IADC TRENDS IN CLASS ACTIONS: CASES DISCUSSED

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JURISDICTION

***Bristol-Myers Squibb Co. v. Sup. Court*, 137 S. Ct. 1773 (2017).** More than 600 plaintiffs from 34 different states sued BMS in California state court asserting a variety of state-law claims arising from injuries allegedly caused by the blood thinner Plavix. (1777.) BMS moved to quash service of the out-of-state claims, but the state court denied the motion, finding it had general jurisdiction. (1778.) The state appellate court held there was no general jurisdiction, but there was specific jurisdiction. (*Id.*). The California Supreme Court affirmed, applying a "sliding scale approach to specific jurisdiction." (*Id.*) The Supreme Court reversed, holding that specific jurisdiction requires a connection between the defendant's activities in the forum state and the lawsuit: "What is needed—and what is missing here—is a connection between the forum and the specific claims at issue." (1781.)

***Ford Motor Co. v. Montana Eighth Jud. Dist.*, 141 S. Ct. 1017 (2021).** Plaintiffs from Montana and Minnesota sued Ford in state court actions resulting from automobile actions that happened in the states of each suit. (1022.) Ford challenged jurisdiction because neither car was first sold, designed, or manufactured in those states. (1023.) The Supreme Court rejected that argument, because the plaintiffs had each filed in the state of the accident, and were not engaged in forum-shopping. (1031.) It held that "each plaintiff brought suit in the most natural State—based on an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that took place there." (*Id.* (cleaned up).)

***Hood v. Am. Auto Care, LLC*, 2021 WL 6122400 (10th Cir. Dec. 28, 2021).** Plaintiff filed a Telephone Consumer Protection Act (TCPA) class action against a seller of vehicle service contracts, alleging it had placed unwanted calls to his cell phone. (*1.) Defendants moved to dismiss under Rule 12(b)(2) for lack of personal jurisdiction. (*Id.*) The district court granted the motion because the plaintiff had not alleged the defendants' contact with the jurisdiction "did not arise out of, or relate to" the unwanted calls. (*Id.*) The Tenth Circuit reversed, because *Ford Motor Co.* "made clear that a causal connection is not required" for personal jurisdiction. (*4.)

***LNS Enters., LLC v. Continental Motors, Inc.*,** No. 20-16897 (9th Cir. Jan. 12, 2022) (slip op.). The plaintiffs sued an airline manufacturer in Arizona state court for damage their plane received in a nonfatal clash. (5.) Defendants removed to federal court. (6.) They then moved to dismiss on personal jurisdiction grounds because the plane had not been manufactured, sold, or serviced in Arizona. (5-6.) The trial court granted the motion. (6.) Plaintiffs appealed against two defendants, and the Ninth Circuit affirmed, holding that the defendants did not have sufficient contacts with Arizona, and those contacts they did have were not relevant to the lawsuit. (17-20.) It also held that the district court did not abuse its discretion in denying jurisdictional discovery based on plaintiffs' "hunch" they might find connections with the jurisdiction. (22.)

OPT-OUT LITIGATION

In re Ford Motor Co. DPS6 Powershift Transmission Prod. Liab. Litig., **CITE TK** (C.D. Cal. Mar. 29, 2021). Plaintiff sued Ford under the Lemon Law alleging it had manufactured a vehicle with a defective transmission. (*1.) Ford moved for summary judgment, arguing in part that his claims

were barred by the statute of limitations. (*Id.*) Plaintiff tried to invoke *American Pipe* tolling based on the pendency of a previous class action, but the court dismissed the claims, because the class action would not have tolled enough time to save them, and the class actions had not asserted the same claims. (*3.)

***Jackson v. SPS Techs., LLC*, 2018 WL 4440804 (C.D. Cal. Sep. 4, 2018)**. Well after a class action settlement resolving FEHA claims had passed its opt-out deadline, an objector stated his intent to move to opt out of the settlement. (*2.) The court found that, due to counsel's early knowledge of the objector's desire to opt out but unexplained inaction, the "mistaken belief and unexplained delay do not support a finding of excusable neglect." (*3.)

