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May 14, 2019

# FIRST QUARTER 2019 UPDATE ON CLASS ACTIONS

To Our Clients and Friends:

This update provides an overview and summary of key class action developments during the first quarter of 2019 (January through March), as well as an important decision concerning class arbitration that the Supreme Court issued in April.

- **Part I** summarizes the Supreme Court's three recent opinions concerning the Federal Arbitration Act, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019), and *Lamps Plus, Inc. v. Varela*, No. 17-988, 2019 WL 1780275 (U.S. Apr. 24, 2019).

- **Part II** covers the Supreme Court's decision in *Frank v. Gaos*, 139 S. Ct. 1041 (2019), which remanded the closely watched case and directed the lower courts to assess whether the plaintiffs have Article III standing, rather than providing the much-anticipated guidance on the propriety of *cy pres*-only class action settlements.

- **Part III** discusses the Supreme Court's decision in *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019), that the 14-day deadline to seek permission to appeal a class certification order under Rule 23(f) is not subject to equitable tolling.

- **Part IV** addresses a mandamus petition pending in the Ninth Circuit regarding Northern District of California Judge William H. Alsup's local policy of barring parties from engaging in class settlement discussions before class certification has been granted.

## I. The Supreme Court Issues Three Decisions on the Federal Arbitration Act

Arbitration has been a hot topic at the Supreme Court in the first few months of 2019, with the high court issuing three notable decisions on the Federal Arbitration Act ("FAA").

***Who Decides Arbitrability?*** First, on January 8, the Court decided *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). Writing for a unanimous Court in his first opinion, Justice Kavanaugh held that courts may not decline to enforce agreements delegating arbitrability issues to an arbitrator, even if the court concludes that the claim of arbitrability is "wholly groundless." *Id.* at 531.

The defendants in the underlying antitrust lawsuit had sought to compel arbitration based on a clause in their contracts with the plaintiff that purported to require arbitration of any "dispute arising under or related to" the contracts, with an exception for "actions seeking injunctive relief." *Id.* at 528 (quotation marks and citation omitted). Although the plaintiff had sought damages as well as injunctive relief, the

defendants argued that arbitration was required because damages were the predominant form of relief requested. *Id.* Relying on a purported exception to the rule that parties may delegate arbitrability decisions to arbitrators, the Fifth Circuit held that the trial court properly declined to refer the arbitrability issue to an arbitrator because the plaintiff's claim for injunctive relief made the defendants' request for arbitration "wholly groundless." *Id.*

The Supreme Court reversed, holding that courts must enforce agreements to delegate arbitrability issues to an arbitrator, even if the court concludes that a claim of arbitrability is "wholly groundless," because that exception has no basis in either the text of the FAA or in the line of Supreme Court cases that expressly allowed parties to delegate arbitrability decisions to the arbitrator. *Id.* at 531. The Court was also skeptical that the "wholly groundless" exception would promote efficiency, as the plaintiff had argued. Rather, the Court noted that such an exception would "inevitably spark collateral litigation" over whether a claim of arbitrability was merely "groundless" as opposed to "wholly groundless." *Id.* at 530-31. As has been a theme with the Court in recent years, the *Henry Schein* decision again emphasized the importance of enforcing arbitration agreements as drafted and avoiding exceptions that would permit judicial second-guessing.

Just one week after its decision in *Henry Schein*, the Court issued the opinion in *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019), which we previewed in our third quarter 2018 update. Writing for another unanimous Court (8-0, with Justice Kavanaugh taking no part in the decision), Justice Gorsuch held that it is up to courts—not arbitrators—to decide the applicability of Section 1 of the FAA (9 U.S.C. § 1), which exempts from arbitration any disputes involving "contracts of employment" of certain transportation workers. The Court also held that the § 1 exemption applies not only to employer-employee agreements but also to independent contractor agreements.

***We Meant What We Said In Stolt-Nielsen.*** Next, the Court decided *Lamps Plus, Inc. v. Varela*, No. 17-988, 2019 WL 1780275 (U.S. Apr. 24, 2019), which built upon the Court's earlier holding in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), that class arbitration so fundamentally changes the nature of dispute resolution that the parties must expressly agree to it.

