GIBSON DUNN

# Fourth Quarter 2023 Update on Class Actions

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*This update provides an overview of key class action-related developments during the fourth quarter of 2023 (October to December).* **Table of Contents**

- **Part I** reviews decisions from the Sixth and Tenth Circuits reaffirming the importance of courts conducting a "rigorous" analysis of each Rule 23 factor before certifying a class;
- **Part II** provides an update on cases analyzing the need for plaintiffs to demonstrate a classwide method of proving injury to meet the predominance requirement of Rule 23(b)(3); and
- **Part III** discuses a Ninth Circuit decision scrutinizing the adequacy of a lead plaintiff in a class settlement.

**I. Circuit Courts Continue to Emphasize the Importance of "Rigorously" Analyzing Each Rule 23 Class Certification Factor** In its landmark decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the Supreme Court held (among other things) that before certifying a class, district courts must conduct a "rigorous analysis" of the Rule 23 factors. *Id.* at 351. This critical requirement remains alive and well, as we've covered in previous updates, including here and here. And this past quarter, circuit courts have continued to emphasize that district courts cannot grant class certification with a rubber stamp. In *Brayman v. KeyPoint Government Solutions, Inc.*, 83 F.4th 823 (10th Cir. 2023), the Tenth Circuit vacated an order granting class certification because "[a] rigorous analysis requires more" than a one-paragraph discussion of predominance. *Id.* at 838–39. The district court had certified a class of employees who alleged their employer required them to work uncompensated overtime. Although the Tenth Circuit declined to conduct the commonality or predominance analyses itself in the first instance, it provided suggestions about "some of the questions that the district court would need to consider when determining what issues in the class action were common issues, what issues were individual issues, and which predominate." *Id*. at 839–41. As one example, the Tenth Circuit considered how the plaintiffs would prove that an employee worked uncompensated overtime. The plaintiffs contended that each class member would testify about how many hours they worked per week, yet they failed to present any "expert testimony, statistical data, or representative evidence" showing how this was a common, rather than an individual, issue. *Id.* at 839. As another example, the Tenth Circuit noted that to succeed on their claims, the plaintiffs had to establish that their employer knew of this overtime work, but the plaintiffs' "unelaborated" interrogatory answers and deposition testimony were not "sufficiently specific and representative to be 'common' evidence that would be admissible in each [putative class member]'s individual case" about the employer's knowledge for that particular individual. *Id.* at 840. Similarly, in *In re Ford Motor Co.*, 86 F.4th 723 (6th Cir. 2023), the Sixth Circuit concluded the district court did not conduct a rigorous analysis of commonality, cautioning that Rule 23 "requires a named plaintiff to offer '[s]ignificant' evidentiary proof that he can meet *all four* of [its] criteria." *Id.* at 726 (emphasis added). *In re Ford* involved allegations about alleged brake design defects in pickup trucks over a five-year period. *Id.* Although the district court certified Rule 23(c)(4) "issue" classes to resolve three primary issues related to the purported defects, it did so with "cursory treatment of commonality." *Id.* In particular, the district court's analysis did "not make clear that the three certified issues can each be answered

