GIBSON DUNN

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YEAR-END AND FOURTH 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 fourth quarter of 2019 (October through December).

Part I discusses the Second Circuit's decision in *Jock v. Sterling Jewelers Inc.*, 942 F.3d 617 (2d Cir. 2019), affirming the power of an arbitrator to bind absent class members.

Part II addresses several important appellate decisions reversing class certification orders or affirming the denial of certification that could help defendants opposing class certification in other cases.

Part III reviews further developments on the issue of Article III standing in class actions after *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

Part I: The Second Circuit Rejects Challenge to Class Arbitration, and Holds That an Arbitrator Has the Power to Bind Absent Class Members

The Supreme Court made clear in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), and *Stolt-Nielsen S.A. v. AnimalFeeds International 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. (Gibson Dunn's analyses of those cases can be found here and here.) Against that backdrop, the Second Circuit recently issued an important ruling about the terms that indicate an express agreement to class arbitration.

In *Jock v. Sterling Jewelers Inc.*, 942 F.3d 617 (2d Cir. 2019), current and former female employees of a jewelry maker filed a demand for class arbitration, asserting various claims on the theory that they were paid less than their male counterparts. The arbitrator certified a mandatory, non-opt-out class of approximately 44,000 women, despite the fact only 254 plaintiffs had chosen affirmatively to participate in the arbitration proceedings. *Id.* at 621.

At the defendant's urging, the district court vacated the arbitrator's class certification order because the arbitration agreement did not expressly authorize the arbitrator to certify a class that included members who had not opted in to arbitration. *Id.* at 622. The agreement provided that "questions of arbitrability" and "procedural questions" "shall be decided by the arbitrator," and that claims arising under the agreement would be arbitrated "in accordance with the National Rules for the Resolution of Employment Disputes of the American Arbitration Association [('AAA')]." *Id.* at 620, 624.

The Second Circuit reversed for two reasons. *Id.* at 623–24. First, the agreement incorporated the AAA Rules, which provide that "the arbitrator shall determine as a threshold matter . . . whether the applicable arbitration clause permits the arbitration to proceed on behalf of . . . a class." *Id.* at 623 (alterations in original). Second, in a holding with potentially broader application, the court ruled that the arbitrator had authority to decide "the availability of class procedures" in light of her express authority under the agreement to decide "questions of arbitrability" and "procedural questions." *Id.* at 624. The court left open on remand the question of whether the arbitrator had exceeded her authority by certifying a mandatory class, as opposed to an opt-out class. *Id.* at 626.

Jock is particularly significant in light of the Supreme Court's repeated emphasis that class arbitration is unusual. Few other appellate cases have addressed, much less endorsed, the use of class arbitration. The Second Circuit's word may not be final, though, as Sterling Jewelers plans to seek review from the Supreme Court.

Part II: Appellate Courts Issue Several Important Decisions Rejecting Class Certification

During the last quarter of 2019, the Eleventh, Eighth, and Third Circuits issued several rulings reversing or vacating class certification. In one case, individualized questions regarding whether absent class members had standing led to a remand for a district court to reassess whether those issues predominated over any common issues. In another, a state consumer protection law was rejected as the basis for a nationwide class alleging injury arising from out-of-state transactions. And in the third, individual issues were found to predominate in an employment dispute where class members would have to prove if and when they had performed unpaid work. Defendants may be able to leverage these important decisions in opposing class certification in similar cases.

In *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259 (11th Cir. 2019), the Eleventh Circuit vacated the certification of a class where "a large portion" of it "d[id] not have standing" and "individualized questions" about which members had standing "may predominate over common issues susceptible to class-wide proof." *Id.* at 1275, 1277.

The named plaintiff had alleged that DIRECTV and a telemarketing contractor, Telecel, violated Federal Communications Commission regulations promulgated under the Telephone Consumer Protection Act by failing to maintain an internal do-not-call list. *Id.* at 1266. The named plaintiff alleged that he had received eighteen calls even though his phone number appeared on the National Do Not Call Registry and he had specifically requested that Telecel stop calling him. *Id.* The district court certified a Rule 23(b)(3) class defined as "all individuals who received more than one telemarketing call from Telecel" during the period that Telecel failed to maintain an internal do-not-call-list. *Id.*

On appeal, the defendants argued that absent class members who never requested that Telecel stop calling them necessarily lacked Article III standing because they had not suffered an injury-in-fact that was fairly traceable to the defendants' conduct. *Id.* at 1268. The Eleventh Circuit concluded that "the receipt of more than one unwanted phone call is enough to establish injury in fact" because "a phone call intrudes upon the seclusion of the home, fully occupies the recipient's device for a period of time, and demands the recipient's immediate attention." *Id.* at 1269–70. As to traceability, however, the court

agreed that absent class members who did not request that Telecel stop calling them could not trace their injury to Telecel's alleged misconduct, because they would have received unsolicited calls *even if* Telecel had maintained an internal do-not-call list. *Id.* at 1271–72.

The Eleventh Circuit then vacated the certification order and remanded so that the district court could determine in the first instance whether individualized standing questions would predominate, precluding certification under Rule 23(b)(3). *Id.* at 1277. Although the Eleventh Circuit agreed that the class's claims were justiciable—because the named plaintiff had standing—the court held that district courts must consider whether and how to certify a class "[i]f many or most of the putative class members could not show that they suffered an injury fairly traceable to the defendant's misconduct." *Id.* at 1273 (emphasis omitted).

