GIBSON DUNN

January 30, 2018

FOURTH QUARTER 2017 UPDATE ON CLASS ACTIONS

To Our Clients and Friends:

This update provides an overview and summary of key class action developments during the fourth quarter of 2017 (October through December), and a brief look ahead to some of the key class action issues anticipated in 2018.

- **Part I** addresses class action developments at the United States Supreme Court, including the December grant of certiorari in an important case regarding the tolling effect of putative class actions under the *American Pipe* rule, and a pending certiorari petition that could provide clarification of the propriety of *cy pres* awards in class action settlements.

- **Part II** covers rulings from the Third and Ninth Circuits that explore the limits that Article III standing imposes on consumer protection suits in the absence of a clear injury to the plaintiff, and the circuit split that now exists on this issue.

- **Part III** describes several rulings from the federal appellate courts on the issue of removal under the Class Action Fairness Act ("CAFA").

- **Part IV** discusses noteworthy rulings from the California Court of Appeal that reaffirm the differences in class certification standards between California and federal courts, including California's emphasis on the ascertainability of a proposed class.

In 2017, our first quarter update covered notable decisions by the federal courts of appeals interpreting the Supreme Court's rulings in *Spokeo, Inc. v. Robins* (standing to sue for statutory violations) and *Campbell-Ewald Co. v. Gomez* (whether an unaccepted offer of judgment may moot a class action), and other key decisions in the areas of class certification and class settlement. Our second quarter update addressed the Supreme Court's opinion in *Microsoft v. Baker* (rejecting plaintiffs' attempts to manufacture appellate jurisdiction by a "voluntary dismissal" following orders denying class certification), and several other topics of interest to class action litigators, including CAFA issues. And our third quarter update focused on arbitration-related developments, interlocutory appeals under Rule 23(f), and other noteworthy appellate rulings issued during that quarter.

We will continue to issue quarterly updates on developments in the law of class actions throughout 2018.

I. Supreme Court Agrees to Decide Tolling Effect of Putative Class Actions and Weighs Certiorari on *Cy Pres* Relief

As our second quarter 2017 update explained, the Ninth Circuit in *Resh v. China Agritech, Inc.*, 857 F.3d 994 (9th Cir. 2017), in conflict with several other circuits, held that the tolling of a statute of limitations

under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974)—which held that the timely filing of a putative class action tolls the limitations period as to the *individual* claims of the putative class members—applies not only to the filing of subsequent individual lawsuits but also to subsequent class action lawsuits. On December 8, 2017, the Supreme Court granted China Agritech's cert petition (No. 17-432) to decide whether the *American Pipe* rule permits a previously absent putative class member to bring a subsequent *class action* outside the applicable limitations period. Whether the *American Pipe* rule extends to successive (or "stacked") class actions—and thus whether the rule can be used to revive the claims of absent persons who did not themselves sue after class certification was denied in an earlier case—is of considerable practical importance to class action defendants, who face the prospect of a series of duplicative putative class actions over a potentially lengthy period of time. The Court has set the case for oral argument on March 26, 2018. (At the petition stage, Gibson Dunn represented the Chamber of Commerce of the United States of America and the Retail Litigation Center as amici supporting petitioner China Agritech. At the merits stage, Gibson Dunn represented those organizations, and the American Tort Reform Association, in an amicus brief supporting the petitioner.)

Additionally, the Supreme Court is also expected to decide by June 2018 whether the National Labor Relations Act precludes enforcement of class action waivers in mandatory employment arbitration agreements, which is the question presented in *Epic Systems Corp. v. Lewis* (No. 16-285), *National Labor Relations Board v. Murphy Oil USA, Inc.* (No. 16-307), and *Ernst & Young LLP v. Morris* (No. 16-300). We discussed the underlying circuit split in our third quarter 2016 update, and described the October 2, 2017 oral argument in our third quarter 2017 update.

