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FOURTH QUARTER 2018 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 2018 (October through December).

- **Part I** summarizes amendments to Rule 23 that went into effect on December 1, 2018.
- **Part II** covers an important First Circuit decision in *In re Asacol Antitrust Litigation*, in which the court reversed a class certification order where a significant number of uninjured individuals were included in the certified class.
- **Part III** discusses a Second Circuit decision rejecting an attempt by defendants to moot putative class actions.
- **Part IV** addresses a Ninth Circuit decision considering what constitutes a "coupon" settlement subject to increased scrutiny under the Class Action Fairness Act.

I. December 2018 Amendments to Rule 23

First, new amendments to Rule 23 took effect on December 1, 2018. These amendments focus on procedural issues relating to class settlement and notice to absent class members. We have briefly summarized the changes below:

Electronic Notice to Rule 23(b)(3) Classes: Rule 23(c)(2)(B), which governs notice requirements for Rule 23(b)(3) classes, now expressly permits notice via electronic or other means, so long as the selected method is "the best notice practicable under the circumstances."

Explicit Standards for Settlement Approval: To provide courts with a standard set of substantive and procedural concerns to consider when determining whether a settlement is "fair, reasonable, and adequate," the amended Rule 23(e)(2) directs courts to consider: (1) the adequacy of representation by class representatives and class counsel; (2) whether "the proposal was negotiated at arm's length"; (3) the adequacy of relief, taking into account various factors; and (4) whether "class members are treated equitably relative to each other."

Many courts had already been relying on these factors, but there was not always uniformity among the federal circuits. The advisory committee's comments also specifically note that the amended language was not intended to displace other factors courts have used to determine fairness, reasonableness, and adequacy.

Addressing "Bad Faith" Objectors: The amendments to Rule 23(e)(5) attempt to deter "bad faith" objections to class settlements in two ways. First, Rule 23(e)(5)(A) requires objectors to state specific grounds for any objection and whether the objection applies to the entire class, a subset of the class, or just the objector. Second, a new provision—Rule 23(e)(5)(B)—prohibits an objector from receiving consideration for withdrawing an objection or for abandoning an appeal from a judgment approving the proposal, unless approved by the court after a hearing. These changes are designed to curb meritless objections that are asserted by objectors in order to obtain payoffs in return for withdrawing the objections—a disturbing trend that has increased in recent years.

***Standards for Approving Notice of Proposed Class Settlement*:** In an effort to avoid scenarios in which the parties provide notice after preliminary approval of a class settlement, only to have the court deny final approval or order additional notice, the amendment to Rule 23(e)(1) now requires parties to provide the court "with information sufficient to enable [the court] to determine whether to give notice of the proposal to the class." Based on the information provided by the parties, Rule 23(e)(1) also now mandates that a court determine, before sending notice to the class, that the proposed class will likely be certified and the proposed settlement is likely to earn final approval. Before this change, many courts at the preliminary approval stage had merely been asking whether a settlement was within the "range of reasonableness," so it was not entirely unusual for courts to grant preliminary approval, direct costly notice to be issued to the class, but then deny final approval based on concerns that could have been spotted at the outset. This amendment thus aims to prevent situations in which a court is asked to order notice based on insufficient information, and thereafter must order a second notice, which is both wasteful and confusing to class members.

Clarification of Interlocutory Appeals Permitted under Rule 23(f): The amendment to Rule 23(f) clarifies that an order to give notice of proposed settlement under Rule 23(e)(1) cannot be appealed under Rule 23(f). As such, Rule 23(f) permits parties to seek permission to pursue an interlocutory appeal only of an order granting or denying class certification. Rule 23(f) also extends the 14 day time limit to 45 days for cases where the U.S. government is a party.

II. First Circuit Reverses Class Certification Order Because at Least 10% of Class Members Suffered No Injury

As we have discussed in a past update, the federal courts of appeals have long been divided over whether it is permissible to certify a class that includes uninjured class members who lack standing under Article III. Although the Supreme Court has never squarely addressed the issue, the Court noted in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), that "the question whether uninjured class members may recover is one of great importance." *Id.* at 1050. And Chief Justice Roberts in his *Tyson Foods* concurring opinion expressed his view that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Id.* at 1053 (Roberts, C.J., concurring).

This past quarter, the First Circuit addressed this issue in *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018). The court reversed an order certifying a class of indirect purchasers of the anti-inflammatory drug Asacol because "there are apparently thousands [of class members] who in fact

suffered no injury" and the "need to identify those individuals will predominate and render a[class] adjudication unmanageable." *Id.* at 53–54.

