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THIRD 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 third quarter of 2019 (July through September).

- **Part I** discusses varying approaches to assessing damages at the class certification stage.
- **Part II** addresses developments in class settlements law, including pre-certification negotiations and *cy pres*-only settlements.
- **Part III** reviews further developments in the federal courts of appeals' analysis of Article III standing under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).
- **Part IV** describes a recent California Supreme Court decision that rejected a strict interpretation of the state-law ascertainability requirement.

Part I: Federal Courts of Appeals Apply a Range of Approaches to Damages Proposals at the Class Certification Stage

Questions of how to measure a class's damages—and what measures of damages lend themselves to classwide treatment—were addressed in several decisions during the last quarter. In each case, the courts evinced sensitivity toward the issue of individualized damages, but responded to those arguments quite differently.

In *Nguyen v. Nissan North America, Inc.*, 932 F.3d 811 (9th Cir. 2019), a consumer brought a class action against an automobile manufacturer under state and federal law, alleging defects with the vehicle's clutch. *Id.* at 813–14. The plaintiff sought class certification, arguing that his damages model—which proposed that every class member receive damages equal to the cost of a replacement clutch—was "based on the economic principle of benefit-of-the-bargain and is consistent with [his] theory of liability." *Id.* at 815. The district court rejected that model because "the difference between value represented and value received only equals the cost to replace the defective [system] *if* consumers would have deemed the defective part valueless." *Id.* at 816 (citation omitted). Because putative class members drove their vehicles for varying amounts of miles before experiencing the defect, the district court found that the plaintiff had not satisfied the predominance requirement. *Id.*

The Ninth Circuit reversed. The plaintiff's theory was not that the clutch performed below his expectations—rather, the theory was that the clutch was *per se* defective. Accordingly, the court held that a benefit-of-the-bargain model satisfied Rule 23(b)(3)'s predominance requirement. 932 F.3d at

821–22. The Ninth Circuit explained that the "district court mischaracterized Plaintiff's theory as being centered on performance issues, rather than the defective system itself." *Id.* at 819. The court clarified that the "liability-triggering event" would be "the sale of the vehicle with the known defect," not "when the [alleged defect] manifests." *Id.* at 820. The court believed that "[t]his distinction is key"—under past precedent, individualized issues would predominate if plaintiffs sought "damages for the faulty performance of the clutch system." *Id*. at 822. "Instead, Plaintiff's theory is that the allegedly defective clutch is itself the injury, regardless of whether the faulty clutch caused performance issues." *Id*.

In re Rail Freight Fuel Surcharge Antitrust Litigation, 934 F.3d 619 (D.C. Cir. 2019), wrestled with a different issue—namely, whether a class can be certified where a damages model shows not only variable damages, but also that some class members suffered no harm or damage at all. *Id.* at 620. The plaintiffs sought class certification under Rule 23(b)(3), and submitted an expert report that contained a regression model to establish causation, injury, and damages on a classwide basis. *Id.* at 621–22. The damages model indicated that approximately 2,000 putative class members (about 12.7% of the class) suffered no harm. *Id.* at 623–24. The district court determined that this model did not satisfy Rule 23(b)(3)'s predominance requirement, reasoning that "even assuming the model can reliably show injury and causation for 87.3 percent," there was "no common proof of those essential elements of liability for the remaining 12.7 percent." *Id.* at 623–24.

The D.C. Circuit affirmed the denial of class certification. Pursuant to *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), courts must take a "hard look at the soundness of statistical models that purport to show predominance." *Rail Freight*, 934 F.3d at 621. Because the plaintiffs must prove through common evidence "that all class members were in fact injured" by the alleged violation, the court took a "hard look" and reasoned that the regression damages model did not satisfy the predominance requirement. *Id.* at 623–26. This insufficiency was confirmed by plaintiffs' failure to propose any "winnowing mechanism" to prevent uninjured class members from recovering. *Id.* at 625. (Gibson Dunn represented BNSF Railway Company in this matter.)

