

Defending Against Fail-Safe Classes With Rule 23

By Jeffrey Huberman and Andrew Soukup (May 9, 2023, 4:54 PM EDT)

In recent years, courts, litigants and legal commentators have focused on the issue of fail-safe class definitions and the potential problems they pose.

Some courts — such as the U.S. Court of Appeals for the First Circuit in *In re: Nexium Antitrust Litigation* in 2015 — have opined that fail-safe classes are impermissible under Rule 23 of the Federal Rules of Civil Procedure and that those classes cannot be certified.

Others, on the other hand, including the U.S. Court of Appeals for the Fifth Circuit in *In re: Rodriguez* in 2012, have rejected a rule against fail-safe classes.

Recently, the U.S. Court of Appeals for the D.C. Circuit became the latest circuit to weigh in, finding in *In re: White* last month that there is no stand-alone rule against fail-safe classes.

This article provides an overview of fail-safe classes and the potential issues they raise, as well as how federal courts view these classes.

The article will also discuss how defendants can still effectively attack fail-safe class definitions via different procedural hooks even where there is no rule against them.



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Fail-Safe Classes and Their Potential Problems

Although courts have defined fail-safe classes differently, a fail-safe class refers to a class whose membership depends on a determination of the merits and is defined in terms of the legal injury at issue in the litigation.[1]

For example, take "a class definition that encompasses 'all those whom Company X defrauded'" from the *White* decision. That definition is fail-safe because whether certain actions constitute fraud — and ultimately which individuals were defrauded — is "just what the litigation is meant to figure out."

Or, as another example, a class defined as "all individuals denied benefits in violation of law" would be fail-safe because one cannot know who has been illegally denied benefits without a merits determination.

Courts have identified two main problems with fail-safe classes. First, if class membership is defined in terms of whether one has a viable claim, according to the Nexium decision, essentially "it is virtually impossible for the Defendants to ever 'win' the case." [2]

According to the Rodriguez decision, this is because "the class definition precludes the possibility of an adverse judgment against class members; the class members either win or are not in the class." [3]

In other words, individuals either win and obtain relief as part of the class — or, by virtue of losing, are "defined out of the class, escaping the bars of res judicata and collateral estoppel," the court said in White. [4]

Second, if class membership depends on a resolution of the merits, determining and administering class membership at an early stage, before a resolution on the merits, is difficult, if not impossible. [5]

Fail-Safe Classes and Rule 23

Federal appellate courts are divided whether fail-safe class definitions are per se impermissible. The First, Sixth, Seventh and Eighth Circuits have endorsed a rule against fail-safe classes, finding that fail-safe classes cannot be certified under Rule 23. [6]

Meanwhile, the Fifth Circuit previously was the only circuit court to have outright rejected a rule against fail-safe classes — in Mullen v. Treasure Chest Casino in 1999. [7]

The Third, Fourth, Ninth and Eleventh Circuits have fallen in the middle, by recognizing problems with fail-safe classes without outright issuing a prohibition on them or declaring that fail-safe classes can never be certified. [8] The cases were:

- EQT Production Co. v. Adair in the U.S. Court of Appeals for the Fourth Circuit in 2014;
- Byrd v. Aaron's Inc. in the U.S. Court of Appeals for the Third Circuit in 2015;
- Cordoba v. DirecTV LLC in the U.S. Court of Appeals for the Eleventh Circuit in 2019; and
- Olean Wholesale Grocery Cooperative Inc. v. Bumble Bee Foods LLC in the U.S. Court of Appeals for the Ninth Circuit last year.

And finally, the Second and Tenth Circuits have not directly weighed in on the issue at all.

The D.C. Circuit's Decision in White

The D.C. Circuit recently sided with the minority position, holding that district courts may not refuse to certify a class simply because it includes a fail-safe class definition.

In White, the plaintiffs challenged a hotel chain's denial of certain retirement benefits under the Employee Retirement Income Security Act, and they sought to represent a class defined as hotel employees who have "been denied vested rights to retirement benefits by the Hilton Defendants." [9]

The U.S. District Court for the District of Columbia denied class certification on the grounds that the plaintiffs "had proposed an 'impermissibly 'fail-safe class.'" [10] The D.C. Circuit granted the plaintiffs' permission to appeal the denial of certification under Rule 23(f), and then found that the district court's

denial of certification was erroneous.

The D.C. Circuit recognized the potential problems posed by fail-safe classes and found the concerns posed by them to be understandable.[11]

But the court believed that Rule 23's textual requirements contained enough protection to address those problems and concerns, and it held that, enforcing the Rule's written requirements is greatly preferred to deploying a textually untethered and potentially disuniform criterion, the contours of which can vary from case to case.[12]

In other words, "courts should stick to Rule 23's specified requirements when making class certification decisions, and, in doing so, will likely find any 'fail-safe' concerns assuaged." [13] Because the district court used a "stand-alone and extra-textual rule against 'fail-safe' classes, rather than applying the factors prescribed by" Rule 23, the D.C. Circuit held that the denial of class certification was an abuse of discretion.[14]

The court was also clear that where class definitions are potentially fail-safe, district courts should "work with counsel to eliminate the problem [by redefining the class] or for the district court to simply define the class itself." [15] But the D.C. Circuit warned district courts that they should not outright deny certification simply because the proposed class definition is fail-safe.[16]

Accordingly, the D.C. Circuit reversed the district court's denial of certification and remanded for further proceedings, presumably to give the lower court and the parties another opportunity to refine the class definition.

