JULY 13, 2023

Recent developments in ascertainability, uninjured class members, and other class action issues in the second quarter of 2023

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Several appellate decisions addressed the "implicit" class action requirement of ascertainability during the second quarter of 2023, with the Third, Tenth and D.C. Circuits weighing in. Meanwhile, the Fifth Circuit maintained its "non-position" on class member standing, the Seventh Circuit permitted shifting of the cost of notice to the class action defendant. and the Ninth Circuit reigned in an attorney's fee award.

Ascertainability

In re Niaspan Antitrust Litigation, 67 F.4th 118 (3d Cir. 2023)

The *Niaspan* decision involved a challenge to a reverse-pay settlement agreement between the manufacturer of a name brand drug and the manufacturer of the generic drug. The plaintiffs sought certification of a class of end-payors who purchased, paid for, or provided reimbursements for the name brand or its generic version. The class definition expressly excluded "fully insured health plans" (defined as plans that purchased insurance from another third-party payor that covered 100% of the plan's reimbursement obligations to its members). The district court denied certification, finding the plaintiffs had not shown an administratively feasible way to identify the "fully insured health plans" for purposes of excluding them from the class. 67 F.4th at 121-22.

The Court of Appeals confirmed that ascertainability remains a Rule 23 requirement in the Third Circuit, declining the named plaintiffs' request to reject the ascertainability requirement altogether. *Id.* at 132-33. Thus, consistent with Third Circuit precedent, the *Niaspan* court read Rule 23 as requiring named plaintiffs to show that class members can be identified in an administratively feasible manner. *Id.* at 133. The court also confirmed that expert witness disputes should be resolved at the certification stage and rejected the plaintiffs' proposed methodology for identifying the "fully insured health plans" as contrary to the actual evidence presented in the case. *Id.* at 138. Finally, the Court emphasized the district court's broad discretion in resolving the factual issues pertinent to the certification issues and in deciding not to hold an evidentiary hearing in affirming the denial of class certification. *Id.* at 139.

Evans v. Brigham Young University, Case No. 22-4050, 2023 WL 3262012 (10th Cir. May 5, 2023)

The Tenth Circuit's unpublished *Evans* decision involved COVID-related claims where a student plaintiff sued a university for breach of contract and unjust enrichment arising out of the university's decision to pivot to on-line classes during the pandemic. The named plaintiff sought to certify a class of "all persons who paid tuition . . . to attend in person and had their classes moved to online only learning," but the district court denied class certification on ascertainability grounds. 2023 WL 3262012, at *2-3.

As with the Third Circuit, ascertainability continues to be a sub-requirement of numerosity in the Tenth Circuit: "if the district court cannot ascertain who falls into the class, then it cannot evaluate whether the

class is so numerous that joinder is impracticable." *Id.* at * 3. Although the Tenth Circuit still has not adopted a recognized standard for analyzing ascertainability, the class definition in *Evans* failed both the Third Circuit's stringent test and the more lenient Seventh Circuit test. *Id.* *8. The class definition was inherently individualized and therefore unworkable: (1) determining who actually "paid" the tuition would require individualized inquiries; and (2) "to attend in person" was inherently subjective, requiring individualized inquiries. In the words of the court: "the district court could not identify 'all persons who paid ... to attend in-person classes' without first identifying all third-party payment sources for tuition and then inquiring into the subjective state of mind for each student—Why did they pay tuition?"*Id.* at *6. As with *Niaspan*, the Tenth Circuit focused on the abuse of discretion standard and declined to disturb the trial court findings: "the fact that other district courts may have come to a different conclusion does not persuade us that the district court abused its discretion . . . we grant "wide latitude to the district court in making this [numerosity] determination." Because the district court's Rule 23 analysis was free from legal errors, and because it was rational for the district court to read "persons who paid tuition" to include third-party payors, there is no abuse of discretion. *Id.* at *7-8.

In re White, 64 F.4th 302 (D.C. Cir. 2023)

The D.C. Circuit's recent ascertainability decision, *In re White*, involved a so-called "fail-safe" class. In a fail-safe class, a party's membership in the class turns on whether that party has a meritorious claim. Thus, fail-safe classes present a "heads I win, tails you lose" scenario: class members with meritorious claims can form a successful class, but absent class members will not be bound by an adverse class ruling because they were never part of the class in the first place. The *White* class of hotel employees, who challenged the denial of vested retirement benefits, defined their class as "former or current employees . . . or the surviving spouses or beneficiaries of former . . . employees who submitted a claim for vested retirement benefits . . . and [h]ave been denied vested rights to retirement benefits." 67 F.4th at 306. The district court denied certification because of the "fail-safe" class definition. *Id.*