***In re Processed Eggs Prods. Antitrust Litig.*, 130 F. Supp. 3d 945 (E.D. Pa. 2015).** *In re Processed Eggs Prods* was an antitrust multi-district litigation involving direct purchasers of eggs who alleged that defendants had engaged in an antitrust conspiracy to fix the price of domestic eggs. (948.) The trial court approved a settlement with purchasers against one company, Cal-Maine. (*Id.*) The settlement included a group of plaintiffs who had been litigating separately. (949.) That group filed a motion to be excluded from the settlement, either because its conduct was a functional equivalent of opting out, or because the failure to opt out was excusable neglect. (*Id.*) The court found that the group's post-settlement conduct was not unambiguous, because it had not foreclosed the possibility of participating in the settlement. (952.) But it also found that the failure to opt out officially was the product of excusable neglect. (956.)

***In re Prudential Secs. Ltd P'ships Litig.*,** 164 F.R.D. 362 (S.D.N.Y. 1996). *In re Prudential* was a multi-district litigation involving a number of class actions challenging the allegedly fraudulent marketing of limited partnership interests. (364.) The resulting settlement included a "blow" provision, similar to a modern walkaway provision, where defendants could cancel the settlement if too many class members opted out, preventing a global resolution. (365-66.) After the settlement received final approval, a number of investors who had *not* opted out by the final deadline sought extensions to the opt-out period. (368.) The court denied the requests because allowing the additional opt-outs would have activated the "blow" provision, jeopardizing the settlement. (372.)

ARBITRATIONS

***McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017).** Plaintiff filed class action against bank under California consumer-protection statutes, alleging it misled her when it sold her credit protection. (952.) Citibank moved to compel individual arbitration based on an arbitration clause in an update to its terms and services. (953.) The trial court granted the motion, and plaintiff appealed. (*Id.*) The court of appeal affirmed, but the California Supreme Court granted certiorari. (*Id.*) It reversed, invalidating the arbitration agreement because it sought to preclude the plaintiff from seeking public injunctive relief in any forum. (966.)

***DiCarlo v. MoneyLion, Inc.*, 988 F.3d 1148 (9th Cir. 2021).** Plaintiff filed a class action against MoneyLion under California's consumer-fraud statutes, alleging that its smartphone app was a "high-tech debt trap" that caused her to go hundreds of dollars into debt. (1151-52.) MoneyLion moved to compel arbitration, and the trial court granted the motion and dismissed the case.

(1152.) Plaintiff appealed, arguing that MoneyLion could not arbitrate a lawsuit where she was seeking public injunctive relief. (1153.) The Ninth Circuit held a private individual may seek public injunctive relief without being transformed into a private attorney general, and therefore a trial court could still compel that the private plaintiff seek that relief in arbitration. (1158.)

***Hodges v. Comcast Cable Commc'ns, LLC*, 2021 WL 6110309 (9th Cir. Dec. 23, 2021).** Plaintiffs were former cable subscribers who filed a class action against Comcast alleging it had collected data in violation of their statutory privacy rights. (*2.) Comcast moved to compel arbitration, but the trial court denied it because the plaintiffs in part sought an injunction, which it characterized as "public injunctive relief." (*4.) Comcast appealed, and the Ninth Circuit reversed, holding former subscribers could not seek prospective relief, and that injunctive relief that only benefits members of an ascertainable class is "private," not "public," relief. (*5.)

***Felisilda v. FCA US LLC*, 53 Cal. App. 5th 486 (2020).** Plaintiffs sued FCA and a local dealer alleging they had bought a defective Jeep. (489.) The dealer moved for arbitration (FCA did not oppose), and the trial court granted the motion. (*Id.*) At that point, the plaintiffs dismissed the dealer, but the arbitrator found in favor of FCA, and the trial court confirmed the decision. (*Id.*) Plaintiffs appealed, arguing that the trial court should not have compelled arbitration when FCA was not a signatory of the arbitration agreement. (*Id.*) After holding that the plaintiffs had not forfeited their argument, the appellate court held that the plaintiffs' arbitration agreement expressly covered claims rising out of ythe condition of the vehicle, and that included third party nonsignatories. (497.)

