GIBSON DUNN

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FIRST QUARTER 2023 UPDATE ON CLASS ACTIONS

To Our Clients and Friends:

This update provides an overview of key class action-related developments during the first quarter of 2023 (January through March).

Part I discusses noteworthy cases from the Fifth and Ninth Circuits interpreting Rule 23's predominance requirement—including a decision affirming an order granting a motion to strike class allegations and a decision vacating class certification based on evidence of individual issues related to Article III standing.

Part II discusses a series of cases concerning constructive notice of arbitration agreements and waiver of arbitration.

And **Part III** addresses a growing circuit split concerning whether lead plaintiffs may be paid service awards from common-fund settlements.

I. The Fifth and Ninth Circuits Interpret Rule 23's Predominance Requirement as Applied To Motions to Strike Class Allegations and Individual Questions of Article III Injury

This past quarter, the Fifth and Ninth Circuits issued significant decisions analyzing the effects of variations in state law and individualized questions of Article III injury—even as to a small fraction of the putative class—on Rule 23's predominance requirement.

In *Elson v. Black*, 56 F.4th 1002 (5th Cir. 2023), the Fifth Circuit affirmed the district court's order striking the plaintiffs' class allegations on the grounds that the plaintiffs could not establish predominance as a matter of law. The plaintiffs alleged that the defendants' advertisements for a massager product said to "virtually eliminate cellulite," help with weight loss, and relieve pain violated various federal and state false advertising laws. *Id*. at 1004–05. The district court struck the nationwide class allegations, holding that whether each person justifiably relied on the alleged misrepresentations was "intrinsically an individual determination" that precluded a finding of commonality. *Id.* at 1005.

Considering the issue as one of predominance, rather than commonality, the Fifth Circuit affirmed, holding that "Plaintiffs are unable to establish predominance as a matter of law for two reasons." *Id.* at 1006. First, because "different state laws govern different Plaintiffs' claims," the plaintiffs failed "to assure the district court that such differences in state law would not predominate" over individual issues. *Id.* For example, "the different reliance requirements of the state laws" underscored that "variations in state law here swamp[ed] any common issues and defeat[ed] predominance." *Id.* at 1007 (internal quotation marks omitted). Second, "Plaintiffs' allegations introduce[d] numerous factual differences" because the named plaintiffs and the putative class members did not rely on the same alleged

misrepresentations. *Id.* The court also rejected plaintiffs' attempt to propose seven state-specific subclasses, explaining that "'Subclass' is not a magic word that remedies defects of predominance" because a plaintiff must "demonstrate to the district court *how* certain proposed subclasses would alleviate existing obstacles to certification," which the plaintiffs failed to do. *Id.* at 1007–08.

The Ninth Circuit also ruled that individualized questions can defeat predominance in *Van v. LLR, Inc.*, 61 F.4th 1053 (9th Cir. 2023). In this case, the plaintiff brought suit on behalf of herself and other Alaskans claiming they were improperly charged sales tax by the defendants when making purchases from counties with no sales tax requirement. *Id.* at 1058–59. Although the defendants had issued refunds for all charges improperly collected as sales tax, they did not refund any interest that might have accrued between the time of the purchase and the time of the refund, and the plaintiff sought recovery for lost interest on the refunded amounts. *Id.* at 1060–61. The district court certified the class, and the Ninth Circuit granted the defendants' Rule 23(f) petition. *Id.*

On appeal, the Ninth Circuit first held that class members who suffered injuries of $0.01 to $0.05 had Article III standing, explaining that "[a]ny monetary loss, even one as small as a fraction of a cent, is sufficient to support standing," and "the presence of class members who suffered only a fraction of a cent of harm does not create an individualized issue that could predominate over class issues." *Id.* at 1064. Even so, the court held that some class members nonetheless lacked Article III standing because they received discounts when making their purchases that offset the improper sales tax. *Id.* at 1068–69. And because the defendants proffered evidence showing that even a small fraction (18 out of 13,860) of class members received such discounts, the defendants had invoked an individual issue and the district court should have analyzed whether the plaintiff proved predominance by a preponderance of the evidence. *Id.* at 1069. Because the district court did not conduct this analysis, the Ninth Circuit vacated certification and remanded for further consideration of whether plaintiffs could establish predominance.