In *AA Suncoast Chiropractic Clinic, P.A. v. Progressive America Insurance Co.*, 938 F.3d 1170 (11th Cir. 2019), the Eleventh Circuit considered another recurring issue: whether and when a court can certify a Rule 23(b)(2) class in a case where the plaintiffs are also seeking damages. In *AA Suncoast*, healthcare providers brought a putative class action against an insurance company, alleging that the insurer was improperly reducing its policy limits based on the opinions of non-treating physicians. 938 F.3d at 1172. The plaintiffs sought damages for past coverage reductions, as well as an injunction that would have restored the higher coverage limit for previously affected policies. *Id.* at 1173. The district court certified an "injunction class" under Rule 23(b)(2), but denied certification of a "damages subclass" under Rule 23(b)(3), which would have required "each and every member of the damages subclass" to "establish an individualized entitlement to damages . . . ." *Id.* at 1175.

The Eleventh Circuit reversed, holding that the "injunction class" was actually a "damages subclass" seeking to evade Rule 23(b)(3)'s predominance and superiority requirements. 938 F.3d at 1175. The injunction class sought only to rectify past injuries, not enjoin future harm. *Id.* In fact, the injunction was "not an injunction at all" because it was "not designed to address the treatment of future claims"; it aimed to require the defendant to reimburse the plaintiffs for prior harms. *Id.* Certifying this class under Rule

23(b)(2) was improper because it "sidestep[ped] the Rule 23(b)(3) problems by shaving away all the issues that would require individualized determinations." *Id.*

Nguyen, *Rail Freight*, and *AA Suncoast* each illustrate the general theme that courts can and should look beyond the parties' arguments to determine the true nature of the damages alleged, and whether they might be amenable to classwide treatment.

Part II: Courts Show Flexibility in Assessing Class Action Settlements

The courts of appeals continue to actively police the process and remedies arising out of class action settlements. In the past quarter, the Ninth Circuit declined to overrule a standing order from a Northern District of California judge that bars pre-certification class settlement negotiations, and the Third Circuit declined to adopt a rule that would categorically bar *cy pres* remedies in Rule 23(b)(2) class actions.

Many courts have warned of the need to be "particularly vigilant of pre-certification class action settlements." *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (citation omitted). But in the Northern District of California, Judge William Alsup has gone so far as to ban them altogether via a standing order. In a decision issued this past quarter, the Ninth Circuit denied a mandamus petition challenging this standing order on various grounds. *In re Logitech, Inc.*, No. 19-70248, 2019 WL 4319012 (9th Cir. Sept. 12, 2019).

The panel determined that the standing order was not clearly erroneous, in part because Rule 23 "explicitly contemplates the simultaneous certification of a class and settlement, albeit with permissive and not mandatory language." 2019 WL 4319012 at *1. The court further acknowledged that "sections of Rule 23 provide district courts with wide discretion, including the factors to be considered in the appointment of class counsel, which is required before a class can be certified and settled." *Id.* (citing Fed. R. Civ. P. 23(g)(1)(A)–(B)). Given this wide discretion and Rule 23's "lack of mandatory class settlement language," the Ninth Circuit could not "say the [o]rder's prohibition on class negotiations before certification is clear error." *Id.*

The Ninth Circuit next determined that Judge Alsup's standing order did not violate the principles enunciated in *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), which stated that "any restriction on communications [with putative class members] that would frustrate the policies of Rule 23 must follow 'a specific record showing . . . the particular abuses . . . threatened' and the district court must 'give explicit consideration to the narrowest possible relief which would protect the respective parties.'" *Logitech*, 2019 WL 4319012, at *1 (quoting *Gulf Oil*, 452 U.S. at 102). The Ninth Circuit acknowledged that the district court had made no "specific findings of the abuses [n]or explicitly consider[ed] narrower means of protecting the parties from any abuses threatened by pre-certification class negotiations," but nevertheless determined that the order did not "amount to clear error." *Id.*

Finally, the Ninth Circuit determined that there was no violation of the defendant's First Amendment rights, reasoning that "[e]ven if the [o]rder 'involved serious restraints on expression,' it is unclear whether the expression is protected by the First Amendment." 2019 WL 4319012 at *1. (quoting *Gulf Oil*, 452 U.S. at 103–04). Settlement discussions "may not be protected speech because [a defendant]

does not have a right to negotiate with absent, unrepresented, potential class members before there is a class or interim class counsel." *Id.* (citation omitted).

