For The Defense™

dri
The magazine for defense, insurance and corporate counsel

January 2025

Product Liability

Including . . .

Lingering Circuit Splits Every Class Action Practitioner Should Have on the Radar

Ask the Expert: A Rules-Based Approach to Deposing Expert Witnesses

And More!

THE CENTER

Lingering Circuit Splits Every Class Action Practitioner Should Have on the Radar

By Michael R. Pennington, Thomas Richie, and Zac Madonia

The Supreme Court of the United States has shown less interest in tackling class action issues over the last couple of terms than did in the preceding few years. But that does not mean that important class action splits are not out there for astute class action defense lawyers to be litigating and preserving. Once the Court is less occupied with presidential politics, conflicts between the executive and legislative branches, and presidential immunity than it is currently forced to be, attention is likely to return to class action issues that have divided the lower courts for years but remain unresolved.

Ascertainability

For example, the issue of ascertainability continues to have lower courts singing from inconsistent sheet music, even though Rule 23 reads exactly the same for all of them. Rule 23 does not contain any express mention of ascertainability, but it has long been acknowledged by almost all courts that you cannot reasonably certify a class unless you can at some point in the litigation determine who is in it. What the courts cannot agree on is when in the process that must happen, how it can be done, and how manageable or objective the process must be.

The most extreme examples of classes with ascertainability problems are so-called "failsafe" classes—classes defined, more or less explicitly, as those to whom the defendant is liable, or in other words, a class definition for which membership can only be ascertained through "a determination of the merits of the case." For example, a class defined as "all those who were defrauded by Defendant" would be a failsafe class. The fraud would have to be proven at the individual level on the merits—those for whom the fraud could be proven would be in the class, and those for whom it could not never were. This creates a "heads I win, tails you lose" problem for the defendant: even if certification is granted and the defendant proves no fraud was committed against anyone, there would be no res judicata effect as to the class because, by definition, no one was ever in it. For these reasons and others, almost all courts agree that failsafe classes are improper under Rule 23. *See, e.g., In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 (1st Cir. 2015) (endorsing a rule against fail-safe classes); *Byrd v. Aaron's Inc.*, 784 F.3d 154, 167 (3d Cir. 2015) (same); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 360, n.9 (4th Cir. 2014) (instructing district court to consider anti-failsafe rule on remand); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012) (endorsing rule against failsafe classes, but rejecting defendant's proposed application); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (recognizing failsafe problem, but noting it can and often should be resolved by refining class definition, not denying

Michael R. Pennington, Thomas Richie, and **Zac Madonia** are partners in Bradley's Birmingham, Alabama, office. Mike is the immediate past chair of the DRI Center for Law and Public Policy's Class Action Task Force, dedicated to class action reform, and also served as chair of the DRI Commercial Litigation Committee's Class Action SLG, dedicated to honing the skills of class action defense practitioners across the country. Thomas represents clients in procedurally complex civil litigation, both in trial and appellate courts throughout Alabama and across the country. He has litigated a broad range of cases, from class actions to municipal tax disputes to the Chapter 9 bankruptcy case of Jefferson County, Alabama. Zac is a litigator who primarily practices in the areas of class action defense and complex commercial litigation. He represents corporate clients from a diverse range of industries facing class and mass actions in federal and state courts across the country. Zac currently chairs the Center's Class Action Task Force.

certification); *Orduno v. Pietrzak*, ***932 F.3d 710, 716–17*** (8th Cir. 2019) (endorsing rule against failsafe classes as independent bar to class certification); *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 n.7 (9th Cir. 2016) (recognizing failsafe problem as other side of coin to over-inclusiveness in class definition); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019) (same).

But even as to failsafe classes, some courts disagree that they are inherently uncertifiable. The Fifth Circuit refused to go there in *In re Rodriguez*, 695 F.3d 360, 369–70 (5th Cir. 2012). More recently, the D.C. Circuit refused to adopt a bright-line rule against failsafe classes. *In re White*, 64 F. 4th 302 (D.C. Cir. 2023). Similar petitions in the future might well get more attention.

