Spring 2026 update, we reported that the issue of uninjured class members is arguably analogous to the issue of disjuncture, which focuses on whether a disparity between the named plaintiffs' injury and the injuries of other prospective class members presents issues under Article III or Rule 23. The Second and Eleventh Circuits, deploying a standard similar to the standing approach, have held that a named plaintiff does not have standing unless they "possess the same interest and suffer the same injury" as the other prospective class members.[5] However, the First, Third, Fifth, Sixth, Eighth and Ninth Circuits, deploying a standard similar to the class certification approach, have held that differences between the named plaintiff's injury and the injury of other unnamed class members is a Rule 23 predominance issue.[6]

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[4] *Tyson Foods, Inc., v. Bouaphakeo*, 577 U.S. 442 (2016); *Spokeo, Inc. v. Robbins*, 578 U.S. 330 (2016); *Ramirez v. TransUnion LLC,* 594 U.S. 413 (2021).

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

[6] *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018); *Boley v. Universal Health Servs., Inc.*, 36 F.4th 124 (3d Cir. 2022); *Chavez v. Plan Benefit Servs., Inc.,* 108 F.4th 297 (5th Cir. 2024); *Fallick v. Nationwide Mut. Ins.*, 162 F.3d 410 (6th Cir. 1998); *Avritt v. Reliastar Life Ins.*, 615 F.3d 1023 (8th Cir. 2010); *B.K. ex rel. Tinsley v. Snyder*, 922

III. Administrative Feasibility or 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 this requirement in a series of cases. However, in our Summer 2023 update, we reported 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,[7] while the Second, Sixth, Seventh, Eighth, Ninth, Eleventh, and Federal Circuits have rejected it.[8] As we reported in our Spring 2026 update, 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), in which it explicitly adopted the Seventh Circuit's ascertainability test as articulated in *Mullins*. In doing so, the Tenth Circuit rejected an administrative feasibility requirement because it would allow defendants to "defeat class certification either by failing to keep proper records or failing to produce them." The court treated administrative feasibility as a relevant factor that "may bear on whether class resolution is superior to individual resolution" but "should not operate as a trump card that outweighs all other factors under Rule 23."

The Tenth Circuit recently expanded on *Cline*, clarifying the role of administrative feasibility in *Dunn v. Santa Fe Natural Tobacco Co.*, 185 F.4th 999 (10th Cir. 2026). In an opinion predating *Cline*, the district court in *Dunn* granted certification of state-law false advertising classes of menthol cigarette smokers despite identifying problems regarding the administrative feasibility of identifying class members. On appeal, the Tenth Circuit affirmed certification, reiterating its holding in *Cline* and citing its sister circuits—including the Seventh Circuit's opinion in *Mullins* and the Ninth Circuit's opinion in *Briseno*—to hold that "refusing to certify on manageability grounds alone should be the last resort." If and when the defendant eventually produces individualized rebuttal evidence, the court reasoned, the district court may later decertify the class if appropriate. In reversing the district court's refusal to certify a separate class of "natural" cigarette smokers, the court also clarified that administrative feasibility is relevant not only to superiority but also to predominance, because Rule 23(b)(3)(D)'s reference to

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F.3d 957 (9th Cir. 2019).

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

[8] *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).

manageability—to which administrative feasibility is relevant—relates to both requirements.

IV. Attorneys' 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 Rules 23(e)(2) and 23(h), which has important implications for private enforcement incentives. Two methods are generally used when assessing the substantive reasonableness of a fee award. The percentage approach assesses the fee award as a percentage of the total amount recovered. The lodestar approach assesses the award by comparing it to a "lodestar," calculated based on a reasonable hourly rate for the number of hours worked. A court may allow the fee award to be higher than the lodestar itself, multiplying the lodestar by a "lodestar multiplier." Courts may also use a percentage approach to calculate the fee but cross-check using the lodestar method to confirm that the lodestar multiplier implied by the fee is appropriate.

In our Spring 2026 update we examined *Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.*, 166 F.4th 34 (10th Cir. 2026), in which the Tenth Circuit affirmed the district court's $17.3 million fee award—a percentage fee award of 33%, cross-checked as a 2.15 lodestar multiplier—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."

