GIBSON DUNN

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FIRST QUARTER 2018 UPDATE ON CLASS ACTIONS

To Our Clients and Friends:

This update provides an overview and summary of significant class action developments during the first quarter of 2018 (January through March), as well as a brief look ahead to some of the key class action issues anticipated later this year.

- **Part I** addresses developments at the United States Supreme Court, including the oral arguments in *China Agritech, Inc. v. Resh*, the decision in *Jennings v. Rodriguez* and its implications for Rule 23(b)(2) class actions, and three grants of certiorari in cases relating to class actions (including in two important arbitration cases, and in another that will address the use of *cy pres* in class action settlements).

- **Part II** covers the Ninth Circuit's decision in *In re Hyundai & Kia Fuel Economy Litigation*, which may have significant consequences for plaintiffs attempting to certify nationwide class actions, as well as parties attempting to settle such actions.

- **Part III** describes several rulings addressing important issues regarding class settlements, including recent activity by the U.S. Department of Justice in scrutinizing these settlements.

- **Part IV** discusses a series of decisions from the federal courts of appeals, involving (among other things) what it takes to establish standing under Article III in data breach class actions.

- **Part V** addresses a new California Court of Appeal decision regarding the standards applicable to the use of experts at class certification.

I. The U.S. Supreme Court Hears Argument on the Tolling Effect of Putative Class Actions, Issues Guidance on Rule 23(b)(2) Class Actions, and Grants Certiorari in Three Important Cases

As previewed in our fourth quarter 2017 update, the U.S. Supreme Court heard oral argument on March 26, 2018, in *China Agritech, Inc. v. Resh* (No. 17-432). The case concerns the scope of the equitable tolling rule of *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974), which held that the filing of a class action tolls the statute of limitations for absent class members and permits them to bring subsequent *individual* suits after the original class action has been dismissed. *China Agritech* asks whether the *American Pipe* rule should be extended to permit absent class members to bring successive *class action* lawsuits—a question that has divided the courts of appeals.

The oral argument did not suggest a clear answer. While some justices seemed skeptical of barring individuals who relied on their membership in a class action (as a reason not to sue within the limitations

period) from then using Rule 23 in a subsequent suit, others expressed concern that applying the *American Pipe* rule to subsequent class actions would encourage "stacked" successive class actions that would undermine the efficiency rationales underlying the class action device. (Gibson Dunn filed an amicus brief in this case on behalf of the Chamber of Commerce of the United States, the Retail Litigation Center, Inc., and the American Tort Reform Association in support of the petitioner.)

The Court also provided guidance regarding Rule 23(b)(2) classes in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), a case involving the government's detention of aliens without bond hearings. The Court instructed the Ninth Circuit to "consider whether a Rule 23(b)(2) class action continues to be the appropriate vehicle for respondents' [due process] claims in light of" its holding in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), that "'Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.'" *Id.* at 851–52 (quoting *Dukes*, 564 U.S. at 360). Writing for the majority, Justice Alito explained that Rule 23(b)(2) may no longer permit class treatment because some class members may not be entitled to bond hearings as a matter of constitutional due process. *Id.* at 852. The Court also instructed the Ninth Circuit to consider whether the "flexible" due process inquiry, which "calls for such procedural protections as the particular situation demands," can be adjudicated in a class action. *Id.* (quotations omitted).

Looking ahead, there are several significant class action issues on the Court's docket. As noted in our fourth quarter 2017 update, by June 2018, the Court is expected to decide whether the National Labor Relations Act precludes enforcement of class action waivers in mandatory employment arbitration agreements, which is the question presented in a consolidated trio of cases, *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).

In the past three months, the Court granted certiorari in three more cases that will address issues relevant to class actions.

