GIBSON DUNN

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SECOND QUARTER 2022 UPDATE ON CLASS ACTIONS

To Our Clients and Friends:

This update provides an overview of key class action-related developments during the second quarter of 2022 (April through June).

Part I discusses noteworthy cases from the Ninth, Sixth, and Third Circuits regarding the requirements for class certification—including important decisions on how to address uninjured putative class members.

Part II covers two decisions from the Eighth and Seventh Circuits analyzing Article III standing in light of the U.S. Supreme Court's decisions in *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), and *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021).

And **Part III** analyzes a recent decision from the Third Circuit regarding late removals of class actions to federal court under the Class Action Fairness Act of 2005 ("CAFA").

I. The Ninth, Sixth, and Third Circuits Discuss Rule 23 Requirements

This past quarter, the Ninth, Sixth, and Third Circuits issued significant decisions applying the Rule 23 class certification requirements.

As reported in our prior client alert, the Ninth Circuit released an important en banc opinion in *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022). The case involved three classes of tuna purchasers who alleged that tuna suppliers engaged in a price-fixing conspiracy in violation of federal and state antitrust laws. In certifying the classes, the district court relied on the plaintiffs' expert's analysis purporting to show that the alleged conspiracy resulted in substantial price impacts that injured purchasers on a class-wide basis.

While the Ninth Circuit ultimately affirmed the granting of class certification in *Olean*, and rejected a *per se* ruling against certifying a class that contains more than a de minimis number of uninjured class members (a ruling which conflicts with decisions from the First and D.C. Circuits), the court's opinion outlines a framework for class certification that creates significant hurdles for plaintiffs seeking to certify expansive classes, especially where proving injury at trial would require individualized adjudications. *Olean* was covered in greater detail in our prior client alert, and we expect the case to impact all types of class actions in the Ninth Circuit, including consumer and employment cases.

The Sixth Circuit also confronted the issue of identifying injured class members in *Tarrify Properties, LLC v. Cuyahoga County*, 37 F.4th 1101 (6th Cir. 2022), which affirmed the denial of certification of a

putative class of owners of abandoned properties to whom the defendant county failed to reimburse the remaining equity when it foreclosed on their properties. Given the many factors that influence property values, the Sixth Circuit reasoned that determining whether any given property owner was owed money required "proof that is variable in nature and ripe for variation in application," such that "mini-trials" would be necessary to determine the remaining equity in each foreclosed property. *Id.* at 1106–07. Moreover, the issue was one of determining injury—rather than damages—because "[t]he key impediment . . . is that the court must ask whether a given property's fair market value exceeds the taxes owed at the time of the transfer to determine who is in the class." *Id.* at 1106. The Sixth Circuit also rejected the plaintiff's proposal to use tax appraisal values to determine whether each property owner had been harmed, calling that approach a "rough justice method" that failed to sufficiently account for "the vagaries of [determining] fair market value." *Id.* at 1106–08.

Finally, the Third Circuit addressed the numerosity and commonality requirements of Rule 23 in *Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890 (3d Cir. 2022), and vacated certification of an Americans with Disabilities Act class action against a retail operator with 400 retail stores across 29 states. The plaintiffs had alleged that the retailer's stores were inaccessible to disabled people using wheelchairs because the aisles were often blocked with merchandise. To satisfy the numerosity requirement, the plaintiffs introduced census data estimating the number of people with ambulatory disabilities for each zip code with a store, 12 emails from patrons using wheelchairs, and evidence that 16 patrons using wheelchairs visited two stores in Pennsylvania over the course of one week. To satisfy the commonality requirement, the plaintiffs argued that the retailer had nationwide store-layout policies that affected accessibility in its stores. The district court granted certification, finding that the plaintiffs had proved there were at least 30 people in the putative class and that the proposed class members would have suffered the same injury stemming from the retailer's alleged policies.

The Third Circuit reversed on both grounds. On numerosity, the Third Circuit held that the plaintiffs' evidence was "far too speculative" because the census data said nothing about the number of disabled people who actually shopped at the stores, the customer complaints were "few," and there were no documented accessibility issues for those patrons recorded visiting the Pennsylvania stores. *Id.* at 899–900. In contrast to the plaintiffs' "speculative" evidence, in order to satisfy numerosity, the plaintiffs would have needed to provide "concrete evidence of class members who have patronized a public accommodation and have suffered or will likely suffer common ADA injuries." *Id.* at 897.

On commonality, the Third Circuit held that "stitching together a corporate-wide class requires more" than showing "that [the defendant] has corporate policies and that some or all stores in Pennsylvania pay inadequate attention to aisle accessibility." *Id.* at 901. Because the plaintiffs' evidence of inaccessible aisles was limited to Pennsylvania, there was no way of knowing whether the retailer's visual standards resulted in discrimination "in some regions" but not others. *Id.* at 902. It concluded that evidence from one state was not enough to support "[p]roceeding on a corporate-wide basis against a corporation with over four hundred stores in twenty-nine states." *Id.*

II. The Eighth and Seventh Circuits Analyze Article III Standing in Light of *Spokeo* and *TransUnion*

As reported in prior updates, federal courts continue to assess whether named plaintiffs have adequately alleged Article III standing to bring a variety of claims commonly filed as class actions. This past quarter was no different, with the Eighth Circuit and Seventh Circuit clarifying what constitutes a concrete Article III injury under *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), and *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021).

