GIBSON DUNN

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FIRST QUARTER 2021 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 2021.

Part I discusses appellate decisions in the Ninth, Seventh, and Eleventh Circuits about predominance, numerosity, and administrative feasibility.

Part II covers two decisions from several circuit courts of appeals relating to the evidentiary standards at the class-certification stage.

Part III reports on a decision from the Eleventh Circuit discussing Article III standing and data breach class actions.

I. Class Certification Requirements: The Ninth Circuit on Predominance; the Seventh Circuit on Numerosity; and the Eleventh Circuit on Administrative Feasibility

The Ninth, Seventh, and Eleventh Circuits issued important opinions regarding predominance, numerosity, and administrative feasibility.

Predominance. In *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 2021 WL 1257845 (9th Cir. Apr. 6, 2021), a case involving an alleged tuna price fixing conspiracy, the Ninth Circuit clarified a district court's obligations when assessing predominance, particularly where there is a dispute over whether all class members have suffered injury. *Olean* contains three key holdings:

- First, it held for the first time that a district court must find that plaintiffs have established predominance by "a preponderance of the evidence," joining the rule followed by the First, Second, Third, Fifth, and Seventh Circuits. at *4. The Ninth Circuit explicitly rejected the use of a "no reasonable juror" test outside of the wage-and-hour context. *Id*. at *5 & n.4.

- Second, it held that plaintiffs in an antitrust price-fixing action can establish predominance using statistical evidence, but a district court must scrutinize—"with care and vigor"—the reliability of that evidence before certifying a class. at *5. Specifically, if the parties offer competing expert evidence regarding the number of uninjured class members, the district court must "resolve the

competing expert claims" in order to determine whether predominance has been established. *Id.* at *10.

- Finally, the court held that although there is no "threshold" percentage of uninjured class members that would defeat predominance, "it must be *de minimis*," suggesting "that 5% to 6% constitutes the outer limits of a *de minimis* number"—and at the very least, 28% "would be out-of-bounds." at *11. It also noted that the presence of uninjured class members presents "serious standing implications under Article III," but did not reach the issue because class certification failed under Rule 23(b)(3). *Id.* at *10 n.7.

Numerosity. The Seventh Circuit affirmed a district court's determination that a proposed class of 37 seasonal employees failed to satisfy Rule 23's numerosity requirement in *Anderson v. Weinert Enterprises, Inc.*, 986 F.3d 773 (7th Cir. 2021). In its decision, the court acknowledged that its cases "have recognized that 'a forty-member class is often regarded as sufficient to meet the numerosity requirement.'" *Id.* at 777 (citation omitted). But the court also noted that the "[t]he key numerosity inquiry under Rule 23(a)(1) is not the number of class members alone but the practicability of joinder." *Id.* To that end, the Seventh Circuit determined that the district court did not abuse its discretion in finding that the factors it considered—including the class's geographic dispersion, overall size, and small dollar amounts involved with each individual claim—all "weighed against certifying the class." *Id.*

Administrative feasibility. In *Cherry v. Dometic Corp.*, 986 F.3d 1296 (11th Cir. 2021), the Eleventh Circuit held that an "administratively feasible" method to identify absent class members is not required to certify a class. It further held that denying certification does not divest a federal court of CAFA jurisdiction.

In the district court, plaintiffs had proposed a class of individuals who purchased allegedly defective refrigerators between 1997 and 2016. Defendant contended that the class representatives failed to show that the class was "ascertainable" because they "provided no evidence that their proposed method of identification would be workable." *Id.* at 1300. The district court agreed with defendant and denied certification.

The Eleventh Circuit reversed. First, it held that administrative feasibility is not required for class certification, though it remains relevant to whether a proposed class may proceed under Rule 23(b)(3). Recognizing a circuit split on this issue (in fact, calling it "[o]ne of the most hotly contested issues in class action practice today"), the court reasoned that Rule 23(a) says nothing about administrative feasibility, which bears only on "how the district court can locate the remainder of the class after certification." *Id.* at 1301, 1303. As such, it concluded, "administrative difficulties—whether in class-member identification or otherwise—do not alone doom a motion for certification." *Id.* at 1304. Second, the court held that because CAFA jurisdiction does not depend on certification, a district court retains jurisdiction even after it denies certification in a CAFA action. *Id.* at 1305.

II. Several Circuits Clarify the Standards for Assessing the Admissibility of Evidence at the Class-Certification Stage

The Supreme Court has made clear that Rule 23 "does not set forth a mere pleading standard" and that a plaintiff "must be prepared to prove" that Rule 23's requirements are "*in fact*" satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (emphasis in original). The need to assess actual evidence at the class-certification stage raises an important question: does such evidence need to be admissible? The Fifth and Sixth Circuits issued important decisions this past quarter that take divergent approaches to that question.

