PAPER TITLE: Healthcare Class Action Trends and Strategies

Adelle Greenfield

Gordon Rees Scully Mansukhani, LLP
701 Fifth Avenue, Suite 2100
Seattle, Washington 98104
206-695-5163
agreenfield@grsm.com

SESSION TITLE: *Healthcare Class Action Trends and Strategies*

Presented by:
Adelle Greenfield, *Gordon Rees Scully Mansukhani, LLP, Seattle, WA*

Adelle Greenfield is Senior Counsel in the Seattle office of Gordon Rees Scully Mansukhani. She represents insurers and employee benefit plans in life, health, and disability matters in California and Washington state. Her practice focuses on individual and group disability insurance, life insurance, and accidental death claims, including insurance bad faith and ERISA litigation. She also represents health plans in disputes with providers and plan participants. Adelle also handles class action litigation on behalf of her insurer clients, and has successfully defended complex class actions in state and federal courts.

Federal Rule of Civil Procedure 23 and its state-law counterparts provide for cases to proceed as class actions if they involve questions of law or fact that are common to the class, satisfying requirements of numerosity, commonality, typicality, and adequacy of representation. *See* Fed. R. Civ. P. 23(a). In healthcare class actions, each stage of litigation presents an opportunity for the defendant to showcase its themes and narrative, while emphasizing individualized issues to defeat class certification. An informed class action strategy will maximize the defendant's opportunities to win the case *before* trial, including at the pleading stage, on summary judgment, and at class certification.

I. Preliminary Considerations

A. Potential for Arbitration

At the outset of a class action, as in any lawsuit, the defense should quickly evaluate the appropriateness of the plaintiff's chosen forum and consider whether moving the case to a different court or tribunal would provide a strategic advantage. This could take the form of a motion to transfer venue, a removal to federal court, or a motion to compel arbitration.

A valid arbitration agreement with a class action waiver can preclude aggregation of claims into a class action, so defense counsel should consider the scope of any written arbitration provisions (which are common in health insurers' contracts with providers), and whether they include such waivers. *See e.g., Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 687 (2010) (class arbitration cannot be imposed on parties who have not agreed to authorize it, and silence on this issue does not constitutes consent); *see also Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 231 (2013) (courts cannot invalidate contractual waiver of class arbitration on grounds that claimant's arbitration cost exceeds potential recovery).

However, if there are questions as to whether the agreement authorizes class arbitration, a health insurer who compels arbitration of a putative class action risks adverse class-wide determinations by an arbitrator, with very limited appeal rights. And defense counsel should keep in mind that submitting this issue to the arbitrator likely waives any right to challenge the arbitrator's decision on it. *See e.g., Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 565–66 (2013) (arbitrator's decision that contract provided for class arbitration survived limited judicial review available under Federal Arbitration Act, regardless of whether it misinterpreted the contract).

If the district court denies a motion to compel arbitration, the Federal Arbitration Act at provides for an immediate interlocutory appeal. 9 U.S.C. § 16(a). The United States Supreme Court recently held that district courts must stay their proceedings while an interlocutory appeal on the question of arbitrability is pending. *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 740 (2023). However, at least one district court has held that the required stay applies only to appeals to the circuit court, not to petitions for certiorari to the Supreme Court. *Harrison v. Envision Mgmt. Holding, Inc.*, 2023 WL 4945841, at *2 (D. Colo. Aug. 3, 2023 (defendants in putative class action not entitled to stay while petitioning SCOTUS to review 10th circuit decision that arbitration provision impermissibly blocked ERISA remedies).

B. Early Case Assessment

A thorough early case assessment will help defense counsel develop a winning litigation strategy and focus their investigation and discovery efforts leading into class certification. The assessment should include an element-by-element analysis of the claims and potential defenses, noting any differences between the defenses applicable to the claims of the named plaintiffs as compared to those of the rest of the putative class.

Counsel should investigate the facts that will drive class certification, including evaluating which facts will be common to the class and which will be materially different, as those differences will be key to defeating class certification. The fact investigation should also target the named plaintiff's standing to bring the claims asserted, including as to the existence of a concrete and particularized injury.

At the outset of the case, defense counsel should also begin developing their themes and narrative, identifying compelling reasons why fairness requires that they should win, and telling a story that shows why the defendant has the moral high ground. These themes should be repeated and reinforced throughout the litigation.

II. Motion to Dismiss

Although Rule 12 motions to dismiss present some risks and are generally unlikely to dispose of an entire case, they can be an effective tool in class action practice. A motion to dismiss is a valuable opportunity to present the defendant's themes and narrative to the judge, while previewing some of the individualized issues that may impact class certification.

