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2016 YEAR-END UPDATE ON CLASS ACTIONS

To Our Clients and Friends:

Last year saw continued attention to class action issues across the federal appellate courts, with the U.S. Supreme Court issuing three decisions on important issues to practitioners--*Spokeo, Inc. v. Robins* (whether plaintiffs must allege more than a statutory violation to have standing to sue in federal court); *Campbell-Ewald Co. v. Gomez* (whether the claims of a named plaintiff are rendered moot by an offer of full relief); and *Tyson Foods, Inc. v. Bouaphakeo* (the permissibility of using statistical sampling and extrapolation to adjudicate class claims). Both plaintiffs and defendants quickly moved to leverage these decisions in pending class actions, and the lower courts have grappled with the Supreme Court's guidance and the questions that *Spokeo*, *Campbell-Ewald*, and *Tyson Foods* both created and left unanswered.

This update provides an overview and summary of key class action developments during 2016 and previews important issues looming on the horizon. **Part I** addresses the Supreme Court's decisions and explores how the courts of appeals have interpreted and applied this trio of opinions. **Part II** discusses several important decisions in 2016 addressing the impact of arbitration agreements on putative class actions. **Part III** discusses a deepening circuit conflict on ascertainability that appears destined for the Supreme Court. Finally, **Part IV** outlines proposed amendments to Rule 23 addressing class settlements and notice to absent class members that are being considered this year.

I. The Supreme Court's Decisions in *Spokeo*, *Campbell-Ewald*, and *Tyson Foods*, and How the Courts of Appeals Have Applied Those Decisions

A. *Spokeo*: Article III Standing and Alleged Statutory Violations

In *Spokeo, Inc. v. Robins*, the Court clarified that the injury-in-fact component of the "case" or "controversy" requirement of Article III requires plaintiffs to show they have suffered an actual (or imminent) injury that is *both* particularized and "concrete . . . even in the context of a statutory violation," and it cautioned against finding that the concreteness requirement is satisfied for statutory violations that "result in no harm." 136 S. Ct. 1540, 1548–50 (2016). As we explained in our May 2016 alert on *Spokeo*, the Supreme Court's decision "clearly places a significant additional burden on plaintiffs seeking to recover statutory damages in federal court, and provides class-action defendants with an additional avenue of attack at both the pleading and class certification stages." The Supreme Court flatly rejected the plaintiffs' theory that a bare statutory violation--without more--is sufficient to establish Article III standing.

Decisions from several courts of appeals confirm that *Spokeo* is a useful means for defendants in putative class actions to prevail against named plaintiffs who assert violations of statutes, but cannot allege any actual harm or a meaningful exposure to risk of such harm. A majority of courts of appeals have held

that plaintiffs lacked Article III standing under *Spokeo* in a variety of statutory contexts. *See, e.g.*, *Meyers v. Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724 (7th Cir. 2016) (Fair and Accurate Credit Transactions Act); *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998 (11th Cir. 2016) (New York real property laws); *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523 (5th Cir. 2016) (Employee Retirement Income Security Act); *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925 (8th Cir. 2016) (Cable Communications Policy Act); *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511 (D.C. Cir. 2016) (District of Columbia consumer identification and protection laws).

In each of these cases, the court held that there were insufficient allegations of any real-world harm or appreciable risk of harm to the named plaintiff. For example:

- In *Meyers*, the Seventh Circuit concluded that a plaintiff alleging a violation of a federal statute requiring truncation of credit card expiration dates printed on receipts lacked Article III standing under *Spokeo* because the allegations showed he "did not suffer any harm" from the "printing of the expiration date on his receipt," nor "any appreciable risk of harm" because he had "discovered the violation immediately and nobody else ever saw the non-compliant receipt." 843 F.3d at 727.

- In *Lee*, the Fifth Circuit held that, after *Spokeo*, a "bare allegation of improper defined-benefit-plan management under ERISA, without concomitant allegations that any defined benefits are even potentially at risk, does not meet the dictates of Article III." 837 F.3d at 530.

- In *Braitberg*, the Eighth Circuit reasoned that a plaintiff alleging that a defendant violated a statutory "duty to destroy personally identifiable information by retaining certain information longer than the company should have kept it" lacked Article III standing where he did not allege that the defendant "disclosed the information to a third party, that any outside party has accessed the data, or that [the defendant] has used the information in any way during the disputed period." 836 F.3d at 930.

In short, *Spokeo* appears to have become an effective countermeasure for defendants in "no injury" class actions based on alleged statutory violations. Plaintiffs now will need to establish not merely that they have been exposed to certain conduct, but that the complained-of conduct actually and concretely caused a particularized harm.

