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Preventing, Defeating, and Resolving Class Actions

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May 10, 2023

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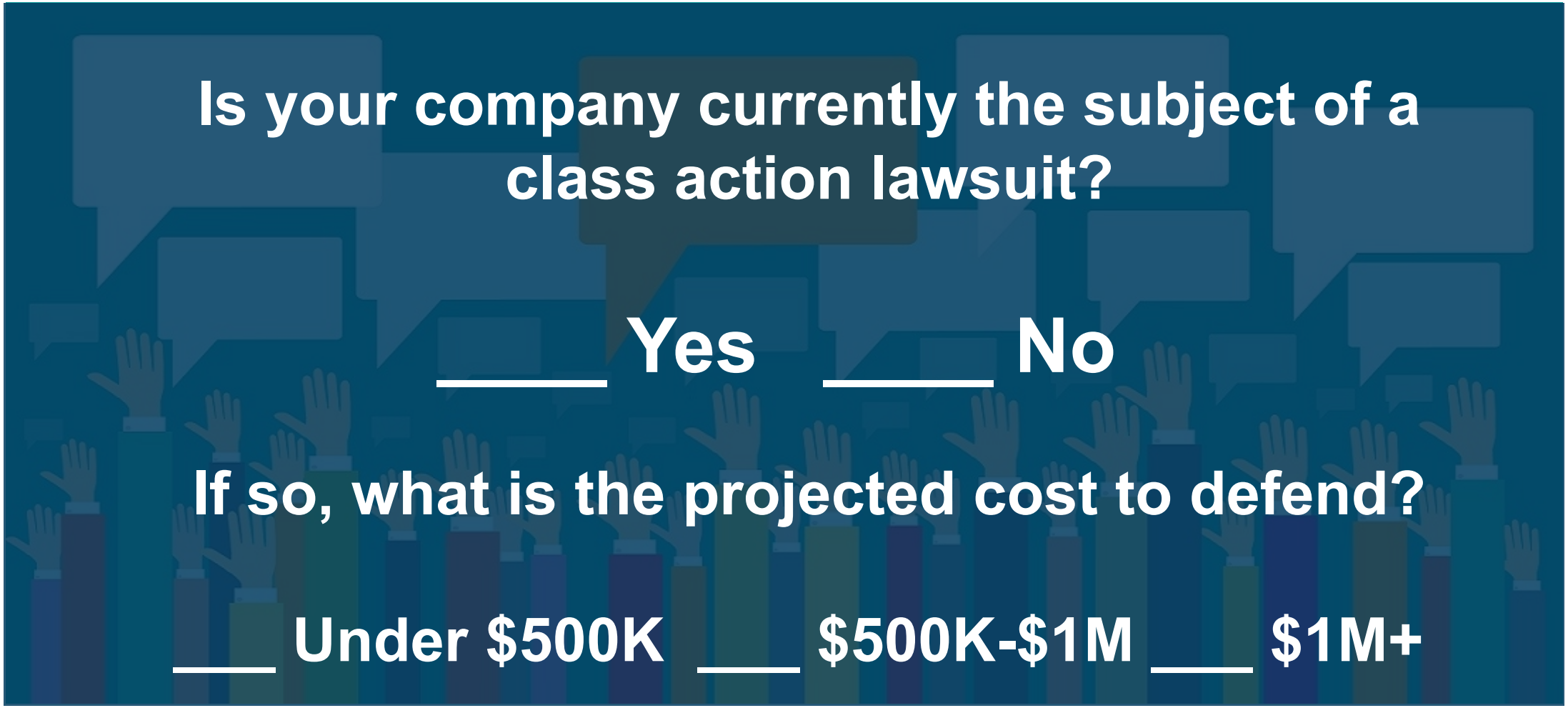
Is your company currently the subject of a class action lawsuit?
____ Yes ____ No
If so, what is the projected cost to defend?
___ Under $500K ___ $500K-$1M ___ $1M+