A. Highlight Individualized Issues

Class action complaints are often light on factual details, to avoid revealing individualized issues that can negatively impact class certification. As a result, class action complaints often lack sufficient factual details to state a plausible claim for relief under *Iqbal*/*Twombly* or, where applicable, Rule 9's heightened pleading standard for fraud claims. A motion to dismiss can exploit the inherent tensions between the class certification requirements and federal pleading standards by forcing the plaintiffs to allege additional facts. More detailed allegations can undermine class certification by revealing material differences between the claims, requiring individualized analysis.

B. Challenge the Plaintiffs' Standing

A motion to dismiss can be particularly effective where there are issues with the named plaintiffs' standing. For actions filed in federal court, it is essential to evaluate the plaintiffs' standing early and often, as it can provide grounds to dismiss the case at any time. *See* Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"). Federal courts are trending toward a more demanding approach to standing at each stage of litigation.

"[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Thus, Article III standing is required for federal subject matter jurisdiction. *See id.*; *see also Flast v. Cohen*, 392 U.S. 83, 99–100 (1968) ("when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue"). The party invoking the federal court's jurisdiction must show "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560.[1] "And standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021).

At the pleading stage, the named plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), *as revised* (May 24, 2016), quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 40, n. 20 (1976).

1. Recent Healthcare Provider Class Actions Presenting Standing Issues

As examples of the named plaintiffs' lack of standing resulting in dismissal of putative class actions at the pleading stage, an out-of-network healthcare provider recently sued various insurers in putative class actions under ERISA for failure to pay billed charges for COVID-19 testing services. *See e.g.*, *Saloojas, Inc. v. United Healthcare Ins. Co.*, No. C 22-03536 WHA, 2023 WL 7393016, at *3 (N.D. Cal. Nov. 8, 2023); *Saloojas, Inc. v. Cigna Healthcare of California, Inc.*, No. 22-CV-03270-CRB, 2023 WL 1768117, at *2 (N.D. Cal. Feb. 3, 2023); *Saloojas, Inc. v. Aetna Health of California, Inc.*, No. 22-CV-02887-JSC, 2023 WL 1975248, at *2 (N.D. Cal. Feb. 13, 2023). Because healthcare providers are neither participants nor beneficiaries, they lack standing to sue under ERISA, unless they adequately allege a valid assignment of a claim by a beneficiary, which the complaints failed to do. Thus, the provider's ERISA claims were dismissed for lack of standing. Similarly, the provider's federal claims under the CARES Act and FFCRA also failed for lack of standing because those statutes do not create a private right of action for providers. *See* 2023 WL 7393016 at *2.

2. Recent Beneficiary Class Actions Presenting Standing Issues

The named plaintiffs' standing also appears to have become an issue for several recent putative class actions based on a health insurer's use of a software tool to aid in its post-service claim review process. These lawsuits were filed in various district courts, following a spate of

[1] A defendant who has removed the action to federal court should use caution in challenging standing, as the court may decline to dismiss the case and instead remand it to state court for lack of federal subject matter jurisdiction. *See e.g. Mocek v. Allsaints USA Ltd.*, 220 F. Supp. 3d 910, 912 (N.D. Ill. 2016) (granting motion to remand "based on the parties' post-removal agreement that federal jurisdiction is lacking"); *Polo v. Innoventions Int'l, LLC*, 833 F.3d 1193, 1197 (9th Cir. 2016) ("This case lacked a named plaintiff with Article III standing, and therefore was not properly removed.").

media attention to Cigna's use of its "Procedure to Diagnosis" or "PxDx" tool. *See* Class Action Complaint, *Kisting-Leung, et al. v. Cigna Corporation, et al.*, E.D. Cal. Case No. 2:23-cv-01477-DAD-JKN, ECF No. 1 (Jul. 24, 2023); Class Action Complaint, *Veinbergs v. Cigna Corporation, et al.*, S.D. Cal. Case No. 3:23-cv-01540-LAB-DEB, ECF No. 1 (Aug. 21, 2023); Class Action Complaint, *Ahmed v. Cigna Health Management, et al.*, S.D.N.Y. Case No. 1:23-cv-08094-AS, ECF No. 1 (Sep. 13, 2023); *Van Pelt v. The Cigna Group, et al.*, D. Conn. Case No. 3:23-cv-01135, ECF No. 1 (Aug. 25, 2023); Complaint and Jury Demand, *Snyder v. The Cigna Group, et al.*, D.Conn. Case No. 3:23-cv-01451, ECF No. 1 (Nov. 2, 2023). The complaints allege PxDx is an algorithm used to improperly deny claims without physician review. However, Cigna has explained that PxDx is a simple sorting technology that does not involve algorithms or artificial intelligence, that it has been used for more than a decade to accelerate payments to physicians and is not used as alleged, and that the media story that precipitated the lawsuits was riddled with factual errors and mischaracterizations.[2]