In *Stolt-Nielsen*, the parties had stipulated that their contract was silent on the issue of class arbitration. The Court thus held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so"—silence is not enough. *Stolt-Nielsen*, 559 U.S. at 684. Following this decision, the parties in *Lamps Plus* never stipulated that the agreement was "silent" on this issue, and the plaintiffs attempted to infer an agreement to class arbitration from various provisions in the agreement. In its 5-4 decision, the Court held that an agreement that is ambiguous on whether it allows class arbitration is not sufficient; the FAA preempts state laws that require class arbitration when an arbitration agreement is ambiguous as to whether the parties consented to such a procedure. *Lamps Plus*, 2019 WL 1780275, at *6.

*Lamps Plus* involved a dispute over the availability of class arbitration in an employment dispute. The defendant-employer argued that the agreement required individual arbitration because, among other reasons, it provided that the plaintiff must arbitrate claims or controversies that "I may have against the Company." The plaintiff-employee, on the other hand, argued that the agreement was ambiguous in part

because it provided that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings." The Ninth Circuit applied California contract law and found the agreement ambiguous, which led the court to apply a doctrine that requires contractual ambiguities to be resolved against the drafter. *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670 (9th Cir. 2017).

Writing for the Court, Chief Justice Roberts emphasized that "arbitration 'is a matter of consent, not coercion,'" and therefore "courts may not infer consent to participate in class arbitration absent an affirmative 'contractual basis for concluding that the party *agreed* to do so.'" *Lamps Plus*, 2019 WL 1780275, at *5–6 (quoting *Stolt-Nielsen*, 559 U.S. at 681, 684). The Court also noted that *class* arbitration is generally not contemplated by the FAA, *id.* at *7, and that arbitration loses many of its advantages ("lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes") when done on a classwide basis. *Id.* at *5. The Court found that California's anti-drafter interpretation doctrine is grounded in public policy and invoked only once a court finds that it cannot discern the parties' intent. *Id.* at *6–7. But, the Court held a public-policy consideration cannot trump the FAA's consent requirement, and California's rule was therefore preempted. *Id.* at *7.

Justice Thomas joined the majority in full, but also filed a concurring opinion to state his view that the contract at issue was not "ambiguous" and therefore *Stolt-Nielsen* foreclosed the availability of class arbitration. *Id.* at *8–9. Justice Thomas would not have evaluated whether "California's *contra proferentem* rule, as applied here, 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA" because he "remain[s] skeptical of this Court's implied pre-emption precedents." *Id.* at *9 (citations omitted).

Justices Kagan, Ginsburg, Breyer, and Sotomayor each filed a dissenting opinion. Writing the principal dissent, Justice Kagan emphasized the capacious language in the contract providing that "any and all disputes, claims, or controversies" must be arbitrated. *Id.* at *16. In her view, this language was "broad enough to cover both individual and class actions." *Id.* at *17. Alternatively, Justice Kagan wrote that the contract is ambiguous and California courts would therefore apply the anti-drafter doctrine to permit class arbitration. *Id.* at *17–19. This approach is correct, she asserted, because that interpretive rule does not facially discriminate against arbitration. *Id.*

*Lamps Plus* marks a substantial victory for class-action defendants, as plaintiffs will no longer be able to seek classwide arbitration with an unsuspecting defendant based on supposed ambiguities in an arbitration agreement. As a result, defendants can now enjoy greater assurance that arbitration agreements calling for individual, bilateral arbitration will not be construed to require aggregate dispute resolution. But as the intervening seven years between *Stolt-Nielsen* and *Lamps Plus* demonstrate, plaintiffs' attorneys will continue to seek ways to evade individual arbitration.

**II. The Supreme Court Remands for Standing Analysis Under *Spokeo*, Rather than Weighing in on the Propriety of *Cy Pres*-Only Class Action Settlements**

The Supreme Court also issued a decision this past quarter in the *Frank v. Gaos*, 139 S. Ct. 1041 (2019), a case we previously discussed in our 2017 fourth quarter update, and in our first, second, and third

quarter updates in 2018. In its decision, the Supreme Court ended up not addressing the issue it had granted certiorari to decide—the propriety of *cy pres*-only settlements that provide no direct compensation to class members. Instead, at the urging of the Solicitor General, the Court vacated and remanded "for the courts below to address the plaintiffs' standing in light of *Spokeo*." *Id.* at 1046.