First, on February 26, 2018, the Court granted certiorari in *New Prime Inc. v. Oliveira* (No. 17-340) to resolve two important issues concerning the interpretation and scope of the Federal Arbitration Act ("FAA"): (a) whether a dispute regarding the applicability of the FAA must be resolved by an arbitrator under a valid delegation clause, and (b) whether an exemption for contracts of employment for transportation workers in Section 1 of the FAA applies to independent contractors. Both questions have divided the federal courts of appeals. The case presents an opportunity for the Court to establish uniform, national rules concerning the interpretation of the FAA, including the ability of parties to incorporate enforceable arbitration provisions in agreements governing independent contractors. (Gibson Dunn represents the petitioner, New Prime Inc.)

Second, on April 30, 2018, the Court granted certiorari in *Lamps Plus, Inc. v. Varela* (No. 17-988), which presents the question whether the FAA forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements. *Lamps Plus* presents the Court with an opportunity to again wrestle with the propriety of class arbitration, an issue that the Court previously addressed in *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010).

Finally, on April 30, 2018, the Court granted certiorari in *Frank v. Gaos* (No. 17-961), which we discussed in our third quarter 2017 update and our fourth quarter 2017 update. *Frank*, which involved a class action settlement of claims against Google, concerns the validity of *cy pres*-only settlements that provide no direct compensation to class members. *Frank* presents an opportunity to address the "fundamental concerns" with *cy pres*-only settlements that Chief Justice Roberts previously identified, "including when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy," among other issues. *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting denial of certiorari).

II. Ninth Circuit Vacates Certification of Nationwide Settlement Class

This past quarter, the Ninth Circuit likely increased the scrutiny that district courts must now apply to the certification of nationwide class actions asserting state-law claims. In *In re Hyundai & Kia Fuel Economy Litigation*, 881 F.3d 679 (9th Cir. 2018), a divided panel vacated a nationwide class action settlement because the district court failed to properly analyze whether California law could be applied to all class members.

This action arose out of alleged misstatements concerning the fuel efficiency of certain Hyundai and Kia vehicles. *In re Hyundai*, 881 F.3d at 694-95. The district court certified a nationwide Rule 23(b)(3) class for settlement purposes and granted preliminary approval of a proposed class settlement. *Id.* at 700-01. The district court ruled that it was not required to analyze whether there were significant differences between California law and the laws of the other states at issue because differences in state law could be addressed during a hearing on the fairness of the settlement. *Id.* at 700. The district court approved the settlement without conducting a choice-of-law analysis. *See id.* at 701.

The Ninth Circuit vacated the class certification order. It emphasized that, under *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), "the district court was required to apply California's choice of law rules to determine whether California law could apply to all plaintiffs in the nationwide class, or whether the court had to apply the law of each state, and if so, whether variations in state law defeated predominance." *In re Hyundai*, 881 F.3d at 702. The Ninth Circuit agreed that district courts need not consider "litigation management issues" in deciding whether to certify a settlement class, but they were still obligated to ensure that the class "meets all of the prerequisites of Rule 23," including its predominance requirement. *Id.* Punting the decision about choice-of-law issues to a "fairness hearing" was not a viable option, as a "fairness hearing under Rule 23(e) is no substitute for rigorous adherence to those provisions of the Rule designed to protect absentees[.]" *Id.* at 703 (alteration in original) (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 849 (1999)).

The Ninth Circuit also took steps to limit the perception that nationwide or mass advertising campaigns can produce a "common" question of whether the class relied on certain misrepresentations by the defendants. The court reasoned that even though there was some evidence of nationwide advertising, there was no evidence of uniform representations to used car purchasers, and no evidence of the sort of "massive advertising campaign" that could give rise to a presumption of reliance as to such

purchasers. *In re Hyundai*, 881 F.3d at 704. It also rejected the argument that individualized questions regarding exposure to the advertising could simply be ignored in the settlement context.