Agenda

I. Threshold Issues

II. “Consumer” Class Action Trends

III. Employer/Employee Class Action Trends

IV. Resolution of Class Actions

I. Threshold Issues

a. Data on class action prevalence and costs

b. Arbitration questions – avoiding class actions

c. Refresher on class action requirements

d. Unsettled questions around class certification

I.a: Class Action Data – Costs and Frequency

- Companies spent billions on class actions last year and increasing
- Hot areas:
  - Consumer class actions (e.g., false advertising and product defect claims, but also spam calls, data privacy, and other areas)
  - Labor and employment claims (i.e., ERISA, wage & hour) - about 1/3 of actions filed
  - Pandemic-related putative class actions are waning
- More companies have insurance but insurers are paying a lower percentage of costs due to large coinsurance

I.b: Class-Arbitration Waivers

- Per Supreme Court, class-arbitration waivers are generally enforceable in the ***consumer*** and ***employment*** settings
  - **<u>But</u>:** Exemption under FAA for transportation workers. 9 U.S.C. § 1.
    - The Supreme Court recently interpreted to include "any class of workers **directly involved in transporting goods across state or international borders**." *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1789 (2022) (emphasis added)
  - **<u>But</u>:** Pre-dispute arbitration clauses concerning sexual assault and harassment claims are unenforceable at the election of the plaintiff or class action representative under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFAA").

What workers are engaged in interstate commerce?

- Courts generally take the view that "interstate movement of goods" or passengers must be "a central part" of the job description of the class. *Singh v. Uber*, -- F.4th --, 2023 WL 3086603 (3d Cir. 2023).
  - Airline baggage workers? Yes. *Saxon*, 142 S.Ct. at 1790
  - Amazon delivery drivers? Yes. *Waithaka v. Amazon.com*, Inc., 966 F.3d 10, 13 (1st Cir. 2020) (they "haul goods on the final legs of interstate journeys")
  - Drivers of food products from distribution center to restaurant? Yes. *Oakley v. Domino's Pizza LLC*, 23 Wash. App. 2d 1008 (2022)
  - Restaurant delivery drivers? No. *Immediato v. Postmates, Inc.*, 54 F.4th 67, 77 (1st Cir. 2022) ("[I]nterstate movement necessarily terminates when those goods arrive at the local manufacturer or retailer.").
  - Note: State arbitration laws may apply even if FAA does not.

Do ride-share services qualify?

- Interstate transportation is important to Uber's business. Uber rideshare drivers made 141.5 million total interstate trips over ten year period. 2.5% of Uber trips are interstate (e.g., every Uber from DCA into DC).
- 35% percent of tenured drivers (50 or more trips) have made an interstate trip. Drivers cannot opt out of interstate trips, and some drivers are specifically assigned to multistate territories.
- Uber drivers frequently ferry passengers to and from airports and Uber has agreements with major airports authorizing drivers to drop off and pick up passengers at terminals.

Poll


Do Uber drivers qualify for the FAA transportation worker exception?
_____ Yes _____ No

Answer: ride-share drivers are not exempt

- Uber drivers do ***not*** qualify for the exemption. *E.g.*, *Singh v. Uber*, -- F.4th --, 2023 WL 3086603, at *7 (2023) (holding that such interstate trips "are incidental—take away interstate trips, and the fundamental character of Uber drivers' work remains the same" and the airport trips are not part of interstate transportation)

Has EFAA had a big impact in the class action space?

- **Not yet:**
  - **No retroactive application**: Courts generally have coalesced around view that the Act applies only to claim accruing on or after the date of enactment (March 3, 2022)
  - **No class actions decided under this statute.**
- **<u>But</u> note: Where applicable, EFAA would have broad effect**:
  - General rule under FAA: If some claims are arbitrable and some are not, then piecemeal litigation results. *KPMG LLP v. Cocchi*, 565 U.S. 18, 19, (2011).
  - EFAA override: "**[EFAA's] invalidation of an arbitration agreement extends to the entirety of the case relating to the sexual harassment dispute.**" *Johnson v. Everyrealm, Inc.*, 2023 WL 2216173, at *18 (S.D.N.Y. Feb. 24, 2023).
  - **Also, courts, not arbitrator, decide whether arbitration clause is subject to EFAA**.

