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Second Quarter 2023 Update on Class Actions

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This update provides an overview of key class action-related cases during the second quarter of 2023 (April through June).

Part I recaps recent developments regarding the Federal Arbitration Act ("FAA"), including the Supreme Court's decision requiring automatic stays pending appeals from denials of motions to compel arbitration and a Third Circuit opinion on the scope of the Section 1 exemption for interstate transportation workers.

Part II discusses Article III standing cases from the Seventh and Third Circuits.

Part III discusses a Sixth Circuit decision that rejects the juridical link doctrine, deepening the circuit split on this issue.

And **Part IV** discusses noteworthy cases from the Eleventh and Ninth Circuits on issues relating to class settlement approval.

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Jessica Pearigen Barnes

Wesley Sze

Lauren M. Blas

Bradley J. Hamburger

Kahn A. Scolnick

Christopher Chorba

I. The Supreme Court and Third Circuit Resolve Important Questions Relating to Arbitration

In *Coinbase v. Bielski*, 143 S. Ct. 1915 (2023), the Supreme Court held that appealing the denial of a motion to compel arbitration automatically stays district court proceedings pending resolution of that appeal. Please see our prior client alert for an analysis of this important decision, which helps protect defendants from losing the benefits of arbitration. As the Court recognized, absent these protections, the "potential for coercion is especially pronounced in class actions, where the possibility of colossal liability can lead to . . . 'blackmail settlements.'" *Id.* at 1921.

In another decision that will be of interest to class action practitioners, the Third Circuit held that drivers who use the Uber app are not exempt from the FAA under the interstate transportation worker exception of Section 1. *See Singh v. Uber Techs., Inc.*, 67 F.4th 550 (3d Cir. 2023). In this case, drivers appealed from orders compelling arbitration under Uber's arbitration agreements, arguing that they are exempt from the FAA because it does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.* at 553 (citing 9 U.S.C. § 1).

The Third Circuit disagreed with the drivers, holding that the last category—"workers engaged in foreign or interstate commerce"—applies only if "interstate movement of goods or passengers is a central part of the job description of the class." *Id.* at 557 (citation and internal quotation marks omitted). The court reasoned that the "work of Uber drivers is centered on local transportation," and even "[w]hen Uber drivers do cross state lines, they do so only incidentally, as part of Uber's fundamentally local transportation business." *Id.* at 553. With this opinion, the Third Circuit joins the First and Ninth Circuits, which similarly ruled that rideshare drivers do not qualify as "workers engaged in . . . interstate

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commerce" under FAA. *See Cunningham v. Lyft, Inc.*, 17 F.4th 244 (1st Cir. 2021); *Capriole v. Uber Techs., Inc.*, 7 F.4th 854 (9th Cir. 2021). Gibson Dunn represented Uber in this appeal.

II. The Seventh and Third Circuits Address Article III Standing in Putative Class Actions

Questions regarding Article III standing continue to arise in class action cases, with the Seventh and Third Circuits to be the latest courts to address standing this quarter.

In *Pucillo v. National Credit Systems, Inc.*, 66 F.4th 634 (7th Cir. 2023), the Seventh Circuit affirmed a district court's dismissal of a complaint for lack of Article III standing, holding that feelings of being "concerned," "upset," "confused," and "alarmed" did not provide the plaintiff standing to sue for money damages under the Fair Debt Collection Practices Act ("FDCPA"). *Id.* at 636, 638, 642. The case involved debt collectors who sent two letters to the plaintiff demanding payment on a debt that had been discharged through bankruptcy proceedings. *Id.* at 636. The plaintiff filed suit against the debt collectors, relying on his emotional reactions to the letters. *Id.* The Seventh Circuit held that the plaintiff's emotional responses were insufficient to support standing. *Id.* at 638. In addition, while the court agreed that contact with a credit rating agency or repeated automated phone messages might be sufficiently similar to the common law tort of intrusion upon seclusion to provide standing, the two letters sent to the plaintiff in *Pucillo* were not. *Id.* at 641–42. The court also found persuasive that the two letters sent by mail a year apart did not represent the "kind of abusive practice" the FDCPA was meant to address, noting that Congress's "judgment is also instructive and important for determining whether an intangible harm constitutes injury in fact." *Id.* (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)).

By contrast, in *Weichsel v. JP Morgan Chase Bank, N.A.*, 65 F.4th 105 (3d Cir. 2023), the Third Circuit held that a plaintiff who received a credit card renewal notice that allegedly failed to itemize annual fees in violation of the Truth in Lending Act ("TILA") and Regulation Z had sufficiently alleged an Article III injury—even though his alleged injury had nothing to do with the purposes underlying the statutory cause of action. *Id.* at 108–10. The court reasoned the plaintiff had standing because he suffered a traceable, economic injury: he said he read and understood the non-itemized renewal notice and would not have paid the full annual fee if he had known it included an additional card fee. *Id.* at 111. At least in the Third Circuit's view, it did not matter that the plaintiff's alleged injury was not tied to TILA's "underlying concrete interest," which is to remind borrowers of an upcoming obligation. *Id.* at 112 (citation omitted). Instead, the court reasoned that "while a statutory violation gives Plaintiff his cause of action, that statutory cause of action is distinct from his Article III injury," such that the plaintiff "need not allege any additional injury with a connection to the statute's purpose." *Id.* Nevertheless, the court agreed that the disconnect between his allegations and the purposes of the statute was sufficient to dismiss the complaint for failure to state a claim. *Id.* at 112–14.