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'in one stroke.'" *Id.* at 727 (quoting *Dukes*, 564 U.S. at 350). For instance, one certified issue concerned whether the brakes in the pickup trucks were defective. Although the plaintiffs alleged this was a common issue, the district court failed to "grapple" with the evidence that certain redesigns and manufacturing changes over the class period made a material difference to the alleged defect. *Id.* at 728. The Sixth Circuit reminded trial judges that they "must evaluate whether each of the four Rule 23(a) factors is *actually* satisfied, not merely that the factors are properly *alleged*." *Id.* at 729 (citations omitted) (emphases added). **II. Circuit Courts Continue to Require Classwide Method of Proving Injury Before Certifying Rule 23(b) Classes** Two decisions from this quarter, *Huber v. Simon's Agency, Inc.*, 84 F.4th 132 (3d Cir. 2023), and *Sampson v. United Services Automobile Ass'n*, 83 F.4th 414 (5th Cir. 2023), reaffirmed the principle that plaintiffs must demonstrate a classwide method of proving injury to meet the predominance requirement of Rule 23(b)(3). *Huber* concerned a putative class action against a medical debt collection agency that allegedly provided misleading and confusing notices to debtors. *See* 84 F.4th at 141. The named plaintiff claimed she incurred extensive financial costs as a result of the misleading information. *See id.* at 143. The district court certified a class of individuals who received the same information from the defendant. *Id.* at 142. On appeal, the Third Circuit held that under *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), and circuit precedent, merely receiving a misleading notice, without allegations of financial loss, was insufficient to establish Article III standing. *Huber*, 84 F.4th at 148–49. While the Third Circuit ruled that the class action was justiciable because the named plaintiff herself had standing, it reasoned that unnamed class members would need to put forward specific information about their financial circumstances to meet the justiciability requirement. *Id.* at 147–54. The Third Circuit therefore vacated the certification order and remanded to the district court to assess "the implications of [the] individualized showings [the unnamed class members need to make] for the predominance requirement." *Id.* at 157. In remanding, the Third Circuit offered guidance as to how the predominance inquiry should unfold: if few class members are able to show that they suffered concrete financial injuries, then the class should not be considered sufficiently cohesive to warrant certification. *Id.* at 157–58. On the other hand, if many class members appear likely to have standing or "if there is a plausible straightforward method to sort them out at the back end of the case," then the case may be able to proceed on behalf of the class. *Id.* In a similar case, *Sampson v. United Services Automobile Ass'n*, 83 F.4th 414 (5th Cir. 2023), the Fifth Circuit vacated a class certification order because the plaintiffs failed to identify a classwide way of establishing the defendant's liability. *Sampson* was a breach of contract action against an insurance company based on its use of a particular method of vehicle valuation. *See id.* at 417. The plaintiffs-insureds claimed that if the defendant had used a different valuation method, they would have gotten bigger payouts when they totaled their cars. *Id.* One of the questions on appeal was whether the plaintiffs could establish classwide injury—an essential element of the claims at issue—by relying on their preferred vehicle-valuation standard. *Id.* at 421. According to the plaintiffs, the choice of the appropriate vehicle-valuation standard was only a damages question, and district courts have wide discretion to choose among damages models at the class-certification stage. *Id*. The Fifth Circuit acknowledged that district courts generally do have such discretion, but the purported damages issue was actually entwined with the question of injury. *Id.* at 421–22. Because the selection of the appropriate vehicle-valuation standard was not just a choice between "imperfect *damages* models," but rather went to the question of liability, the Fifth Circuit concluded that "a district court's wide discretion to choose an imperfect estimative-damages model at the certification stage" had no application. *Id.* at 422–23. **III. The Ninth Circuit Vacates Approval of Class Settlement, Holding that Class Representative Who Was Subject to Arbitration Agreement Could Not Adequately Represent Class Members Who Were Not** As reported in several previous updates (including here and here), circuit courts have continued the trend of taking more active roles in scrutinizing class settlements. This past quarter, the Ninth Circuit vacated the approval of a class settlement in a case against a dating app, holding that the lead plaintiff was not an adequate representative of the class due to her conflict of interest and failure to vigorously litigate on behalf of all 240,000 class members. *See Kim v. Allison*, 87 F.4th 994 (9th Cir. 2023). In *Kim*, the plaintiff alleged a dating app's age-based pricing scheme violated California law. *Id.* at 999. The defendant

successfully moved to compel arbitration as to the lead plaintiff because she had agreed to a version of the app's terms of use that included an arbitration clause. *Id.* While the plaintiff was appealing the order compelling arbitration, she negotiated a class settlement. In this second appeal from the settlement approval, objectors focused their arguments on the lead plaintiff's lack of adequacy, arguing that "unlike the remainder of the class, [the plaintiff] was subject to a binding arbitration order" and the class definition did not account for that important difference. 87 F.4th at 999. The Ninth Circuit agreed that the plaintiff was an inadequate representative and vacated the settlement. With respect to the plaintiff's conflict of interest, the Ninth Circuit emphasized that she was subject to an agreement to arbitrate, while potentially 7,000 other class members were not. *Id.* at 1001. The court reasoned that the plaintiff had a strong interest in settling her claims since she has "no chance of going to trial," even "at the cost of a broad release of other claims that are not subject to arbitration." *Id.* The conflict was "exacerbated" by other provisions in the version of the terms of use that she accepted, including a Texas choice-of-law provision and limitation on liability that did not bind other class members. *Id.* The court also faulted the plaintiff for making inadequate efforts to conduct discovery before reaching a settlement, and said her "approach to opposing [the defendant]'s motion to compel [arbitration was] not suggestive of vigor" because she "belatedly raised formation challenges" when opposing that motion and failed to make "obvious arguments until after they were forfeited." *Id.* at 1002–03.

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