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Third Quarter 2020 Update on Class Actions

Client Alert | November 10, 2020

This update provides an overview and summary of key class action developments during the third quarter of 2020 (July through September).

Part I discusses an important Second Circuit decision regarding claims for injunctive relief in false advertising class actions.

Part II describes an Eleventh Circuit opinion in which a divided panel held that 19th-century Supreme Court decisions prohibit the very common practice of providing incentive awards to class representatives.

Part III covers two decisions from the Ninth Circuit relating to the Class Action Fairness Act's amount-in-controversy requirement.

I. The Second Circuit Holds That It Is Improper to Certify an Injunctive-Relief Class of Past Purchasers of an Allegedly Falsely Advertised Product

In a very significant decision impacting false advertising class actions, the Second Circuit in *Berni v. Barilla S.p.A.*, 964 F.3d 141 (2d Cir. 2020), held that district courts cannot certify a Rule 23(b)(2) injunctive-relief class of past purchasers of products that were allegedly falsely advertised.

Berni involved the allegation that boxes of pasta they had purchased were underfilled in violation of New York's General Business Law § 349(a), which prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce." *Id.* at 144. The parties reached a settlement in which the defendant agreed, among other things, to include disclosures on its boxes regarding the amount of pasta contained in them. *Id.* The district court certified an injunctive-relief class for settlement purposes under Rule 23(b)(2) and entered final approval of the settlement. An objector appealed.

The Second Circuit held that the objector had standing to appeal even though he was not personally deceived by the packaging, *id.* at 145–46, and it then reversed the grant of class certification, holding that a Rule 23(b)(2) class may be certified only where the injunctive relief sought would be "proper for each and every member of the group of past purchasers." *Id.* at 146. In this case, such relief would not be proper, according to the court, because past purchasers were under no obligation to buy the product again, and, even if they did, would already have the information they claimed to lack at the time of their initial purchase. As such, they were "not likely to encounter future harm of the kind that makes injunctive relief appropriate." *Id*. at 147–48.

The *Berni* decision is a critical ruling in favor of class-action defendants, as it will prevent the certification of Rule 23(b)(2) classes in many, if not most, false advertising class actions within the Second Circuit. Coupled with the Ninth Circuit's decision in *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020), which upheld the dismissal of equitable claims when an adequate legal remedy exists, plaintiffs should face more challenges asserting Rule 23(b)(2) class actions in two of the busiest jurisdictions for these

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lawsuits.

II. Relying on Longstanding Supreme Court Decisions, the Eleventh Circuit Rejects Incentive Awards for Class Representatives

The Eleventh Circuit caught the attention of practitioners this quarter on the permissibility of incentive payments for class representatives, which are almost customary in class settlements.

In *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2020), a putative class of consumers alleged that the defendant had violated the Telephone Consumer Protection Act, 47 U.S.C. § 227. The parties settled, and the district court eventually approved the settlement, overruling one class member's objection that the class representative's incentive award "contravened" the United States Supreme Court's decisions in *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885), which are known for "establishing the rule . . . that attorneys' fees can be paid from a common fund." *Johnson*, 975 F.3d at 1250, 1255–56.

The frequency of class action "service awards" in modern practice did not persuade the majority of the Eleventh Circuit panel:

The class-action settlement that underlies this appeal is just like so many others that have come before it. And in a way, that's exactly the problem. We find that, in approving the settlement here, the district court repeated several errors that, while clear to us, have become commonplace in everyday class-action practice . . . . We don't necessarily fault the district court—it handled the class-action settlement here in pretty much exactly the same way that hundreds of courts before it have handled similar settlements. But familiarity breeds inattention, and it falls to us to correct the errors in the case before us.

Id. at 1248–49. The majority ruled that while *Greenough* and *Pettus* had permitted an award of class counsel's fees, they had denied class representatives' claims for a "salary" or "personal services" and for "private expenses" as "unsupported by reason or authority." *Id.* at 1256–57. The majority held that incentive awards are "roughly analogous to a salary" and, "[i]f anything, . . . present even more pronounced risks than . . . salary and expense reimbursements" because they "promote litigation by providing a prize to be won." *Id.* at 1257–58.

Judge Martin dissented and warned that the majority's holding was unprecedented and would cause plaintiffs to "be less willing to take on the role of class representative in the future." *Id.* at 1264.

III. The Ninth Circuit Reverses Remand Orders in Two Class Action Fairness Act Cases

The Ninth Circuit issued two significant decisions in appeals involving remand orders under the Class Actions Fairness Act ("CAFA") that will make it easier for defendants to establish the $5 million amount in controversy needed for removal under CAFA.

In *Salter v. Quality Carriers, Inc.*, 974 F.3d 959 (9th Cir. 2020), the court held that plausible allegations of CAFA's amount-in-controversy requirement are sufficient unless the plaintiff challenges the truth of those allegations. In *Salter*, the defendant removed an action brought by a putative class of truck drivers alleging that they were misclassified as independent contractors. To establish that the amount in controversy exceeded $5 million, the defendant relied on a declaration from its Chief Information Officer that stated he was familiar with the company's record-keeping practices and that the company had deducted expenses totaling over $14 million from putative class members' paychecks. *Id.* at 961–62. The district court determined that the declaration was conclusory and faulted the defendant for failing to attach the underlying business records, and remanded the action to state court. *Id.* at 962. Citing *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81,

88–89 (2014), the Ninth Circuit vacated the remand order because the district court erred in refusing to accept the truth of the declaration. *Salter*, 974 F.3d at 964–65. Because the plaintiff did not make a factual attack on the truth of the declaration, and instead argued only that the declaration was insufficiently detailed and did not attach supporting data, the declaration's conclusions should have been accepted as true. *Id.* at 965.

In *Greene v. Harley-Davidson, Inc.*, 965 F.3d 767 (9th Cir. 2020), the Ninth Circuit held that punitive damages can be factored into the amount in controversy calculation under CAFA if there is a "reasonable possibility" of such damages. The defendant argued that a jury might award punitive damages on a 1:1 ratio with compensatory damages, as juries had done in other cases brought under California's Consumers Legal Remedies Act. *Id.* at 770–71. The district court refused to include punitive damages in the amount-in-controversy calculation because the defendant did not "analogize or explain" how the cited cases "[we]re similar to the instant action." *Id.* at 771. The Ninth Circuit reversed. It reasoned that the amount in controversy for purposes of CAFA is the "amount *at stake* in the underlying litigation," which "refers to *possible* liability." *Id.* at 772 (first emphasis in original, second emphasis added). A defendant could meet its burden to show possible liability by "cit[ing] a case based on the same or a similar statute in which the jury or court awarded punitive damages based on the punitive-compensatory damages ratio relied upon by the defendant in its removal notice." *Id.* Because the defendant had cited four such cases, it met its burden. *Id.*

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

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