***Ngo v. BMW of N. Am., LLC*, 2022 WL 109044 (9th Cir. Jan. 12, 2022).** The plaintiff sued BMW, alleging that his new 525i had various defects. (*2.) Plaintiff's retail contract with the dealership had an arbitration clause, and so BMW filed a motion to compel arbitration as a third-party beneficiary of the clause. (*3.) The district court granted the motion, and the plaintiff appealed. (*3.) The Ninth Circuit reversed, holding that BMW was not an intended beneficiary, and the benefits it received from the clause were only "peripheral and indirect." (*4.)

***Abernathy v. DoorDash, Inc.*,** 438 F. Supp. 3d 1062 (N.D. Cal. 2020). Plaintiffs sought to seek arbitration of 5,879 claims under federal and state labor laws. (1064.) DoorDash sought a stay based on a pending class action settlement. (*Id.*) The court granted the motions to compel for 5,010 plaintiffs (and denied for 869 who had not submitted the proper declarations). (1066.) It also denied the motion to stay.

MARKET ACTIONS

***Hadley v. Chrysler Group LLC*, 624 Fed. Appx. 374 (6th Cir. 2015).** Plaintiffs sued Chrysler alleging that they had bought a Jeep with defective airbags and seeking, among other things, injunctive relief. (375.) Chrysler moved to dismiss, arguing that the plaintiffs had no standing because it had acknowledged the defect and offered a repair in a voluntary recall, and it had actually fixed the plaintiff's car under the recall. (*Id.*) The district court granted the motion because the plaintiffs lacked standing and their complaint was moot in light of the recall repair. (376.) Plaintiffs appealed, but the Sixth Circuit affirmed. (380.)

***Winzler v. Toyota Motor Sales, USA, Inc.*, 681 F.3d 1208 (10th Cir. 2012) (Gorsuch, J.).** Plaintiff sued Toyota alleging that it made cars with a defective engine control module that caused stalling without warning. (1209.) The trial court dismissed the complaint, and while the plaintiff was beginning her appeal, Toyota implemented a NHTSA-overseen recall to fix the ECM. (*Id.*) When plaintiff appealed, Toyota asked the Tenth Circuit to dismiss the appeal as moot. (*Id.*) The Tenth Circuit agreed: "Ms. Winzler's case contains all these traditional ingredients of a prudentially moot case. … By filing documents with NTSA notifying it of a defect, Toyota set into motion the great grinding gears of a statutorily mandated and administratively overseen national recall process." (1211.)

***In re Toyota Motor Hybrid Brake Mktg., Sales Practices & Prods. Liab. Litig.*, 288 F.R.D. 445 (C.D. Cal. 2013).** Plaintiffs sued Toyota alleging they overpaid for cars with a defect in the anti-lock braking system (ABS) that caused it to improperly engage. (446.) When Toyota had first discovered the issue, it had "initiated a voluntary safety recall of the Class Vehicles to facilitate a software update to the vehicles' ABS intended to address the inconsistent brake feel." (447.) The trial court denied certification on predominance grounds: "Most problematic for Plaintiffs is that they seek to certify a class in which the substantial majority of class members never suffered an actual injury that was caused by a manifest defect in the ABS. Toyota presented substantial evidence that the updated software installed in the Class Vehicles as part of the national recall rectified any actual or perceived problem with the braking performance of the ABS." (449.)

***Martin v. Ford Motor Co.*, 292 F.R.D. 252 (E.D. Pa. 2013).** Plaintiffs sued Ford alleging that it had manufactured minivans with defective rear axles. (255.) The same month plaintiffs filed their class action, NHTSA began an investigation that resulted in a voluntary recall of minivans in 21 states. (*Id.*) Ford opposed certification in part by arguing that a class action would not be superior to the preexisting recall. (284.) The court agreed, and denied certification. (*Id.*)

***In re ConAgra Peanut Butter Litig.*, 251 F.R.D. 689 (N.D. Ga. 2008).** Plaintiffs sued ConAgra for distributing peanut butter tainted by salmonella. (691.) ConAgra opposed certification in part because it had already issued a refund, whether the peanut butter was consumed or not. (699.) The court agreed, dismissing plaintiffs' assertions that the program was inadequate by observing "that the public was notified of the program immediately after its inception. And, as the Defendant notes, the program is ongoing." (701.)

