GIBSON DUNN

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First Quarter 2024 Update on Class Actions

This update provides an overview of key class action-related developments during the first quarter of 2024 (January to March).

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I. Ninth Circuit Affirms Order Compelling Arbitration Under a Website's Terms of Service

This past quarter, the Ninth Circuit published an important decision affirming the enforceability of an arbitration provision contained in a website's terms of service. In *Patrick v. Running Warehouse, LLC*, 93 F.4th 468 (9th Cir. 2024), the plaintiffs sued the operators of an e-commerce website after hackers allegedly breached the website and accessed customer information. *Id*. at 475. The defendants moved to compel arbitration because the plaintiffs were bound by the arbitration provision in the website's Terms of Service, which the plaintiffs acknowledged by checkbox (with a hyperlink to the Terms) when they signed up for an account, and again when they pressed a button to "Submit Order" (which notified them that by submitting an order, they agreed to the hyperlinked Terms). *Id*. at 474. The district court granted the motion and compelled the plaintiffs to arbitration. *Id*. The plaintiffs appealed, arguing that they had not assented to the Terms, and that even if they had, the arbitration provision was unenforceable.

The Ninth Circuit affirmed and held that the plaintiffs were bound by the arbitration provision. In so holding, the court addressed several issues that frequently arise in motions to compel arbitration:

- Notice of the Arbitration Provision. The court held that the defendants provided sufficient information to at least put the plaintiffs on inquiry notice of the Terms because the notice was explicitly visible on the final order review page, and the webpage was otherwise "uncluttered." *Id*. at 477.

- Unilateral Modification Clause Not Unconscionable. The court rejected the plaintiffs' argument that the arbitration provision was unconscionable because of a separate clause allowing the defendants to unilaterally amend the Terms "with no notice to users." *Id*. at 480. The court held that this unilateral modification clause alone "does not render a separate arbitration clause at all substantively unconscionable" under California law, since "the implied covenant of good faith and fair dealing prevents a party from exercising its rights under a unilateral modification clause in a way that would make it unconscionable." *Id*. (quoting *Tomkins v. 23andMe, Inc.*, 840 F.3d 1016, 1033 (9th Cir. 2016)).

- Delegation by Reference to JAMS Rules. The court held that the parties delegated threshold questions of arbitrability to the arbitrator by expressly incorporating the JAMS rules (which, in turn, state that an arbitrator should decide threshold questions of arbitrability) into the arbitration agreement. *Id*. at 481.

- Public Injunctive Relief. The court also rejected the plaintiffs' argument that the arbitration provision was invalid under the California Supreme Court's decision *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017), because it supposedly prohibited public injunctive relief. 93 F.4th at 477–88. Although the arbitration provision "prohibit[ed] the consumer from arbitrating as part of a class or representative proceeding," the court noted that the provision said "nothing about the consumer's ability to pursue, or the arbitrator's ability to award, any certain type of relief." *Id.* at 478. Nor was there any provision "providing that the arbitrator could grant only individual relief." *Id.* Accordingly, the arbitration provision did "not bar the arbitrator from awarding public injunctive relief" and was "not invalid under *McGill*." *Id*.

In a separate opinion, the Ninth Circuit subsequently addressed the contract formation issues for an arbitration agreement presented through a mobile application's sign-in screen. *See Keebaugh v. Warner Bros. Ent. Inc.*, No. 22-55982, 2024 WL 1819651, – F.4th — (9th Cir. Apr. 26, 2024).

II. Fourth Circuit Affirms Denial of Class Certification for Failure to Satisfy Ascertainability Requirement

While not expressly mentioned in Rule 23, some courts continue to recognize ascertainability as a requirement for class certification. The Fourth Circuit reaffirmed this principle in *Career Counseling, Inc. v. AmeriFactors Financial Group, LLC*, 91 F.4th 202 (4th Cir. 2024), explaining that it requires members of the proposed class to be "readily identifiable." *Id.* at 206 (quoting *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014)).

Career Counseling concerned a putative class action alleging that the defendant sent unsolicited faxes in violation of the Telephone Consumer Protection Act ("TCPA"). *Id.* at 205. The plaintiffs sought to certify a class comprising the recipients of the unsolicited faxes; however, this class would have included both individuals who used *stand-alone* telephone fax machines (which are subject to the TCPA), as well as those who used an *online* fax service (which are not subject to the TCPA). *Id.* at 207. The district court denied class certification because it would have required individualized inquiries to determine if each recipient used a stand-alone fax machine. *Id.* at 208.