Ascertainability can still be an issue even when the class definition is not "failsafe." If there are no written records from which membership in the class can easily be determined according to objective criteria, ascertainability is likely to be an issue. If the class is "everyone who bought a Yugo in the United States," membership in that class is likely easily and objectively ascertainable from motor vehicle registration records. If the class is "everyone in the United States who used, drank, or came into contact with water from the River Styx after January 1, 2023," there are no records to identify large chunks of that class, and ascertainability is going to be an issue. But after years of wrangling with the issue, the circuits still have substantial disagreement about just how ascertainable a class must be at the certification stage.

Plaintiffs often posit that class members can solve ascertainability problems by simply self-identifying through affidavits or individual submissions at some later stage of the proceeding. Some courts, like the Third Circuit, have disagreed. *See Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir. 2012) ("Forcing BMW and Bridgestone to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications."). The Third Circuit recently reiterated its view that Rule 23 demands an objective, administratively feasible, and manageable way of identifying the class as an implicit requirement for class certification. *In re Niaspan Antitrust Litig.*, 67 F.4th 118, 133–34 (3d Cir. 2023). Similarly robust objective ascertainability requirements are endorsed by the First and Fourth Circuits. *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014).

At the other end of the spectrum, the Ninth Circuit rejects the notion that ascertainability is a requirement for class certification at all, much less objective and administratively feasible ascertainability. *Briseno v. ConAgra Foods, Inc.*, ***844 F.3d 1121, 1132–33*** (9th Cir. 2017). In between, the Second, Sixth, Seventh, Eighth, and Eleventh Circuits do not reject the ascertainability requirement itself but reject any strict requirement of administrative feasibility. *In re Petrobras Sec.*, ***862 F.3d 250, 267*** (2d Cir. 2017); *Rikos v. Procter & Gamble Co.*, ***799 F.3d 497, 525*** (6th Cir. 2015); *Mullins v. Direct Digit., LLC*, ***795 F.3d 654,***

662 (7th Cir. 2015); *Sandusky Wellness Ctr.*, 821 F.3d 992,995–96 (8th Cir. 2016); *Cherry v Dometic Corp.*, 986 F.3d 1296, 1304 (11th Cir. 2021); *see also Seeligson v. Devon Energy Prod. Co.*, 761 F. App'x 329, 334 (5th Cir. 2019).

Clearly, this is a split long overdue for resolution. One would think the drafters of the Federal Rules would take the issue on, since in theory the same federal rules are supposed to actually unify federal practice across the country, not serve as a vehicle for experiments by independent labs in every federal district and circuit. Failing the drafters seeing that light, presumably SCOTUS will step in to the breach one day. Preserving the issue for appeal is warranted even in the jurisdictions that reject administrative feasibility. After all, how can you fairly judge numerosity, commonality, adequacy, typicality, predominance, and superiority if you don't even know who is in the class or how or when that will be knowable? How are the efficiencies of class litigation achieved if individualized evidence is needed to establish class membership anyway?

Bristol–Meyers Squibb and Personal Jurisdiction over the Claims of Absent Class Members

Another issue that has divided the lower courts is whether a court must have personal jurisdiction over a defendant as to the claims of each and every putative class member, not just the lead plaintiffs. This issue has come to the forefront following *Bristol-Myers Squibb v. Superior Court of California*, 582 U.S. 255, 137 S. Ct. 1773 (2017) (*"BMS"*), where SCOTUS held that courts must have personal jurisdiction over defendants as to the claims of each and every plaintiff in a consolidated action involving roughly 700 different plaintiffs alleging harm from the antiplatelet drug Plavix. *BMS* was a mass action not a class action, and, as Justice Sotomayor noted, it did not address whether a court needed personal jurisdiction as to the claims of absent class members. But *BMS's* logic certainly seemed like it could apply to class actions. After all, the personal jurisdiction requirement is a substantive right anchored in the Due Process Clause of the U.S. Constitution, and the procedural rules allowing for class actions are not supposed to alter parties' substantive rights.