Cigna has successfully challenged the named plaintiffs' standing in many of these cases. For example, in *Leung*, after Cigna pointed out that one of the named plaintiffs was not even a Cigna customer,[3] the complaint was amended to replace that class representative. *See* Amended Class Action Complaint, 2:23-cv-01477-DAD-KJN, ECF No. 24 (Oct. 16, 2023) and Second Amended Class Action Complaint, ECF No. 25 (Nov. 28, 2023). Similarly, in *Ahmed*, the sole class representative amended his complaint in response to Cigna's declaration that his claims were not subject to the PxDx review process, and he now alleges that his experience and outcome were "analogous" to those of unnamed class members whose claims *were* subject to PxDx review. First Amended Complaint, 1:23-cv-08094-AS, ECF. No. 41, ¶93 (Dec. 20, 2023).

In some cases, challenging the named plaintiffs' standing at the outset of litigation can lead to voluntary dismissal of a putative class action without the need for motion practice. For example, the *Veinbergs* and *Van Pelt* cases were each voluntarily dismissed, shortly after Cigna publicly stated that based on its research, the claims outlined in the complaints were not subject to the PxDx review process. Order of Dismissal, *Veinbergs*, 23-cv-1540-LAB-DEB, ECF No. 4; Notice of Voluntary Dismissal (Dec. 7, 2023); *Van Pelt*, 3:23-cv-1135(OAW)(RMS), ECF No. 40 (Nov. 6, 2023). However, around the same time that the *Veinbergs* case was voluntarily dismissed, the same counsel filed a similar class action against Cigna with different named plaintiffs. Complaint and Jury Demand, *Snyder v. The Cigna Group, et al.*, D.Conn. Case No. 3:23-cv-01451, ECF No. 1 (Nov. 2, 2023).

These recent case filings highlight the importance of investigating the named plaintiffs' standing as part of the early case evaluation. They also illustrate that challenges to standing may result in replacement of class representatives.

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[2] *The Facts about Cigna Healthcare's Claims Review Process*, https://newsroom.thecignagroup.com/pxdx (last visited Jan. 19, 2024).

[3] John Hilton, *Plaintiff drops out of lawsuit accusing Cigna of improperly rejecting claims*, INSURANCE NEWSNET, Oct. 20, 2023, https://insurancenewsnet.com/innarticle/plaintiff-drops-out-of-lawsuit-accusing-cigna-of-improperly-rejecting-claims.

III. Discovery

Class action discovery strategies must be tailored to fit the needs of the particular case, so a comprehensive discussion is beyond the scope of this manuscript. But one important issue for the defense to evaluate in every class action is whether to seek phased or bifurcated discovery. Bifurcation of discovery between class certification and merits issues can avoid the need for extensive merits discovery in cases that do not qualify for class treatment. Such bifurcation was once standard practice in class actions, but it has become is less common since 2011, when the U.S. Supreme Court held that trial courts must undertake a "rigorous analysis" of each Rule 23 requirement, which frequently involves some overlap with the merits of the underlying claim. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011). Due to this overlap, bifurcation of discovery between class certification and merits issues can result in duplication of efforts, as well as costly disputes as to how to classify discovery. Moreover, defense counsel should be particularly careful to avoid taking inconsistent positions as to bifurcated discovery; *e.g.*, a defendant who blocks discovery on a particular issue on the grounds that it constitutes premature merits discovery may be precluded from relying on that same issue to oppose class certification.

As an alternative to bifurcated discovery, defense counsel should consider aggressively pushing for merits-related discovery early in the case. Merits discovery can reveal individualized issues and defenses that can impact the class certification analysis, including the plaintiffs' method of proving class-wide injuries and their damages model. Early merits discovery is also a valuable tool to explore any weaknesses in the named plaintiffs' claims that may warrant summary judgment.

IV. Summary Judgment

A pre-certification motion for summary judgment has the potential to narrow the claims at issue, or dispose of the entire action by prevailing on the named plaintiffs' claims. Even if the motion is unsuccessful, it can emphasize individualized issues to aid in challenging predominance in opposition to class certification.

Courts generally have discretion to rule on summary judgment before class certification, and an early motion for summary judgment can swiftly end meritless litigation. *See e.g., Thomas v. UBS AG*, 706 F.3d 846, 849–50 (7th Cir. 2013) (where "the suit can quickly be shown to be groundless, it may make sense for the district court to skip certification and proceed directly to the merits"). An early summary judgment motion has the potential to end the litigation, if the class representatives' claims fail on the merits and no new representatives step up to take their place. It can also be an effective tool to narrow the issues and scope of further discovery, *e.g.*, by determining which claims are time-barred.