The Fourth Circuit affirmed the denial of certification, holding that plaintiffs did not meet their burden to prove ascertainability because class members using stand-alone fax machines were not readily identifiable. *Id.* at 208. The plaintiff's method of identifying the stand-alone fax machine users—subpoenaing telephone carrier records to determine whether carriers offered each recipient an online fax service—was deficient because one could not assume recipients who were not using online fax services were necessarily using stand-alone fax machines. *Id.* at 212. Thus, the court agreed with the district court's determination that it would have had to engage in "extensive and individualized fact-finding or 'mini-trials'" to identify those class members who used stand-alone fax machines, thereby making class certification inappropriate. *Id.* at 206 (quoting *EQT Prod.*, 764 F.3d at 358).

III. Eleventh Circuit Vacates Class Settlement, Holding that a District Court Erred in Considering Value of Injunctive Relief that Plaintiffs Lacked Standing to Obtain

Although proposed class settlements often include injunctive relief and value such relief in seeking court approval, the Eleventh Circuit recently clarified that the plaintiffs must have Article III standing to seek this relief in the first place. *Smith v.* Miorelli, 93 F.4th 1206 (11th Cir. 2024).

Smith involved the settlement of a consumer class action against a sunglass company, which allegedly failed to provide its customers with guaranteed repairs for free or for a nominal fee. *Id.* at 1209. The plaintiffs had sought monetary damages and injunctive relief; however, none of the named plaintiffs alleged that they were at risk of future harm. *Id.* at 1210. Even so, the parties reached a proposed class settlement that included monetary relief and injunctive relief that required the company to eliminate the allegedly misleading language from their product packaging and marketing materials. *Id.* After valuing the injunctive relief at $5 million, the district court approved the settlement as fair, reasonable, and adequate. *Id.* at 1211. But an objector appealed, arguing the district court erred in considering the value of the injunctive relief because the plaintiffs lacked Article III standing to seek such relief in the first place. *Id.*

The Eleventh Circuit agreed and held that the district court abused its discretion by considering the value of the injunctive relief when approving the settlement. *Id.* at 1213. Citing basic principles of Article III standing, the court explained that a plaintiff must demonstrate standing separately for each form of relief sought. *Id.* at 1212. For injunctive relief, this requires the plaintiffs to establish that they faced a threat of "real and immediate" future injury if the defendant's alleged misconduct was allowed to continue. *Id.* However, because the plaintiffs had not demonstrated that they faced any such "real and immediate" threat of future injury (such as by having broken sunglasses that needed to be repaired), they lacked standing to seek injunctive relief. *Id.* The court thus reversed the settlement approval, explaining that "when a district court lacks the power to grant the requested injunctive relief, its approval of a settlement is based on a legal error, and must be set aside as an abuse of discretion." *Id.* at 1213 (cleaned up).

IV. The Fourth Circuit Uses Pendent Appellate Jurisdiction to Review Motion to Dismiss Ruling that Was "Interconnected" with Class Certification Order

Rule 23(f) permits appeals "from an order granting or denying class-action certification." But as illustrated in a decision from the Fourth Circuit this quarter, a class certification order can be so

"interconnected" with a district court's motion to dismiss rulings so as to authorize review of motion to dismiss rulings under pendent appellate jurisdiction.

In *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Co.*, 95 F.4th 181 (4th Cir. 2024), a putative class of businesses were allegedly denied insurance coverage when several state executive orders required full or partial closure of those businesses during the COVID-19 pandemic. *Id.* at 184. The district court denied the defendant's motion to dismiss and certified a class. *Id.* at 185–86. The defendant appealed under Rule 23(f). *Id.* at 186.

Although the Fourth Circuit lacked jurisdiction under Rule 23(f) itself to consider the district court's ruling on the defendant's motion to dismiss, the court held that "under the doctrine of pendent appellate jurisdiction, [it] may review an issue not otherwise subject to immediate appeal when the issue is 'so interconnected' with an issue properly before [the court] as to 'warrant concurrent review.'" *Id.* at 188 (quoting *EQT Prod.*, 764 F.3d at 364). The court highlighted two circumstances that warrant this exercise of pendent appellate jurisdiction: (1) where "an issue is 'inextricably intertwined' with a question that is the proper subject of an immediate appeal," or (2) when "review of a jurisdictionally insufficient issue is 'necessary to ensure meaningful review' of an immediately appealable issue." *Id.* (citing *Scott v. Fam. Dollar Stores, Inc.*, 733 F.3d 105, 111 (4th Cir. 2013)).

In *Elegant Massage*, the Fourth Circuit held that the defendant's appeal fell within the second category because the district court's motion to dismiss rulings about coverage under the defendant's insurance policy were essential to its analysis of the class certification order. *Id.* at 188. Exercising its pendent appellate jurisdiction, the court held the district court erred in its interpretation of the defendant's insurance policy, and because "the legal error animating the court's denial of the motion to dismiss directly affects the outcome of the court's class certification order," it was appropriate to reverse the class certification order. *Id.* at 191.

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