The plaintiffs sought to represent a class of buyers who purportedly bought Allergan medicines at artificially high prices because Allergan's predecessor allegedly pulled Asacol off the shelves just before its patent expired and replaced it with a newer version of the drug, which had a later patent expiration date. *Id.* at 45–47. According to the plaintiffs, this conduct injured them because it "allegedly precluded generic manufacturers from introducing a generic version of Asacol, which would have provided a lower-cost alternative." *Id.* at 44.

It was undisputed that at least 10% of the putative class members—"thousands" of individuals—had not suffered any injury attributable to the allegedly anticompetitive conduct because they were brand loyalists who would not have switched to a generic drug had one been available. *Id.* at 53–54. Nonetheless, the district court certified a class that included those uninjured persons, reasoning that the uninjured class members could be removed in a subsequent proceeding conducted by a claims administrator. *Id.* at 47.

The First Circuit reversed, holding that the plaintiffs could not satisfy the predominance requirement of Rule 23(b)(3) because individualized issues relating to the uninjured class members would predominate. As the First Circuit noted, "determining whether any given individual was injured (and therefore has a claim) turns on an assessment of the individual facts concerning that person," and "the defendant must be offered the opportunity to challenge each class member's proof that the defendant is liable to that class member." *Id.* at 55.

The court rejected the plaintiffs' argument that class members could submit affidavits to a claims administrator who could distinguish injured class members from uninjured members, explaining that such a process could only work if the declarations would be "unrebutted." *Id.* at 52–53. But where the "defendants have expressly stated their intention to challenge any affidavits that might be gathered," the affidavits would not be sufficient, as a "claims administrator's review of contested forms completed by consumers concerning an element of their claims would fail to be protective of defendants' Seventh Amendment and due process rights." *Id.* (internal quotation marks omitted). The First Circuit emphasized that "[t]he fact that plaintiffs seek class certification provides no occasion for jettisoning the rules of evidence and procedure, the Seventh Amendment, or the dictate of the Rules Enabling Act." *Id.* at 53.

In reaching its decision, the First Circuit distinguished the Supreme Court's decision in *Tyson Foods*, where the underlying substantive law—the Fair Labor Standards Act—supported the admissibility of representative evidence, noting that the plaintiffs in *Asacol* had "point[ed] to no such substantive law that would make an opinion that ninety percent of class members were injured both admissible and sufficient to prove that any given individual class member was injured." *Id.* at 54.

The First Circuit also disagreed with the plaintiffs' assertion that the district court could proportionately reduce the aggregate damages award by the percentage of uninjured class members, concluding that this approach incorrectly assumed that the amount of damages did not depend on the number of class

members harmed. *Id.* at 55. Rather, "proving that the defendant is not liable to a particular individual because that individual suffered no injury reduces the amount of the possible total damages." *Id.* Moreover, if the plaintiffs' approach were permissible, "there would be no logical reason to prevent a named plaintiff from bringing suit on behalf of a large class of people, forty-nine percent or even ninety-nine percent of whom were not injured, so long as aggregate damages on behalf of 'the class' were reduced proportionately." *Id.* at 56. The First Circuit concluded that "[s]uch a result would fly in the face of the core principle that class actions are the aggregation of individual claims, and do not create a class entity or re-apportion substantive claims." *Id.*

Asacol represents a significant victory for class action defendants, who often are faced with putative classes filled with uninjured persons who could never assert a viable claim on an individual basis. The plaintiffs have filed a petition for rehearing en banc, which remains pending.

III. The Second Circuit Rejects Attempt to Moot Putative Class Actions

As we have discussed previously, including in our 2016 year-end update, the Supreme Court decided in *Campbell-Ewald Co. v. Gomez* that an unaccepted settlement offer—even an offer of complete relief—does not necessarily moot a plaintiff's claim. 136 S. Ct. 663, 670–71 (2016). However, the Court did not decide "whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." *Id.* at 672. Nonetheless, the trend has been to reject a distinction between an unaccepted offer of judgment and an unaccepted offer combined with the delivery of money to the plaintiff, as we reported in May 2017.

That trend continued in the Second Circuit this past quarter. In *Geismann v. ZocDoc, Inc.*, 909 F.3d 534 (2d Cir. 2018), the court held that tendering payment to the named plaintiff does not moot putative class claims. The plaintiff filed a putative class action alleging violations of the Telephone Consumer Protection Act. *Id.* at 536–37. The defendant made two attempts to moot the plaintiff's individual claims. It first made a settlement offer under Rule 68, which the plaintiff rejected. *Id.* at 537. The district court then entered judgment in the amount of the offer, and dismissed the action as moot. The plaintiff appealed, and the Second Circuit applied *Campbell-Ewald* to reverse, holding that the offer did not moot the claims. *Id.* On remand, the defendant tried again, this time tendering payment to the court under Rule 67. *Id.* The district court again entered judgment for the defendant, and the plaintiff again appealed. *Id.*