Judge Nguyen's dissent claimed, among other things, that the majority improperly shifted the burden from the objectors to the district court or class counsel to decide whether other states' laws apply and argued that the majority's decision had created a circuit split and ran afoul of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

The settling parties filed petitions for rehearing and rehearing en banc in March. The objectors were ordered to file their response and did so on March 28. The petitions are currently pending.

III. Notable Decisions Involving Objections to Class Action Settlements

There were two other notable decisions regarding class action settlements this quarter.

First, the United States Department of Justice signaled a renewed interest in policing class action settlements. According to reports, the DOJ receives more than 700 notices of class action settlements each year as required by the Class Actions Fairness Act ("CAFA"), but it had only participated in two cases. Dep't of Justice, *Associate Attorney General Brand Delivers Remarks to the Washington, D.C. Lawyers Chapter of the Federalist Society* (Feb. 15, 2018), https://www.justice.gov/opa/speech/associate-attorney-general-brand-delivers-remarks-washington-dc-lawyers-chapter. At a conference on February 15, however, Associate Attorney General Rachel L. Brand warned that "If a settlement isn't fair or reasonable under CAFA, DOJ may file a statement of interest saying so. Be on the lookout in the coming days for the first example." *Id.*

The DOJ followed through on this promise in *Cannon v. Ashburn Corp.*, No. 16-cv-1452, 2018 WL 1806046 (D.N.J. Apr. 17, 2018), where the district court denied a motion for final settlement approval based in part on the concerns raised by the DOJ. The DOJ had filed a "statement of interest" objecting to the class settlement of claims involving alleged false advertising in connection with the sale of wines. *Id.* at *12. The proposed settlement offered class members coupons worth between $0.20 to $2.25 per bottle of wine purchased, with a total settlement value estimated at $10.8 million. *Id.* at *3. Class counsel were to receive $1.7 million in fees. *Id.* In its "statement of interest," the DOJ argued that class counsel should not receive a "windfall" of $1.7 million, given the minimal benefit to class members and the apparent lack of merit of the claims. Statement of Interest of the United States at 1, *Cannon v. Ashburn Corp.*, No. 16-cv-1452 (Feb. 16, 2018), ECF No. 58. Arguing that the settlement was "a textbook coupon settlement" that would force class members to engage in future business with the defendant if they wanted to receive any benefit, the DOJ urged the court, should it grant approval, to defer payment of fees to class counsel until the total value of redeemed coupons is known. *Id.* at 9–11, 16. The Arizona Attorney General also weighed in on behalf of 19 states' Attorneys General, as did ten objectors. 2018 WL 1806046, at *4. This case may be the first example of what appears to be a new trend of heightened scrutiny of class action settlements by both state and federal law enforcement officials.

Second, in *Low v. Trump University, LLC*, 881 F.3d 1111 (9th Cir. 2018), the Ninth Circuit affirmed the district court's order approving a class settlement between Trump University and its former students. *Id.*

at 1113. A lone objector sought to opt out of the class after receiving a court-approved settlement notice and submitting her claim. *Id*. at 1115-16. The district court approved the settlement and the objector appealed. *Id*. at 1116. The objector argued that a single sentence in the long-form notice stating that class members would "be notified about how to obtain a share (or how to ask to be excluded from any settlement)" led her to believe that there would be a second opportunity to opt out. *Id*. at 1117. The Ninth Circuit found that, "reading the notice as a whole and in context," it "promised only one opportunity to opt out," and observed that there is "'no authority of any kind suggesting that due process requires that members of a Rule 23(b)(3) class be given a second chance to opt out.'" *Id*. at 1121 (quoting *Officers for Justice v. Civil Serv. Comm'n of S.F.*, 688 F.2d 615, 635 (9th Cir. 1982)).

IV. *In re Zappos.com* and Other Notable Opinions from the Federal Courts of Appeals Addressing Article III Standing

The issue of Article III standing in putative class actions, and in data privacy class actions in particular, continues to be a hotly litigated issue.