The plaintiff, Paloma Gaos, had alleged that "Google's transmissions of user's search terms in referrer headers" violated the Stored Communications Act (SCA), which provides a private right of action when "a person or entity providing an electronic communication service to the public . . . knowingly divulge[s] to any person or entity the contents of a communication while in electronic storage by that service," 18 U.S.C. § 2702(a)(1). *Gaos*, 139 S. Ct. at 1044. After initially dismissing the complaint for lack of standing in a pre-*Spokeo* decision, the district court permitted the SCA claim to proceed. Relying on the Ninth Circuit's decision in *Edwards v. First American Corp.*, 610 F.3d 514 (2010), the district court determined that Gaos established standing in her amended complaint by alleging a violation that was "specific to her (i.e., based on a search she conducted)." *Gaos*, 139 S. Ct. at 1044.

The putative class action was consolidated with another complaint; the parties reached a classwide settlement. *Id.* at 1045. The terms of that settlement included Google agreeing to pay $8.5 million, with most of the funds to be distributed not to absent class members but to six *cy pres* recipients. *Id.* The *cy pres* recipients were selected by class counsel and Google to "promote public awareness and education . . . related to protecting privacy on the internet." 139 S. Ct. at 1044.

Five class members objected to the settlement, and two of them appealed the approval of the settlement to the Ninth Circuit. The objectors took issue "with the choice of *cy pres* recipients because Google has in the past donated to at least some" of them, three others had "previously received Google settlement funds," and another three were "organizations housed at class counsel's alma maters." *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 744 (9th Cir. 2017).

The Ninth Circuit affirmed and the Supreme Court thereafter granted certiorari to determine whether the *cy pres*-only settlement was fair, reasonable, and adequate under Rule 23(e)(2). *Gaos*, 193 S. Ct. at 1045. The case attracted significant attention from the class actions bar, as well as from non-profits who receive *cy pres* donations, leading to the filing of over twenty amicus briefs.

The most influential amicus brief proved to be the Solicitor General's, which urged the Court to vacate the Ninth Circuit decision and remand the case so the lower courts could address the standing issue. The district court had found standing based on the Ninth Circuit's decision in *Edwards*, which had held "that the violation of a statutory right automatically satisfies the injury-in-fact requirement whenever a statute authorizes a person to sue to vindicate that right." *Gaos*, 139 S. Ct. at 1046. But in between the district court's decision and the Ninth Circuit's ruling on the *cy pres* issue, the Supreme Court abrogated *Edwards* in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), holding that "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* at 1549. The Ninth Circuit, however, did not address *Spokeo* in its opinion in *Goas*.

Noting that it is "a court of review, not first view," the Supreme Court remanded the issue of Article III standing back to the lower courts, explaining that "no court in this case has analyzed whether any named

plaintiff has alleged SCA violations that are sufficiently concrete and particularized to support standing." *Gaos*, 139 S. Ct. at 1046.

Justice Thomas dissented, contending a plaintiff need only allege invasion of a private right to establish standing, and the Stored Communications Act and state law created such private rights. *Id.* at 1047. On the merits, he opined that the *cy pres* settlement provided class members with no meaningful relief, rendering it unfair and unreasonable under Rule 23(e)(2). *Id.* at 1048.

Depending on how the standing issue is resolved on remand, *Gaos* may make a return trip the Supreme Court in the near future, as the propriety of *cy pres*-only class action settlements remains an important and unresolved issue.

**III. The Supreme Court Rejects Equitable Tolling Under Rule 23(f)**

The Supreme Court also resolved a circuit split over whether Federal Rule of Civil Procedure 23(f)'s 14-day deadline for seeking permission to appeal a class certification order is subject to equitable tolling. In *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019), the Court unanimously answered "no" to this question.

As previewed in our past updates in 2017 and 2018, *Lambert* involved claims that Nutraceutical's marketing of a dietary supplement violated California consumer-protection laws. *Id.* at 713. The district court initially certified a class but then decertified it in February 2015. *Id.* Instead of appealing the decertification decision within Rule 23(f)'s fourteen-day window, Lambert informed the district court that he would move for reconsideration. *Id.* He filed that motion twenty days after the decertification order and sought appellate review only after the court denied his bid for reconsideration. *Id.*

Over Nutraceutical's objection, the Ninth Circuit deemed Lambert's petition for review timely, reasoning that Rule 23(f)'s deadline was "non-jurisdictional" and was equitably tolled. *Id.*