In addition, a class action defendant can file a summary judgment motion with its opposition to class certification, forcing the plaintiffs to highlight individualized issues in their attempt to identify genuine factual disputes to survive summary judgment. This can help focus the judge on elements of the claims that require individualized inquiries and evidence.

Early summary judgment motions have their downsides, however. A weak motion risks souring the judge's impression of the defense narrative heading into class certification. Moreover, a dispositive motion that is granted prior to class certification can have no preclusive effect on putative class members who may chose to file additional class actions or individual lawsuits. The defendant must decide whether it makes sense to take these risks under the circumstances of the particular case.

V. Class Certification

A. Plaintiffs' Burden

The party seeking certification bears the burden of proving that each of Rule 23's requirements is satisfied, and the court must base its certification decision on evidence, not mere allegations. *See Dukes*, 564 U.S. at 351-52. Historically, courts granted class certification based on "some showing" that Rule 23's requirements were met, but the modern trend is to require plaintiffs to prove they have met the requirements by a preponderance of the evidence. *See e.g. Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665 (9th Cir. 2022) (joining several circuits in adopting preponderance of the evidence standard for class certification). To determine whether the plaintiffs met their burden, the court must perform a "rigorous analysis" of each of Rule 23's requirements, which frequently involves some overlap with the merits of the underlying claims. *Dukes*, 564 U.S. at 350–51.

B. Overlapping Merits Inquiries

The court must decide whether Rule 23's requirements are met, not whether the plaintiffs will prevail on the merits. However, the class certification analysis often requires the court to reach into the merits to determine whether Rule 23's criteria are satisfied. "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465–66 (2013). Regardless, the judge's views of the relative merits are likely to subtly influence the class certification decision, so it is important for the defendant to have laid the groundwork by developing its themes and narrative in prior stages of litigation.

When courts inquire as to the merits at the class certification stage, they consider how the issues that would arise at trial impact the requirements for class treatment, including whether the plaintiff can show common legal issues, establish a claim with common proof, and present a viable damages model. These merits inquiries allow the defendant to present a variety of arguments as to why Rule 23's requirements are not satisfied.

C. Rule 23(a)'s Explicit Prerequisites for Certification

Rule 23(a) sets out four required elements that must be met for a class to be certified:

- **Numerosity:** "[T]he class is so numerous that joinder of all members is impracticable," *i.e.*, difficult and inconvenient;
- **Commonality:** There are "questions of law or fact common to the class;"

- **Typicality:** The claims or defenses of the named plaintiffs are typical of the class; and
- **Adequacy:** The named plaintiffs will "fairly and adequately protect the interests of the class."

See Fed. R. Civ. P. 23(a)(1)-(4).

The commonality and typicality inquiries both concern whether a class action is economical and would protect absent class members' interests, whereas adequacy focuses on the named plaintiffs' ability to represent the class. Commonality is satisfied if the claims depend on one or more common questions that are capable of class-wide resolution by common answers. *Dukes*, 564 U.S. at 350. Typicality is generally satisfied where the claims of the named plaintiffs and the absent class members arise from the same course of events or conduct, are based on the same legal theory, and are not subject to unique defenses. The adequacy requirement aims to reveal any conflicts of interest between the named plaintiffs and the rest of the class, such as where the named plaintiffs are subject to a unique defense that could become the focus of the litigation.

Concerns about adequacy and typicality can sometimes be remedied with subclasses under Rule 23(c)(5), but subclasses can fuel additional challenges to class certification. Each subclass is treated like a separate class action, and must independently satisfy Rule 23's certification requirements, including having an adequate class representative. However, subclassing is improper where an unmanageably large number of subclasses would be needed. *See Sacred Heart Health Sys., Inc. v. Humana Mil. Healthcare Servs., Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010). Indeed, "[t]he necessity of a large number of subclasses may indicate that common questions do not predominate." *Id.* at 1177. Subclassing can also defeat superiority "by splintering the proposed class and thereby diminishing the relative value of a class action over other forms of litigation." *Id.* at 1184. In *Sacred Heart*, a healthcare provider class action in which the class definition included more than 300 network agreements with "around 33 variants" of individualized payment clauses, class treatment was inappropriate because any common questions would be "overwhelmed by individualized issues flowing from variations in the contractual terms and the parties' course of dealings. *Id.* at 1170-71. "Subclasses are no answer to this problem . . . ." *Id.* at 1176.