Don’t delay: Waiver of class arbitration

- A court might find waiver even where the plaintiff has suffered no prejudice. *Morgan v. Sundance, Inc.,* 142 S. Ct. 1708 (2022) (collective wage/hour action by employees at Taco Bell franchises).
- Example of **waiver**: Although state and federal actions were in the beginning stages, defendant waited a year before invoking arbitration clause. *Warrington v. Rocky Patel Premium Cigars, Inc*., 2023 WL 1818920 (11th Cir. Feb. 8, 2023).

Mass arbitration

- Plaintiff's firms are seeking to weaponize the class-arbitration waivers by bringing individual claims at arbitration. Consumer cases:

Issue	AAA
Total up-front costs *(filing fees and admin fees due upon or shortly after filing)*	*Mass Arb. (100 cases):* 1 case: **$1,700** 100 cases: **$170,000** 1,000 cases: **$1,662,500**
Minimum total costs to defend on papers	1 case: **$3,200** 100 cases: **$320,000** 1,000 cases: **$3,162,500**

- Digital marketing is a game changer for amassing large client list

Batch arbitration—the *Verizon* case

- So Verizon added a provision calling for arbitration in **batches of 10** where 25+ customers represented by the same or coordinated counsel raise similar claims
- Plaintiff's firm in hidden fees case challenged it, arguing it would take **156 years** for their 2,712 clients to arbitrate all disputes under the AAA's historical pace
- District court struck the clause: Potential delay deemed "'unreasonably favorable' to Verizon." *MacClelland v. Cellco P'ship*, 609 F. Supp. 3d 1024, 1042 (N.D. Cal. 2022)
- *MacClelland* suggested Door Dash provision might pass muster:
    1. Cases 1-10 based on random assignment would be "test cases" resolved with 120 days
    2. Results given to a mediator to try to resolve the remaining cases
    3. After a mediation period of 90 days, a party may choose to opt out and sue in court
- On appeal to Ninth Circuit.
- Arbitration might be more expensive in the end than litigation

What *else* are companies doing in response to mass arbitration threats?

- Litigating the individual arbitrations in war of attrition
- Seeking to move arbitrations to small claims court
- Using offers of judgment
- Discontinuing arbitration clauses (e.g., Amazon consumers)
- Using only class-action waivers

Perspective of in-house counsel: Mass arbitration threats

- Balance not wanting to be easy mark with financial sense
- Size up the plaintiff's lawyers: Are they fit for the fight?
- Consider collateral estoppel consequences of bad result in individual arbitration
- Stay apprised of changes in law as they may reevaluate use of arbitration clause

I.c: Refresher on class action requirements

- Class actions are "exception[s] to the usual rule" that litigation is conducted by named parties. *Comcast,* U.S. 2013.
- Rule 23 is a claim-aggregating device - leaves rights and duties intact, rules of decision unchanged, does not affect substance of claims or burdens of proof. *Shady Grove,* U.S. 2010.
- Plaintiff must "prove, not simply plead" that Rule 23 is satisfied, *Halliburton*, U.S. 2014, based on preponderance of admissible evidence. *Tyson Foods,* U.S. 2016. Proponent has burden. Analysis must be "rigorous"; may "overlap with the merits." *Amgen*, U.S. 2013.
- Class certification requires satisfaction of Rule 23 requirements, requires Article III standing, and (sometimes) requires "ascertainability" or "administrative feasibility."

Rule 23 requirements

- **Rule 23(a) (always required):**
  - ***Numerosity, commonality, typicality, adequacy***
- **Rule 23(b) (one is required):**
  - ***Rule 23(b)(1)***: Risk of inconsistent adjudications / incompatible standards.
  - ***Rule 23(b)(2)***: Conduct "appl[ies] generally to the class." (Monetary relief not usually available. *Wal-Mart*.)
  - ***Rule 23(b)(3)*** (most common). Common questions ***predominate***, class resolution is ***superior***.
- Class actions in state court – Class Action Fairness Act removal.
- Specific requirements around settlement.

