

RECENT DEVELOPMENTS IN CLASS ACTIONS

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- **The question of lack of standing can be an important defense to class certification.** In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the Supreme Court held that when some members of a class lack standing to bring a claim under a federal statute because they have not suffered a concrete injury, the class should not be certified, even though the statute may have been violated in all instances. (In *TransUnion*, only a quarter of the class had had their credit reports forwarded to third parties; the rest had suffered a statutory violation, but no concrete injury resulting from it.) *TransUnion* implies that for the three quarters of the class who suffered only a statutory violation, the case and controversy requirement prevents federal courts from vindicating their rights. But beware—many states do not have such a case or controversy requirement. Thus, if you prevail in getting a class action dismissed in federal court, you may end up with a state court class action that is effectively not removable! There will be much more litigation over the question of what courts should do if there is some identifiable portion of the class who lack standing. Should they be carved out of the class? Can they be?
 - In *Bassett v. Credit Bureau Services, Inc.*, 60 F.4th 1132 (8th Cir. 2023), the Eighth Circuit quoted extensively from *TransUnion*, observing that Article III requires concrete injury even where there is a statutory violation. The plaintiff had received a form letter that, *inter alia*, demanded interest on sums that had not been reduced to a judgment. But the plaintiff had not actually paid the interest or principal after receiving the letter. The court affirmed summary judgment dismissing plaintiff's claim: "Bassett received a letter.

Without more—without a concrete injury in fact—Bassett is not ‘seeking to remedy a harm to herself but instead is merely seeking to ensure a defendant’s compliance with regulatory law (and, of course, to obtain some money via the statutory damages).’” *Id.* at 1137 (citation omitted).

- **Can personal jurisdiction issues be a basis for limiting class claims?** In *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. 255 (2017)—which was *not* a class action—the Court held that an Ohio plaintiff could not join with a California plaintiff to sue the defendant in California because the Ohio plaintiff was not injured in California and his claim had no connection with that state, and thus California had no personal jurisdiction over defendant for the Ohio-based claim. Subsequently class action defendants began making personal jurisdiction motions to limit the scope of putative class actions based on *Bristol-Myers Squibb*. The Supreme Court loosened the personal jurisdiction standard in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), which also was *not* a class action case. There, the Court held that a consumer who bought his car outside of Montana could bring his claim in Montana after he moved there because his injuries were “related” to Ford’s sale of other cars in Montana. The difference in the two decisions can be practically explained by the fact that the Plaintiff was forum shopping in *Bristol-Myers Squibb*, and the Defendant was effectively forum shopping in *Ford*. But what are the implications of these two decisions for class actions where absent class members are not citizens of the forum? It is ripe for litigation. Some courts that have considered the personal jurisdiction/scope of class question have allowed national class actions. *See, e.g., Hood v. Am. Auto Care, LLC*, 21 F.4th 1216, 1224 (10th Cir. 2021); *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447 (7th Cir. 2020). The Sixth Circuit has stated in *dicta* that the personal jurisdiction analysis should only apply to the putative class representative because “a class action is formally one suit in which, as a practical matter, a defendant

litigates against only the class representative” and absent class members technically are not “parties” for jurisdictional purposes. *Lyngaas v. Ag*, 992 F.3d 412, 423 (6th Cir. 2021). *But see* Judge Thapar’s dissent, arguing that *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985) requires courts to evaluate their exercise of personal jurisdiction over absent class members. If Rule 23 is a procedural rule that the Rules Enabling Act says is not supposed to alter substantive law (including Constitutional notions of due process), then can Rule 23 really alter personal jurisdiction principles for the convenience of having a nationwide class? A related question is the *timing* of any personal jurisdiction motion. If putative class members only become parties once the class is certified, then can you wait to move on personal jurisdiction grounds until *after* the class is certified? A Ninth Circuit decision suggests you can. *Moser v. Benefytt, Inc.*, 8 F.4th 872, 879 (9th 2021).

