GIBSON DUNN

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THIRD QUARTER 2021 UPDATE ON CLASS ACTIONS

To Our Clients and Friends:

This update provides an overview of key class action developments during the third quarter of 2021.

Part I covers two important decisions from the Third and Ninth Circuits regarding the scope of the Section 1 exemption under the Federal Arbitration Act.

Part II addresses a Ninth Circuit decision endorsing the use of a motion to deny class certification at the pleadings stage.

Part III reports on a Fourth Circuit decision vacating a class certification order because of the numerosity requirement.

Part IV discusses a Third Circuit decision rejecting the certification of an "issue" class under Rule 23(c)(4) where the district court did not find that one of the Rule 23(b) factors was satisfied.

And finally, **Part V** analyzes a Ninth Circuit decision clarifying that a defendant need not raise a personal jurisdiction defense as to a putative absent class member at the outset of a case, and instead can assert that defense for the first time at the class certification stage.

I. The Third and Ninth Circuits Address the Federal Arbitration Act's Section 1 Exemption

The Third and Ninth Circuits both weighed in this past quarter on the so-called Section 1 exemption in the Federal Arbitration Act ("FAA"), which exempts "workers engaged in foreign or interstate commerce" from having to arbitrate their claims under federal law. 9 U.S.C. § 1. The Section 1 exemption has been the subject of substantial litigation in recent years, particularly in the context of class actions involving "gig" economy workers, and the decisions from the Third and Ninth Circuits provide additional clarity to litigants regarding the scope of this exemption. Gibson Dunn served as counsel to the defendants in both appeals.

In *Harper v. Amazon.com Services, Inc.*, 12 F.4th 287 (3d Cir. 2021), a delivery driver claiming he was misclassified as an independent contractor asserted that he could not be compelled to arbitrate his claim because he and other New Jersey drivers made some deliveries across state lines and therefore qualified for the Section 1 exemption. *Id.* at 292. The district court deemed that contention to raise a question of fact and it ordered discovery, without examining Amazon's contention that state law would also require arbitration even if the Plaintiff was exempt from arbitration under the FAA. *Id.* The Third Circuit vacated the district court's order and "clarif[ied] the steps courts should follow—before discovery about the scope of § 1—when the parties' agreement reveals a clear intent to arbitrate." *Id.* at 296. Under this three-part framework, a district court must first determine, based on the allegations in the complaint, whether the agreement applies to a class of workers that fall within the exemption. If it is not clear from

the face of the complaint, the court must assume § 1 applies and "consider[] whether the contract still requires arbitration under any applicable state law." *Id.* If the arbitration clause is unenforceable under state law, only then does the court "return to federal law and decide whether § 1 applies, a determination that may benefit from limited and restricted discovery on whether the class of workers primarily engage in interstate or foreign commerce." *Id.*

In *Capriole v. Uber Technologies, Inc.*, 7 F.4th 854 (9th Cir. 2021), the Ninth Circuit addressed whether rideshare drivers are transportation workers engaged in foreign or interstate commerce; it joined the growing number of courts holding that such drivers do not fall within this Section 1 exemption. Although the plaintiffs claimed they fell under the Section 1 exemption because they sometimes cross state lines, and also pick up and drop off passengers from airports who are engaging in interstate travel, the Ninth Circuit held this was not enough to qualify for the exemption. *Id.* at 863. In particular, the Ninth Circuit cited the district court's finding that only 2.5% of trips fulfilled by Uber started and ended in different states, and that only 10.1% of trips began or ended at an airport (and not all of the customers' flights involved interstate travel). *Id.* at 864. This sporadic interstate movement "cannot be said to be a central part of the class member's job description," and thus a driver "does not qualify for the exemption just because she occasionally performs" work in interstate commerce. *Id.* at 865. The Ninth Circuit's holding "join[s] the growing majority of courts holding that Uber drivers as a class of workers do not fall within the 'interstate commerce' exemption from the FAA." *Id.* at 861.

II. The Ninth Circuit Affirms the Granting of a Motion to Deny Class Certification at the Pleadings Stage

The propriety of class certification is typically decided after discovery occurs and the plaintiff moves to certify a class. But in some cases, a defendant can properly move to deny class certification at the outset of a case. That is exactly what the Ninth Circuit endorsed this quarter in *Lawson v. Grubhub, Inc.*, 13 F.4th 908 (9th Cir. 2021), a case in which Gibson Dunn served as counsel for the defendant.

In *Lawson*, the district court granted the defendant's motion to deny class certification on the ground that the vast majority of putative class members were bound by arbitration agreements with class action waivers. *Lawson*, 13 F.4th at 913. The Ninth Circuit affirmed, explaining that because only the plaintiff and one other person had opted out of the arbitration clause and class action waiver in their contracts, the plaintiff was "neither typical of the class nor an adequate representative," and the proceedings were "unlikely to generate common answers." *Id.* The Ninth Circuit also rejected the plaintiff's argument that the denial of class certification was premature because the plaintiff had not yet moved for certification, and specifically held that Rule 23 "allows a preemptive motion by a defendant to deny class certification." *Id.*

III. The Fourth Circuit Addresses the Numerosity Requirement

Plaintiffs seeking class certification often have little trouble satisfying Rule 23(a)(1)'s requirement that "the class is so numerous that joinder of all members is impracticable." With proposed classes commonly covering thousands or millions of members, appellate courts rarely have an opportunity to address this numerosity requirement. But in certain areas, including in pharmaceutical antitrust class

actions, it has become increasingly common for plaintiffs to seek certification of small classes of sophisticated and well-resourced businesses claiming substantial damages. This past quarter, however, the Fourth Circuit vacated an order certifying such a class after finding that the district court had applied an erroneous standard for assessing numerosity. Gibson Dunn represented one of the defendants in this action.