In *Hale v. Emerson Electric Co.*, 942 F.3d 401 (8th Cir. 2019), the Eighth Circuit reversed a district court's order certifying a nationwide class of vacuum purchasers and applying Missouri's consumer-protection laws to all of their claims. The Eighth Circuit explained that because "every part of the challenged transaction"—including the purchase and alleged failure of the product to perform as advertised—"took place in a class member's home state," the consumer-protection laws of their home states would apply. *Id.* at 403–04. The Eighth Circuit also remanded so that the district court could apply Missouri's choice-of-law rules to the class members' non-consumer-protection claims in the first instance. *Id.* at 404.

The Third Circuit also reversed a class certification order in *Ferreras v. American Airlines, Inc.*, 946 F.3d 178 (3d Cir. 2019). There, the district court had certified multiple subclasses of employees who sued their employer under New Jersey's employment laws. In reversing, the Third Circuit noted, among other things, that the purported "common questions" that the district court had identified—"whether hourly-paid American employees at Newark airport are not being compensated for all hours worked, and . . . whether American has a policy that discourages employees from seeking exceptions for work done outside of their shifts"—could not "generate common answers" amenable to class-wide treatment, since each plaintiff would still have to prove when they were working. *Id.* at 185–86.

Significantly, the Third Circuit distinguished the Supreme Court's decision in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), which held that "representative evidence" could in some circumstances be a "permissible means of establishing the employees' hours worked in a class action." *Id.* at 1046–47. The Third Circuit held that such evidence could not be used because, unlike the employees in *Tyson Foods*, American's employees did not all perform the same unpaid activity, and thus representative evidence would not be used solely to determine the amount of time they spent performing the activity. *Ferreras*, 946 F.3d at 186–87.

Part III: Appellate Courts Issue a Range of Rulings Dealing with Non-Traditional "Injuries"

The federal courts of appeals continue to grapple with Article III standing after the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), as we have discussed in prior updates. This past quarter, courts attempted to apply *Spokeo* in situations involving non-traditional purported injuries.

The decisions suggest that whether courts will find standing in a given case is likely to be highly dependent on the particular claims and factual allegations at issue.

In *Nayab v. Capital One Bank (USA), N.A.*, 942 F.3d 480 (9th Cir. 2019), the Ninth Circuit held that a plaintiff has Article III standing when a third party obtains his or her credit report for a purpose not authorized by the Fair Credit Reporting Act (FCRA). *Id.* at 487. Citing existing precedent as well as historical practice, the court concluded that because the FCRA "protect[s] the consumer's privacy interest" in his or her credit report, obtaining a credit report for an unauthorized purpose "violates a *substantive* provision of the FCRA." *Id.* at 490. The court therefore held that a plaintiff "has standing to vindicate her right to privacy under the FCRA when a third-party obtains her credit report without a purpose authorized by statute, regardless of whether the credit report is published or otherwise used by that third-party." *Id.* at 493.

The Eleventh Circuit likewise found standing under the Food, Drug, and Cosmetic Act (FDCA) and the Dietary Supplement Health and Education Act (DSHEA) in *Debernardis v. IQ Formulations, LLC*, 942 F.3d 1076 (11th Cir. 2019). The plaintiffs alleged they suffered economic loss when they purchased dietary supplements that the FDCA and DSHEA banned from sale. *Id.* at 1080. The district court dismissed their claims, stating that "even if the supplements could not legally be sold, the plaintiffs received the benefit of their bargain because there was no allegation that the supplements failed to perform as advertised, that the supplements caused any adverse health effects, or that the plaintiffs paid a premium for the supplements." *Id.* at 1083. The Eleventh Circuit reversed. *Id.* at 1089. It concluded that because the supplements had been deemed unsafe under the FDCA and DSHEA, the plaintiffs plausibly alleged that they received a product that had no value. *Id.* at 1085. The plaintiffs thus had standing under "the well-established benefit-of-the-bargain theory of contract damages, which recognizes that some defects so fundamentally affect the intended use of a product as to render it valueless." *Id.* The court cautioned, however, that its decision was "limited to the specific facts alleged in this case." *Id.* at 1088. And in a concurring opinion, Judge Sutton (sitting by designation) suggested that the plaintiffs' injuries were on "the razor's edge of Article III jurisdiction." *Id.* at 1089.

By contrast, the Seventh Circuit declined to find Article III standing in a different "benefit-of-the-bargain" case brought under the FDCA. The plaintiffs in *Benson v. Fannie May Confections Brands, Inc.*, 944 F.3d 639 (7th Cir. 2019) alleged that they were deceived by boxes of chocolate that contained roughly 33%-40% "slack-fill" or empty space, which supposedly caused consumers to believe that the boxes contained more chocolate than they actually did. *Id.* at 644. The Seventh Circuit affirmed dismissal of the complaint, holding that plaintiffs "failed to raise a plausible theory of actual damage" because they "never said that the chocolates they received were worth less than the $9.99 they paid for them, or that they could have obtained a better price elsewhere." *Id.* at 648. In addition to that "fatal" defect, the court noted that "their request for damages based on the percentage of nonfunctional slack-fill is quite vague" insofar as they failed to "explain how a percentage refund of the purchase price based on the percentage of nonfunctional slack-fill corresponds to their alleged harm." *Id.*

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Gibson Dunn attorneys 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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