Making Fail-Safe Arguments Post-White

The D.C. Circuit's decision in *White* deepens an existing circuit split, although the panel did not acknowledge that it was joining the minority position.

Following the *White* decision, the majority of circuits still either prohibit fail-safe classes outright or have at least suggested that they pose problems that could render certification inappropriate.

But defendants in jurisdictions where fail-safe classes are permitted are not without recourse. As the D.C. Circuit recognized in *White*, many of the problems posed by fail-safe classes can be addressed via different procedural arguments based in Rule 23.

For example, the D.C. Circuit said a class defined circularly "could reveal the lack of a genuinely common issue of law or fact." [17] And arguments as to typicality, adequacy and superiority — other Rule 23 requirements — may also provide effective vehicles to raise fail-safe concerns. [18]

Furthermore, the inability of fail-safe class members to be bound by an adverse judgment could be fatal given "the requirement in Rule 23(c) that the district court ensure up front the 'binding effect of a class judgment on members.'" [19]

Efforts to redefine a class to avoid fail-safe class concerns may create their own set of challenges. For example, the D.C. Circuit previously concluded in *In re: Rail Freight Fuel Surcharge Antitrust Litigation* in 2019 that a district court may not certify a class that contains more than a de minimis number of class members who have suffered no injury.[20]

A plaintiff who attempts to expand a class definition to avoid fail-safe class concerns may nevertheless create problems that defeat class certification, if the new class includes class members who have not suffered any injury.

Given that the D.C. Circuit's decision in *White* has furthered the circuit split over this issue, it is possible that the U.S. Supreme Court will weigh in and decide whether fail-safe classes are permissible and under what circumstances.

But the *White* decision's recognition that the problems posed by fail-safe classes can still be addressed within the contours of Rule 23 could mean that the impact of *White* will be minimal, decreasing the likelihood of Supreme Court intervention. Time will tell.

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[1] See *In re Rodriguez*, 695 F.3d at 370 ("A fail-safe class 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."); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (explaining that a fail-safe class is "defined so that whether a person qualifies as a member depends on whether the person has a valid claim").

[2] *In re Nexium*, 777 F.3d at 22 n.18.

[3] *In re Rodriguez*, 695 F.3d at 370 (citation omitted).

[4] *In re White*, 2023 WL 2763812, at *10 (citing *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012)).

[5] See, e.g., *id.* (citing *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 492–97 (7th Cir. 2012)).

[6] See, e.g., *In re Nexium Antitrust Litig.*, 777 F.3d at 22 (recognizing "the inappropriateness of certifying what is known as a 'fail-safe class'"); *Young*, 693 F.3d at 537–38 (fail-safe classes are impermissible); *McCaster v. Darden Restaurants, Inc.*, 845 F.3d 794, 799 (7th Cir. 2017) ("A case can't proceed as a class action if the plaintiff seeks to represent a so-called fail-safe class." (citing *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012))); *Orduno v. Pietzrak*, 932 F.3d 710, 716–17 (8th Cir. 2019) (fail-safe classes are prohibited).

[7] See *In re Rodriguez*, 695 F.3d at 370 (noting that Fifth Circuit "precedent rejects the fail-safe class prohibition") (citing *Mullen v. Treasure Chest Casino*, 186 F.3d 620 (5th Cir. 1999)).

[8] See, e.g., *Byrd v. Aaron's Inc.*, 784 F.3d 154, 167 (3d Cir. 2015) (noting problems with fail-safe classes); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 360 n.9 (4th Cir. 2014) (reversing class certification decision and instructing district court on remand to consider whether class definition is fail-safe); *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 n.14 (9th Cir. 2022) (en

banc) (recognizing that fail-safe class definitions are improper but suggesting that issue should be resolved by "refining the class definition rather than flatly denying class certification"); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1276–77 (11th Cir. 2019) (recognizing problems with fail-safe classes without outright prohibiting them); accord *MSP Recovery Claims, Series LLC v. Ace Am. Ins. Co.*, 341 F.R.D. 636, 647 (S.D. Fla. 2022) (explaining that "the Eleventh Circuit has not yet expressly prohibited" fail-safe class definitions); *Cummins v. Ascellon Corp.*, 2020 WL 6544822, at *7 (D. Md. Nov. 6, 2020) (noting that within the Fourth Circuit, fail-safe class "doctrine generally does not bar certification but counsels for reformation where necessary").

[9] 2023 WL 2763812, at *4.

[10] *Id.* at *1.

[11] *Id.* at *10.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at *12.

[16] *Id.*

[17] *Id.* at 11 (citing Fed. R. Civ. P. 23(a)(2)).

[18] *Id.* (noting typicality and adequacy issues if "named plaintiffs might not be members of the class come final judgment" and that a "class action would fail to be a superior device . . . if the class would collapse should the plaintiffs lose on the merits").

[19] *Id.* (quoting Fed. R. Civ. P. 23(c)(2)(B)(vii)).

[20] See *In re Rail Freight Fuel Surcharge Antitrust Litig.* - MDL No. 1869, 934 F.3d 619, 623–25 (D.C. Cir. 2019).