GIBSON DUNN

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THIRD 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 third quarter of 2018 (July through September), as well as a brief look ahead to some of the key class action issues anticipated for the end of 2018 and into 2019.

- **Part I** covers the class action cases on the U.S. Supreme Court's docket this Term.
- **Part II** reviews several decisions from the federal courts of appeals relating to the interplay between class actions and arbitration agreements, including Gibson Dunn's recent win before the Ninth Circuit in *O'Connor v. Uber Technologies*.
- **Part III** highlights two decisions that have created circuit splits on important issues of class action procedure.
- **Part IV** wraps up with a discussion of a new Ninth Circuit decision on the amount-in-controversy requirement in the Class Action Fairness Act (CAFA).

I. The U.S. Supreme Court Is Hearing Argument on Arbitration Issues and Will Consider Several Other Class Action Cases

As previewed in our first and second quarter 2018 updates, an eight-member U.S. Supreme Court heard argument on October 3, 2018 in *New Prime Inc. v. Oliveira* (No. 17-340). (Gibson Dunn represents the petitioner, New Prime Inc.)

The Court—now with all nine members—will also hear argument in three other cases involving arbitration or class action issues in late October, as previewed in our first and second quarter 2018 updates and 2018 Supreme Court Roundup. On October 29, the Court will hear argument in *Lamps Plus, Inc. v. Varela* (No. 17-988), to decide whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that authorizes class arbitration based on general language commonly used in such agreements. The same day, argument will be held in *Henry Schein, Inc. v. Archer & White Sales, Inc.* (No. 17-1272), which concerns whether a court can decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes that the claim of arbitrability is "wholly groundless." And on October 31, in *Frank v. Gaos* (No. 17-961), the Court will consider the validity of *cy pres*-only settlements that provide no direct compensation to class members.

The Court also added another class action case to its docket in September, *Home Depot U.S.A., Inc. v. Jackson* (No. 17-1471), which presents two questions regarding the permissibility of removal to federal

court under CAFA: (a) whether CAFA's statement that "any defendant" may remove an action permits removal by a party that was brought into the suit when an original named defendant filed a *counterclaim*, and (b) whether the Supreme Court's holding in *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100 (1941)—that an original plaintiff may not remove a counterclaim against it—extends to third-party counterclaim defendants. In *Home Depot*, Citibank filed a state-court collection action against Jackson, and Jackson filed a counterclaim against Citibank, Home Depot, and another company, alleging class-action consumer-protection claims. The Fourth Circuit held that Home Depot could not remove the case to federal court under CAFA because Home Depot was a counterclaim defendant, not an original defendant. The three other circuits to have addressed this issue have also held that CAFA does not permit removal in these circumstances. Home Depot argues that this interpretation creates an "unfortunate loophole" in CAFA's grant of federal jurisdiction over certain class actions, allowing plaintiffs' attorneys to keep consumer class actions out of federal court simply by bringing them as counterclaims in minor debt-collection and other state court suits. *Home Depot* presents the Court with the opportunity to determine whether its precedent and CAFA's text requires this result.

II. Several Federal Courts of Appeals Issue Significant Rulings Regarding the Interplay Between Class Actions and Arbitration

Arbitration—and class arbitration in particular—continues to be actively litigated in the circuit courts.

In an important decision that will have significant implications for attempts to pursue class actions notwithstanding individual arbitration agreements, the Ninth Circuit in *O'Connor v. Uber Technologies, Inc.*, 904 F.3d 1087, 2018 WL 4568553 (9th Cir. 2018), reversed an order certifying a class of hundreds of thousands of current and former drivers alleging they were misclassified as independent contractors. Relying on its earlier decision in *Mohamed v. Uber Technologies, Inc.*, 848 F.3d 1201 (9th Cir. 2016), which upheld the enforceability of Uber's arbitration agreements with drivers, the Ninth Circuit reversed the district court's class certification orders, orders denying Uber's motions to compel arbitration, and orders regulating Uber's communications with drivers under Rule 23(d). (Gibson Dunn represented Uber in *O'Connor* and *Mohamed*.)

In *O'Connor*, the plaintiffs argued that the arbitration agreements were unenforceable because the named plaintiffs had supposedly "opted out of arbitration on behalf of the entire class," and the agreements contained class-action waivers that violated the National Labor Relations Act. 2018 WL 4568553, at *4. The Ninth Circuit rejected both arguments, holding that the plaintiffs' opt-out argument—which was premised on the Georgia Supreme Court's decision in *Bickerstaff v. Suntrust Bank*, 788 S.E.2d 787 (Ga. 2016)—was not supported by federal law and, in fact, "would be preempted by the FAA." *O'Connor*, 2018 WL 4568553, at *4–5. The court also held that the plaintiffs' NLRA argument was "extinguished" by *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). *O'Connor*, 2018 WL 4568553, at *5.