In our Fall 2020 and Fall 2021 updates, we discussed *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010), in which the Supreme Court held that when a statute shifts attorney's fees from one party to another, a lodestar multiplier is appropriate only in the "rare" and "exceptional" circumstance that an attorney's superior performance is "not adequately taken into account" in the lodestar itself. In June, the Third Circuit extended *Perdue* to fee-shifting contracts in *Gelis v. BMW of N. Am., LLC*, 178 F.4th 810 (3d Cir. 2026), in which it vacated the district court's $3.7 million fee award because it inappropriately applied a lodestar multiplier in awarding attorneys' fees pursuant to a settlement agreement. The court joined the Sixth, Ninth, and Eleventh Circuits in holding that *Perdue*'s constraints on lodestar multipliers in statutory fee-shifting cases also apply in contractual fee-shifting cases, such as when a settlement agreement indicates that one party will pay the other's fees. It reasoned that, while *Perdue* is not "technically binding" in a contractual fee-shifting context, its reasoning "applies with equal force." Accordingly, while a district court is authorized to consider a lodestar multiplier pursuant to a settlement agreement providing for reasonable attorneys' fees according to federal law, it could not base its application on factors that are "subsumed in the baseline lodestar," such as nonpayment risk, or on attorney performance in a case that is not "rare" and "exceptional" under *Perdue*.

The circuits differ in their approach to attorneys' fees in so-called "megafund" cases involving a recovery greater than $100 million. The Ninth Circuit carefully scrutinizes fees in megafund cases, preferring a lodestar method or lower percentage than the 25%

benchmark often used in cases with smaller recoveries.[9] By contrast, in August, the Eighth Circuit affirmed a $333 million fee award—amounting to 33% of the settlement fund—in *Burnett v. Nat'l Ass'n of Realtors,* 187 F.4th 1051 (8th Cir. 2026), as "in line with other awards in the Eighth Circuit."

V. Cy Pres

In our Fall 2019 update, we discussed the Supreme Court's per curium decision in *Frank v. Gaos*, 586 U.S. 485 (2019), which presented the issue of whether a settlement is "fair, reasonable, and adequate" under Rule 23(e)(2) if it includes a *cy pres* award but no direct compensation to unnamed class members. The Court did not ultimately reach the merits. But Justice Thomas dissented, contending that *cy pres*-only settlement classes should not be allowed because they do not benefit the class.

As we noted in our Spring 2024 update, the Supreme Court has twice denied certiorari in cases raising similar issues to those presented in *Gaos*,[10] while the Ninth Circuit, in *Joffe v. Google, Inc. (In re Google Inc. St. View Elec. Communs. Litig.)*, 21 F.4th 1102 (9th Cir. 2021), held that *cy pres*-only settlements are permissible where the settlement fund is unclaimed or non-distributable. Judge Bade, who authored the majority opinion in *Joffe*, also authored a separate concurrence in which she acknowledged that *cy pres*-only settlements are permitted under binding Ninth Circuit precedent, but echoed Justice Thomas's concern that *cy pres*-only awards do not benefit the class.

This debate recently resurfaced in the Ninth Circuit in *In re Google Location Hist. Litig.,* 189 F.4th 850 (9th Cir. 2026), where the panel affirmed a *cy pres*-only award. The primary issue on appeal was whether the district court correctly found that the settlement fund was not distributable when each individual class member's recovery under direct distribution would be *de minimis,* around twenty-five cents per class member. The majority—comprised of Judge Clifton and Judge Bybee—affirmed, reasoning that *de minimis* settlement awards are functionally non-distributable given the high administrative costs of distributing the settlement to individual members and the negligible social impact of a *de minimis* award to individual class members. In dissent, Judge Forrest echoed Justice Thomas and Judge Bade, arguing that as a matter of law the settlement award was technically distributable and that the majority's feasibility concerns "do not justify depriving class members an opportunity to claim settlement funds secured on their behalf."

VI. Nationwide Classes Involving Varying State Laws

In our Fall 2021 update, we reported on the Ninth Circuit's holding in *Stromberg v. Qualcomm, Inc.*, 14 F.4th 1059 (9th Cir. 2021), that state law variations with respect to *Illinois Brick*-repealer rules "swamp" predominance in a multistate class of indirect purchasers from both repealer and non-repealer states. AAI filed an amicus brief in

[9] *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002)
[10] *Hyland v. Navient Corp.*, 48 F.4th 110 (2d Cir. 2022); *Jones v. Monsanto Co.*, 38 F.4th 693 (8th Cir. 2022)

Stromberg, arguing that California's choice-of-law rules—which permit application of California law absent a "true conflict" with the laws of other states—do not prevent the court from applying California's rule permitting indirect-purchaser suits, which would render antitrust standing a common question for purposes of the predominance inquiry. But the court ruled otherwise, largely adopting Qualcomm's arguments and the supporting arguments offered by the Department of Justice, which reversed course from its prior position in *Arc America* to argue that there is an irreconcilable conflict between repealer and non-repealer states. Without acknowledging numerous arguments to the contrary in the parties' briefing and elsewhere in the record, the panel concluded that states which have not passed *Illinois-Brick* repealer legislation have signaled a desire to prevent their citizens from recovering for antitrust injuries under other states' repealer laws.