- **Class definition—The Failsafe Class “Rule.”** In *In re White*, 64 F.4th 302 (D.C. Cir. 2023), the DC Circuit took a very textualist approach and rejected the “failsafe class rule,” which many courts recognize as precluding class certification where the class definition is circular or requires the determination of a merits issue in order to determine who is in the class (e.g., “all persons who were defrauded by defendant”). The DC Circuit reasoned that strictly applying Rule 23(a)’s requirements should reveal the defect in the class definition, and it is those express requirements—and *not* a “rule” that is not expressly articulated in Rule 23—that should solve the problem. The court also said that the failsafe class problem generally should be solved by redefining the class, not denying certification, as the district court had done here.
- **Can the “unwritten” requirement of “ascertainability”—which is closely related to the unwritten requirement that a class definition be objectively discernable—be a basis for**

limiting or defeating a class in some jurisdictions?

Historically, the Third Circuit has taken a hard-nosed view that a prerequisite to class certification (upon which plaintiff bears the burden of proof) is proof that finding and compensating each class member is administratively feasible based on objective evidence (*i.e.* not by affidavit or testimony from putative class members). The Eleventh Circuit described the circuit split in *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1302 (11th Cir. 2021) (First, Third, and Fourth Circuits require proof of ascertainability as a prerequisite to certification, while the Second, Sixth, Seventh, Eighth, and Ninth do not).

- **Can individualized issues inherent in damages calculations destroy predominance?** In *Comcast v. Behrend*, 569 U.S. 27, 34 (2013), the Supreme Court in an antitrust case held that the class was improperly certified because “questions of individual damages calculations will inevitably overwhelm questions common to the class.” Justice Ginsburg, in her dissent, threw cold water on the notion that this was a defense lawyer’s dream decision. In antitrust law, the fact of loss is an element of each claimant’s claim, and the parties had agreed (and thus did not litigate before the Court) the question whether each claimant was required to prove fact of loss. Ginsburg observed that Justice Scalia’s decision did not purport to overturn the long-accepted line of decisions holding that the mere fact that there are individual issues in proving the amount of damages does not mean the class fails the predominance requirement. Most subsequent court decisions have followed Justice Ginsburg’s analysis. *See, e.g., Sykes v. Mel L. Harris Assocs., LLC*, 780 F.3d 70, 82 (2d Cir. 2018). But be on the lookout for decisions where courts use *Comcast* to limit the size or scope of the class because of individual issues in proving damages. For example, in *Williams v. Apple, Inc.*, 338 F.R.D. 629 (N.D. Cal. 2021), the trial court certified the class in part, but did not certify most of the class period because

the damages were more complicated and individualized the older the claim got.

- **Arbitration.** In *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023), the Supreme Court continued its string of decisions favoring arbitration over class litigation, holding that a district court must stay its proceedings in a matter where the issue of arbitrability is on interlocutory appeal.
- **Arbitration.** In *H&T Fair Hills Ltd. v. Alliance Pipeline L.P.*, 76 F.4th 1093, 1100 (8th Cir. 2023), the court held that where none of the named class representatives had arbitration clauses in their easements, a defendant who waited until after the class was certified to move to compel arbitration had not waived its right to arbitrate. “[A] motion to compel arbitration prior to class certification would have been a motion to bind parties who were not yet part of the case.”
- **Arbitration.** In *Burnett v. National Association of Realtors*, 75 F.4th 975 (8th Cir. 2023), the court held that “[w]hether a particular arbitration provision may be used to compel arbitration between a signatory and a nonsignatory is a threshold question of arbitrability” that is properly decided by a court, *not* an arbitrator. Missouri law provides that only signatories and third party beneficiaries to a contract have standing to enforce it, and it narrowly construes who may be third party beneficiaries.
- **CAFA Removal—Can a *parens patriae* action be removed under CAFA?** Minnesota has a statute allowing the Attorney General to bring consumer fraud actions on behalf of its citizens and obtain recovery that it would then distribute to them. In *Minnesota by Ellison v. American Petroleum Institute*, 63 F.4th 703 (8th Cir. 2023) (which alleged consumer fraud about climate change), the court held that such *parens patriae* suits cannot be removed under CAFA, reasoning that “a State’s exercise of *parens*