In the immediate aftermath of *BMS*, class action defendants raised personal jurisdiction challenges to the claims of absent class members early and often. Results were decidedly mixed. Some federal district courts concluded that *BMS* applied to class actions for the precise reason articulated above: Rule 23's procedural mechanisms cannot supplant a defendant's substantive Due Process rights. *See, e.g., In re Dental Supplies Antitrust Litig.*, 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 2017) ("The constitutional requirements of due process does not wax and wane when the complaint is individual or on behalf of a class. Personal jurisdiction in class actions must comport with due process just the same as any other case."); *Maclin v. Reliable Reports of Texas, Inc.*, 2018 WL 1468821 (N.D. Ohio Mar. 26, 2018) ("[T]he Court cannot envisage that the Fifth Amendment Due Process Clause would have any more or less effect on the outcome respecting FLSA claims than the Fourteenth Amendment Due Process Clause, and this district court will not limit the holding in *BMS* to mass tort claims or state courts."); *Chavez v. Church & Dwight Co*,2018 WL 2238191 (N.D. Ill. May 16, 2018) (due process concerns "suggest that it seeks to bar nationwide class actions in forums where the defendant is not subject to general jurisdiction").[1]

Other courts, however, reached the opposite result, cabining *BMS* to mass actions, and distinguishing mass actions, where each plaintiff is named as an individual party and, therefore, is a "real party in interest," from class actions, where, according to these courts, only the lead plaintiffs are real parties in interest. *See, e.g., Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, No. 17-CV-00564 NC, 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017) ("Yet the Supreme Court did not extend its reasoning to bar the nonresident plaintiffs' claims here, and *Bristol-Myers* is meaningfully distinguishable based on that case concerning a mass tort action, in which each plaintiff was a named plaintiff"); *Sloan v. General Motors LLC*, 287 F. Supp.3d 840 (N.D. Cal. Feb. 7, 2018).

In the immediate aftermath of *BMS*, class action defendants raised personal jurisdiction challenges to the claims of absent class members early and often.

Meanwhile, still other courts punted on the issue, denying precertification BMS personal jurisdiction challenges, but reserving the question until class certification. For example, in *Chernus v. Logitech, Inc.*, No.: 17-673(FLW), 2018 WL 1981481 (D.N.J. April 27, 2018), the court recognized division in district court opinions regarding *BMS*, found the balance weighing against applying it in the class context, then stated "no class has been certified, and

1 *See also, e.g., Roy v. FedEx Ground Package Sys., Inc.*, 2018 WL 2324092, at *9 (D. Mass. May 22, 2018) (rejecting argument that *BMS* should be limited to cases originally filed in state court but finding the exercise of jurisdiction appropriate on the facts of the case); *In re Nexus 6P Prods. Litig.*, 2018 WL 827958 at *5–6 (N.D. Cal. Feb. 12, 2018) (requiring plaintiffs to re-plead complaint to attempt to allege jurisdiction in a manner consistent with *BMS*); *McDonnell v. Nature's Way Prods., LLC*, 2017 WL 4864910 at *4–5 (N.D. Ill. Oct. 26, 2017) (dismissing claims "brought on behalf of non-Illinois residents or for violations of Florida, Michigan, Minnesota, Missouri, New Jersey, New York, and Washington law without prejudice"); *Wenokur v. AXA Equitable Life Ins. Co.*, 2017 WL 4357916 at *4 n.4 (D. Ariz. Oct. 2, 2017) ("The Court also notes that it lacks personal jurisdiction over the claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class."); *Leppertv. Champion PetfoodsUSA Inc.*, 2019 WL 216616, at *4 (N.D. Ill. Jan. 16, 2019); *Plumber's Local Union No. 690 Health Plan v. Apotex Corp.*, 2017 WL 3129147, at *9 (E.D. Pa. July 24, 2017) (dismissing non-Pennsylvania claims for certain defendants); *Spratley v. FCA US LLC*, 2017 WL 4023348, at *7–8 (N.D.N.Y. Sept. 12, 2017) (dismissing claims of out-of-state plaintiffs who had "shown no connection between their claims and Chrysler's contacts with New York").

therefore, to determine whether this Court has specific jurisdiction over Defendant with respect to the claims of the unnamed class members prior to class certification would put the proverbial cart before the horse."

So far, no appellate court has yet found that *BMS* applies to class actions—at least outside of the FLSA collective action context.[2] The Third, Seventh, and Sixth Circuits have held that *BMS* does not apply to class actions, concluding that "the named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so." *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020) (Barrett, J.); *Lyngaas v. Curaden AG*, 992 F.3d 412 (6th Cir. 2021); *Fischer v. Federal Express*, 42 F.4th 366 (3d Cir. 2022). In *Lyngaas*, Judge Thapar authored a notable dissent, forcefully arguing that the constitutional limit of "minimum contacts" could not be abrogated by class action procedure, and that courts must have "personal jurisdiction over all parties for each claim—including the claims of absent class members."