In 2018, the Court could also address a significant class action question raised by the certiorari petition in *Frank v. Gaos* (No. 17-961) (pet. for cert., filed Jan. 3, 2018). Specifically, the petition in *Frank* gives the Court the opportunity to address some of the "fundamental concerns" Chief Justice Roberts previously identified "surrounding the use of" *cy pres* remedies—under which courts redirect unclaimed funds to their next best use, often benefitting persons who are *not* identical to the aggrieved class of plaintiffs—which are "a growing feature of class action settlements." *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting denial of certiorari). The petitioners in *Frank* objected to the fairness of the "*cy pres*-only," no-money-for-the-class settlement approved by a divided vote in *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017). We described the Ninth Circuit's decision sustaining that settlement in our third quarter 2017 update.

Petitioners challenge the allowance of purely *cy pres* settlements, in which money flows to non-parties (typically, charitable institutions selected by class counsel and the defendants), whenever direct monetary payments to class members is deemed "infeasible" (in that the monetary amount would be small when divided among class members). They contend the Ninth Circuit's forgiving standard for such settlements conflicts with the more stringent standards of the Third, Fifth, Seventh, and Eighth Circuits disfavoring purely *cy pres* relief, inviting class action plaintiffs' counsel to favor the Ninth Circuit. Petitioners urge the Court to reject the Ninth Circuit's approach as "a serious abuse of the class action mechanism that puts the interests of those it is intended to protect, class members, dead last." Respondents' brief in opposition is currently due on March 9, 2018.

II. The Courts of Appeals Issue Significant Rulings on Article III Standing

In two notable decisions this quarter, the Third and Ninth Circuits issued rulings making it more difficult for defendants to obtain the dismissal of class complaints on Article III standing grounds.

***Cottrell v. Alcon Labs.*, 874 F.3d 154 (3d Cir. 2017)**

In *Cottrell*, a split panel reversed a district court's dismissal of a putative consumer class action lawsuit on standing grounds. The plaintiffs were consumers of prescription eye medication who alleged that manufacturers and distributors of the medication packaged it with a dispenser that discharged the medicine in doses that were too large, forcing consumers to waste it, and thereby violating the consumer protection statutes of their home states. *Id.* at 159. The district court granted the defendants' motion to dismiss on the grounds that the named plaintiffs lacked Article III standing, finding that the plaintiffs had not pleaded an injury in fact. *Id.* at 161.

Breaking with a decision of the Seventh Circuit, the Third Circuit held that, under *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540 (2016), the plaintiffs had sufficiently alleged an injury to confer standing to sue for unfair trade practices based on their theory that a manufacturer is obliged to optimize the number of eye drop doses in a container of fixed volume, even if there was no misrepresentation as to the number of doses in the product. *Id.* at 163-65. The court acknowledged that the Seventh Circuit had recently reached the opposite conclusion when faced with similar allegations in *Eike v. Allergan, Inc.*, 850 F.3d 315 (7th Cir. 2017), but concluded that the Seventh Circuit improperly "blended standing and merits together in a manner that the Supreme Court has exhaustively cautioned courts against," and in so doing, the Seventh Circuit's analysis "flips the standing inquiry inside out, morphing it into a test of the legal validity of the plaintiffs' claims of unlawful conduct." *Id.* at 165-66.

In a strongly-worded dissent, Judge Jane R. Roth cautioned that the Third Circuit's opinion "erodes [constitutional] strictures by allowing the plaintiffs here to manufacture a purely speculative injury in order to invoke our jurisdiction." *Id.* at 171. Judge Roth further warned that "the Majority … invites judges—rather than industry experts, market forces, or agency heads—to second-guess the efficacy of product design even in the most opaque of industries." *Id.* at 175-76.

