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BLOG

D.C. Circuit Rejects Rule Against "Fail-Safe" Class Certification

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Key Takeaways

- Despite suggesting that truly fail-safe classes would likely fail to meet Rule 23(a)'s requirements, the D.C. Circuit held, in an opinion splitting with several other circuits, that a separate legal rule against fail-safe classes is inappropriate and ungrounded from the text of Rule 23.
- The D.C. Circuit stated that the solution in cases like these is for the Court to work with counsel to redefine the class or define the class itself. We will follow the implications of this decision with interest, both on remand and in future cases.

In *In re White*, 2023 WL 2763812 (C.A.D.C., 2023), the D.C. Circuit—splitting with several other circuit courts—reversed a district court's order that denied class certification because the plaintiffs sought to certify a "fail-safe" class. While acknowledging the recognized criticisms of fail-safe classes, the D.C. Circuit held that a standalone rule against fail-safe classes is an inappropriate and "extra-textual" limitation on certification.

"Fail-safe" classes are classes for which membership can be determined only through a decision on the merits. *See, e.g.*, *In re Rodriguez*, 695 F.3d 360, 369-70 (5th Cir. 2012). A quintessential example would be a class defined as "all persons whom Defendant defrauded." As courts criticizing such fail-safe classes have noted, fail-safe classes are unfair to defendants. *See e.g. Zarichny v. Complete Payment Recovery Services*, Inc., 80 F.Supp.3d 610, 624-26 (E.D.Pa., 2015). They present defendants with a "tails I win, heads you lose" situation—if the plaintiffs win on the merits, then the class is populated with those successful claims, but if or to the extent plaintiffs fail on the merits, the "losing" class members are, by definition, outside of the class and thus cannot be bound by an adverse judgement.

In *White*, the named plaintiff sued her former employer, alleging that it wrongfully denied her vested retirement benefits by undercounting her eligible hours of service. She sought to certify a class of former employees that had "been denied vested retirement benefits." The district court denied certification primarily on the ground that this was an improper fail-safe class because whether class members had "been denied vested retirement benefits" was a key issue to be decided on the merits.

On appeal, the D.C. Circuit held that the district court was wrong to base its denial on "a stand-alone and extra-textual rule" against fail-safe classes. The appellate court maintained that Rule 23 is "fully capable of guarding against unwise uses of the class action mechanism" and rejected a "rule against 'fail-safe' classes as a freestanding bar to class certification ungrounded in Rule 23's prescribed criteria." The opinion also suggested that, rather than denying class certification, "the solution for cases like these is for the district court either to work with counsel to eliminate the problem or for the district court to simply define the class itself."

Despite its holding, the Court spent several pages explaining that truly fail-safe classes would likely fail to meet the requirements of Rule 23(a), suggesting that such classes would have difficulty with *all* of Rule 23(a)'s four requirements.

Despite this discussion, we are concerned about the implications of this opinion for defendants in class actions in the D.C. Circuit, and it will be important and interesting to see the ramifications of the opinion going forward. For example, even accepting the opinion's conclusion that fail-safe classes cannot meet the Rule 23(a) factors, the Rule 23(a) analysis is often heavily factual, so early motions to strike or defeat class allegations may be more difficult. Moreover, the opinion's suggestion that district courts can "fix" an inadequate class definition would seem to pit the district court against the defendant in some situations—which we think is inconsistent with the court's appropriate role as an arbiter rather than an advocate.

The circuit split created by *White* also means that appellate proceedings may not be quite at an end. We will be following closely and would not be shocked to see either en banc, or perhaps even Supreme Court review.

3 Min Read

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