View on our website.

GIBSON DUNN

Class Actions Update January 17, 2025

Looking Ahead at the Class Action Litigation Landscape in 2025

Class actions remain an active and evolving area of litigation, and we expect that trend to continue in 2025.

This update previews several important issues for class-action practitioners in the year ahead, including significant circuit splits, a noteworthy petition before the Supreme Court regarding Rule 23's "ascertainability" requirement, and developments in mass arbitration.

I. Circuit Splits to Watch in 2025

Class action-related issues continue to percolate through the federal courts of appeals, with several circuit splits that deepened in 2024 growing potentially ripe for Supreme Court review. This section highlights circuit splits on standing in class actions, personal jurisdiction, and standards for expert evidence at the class-certification phase.

A. Standing in Class Actions

Courts continue to grapple with how Article III standing principles affect class actions. As summarized in the Fifth Circuit's recent decision in *Chavez v. Plan Benefit Services, Inc.*, 108 F.4th 297 (5th Cir. 2024), the courts of appeals have taken varying approaches to implementing Article III requirements in class actions, including: (1) the "standing" approach, and (2) the "class certification" approach. *Id*. at 308-11.

Under the "standing" approach—adopted by the Second, Seventh, and Eleventh Circuits—named plaintiffs must establish Article III standing for themselves and absent class members before courts can proceed to a Rule 23 certification analysis. *Chavez*, 108 F.4th at 309-11. Although the specific approach varies somewhat by circuit, it generally requires class representatives to show they have the "same interest[s] and "same injur[ies]" as the putative class. *Id*. at 311.

By contrast, under the "class certification" approach—adopted by the First, Third, Fourth, Sixth, and Tenth Circuits—courts include these standing questions as part of "the Rule 23 inquiry." *Id*. at 312. According to the Fifth Circuit, courts following this approach do so to separate Article III's standing requirements with Rule 23's requirements, and thus focus on "the relationship between the class representative and the passive class members." *Id*. at 309.

There remain important questions about how to square these approaches with the Supreme Court's insistence that Article III principles apply equally in class actions. As the Fifth Circuit observed, the Supreme Court has "caution[ed] against dispensing standing 'in gross' in a class-action context"—and emphasized that plaintiffs must always "demonstrate standing for each claim that they press and for each form of relief that they seek." *Id.* at 307 (quoting *TransUnion, LLC v. Ramirez*, 594 U.S. 413, 431 (2021)); *see also TransUnion*, 594 U.S. at 431 ("Every class member must have Article III standing in order to recover individual damages."). But it seems we will have to wait before there is more clarity on this issue: although the defendants in *Chavez* filed a petition for a writ of certiorari, the Supreme Court denied the petition in December. So at least for now, the split will persist—though it may only be a matter of time before the Supreme Court provides guidance.

B. Personal Jurisdiction in FLSA Collective Actions

We previously addressed a circuit split on the issue of personal jurisdiction in collective actions under the Fair Labor Standards Act (FLSA), specifically regarding whether out-of-state plaintiffs can join an FLSA action filed in a state where the defendant is not subject to general personal jurisdiction. This circuit split stems from competing interpretations of the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. 255 (2017), which addressed personal jurisdiction in mass actions, but did not explicitly address FLSA collective actions.

Since the Supreme Court decided *Bristol-Myers Squibb*, the Third, Sixth, and Eighth Circuits have held that the jurisdictional analysis in *Bristol-Myers Squibb*, which requires a "claim-by-claim personal jurisdiction analysis" in mass actions, also applies to FLSA collective actions. *Fischer v. Fed. Express Corp.*, 42 F.4th 366, 375 (3d Cir. 2022); *Canaday v. Anthem Cos., Inc.*, 9 F.4th 392, 397 (6th Cir. 2021); *Vallone v. CJS Sols. Grp., LLC*, 9 F.4th 861, 865 (8th Cir. 2021). By contrast, only the First Circuit has declined to follow that line of decisions and instead has held that courts need not have personal jurisdiction over every opt-in plaintiff in FLSA cases. *See Waters v. Day & Zimmerman NPS, Inc.*, 23 F.4th 84, 93 (1st Cir. 2022).