I.d: Unsettled class certification issues – case study

- Putative class of major tuna buyers – Trader Joe's, Amazon, etc.
- They individually negotiate pricing of hundreds of products.
- Plaintiffs' expert calculates "average" overcharges. If any transaction is above that price, Plaintiffs claim antitrust injury as to that purchaser. On this analysis, 95% of direct purchasers are injured (and 5% are not).
- Defendants' expert prepares competing model by individual direct purchaser, showing 28% of direct purchasers are uninjured.

Poll

Circuit splits posed by *Olean*

- **Can a class be certified with more than *de minimis* uninjured members?** *Olean* says yes. D.C. Circuit, Third Circuit, First Circuit say no.
- **When are expert disputes regarding extent of uninjured class decided?** *Olean* says later, on merits (certify if evidence is "capable" of showing classwide injury). D.C. Circuit, Third Circuit, First Circuit say now.
- **May "representative evidence" ("averages") support certification?** *Olean* says yes, as long as evidence is "plausible" (despite variation). Third Circuit, First Circuit say no – most class members injured does not show that any particular class member was injured.
- **Supreme Court denied certiorari - open questions.**

II. “Consumer” Class Action Trends

a. Telephone Consumer Protection Act (TCPA)

b. Data privacy

c. Website accessibility

d. Sample of other consumer class action areas

II.a: TCPA and Mini-TCPA Class Actions

- **Remain popular**: (a) no need to show damages and (b) proliferation of marketing to mobile devices.
- **Common TCPA allegations**: (1) unsolicited calls to residential or cell phones using automated dialing or pre-recorded messages or (2) calls or texts to numbers on the National Do Not Call Registry.
- **No cap**: Strict liability of $500 for each separate violation, and up to treble damages for a willful or knowing violation. 47 U.S.C. § 227(b)(3).
- **Four year statute of limitations**. *See, e.g.*, *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.,* 642 F.3d 560, 561 (7th Cir. 2011).

Defeating Putative TCPA Class Actions

- **No Standing: Plaintiff must show concrete injury in Federal Court**
  - ***Circuit split whether a single text message suffices***:
  - *Compare Salcedo v. Hanna,* 936 F.3d 1162 (11th Cir. 2019) (no standing because it was "a brief, inconsequential annoyance")
  - *with Cranor v. 5 Star Nutrition, LLC,* 998 F.3d 686, 689-90, 692-93 (5th Cir. 2021) (holding that a single text message is a nuisance and an invasion of privacy).
- **Individualized Issues: Especially Consent**
  - Prior consent could not be determined by generalized proof because there was a great variation in contracts, personal contacts, and relationships. *Gorss Motels, Inc. v. Brigadoon Fitness, Inc.,* 29 F.4th 839 (7th Cir. 2022).

Defeating Putative TCPA Class Actions (cont.)

- **No Typicality and Adequacy**
  - Serial filer example:
    - Plaintiff made $60,000/year from TCPA lawsuits
    - He admitted it his “typical practice to pose as a customer” and confirm information even if inaccurate.
    - He testified that “deception is an appropriate behavior for a class representative.”
    - Court refused to certify class. *Johansen v. Bluegreen Vacations,* 2021 WL 4973593 (S.D. Fla. Sept. 30, 2021), aff’d, 2022 WL 17087039 (11th Cir. Nov. 21, 2022) (per curiam).

II.b: Data Privacy Overview

- **Record number** of privacy class actions in 2022
- Wide variety of theories :
  - Tracking customers' actions without consent
  - Selling personal information without consent
  - Unauthorized use of facial recognition software
- Attractive candidate for class actions because of **statutory damages**
- Legislative efforts abound so **more is coming**

Data Privacy: Compliance Challenge

- General Privacy Statutes (CA with more states on the way)
- Biometric identifier statutes (e.g., IL, TX, WA)
  - IL law: liquidated damages per violation + 5 year SOL + extraterritorial
  - E.g., allegation virtual make-up "try on" option collects "face geometry" w/out consent. *Hackler v. MakeupByMario, Inc.,* No. 1:2023 cv 01586 (N.D. Ill. Mar. 14, 2023)
- Electronic or Video Surveillance
  - E.g., using session replay software to make unauthorized copies of a user's scrolling, hovering, typing and swiping; track video viewing
- Many other statutes: HIPAA, FCRA, etc.