Stromberg stands for the proposition that common questions may be "swamped" by fundamental conflicts among state laws in a multistate class, and that states' differing laws on whether or not indirect purchasers can bring a claim is one such fundamental conflict. The court did not reach the issue of whether a multistate class of indirect purchasers comprised solely of repealer states can be certified, but noted in *dicta* that, since repealer state laws are "hardly uniform," the question was "not clear."

The Ninth Circuit now seems poised to reach the question it left open in *Stromberg*. In *In re Juul Labs, Inc. Antitrust Litig.*, No. 26-2626 (9th Cir. Apr. 27, 2026), the court granted defendants' 23(f) petition to appeal the district court's opinion granting certification of a multistate class of indirect purchasers in thirty-one repealer states. AAI filed an amicus brief addressing defendants' argument on appeal that differences between *Illinois Brick* repealer states' laws categorically prevent a predominance finding. In its brief, AAI explains that multistate repealer classes do not present unique predominance issues because repealer state laws are aligned on the core, common question of antitrust liability—which typically predominates over any state-specific questions related to remedies—and on the fundamental question of whether indirect purchasers have antitrust standing. It also explains how prohibiting multistate repealer classes would undermine the policy goals behind Rule 23 and the Class Action Fairness Act by requiring the common question of antitrust liability to be litigated in each of the repealer states. Considering the economic reality that many single-state classes cannot achieve the economies of scale that antitrust plaintiffs need to make their claims financially viable, disallowing multistate repealer classes would also undermine the repealer states' legitimate policy choices and weaken antitrust enforcement more broadly.

AAI's brief respectfully maintains that the court erred in *Stromberg* by incorrectly assuming that, in failing to adopt *Illinois Brick* repealer rules, non-repealer states affirmatively chose not to allow indirect purchasers to bring antitrust suits. At any rate, the court's reasoning in *Stromberg* strongly supports a predominance finding in classes made up of only repealer states: if state-law differences regarding the issue of indirect purchaser standing present a fundamental conflict that defeats predominance, then state-law uniformity on the same issue should support it. To rule otherwise would be to apply

Stromberg's logic only when it weighs against certification, employing a "heads I win, tails you lose" approach to predominance.

VII. Rule 23(f) Appeals

Rule 23(f) allows a party to seek permission from the court of appeals for an interlocutory appeal of a district court order granting or denying class certification. As examined in our Summer 2022 update, most 23(f) orders are denied through summary orders, meaning that courts' reasoning for granting or denying a 23(f) petition is often hidden. However, our Summer 2022 update identified five notable exceptions, in which the Sixth and Eleventh Circuits issued rare opinions explaining denials of Rule 23(f) petitions. In our Fall 2024 update, we examined the Third Circuit's opinion in *Forsythe v. Teva Pharm. Indus*., 102 F.4th 152 (3d Cir. 2024), in which it clarified that, under that circuit's "more liberal standard" for 23(f) petitions, 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.

If a party does not file a 23(f) petition to appeal a district court's class certification order within the time limit allowed under that rule, the order becomes interlocutory and unreviewable by the court of appeals until the case reaches final judgment. But when a court of appeals vacates or reverses an otherwise final order and remands for further proceedings, can it also review a previously issued class certification order in the case? Prior to the promulgation of Rule 23(f), the Ninth and Sixth Circuits had answered that question in the negative, reasoning that, because the case becomes non-final upon reversal and remand, the class certification order is rendered non-final and unreviewable on appeal.[11] The Seventh Circuit, in contrast, reached the opposite conclusion, reviewing a class certification order in an otherwise remanded case because the defendants had "become adversely affected by the district court's orders certifying the class."[12]

The Fourth Circuit recently addressed this issue for the first time in *Jonathan R. v. Morrisey*, 178 F.4th 139 (4th Cir. 2026), in which it adopted the approaches of the Ninth and Sixth Circuits to hold that a class certification order does not become reviewable after reversal and remand of a subsequent final judgment. The court reasoned that Rule 23(f) resolves the question by putting a time limit on the appealability of a class certification order. Because a reversal and remand revives the case, an appeal of the class certification order is interlocutory and cannot be heard by the court of appeals unless requested within the time limit set out in Rule 23(f).