The First Circuit's decision is the clear outlier among the circuits, with the momentum in favor of the majority approach adopted by more and more circuits. For example, this past year, in *Vanegas v. Signet Builders, Inc.*, 113 F.4th 718 (7th Cir. 2024), the Seventh Circuit joined the majority of circuits in holding that opt-in plaintiffs must each satisfy personal jurisdiction requirements to participate in FLSA collective actions. *Id.* at 724. The court explained that an

FLSA collective action is like a mass action because it is a "consolidation of individual cases, brought by individual plaintiffs." *Id*. at 725.

While it remains unsettled whether the same rule applies to absent class members in Rule 23 class actions, the growing agreement among the circuits suggests that companies should expect their home jurisdictions to be the preferred venue for plaintiffs filing nationwide collective actions—meaning jurisdictional defenses will remain an important consideration when defending such actions in other forums.

C. Standards for Expert Evidence at Class Certification

Parties often rely on expert evidence when litigating class-certification motions, and one important question that practitioners routinely confront is to what extent the admissibility of such expert evidence should affect the class-certification analysis. We earlier previewed a developing circuit split on the intersection between *Daubert* admissibility analysis and class certification. On one side of the split, the Third, Fifth, and Seventh Circuits require a full *Daubert* analysis and a finding that expert evidence is admissible before it can support class certification. *In re Blood Reagents Antitrust Litig.*, , 186-88 (3d Cir. 2015); *Prantil v. Arkema Inc.*, 986 F.3d 570, 575-76 (5th Cir. 2021); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010). On the other side of the split, the Eighth Circuit has applied a more flexible approach for examining expert evidence regarding class certification. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 611-14 (8th Cir. 2011).

This circuit split is poised to persist into 2025, with no clear consensus emerging. The Sixth and Ninth Circuits entered the fray this past year, with the Sixth Circuit joining the majority and the Ninth Circuit apparently siding with the minority:

- In *In re Nissan North America, Inc. Litigation*, 122 F.4th 239 (6th Cir. 2024), the Sixth Circuit reasoned that "[i]f expert testimony is insufficiently reliable to satisfy *Daubert*, it cannot prove that the Rule 23(a) prerequisites have been met in fact through acceptable evidentiary proof." at 253 (internal quotation marks omitted); *see In re Nissan N. Am., Inc. Litig.*, 122 F.4th 239, 253 (6th Cir. 2024) ("[t]he Supreme Court requires parties to 'satisfy through evidentiary proof' that they 'in fact' meet the elements" of Rule 23). The Sixth Circuit therefore held that where expert evidence is "material to class certification," it must satisfy *Daubert*. *Nissan*, 122 F.4th at 253.

- By contrast, the Ninth Circuit recently held that plaintiffs may rely on evidence that is not admissible to support class certification and that a district court need conduct only a "limited" *Daubert* analysis at the class-certification stage, even if an expert's model is not "fully developed." *Lytle v. Nutramax Labs., Inc.*, 99 F.4th 557, 570-71, 576-77 (9th Cir. 2024). The Ninth Circuit based its holding on the "temporal focus of the class certification inquiry," reasoning that "class action plaintiffs are not required to actually prove their case" at class certification, but rather "must show that they will be able to prove their case through common proof *at trial*." at 570. Notably, the holding in *Lytle* appears at odds with *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022) (en banc), in which the Ninth Circuit held en banc that plaintiffs "may use any *admissible* evidence" to satisfy their burden at class certification (*id.* at 665 (emphasis

> added)) and that defendants "may challenge the reliability of an expert's evidence under *Daubert*" when opposing class certification (*id.* at 665 n.7).