Meanwhile, the D.C., Fifth, and Ninth Circuits all chose to punt on the specific issue of whether *BMS* applied in class actions. In *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 299 (D.C. Cir. 2020), the D.C. Circuit affirmed the denial of a motion to dismiss the claims of absent class members for lack of jurisdiction on ripeness grounds, concluding that absent class members "become parties to an action—and thus subject to dismissal—only after class certification." *Molock* also involved a notable dissent from Judge Silberman, who would have struck the plaintiff's attempt to represent a nationwide class. In *Cruson v. Jackson National Life Insurance*, 954 F.3d 240 (5th Cir. 2020), the Fifth Circuit reversed certification of a nationwide class action where the district court had refused to consider the defendant's personal jurisdiction defense to the claims of non-Texas absent class members. Like the D.C. Circuit, the Fifth Circuit concluded that the personal jurisdiction defense was not available for absent class members until the class certification stage. But the Fifth Circuit did not tip its hand on the merits of the issue. And in *Moser v. Benefytt, Inc.*, 8 F.4th 872, 877 (9th Cir. 2021), the Ninth Circuit reached a nearly identical result, reversing district court ruling that defendant had waived *BMS* personal jurisdiction challenge to claims of absent class members by failing to raise it in motion to dismiss, but not signaling how it would rule on the underlying issue of *BMS*'s applicability to class actions.

Given that no circuit courts have yet found that *BMS* applies to class actions, there seems to be a general perception that the tide has turned against defendants' efforts to use *BMS* to defeat nationwide class actions. But all it takes is one circuit to reach the opposite conclusion—and we already have two well-reasoned dissents from circuit judges making a compelling case for why *BMS* should apply to class actions. Accordingly, class action defendants should continue to consider raising *BMS* at every possible turn: in a motion to dismiss the complaint, in a motion to strike nationwide class allegations, in an answer, and in opposition to class certification. While the D.C., Fifth, and Ninth Circuits' reasoning that a defendant need not raise a personal jurisdiction defense to the claims of absent class members before the class certification stage seems logically sound, there is always a risk that a court could disagree and find that the failure to raise the personal jurisdiction defense on the first possible occasion constitutes a waiver.

Issue Class Certification Without Meeting the Predominance Requirement

When plaintiffs can't clear the predominance, manageability, and superiority hurdles for Rule 23(b)(3) certification, they often turn to Rule 23(c)(4) for so-called "issue class" certification. The idea is that only the common issues relating to defendant's conduct will be tried on a class basis, leaving questions of individual eligibility for relief and damages for future individualized proceedings. The Machiavellian view is, of course, that the daunting burden and expense promised by all this will force the defendant to settle long before the individual proceedings are necessary.

Given that no circuit courts have yet found that *BMS* applies to class actions, there seems to be a general perception that the tide has turned against defendants' efforts to use *BMS* to defeat nationwide class actions.

But an important split has lingered in relation to this gambit. Must the entire claim still meet the predominance requirement for certification, or do common issues only need to predominate as to the issues to be tried on a class basis? The Fifth and Eleventh Circuits are in the former camp, and the Second, Fourth, Sixth, Seventh, and Ninth Circuits are in the latter camp. *Augustin v. Jablonsky (In re Nassau County Strip Search Cases)*, 461 F.3d 219, 231 (2d Cir. 2006); *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 468 (4th Cir. 2003); *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 417 (6th Cir. 2018); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 492 (7th Cir. 2012); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1235 (9th Cir. 1996). The issue can be dispositive of class certification, because in an issue class effort, the plaintiff can always lop off individual issues until only common issues remain for a class trial, thereby guaranteeing predominance *of what remains*. But is that the predominance that counts? Again, this issue should have been resolved by federal rulemakers long ago. But since it hasn't been, preserving the issue if it arises in your case is a must. Even assuming the

2 The only Circuit courts to have addressed the issue have concluded that *BMS* does apply to FLSA collective actions. *Fischer v. Federal Express*, 42 F.4th 366 (3d Cir. 2022); *Canaday v. Anthem Cos.*, 9 F.4th 392 (6th Cir. 2021); *Vallone v. CJS Sols. Grp., LLC*, 9 F.4th 861 (8th Cir. 2021).

plaintiffs' myopic view of predominance is consistent with the rules, there would remain an issue of whether it is consistent with the constitutional requirements of Due Process.