***In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748 (7th Cir. 2011)**. Plaintiffs sued Aqua Dots alleging that its product looked like candy, and put children into comas when they swallowed it. (749-50.) Aqua Dots opposed certification, arguing a class action was not superior because it had already implemented a recall. (751.) The trial court agreed and denied the motion. (*Id.*) On appeal, the Seventh Circuit held that the trial court should not have denied the motion on superiority grounds, because Rule 23(b)(3) requires courts to consider other methods of "adjudication," and a recall is not adjudicated. (752.) But it upheld the denial on the grounds that any plaintiff "who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on offer is not adequately pursuing class members' interests." (*Id.*)

***Elkins v. Am. Honda Motor Co., Inc.*, 2020 WL 4882412 (C.D. Cal. Jul. 20, 2020).** Plaintiffs filed a class action against Honda alleging it manufactured certain vehicles with a defective air conditioning system. (*1.) While Honda had a warranty program, plaintiffs alleged its warranty repair was not sufficient. (*2.) That said, when Honda moved to dismiss, most plaintiffs' cars were functioning without problems. (*Id.*) Honda argued that, because plaintiffs had not suffered any malfunctions post-warranty repair—and some had not gotten the repair—their claims were not ripe. (*4.) The court agreed and dismissed the complaint. (*6.)

***Strama v. Toyota Motor Sales U.S.A., Inc.*, 2016 WL 561936 (N.D. Ill. Feb. 12, 2016).** Plaintiffs filed a class action against Toyota alleging its RAV4s consumed excess oil. (*1.) Toyota moved to dismiss for lack of subject matter jurisdiction, because it had implemented a warranty enhancement program, and plaintiffs' allegations the program was not sufficient were not ripe until they tried the program. (*2.) The court agreed and dismissed the complaint. (*4.)

***Edwards v. Ford Motor Co.*, 727 Fed. Appx. 233 (9th Cir. 2018).** Plaintiff filed a class action against Ford alleging that certain cars had defective braking systems. (233.) The class action was followed by a customer satisfaction program. (234.) Plaintiff moved for fees as a "catalyst" for the program, and the trial court agreed. (*Id.*) On appeal, the Ninth Circuit affirmed the fee, holding that the trial court had not abused its discretion in believing plaintiff's assertions over a timeline Ford offered. (235.) It declined, however, to employ a multiplier. (236.)

***MacDonald v. Ford Motor Co.*, 2016 WL 3055643 (N.D. Cal. May 31, 2016).** Plaintiffs filed a class action against Ford alleging it had manufactured cars with a defective coolant system. (*1.) A year into the litigation, Ford issued a NHTSA-supervised safety recall addressing coolant pump failures. (*Id.*) While the recall rendered the case moot, plaintiffs argued they were entitled to fees as a "catalyst" for the recall. (*Id.*) The court agreed, awarding $843,433.50 in fees. (*11.)

***Gordon v. Tootsie Roll Indus., Inc.*, 810 Fed. Appx. 495 (9th Cir. 2020).** Plaintiff filed a "slack fill" class action against Tootsie Roll, alleging that it had left too much empty space in boxes of Junior Mints and Sugar Babies. (496.) Tootsie Roll changes its boxes to add a piece count and clarify that the candy was sold by weight, not volume. (496-97.) Plaintiff dismissed her case as moot and sought attorneys' fees for acting as a "catalyst" for the changes. (496.) The trial court denied the motion for fees, and the Ninth Circuit affirmed because plaintiff sought damages, not a labeling change. (497.)