Perspective of In-House Counsel: Data Privacy

- Class action defense begins with disclosure and consent
- Conform to the strictest law out there (GDPR and CCPA)
- Find win/win with marketing department but be firm
- Hire great counsel to keep updated on the landscape
- And we have not even talked about data **breaches**!

II.c: Website Accessibility

- 3000+ new cases in 2022
- Circuit split whether websites are “places of public accommodation” that must provide “equal access”
  - Yes, place of public accommodation (1st, 2d, 7th Circuits)
    - E.g., SDNY declined to dismiss a putative class action alleging website denied equal access to blind customers. *Del-Orden v. Bonobos, Inc.,* 2017 WL 6547902 (S.D.N.Y. Dec. 20, 2017).
  - No (3d, 6th, 9th, 11th Circuits), but exposure still if inaccessibility impeded equal access to, or enjoyment of, goods and services offered at a defendant’s physical facilities
- Compliance challenge: Expansive remedies; negative publicity

II.d: Sample of other consumer class action areas (and trends)

- New areas of product safety class actions: “Forever chemicals,” “clean” foods.
- False labeling cases remain active (e.g., natural” or “pure” or “100%” claims). No clear trend on standard to plead or certification – very fact/allegation dependent.
  - *Compare Willard*, 2021 WL 6197079 (N.D. Ill.) (“100% juice”) *with Richburg*, 2023 WL 1818561 (N.D. Ill.) (“100% real ingredients”).
- Some theories are duds – e.g., slack fill cases.
- ESG cases (e.g., “greenwashing”) – sometimes survive dismissal.
  - *E.g.*, *Gardner*, 2020 WL 1531346 (N.D. Cal.) (dolphin-safe tuna); *Smith*, 393 F. Supp. 3d 837 (2019) (“recyclable” coffee pods (later certified a class)).

Other consumer cases – bases for dismissal

- **Variations between circuits on economic standing questions:**
  - *In re J&J*, 903 F.3d 278 (3d Cir. 2018) (baby powder – no economic injury).
  - *McGee*, 982 F.3d 700 (9th Cir. 2020) (unhealthy oil in popcorn – possible economic injury).

- **Some good recent appellate decisions on "reasonable consumer" standard.**
  - *Moore*, 4 F.4th 874 (9th Cir. 2021) (Trader Joe honey label not misleading as matter of law).
  - *George*, 857 F. App'x 705 (2d Cir. 2021) (Starbucks claims of "no artificial dyes" not misleading to reasonable consumer).
  - But hard to discern a rule or pattern – very fact and context dependent.

- **At class certification, objective tests are challenging.** Look to variation in information disseminated (method or content), consumer practices.

Statutory damages case study - *Montera*

- **Many consumer fraud statutes provide for statutory damages.**
  - E.g., N.Y. G.B.L. §§ 349-350 ($50 or $500 per violation).
  - But New York law expressly limits statutory damages in class actions!
  - *Shady Grove*, 559 U.S. 393 (2009): That limitation is procedural, sorry.

- ***Montera*, 2022 WL 3348573 (N.D. Cal.):**
  - Jury: $1.5 million in actual damages ("Joint Juice").
  - Defendants' position: No statutory damages.
  - Plaintiffs' position: $91 million in statutory damages.
  - Court: $8.3 million in statutory damages ($50 per violation).
  - Everyone ends up unhappy.

III. Employer-Employee Class Action Trends

a. Employee Retirement Income Security Act (ERISA) case trends

b. Wage and hour case trends

III.a: ERISA - what kinds of class actions are being filed?

- Fewer **stock drop** cases – even after *Dudenhoeffer*, 573 U.S. 409 (2014), many dismissals.
- Many **performance and fees** cases. Recent wave of BlackRock target date fund cases. Courts do not seem enamored. *E.g.*, *Beldock*, 2023 WL 1798171 (W.D. Wash.).
- String of "**actuarial equivalence**" cases. Largely survived pleading challenges; defendants have better luck on class certification.
  - Related cases challenging withdrawal assumptions. *Sofco*, 15 F.4th 407 (6th Cir. 2021); *United Mine Workers*, 39 F.4th 730 (D.C. Cir. 2022).
- **Cybersecurity** cases. *E.g.*, *Disberry*, 2022 WL 17807122 (S.D.N.Y.); *Bartnett*, 2021 WL 428820 (N.D. Ill.).
  - Note data breach class actions against administrators or consultants. *E.g.*, *Giannini*, S.D.N.Y.; *Sherwood v. Horizon Actuarial Services LLC* (N.D. Ga.).