Class Representative Incentive Awards

In *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2020), the Eleventh Circuit shook up the class settlement world with a holding that century old precedent from the United States Supreme Court meant that class representatives could not receive "service awards" or "incentive awards" separate from the relief shared by all class members, because that would create a conflict of interest with the class they represent. It had been common practice for decades to pay such awards as part of a class settlement.

In the wake of *NPAS*, no other circuit has agreed with the Eleventh Circuit on this. *See, e.g., Scott v. Dart*[3], 99 F. 4th 1076 (7th Cir. 2024); *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85 (2d Cir. 2019); *Murray v. Grocery Delivery E-Services USA, Inc.*, 55 F.4th 340 (1st Cir. 2022); *In re Apple Inc. Device Performance Litigation*, 50 F.4th 769 (9th Cir. 2022); *Fikes Wholesale Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704 (2d Cir. 2023). But until SCOTUS or the rulemakers weigh in, we have one rule in the Eleventh Circuit and another everywhere else. Only class settlement objectors are likely to bring this issue before the Supreme Court—the named parties are always in agreement in the settlement context.

Spokeo, Transunion v. Ramirez, and Standing in Class Actions

Some of the most important recent class action decisions from the Supreme Court have sought to answer two important questions about Article III standing: what injuries confer standing and who has to have standing?

The Supreme Court's decision in *TransUnion LLC v. Ramirez* is the place to start. In keeping with *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), *TransUnion* emphasizes that a plaintiff must show more than a violation of a federal statute to have Article III standing. 594 U.S. 413, 426 (2021). Congress can create causes of action, but it cannot dispense with Article III's requirement that a plaintiff be concretely harmed to have standing. *Id.* at 426–27. Applying this rule to the class action context, *TransUnion* stated that the standing requirement applies to every class member seeking damages, at least at the stage that damages are awarded: "Every class member must have Article III standing in order to recover individual damages." *Id.* at 431. But, the Court noted in a footnote, it did "not here address the distinct question whether every class member must demonstrate standing *before* a court certifies a class." *Id.* at 431 n.4 (italics in original). *TransUnion* sets parameters: a class member must prove standing before the jury renders a verdict, but that class member does not have to prove standing before class certification.

This rule leaves the biggest question open. Does a plaintiff have to prove that each class member has standing at class certification? Before *TransUnion*, many circuits allowed a class to be certified, even if it included class members without standing, as long as at least one named plaintiff had standing and the class did not include so many of unharmed members as to create an individualized proof problem. *See In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 934 F.3d 619, 625 (D.C. Cir. 2019) (suggesting that 5–6 percent as an outer limit for uninjured class members, and affirming denial of class certification when 2,037 class members would require individual determination of injury). *See also Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 958 (4th Cir. 2019) (calling the issue of uninjured class members a "red herring" because "there is simply not a large number of uninjured persons included within the plaintiffs' class.").

So far, circuit courts have read *TransUnion* to leave this Goldilocks-style rule in place. The Third Circuit, for example, cited stare decisis as a reason to interpret *TransUnion* as allowing courts to certify classes with unharmed class members, as long as doing so does not create a Rule 23 problem. *Huber v. Simon's Agency, Inc.*, 84 F.4th 132, 155 (3rd Cir. 2023) (vacating class certification and remanding for further analysis of the facts required to establish standing); *see also Green-Cooper v. Brinker Int'l, Inc.*, 73 F.4th 883, 891 (11th Cir. 2023) (calling the predominance inquiry "especially important in light of *TransUnion*'s… reminder that every class member must have Article III standing in order to recover individual damages.") (cleaned up). The Seventh Circuit cited *TransUnion* and pre-*TransUnion* precedents together without analysis. See *Montoya v. Jeffreys*, 99 F.4th 394, 399 (7th Cir. 2024).

To sum up, in deciding disputed class certification, circuits have declined to apply a bright-line test that requires every class member to have standing as a prerequisite for class certification. Courts may disagree about how much individualized proof is too much, but the circuits have adopted generally similar approaches. But what about when the class is certified because of a settlement? Settlements often involve the payment of money, and *TransUnion* set a money judgment as a point at which a class member must have standing.