D. Class Representatives' Standing

In addition to Rule 23(a)'s explicit requirements, resolving concerns regarding the plaintiffs' standing "is an inherent prerequisite to the class certification inquiry." *Angell v. GEICO Advantage Ins. Co.*, 67 F.4th 727, 733 (5th Cir. 2023). Thus, the defense can challenge the plaintiffs' standing in opposition to the class certification motion, even if the allegations were sufficient to survive motion to dismiss at the pleading stage. The elements of standing are "not mere pleading requirements but rather an indispensable part of the plaintiff's case [which] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. At the class certification stage, courts can "probe behind the pleadings" to assess standing. *Green-Cooper v. Brinker Int'l, Inc.*, 73 F.4th 883, 891 (11th Cir. 2023).

It is well established that a class cannot be certified if the named plaintiff lacks standing. *See e.g.*, *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1267 (11th Cir. 2019). But the Supreme Court has expressly left open the question of "whether every class member must demonstrate standing before a court certifies a class." *TransUnion*, 594 U.S. at 431, n. 4.

Moreover, federal courts differ in their approaches for analyzing the named plaintiff's standing at the class certification stage. *Angell*, 67 F.4th at 734. There is a tension as to whether concerns of the plaintiff's ability to represent absent class members is an issue of Article III standing, or merely an issue of satisfying Rule 23(a)'s prerequisites for class certification. *Gratz v. Bollinger*, 539 U.S. 244, 262–63, n. 15 (2003) (declining to resolve question of standing versus adequacy). Under the less stringent class certification approach, the court "only assesses a named plaintiff's individual standing; if that is satisfied, any remaining analysis is considered a matter of class certification under Rule 23." *Angell*, 67 F.4th at 734. In contrast, under the more intensive standing approach, even if the named plaintiffs have standing to pursue their individual claims, the court will nevertheless "hold that the named plaintiff lacks standing for the class claims if his or her harms are not sufficiently analogous to those suffered by the rest of the class." *Id.*

As an example of a failure to satisfy the Article III standing requirement at the class certification stage, in *MAO-MSO Recovery II, LLC v. Mercury General*, the Ninth Circuit affirmed dismissal of a pair of putative class actions in which collections agencies sought reimbursement for medical expenses under the Medicare Secondary Payer Act based on alleged assignments. No. 21-56395, 2023 WL 1793469, at *2 (9th Cir. Feb. 7, 2023). The existence of valid assignments directly related to the plaintiffs' "legally protected interest" in bringing suit, which is "a quintessential standing question." *Id.* Although the complaints alleged sufficient facts to survive a Rule 12 facial attack, the evidence at class certification did not support the allegations; thus, the named plaintiffs lacked standing to pursue their individual claims. *MAO-MSO Recovery II, LLC v. Mercury Gen.*, No. CV1702525ABAFMX, 2021 WL 3615905, at *5 (C.D. Cal. Aug. 12, 2021), affirmed, 2023 WL 1793469. Moreover, the plaintiffs were not entitled to further amend their complaints, where the case had been pending for several years by the time it reached the class certification stage, and amendment to plead new operative facts would unfairly prejudice the defendant. 2023 WL 1793469 at *3.

E. Types of Class Actions Under Rule 23(b)

Class treatment is appropriate if the plaintiffs satisfy all of the requirements of Rule 23(a), as well as one or more of the grounds for maintaining a class action under Rule 23(b):

- 23(b)(1)(A): Separate actions would create a risk of "inconsistent or varying adjudications" that "would establish incompatible standards of conduct;"
- 23(b)(1)(B): Judgments in individual lawsuits would adversely affect the rights of other class members;
- 23(b)(2): "The party opposing the class has acted (or refused to act) in a manner applicable to the class generally, thereby making injunctive or declaratory relief appropriate with respect to the class as a whole;" or

- 23(b)(3): "[T]he questions of law or fact common to the class 'predominate' over questions affecting the individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." (These are known as the predominance and superiority requirements.)

Fed. R. Civ. P. 23(b).

Classes actions under Rule 23(b)(1) and (b)(2) avoid the predominance and superiority requirements of Rule 23(b)(3). However, a class cannot be certified under (b)(1) or (b)(2) if the claims "seek monetary relief that is not incidental to the injunctive or declaratory relief," *i.e.*, if individualized money damages are sought. *Dukes*, 564 U.S. at 360-61. Instead, "individualized monetary claims belong in Rule 23(b)(3)." *Id.* at 362.

Rules 23(b)(1) and (b)(2) are conducive to ERISA claims. Rule 23(b)(1)(A)'s risk of inconsistent adjudications "speaks directly to ERISA suits, because defendants have a statutory obligation, as well as a fiduciary responsibility, to treat the members of the class alike." *Kindle v. Dejana*, 315 F.R.D. 7, 12 (E.D.N.Y. 2016). In addition, Rule 23(b)(1)(B) is often appropriate for ERISA claims because ERISA creates a shared set of rights for all plan participants and "structures relief in terms of the plan and its accounts, rather than directly for the individual participants." *Id.* Similarly, Rule 23(b)(2) class actions for declaratory or injunctive relief require that the remedy be "indivisible," meaning the conduct "can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360.