The Third Circuit's decision also appears to be in tension with the Ninth Circuit's decision in *Ebner v. Fresh, Inc.*, 838 F.3d 958 (9th Cir. 2016), which concluded that a plaintiff could not state a valid claim for false advertising based on the quantity of lip balm in a dispenser tube, some of which may not be reasonably accessible once the consumer reaches the bottom of the tube using a screw mechanism. The Ninth Circuit concluded that the product's label accurately stated the amount of lip balm in the tube, and was "not false and deceptive merely because the remaining product quantity may be 'unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons' that may purchase the product." *Id.* at 996.

***Davidson v. Kimberly-Clark Corp.*, 873 F.3d 1103 (9th Cir. 2017)**

In *Davidson*, the Ninth Circuit revived a putative class action filed by a consumer who alleged that Kimberly-Clark's flushable wipes are not actually flushable. The plaintiff in *Davidson* asserted claims

under California's Consumers Legal Remedies Act, Unfair Competition Law, and False Advertising Law, and sought damages and injunctive relief, among other remedies. The district court found that the plaintiff lacked standing to seek injunctive relief because she was unlikely to purchase Kimberly-Clark's flushable wipes in the future. *Id.* at 1108-09. On the merits, the district court concluded that the plaintiff had failed to adequately allege why the representation "flushable" was false, and dismissed the complaint. *Id.* at 1109. Finally, the district court found that the plaintiff failed to allege any harm due to her use of the product. *Id.*

The Ninth Circuit reversed, holding that the complaint adequately alleged that the term "flushable" deviated from the dictionary definition of the term. *Id.* at 1110-11. The court further held that the plaintiff sufficiently alleged harm because she claimed she was exposed to false information about the product purchased, which caused the product to be sold at a higher price. *Id.* at 1112.

In reaching its decision, the Ninth Circuit noted that several district courts had reasoned that plaintiffs who are already aware of the deceptive nature of an advertisement are not likely to be misled into buying the relevant product in the future and, therefore, are not capable of being harmed again in the same way. *Id.* at 1113-14. The Ninth Circuit, however, rejected that reasoning, and instead held that "a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an 'actual and imminent, not conjectural or hypothetical' threat of future harm." *Id.* at 1115.

III. Disputes Regarding the Removal of Class Actions Under CAFA Continue to Be Resolved y the Courts of Appeals

The federal courts of appeals continue to grapple with the terms of the CAFA statute and its application to various factual scenarios, and this quarter they issued an unusually high number of decisions on these issues.

Corporate Citizenship. In *Roberts v. Mars Petcare US, Inc.*, 874 F.3d 953 (6th Cir. 2017), the Sixth Circuit reversed the district court's denial of a motion to remand to Tennessee state court a lawsuit by a putative class of Tennessee citizens against a Delaware corporation headquartered in Tennessee. The court held that the phrase "a citizen of a State different from any defendant" in CAFA, 28 U.S.C. § 1332(d)(2)(A), refers to "all of a defendant's citizenships, not the alternative that suits it." *Roberts*, 874 F.3d at 955. The court reasoned that CAFA did not alter the general rule under the diversity jurisdiction statute that a corporation is considered a citizen of both its state of incorporation and the state of its principal place of business for diversity purposes, and that Mars Petcare was therefore not diverse from the members of the putative class. *Id.* at 955-56.

Discretionary Exception. In *Speed v. JMA Energy Co.*, 872 F.3d 1122 (10th Cir. 2017), the district court remanded a lawsuit filed by a putative class of oil well owners to Oklahoma state court. Although the class met the elements for removal under CAFA, the district court concluded that the factors in the discretionary exception to CAFA, 28 U.S.C. § 1332(d)(3), weighed in favor of remand, because the plaintiff had sued an Oklahoma energy company under an Oklahoma statute, and more class members

were from Oklahoma (48%) than from any other state. The Tenth Circuit affirmed, rejecting the defendant's argument that a factor in the discretionary exception analysis found to be "neutral" should count against remand. *Speed*, 872 F.3d at 1128-29.