FRAUD & EQUITABLE CLAIMS

***Becerra v. Dr. Pepper/Seven Up, Inc.*, 945 F.3d 1225 (9th Cir. 2019).** Plaintiff sued Dr. Pepper alleging it misled consumers when labeling Diet Dr. Pepper as "diet." (1227.) The trial court dismissed the complaint with prejudice, and the Ninth Circuit affirmed on appeal. (*Id.*) It held that "no reasonable consumer would believe that the word 'diet' in a soft drink's brand name promises weight loss or healthy weight management …" (*Id.*)

***In re Ford Motor Co. DPS6 Powershift Transmission Prods. Liab. Litig.*, 483 F. Supp. 3d 838 (C.D. Cal. 2020).** Plaintiff filed a Lemon Law suit against Ford for manufacturing a defective transmission. (841.) Ford moved for judgment on the pleadings on the fraud claims, arguing (in part) that plaintiff had not pled fraudulent omission with particularity. (846.) The court agreed

that simply calling the transmission defective and describing symptoms did not adequately allege an omission from any specific disclosure, and dismissed the claim. (847.)

***Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992 (N.D. Cal. 2012).** Plaintiff sued Symantec alleging that its upgrades of its antivirus software were deceptively sold. (996.) Symantec moved to dismiss her fraudulent omission claims as inadequately pled. The court agreed: "In this case, to plead the circumstances of omission with specificity, plaintiff must describe the content of the omission and where the omission should or could have been revealed, as well as provide representative advertisements, offers, or other representations that plaintiff relied on to make her purchase and that failed to include the allegedly omitted information." (1002.)

***Banh v. Am. Honda Co., Inc.*, 2019 WL 8683361 (C.D. Cal. Dec. 17, 2019)**. Plaintiffs sued Honda alleging that its infotainment systems were defective. (*1.) Honda moved to dismiss plaintiffs' fraudulent omission and concealment claims as inadequately pled. (*6.) The court denied the motion. (*8.)

***Williams v. Tesla, Inc.*, 2021 WL 2531177 (N.D. Cal. Jun. 21, 2021).** Plaintiffs sued Tesla alleging that it manufactured vehicles with defective suspensions. (*1.) Tesla moved to dismiss, arguing that plaintiffs' fraud-based claims did not meet Rule 9(b)'s pleading standards. (*6.) Citing Marolda, the court agreed and dismissed the claims. (*7.)

***Goldstein v. Gen. Motors Corp.*, 445 F. Supp. 3d 1000 (S.D. Cal. 2020).** Plaintiffs sued GM alleging that it had manufactured vehicles with defective touch screen displays. (1007.) GM moved to dismiss based on Rule 9(b). The court agreed, quoting *Marolda,* and dismissed the fraudulent omission claims. (1019.)

***Buckley v. BMW N. Am., LLC*, 2020 WL 3802905 (C.D. Cal. Mar. 9, 2020).** Plaintiff sued BMW alleging that it had fraudulently sold him two cars that contained multiple defects. (*1.) After multiple amendments, BMW moved to dismiss a final time because plaintiff still had not met the requirements of Rule 9(b). The court agreed, noting that by not identifying the parties who had spoken on a sales call or the advertisements he had seen "Plaintiff fails to provide sufficient factual allegations, that are within his knowledge, that would allow BMW NA to prepare an adequate answer." (*11.)

***Heber v. Toyota Motor Sales USA, Inc.*, 823 Fed. Appx. 512 (9th Cir. 2020).** Plaintiffs sued Toyota alleging that it had manufactured vehicles with a soy-based wiring that attracted rats. (514.) Toyota moved to dismiss the fraud claims as not adequately pled under Rule 9(b); the trial court granted the motion. (514.) On appeal, the Ninth Circuit affirmed: "Appellants merely state in conclusory fashion that Toyota fraudulently failed to disclose the alleged defect. … We are left to wonder who at Toyota was aware of the alleged defect and why Toyota did not disclose it." (515.)

***Sonner v. Premium Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020).** Plaintiff filed a class action against Premier alleging that it had deceptively marketed its Joint Juice as a dietary supplement. (838.) Plaintiff originally sought damages under the CLRA, but right before trial she amended her complaint to drop the damages claim, presumably to force a bench trial instead of a jury trial. (*Id.*) Premier opposed the motion for leave to amend as futile, arguing that plaintiff could

not seek equitable relief because she had not alleged the unavailability of legal relief. (*Id.*) The trial court agreed, and dismissed the complaint. (*Id.*) On appeal, the Ninth Circuit held that it must apply "traditional equitable principles," which required plaintiff to "establish that she lacks an adequate remedy at law" before securing equitable relief. (843-44.)