The most significant decision this quarter came from the Ninth Circuit, which reversed the dismissal of a putative class action relating to the breach of Zappos.com's data systems that had allegedly exposed the "names, account numbers, passwords, email addresses, billing and shipping addresses, telephone numbers, and credit and debit card information" of 24 million customers. *In re Zappos.com, Inc.*, --- F.3d ---, No. 16-16860, 2018 WL 1883212, at *2 (9th Cir. Apr. 20, 2018). The district court ruled that those plaintiffs who alleged "actual fraud occurred as a direct result of the breach" had Article III standing, but that those plaintiffs who "failed to allege . . . actual identity theft or fraud" based on the breach did not. *Id.* at *3.

The Ninth Circuit reversed, concluding that the dismissed plaintiffs had "sufficiently alleged standing based on the risk of identity theft." *Zappos*, 2018 WL 1883212, at *2. The Ninth Circuit relied heavily on its previous decision in *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010), which had addressed "the Article III standing of victims of data theft." *Zappos*, 2018 WL 1883212, at *3. The court considered whether *Krottner* was still good law following the Supreme Court's decision in *Clapper v. Amnesty International, USA*, 568 U.S. 398 (2013), but ultimately concluded that "*Krottner* is not clearly irreconcilable with *Clapper*" and thus "control[led] the results here." *Zappos*, 2018 WL 1883212, at *5–*6.

Applying *Krottner*, the Ninth Circuit reasoned that "the sensitivity of the personal information, combined with its theft," meant that "the plaintiffs had adequately alleged an injury in fact" for standing purposes. *Zappos*, 2018 WL 1883212, at *6. Because the hackers had allegedly accessed full credit card numbers, the stolen information "gave hackers the means to commit fraud or identity theft," as underscored by those "plaintiffs who alleged that the hackers had already commandeered their accounts or identities using information taken from Zappos." *Id.* Finding the other elements of Article III standing satisfied, the Ninth Circuit remanded the case to the district court for further proceedings.

While *In re Zappos.com* held that Article III was satisfied based on the facts alleged there, three other decisions issued this past quarter came to the opposite conclusion and thus affirmed the dismissal of putative class actions:

- In *Owner-Operator Independent Drivers Association v. U.S. Department of Transportation*, 879 F.3d 339 (D.C. Cir. 2018), the D.C. Circuit held that commercial truck drivers lacked Article III standing to sue the Department of Transportation for inaccuracies in its database of driver-safety information. Five commercial truck drivers sued the Department because their records contained inaccuracies, but only two of the drivers ever had the inaccurate information shared with future employers. *Id.* at 340. On these facts, the court determined that "the mere existence of inaccurate database information is not sufficient to confer Article III standing" because there was no concrete or de facto harm. *Id.* at 345. Nevertheless, the court found the actual dissemination of inaccurate information was sufficient to confer standing for the two truck drivers whose information had in fact been shared. *Id.*

- In *Bassett v. ABM Parking Services, Inc.*, 883 F.3d 776 (9th Cir. 2018), the Ninth Circuit agreed with the Second and Seventh Circuits that alleging "a statutory violation," without more, was "too speculative" a "theory of exposure to identity theft" to confer Article III standing on a plaintiff to litigate claims under the Fair and Accurate Credit Transactions Act and the Fair Credit Reporting Act. *Id.* at 777, 783; *see also Crupar–Weinmann v. Paris Baguette Am., Inc.*, 861 F.3d 76 (2d Cir. 2017); *Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724 (7th Cir. 2016). The court determined that this bare procedural violation failed to establish a concrete harm and that plaintiff's "theory of 'exposure' to identity theft"—premised on the printing of a few digits of his credit card on a parking receipt—"[was] . . . 'too speculative for Article III purposes.'" *Bassett*, 883 F.3d at 783 (quoting *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 654 (9th Cir. 2017)).