ERISA - what kinds of class actions are being filed?

- *Coming up?* **Possible post-*Dobbs* cases** related to abortion access.
  - Possible litigation around federal preemption principles: Would those apply to state criminal laws around abortion?
  - Possible litigation around privacy: Will HIPAA shield state government requests for information?
- As to **health benefits**, note *Wit*, 58 F.4th 1080 (9th Cir. 2023):
  - Reversing class certification of claims against insurance benefit administrator seeking class-wide "reprocessing" remedy for alleged failure to apply correct guidelines – "reprocessing" is not an available remedy under ERISA.

ERISA pleading – Supreme Court

- Rule 12 requires "**careful, context-sensitive scrutiny**" to "divide the plausible sheep from the meritless goats." *Dudenhoeffer*, 573 U.S. 409 (2014).
  - **Reversed**: No presumption of prudence in ESOP stock drop lawsuits.
  - **But**: Signaling the importance of weeding out implausible claims early on.
- On the pleadings, courts must consider "**the range of reasonable judgments** a fiduciary may make." *Hughes*, 142 S. Ct. 737 (2022).
  - **Reversed**: Cannot rely on availability of prudent alternatives to dismiss imprudent claims.
  - **But**: Emphasis on deference to fiduciaries given difficult tradeoffs.
  - **Pleading standard a little unclear**.
- Defined benefit: Harder to sue where participants will get the same benefits regardless of the breach. *Thole*, 140 S. Ct. 1615 (2020) (no standing).
  - But: Egregious mismanagement claims can still be brought.

ERISA pleading – as applied

- Claims related to **retail / institutional shares** likely get past a motion to dismiss. *Kong*, 2022 WL 1125667 (9th Cir. 2022).
  - There may still be valid reasons to use retail shares (e.g., revenue sharing). But less likely to be resolved on the pleadings. (Consider early summary judgment.)
- Other investment performance and fee claims: Trend towards "meaningful benchmark" test. *Matousek*, 51 F.4th 274 (8th Cir. 2018); *CommonSpirit*, 37 F.4th 1160 (6th Cir. 2022); *Albert*,47 F.4th 570 (7th Cir. 2022).
  - Need to show *why* the comparator is comparable (comparable services for fees, comparable strategy or goals for performance).
  - Pending in 9th and 10th Circuits.
- **Active / passive claims** have varied outcomes.

ERISA - prospects at class certification

- ERISA classes are certified about 2/3 of the time (likely higher in defined contribution cases regarding fees, performance or administration).
  - Commonality is usually satisfied.
  - Predominance not always needed if seeking Rule 23(b)(1) or Rule 23(b)(2) classes.
- Best chances to defeat class cert may be in individualized communications (e.g., *Fitzwater*, 2019 WL 5191245 (S.D. W. Va.)), or "winners and losers" arguments (e.g., *Torres*, 2020 WL 3485580 (N.D. Tex. 2020)).
- Standing arguments a mixed bag. *E.g.*, *Boley*, 36 F.4th 124 (3d Cir. 2022) (class properly certified even though class reps not invested in all challenged funds); *Wilcox*, 2019 WL 132281 (D.D.C.) (class reps "clearly cannot allege an individual violation of ERISA" for funds they did not own).

ERISA - prospects at class certification (cont'd)

- Possible silver lining of *Intel*, 140 S. Ct. 768 (2020) - individualized issues on actual knowledge?
- Class certification requires consideration of all relevant evidence – including individualized affirmative defenses. *Haley*, 54 F.4th 115 (2d Cir. 2022).
  - *Haley* related to statutory exemptions to prohibited transaction claims. But principle applies to all affirmative defenses.
- Note mini trend of stipulated certification to save costs and focus efforts on merits issues. *E.g.*, *Herndon*, E.D. Va. 2020 (actuarial equivalence); *Velazquez*, D. Mass 2019 (performance and fees).