B. *Campbell-Ewald*: Mootness and Offers of Complete Relief

As discussed in an earlier update, the Supreme Court held in *Campbell-Ewald Co. v. Gomez* that an unaccepted settlement offer--even an offer of complete relief--does not necessarily moot a plaintiff's claim. 136 S. Ct. 663, 670–71 (2016). The Court's decision rested on principles of contract law, under which a rejected offer is a nullity. *Id.* at 670. As such, after an offer of relief is rejected, the parties remain adverse, and thus a case or controversy within the meaning of Article III still exists. *Id.* at 670–71.

Campbell-Ewald nonetheless expressly left open the question whether an offer accompanied by proof that the defendant would pay the full amount *could* moot a plaintiff's claim: "We need not, and do not,

now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." *Id.* at 672. A year after the Court posed that question, decisions have emerged on both sides, but a growing number of courts of appeals have rejected attempts to moot putative class actions after *Campbell-Ewald*.

A prominent example is the Ninth Circuit's decision in *Chen v. Allstate Ins. Co.*, which held that a claim is not moot until "a plaintiff *actually receives* all of the relief he or she could receive on the claim through further litigation." 819 F.3d 1136, 1144 (9th Cir. 2016). Thus, although the defendant had deposited the full value of the plaintiff's claims into an escrow account, and had agreed to have judgment entered against it in full satisfaction of the plaintiff's claims for damages and injunctive relief, the Ninth Circuit concluded that this was insufficient to render the claims moot. *Id.* at 1146. *Chen* also held that even if the plaintiff had actually received full relief, he would still be entitled to seek class certification. *Id.* at 1148. Relying on a prior decision, the Ninth Circuit held that the "inherently transitory" exception to mootness applies when a defendant attempts to "pick[] off" the named plaintiff in a putative class action. *See id.* at 1142–43, 1147 (citing *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011)).

Like the Ninth Circuit, both the Third and Sixth Circuits permitted plaintiffs to continue pursuing putative class actions even if their individual claims are rendered moot. *See Richardson v. Bledsoe*, 829 F.3d 273, 286 (3d Cir. 2016); *Wilson v. Gordon*, 822 F.3d 934, 949–51 (6th Cir. 2016).

In the coming year, courts will continue to grapple with how to address the open question of what happens when a defendant makes a complete offer of relief, and places the funds on deposit with the court. One case that squarely involves that issue is *Leyse v. Lifetime Entertainment Services LLC*, which is on appeal before the Second Circuit following the district court's dismissal of a putative class action as moot after the defendant deposited a full settlement with the court. 171 F. Supp. 3d 153, 156 (S.D.N.Y. 2016) ("[A] defendant's deposit of a full settlement with the court, and consent to entry of judgment against it, will eliminate the live controversy before a court."). *Leyse* is scheduled for oral argument in February 2017.

C. *Tyson Foods*: Statistical Sampling and Extrapolation

The Supreme Court also decided *Tyson Foods, Inc. v. Bouaphakeo*, a case involving the important question whether statistical sampling and extrapolation can be used to adjudicate class and collective claims. Instead of definitively resolving that issue, the Court declined to adopt any "broad and categorical rules governing the use of representative and statistical evidence in class actions." 136 S. Ct. 1036, 1049 (2016). Rather, the Court held that "[w]hether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action." *Id.* As the Court explained, in those cases "where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class" because "[t]o so hold would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any substantive right.'" *Id.* at 1046 (quoting 28 U.S.C. § 2072(b)).

As for the claims at issue in *Tyson Foods*, which were brought under the Fair Labor Standards Act ("FLSA") and the Iowa state counterpart to the FLSA, the Court concluded that using statistical sampling and extrapolation was permissible because "each class member could have relied on that sample to establish liability if he or she had brought an individual action." *Id.* According to the Court, *Anderson v. Mt. Clemens*, 328 U.S. 680 (1946), permits an employee pursuing claims under the FLSA to prove the amount and extent of uncompensated work as a "matter of just and reasonable inference" in situations where an employer has violated a "statutory duty to keep proper records." *Id.* at 1047. Thus, the plaintiffs in *Tyson Foods* were able to "introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records," which is the same method of proof that would likely have been used "[i]f the employees had proceeded with 3,344 individual lawsuits." *Id.*

While the courts of appeals have not yet applied *Tyson Foods* in the context of a proposal to use statistical sampling and extrapolation to resolve class claims, the Ninth Circuit has viewed *Tyson Foods* as supporting the rejection of various arguments challenging class certification orders. In *Vaquero v. Ashley Furniture Industries, Inc.*, a case involving California wage-and-hour claims, the Ninth Circuit cited *Tyson Foods* to support its reliance on prior Ninth Circuit decisions holding that "the need for individual damages calculations does not, alone, defeat class certification." 824 F.3d 1150, 1155 (9th Cir. 2016). And in *Torres v. Mercer Canyons Inc.*, a case involving alleged violations of statutes relating to an employer's obligations to domestic farm workers under a foreign farm worker visa program, the Ninth Circuit held that *Tyson Foods* supported the plaintiffs' "resort to an aggregate method of providing wage underpayment." 835 F.3d 1125, 1140 (9th Cir. 2016).