The defendants in *Lytle* petitioned for a writ of certiorari, asking the Supreme Court to rule on whether a district court may rely on inadmissible expert evidence to certify a class under Rule 23. As argued in the petition, the less stringent approach described in *Lytle* is particularly dangerous because it "allows putative class counsel to *choose* what evidentiary standard applies," and "expert testimony that is *less developed* receives *less scrutiny*." *Nutramax Labs., Inc. v. Lytle*, No. 24-576, 2024 WL 4904592, at *15 (U.S. Nov. 21, 2024). The petition remains pending.

The Supreme Court previously expressed doubt that *Daubert* was not applicable to expert testimony at the class-certification stage. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354 (2011). Until the Supreme Court provides clarification, parties and practitioners should carefully consider their approach to relying on and opposing expert evidence at the class-certification stage, particularly in jurisdictions like the Eighth or Ninth Circuits (or those that have yet to address the role of *Daubert* at class certification). Given the possibility for Supreme Court review, litigants should ensure that their own expert evidence satisfies *Daubert*, consider mounting *Daubert* challenges to opposing expert evidence to preserve claims of error, and ask courts to make clear findings regarding admissibility of expert evidence to best position their cases for review in the event the Supreme Court decides this issue.

II. Ascertainability at the Supreme Court

The Supreme Court continues to receive cert petitions that raise interesting and recurring issues in the class-action space. There is one such petition pending on an oft-litigated issue: whether Rule 23 embodies an "ascertainability requirement" that obliges plaintiffs to offer "objective criteria" by which class members are "readily identifiable" in reference to objective criteria. As discussed in last year's article, courts have taken different approaches to ascertainability, with no clear consensus among the circuits.

The pending cert petition seeks review of the Fourth Circuit's decision in *Career Counseling, Inc. v. AmeriFactors Financial Group, LLC*, 91 F.4th 202 (4th Cir. 2024), which reaffirmed that Rule 23 contains an ascertainability requirement. The case involves a putative class action alleging that a company sent unsolicited fax advertisements to 59,000 recipients in violation of the Telephone Consumer Protection Act (TCPA). The district court denied class certification, holding that the putative class failed to satisfy Rule 23's implicit threshold requirement of ascertainability. *Id.* at 207. Specifically, the district court reasoned that the individuals eligible for class membership were not "readily identifiable" because only those who received the advertisements through "stand-alone" fax machines (rather than online fax services) could maintain a TCPA claim, and there was no way to readily identify those with stand-alone fax machines. *Id.* In affirming the denial of class certification, the Fourth Circuit rejected the plaintiffs' argument that there is no implicit ascertainability requirement under Rule 23. *Id.* at 209.

The plaintiffs filed a cert petition that asks the Supreme Court to settle whether "administrative feasibility" stands as a distinct prerequisite to class certification, or instead sits as one of several prudential factors for courts to consider in their Rule 23(b)(3) superiority analysis. *See Career*

Counseling v. Amerifactors Fin. Grp., No. 24-86, 2024 WL 3569079, at *11 (U.S. July 19, 2024). This is the latest of several cert petitions to have raised this question in the past few years; although the Supreme Court has not taken the question up yet, this is certainly an issue that many are eagerly watching.

III. Continued Judicial Scrutiny of Dispute-Resolution Agreements and Evolving Strategies to Manage Mass Arbitration Risk

Mass arbitration is becoming one of the largest legal threats to companies, with a sophisticated plaintiff's bar implementing novel strategies to take advantage of arbitration agreements to exert settlement pressure on defendants. We see no signs of this trend slowing in 2025, and companies have responded to this threat with dispute-resolution provisions that encourage the efficient resolution of individual disputes—all the while disincentivizing plaintiff's attorneys from initiating "mass arbitration" campaigns that benefit no one other than themselves.

Courts have begun to review these efforts to curb the risk of exploitative mass arbitration. In *Heckman v. Live Nation Entertainment, Inc.*, 120 F.4th 670 (9th Cir. 2024), the court has declined to enforce an arbitration agreement based on its conclusion that the arbitration provider's rules were "internally inconsistent, poorly drafted, and riddled with typos," and that "counsel struggled to explain the Rules at oral argument." *Id.* at 677-78.