patriae authority is not the same as a class action, even when the State seeks recovery for and on behalf of citizens' injuries." The Supreme Court had rejected the argument that such suits qualify as "mass actions" under CAFA. See *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161 (2014). And ultimately, the Eighth Circuit reasoned that Minnesota's statutory *parens patriae* action lacked the elements required in Rule 23 and did not bind absentees in the way a class action would. Thus, it was not removable as a class action under CAFA.

- **CAFA Removal—Amount in Controversy.** In *Brunts v. Walmart, Inc.*, 68 F.4th 1091 (8th Cir. 2023), Judge Sippel had remanded to state court a putative class action over deceptive advertising of cough suppressants because he did not believe CAFA's \$5 million amount-in-controversy requirement had been met. The Eighth Circuit reversed, explaining that unlike removals under the ordinary removal statute, for CAFA removals there is *no* presumption against federal jurisdiction and thus if the removal petition "plausibly alleges . . . the case might be worth more than \$5 million (excluding interests and costs)," then it belongs in federal court. Walmart had provided a declaration stating that product sales for the relevant class period exceeded \$5 million, and argued that the class action as drafted might require disgorgement of all sales revenue, and an injunction against future sales would cost Walmart more than \$5 million, and that attorneys fees could increase the amount in controversy by 40 percent. Judge Sippel held that the declaration was too perfunctory and did not provide enough detail as to how the sales exceeded \$5 million. He also held that injunctive costs were not part of the amount in controversy calculation, and even if they were, there was insufficient detail in the declaration about how those costs would be calculated. He also held Walmart did not specify the amount of attorneys' fees with sufficient detail. The Eighth Circuit rejected these findings, explaining that the defendant's burden on removal is a pleading requirement, not a

demand of proof, and that allegations in the notice of removal must be accepted if they are made in good faith. The court explicitly noted that “the total amount of sales can be a measure of the amount in controversy.” It also said that while the declaration lacked detail that a court might have wanted to see, it was sufficient, “particularly when it is very plausible that a company the size of Walmart would have sold more than \$5 million in cough suppressants in Missouri over the period of five years.” The court also rejected the plaintiff’s argument that the court should credit the complaint’s statement that it would voluntarily limit the amount of recovery to an amount less than the entire sales price because “a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified.” *Id.* at 1094 (citation omitted).

- **CAFA Removal—Proof of Amount in Controversy.** In *Leflar v. Target Corp.*, 57 F.4th 600 (8th Cir. 2023), the court reversed a district court’s remand order, holding that it had improperly applied an anti-removal presumption to the CAFA removal and had improperly ignored defendant’s post-removal declaration laying out the costs it would incur if plaintiff’s requested injunctive relief were issued. The Eighth Circuit instructed that “Courts have become confused, however, about how to evaluate the amount in controversy at each step. At step one, the pleading stage, the test is whether “the notice of removal plausibly alleges” that the case *might* be worth more than \$5 million. And at step two, following a jurisdictional challenge, the district court must determine if ‘a fact finder *might* legally conclude’ that the value of the case is more than \$5 million, not whether the damages ‘*are* greater than the requisite amount.’” Parties can supplement their notice of removal after a jurisdictional challenge with declarations and evidence, and the test for such evidence is “simply whether the additional proof ‘sheds light on the situation that existed when the case was removed.’” *Id.* at 604.

