GIBSON DUNN

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YEAR-END AND FOURTH QUARTER 2022 UPDATE ON CLASS ACTIONS

To Our Clients and Friends:

This update provides an overview of key class action-related developments during the fourth quarter of 2022 (October through December).

> **Part I** summarizes two cases from the First and Fifth Circuits addressing Article III standing in class actions involving "overcharge" or "overpayment" theories of injury;
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> **Part II** analyzes a recent Second Circuit decision reiterating that individualized affirmative defenses must be considered in a Rule 23(b)(3) predominance inquiry;
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> **Part III** discusses a decision from the Ninth Circuit remanding a large statutory damages award in a class action to assess whether it comported with due process;
>
> And **Part IV** covers decisions from the First and Ninth Circuits involving class settlements.

I. Courts Address Whether "Overpayment" Theories of Injury Suffice to Establish Article III Standing

Questions about standing and Article III injury in class actions continue to be front and center in the federal courts of appeals, with the Fifth and First Circuits reaching contrasting results this past quarter in cases involving claims based on alleged "overpayments."

In *Earl v. Boeing Co*., 53 F.4th 897, 901 (5th Cir. 2022), the plaintiffs sought to represent all individuals who purchased tickets for air travel on the Boeing 737 MAX 8 aircraft, and alleged that these consumers overpaid for the tickets because Boeing purportedly concealed various safety defects. After the district court granted class certification, the Fifth Circuit agreed to hear Boeing's interlocutory appeal under Rule 23(f).

Instead of reaching the propriety of class certification, the Fifth Circuit focused on the threshold issue of Article III standing, and ultimately concluded the plaintiffs had not suffered any actual injury and remanded with instructions to dismiss the case. *Id*. at 903.

Because the plaintiffs conceded they did not experience any physical injury, the court focused on their theory of economic harm. Under this theory, the plaintiffs claimed they paid ticket prices that were "significantly higher than the value of those tickets, which for many, if not most, passengers was zero" had the alleged defects been known. *Id*. at 902. While plaintiffs submitted an expert survey analysis showing that demand for flights on the aircraft would have been lower if the public had known about the

safety defect, the Fifth Circuit held that this theory rested on the "unsupportable" inferences that airlines would have continued to offer flights on the aircraft—and that the FAA would have allowed the aircraft to fly—even after the defect was disclosed. *Id.* at 903.

The First Circuit also addressed an "overpayment" theory of injury this past quarter in *In re Evenflo Co.*, 54 F.4th 28 (1st Cir. 2022). The plaintiffs in that case alleged they bought the defendant's booster seat relying on its statements regarding safety testing and overall safety ratings, and that but for those statements (which the plaintiffs claimed were false), they "would not have purchased the seat, would have paid less for it, and/or would have bought a safer alternative." *Id*. at 32. The district court dismissed the action for lack of Article III standing. *Id*.

On appeal, the First Circuit held that the alleged overpayment was a cognizable injury for standing purposes and that while the pleadings plausibly demonstrated standing to seek monetary relief, the plaintiffs lacked Article III standing to pursue injunctive relief. *Id*. at 32.

As for monetary damages, the First Circuit concluded that "overpayment for a product—even one that performs adequately and does not cause any physical or emotional injury—may be a sufficient injury to support standing." *Id*. at 35. The court also distinguished the U.S. Supreme Court's decisions in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), and *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), holding that "monetary harms such as those alleged here fall firmly on the real, concrete side of the divide." *Id*. at 39.

As for declaratory and injunctive relief, the court reversed because the plaintiffs waived their entitlement to that relief by failing to address it in their brief, and because they failed to plead any possibility of future harm (such as an intention to buy another booster seat in the future) that would entitle them to injunctive relief. *Id*. at 41.

II. The Second Circuit Reiterates That the Presence of Affirmative Defenses Can Preclude a Finding of Predominance Under Rule 23(b)(3)

In *Haley v. Teachers Insurance and Annuity Association*, 54 F.4th 115 (2d Cir. 2022), the Second Circuit underscored how individualized affirmative defenses—not just claims—must be considered when determining whether predominance has been met. Following a Rule 23(f) interlocutory appeal, the court reviewed the certification of a class of nearly 8,000 retirement plans with respect to claims based on the allegation that the defendant unlawfully profited from its retirement loan program. *Id*. at 117.