A unanimous Supreme Court reversed. *Id.* at 718. Writing for the Court, Justice Sotomayor first held that Rule 23(f)'s time limitation was a nonjurisdictional claim-processing rule. *Id.* at 712, 714. The Court then turned to whether the rule was mandatory or subject to tolling. *Id.* at 714. Looking to "whether the text of the rule le[ft] room for such flexibility," the Court found clear guidance in the Federal Rules of Procedure and Federal Rules of Appellate Procedure. *Id.* at 714–15. First, Rule 23(f) imposed a time limitation without qualification, and Federal Rule of Appellate Procedure 5 "single[d] out Civil Rule 23(f) for inflexible treatment." *Id.* at 715. Second, Rule 23(f)'s deadline was expressly carved out from the other rules providing for tolling under Rule 26—"express[ing] a clear intent to compel rigorous enforcement of Rule 23(f)'s deadline, even where good cause for equitable tolling might otherwise exist." *Id.*

*Lambert* continues the Supreme Court's trend of enforcing the Federal Rules as written in class actions. It also realigns the Ninth Circuit with other courts across the country, reminding litigants to not rely on courts' powers to forgive tardy filings. But the decision expressly leaves three related questions unanswered. First, it remains unclear whether a motion for reconsideration filed within Rule 23(f)'s 14-day deadline tolls the time to file for permission to appeal under Rule 23(f) itself, as every circuit to have

considered the issue has concluded, but was met with skepticism by some of the Justices during oral argument. *Id.* at 717 n.7. Second, the Court did not decide whether the deadline is tolled if a district court misleads a litigant about the deadline. *Id.* Third, the Court did not decide what happens if there was an "insurmountable impediment to filing timely." *Id.*

**IV. The Ninth Circuit Considers District Judge's Rule Prohibiting Pre-Certification Class Settlement Discussions**

Finally, parties litigating in the Northern District of California may take special interest in a mandamus petition pending before the Ninth Circuit that challenges Judge William H. Alsup's policy barring class action settlement discussions before class certification is granted. *See In re: Logitech, Inc.*, No. 19-70248, Dkt. 1-1 (9th Cir. Jan. 25, 2019). Judge Alsup's standing order for class actions limits settlement discussions between opposing counsel until they know what claims are certified for class treatment or until the district court grants a motion under Rule 23(g)(3) for the appointment of interim class counsel. *Id.* at 3-4.

The plaintiff in *Logitech* filed suit on behalf of a putative class, alleging various false-advertising claims. *Id.* at 1. After several months of litigating, the parties filed a joint stipulation explaining that pre-certification settlement was appropriate, and requesting that a magistrate judge oversee the process. *Id.* at 4. The plaintiff also filed a motion for appointment of interim class counsel to oversee the settlement process. *Id.* at 3-4. Judge Alsup expressed concern that the resulting settlement would have a "collusive" effect on absent class members pre-certification, and thus the court declined to allow settlement talks to proceed before certification and denied the motion for appointment of interim class counsel. *Id.* at 5–7.

Logitech argues that Judge Alsup's policy amounts to an unconstitutional prior restraint on free speech that also violates Rule 23 and the "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Id.* at 10, 19. It also argued Judge Alsup's policy does not survive strict scrutiny review because it is not content-neutral—it specifically forbids *settlement* discussions—and because it is not the least restrictive means "to prevent inappropriately discounted settlements." *Id.* at 12-14 (quotation marks and citation omitted). Logitech also contended that Rule 23 confirms that parties may engage in pre-certification settlement discussions, as the Advisory Committee Notes state that "if a class has not been certified," the parties must give the court a sufficient basis in the record to conclude that it will be able to certify the class "after the final hearing" assessing the settlement. *Id.* at 20.

Judge Alsup filed a response to Logitech's petition in which he explained the reasoning behind his rule. *See In re: Logitech, Inc.*, No. 19-70248, Dkt. 4-1 (9th Cir. Feb. 28, 2019). The court first explained that for absent class members, "there is an important difference between a class settlement struck *before* a ruling under Rule 23 seeking class certification and one negotiated *after* a class has been certified." *Id.* at 2. When parties negotiate a classwide settlement before certification, Judge Alsup noted that "plaintiff's counsel necessarily negotiates from a position weakened by the uncertainty over whether or not counsel will later win or lose a class certification motion," which he asserted can prejudice any settlement. *Id.* at 2-3. Thus, absent class members deserve "to have their recovery discounted only on

the merits of their claims without further discount based on possible unsuitability of the case for class certification." *Id.* at 4.

The Ninth Circuit referred the mandamus petition to a motions panel and oral argument has been set for July 18, 2019.

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