***Moore v. Mars Petcare US Inc.*, 966 F.3d 1007 (9th Cir. 2020).** Plaintiffs sued pet-food companies alleging their strategy of requiring a prescription for its food was deceptive. (1013.) After the trial court dismissed their complaints, they appealed. (*Id.*) The Ninth Circuit reversed, holding that plaintiffs had adequately alleged fraud under the "reasonable consumer" test. (1020.)

***Nacarino v. Chobani, Inc.*, 2021 WL 3487117 (N.D. Cal. Aug. 9, 2021).** Plaintiff sued Chobani alleging its "vanilla" yogurt packaging "falsely represents that the yogurt's vanilla flavoring comes exclusively from the vanilla plant." (*1.) The court dismissed the complaint because it did not "state a deceptive labeling claim as a matter of law. While a reasonable consumer might believe that the Product contains some vanilla extract, Ms. Nacarino's more extreme claim—that such a consumer would believe that the Product's vanilla flavor derives *entirely* from the vanilla plant—is implausible under the facts presented here." (*5 (emphasis in orginal).)

***Hazdovac v. Mercedes-Benz USA*, 2020 WL 12044146 (N.D. Cal. Sep. 16, 2020)**. Plaintiff filed a class action against Mercedes , alleging that it had lied to California regulators, requiring her to buy "high-priced" and "emissions-related" parts that should have been covered under warranty. (*1.) Following *Moore,* the court dismissed Mercedes's motion to dismiss because plaintiff had adequately alleged fraudulent conduct under the "reasonable consumer test." (*5.)

***In re Coca-Cola Prods. Mktg.*, 2021 WL 38708654 (9th Cir. Aug. 31, 2021).** Plaintiffs sued Coca-Cola for allegedly mislabeling its flagship product. (*1.) The trial court certified a class, and Coca-Cola appealed. The Ninth Circuit held that plaintiffs lacked standing to seek an injunction to modify the label, because none of them "alleged a desire to purchase Coke *as advertised*." (*2 (emphasis in original).) Instead, "each stated that if Coke were properly labeled, they would consider purchasing it." (*Id.*) The Ninth Circuit held this did not establish standing for an injunction because "the imminent injury requirement is not met by alleging that the plaintiffs would *consider* purchasing Coke." (*Id* (emphasis in original).)

***Cal. Chamber of Commerce v. Becerra*, 2021 WL 1193829 (E.D. Cal. Mar. 30, 2021).** The Chamber sued California's Attorney General alleging that statutorily-required toxicity warnings violated the First Amendment. (1103.) The Chamber sought a preliminary injunction, prompted in part by the rise in private enforcement actions. (1122.) The court granted the injunction. (1123.)

EXPERT EVIDENCE

***Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813 (7th Cir. 2010) (per curiam).** Plaintiffs filed a class action against Honda alleging that it manufactured motorcycles with an alleged steering defect. (814.) Their motion for certification relied on an expert using a novel "wobble decay standard" for steering assemblies. (*Id.*) Honda moved to strike the testimony as unreliable. (*Id.*) While the trial court agreed it could decide the admissibility of the expert report before certification, and expressed concerns about the testimony's reliability, it declined to exclude it "in its entirety," and certified the class. (814-15.) The Seventh Circuit vacated the certification:

"We hold that when an expert's report or testimony is critical to class certification, as it is here, a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. That is, the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants." (815-16.)

***Prantil v. Arkema, Inc.*, 986 F.3d 570 (5th Cir. 2021).** Plaintiffs filed a class action against the owner of a chemical facility in Texas for damages resulting from a leak during Hurricane Harvey. (573.) In their motion for certification, the plaintiffs submitted an expert to testify that damages were susceptible to classwide proof. (*Id.*) The trial court certified a class. (*Id.*) The Fifth Circuit held that "the *Daubert* hurdle must be cleared when scientific evidence is relevant to the decision to certify," and "an assessment of the reliability of Plaintiff's scientific evidence for certification cannot be deferred." (575-76.) It reversed the certification in part because "[i]n its certification order, the district court was not as searching in its assessment of the expert reports' reliability as it would have been outside the certification setting." (576.)