Courts have long treated Rule 23(f) authority as giving them absolute discretion over whether to take an appeal, but leaving a gray area regarding their ability to narrow multi-issue petitions upon acceptance. The Third Circuit recently held in *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 183 F.4th 178 (3d Cir. 2026), that it has discretion to limit the scope of its Rule 23(f) review to specific questions. Comparing the language of

[11] *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979); *Milan Express Co. v. W. Sur. Co.*, 886 F.2d 783 (6th Cir. 1989).
[12] *Council 31, Am. Fed'n of State, Cnty. & Mun. Emps. v. Ward*, 978 F.2d 373 (7th Cir. 1992).

Rule 23(f) to 28 U.S.C. § 1292(b)—which allows interlocutory appeals of questions certified by a district court—the court noted the permissive language used to describe both statutes in its own precedents selecting which issues to consider in a § 1292(b) appeal. Reasoning that the language of Rule 23(f) is even more permissive than the language of § 1292(b), the Court concluded that—with the exception of challenges to its jurisdiction, which a court can never set aside—it had discretion to choose which issues to review in a 23(f) appeal. In particular, "although a motions panel is free to specify the issues for the merits panel to review, the merits panel may refuse to answer them."

VIII. § 1291 Appeals

In our Fall 2017 update, we discussed the Supreme Court's holding in *Microsoft Corp. v. Baker*, 582 U.S. 23(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.

We have been following the implications of *Baker* for § 1291 appeals and the final-judgment rule. In our Summer 2022 update, we described how the Sixth Circuit distinguished *Baker* in *Ohio Pub. Emps. Ret. Sys. v. Fed. Home Loan Mortg. Corp.*, No. 20-4082, 2022 U.S. App. LEXIS 488 (6th Cir. Jan. 6, 2022), to hold that a final order of dismissal solicited by plaintiffs is appealable. And in our Fall 2024 update, we examined the Eleventh Circuit's ruling in *Allen v. AT&T Mobility Servs., LLC*, 104 F.4th 212 (11th Cir. 2024), which applied *Baker* to rule that an intervenor-plaintiff could not appeal a class certification denial.

The Court's reasoning in *Baker* also has implications for the finality of a voluntary dismissal without prejudice, which the majority of circuits have held are not final and appealable because the claimant can still bring their claim.[13] The Ninth Circuit takes a different approach, focusing on evidence of intentional jurisdictional manipulation rather

[13] *Scottsdale Insurance Co. v. McGrath*, 88 F.4th 369 (2d Cir. 2023); *S.B. v. KinderCare Learning Ctrs., LLC*, 815 F.3d 150 (3d Cir. 2016); *Metz v. McCarthy*, 167 F.4th 722 (4th Cir. 2026); *Williams v. Taylor Seidenbach, Inc.*, 958 F.3d 341 (5th Cir. 2020) (en banc); *Rowland v. S. Health Partners, Inc.*, 4 F.4th 422 (6th Cir. 2021); *West v. Louisville Gas & Electr. Co.*, 920 F.3d 499 (7th Cir. 2019); *City of Burnsville v. Koppers, Inc. (In re Municipal Stormwater Pond Coordinated Litig.)*, 73 F.4th 975 (8th Cir. 2023); *Eastom v. City of Tulsa*, 783 F.3d 1181 (10th Cir. 2015); *Blue v. D.C. Pub. Sch.*, 764 F.3d 11 (D.C. Cir. 2014).

than the nature of the dismissal,[14] and the Eleventh Circuit holds that a voluntary dismissal creates finality regardless of prejudice.[15]

The First Circuit reached the issue for the first time in *Air-Con, Inc. v. Daikin Applied Latin Am., LLC*, No. 24-1863, 2026 U.S. App. LEXIS 25406 (1st Cir. Aug. 21, 2026), relying on the reasoning in *Baker* and joining the majority of circuits to hold that voluntary dismissals without prejudice are not final, appealable orders. The issue in *Air-Con* is particularly interesting because, there, the defendant-appellee voluntarily dismissed its claims without prejudice, thwarting the plaintiff-appellant's right to appeal by preventing the case from reaching finality. Rather than construing the defendant-appellee's voluntary dismissal without prejudice as final, the court reasoned that the better bath forward is for district courts to require the claimant to choose between dismissal with prejudice or litigating the claim to final judgment, and to rely on Rules 41(b) and 60(b), which allow for dismissal with prejudice for failure to prosecute and relief from a final judgment, respectively.

American Antitrust Institute
October 29, 2026

[14] *Galaza v. Wolf*, 954 F.3d 1267 (9th Cir. 2020)
[15] *Corley v. Long-Lewis, Inc.*, 965 F.3d 1222 (11th Cir. 2020)