On this issue, doctrinal split (though not a circuit split) is emerging between settlements involving damages and settlements limited to injunctive relief. In a decision that has been overruled en banc on other grounds, the Eleventh Circuit required that every member of a settlement damages class have standing. *Drazen v. Pinto*, 41 F.4th 1354, 1361 (11th Cir. 2022), reversed on other grounds 74 F.4th 1336 (11th Cir. 2023) ("[W]hen a class seeks certification for the sole purpose of a damages settlement under Rule 23(e), the class definition must be limited to those individuals who have Article III standing."). It reasoned that "[i]f every plaintiff within the class definition in the class action in *TransUnion* had to have Article III standing to recover damages after trial, logically so too must be the case with a court-approved class action settlement." *Id.* In an unpublished opinion, the Ninth Circuit has agreed with this approach as to settlements of damages classes. *Harvey v. Morgan Stanley Smith Barney LLC*, 2022 WL 3359174 at *3 (9th Cir. Aug. 15, 2022).

At least when equitable or injunctive relief is at issue, different results are possible. Even though the Ninth Circuit used to require that every member of a settlement

3 *Read the full amicus brief filed by the Center.*

class have standing (regardless of the relief sought), the court overruled that requirement in equitable and injunctive relief cases. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 682 n.32 (9th Cir. 2022). And the Second Circuit affirmed a settlement that included injunctive relief relating to student loan borrowers, some of whom no longer had loans serviced by the defendant. *Hyland v. Navient Corp.*, 48 F.4th 110, 118–19 (2d Cir. 2022). The court concluded that, at least for indivisible injunctive relief classes, one representative with standing was enough. *Id.* at 118.

We close with a recent Fifth Circuit opinion that sets out the state of the law what it views as an emerging circuit split on the extent to which differences in the plaintiff's injury and the class's injury implicates standing. In *Chavez v. Plan Benefit Services, Inc.*, 108 F.4th 297 (5th Cir 2024), the Fifth Circuit discussed two approaches to addressing differences between a plaintiff's injury and the class's injury. It called these approaches the "class certification approach" and the "standing approach." The class certification approach views these plaintiff/class differences as issues to be handled through the Rule 23(a) and (b) factors. *Chavez*, 108 F.4th at 308–09. From an Article III standpoint, the class certification approach says that any plaintiff with a sufficient injury has standing and differences between injuries may (or may not) affect whether a class can be certified. *Id.* The First, Third, Sixth, and Ninth Circuits follow this approach. *In re Asacol Antitrust Litig.*, 907 F.3d 42, 49 (1st Cir. 2018); *Boley v. Universal Health Servs., Inc.*, 36 F.4th 124, 133 (3d Cir. 2022); *Fallick v. Nationwide Mut. Ins. Co.*, 162 F4th 410, 424 (6th Cir. 1998); *B.K. v. Snyder*, 922 F.3d 957, 967 (9th Cir. 2019). In contrast, the standing approach concludes that differences between the injury of the class representative and class members implicate the court's subject matter jurisdiction because "a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Chavez*, 108 F.4th at 309 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982)). Circuits applying this test include the Second and Eleventh. *Barrows v. Becerra*, 24 F.4th 116, 129 (2d Cir. 2022); *Fox v. Ritz-Carlton Hotel Co., LLC*, 977 F.3d 1039, 1046 (11th Cir. 2020). While the Seventh Circuit has not aligned itself with either test, it has held that a plaintiff cannot "piggyback" on the injuries of class members to obtain broader standing. *Marion Diagnostic Center, LLC v. Becton Dickinson & Co.*, 29 F.4th 337, 346–47 (7th Cir. 2022). After discussing the circuit split at length, the Fifth Circuit elected not to pick a side; the *Chavez* decision applies both approaches and finds that, based on the facts of that case, both approaches yielded the same result. *Chavez*, 108 F.4th at 308.

Conclusion

Preserving issues relating to circuit splits is an important part of class action defense. An appeal that threatens to resolve one of these splits in the defense's favor, or even the threat of such an appeal, can have a favorable effect on settlement negotiations. And if the class certification decision goes against you, preserved circuit splits like these are important arrows in your quiver in pursuing a successful appeal.