The Fifth Circuit in *Prantil v. Arkema Inc.*, 986 F.3d 570 (5th Cir. 2021), held that the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), standard for admissibility of expert evidence applies at the class-certification stage when scientific evidence is relevant to the certification decision. 986 F.3d at 575 & n.12. The Fifth Circuit explained that applying *Daubert* at the certification stage was a natural extension of the Supreme Court's admonition that courts conduct a "rigorous analysis" of the proposed class's conformity with Rule 23. *Id.* at 575. The Fifth Circuit thus joined the Third, Seventh, and Eleventh Circuits in holding that "the *Daubert* hurdle must be cleared when scientific evidence is relevant to the decision to certify," and declaring that the district court's "hesitation to apply *Daubert*'s reliability standard with full force" was error. *Id.* at 575–76. The Fifth Circuit's holding is consistent with the Ninth Circuit's recent admonition in *Olean*, where it made clear that district courts must resolve competing expert claims on the reliability of evidence to support class certification. 2021 WL 1257845, at *10.

The Sixth Circuit took a slightly different approach—this time, with nonexpert evidence—in *Lyngaas v. Curaden AG*, 992 F.3d 412 (6th Cir. 2021). *Lyngaas* held that nonexpert evidence need not be admissible in order to be considered at class certification. *Id.* at 428–29. The district court certified a class of individuals who purportedly received unsolicited faxes from defendants and offered summary report logs as proof. The court rejected the defendants' assertion that the logs had not been properly authenticated and therefore plaintiff had failed to support his motion with admissible evidence. *Id.* at 418–19.

On appeal, the Sixth Circuit held as a matter of first impression that a district court is not required to "decide conclusively at the class-certification stage what evidence will ultimately be admissible at trial." *Id.* at 428. In so holding, the court adopted the reasoning of the Eighth and Ninth Circuits to conclude that the "evidentiary proof" required at class certification "need not amount to admissible evidence, at least with respect to nonexpert evidence." *Id.* at 428–29. Rather, because of the "differences between Rule 23, summary judgment, and trial," parties should be afforded "greater evidentiary freedom at the class certification stage." *Id.* at 429 (quoting *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1005 (9th Cir. 2018)). Therefore, reliance on non-authenticated summary-report logs satisfied the district court's obligation to conduct a "rigorous analysis" at class certification. *Id.* at 430.

III. The Eleventh Circuit Addresses Article III Standing in Data Breach Class Actions

As discussed in prior updates, federal courts at all levels have continued to ponder and opine on the role Article III standing plays in class actions. The Eleventh Circuit weighed in this quarter in *Tsao v. Captiva MVP Restaurant Partners, LLC*, 986 F.3d 1332 (11th Cir. 2021), holding that absent class members lacked standing following a data breach when the only injuries alleged were (a) a future risk of identity theft and (b) costs incurred to mitigate the risk of identity theft.

In *Tsao*, the plaintiff filed a putative data-breach class action after a restaurant chain announced a data breach involving its point-of-sale systems. The district court dismissed the case for lack of Article III standing, holding "[e]vidence of a data breach, without more, [is] insufficient to satisfy injury in fact under Article III standing." *Id*. at 1337. The Eleventh Circuit affirmed, rejecting both of plaintiff's argument that the data breach established standing.

First, the Eleventh Circuit held that an elevated threat of identity theft is not sufficient to establish Article III standing. Citing the Supreme Court's opinion in *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), the court explained "a plaintiff alleging a threat of harm does not have Article III standing unless the hypothetical harm alleged is either 'certainly impending' or there is a 'substantial risk' of such harm." *Id*. at 1339. An "increased risk of identity theft," without more, was not sufficient to meet these requirements. *Id*. at 1344. Thus, it determined that absent "specific evidence of *some* misuse of class members' data, a named plaintiff's burden to plausibly plead factual allegations sufficient to show that the threatened harm of future identify theft was 'certainly impending'—or that there was a 'substantial risk' of such harm—will be difficult to meet." *Id*. (emphasis in original).

Second, the court rejected plaintiff's argument that his efforts to mitigate the risk of identity theft—such as by cancelling his credit cards—could create an injury in fact. Where a hypothetical harm is not "certainly impending," "a plaintiff cannot conjure standing by inflicting some direct harm on itself to mitigate a perceived risk." *Id*. at 1339. Were it otherwise, "an enterprising plaintiff" could "secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear," which is "not permit[ted]" by the law. *Id*. at 1345.

While the role of Article III standing in class actions continues to be hotly debated issue, some additional clarity may be on its way. On March 30, 2021, the Supreme Court heard argument in *TransUnion LLC v. Ramirez*. As noted in our prior class action update, the question presented in this case is "whether either Article III or Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered." During argument, the Justices probed this issue further, asking whether the majority of the class members—whose information had never been disclosed to third parties—possessed Article III standing, and whether the representative's claims were typical of those of the absent class members. A decision is expected by summer.

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