The Second Circuit followed the reasoning set forth by the Seventh Circuit in *Fulton Dental, LLC v. Bisco, Inc.*, 860 F.3d 541 (7th Cir. 2017), and held that, under *Campbell-Ewald*, an unaccepted tender of payment under Rule 67 is the same as an unaccepted offer of payment—neither is binding under contract law until accepted, and neither moots a plaintiff's claims. *Geismann*, 909 F.3d at 541. The court explained that the Rule 67 procedure provides for safekeeping of disputed funds pending resolution of litigation, but it cannot alter the parties' contractual relationship and legal duties. *Id.* at 541–42. "[A] conclusion otherwise," the court reasoned, "would risk placing the defendant in control of a putative class action, effectively allowing the use of tactical procedural maneuvers to thwart class litigation at will." *Id.* at 543.

While courts continue to be skeptical of attempts to moot putative class actions through efforts to make a named plaintiff whole, it is important to note that the Supreme Court in *Campbell-Ewald* left open the possibility that actual delivery of money to the named plaintiff—as opposed to a mere settlement offer—might result in mootness. Given that unanswered question, it is possible the Court may eventually weigh in on these issues again.

IV. The Ninth Circuit Provides Guidance on Identifying a "Coupon" Settlement

The Class Action Fairness Act ("CAFA") imposes certain limitations and requirements in the event a class action settlement includes coupons. Specifically, under CAFA, district courts must consider "the value to class members of the coupons that are *redeemed*," and not the aggregate value of all coupons that are simply offered, when assessing the amount of relief awarded to the class for purposes of awarding attorney's fees for class counsel. 28 U.S.C. § 1712(a) (emphasis added). However, CAFA does not define what is a "coupon," leaving that term for the courts to interpret.

The Ninth Circuit took up that issue in *In re Easysaver Rewards Litigation*, 906 F.3d 747 (9th Cir. 2018). The plaintiffs in that case alleged that after they had purchased defendants' products online, the defendants had, without plaintiffs' knowledge or consent, enrolled the plaintiffs in a "rewards" program that charged them ongoing fees for no actual benefits. The parties ultimately reached a proposed settlement that included a $20 credit that class members could use to purchase additional products from the defendants online. The district court approved the settlement and awarded attorney's fees to class counsel based on the total value of the credits offered (not just those redeemed), reasoning that the credits did not count as "coupons" because "of how closely the relief matched class members' alleged injury." *Id.* at 756.

The Ninth Circuit reversed. The court reiterated its three-factor inquiry for determining what constitutes a coupon under CAFA: "(1) whether class members have 'to hand over more of their own money before they can take advantage of' a credit, (2) whether the credit is valid only 'for select products or services,' and (3) how much flexibility the credit provides, including whether it expires or is freely transferrable." *Id.* at 755 (quoting *In re Online DVD*, 779 F.3d 934, 951 (9th Cir. 2015)).

Applying these factors to the credits in *Easysaver*, the Ninth Circuit concluded that the credits were coupons. First, class members could use the credits to purchase only a very limited universe of online products—such as flowers, chocolates, and similar gifts—without spending any of their own money. *Id.* at 757. In fact, when asked at the fairness hearing whether a class member could purchase *anything* from the defendants' websites for the amount of the credits once shipping charges were included, counsel replied: "If you include shipping, I'm not sure." *Id.* Second, the Ninth Circuit was troubled by the fact that in order to take advantage of the credit, class members "must hand over their billing information again to the very company that they believe mishandled that information in the first place," resulting in the same activity that they believe led to their injury. *Id.* Third, the credits also had a series of blackout periods—including Mother's Day, Valentine's Day, and other holidays on which consumers most often buy flowers and chocolates. *Id.*

The district court erred, according to the Ninth Circuit, by improperly relying on a fourth factor—i.e., "how closely the relief matched class members' alleged injury." *Id.* at 756. The court explained that while this equivalence "bore on the fairness of the settlement," it did not impact "whether the vouchers were coupons under CAFA." *Id.* This holding brings the Ninth Circuit in line with the Seventh Circuit, which has rejected a similar analysis. *See In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 706 (7th Cir. 2015).

The proposed credits in *Easysaver* bore several key indicia of a coupon settlement, and the Ninth Circuit plainly was suspicious of the actual value, if any, to class members, particularly given the underlying nature of the defendants' alleged wrongdoing. This opinion reinforces the incentives for plaintiffs' counsel to avoid artificial inflation of a settlement "without a concomitant increase in the actual value of relief for the class." *Easysaver*, 906 F.3d at 755.

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