"Home State" Exception. In *Brinkley v. Monterey Financial Services, Inc.*, 873 F.3d 1118 (9th Cir. 2017), the plaintiff filed a lawsuit in California state court alleging violations of California and Washington laws that prohibit recording of telephone conversations without notice, on behalf of a putative class of individuals who had made or received a recorded phone call with the defendant "while physically located or residing in California and Washington." The defendant removed, and during jurisdictional discovery produced a list of more than 152,000 persons whose calls had been recorded and who had a California or Washington address, and the plaintiff filed an expert report analyzing a random sample of the list. *Id.* at 1120. The district court granted the plaintiff's motion to remand under the "home state" exception to CAFA, 28 U.S.C. § 1332(d)(4)(B), finding that at least two-thirds of the members of the putative class were California citizens based on the expert's statistical evidence. *Id.* The plaintiff, however, had produced evidence only regarding individuals "residing in" California, and had failed to present evidence regarding either the size of the entire class or the composition of the "located in" California subgroup of the class. *Id.* at 1122. The Ninth Circuit therefore vacated the district court's decision, holding that the plaintiff's attempt to remand the case "based on evidence of only some class members' citizenship" was improper. *Id.*

CAFA and Mass Actions. In *Liberty Mutual Fire Insurance Co. v. EZ-FLO International, Inc.*, 877 F.3d 1081 (9th Cir. 2017), the Ninth Circuit affirmed remand of lawsuit that the defendant had removed as a "mass action" under 28 U.S.C. § 1332(d)(11)(B)(i). The case was brought by 26 insurance companies in their capacity as subrogees of 145 insured homeowners with leaking pipes. *Id.* at 1083. The court applied the Supreme Court's holding in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014), that the "persons" in the phrase "100 or more persons" in the CAFA definition of "mass action" refers to named plaintiffs, and therefore concluded that the 145 insureds, although real parties in interest in the case, did not count toward the CAFA numerosity requirement because they were not the parties who had actually brought the lawsuit, filed or served papers, or had any right to control the lawsuit, and thus could not be counted as "plaintiffs." *EZ-FLO*, 877 F.3d at 1084-85.

Notice of Class Settlements to State Officials. In *In re Flonase Antitrust Litigation*, 879 F.3d 61 (3d Cir. 2017), the Third Circuit affirmed the district court's denial of a motion by GlaxoSmithKline to enforce a class settlement against the State of Louisiana through an injunction to prevent the state from pursuing its claims against the manufacturer in a separate lawsuit. Louisiana, an indirect purchaser of Flonase and a potential member of the class, had not received class notice, but had received notice of the litigation pursuant to the CAFA provision that requires the complaint be sent to each state in which a class member resides, 28 U.S.C. § 1715(b). *Id.* at 63-64. The court held that the class settlement could not be enforced against Louisiana through an injunction because the state had not waived its sovereign immunity and its receipt of the statutory notice under CAFA did not constitute a clear declaration of its consent to be sued. *Id.* at 68-69.

As these cases indicate, parties removing cases under CAFA should pay close attention to the text of the statute when determining whether the removal requirements apply, and should stay advised of the latest developments in the courts of appeals as they continue to interpret various provisions of the statute.

IV. Notable California Appellate Decisions on Class Certification Standards

The California Court of Appeal issued two notable class actions decisions last quarter that reaffirmed the differences between California and federal class certification standards, and emphasized the state's heightened rule for establishing ascertainability.

***Hefczyc v. Rady Children's Hospital-San Diego,* 17 Cal. App. 5th 518 (2017) (pet. for review filed Dec. 27, 2017)**

In *Hefczyc*, the plaintiff filed a putative class action against a hospital seeking only declaratory relief regarding certain contractual terms between a class of the hospital's patients (or their guarantors) and the hospital. *Id*. at 522. The plaintiff moved for class certification under California Code of Civil Procedure section 382 and asserted that this provision of law was the state law equivalent of Federal Rule of Civil Procedure 23(b)(1) and (b)(2), the elements of which are less onerous for declaratory or injunctive relief actions than for damages actions. *Id*. at 525-26. The trial court rejected the plaintiff's argument and denied class certification, finding that the plaintiff's motion was insufficient because he failed to establish ascertainability, predominance, and superiority as required by section 382. *Id.* at 526.