- **Non-CAFA Removal.** In *Wullschleger v. Royal Canin U.S.A., Inc.*, 75 F.4th 918 (8th Cir. 2023), the court held that a post-removal amendment of a complaint to eliminate the only federal questions destroyed subject matter jurisdiction and required remand of the action to state court. The Eighth Circuit on a prior appeal had reversed the district court’s decision to remand the case to state court, holding that plaintiff’s antitrust and unjust enrichment claims were “state law claims that implicate federal issues” and thus had provided federal question jurisdiction. Back in the trial court, the plaintiff amended the complaint to eliminate those two claims and assert only two state law causes of action: MMPA and civil conspiracy. The Eighth Circuit held that this post-removal amendment of the complaint eliminated the federal question that provided original jurisdiction in federal court. The Eighth Circuit explained that “an amended complaint supersedes an original complaint,” and that although jurisdiction “depends upon the state of things at the time the action is brought,” “we can assess the ‘state of things’ at the time of filing and still evaluate jurisdiction according to the allegations in an amended complaint.” *Id.* at 922. Notably, because the defendant was a citizen of the State of Missouri, the Eighth Circuit did not credit the defendant’s arguments for CAFA jurisdiction. Because it was considering only federal question jurisdiction under the ordinary removal statute, the Eighth Circuit applied a presumption against federal jurisdiction, unlike the CAFA cases in which it has recognized that Congress intended a presumption *for* federal jurisdiction over class actions.
- **Settlement—Court’s continuing jurisdiction to enforce agreement.** In *Benacquisto v. American Express Financial Corp.*, 44 F.4th 741 (8th Cir. 2022), a Minnesota district court had approved a class action settlement of annuity and life insurance claims. The estate of a class member brought a subsequent suit in Oregon state court. The defendant moved in the federal court to enforce the settlement. Plaintiff claimed the court lacked personal

jurisdiction over it. The Eighth Circuit affirmed the district court's grant of the motion to enforce the settlement. Plaintiff's decedent had been a class member and received notice and an opportunity to opt out, and chose not to. The settlement agreement's release thus applied, and the settlement expressly reserved to the court jurisdiction to enforce the agreement.

- **Settlement—*Cy pres* awards.** The distribution of funds to charities that were intended to compensate class members has been widely criticized in academic literature and by various courts. Many SCOTUS watchers were hopeful that we would get more clarity in rules regarding *cy pres* recovery if the court would accept certiorari in *St. John v. Jones*, No. 21-2292. Sadly, the Court denied certiorari in May, but the certiorari briefing should be helpful if you end up having to litigate on either side of the *cy pres* issue.
 - In *Jones v. Monsanto Co.*, 38 F.4th 693 (8th Cir. 2022), the Eighth Circuit affirmed the *cy pres* distribution of roughly \$15 million in Roundup class settlement funds to the National Consumer Law Center, the BBB's National Advertising Division, and the Berkeley Center for Consumer Law & Economic Justice, as well as the use of those amounts in calculating the class counsel's fee award. The Eighth Circuit previously has held that unclaimed funds may be distributed for *cy pres* purposes where the existing claimants have been fully compensated and distribution to remaining class members is not feasible. *See In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015). In *Jones*, the court explained that where the case involves liquidated damages, claimants are fully compensated where they receive 100% of their claimed damages. Where, however, the damages are unliquidated, the court held that "fully compensated" requires the district court to determine "the damages that would be recoverable." The *Jones* Court found that the trial court had not abused its discretion by

conducting an analysis and concluding that a payment to class members of 50% of the items they purchased was “full compensation.” As for including the amount of the *cy pres* recovery in the formula for calculating the attorneys’ fees, the *Jones* Court stated that the funds had been available for the class to claim, and “the court cannot fault plaintiffs’ counsel for the fact that class members, for myriad possible reasons, did not submit enough claims to exhaust the Common Fund.” *Id.* at 700.