In another class settlement decision, the Third Circuit confronted *cy pres* issues. *In re: Google Inc. Cookie Placement Consumer Privacy Litigation*, 934 F.3d 316 (3d Cir. 2019), involved a putative class action alleging that Google violated the California Constitution and common law by using cookies that bypassed internet browser privacy settings. The parties reached a proposed settlement under which Google would "assure it had implemented systems configured to abate or delete all third-party Google cookies" and "pay $5.5 million, to be divided among the settlement administrator, class counsel, the named class representatives, and *cy pres* recipients." *Id.* at 321 (citation omitted). In exchange, the plaintiffs would "release all class member claims, including for damages, that did or could stem from, or relate to, the subject matter of the litigation" on behalf of a settlement class comprising "all persons in America who used Safari or Internet Explorer web browsers and who visited a website from which . . . cookies were placed by the means alleged in the Complaint." *Id.* (citation omitted).

The district court preliminarily certified the settlement class under Rule 23(b)(2). 934 F.3d at 323. Following a notice period, a lone objector—Ted Frank, who was both a party and counsel in *Frank v. Gaos*, 139 S. Ct. 1041 (2019), covered in the First Quarter 2019 Update—challenged the settlement because it prioritized *cy pres* over direct compensation to class members and because there was an alleged conflict of interest among Google, class counsel, and the *cy pres* recipients. *In re: Google*, 934 F.3d at 320. The district court approved the settlement, but the Third Circuit vacated that ruling and remanded. *Id.* at 329, 332.

The court first determined that the plaintiffs had Article III standing under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), because "[h]istory and tradition reinforce that a concrete injury for Article III standing purposes occurs when Google, or any other third party, tracks a person's internet browser activity without authorization," and "[p]rivacy torts have become well-ensconced in the fabric of American law." *In re: Google*, 934 F.3d at 325 (citation omitted).

The court then declined to adopt the objector's proposed rule that *cy pres*-only settlements of Rule 23(b)(2) class actions are *per se* invalid. Although the objector's "central argument on appeal is that *cy pres* awards should never be preferred over direct distributions to class members because the settlement fund properly 'belongs' to individual class members as monetary compensation for their injuries," the court explained there is no rule "that requires district courts to approve only settlements that provide for direct class distributions" where doing so would be "economically infeasible." *Id.* at 327–28. This is especially so with respect to a Rule 23(b)(2) class, which "assumes a single, 'indivisible' injunctive or declaratory remedy against the defendant," such that there is "no reason why a *cy pres*-only (b)(2) settlement . . . could not 'belong' to the class as a whole, and not to individual class members as monetary compensation." *Id.* at 328 (emphasis omitted).

Part III: *Spokeo* Issues Continue to Percolate Throughout the Federal Courts

The last quarter also saw further efforts by the federal courts of appeals to interpret the "concreteness" requirement in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). As we have discussed in two prior updates,

the appellate courts continue to grapple with the application of *Spokeo* under a wide range of consumer protection statutes, with unpredictable and often irreconcilable results from circuit to circuit.

A pair of decisions from the Eighth and Eleventh Circuits addressing the Telephone Consumer Protection Act ("TCPA") is illustrative. In *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019), the Eleventh Circuit concluded that "a single unsolicited text message, sent in violation of" the TCPA, was not a "concrete injury in fact" sufficient to confer standing on a named plaintiff. *Id.* at 1165. The court distinguished a prior Eleventh Circuit decision that held that a single unsolicited fax was sufficient, reasoning that a text message "uses no paper, ink, or toner," does not make the phone unavailable for other uses, and that there was no allegation of a charge by the wireless service provider. *Id.* at 1168. It further reasoned that Congress had "less . . . concern about calls to cell phones" than about residential land lines, and rejected arguments that such messages were akin to the historic torts of intrusion upon seclusion, nuisance, conversion, or trespass to chattel. *Id.* at 1169–72.

This decision deepens a circuit split on text messages: As we discussed in the last update, the Second Circuit also recently considered alleged injuries from unsolicited text messages and came to the opposite conclusion in *Melito v. Experian Marketing Solutions, Inc.*, 923 F.3d 85 (2d Cir. 2019). This past quarter, the Eighth Circuit likewise found standing for a named plaintiff in a TCPA case based on "two telemarketing messages" left on an answering machine in *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 959 (8th Cir. 2019). The court held that such calls "b[ore] a close relationship to the types of harms traditionally remedied by tort law, particularly the law of nuisance," and further relied on the type of harm Congress sought to remedy with the statute. *Id.* (citations omitted). Although the injury was "intangible" and "minimal," under that analysis, the plaintiff had standing. *Id.* at 958–59.