II. The Ninth Circuit Issues a Trio of Decisions on Arbitration Issues

The Ninth Circuit issued several noteworthy opinions regarding arbitration issues this quarter. In *Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011 (9th Cir. 2023), the Ninth Circuit ruled that the defendant had not waived its right to compel arbitration even though it waited almost one year after the lawsuit was filed—and when discovery had been ongoing—before moving to compel arbitration. The Ninth Circuit held that, despite the delay, the defendant's conduct was consistent with an intention to arbitrate, noting that the parties' case management statement listed arbitration as a potential legal issue and defendant's answer reserved arbitration as an affirmative defense. *Id.* at 1013–14.

In *Oberstein v. Live Nation Entertainment*, 60 F.4th 505 (9th Cir. 2023), the Ninth Circuit held that website users were on constructive notice of their arbitration agreement in a website's terms of service, and therefore bound to arbitrate their claims, notwithstanding that the agreement was not a clickwrap agreement. *Id.* at 515–17. While plaintiffs argued the terms failed to identify the full legal names of the parties to the contract and the interface failed to give constructive notice of the terms, the Ninth Circuit held a "reasonable user" would have understood who the parties to the arbitration agreement were because defendants' names were identified several times in the terms. *Id.* at 510–12. The court also concluded the users also had adequate notice of the terms because of the location, font, and color of the

terms, as well as the stages in the process where users were informed about the terms, at which point the users would have scrutinized the agreement. *Id.* at 513–16.

And as discussed in a previous client alert, the Ninth Circuit held in *Chamber of Commerce v. Bonta*, 62 F.4th 473 (9th Cir. 2023), that the FAA preempts a California statute (AB 51) that sought to criminalize employment arbitration agreements.

III. The Second Circuit Deepens Circuit Split Regarding Service Awards in Class Settlements

Although service awards are a common feature in modern class action settlements, a circuit split has been brewing over whether these awards are permissible in light of Supreme Court decisions dating back to the 1800s. While most circuits have upheld service awards, a few years ago the Eleventh Circuit broke with these decisions, citing a nineteenth-century case holding that such awards are improper. *See Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1260 (11th Cir. 2020) (citing *Trustees v. Greenough*, 105 U.S. 527, 537 (1881)).

The Second Circuit weighed in this quarter, with at least some judges appearing to agree with *Johnson*. In *Fikes Wholesale, Inc. v. HSBC Bank USA*, 62 F.4th 704 (2d Cir. 2023), the Second Circuit panel acknowledged that "service awards to lead plaintiffs" in class actions are "likely impermissible under Supreme Court precedent." *Id.* at 721 (citing *Greenough*, 105 U.S. at 537). The panel noted that "the Supreme Court has held that it was 'decidedly objectionable' for cash allowances to be 'made for the personal services and private expenses' of a creditor who brought suit on behalf of himself and other similarly situated bondholders." *Id.* (quoting *Greenough*, 105 U.S. at 537). However, the panel concluded that "practice and usage" may have "superseded" this historic precedent ("if that is possible") and held it "must follow" two recent Second Circuit "precedents" that upheld such awards. *Id.* (citing *Melito v. Experian Mktg. Sols. Inc.*, 923 F.3d 85, 96 (2019) and *Hyland v. Navient Corp.*, 48 F.34th 110, 123–23 (2d Cir. 2022)).

On April 17, 2023, the Supreme Court declined review of the Eleventh Circuit's *Johnson* decision, leaving this issue ripe for further litigation in the lower courts.

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