In vacating the certification order, the Second Circuit reaffirmed that "a complete assessment of predominance demands that a district court consider *all* factual or legal issues and classify them as subject either to common or individual proof." *Id.* at 121. The court also emphasized that it is "well settled that this exercise includes any affirmative defenses," and those defenses "do not carry 'less weight' on the class certification issue simply because the defendant will bear the burden of proof at the merits stage." *Id*. at 121–22.

III. The Ninth Circuit Remands a Large Aggregate Statutory Damage Award in a Class Action for Reassessment of Potential Due Process Issues

In October, the Ninth Circuit issued a noteworthy opinion holding that aggregate statutory damage awards in class actions may become so large that they violate due process, giving guidance to lower courts when evaluating such oversized awards.

In *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109 (9th Cir. 2022), the district court had entered a nearly $1 billion judgment for approximately 1.9 million phone calls that a jury found violated the Telephone Consumer Protection Act (TCPA), which allows for $500 in statutory damages per call. *Id*. at 1113.

Acknowledging the principle that "aggregated statutory damages are, in certain extreme circumstances, subject to constitutional due process limitations," *id*. at 1121, the court remanded the case so the district court could determine whether the damages award was "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable," *id.* at 1125. In particular, the Ninth Circuit instructed the district court to consider several factors, including (1) the amount awarded to each plaintiff, (2) the total award, (3) the nature and persistence of violations, (4) the extent of the defendant's culpability, (5) damage awards in similar cases, (6) the substantive or technical nature of the violations, and (7) the circumstances of each case, to determine whether the magnitude of the aggregated award is proportional and reasonable when the statute's goals of compensation, deterrence, and punishment are taken into account. *Id*. at 1122–23 (citing *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1309 (9th Cir. 1990)). In evaluating these factors, courts must recognize that "[c]onstitutional limits on aggregate statutory damages awards . . . must be reserved for circumstances in which a largely punitive per-violation amount results in an aggregate [award] that is gravely disproportionate to and unreasonably related to the legal violation committed." *Id.* at 1124.

IV. The First and Ninth Circuits Address Class Settlements

This past quarter, the First and Ninth Circuits addressed issues relating to class settlements, with the former addressing the adequacy of representation in a settlement class, and the latter addressing CAFA's coupon settlement provision.

In *Murray v. Grocery Delivery E-Services USA Inc.*, 55 F.4th 340, 342 (1st Cir. 2022), the First Circuit vacated approval of a class settlement in a case alleging that the defendant's marketing campaign violated the TCPA. An objector appealed the settlement approval, arguing that (a) the settlement class was inadequately represented because the class mixed individuals with substantially stronger claims together with those with weaker claims, and (b) the incentive awards to each named plaintiff were improper. *Id*. at 344, 351, 353–54.

The First Circuit concluded that some class members were not adequately represented. 55 F.4th at 351. It held that although all class members alleged a violation of the TCPA, there were separate provisions of the TCPA—each "having significantly different elements and facing significantly different defenses"—that applied to different class members. *Id.* at 351. Because the settlement did not distinguish between these two groups "despite the clear difference in claim value," the court ruled that class members with higher-value claims were not adequately represented by the proffered class

representatives. *Id.* at 350–51. The court did, however, approve the incentive awards to the class representatives. *Id.* at 352–53. In so doing, the First Circuit joined the Second, Sixth, Seventh, and Ninth Circuits' interpretation on this issue, widening a split with the Eleventh Circuit, which—as discussed in our prior update—has held that such incentive awards are improper. At the time of publication, there is a pending petition for a writ of certiorari to review the Eleventh Circuit's decision. *See Johnson v. Dickenson*, No. 22-389 (U.S.).

In *McKnight v. Hinojosa*, 54 F.4th 1069 (9th Cir. 2022), the Ninth Circuit held that a credit to users' Uber accounts was not a "coupon" for purposes of CAFA's "coupon settlement" requirements. *Id.* at 1077. CAFA requires courts to apply "heightened scrutiny" to coupon settlements because of concerns that class counsel might agree to a deal that gives their clients little value in exchange for a large fee award. *Id.* at 1075. To determine whether the settlement was a coupon settlement, the court applied the three-factor test from *In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934 (9th Cir. 2015): (1) whether class members have to use their own money to take advantage of a credit; (2) whether the credit is valid only for select products or services; and (3) how much flexibility the credit provides. 54 F.4th at 1075. Although the second factor favored finding a coupon settlement because the "credit is valid only for Uber services," this was outweighed by the first and third factors, both of which cut against finding a coupon settlement because class members had multiple means of claiming relief, including cash. *Id.* at 1076–77.

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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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