Because the district court's class-certification orders were premised on its erroneous finding that the arbitration agreements were unenforceable, the Ninth Circuit reversed the district court's decisions on those issues as well, emphasizing that a class cannot be certified where drivers "entered into agreements to arbitrate their claims and . . . waive[d] their right to participate in a class action with regard to those claims." *O'Connor*, 2018 WL 4568553, at *5. The Ninth Circuit's decision in *O'Connor* makes clear

that a class cannot be certified where putative class members are subject to binding arbitration agreements that include class waivers.

In several other decisions this past quarter, the Tenth and Eleventh Circuits sided with the Second and Fifth Circuits in a widening split with the Third, Fourth, Sixth, and Eighth Circuits over whether the availability of class arbitration is a "question of arbitrability" that presumptively must be decided by courts in the first instance, absent clear evidence of contrary intent in the parties' arbitration agreement.

In *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230 (11th Cir. 2018), the Eleventh Circuit affirmed a district court's ruling that the availability of class arbitration was presumptively one for the court to decide, but that the parties' arbitration agreement evidenced a clear intent to overcome that default presumption. *Id.* at 1233–34. In particular, the parties' agreement adopted American Arbitration Association (AAA) arbitration rules, including Rule 3 of the AAA's Supplementary Rules for Class Arbitrations, which explicitly provides that an arbitrator shall decide whether an arbitration clause permits class arbitration. *Id.* Siding with the Fifth Circuit, the Eleventh Circuit rejected the "higher burden for showing 'clear and unmistakable' evidence for questions of class arbitrability [relative to] . . . ordinary questions of arbitrability" adopted by the Third, Fourth, Sixth, and Eighth Circuits following *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). *See Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972-73 (8th Cir. 2017) ("The risks incurred by defendants in class arbitration . . . and the difficulties presented by class arbitration . . . all demand a more particular delegation of the issue than we may otherwise deem sufficient in bilateral disputes."); *accord Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 762–63 (3d Cir. 2016); *Dell Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 876–77 (4th Cir. 2015); *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599–600 (6th Cir. 2013). *But see Wells Fargo Advisors, L.L.C. v. Sappington*, 884 F.3d 392, 395 (2d Cir. 2018); *Robinson v. J & K Admin. Mgmt. Servs., Inc.*, 817 F.3d 193, 196 (5th Cir. 2016).

The Eleventh Circuit reached the same conclusion one month later in *JPay, Inc. v. Kobel*, 904 F.3d 923 (11th Cir. 2018), affirming a district court's summary judgment ruling that the availability of class arbitration was presumptively one for the court to decide, but that, like *Spirit Airlines*, the parties' arbitration agreement evidenced a clear intent to overcome that default presumption by adopting the AAA's arbitration rules. *Id.* at 937–40. The court acknowledged that a plurality of the U.S. Supreme Court in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), held that whether an agreement provides for class arbitration is *not* a question of arbitrability, but observed that the Supreme Court has since repeatedly emphasized—in *Stolt-Nielsen* and *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013)—that *Bazzle* was a plurality opinion and that the question remains open. *JPay*, 904 F.3d at 931.

Similarly, in *Dish Network, L.L.C. v. Ray*, 900 F.3d 1240 (10th Cir. 2018), the Tenth Circuit held that the issue of classwide arbitrability presumptively is for a court to decide, but rejected the argument that the arbitrator exceeded his authority in considering that issue and ordering class arbitration because the parties' agreement demonstrated a clear intent to delegate the issue to the arbitrator. As in *Spirit Airlines* and *JPay*, the parties agreed that "any claim, controversy and/or dispute between them" would be resolved through arbitration under AAA rules, which give the arbitrator authority to decide his own jurisdiction. *Id.* at 1245–46.

These cases serve as an important reminder to pay close attention to the terms incorporated by reference into an arbitration agreement in order to avoid inadvertently delegating key issues like classwide arbitrability to an arbitrator, whose decision may be unreviewable by a court or reviewable only under a highly deferential standard. Also, as noted above and in our second quarter 2018 update, the Supreme Court in *Lamps Plus, Inc. v. Varela* (No. 17-988), will decide 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 such agreements. While not explicitly teed up for resolution in *Lamps Plus*, the Court could weigh in on the widening split over whether the availability of classwide arbitration presumptively should be decided by a court or an arbitrator.

III. Circuit Splits Regarding Appealability of Class Action Orders After Settlement and on the Propriety of "Issue" Certification

Class action procedure was another active topic this past quarter, with a Tenth Circuit decision breaking with the Ninth Circuit on the question whether class certification rulings may be appealed following settlement and voluntary dismissal of individual claims, and a Sixth Circuit decision that deepens an existing circuit split as to whether predominance is a prerequisite to "issue" certification under Rule 23(c)(4). Ultimately, one or both of these questions may end up before the Supreme Court.