- **Settlement—Reasonableness of Class Counsel’s Fees.** In *Lowery v. Rhapsody Int’l, Inc.*, 75 F.4th 985 (9th Cir. 2023), class counsel who recovered approximately \$50,000 for the copyright holders of musical compositions (having claimed \$20 million) from a streaming service sought \$6 million in class counsel fees. The trial court awarded \$1.7 million. The Ninth Circuit reversed, instructing that district courts “must consider the actual or realistically anticipated benefit to the class—not the maximum or hypothetical amount—in assessing the value of the class action settlement.” It also held that district courts should cross-check attorneys fee calculations against a second methodology (such as the lodestar) to ensure that the fees are reasonable.
- **Failure to address affirmative defense at class certification.** In *In re Marriott International Inc. Customer Data Security Breach Litigation*, 78 F.4th 677 (4th Cir. 2023), the court reversed a trial court’s certification of a class, holding that the trial court erred when it certified the class before determining the legal import of a class action waiver signed by every class member. The Fourth Circuit reasoned: “the time to address a contractual class waiver defense is before, not after, a class is certified. Courts consistently resolve the import of class action waivers at the certification stage—before they certify a class, and usually as the first order of business.” On the question

of issues classes, the court instructed that “if courts certify classes on individual elements of a cause of action, Rule 23(b)(3)’s superiority requirement takes on special importance.”

- **Consumer Fraud/Deception—Dismissal of consumer fraud claims.** In *Song v. Champion Petfoods USA*, 27 F.4th 1339 (8th Cir. 2022), plaintiff claimed that packaging’s statements that dog food contained “BIOLOGICALLY APPROPRIATE” nourishment and “FRESH REGIONAL INGREDIENTS” that delivered “nutrients naturally.” The trial court granted defendant’s motion to dismiss, and the Eighth Circuit affirmed, reasoning that no reasonable consumer could read the challenged statements as applying to *all* ingredients in the dog food; rather, it relates to only some of the ingredients.
- **MMPA claims adequately pled fraud by omission.** In *Tucker v. General Motors LLC*, 58 F.4th 392 (8th Cir. 2023), the buyers of certain trucks and SUVs brought a class action claiming GM violated the MMPA by failing to disclose an oil consumption defect, *i.e.*, piston rings that, with wear and tear, leak oil in the crankcase, thereby damaging the engine and increasing the likelihood of overheating, seize-up, and other safety risks. The Eighth Circuit reversed Judge Limbaugh’s grant of summary judgment to GM, which had held that the MMPA claims could not be based on advertisements and statements that were mere puffery. The complaint had 21 paragraphs about how GM trumpeted the performance of its engines. The court noted that while those paragraphs might be “puffery” with respect to an affirmative misrepresentation claim, for this claim of fraud by omission, the paragraphs were relevant to show that each plaintiff was a reasonable consumer making a purchasing decision, and because the oil consumption defect involved the inner workings of a complicated machine that consumers could not be expected to know or research, the complaint had stated a valid MMPA claim for omission.

- **Affirming dismissal of breach of contract and MMPA claims for lack of proof of an ascertainable loss.** In *Goldsmith v. Lee Enterprises, Inc.*, 57 F.4th 608 (8th Cir. 2023), the plaintiff alleged that the Post-Dispatch’s monthly invoices contained dates that appeared to overlap with the prior month’s invoice. On summary judgment, the evidence established that although the invoices appeared to have overlaps, in actuality, the payments as applied did not result in any loss to the subscribers. In an opinion that just as easily could have been discussing lack of standing, the Eighth Circuit explained that plaintiff had failed to prove the loss element of his breach of contract and MMPA claims: “Recognition by the Post-Dispatch that its billing system lacked transparency and that unexplained overlaps generated subscriber complaints that needed to be satisfied does not create a genuine fact dispute about whether ‘overlaps cost subscribers money.’ . . . Evidence the Post-Dispatch attempted to fix overlap issues and apologized for the error when customers complained does not negate this undisputed fact. Failing to fix the problem may have been bad customer relations, but it does not establish the damage element of a breach of contract claim.” *Id.* at 612.
- **MMPA—Lack of but-for causation.** In *Vitello v. Natrol, LLC*, 50 F.4th 689 (8th Cir. 2022), Plaintiff bought a dietary supplement, Cognium, as a substitute for the Adderal she had been prescribed by her doctor. The package noted that 9 clinical studies had demonstrated increased cognition and improvements in memory. It also stated that the statements were not approved by the FDA and that “[t]his product is not intended to diagnose, treat, or cure any disease.” It also warned users to consult a physician if the consumer is taking prescription drugs or has or suspects a medical condition. Plaintiff quit her Adderal cold turkey and started on Cognium. Plaintiff brought a class action asserting violations of the MMPA and unjust enrichment, alleging