F. Predominance under Rule 23(b)(3)

For purposes of assessing predominance under Rule 23(b)(3), "[a]n individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (internal quotation marks omitted). In opposing class certification under this rule, the defense should aim to show that class treatment would result in an unmanageable trial involving a multitude of individualized determinations, or a litany of mini-trials.

The predominance analysis can also implicate the absent class members' standing. "Every class member must have Article III standing in order to recover individual damages." *TransUnion*, 594 U.S. at 431 (district court erred in certifying class that included members who suffered no concrete injury for Article III standing purposes). Thus, courts "must ultimately weed out plaintiffs who do not have Article III standing before damages are awarded to a class." *Green-Cooper v. Brinker Int'l, Inc.*, 73 F.4th 883, 888, 891 (11th Cir. 2023). Accordingly, where the class definition potentially includes uninjured individuals who would not have standing, the predominance analysis may require the court to consider whether standing can be established without individualized proof. *Id.* at 893, n. 13.

G. Implicit Ascertainability Requirement?

In addition to Rule 23's explicit requirements, some courts apply an implicit requirement that the class is sufficiently definite such that its members are ascertainable, meaning that it is administratively feasible to determine who is a member of the class. It is important to know your circuit; different circuits view this requirement differently, and some do not impose it at all. *See Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 995 (8th Cir. 2016) (collecting cases recognizing implicit ascertainability requirement); *c.f. True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 929 (9th Cir. 2018) (rejecting administrative feasibility requirement not specifically articulated in Rule 23).

Closely related to ascertainability is the concept of a "fail-safe" class, which is "a class whose membership can only be ascertained by a determination of the merits of the case because the class is defined in terms of the ultimate question of liability." *In re Rodriguez*, 695 F.3d 360, 369–70 (5th Cir. 2012). Such definitions are problematic because "a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 660 (7th Cir. 2015). Whether such class definitions are permissible is yet another unsettled and evolving area of the law. *See In re White*, 64 F.4th 302, 309–10 (D.C. Cir. 2023), cert. denied sub nom. *Hilton Hotels Ret. Plan v. White*, No. 23-166, 2023 WL 8531895 (U.S. Dec. 11, 2023) (collecting cases with a variety of holdings on the propriety of fail-safe classes); *see also Fitzmorris v. New Hampshire Dep't of Health & Hum. Servs. Comm'r Lori Weaver*, No. 21-CV-25-PB, 2023 WL 8188770, at *8 (D.N.H. Nov. 27, 2023) (recognizing circuit split as to "whether a fail-safe class definition is an independent bar to Rule 23 class certification").

Concerns of ascertainability and fail-safe class definitions relate primarily to classes certified under Rule 23(b)(3), and do not generally apply to Rule (b)(2) class actions for injunctive or declaratory relief. *See Fitzmorris*, 2023 WL 8188770 at *9.

VI. Case Studies

A. *The Medical Society of the State of New York v. UnitedHealth Group, Inc.*

In *The Medical Society of the State of New York v. UnitedHealth Group, Inc.*, health benefit plan participants alleged that United violated ERISA by failing to adequately review benefit plan terms in determining that physicians performing office-based surgery ("OBS") in the state of New York were not entitled to a facility fee. No. 22-2702-CV, 2024 WL 177448 at *1 (2d Cir. Jan. 17, 2024). United prevailed on the merits after classes were certified, and the Second Circuit Court of Appeals affirmed the judgment. *Id.*

1. Classes Certified under Rule 23(b)(1) and (b)(2)

At class certification, the district court found the patient class members had a sufficient injury in fact for Article III standing, even if they were not directly billed for their medical services and had no "out-of-pocket liability," because "[i]f patients were entitled to the payment of facility fees under the language of their health benefit plans, United's refusal to pay those fees denied patients the benefit of their bargain." *Med. Soc'y of the State of New York v. UnitedHealth Grp.*

Inc., 332 F.R.D. 138, 147 (S.D.N.Y. 2019). Although United argued the standing determination required "individualized inquiry into whether patients validly assigned claims to their healthcare provider," this assignment issue did not implicate standing, and was better understood as relevant to predominance. *Id.*

Commonality was satisfied because there were common questions as to whether United's claims adjudication processes "actually involve the interpretation of plan terms in the ultimate decision to deny OBS facility fee claims, as a factual matter—and whether these processes satisfy ERISA, as a legal matter." *Id.* at 148-49. Typicality and adequacy were also satisfied. Moreover, the district court rejected United's contention that an office-based surgery practice was not an adequate class representative because it was subject to a unique "unclean hands" defense, as the court could not at that point find the defense was meritorious. *Id.* at 149-51.