The court determined that defendants' "market dominance" in the ticket services industries supported a finding that the contract was adhesive, further supporting a finding of unconscionability. *Id.* at 682. The court also ruled that a provision permitting unilateral modification of the terms without prior notice rendered the clause "procedurally unconscionable" under California law. *Id.* at 682-83.

As to substantive unconscionability, the court expressed three concerns. First, the defendant's "bellwether" process—which would bind future claimants to a single arbitrator's ruling on the validity of the delegation clause in both bellwether and non-bellwether cases—effectively deprived the non-bellwether claimants of their right to be heard or otherwise participate in proceedings that could affect their rights. *Id*. at 684-85. Second, the arbitration rules also restricted discovery and the evidence that could be presented. *Id.* at 685-86. And third, the claimants were bound by what the court viewed as a functionally "asymmetrical" appeal provision, leaving them without a right to appeal any denial of injunctive relief. *Id.* at 686.

Heckman did not reach several types of clauses that have been used to address "mass arbitration" abuses such as pre-dispute informal dispute resolution clauses, individualized arbitration demand requirements, cost-splitting provisions, and fee-shifting for frivolous claims. And courts already have upheld "batching" clauses post-*Heckman*. *See, e.g.*, *Kohler v. Whaleco, Inc.*, 2024 WL 4887538, at *9 (S.D. Cal. Nov. 25, 2024) (post-*Heckman* decision holding that batching provision in arbitration agreement did not make delegation clause unconscionable). Given the rapidly evolving case law and differing approaches to the review of arbitration provisions, companies should analyze their clauses on a regular basis.

The following Gibson Dunn lawyers contributed to this update: Jessica Pearigen, Vannalee Cayabyab, Psi Simon, Matt Aidan Getz, Wesley Sze, Lauren Blas, Bradley Hamburger, Kahn Scolnick, and Christopher Chorba.

Gibson Dunn attorneys are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Class Actions, Litigation, or Appellate and Constitutional Law practice groups, or any of the following lawyers:

Theodore J. Boutrous, Jr. – Los Angeles (+1 213.229.7000, tboutrous@gibsondunn.com)

Christopher Chorba – Co-Chair, Class Actions Practice Group, Los Angeles
(+1 213.229.7396, cchorba@gibsondunn.com)

Theane Evangelis – Co-Chair, Litigation Practice Group, Los Angeles
(+1 213.229.7726, tevangelis@gibsondunn.com)

Lauren R. Goldman – Co-Chair, Technology Litigation Practice Group, New York
(+1 212.351.2375, lgoldman@gibsondunn.com)

Kahn A. Scolnick – Co-Chair, Class Actions Practice Group, Los Angeles
(+1 213.229.7656, kscolnick@gibsondunn.com)

Bradley J. Hamburger – Los Angeles (+1 213.229.7658, bhamburger@gibsondunn.com)

Michael Holecek – Los Angeles (+1 213.229.7018, mholecek@gibsondunn.com)

Lauren M. Blas – Los Angeles (+1 213.229.7503, lblas@gibsondunn.com)

Attorney Advertising: These materials were prepared for general informational purposes only based on information available at the time of publication and are not intended as, do not constitute, and should not be relied upon as, legal advice or a legal opinion on any specific facts or circumstances. Gibson Dunn (and its affiliates, attorneys, and employees) shall not have any liability in connection with any use of these materials. The sharing of these materials does not establish an attorney-client relationship with the recipient and should not be relied upon as an alternative for advice from qualified counsel. Please note that facts and circumstances may vary, and prior results do not guarantee a similar outcome.

If you would prefer NOT to receive future emailings such as this from the firm,
please reply to this email with "Unsubscribe" in the subject line.

If you would prefer to be removed from ALL of our email lists,
please reply to this email with "Unsubscribe All" in the subject line. Thank you.

© 2025 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit our website.