- In *Hagy v. Demers & Adams*, 882 F.3d 616 (6th Cir. 2018), the Sixth Circuit ruled that alleging a violation of the Fair Debt Collection Practices Act ("FDCPA") is not enough to confer Article III standing. The defendant's attorney sent plaintiffs a debt-collection letter stating there would be no more "attempt[s] to collect any deficiency balance." *Id.* at 619. This letter failed to disclose that it was a "communication . . . from a debt collector" in violation of the FDCPA. *Id.* (quoting 15 U.S.C. § 1692e(11)). The court determined that "[f]ar from causing . . . any injury, tangible or intangible, the . . . letter gave [plaintiffs] peace of mind." *Id.* at 621. It accordingly declined to elevate a "bare violation" of the statute to an injury sufficient for Article III standing, as "there must be some limits on Congress's power to create injuries in fact suitable for judicial resolution." *Id.* at 622-23.

V. California Court of Appeal Adopts Majority Position of Federal Courts of Appeals in Holding that the State's *Daubert* Equivalent Applies at Class Certification

In an important new decision, *Apple Inc. v. Superior Court of San Diego County*, 19 Cal. App. 5th 1101 (2018), the Court of Appeal held that *Sargon Enterprises, Inc. v. University of Southern California*, 55 Cal. 4th 747 (2012), which adopts a standard comparable to that by which federal courts evaluate the admissibility of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), "applies to expert opinion evidence submitted in connection with a motion for class certification." *Apple*, 19 Cal. App. 5th at 1106. The ruling aligns California law with the majority of federal courts of appeals.

A proposed class of consumers sought certification of their putative class claims that a purportedly defective power button on older iPhone models decreased the phones' value. The plaintiffs relied on expert declarations to support their certification motion, and the trial court held that it did not need to apply the *Sargon* standard until evidentiary hearings later in the proceedings. The Court of Appeal reversed, reasoning that certifying the class based on inadmissible evidence "would merely lead to its exclusion at trial, imperiling continued certification of the class and wasting the time and resources of the parties and the court." *Apple*, 19 Cal. App. 5th at 1117. The court was careful to clarify, however, that the scope of *Sargon*'s applicability at class certification was "limited . . . compared with the inquiry at trial" because the court "need not rule on the admissibility of certain expert opinion evidence" that is "irrelevant or unnecessary for [the class certification] decision." *Id.* at 1120.

The ruling rested in part on the recognition that "[a]lthough some federal courts appear to have a largely semantic disagreement over whether to apply a 'full' or 'focused' *Daubert* analysis, the substantive result appears the same," and these decisions show that applying the standard is both feasible and desirable. *Apple*, 19 Cal. App. 5th at 1119-20. Four circuits endorse a "full" *Daubert* analysis at class certification, *see In re Blood Reagents Antitrust Litig.*, 783 F.3d 183 (3d Cir. 2015); *In re Carpenter Co.*, No. 14-0302, 2014 WL 12809636 (6th Cir. Sept. 29, 2014); *Sher v. Raytheon Co*., 419 F. App'x 887 (11th Cir. 2011); *American Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010), while the Eighth Circuit, and more recently, the Ninth Circuit, have adopted a more "focused" approach, *see In re Zurn Pex Plumbing Prod. Liab. Litig*., 644 F.3d 604 (8th Cir. 2011); *Sali v. Corona Regional Medical Ctr*., No. 15-56460 (9th Cir. May 3, 2018). Although the Supreme Court has suggested that *Daubert* should apply to expert evidence at class certification, it has yet to squarely resolve the issue. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354 (2011) ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. . . . We doubt that is so. . . .") (internal citation omitted).

Apple v. Superior Court joins a growing body of case law recognizing that the "corrosive effects of improper expert opinion testimony may be felt with substantial force at class certification," so courts must scrutinize such testimony at that stage. 19 Cal. App. 5th at 1119.

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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:

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