In *Anderson Living Trust v. WPX Energy Production, LLC*, 904 F.3d 1135 (10th Cir. 2018), the Tenth Circuit held—contrary to the Ninth Circuit's decision in *Brown v. Cinemark USA, Inc.*, 876 F.3d 1199 (9th Cir. 2017)—that voluntary dismissal of individual claims following settlement does not convert a previous denial of class certification into a final appealable order. In *Anderson*, the parties settled the plaintiffs' individual claims two years after the district court had denied class certification. The district court then entered a stipulated judgment dismissing the individual claims with prejudice, but reserving the plaintiffs' right, if any, to appeal the class-certification denial. But the Tenth Circuit dismissed the appeal, relying on the U.S. Supreme Court's decision in *Microsoft v. Baker*, 137 S. Ct. 1702 (2017), which held that the federal courts of appeals lack jurisdiction "to review an order denying class certification . . . after the named plaintiffs have voluntarily dismissed their claims with prejudice." *Id.* at 1712. The Ninth Circuit in *Brown* had come to the opposite conclusion, and distinguished *Baker* on the ground that there was a difference between dismissing claims following a settlement for consideration and dismissing claims voluntarily as a mechanism to trigger appellate review. The Tenth Circuit, by contrast, held that distinction was illusory, and that the policy concerns articulated in *Baker*—the danger of protracted litigation and piecemeal appeals, preventing parties from usurping Rule 23(f), and wanting to avoid giving plaintiffs an asymmetrical advantage in seeking interlocutory review of class certification decisions—applied in both scenarios.

The Sixth Circuit in *Martin v. Behr Dayton Thermal Products*, 896 F.3d 405 (6th Cir. 2018), added to the division among the federal courts of appeals as to whether plaintiffs must satisfy Rule 23(b)(3)'s predominance requirement for a claim as a whole when seeking "issue" certification under Rule 23(c)(4). In *Martin*, a group of Ohio residents alleged that four companies had contaminated the local drinking water. Plaintiffs sought class certification under Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently

adjudicating the controversy," as well as Rule 23(c)(4), which provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." The district court denied certification under Rule 23(b)(3), holding that the plaintiffs could not meet that rule's predominance requirement as to "injury-in-fact and causation," but granted certification under Rule 23(c)(4) on seven discrete issues, including the extent of "[e]ach [d]efendant's role in creating the contamination" at issue and "[w]hether [the d]efendants negligently failed to investigate and remediate the contamination at and flowing from their respective [f]acilities." *Martin*, 896 F.3d at 409–10.

The Sixth Circuit affirmed the class certification order. It noted the existing circuit split between the "broad" view of Rule 23(c)(4) taken by the Second, Fourth, Seventh, and Ninth Circuits, and the "narrow" view held by the Fifth and Eleventh Circuits. According to the Sixth Circuit, under the "broad" view of Rule 23(c)(4), a district court may certify a class on specific common issues "even where predominance has not been satisfied for the cause of action as a whole," so long as predominance and superiority are satisfied for the issues identified for class treatment. *Martin*, 896 F.3d at 411–12. The "narrow" view of Rule 23(c)(4), by contrast, "prohibits certification if predominance has not been satisfied as to the cause of action as a whole." *Id.* The Sixth Circuit adopted the broad view, reasoning that it "respects each provision's contribution to class determinations by maintaining Rule 23(b)(3)'s rigor without rendering Rule 23(c)(4) superfluous." *Id.* at 413. The court also explained that the superiority requirement of Rule 23 "functions as a backstop against inefficient use of Rule 23(c)(4)." *Id.*

IV. Ninth Circuit Clarifies CAFA's Amount-In-Controversy Requirement

Finally, the Ninth Circuit's opinion in *Fritsch v. Swift Transportation Co. of Arizona, LLC*, 899 F.3d 785 (9th Cir. 2018), slightly relaxed the amount-in-controversy requirement for defendants seeking to remove an action to federal court under CAFA. This holding will likely be of particular import in cases brought under Title VII and other statutes that include a fee-shifting provision for prevailing plaintiffs.

Fritsch was a putative wage-and-hour class action asserting various violations of the California Labor Code. 899 F.3d at 789. The defendant removed the case to federal court, relying on a combination of claimed damages and attorneys' fees to meet the $5 million removal threshold under CAFA. *Id.* The district court concluded that the defendant could not include any fees beyond those that had "been incurred prior to removal," which caused the total amount in controversy to fall below the removal threshold. *Id.* The Ninth Circuit reversed, explaining that under existing circuit precedent, while the threshold is measured "at the time of removal," it includes "all relief claimed at the time of removal to which the plaintiff would be entitled if she prevails." *Id.* at 793 (quotation omitted). For attorneys' fees, this meant that district courts "must include future attorneys' fees recoverable by statute or contract when assessing whether the amount-in-controversy requirement is met," rather than just fees actually incurred at the time of removal. *Id.* at 794. In so ruling, the Ninth Circuit parted ways with the Seventh Circuit's decision in *Gardynski-Leschuck v. Ford Motor Co.*, 142 F.3d 955, 958 (7th Cir. 1998), which had held that future attorneys' fees are too speculative to count toward the amount-in-controversy requirement for federal jurisdiction under the Magnuson-Moss Warranty Act. *Fritsch*, 899 F.3d at 795. To address the concern that future fees may be too speculative, the Ninth Circuit held that a district court must count only those future fees that the removing defendant can substantiate under a preponderance-of-the-evidence standard. *Id.* at 795–96.

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