The district court certified classes under Rule 23(b)(1)(A) and (b)(2). Certification was proper under (b)(1)(A) because "separate actions could put United into a position in which its structure for processing facility fee claims from OBS practices is deemed permissible by some courts but held to violate the requirements of ERISA by others" *Id.* at 154. And (b)(2) was satisfied because the plaintiffs sought a declaratory judgment that United's process violated ERISA, as well as an order requiring reprocessing of denied claims. *Id.* Reprocessing was available as generalized relief under Rule 23(b)(2), even though it would require subsequent individualized determinations and not every class member would ultimately receive benefits as a result. *Id.* at 154-55. However, the court denied certification under Rule 23(b)(3) because predominance was lacking for the proposed benefit class. *Id.* at 158. To determine whether benefits are covered by the class members' respective plans, the court would need to interpret the language of each plan, which "would necessarily devolve into a 'series of mini-trials' to establish each class member's entitlement to benefits." *Id.*

2. Judgment for United, Affirmed on Appeal

Following a bench trial, the district court held that United did not violate ERISA in determining that physicians performing office-based surgeries New York were not entitled to a facility fee. *Med. Soc'y of the State of New York v. UnitedHealth Grp., Inc.*, No. 16-CV-5265 (JPO), 2022 WL 4234547, at *7 (S.D.N.Y. Sept. 14, 2022). Applying an arbitrary-and-capricious standard of review, the court concluded that United "implemented reasonable systems designed to ensure that coverage determinations accord with plan terms" and "reasonably determined that its plans do not require the payment of facility fees to physician offices." *Id.* at 5-7.

On appeal, the class argued that the district court erred by failing to interpret plan terms in accordance with ERISA's plain meaning rule, and by relying on evidence from outside the administrative record in concluding that United's benefit denials were reasonable. *Med. Soc'y of the State of New York v. UnitedHealth Grp., Inc.*, No. 22-2702-CV, 2024 WL 177448 at *1 (2d Cir. Jan. 17, 2024). The Second Circuit affirmed the judgment for United, explaining that "[t]he argument that United improperly construed the terms of particular plans is only relevant to Plaintiffs' classwide reprocessing claim challenging United's claim-adjudication procedure if the allegedly improper constructions of the terms of particular plans is shown to be so frequent as to cast doubt on the process used," and that no such showing was made. *Id.* at *3.

Moreover, because the challenge was to United's claims-adjudication *process*, rather than to the merits of a benefit determination, "the district court did not abuse its discretion by admitting evidence related to that process." *Id.* at *2.

B. *Wit v. United Behavioral Health*

In *Wit v. United Behavioral Health*, the district court certified classes of ERISA health benefit plan members whose requests for coverage of residential treatment services for a mental illness or substance use disorder were denied based on United Behavioral Health (UBH)'s Level of Care or Coverage Determination Guidelines. 317 F.R.D. 106, 110 (N.D. Cal. 2016). The Ninth Circuit issued a series of opinions on appeal, reversing the certification of a class of denial-of-benefits claims. *Wit v. United Behav. Health*, No. 20-17363, 2022 WL 850647, at *1 (9th Cir. Mar. 22, 2022) ("*Wit I*"), opinion withdrawn and replaced by 58 F.4th 1080 (9th Cir. Jan. 26, 2023) ("*Wit II*"), opinion vacated and superseded on reh'g by 79 F.4th 1068 (9th Cir. Aug. 22, 2023) ("*Wit III*").

1. Class Certification

The district court in *Wit* certified classes under Rule 23(b)(1), (b)(2), and (b)(3). 317 F.R.D. at 134, 138, 141. It found certification was appropriate under (b)(1) and (b)(2) because all plans shared a common requirement that the treatment at issue must be consistent with generally accepted standards of care, and all class members were subject to the same guidelines; thus, multiple challenges to the guidelines could lead to inconsistent results and the injury could be remedied by reprocessing the denied claims under modified guidelines. *Id.* at 133, 136. Moreover, the court was not convinced that the relief sought involved more than incidental monetary relief, explaining that an injunction requiring reprocessing of denied claims was not equivalent to an award of money damages to compensate for denied benefits. *Id.* at 133. The court further concluded that "where a defendant has relied on an unlawful policy to determine eligibility for benefits, ordering the defendant to redetermine the plaintiffs' eligibility without the taint of the unlawful policy is a 'final' remedy for the purposes of Rule 65(d)." *Id.* at 137.