In re Zetia (Ezetimibe) Antitrust Litigation, 7 F.4th 227 (4th Cir. 2021), rejected a district court's conclusion that a putative class of 35 purchasers of certain prescription drugs had satisfied Rule 23's numerosity requirement. The court explained that the district court's numerosity analysis rested on "faulty logic" and neglected to consider that "the text of Rule 23(a)(1) refers to whether 'the class is so numerous that *joinder* of all members is impracticable,' not whether the class is so numerous that failing to certify presents the risk of many separate lawsuits." 7 F.4th at 234–35 (quoting *In re Modafinil Antitrust Litig.*, 837 F.3d 238 (3d Cir. 2016)). Accordingly, when evaluating numerosity, the question is whether a class action is preferable as compared to joinder—not as compared to the prospect of individual lawsuits. *Id.* at 235. And with respect to class members' ability and motivation to litigate, the court emphasized that the proper comparison is not individual suits, but rather whether it is practicable to join class members into a single action. Significantly, the Fourth Circuit emphasized that Rule 23(a)(1) requires plaintiffs to produce evidence that, absent certification of a class, the putative class members would not join the suit and that it would be uneconomical for smaller claimants to be individually joined. *Id.* at 235–36 & nn. 5 & 6.

IV. The Third Circuit Heightens the Standard for the Certification of "Issue" Classes

Rule 23(c)(4) provides that, "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Some courts have read this language as permitting the certification of classes without a separate showing that the requirements of Rule 23(b)(1), (b)(2), or (b)(3) are satisfied. In practice, this view of Rule 23(c)(4) can permit plaintiffs to bypass the need to establish that common questions predominate. The Third Circuit this quarter refused to adopt such a reading of Rule 23, and instead held that a certification of an "issue" class under Rule 23(c)(4) is not permissible unless one of the Rule 23(b) requirements is also satisfied.

In *Russell v. Educational Commission for Foreign Medical Graduates*, the Third Circuit reversed a district court's certification of an "issue" class under Rule 23(c)(4) because the district court had not found that any subsection of Rule 23(b) was satisfied. 15 F.4th 259, 271 (3d Cir. 2021). The court explained that "[t]o be a 'class action,' a party must satisfy Rule 23 and all of its requirements," and concluded that class certification was improperly granted because there had been no determination if Rule 23(b) could be met. *Id.* at 262, 271–73. Thus, plaintiffs in the Third Circuit seeking to certify an issue-only class under Rule 23(c)(4) must still satisfy the other requirements of Rule 23, including showing that "action is maintainable under Rule 23(b)(1), (2), or (3)." *Id.* at 267.

V. The Ninth Circuit Holds That a Defendant Does Not Waive a Personal Jurisdiction Defense to Absent Class Members by Not Raising It at the Pleadings Stage

In our First Quarter 2020 Update on Class Actions, we covered decisions from the Fifth and D.C. Circuits holding that the proper time to adjudicate whether a court has personal jurisdiction over absent class members is at the class certification stage, not at the pleading stage. This past quarter, the Ninth Circuit aligned itself with these other Circuits.

In *Moser v. Benefytt, Inc.*, 8 F.4th 872 (9th Cir. 2021), the Ninth Circuit ruled that a defendant can raise a personal jurisdiction objection as to absent class members at the class certification stage, even if the defendant did not raise it in its first responsive pleading. In *Moser*, a California resident filed a putative nationwide class action alleging that the defendant, a Delaware corporation with its principal place of business in Florida, violated the Telephone Consumer Protection Act by making calls to persons across the country. *Id.* at 874. When the plaintiff moved to certify a nationwide class, the defendant argued that the district court could not certify a nationwide class because the court lacked personal jurisdiction over any of the non-California plaintiffs' claims under the Supreme Court's decision in *Bristol-Myers Squibb v. Superior Court*, 137 S. Ct. 1773 (2017). But the district court declined to consider the argument, holding that the defendant waived it by failing to raise the objection to personal jurisdiction in its first Rule 12 motion to dismiss. *Moser*, 8 F.4th at 875.

The Ninth Circuit reversed. It held that the defendant had not waived its personal jurisdiction objection to nationwide certification by not raising it in the first responsive pleading. *Id.* at 877. The court reasoned that because defendants do not yet have "available" a "personal jurisdiction defense to the claims of unnamed putative class members who were not yet parties to the case" at the pleadings stage, defendants could not waive such an objection before the certification stage. *Id.* This ruling clarifies that defendants in the Ninth Circuit do not need to raise personal jurisdiction challenges to putative absent class members at the outset of the case, and instead should raise such challenges at the class certification stage.

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