The California Court of Appeal affirmed, holding that section 382 does not have an equivalent to Federal Rule of Civil Procedure 23(b)(1) or (b)(2), and as a result, California's procedural requirements apply to declaratory relief, injunctive relief, and damages actions alike. The court explained:

> [T]here is no gap in California precedent to be filled by reference to Federal Rules of Civil Procedure, rule 23(b)(1)(A) or (b)(2) (28 U.S.C.) on the issue of what class certification standards must be met when a plaintiff seeks only declaratory or injunctive relief on behalf of a class. Even when the plaintiff seeks solely declaratory or injunctive relief, California case law follows the well-established requirements that our Supreme Court has consistently stated, namely, (as relevant here) that the plaintiff must establish that (1) the class is ascertainable; (2) common questions predominate; and (3) a class action would provide substantial benefits, making it superior to other procedures for resolving the controversy.

Id. at 535-36.

***Noel v. Thrifty Payless, Inc.*, 17 Cal. App. 5th 1315 (2017) (pet. for review filed Jan. 24, 2018)**

In *Noel*, the plaintiff filed suit under the California Consumers Legal Remedies Act, Unfair Competition Law, and False Advertising Law after purchasing an inflatable swimming pool that was smaller than it appeared in a photo on the box. *Id.* at 1320-21. The trial court denied the plaintiff's motion to certify a proposed class of more than 20,000 customers, concluding that the proposed class was not ascertainable,

and further found that the plaintiff had not presented any evidence to establish a method for identifying class members, including what records were available or what those records would show. *Id.* at 1323.

The Court of Appeal affirmed the denial of class certification, criticizing "class counsel's premature filing of the motion without first conducting sufficient discovery to meet its burden of demonstrating there are means of identifying members of the putative class so that they might be notified of the pendency of the litigation." *Id.* at 1321. Doing so, the court reasoned, "jeopardizes the due process rights of absent class members." *Id.*

The court also concluded that the trial court did not abuse its discretion by denying the plaintiff a continuance to conduct additional discovery, noting that "no one forced [plaintiff's counsel] to file a premature class certification motion." *Id*. at 1337. Although the plaintiff had obtained new counsel between the filing of the motion and the hearing, the court noted that new counsel could have withdrawn the motion and conducted additional discovery or requested a continuance if he had concluded the motion was premature. *Id*. at 1338.

The *Noel* decision's strict enforcement of California Code of Civil Procedure section 382's ascertainability requirement is a positive development for defendants in class action suits, but conflicts with another California Court of Appeal decision, *Aguirre v. Amscan Holdings, Inc.*, 234 Cal. App. 4th 1290 (2015), which held that a plaintiff could wait until the remedial stage to offer a member identification plan.

The following Gibson Dunn lawyers prepared this client update: Christopher Chorba, Theane Evangelis, Kahn Scolnick, Bradley J. Hamburger, Indraneel Sur, Jennafer M. Tryck, Samuel D. Eisenberg and Laura A. Sucheski.

Gibson Dunn 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:

Theodore J. Boutrous, Jr. - Co-Chair, Litigation Practice Group - Los Angeles (213-229-7000, tboutrous@gibsondunn.com)
Christopher Chorba - Co-Chair, Class Actions Practice Group - Los Angeles (213-229-7396, cchorba@gibsondunn.com)
Theane Evangelis - Co-Chair, Class Actions Practice Group - Los Angeles (213-229-7726, tevangelis@gibsondunn.com)
Kahn A. Scolnick - Los Angeles (213-229-7656, kscolnick@gibsondunn.com)
Bradley J. Hamburger - Los Angeles (213-229-7658, bhamburger@gibsondunn.com)