Poll


Would you consider stipulating to class certification?
_____ Yes _____ No

ERISA - strategies to anticipate/avoid class actions

- **Review investment menu with an eye to legal trends**.
  - Evaluate (and potentially update) actuarial assumptions as appropriate.
  - Scan for potential imprudence claims (e.g., use of retail versus institutional shares).
  - Regular review of investment options (does not mean picking the cheapest fund or last year's high performer, though).
  - Careful documentation of fiduciary decision making.
- **Review and consider updating plan procedures as to exhaustion of remedies and time limitations to sue**.
- **Consider requiring affirmative acknowledgment of plan disclosures**. *Intel*, 140 S. Ct. 768 (2020).
  - May help on the merits with respect to time-bar affirmative defenses.
  - Could have mixed implications for class certification.

ERISA - strategies to anticipate/avoid class actions (cont'd)

- **Delegation of fiduciary duties to independent investment managers**. *Burke*, 42 F.4th 716 (7th Cir. 2022). But note duty to monitor.
- **Arbitration provisions may be enforceable <u>as to participants</u>**. *Dorman*, 934 F.3d 1107 (9th Cir. 2019). <u>But</u>*:*
  - If it only relates to "employment," that might not be good enough. *Cooper*, 990 F.3d 173 (2d Cir. 2021).
  - If it limits statutory remedies, may not be enforceable. *E.g.*, *Triad*, 13 F.4th 613 (7th Cir. 2021); *Harrison*, 59 F4th 1090 (10th Cir. 2023).
  - Note legislative efforts to void ERISA arbitration provisions. Mental Health Matters Act, H.R. 7740 (2022).
  - And – of course – need to consider mass arbitration risks as discussed earlier.
- **Consider amending plan documents to provide for the <u>plan</u>'s consent to arbitration**. *Hawkins*, 32 F.4th 625 (6th Cir. 2022).
- **Venue clauses may be enforceable as well**, as long as plaintiffs still have "ready access to the federal courts." *In re Becker*, 993 F.3d 731 (9th Cir. 2021).

III.b: Wage and hour – different kind of representative suit

- **Fair Labor Standards Act (29 U.S.C. § 216) authorizes "collective" actions for (inter alia) minimum wage and overtime violations.**
  - Collective actions require affirmative "opt in".
  - Test is whether employees are "similarly situated" (as opposed to stricter Rule 23 requirements).
- **FLSA filing does not toll statute of limitations for other employees until they opt in.**
  - For this reason, courts want to get notice out quickly.
- **Collective and class actions may proceed in tandem; FLSA sets a floor, not a ceiling.**
  - *But see Aldridge*, 990 F.3d 868 (5th Cir. 2021) ("redundant" state law claims are preempted).

Wage and hour – possible overhaul of two-stage certification

- **<u>Background</u>: Since *Lusardi*, 118 F.R.D. 351 (D.N.J. 1987), two-tier certification framework:**
  - "Notice phase" (lenient), followed by "decertification phase" (after full discovery).
  - About 80% of cases are conditionally certified (after which decertification is closer to 50/50).
- **Conditional certification called into question. *Swales*, 985 F.3d 430 (5th Cir. 2021).**
  - Discovery should determine whether others are "similarly situated" – only then send notice.
  - Pending in the Sixth Circuit. *A&L Home Care* (argued Dec. 2022). E.D. Va. district court followed *Swales* a few weeks ago. *Mathews* (April 2023).
- **Some implications of *Swales:***
  - Clock will keep ticking on claims until notice goes out.
  - Might even be able to make dispositive arguments before notice.
  - But courts may expedite full discovery out of sense of urgency, given ticking clock.