III. Sixth Circuit Deepens Circuit Split by Rejecting "Juridical Link" Doctrine

Article III standing generally requires a plaintiff's injuries to be "fairly traceable" to the defendant. But what about named plaintiffs in putative class actions—can they sue defendants who have not injured them if these defendants have injured other, similarly situated absent class members? Some courts have answered that question in the affirmative, relying on the so-called "juridical link" doctrine, which generally provides that a plaintiff may sue defendants that did not injure the plaintiff if all the defendants are "juridically linked" (such as through a "conspiracy" or "concerted scheme") and if it would be "expeditious" to sue all the defendants in one action. *See, e.g.*, *Payton v. Cnty. of Kane*, 308 F.3d 673, 678–79 (7th Cir. 2002). At least two circuits—the Second and Eighth—have previously rejected it. *See Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59 (2d Cir. 2012); *Wong v. Wells Fargo Bank N.A.*, 789 F.3d 889 (8th Cir. 2015).

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This past quarter, the Sixth Circuit in *Fox v. Saginaw County*, 67 F.4th 284 (6th Cir. 2023), joined these circuits in rejecting this doctrine. In *Fox*, the plaintiff claimed to have suffered an unconstitutional taking when his county took ownership of his property for failing to pay property taxes and sought to represent a class of other similarly situated property owners. *Id.* at 288. He sued not only the county in which the taking occurred, but also 26 other counties where putative class members suffered similar takings. *Id.* The Sixth Circuit held that the plaintiff lacked standing to sue the other counties because his own injury was not sufficiently traceable to the 26 other counties where he experienced no personal taking. *Id.* at 293. In so holding, the Sixth Circuit rejected the juridical link doctrine, which other courts have invoked to "allow[] a named plaintiff in a putative class action to sue defendants who have not injured the plaintiff if these defendants have injured absent class members." *Id.* at 288. The Sixth Circuit found that juridical link doctrine conflicted with Supreme Court precedent on a number of basic principles, including "that a class-action request 'adds nothing to the question of standing,'" *id.* (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 40 n.20 (1976)), that standing be determined "at the outset of the litigation" (rather than after a class is certified), *id.* at 294 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000)), and that the three-part standing test sets an "irreducible constitutional minimum," *id.* at 294 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

IV. The Eleventh and Ninth Circuits Reverse Class Settlement Approvals

This past quarter, the Eleventh and Ninth Circuits reversed settlement class approvals, which reflects the continued trend towards greater scrutiny of class settlements.

In *Williams v. Reckitt Benckiser LLC*, 65 F.4th 1243 (11th Cir. 2023), the Eleventh Circuit vacated a class settlement that awarded injunctive and monetary relief to a class of individuals who purchased the defendants' "brain performance supplements" on the ground that the plaintiffs lacked standing to pursue injunctive relief. *Id.* at 1247, 1253. The court explained that "even if a plaintiff can establish standing to pursue separate claims for monetary relief based on allegations of *past* harm, before a court may grant that plaintiff injunctive relief, the plaintiff must separately establish a threat of 'real and immediate,' as opposed to 'conjectural or hypothetical,' future injury." *Id.* at 1253 (citations omitted). The named plaintiffs did not meet that standard because they did not "allege any 'continuing, present adverse effects' associated with prior purchases of [defendants'] [p]roducts," or any "'concrete plans' to purchase [defendants'] [p]roducts again in the future." *Id.* at 1255 (citation omitted). Because the named plaintiffs lacked standing to seek injunctive relief, the district court did not have jurisdiction to grant injunctive relief—even in the settlement context—and therefore should not have approved the settlement as drafted. *Id.* at 1256–57.

In *Lowery v. Rhapsody International, Inc.*, 69 F.4th 994 (9th Cir. 2023), the Ninth Circuit reversed a $1.7 million attorneys' fee award in a "claims-made" settlement where class members submitted claims for less than 0.3% of a capped $20 million settlement fund. *Id.* at 997, 1001. The court explained that district courts awarding fees "must consider the actual or realistically anticipated benefit to the class¾not the maximum or hypothetical amount¾in assessing the value of a class settlement" for purposes of evaluating the reasonableness of a fee award. *Id.* at 1001. On remand, the Ninth Circuit ordered the district court to "disregard the theoretical $20 million settlement cap and instead start with the $52,841.05 that the class claimed" because "[a]ny other approach would allow parties to concoct a high phantom settlement cap to justify excessive fees, even though class members receive nothing close to that amount." *Id.*

The following Gibson Dunn lawyers contributed to this client update: Jessica Pearigen, Allie Miller, Yixian Sun*, Wesley Sze, Lauren Blas, Bradley Hamburger, Kahn Scolnick, and Christopher Chorba.

Gibson Dunn attorneys are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you

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usually work in the firm's Class Actions, Litigation, or Appellate and Constitutional Law practice groups, or any of the following lawyers:

Theodore J. Boutrous, Jr. – Los Angeles (+1 213-229-7000, tboutrous@gibsondunn.com) Christopher Chorba – Co-Chair, Class Actions Practice Group – Los Angeles (+1 213-229-7396, cchorba@gibsondunn.com) Theane Evangelis – Co-Chair, Litigation Practice Group, Los Angeles (+1 213-229-7726, tevangelis@gibsondunn.com) Lauren R. Goldman – New York (+1 212-351-2375, lgoldman@gibsondunn.com) Kahn A. Scolnick – Co-Chair, Class Actions Practice Group – Los Angeles (+1 213-229-7656, kscolnick@gibsondunn.com) Bradley J. Hamburger – Los Angeles (+1 213-229-7658, bhamburger@gibsondunn.com) Lauren M. Blas – Los Angeles (+1 213-229-7503, lblas@gibsondunn.com)

**Yixian Sun is an associate practicing in the firm's New York office who is not yet admitted to practice law in New York.*

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