The court also certified classes under Rule 23(b)(3), finding predominance was satisfied because "the case stands or falls based on the question of whether the use of UBH's Guidelines to adjudicate the class members' claims constituted a breach of fiduciary duty or was arbitrary and capricious." *Id.* at 140. The court determined it did not need "to adjudicate the individualized issues relating to the class members' coverage," but could instead "leave those questions to be addressed in the course of the reprocessing of claims." *Id.* at 141.

2. Merits Adjudication and Appeal

After an ERISA bench trial, the district court found UBH liable for breach of fiduciary duty and improper denial of benefits under 29 U.S.C. §§ 1132(a)(1)(B) and (a)(3). *See Wit III*, 79 F.4th at 1077. The Ninth Circuit held that the district court abused its discretion in certifying classes for the benefit denial claims, "based on its determination that the class members were entitled to have their claims reprocessed regardless of the individual circumstances at issue in their claims," where the court could not determine "whether class members were *actually* entitled to benefits" without considering "a multitude of individualized circumstances relating to the medical

necessity for coverage and the specific terms of the member's plan." *Id.* at 1080, 1084 (emphasis in original).

Although reprocessing may be appropriate "where a plaintiff has shown that his or her claim was denied based on the wrong standard *and* that he or she might be entitled to benefits under the proper standard," reprocessing is not available "without a showing that application of the wrong standard could have prejudiced the claimant." *Id.* at 1084. Because the guidelines contained provisions that were not challenged as potentially unlawful, and the class contained claimants "who were denied coverage solely based on [the] unchallenged provisions," the plaintiffs failed to demonstrate "that all class members were denied a full and fair review of their claims or that such a common showing is possible." *Id.* at 1085-86. And because all class members would be entitled to reprocessing regardless of whether their claims were denied a full and fair review, the district court improperly applied Rule 23 "in a way that enlarged or modified Plaintiffs' substantive rights in violation of the Rules Enabling Act." *Id.* at 1086. Therefore, the Ninth Circuit reversed the class certification of the benefit denial claims.

The Ninth Circuit further held that the district court "abused its discretion by concluding that the reprocessing remedy could arise under §1132(a)(3)." *Id.* at 1086. Although the classes for the fiduciary duty claim were properly certified, the court remanded the case to the district court to determine whether that claim was a "disguised claim for benefits" subject to ERISA's exhaustion of administrative remedies requirement, and if applicable, whether that requirement was satisfied or excused. *Id.* at 1089.

Whereas the Ninth Circuit's earlier decisions in *Wit* stated reprocessing was not available as a standalone remedy under § 1132(a)(1)(B) to justify class treatment, the third version of its ruling avoided that language. *See Wit II*, 58 F.4th at 1095; *c.f. Wit III*, 79 F.4th at 1084. Thus, *Wit* appears to leave open questions as to the availability of classwide reprocessing as an ERISA remedy.

3. Subsequent District Court Rulings

On remand, the district court in *Wit* concluded that the mandate did not require it to enter judgment on the denial of benefits claim, and that the Ninth Circuit "left a number of questions open for consideration . . . beyond the exhaustion issue," including the possibility of "narrowed subclasses that conform to the panel's rulings." *Wit v. United Behav. Health*, No. 14-CV-02346-JCS, 2023 WL 8717488, at *25 (N.D. Cal. Dec. 18, 2023).

In another recent case, an ERISA administrator relied on the Ninth Circuit's decisions in *Wit* to seek decertification of a denial-of-benefits class. *Kazda v. Aetna Life Ins. Co.*, No. 19-CV-02512-WHO, 2023 WL 7305038, at *1 (N.D. Cal. Nov. 6, 2023). The district court denied the motion to decertify, interpreting *Wit* as holding that "reprocessing may be an available remedy for a denial of benefits claim where the administrator has applied an incorrect standard and the claimant has shown that the application of the wrong standard could have prejudiced them." *Id.* at *6.

VII. Looking Ahead

Increased media attention to health insurers' use of technology in the claim review process has inspired a wave of new healthcare class action complaints in federal courts across the country. In addition to lawsuits concerning Cigna's PxDx review process, discussed above, recently filed lawsuits challenge Medicare Advantage Plans' use of prediction tools and models to help plan for patient care needs. Public interest in this topic is on the rise, as evidenced by a recent Senate subcommittee hearing on the use of algorithms and artificial intelligence in the healthcare industry.[4] Thus, we can expect to see more healthcare class action complaints in the near future.

VIII. Conclusion

A successful class action defense requires an understanding of the fundamentals of class action practice, as well as recent developments in the relevant case law. The considerations and strategies discussed above can aid in the defense of healthcare class actions, even as the law continues to evolve and as plaintiffs test new theories.

[4] Gianna Ferrarin, *Senators Told That AI Is Already Harming Patients*, Law360, Nov. 9, 2023, https://www.law360.com/articles/1740241/senators-told-that-ai-is-already-harming-patients.