The Ninth Circuit has been more likely to uphold standing in these scenarios. In addition to concluding that standing existed under the TCPA in *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037 (9th Cir. 2017), in the past quarter, the court also found standing for named plaintiffs alleging a violation of Illinois's Biometric Information Privacy Act. *Patel v. Facebook, Inc.*, 932 F.3d 1264 (9th Cir. 2019). The suit dealt with Facebook's "Tag Suggestions" feature, which compares the faces in newly uploaded pictures to "faces in Facebook's database of user face templates," and prompts the user to "tag" the photo with the names of any matches. *Id.* at 1268. The plaintiffs alleged that this violated the Illinois statute because it "collect[ed], us[ed], and stor[ed] biometric identifiers . . . without obtaining a written release and without establishing a compliant retention schedule." *Id.* (footnote omitted). The Ninth Circuit concluded that there was a concrete injury rooted in a broad right to privacy, pointing to "common law roots" for suits protecting such rights and Supreme Court decisions recognizing privacy rights in various contexts. *Id.* at 1271–74. Facebook has indicated that it intends to petition for certiorari.

As shown by these decisions, litigants (and courts) will continue to confront evolving and contradictory case law applying *Spokeo*, deepening circuit splits, and laying the foundation for future Supreme Court review.

Part IV: The California Supreme Court Softens Ascertainability Requirement

Finally, in July 2019, the California Supreme Court held that plaintiffs need not satisfy a strict "ascertainability" requirement to obtain class certification in California state courts.

In *Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955 (2019), plaintiff asserted violations of California's broad consumer protection and false advertising laws, alleging that he had been misled about the true size of an inflatable plastic pool he had purchased. He sought certification of a class of "all persons who purchased the [pool] at a Rite Aid store located in California within the four years preceding the date of the filing of this action." *Id.* at 962–63.

The trial court denied the named plaintiff's motion for class certification on the grounds that he failed to adequately demonstrate how class members would be identified. 7 Cal. 5th at 963–65.

The California Court of Appeal affirmed, emphasizing that the named plaintiff had "submitted nothing offering a glimmer of insight into who purchased the pools or how one might find out" and failed to describe what, if any, retail transaction records existed that could facilitate identification of members of the proposed class. 7 Cal. 5th at 965 (citation omitted). Although the Court of Appeal acknowledged that the named plaintiff "was not required to actually identify the 20,000-plus individuals who bought pools," it faulted him for failing "to come up with any *means* of identifying them . . . ." *Id.* (citations omitted).

But the California Supreme Court unanimously reversed and remanded, holding that the proposed class was sufficiently ascertainable because it was "defined 'in terms of objective characteristics and common transactional facts' that ma[de] 'the ultimate identification of class members possible when that identification becomes necessary.'" 7 Cal. 5th at 974 (quoting *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 915 (2001)). The court concluded that this standard does not "import[] an additional evidentiary burden into the ascertainability requirement." *Id.* at 967.

The court explained that this ascertainability standard was constitutional because "due process does not invariably require that personal notice be directed to all members of a class [or] that an individual member of a certified class must receive notice to be bound by a judgment." 7 Cal. 5th at 984 (citation omitted). As a result, a class is ascertainable so long as it (1) "puts members of the class on notice that their rights may be adjudicated in the proceeding" and (2) "suppl[ies] a concrete basis for determining who will and will not be bound by (or benefit from) any judgment." *Id.* at 980.

In applying this standard to the facts, the California Supreme Court determined that the proposed class definition was (1) "neither vague nor subjective," (2) provided class members with adequate notice of their membership in the class, and (3) made "the res judicata consequences of a judgment clear, creating no ambiguity as to who will and will not be bound by the outcome." 7 Cal. 5th at 987 (citation omitted). Consequently, the court ruled that the class was sufficiently ascertainable.

Importantly, however, the court emphasized the low cost of the products at issue ($59.99 each), which led it to surmise that "the odds that any class member will bring a duplicative individual action in the future are effectively zero." 7 Cal. 5th at 985. As such, the court held that the choice presented was "between a class action and no lawsuits being brought at all. Under the circumstances, due process

may not demand personal notice to individual class members, and to build a contrary assumption into the ascertainability requirement would be a mistake." *Id.* (footnote omitted). It remains to be seen whether other courts will attempt to distinguish *Noel* on this basis when individual claims have potentially greater value.

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