that defendant had not updated its packaging to reflect that 2 of the 9 studies had been retracted, and defendant had not updated its packaging. Judge Pitlyk had granted summary judgment, and the Eighth Circuit affirmed. “Vitello purchased a product that expressly stated on the label that it was ‘not intended to’ do what she stated she purchased it for,” and thus its actual value both with and without the alleged misrepresentations about the studies was the same for her: zero. “The benefit of the bargain rule does not apply in this situation, so Vitello cannot prove that she suffered ascertainable loss ‘as a result of’ Natrol’s unlawful practice.” *Id.* at 694.

- **Failure to prove but-for causation.** In *Nagel v. United Food and Commercial Workers Local 653*, 63 F.4th 730 (8th Cir. 2023), a union member brought a putative class action alleging that the union breached its duty of fair representation by concealing key information from the members before their vote on a collective bargaining agreement. The trial court had granted summary judgment because plaintiff could not show that the alleged breach was the but-for cause of his injury. The Eighth Circuit affirmed, explaining that the union member was required to show that the vote would have been different if the information had been revealed, and that must be done with “evidence, not conjecture or ‘assumptions.’” The vote had been 228 to 109, and to establish but-for causation plaintiff thus had to prove that more than 119 members would have voted differently. Because he could not, summary judgment on his claim was appropriate.
- **Subrogation.** In *White Knight Diner, LLC v. Owners Insurance Company*, 70 F.4th 453 (8th Cir. 2023), the court affirmed dismissal of a putative class action challenging a standard method by which insurers obtain subrogation in Missouri. (Dowd Bennett defended an insurer in a copycat action in the E.D. Mo.; after our motion to dismiss was fully briefed, plaintiff voluntarily dismissed the complaint.) Unlike most states,

in Missouri the insurer's legal right to recover from a tortfeasor the payments it made to its insured does not reside with the insurer; rather, it remains with the insured, who must obtain full recovery from the tortfeasor and then hold the subrogated sum in trust for the insurer. Thus, in Missouri, the insurer has only an equitable right to subrogation that it cannot go into court and enforce against the tortfeasor before the insured has obtained recovery. Nevertheless, in Missouri, insurers regularly make demands on a tortfeasor's insurer for subrogation payments, and they even have an extrajudicial dispute resolution system to handle such claims. Plaintiff brought a class action, alleging that this was unlawful under Missouri law and violated the duty of good faith and fair dealing. The Eighth Circuit held that even though the insurers could not go to court to enforce their equitable subrogation rights, it was not unlawful for them to deal with such claims voluntarily outside of court, and that doing so was not a violation of the duty of good faith and fair dealing.

- **ILLINOIS BIPA CLAIMS.** Over the last year the Illinois Supreme Court has interpreted the state's Biometric Information Privacy Act in ways that ensure there will continue to be an avalanche of privacy class actions for years to come. In *McDonald v. Symphony Bronzeville Park, Inc.*, 2022 IL 126511 (2022), the court held that the exclusivity provision of the Workers' Compensation Act does not preclude employees from suing their employer for statutory damages for its violations of BIPA. In *Tims v. Black Horse Carriers, Inc.*, 2023 IL 127801 (2023), the court held that the five-year catch-all statute of limitations—rather than the one-year statute of limitations for violations to the right to privacy, apply to BIPA claims.

Because BIPA can be violated by the mere collection and retention of biometric information—and not just unlawfully sharing such information—it is entirely possible for state law claims for each violation of the statute to be pled without having the requisite

actual, concrete injury that would be necessary for federal jurisdiction. Accordingly, much of this litigation will occur in Illinois state court.