***In re Blood Reagents Antitrust Litig.*, 783 F.3d 183 (3d Cir. 2015).** Plaintiffs filed an antitrust class action against two companies selling blood reagents (used to test blood donation compatibility), alleging they had fixed prices. (185.) In their motion for class certification, plaintiffs offered expert testimony to support a classwide damages model. (186.) The trial court admitted the evidence over the defendants' objection and certified a class. (185.) On appeal, the Third Circuit reversed the certification: "We join certain of our sister courts to hold that a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*." (187.)

***Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452 (6th Cir. 2020)**. Plaintiffs filed a class action against State Farm alleging that it did improperly withheld labor depreciation from payments due under its policies. (455.) As part of their motion for certification, plaintiffs offered expert evidence that damages could be proved with classwide proof. (465.) State Farm challenged the evidence, but the trial court declined to hear the motion to strike before certifying the class. (*Id.*) On appeal, the Sixth Circuit affirmed the trial court, holding that it was not an abuse of discretion to decide certification without deciding the admissibility of expert testimony. (466.)

***Cox v. Zurn Pex, Inc.*, 644 F.3d 604 (8th Cir. 2011).** Plaintiffs filed a class action alleging the defendants sold plumbing systems with inherently defective brass fittings. (608.) In their certification motion, the plaintiffs submitted several expert reports. (*Id.*) Defendants moved to strike the reports, but the trial court denied the motions and certified the class. (*Id.*) The Eighth Circuit affirmed, holding that the trial court did not abuse its discretion in conducting a "focused" Rule 702 inquiry, because class certification is an "inherently tentative" procedure that does not require the same level of admissible evidence. (613.)

***Sali v. Corona Reg'l Med. Ctr.*, 889 F.3d 623 (9th Cir. 2018).** Plaintiffs filed an employment class action alleging several hospitals underpaid them as a result of certain policies. (1000.) In their motion for certification, they submitted a declaration by a paralegal at class counsel's firm that the plaintiffs' shift time had been systematically undercounted. (1003.) Defendants moved to strike the declaration; the trial court granted the motion because the declaration should have

been written by an expert witness. (*Id.*) It denied certification because the plaintiffs had not offered admissible evidence that they were typical or adequate class representatives, or that common issues would predominate. (1002.) The Ninth Circuit reversed, holding that the class certification inquiry was too preliminary to require admissible evidence. (1004.) "Inadmissibility alone is not a proper basis to reject evidence submitted in support of class certification." (*Id.*)

***Grodzitsky v. Am. Honda Motor Co.*, 957 F.3d 979 (9th Cir. 2020)**. Plaintiff filed a class action against Honda alleging that it had manufactured cars with a defective window regulator. (981.) In her class certification motion, plaintiff offered expert testimony from an engineer. (982.) At deposition, Honda elicited testimony from the expert that, but for the alleged defect, the window regulator should "work the same way it worked when it was brand new." (*Id.*) Honda moved to strike the expert's testimony as unreliable, and the trial court granted the motion. (983.) Without the expert testimony, the court denied certification. (984.) Plaintiff appealed under Rule 23(f). (*Id.*) The Ninth Circuit affirmed, ruling that the exclusion of the expert was not an abuse of discretion. (987.)

***Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods*, 993 F.3d 774 (9th Cir. 2021), *vacated for en banc review*, 5 F.4th 950 (9th Cir. 2021)**. Plaintiffs sued packaged tuna producers, alleging that they had conspired to fix prices. (782.) As part of their motion for class certification, plaintiffs offered expert testimony that their damages could be satisfied with classwide proof. (783.) Over defendants' objections, the district court found the testimony sufficiently reliable and certified the class. ((783-84.) Defendants appealed under Rule 23(f). (784.) On appeal, a panel of the Ninth Circuit reversed the certification holding that plaintiffs had not met their burden of proof at class certification because a number of factual disputes remained unresolved. (794.) Among those disputes was whether plaintiffs' proposed expert testimony that the proposed class contained only a *de minimis* number of uninjured plaintiffs was correct. (793.) **This ruling has been vacated pending *en banc* review.**

NO INJURY CLASS ACTIONS

***TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021).** Plaintiff sued in a class action TransUnion for falsely reporting his name as a "potential match" to a list of potential terrorists maintained by a government agency, resulting in a particularly humiliating denial of credit. (2201.) After a trial resulted in a plaintiff's verdict, TransUnion appealed arguing that a large portion of the class lacked standing because while there may have been a statutory violation, their potential matches had never been reported to anyone. (2202.) The Supreme Court found the class members lacked standing: "Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III." (2205.)

***Siqueiros v. Gen. Motors LLC*, 2021 WL 4061708 (N.D. Cal. Sep. 7, 2021).** Plaintiffs alleged that General Motors had sold them defective car engines that excessively consumed oil. (*1.) The trial court certified four statewide classes under state law. (*3.) General Motors filed a motion to decertify given the Supreme Court's opinion in *TransUnion*. (*1.) The trial court denied decertification because each class member had allegedly overpaid for their vehicle at the time

they bought it, and "monetary injuries are sufficiently tangible and concrete under Article III" to establish standing, even if many engines had not malfunctioned. (*4.)

***Earl v. Boeing Co.*, 2021 WL 4034514 (E.D. Tex. Sep. 3, 2021).** Plaintiffs filed a class action against Southwest and Boeing arguing that they had overpaid for tickets on Southwest routes because those routes occasionally used allegedly defective 737 MAX planes. (*4.) Defendants opposed certification on various grounds including predominance, arguing that many class members had not flown on MAX aircraft, and many had not paid for their own tickets. (*10-11.) The court certified the class nonetheless. *NOTE: The Fifth Circuit has granted Rule 23(f) review to examine certification.*

SETTLEMENTS

***Chambers v. Whirlpool Corp.*, 980 F.3d 645 (9th Cir. 2020).** Whirlpool appealed the award of attorneys' fees of $14.8 million in a class action settlement that it valued at $4.2 million, but plaintiffs' counsel had represented was worth $116.7 million. (654.) The Ninth Circuit held that the settlement—which comprised primarily claims for rebates rather than cash reimbursement—was a coupon settlement under CAFA. (659-60.) It vacated and remanded the fee award. (672.)

***Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir. 2020).** In reviewing a TCPA class settlement, the Eleventh Circuit held that incentive awards to class members were akin to a salary or bounty, and therefore prohibited under *Trustees v. Greenough,* 105 U.S. 527 (1882). (1258-59.)

Shane Grp. Inc. v. Blue Cross Blue Shield of Mich., 833 Fed. Appx. 430 (6th Cir. 2021). Eleventh Circuit affirmed approval of a settlement that had been resubmitted after the original settlement relied too heavily on sealed filings. (430.)

***Briseno v. Henderson,* 998 F.3d 1014 (9th Cir. 2021).** Plaintiffs sued ConAgra Foods alleging that it had mislabeled its cooking oil as "100% natural" because it contained ingredients from genetically-modified organisms (GMOs). (1019.) After extensive litigation, the parties settled the case. The trial court approved the settlement based on representations that it was worth more than $100 million, and awarded $6.85 million in fees. (1020.) In fact, the settlement resulted in only about $1 million paid out to roughly half a percent of the class. (*Id.*) A law professor from the University of Chicago objected, arguing that the attorneys "hoarded 88% of the class's actual recovery." (*Id.*) The trial court overruled the objection, and the objector appealed. (1022.) The Ninth Circuit reversed, characterizing the case as "**How to Lose a Class Action Settlement in 10 Ways**." (1018.) It held that the trial court had erred by not scrutinizing the fee arrangement as required by the newly amended Rule 23(e)(2) (1024-25), that the settlement had "all the hallmarks of a potentially collusive settlement" (1025), and that the court did not properly estimate the value of the injunctive relief. (1028.)