Wage and hour – personal jurisdiction implications of *BMS*

- Background: *BMS*, 137 S. Ct. 1773 (2017), limits specific jurisdiction over claims by out of state plaintiffs in mass tort action. Application to FLSA collective actions left unresolved.
  - Three circuits (*Canaday*, 9 F.4th 392 (6th Cir. 2021), *Vallone*, 9 F.4th (8th Cir. 2021), *Fischer*, 42 F.4th 366 (3d Cir. 2022)) hold *BMS* bars participation in collective by out-of-state employees.
  - *Waters*, 23 F.4th 84 (1st Cir. 2022): *BMS* does not apply to FLSA collectives.
  - Supreme Court has repeatedly denied review.
- Consensus (so far) that *BMS* does not apply to class actions (i.e., including state law related wage & hour class actions).
- Implications of majority rule:
  - May pull cases to forums where defendants are subject to general jurisdiction.
  - May disincentivize some lower-probability suits by reducing recovery.
  - Could yield opportunities for multiple plaintiff bites at the apple.

Wage and hour – potential new areas of focus

- Pay transparency legislation.
  - *E.g.*, California Pay Transparency Law, SB 1162 eff. 1/1/23: Cannot rely on salary history in hiring, cannot seek it in interviewing. Private right of action available.
  - Similar legislation elsewhere, although not all have right to sue (e.g., New York Labor Law 194-B (effective Sept. 2023) (mandatory disclosure of compensation).
- Non-compete legislation (e.g., D.C. Code § 32-581, eff. 10/1/22).
  - Prohibits non-competes for "covered employees" (non-highly compensated, mostly working in D.C.). Private right of action available.
  - Similar legislation elsewhere (e.g., Oregon, Washington, California).
- Misclassification and overtime issues.
  - Pending U.S. Dep't of Labor rule regarding employee / independent contractor classification.

Wage and hour – two other notes

- Developments around California Private Attorney General Act (Cal. Lab. Code. § 2698):
  - Bad news: Court cannot impose Rule 23 requirements on PAGA claims. *Hamilton*, 39 F.4th 575 (9th Cir. 2022).
  - Good news: Arbitration agreements enforceable as to individual PAGA claims. *Viking River*, 142 S. Ct. 1906 (2022).
  - Uncertain news: After *Viking River*, California Supreme Court now considering PAGA statutory standing.
- Developments around Rule 68 offers of judgment:
  - Rule 23 specifies court approval of certified class actions. What about FLSA collectives?
  - Prevailing practice to require court approval of FLSA offers of judgment. *E.g.*, *Moshan-Martinez*, 2021 WL 6200164 (E.D.N.C.); *Weinstock*, 2021 WL 3115914 (S.D. Fla.).
  - Second Circuit recently concluded this is not necessary. *Yu*, 944 F.3d 395 (2d Cir. 2019). Rule 68 is mandatory: "The clerk must then enter judgment."

Perspective of in-house counsel: Preventing suits

- Periodic wage and hour audits and reviews of employee functions.
- Maintain accurate records (pay, clock-in/clock-out, etc.).
- Careful eye on employee classifications (exempt versus non-exempt).
- Comprehensive but straightforward policies and grievance / dispute resolution procedures.
- Compliance training.
- Stay on top of changes in law (e.g., donning/doffing principles; calculation of overtime; rounding of time records).

IV. Resolution of Class Actions: Recent Issues

- Certification is not necessarily the end (Fifth Third victory)

On the settlement front, some pivotal issues in flux

- Split over permissibility of class representative service awards under FRCP 23:
  - Impermissible: *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2020)
  - Permissible: Ninth, Sixth and Second circuits.
- Do all members of damages settlement class need to possess Article III standing? Rehearing en banc granted by 11th Circuit.

Settlement Issues in Flux (cont.)

- Do *Bluetooth* factors apply to review of pre-cert settlements?
  - The factors: (1) counsel received disproportionate share of any cash; (2) clear sailing arrangement for payment of attorneys' fees separate from class funds; and (3) reversion to defendant rather than class fund.
  - **Yes, apply to all**. *Briseno*, 998 F.3d 1014 (9th Cir. 2021).
- When is a voucher a coupon under CAFA?
  - *McKinney-Drobnis v. Oreshack*, 16 F.4th 594, 607 (9th Cir. 2021) ($36.28 voucher could not buy a single massage session).
  - So court must apply (1) “heightened scrutiny” to settlement and (2) base fee awards on the redemption value, rather than face value.