After confirming the propriety of granting interlocutory review of the district court's class certification decision under Rule 23(f), the *White* court reversed the lower court's denial of class certification "based on a stand-alone and extra-textual rule against 'fail-safe' classes." *Id.* at 313. The D.C. Circuit instead held that the Rule 23 requirements, if analyzed properly, should be more than capable of guarding against "unwise uses of the class action mechanism," including fail-safe class definitions. *Id.* at 315. A fail-safe class that manages to hurdle all of Rule 23's requirements can likely be remedied by modification of the class definition (*i.e.*, by eliminating the word or words that render it "fail-safe"). *Id.* at 314-15. Thus, the *White* court remanded the case for further consideration of the Rule 23 requirements. *Id.* at 315.

Standing

Angel v. Geiko Advantage Ins. Co., 67 F.4th 727 (5th Cir. 2023)

The Courts of Appeals have taken two different approaches to the question of Article III standing in putative class actions. Under the more forgiving "class certification" approach, the federal court "only assesses a named plaintiff's individual standing; if that is satisfied, any remaining analysis is considered a matter of class certification under Rule 23." *Id.* at 734 (discussing decisions of the Sixth, Ninth, and

Eleventh Circuits). Conversely, "courts that employ the standing approach compare the injuries or interests of the named plaintiff with those of the putative class and will hold that the named plaintiff lacks standing for the class claims if his or her harms are not sufficiently analogous to those suffered by the rest of the class." *Id.* (discussing decisions of the First, Second, and Third Circuits). Because the *Angel* court found that the named plaintiffs demonstrating standing "under either approach," the Fifth Circuit refused to decide between the two tests. *Id.* at 735-36.

Having rejected the class defendant's standing challenges, the Fifth Circuit affirmed the district court's order granting class certification, rejecting the defendant's challenges to the named plaintiff's adequacy and typicality, as well as its various predominance arguments. *Id.* at 736-42.

Cost-shifting

Bakov v. Consolidated World Travel, Inc., 68 F.4th 1053 (7th Cir. 2023)

The *Bakov* case involved a highly unusual fact pattern. Initially, the district court had refused to certify a nationwide TCPA class and instead certified only an Illinois class, based on its reading of the Supreme Court's jurisdictional ruling in *Bristol-Myers Squibb Co. v. Superior Court of California*, 582 U.S. 255 (2017). 68 F.4th at 1055. The plaintiffs funded notice to the putative class members, after which the district court granted summary judgment to the Illinois class. *Id.*

The Seventh Circuit entered a decision in 2020 holding that *Bristol-Myers* does not apply to nationwide class actions filed in federal court under a federal statute, prompting the district court to modify the class certification order to encompass a nationwide class. The district court then ordered the defendant to bear the costs of providing notice to the additional class members resulting from the expansion of the class from Illinois to a nationwide class. *Id.* at 1056.

The *Bakov* court addressed whether the Supreme Court's decisions in *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974), and *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), gave a district court discretion to shift the cost of class notice to the defendant before a final judgment. *Id.* at 1056-60. In the unique circumstances presented in *Bakov*, the Court of Appeals held the district court had the discretion to shift the cost of notice to the nationwide class to the defendant. *Id.* at 1060. But the Seventh Circuit cautioned that its ruling "does not mean that costs must be shifted when liability has been found; the ultimate decision rests in the district court's discretion." *Id.* at 1059.

Attorney's fees

Lowery v. Rhapsody Int'l, Inc. , 69 F.4th 994 (9th Cir. 2023)

What happens when class counsel recovers $50,000 for the class, asks for $6 million in fees, and then receives an award of $1.7 million in fees? Not surprisingly, remand after review by an appellate court. In *Lowery*, the Ninth Circuit made it clear that "the touchstone for determining the reasonableness of attorneys' fees in a class action is the benefit to the class." *Id.* at 997. When the class recovers a "measly" $50,000, the $6 million requested and the $1.7 million awarded is too much. *Id.*

Except in extraordinary cases, a fee award should not exceed the benefit that the litigation actually provided to the class: "We hold that courts must consider the actual or realistically anticipated benefit to the class—not the maximum or hypothetical amount—in assessing the value of a class action settlement." *Id.* at 1001. The court must consider the *actual* claims rate (approximately $50,000), not the "illusory" settlement cap. *Id.* at 1000. If the calculated fee to result ratio exceeds 25% of the benefit to the class, then "the court should take a hard and probing look at the award because this disparity may suggest that the fee amount is unreasonable." *Id.* at 1002. A fee award that is multiple times the

settlement's value is "a major red flag" that the award it too high. *Id.*