In *Schumacher v. SC Data Center, Inc.*, 33 F.4th 504 (8th Cir. 2022), the Eighth Circuit held that the named plaintiff in a putative class action failed to sufficiently allege Article III standing based on a prospective employer's purported failure to comply with several technical requirements of the Fair Credit Reporting Act ("FCRA"). Siding with the Ninth Circuit—and disagreeing with the Third and Seventh Circuits—the Eighth Circuit first held that the prospective employer's failure to provide the plaintiff with a copy of her consumer report before denying her employment did not qualify as an "injury in fact" sufficient to confer Article III standing. *Id.* at 510–12. Although the employer's failure to provide the report deprived the plaintiff of an opportunity to explain prior convictions that had led to her denial of employment, the Eighth Circuit held that FCRA did not provide a right to explain an accurate consumer report. *Id.* at 511–12. Second, the Eighth Circuit held that even though the employer violated FCRA by providing an improper disclosure form, that was only a "technical violation" of the statute that did not harm the plaintiff. *Id.* at 512–13. Third, the Eighth Circuit held that the plaintiff lacked standing to challenge any alleged search of a sex-offender database without her authorization, since the plaintiff pled that it caused a mere "invasion of privacy," which was not a sufficiently concrete harm. *Id.* at 514.

The Seventh Circuit also addressed standing issues in *Pierre v. Midland Credit Management, Inc.*, 29 F.4th 934 (7th Cir. 2022), where the court held that efforts to collect on a time-barred debt did not constitute injury for Article III standing. The plaintiff in *Pierre* had defaulted on a credit card and was sued by the debt purchaser, but the lawsuit was subsequently dismissed. After the statute of limitations had run on the debt collection, the defendant sent the plaintiff a letter seeking payment of the debt at a discount, while acknowledging that the plaintiff could not be sued over the debt because of its age. The plaintiff claimed that the letter violated the Fair Debt Collection Practices Act ("FDCPA") because it falsely represented the character of the debt.

The Seventh Circuit remanded with instructions to dismiss for lack of subject matter jurisdiction because the plaintiff had not established an Article III injury. The Seventh Circuit held that, "critically," the plaintiff "didn't make a payment, promise to do so, or otherwise act to her detriment in response to anything in or omitted from the letter." *Id.* at 939. Nor did psychological harm, such as the claimed "confusion" and "worry" arising from the letter, rise to a concrete injury. *Id.* "[A]t most," the defendant's letter created "a risk" of injury—which was "not enough to establish an Article III injury in a suit for money damages." *Id.* at 936 (citing *TransUnion*, 141 S. Ct. at 2210–11).

Judge David F. Hamilton, writing for three other judges dissenting from a subsequent denial of a petition for rehearing in *Pierre*, argued that intangible injuries, such as those advanced by the plaintiff, "could

be concrete for purposes of standing" for violations of the FDCPA. 36 F.4th 728, 730 (7th Cir. 2022) (Hamilton, J., dissenting).

III. The Third Circuit Upholds Late-Stage Removal Under CAFA

The Third Circuit issued a notable decision upholding a late-stage removal of a putative class action to federal court under CAFA, which normally requires defendants to file a notice of removal within 30 days from "receipt" of the "initial pleading setting forth the claim for relief." 28 U.S.C. § 1446(b)(1). CAFA also provides that "if the case stated by the initial pleading is not removable," then a defendant's removal is timely if filed within 30 days "after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." *Id.* § 1446(b)(3).

In *McLaren v. UPS Store Inc*., 32 F.4th 232, 241 (3d Cir. 2022), the Third Circuit held that the 30-day removal deadline under Section 1446(b)(3) is not triggered by the defendant's possession of information about removability. The litigation involved parallel state class actions alleging that the defendants' stores charged an amount for notary services that exceeded the $2.50 fee permitted by New Jersey state law. *Id.* at 234. Neither state complaint alleged that the amount in controversy exceeded $5 million, as required for removal under CAFA. *Id.* at 235. During the course of the state litigation, one defendant produced a spreadsheet that disclosed the number of transactions at issue, revealing that each case had an amount in controversy exceeding $5 million. *Id.* Seven months later—and after an adverse appellate decision affirming denial of the defendants' motion to dismiss—the defendants removed both complaints to federal court, asserting that CAFA's jurisdictional requirements were met. *Id.* The district court remanded the cases back to state court, holding that the defendants' removal was untimely under Section 1446(b). *Id.*

The Third Circuit vacated the district court's remand order, holding that the spreadsheet the defendant produced was not "recei[ved] by [d]efendant[s]," and thus did not trigger any 30-day removal clock. *Id.* at 241. The court reasoned that the removal clocks are triggered based only on what a defendant can ascertain from the four corners of a complaint or other paper the defendant "receives"—and that Section 1446(b) does not impose a duty to search company records to investigate possible removal. *Id.* at 239. Moreover, the statutory text "focuses only on what a defendant receives," and "does not contemplate that the thirty-day clock would be triggered by information that the defendant already possesses or knows from its own records." *Id.* at 238.

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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, Litigation, or Appellate and Constitutional Law practice groups, or any of the following lawyers:

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