Whether *Tyson Foods* will extend beyond FLSA claims remains to be seen. Given the unique rule for FLSA cases under *Mt. Clemens*, there are good reasons not to extend *Tyson Foods* to other contexts. And *Tyson Foods* plainly does not represent a broad endorsement of the use of "Trial by Formula," which also was unanimously rejected in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011). Indeed, the Court in *Tyson Foods* expressly stated that its holding was "in accord with *Wal-Mart*." 136 S. Ct. at 1048.

II. Courts Continue to Address the Interplay Between Arbitration Agreements and Class Actions

A. The Supreme Court Grants Certiorari to Decide Whether the National Labor Relations Act Precludes Enforcement of Class Action Waivers in Mandatory Employment Arbitration Agreements

In our Third Quarter 2016 Update, we noted that the Seventh and Ninth Circuits had created a split of authority regarding whether the National Labor Relations Act ("NLRA") precludes enforcement of class action waivers in mandatory employment arbitration agreements. *Compare Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *and Morris v. Ernst & Young, LLP*, 834 F.3d 975, 981 (9th Cir. 2016), *with D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016), *and Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (per curiam).

Given the numerous pending petitions for a writ of certiorari from parties on all sides (plaintiffs, defendants, and the National Labor Relations Board), it was not surprising that the Supreme Court granted the pending certiorari petitions on January 13, 2017. The Court is likely to address whether the NLRA contains an express "contrary congressional command" that overrides the Federal Arbitration Act ("FAA"), and whether it is possible to harmonize the two statutes. As Judge Ikuta explained in her dissent in *Morris*, "[t]o date, in every case in which the Supreme Court has conducted this analysis of federal statutes, it has harmonized the allegedly contrary statutory language with the FAA and allowed the arbitration agreement at issue to be enforced according to its terms." *Morris*, 834 F.3d at 992 (Ikuta, J., dissenting). We will likely learn in 2017 whether the Supreme Court will follow this same path with respect to the NLRA.

B. The Ninth Circuit Issues Two Important Decisions Rejecting Challenges to Arbitration Provisions

The Ninth Circuit issued two particularly notable arbitration decisions in 2016, both of which rejected challenges to the enforcement of arbitration agreements in putative class actions.

In *Mohamed v. Uber Technologies, Inc.*, a high-profile and closely watched case, the court rejected a number of attacks on the enforceability of Uber's arbitration agreements. No. 15-16178, 2016 WL 7470557 (9th Cir. Dec. 21, 2016). The court first held that the agreements at issue, which were between Uber and individuals who used the Uber app as drivers, clearly and unmistakably delegated to the arbitrator "the threshold question of arbitrability," which meant that the court was required to enforce the agreements "according to their terms," unless there was a valid "generally applicable contract defense." *Id.* at *4–5. The Ninth Circuit concluded that no such defense existed. Rather, the agreements were "procedurally conscionable as a matter of law" because they included a meaningful opt-out provision. *Id.* at *5 (quotation marks and citation omitted). The court further held that a waiver of representative claims under California's Labor Code Private Attorneys General Act did not render the entire agreement unenforceable, as that waiver was expressly severable. *Id.* at *8.

In *Tompkins v. 23andMe, Inc.*, the court affirmed an order compelling arbitration after rejecting various claims that an arbitration provision was unconscionable under California law. 840 F.3d 1016 (9th Cir. 2016). Specifically, *Tompkins* held that a fee-shifting clause, a forum selection clause, a clause excluding intellectual property claims from arbitration, and a one-year statute of limitations were either not substantively unconscionable or did not provide any basis for declining to enforce the arbitration provision. *Id.* at 1024–33. *Tompkins* is important because it firmly rejected several arguments that plaintiffs had routinely raised in opposition to motions to compel arbitration.

While plaintiffs seeking to pursue class claims will continue to challenge the enforceability of arbitration agreements in 2017, the Ninth Circuit's decisions in *Mohamed* and *Tompkins* confirm that such challenges remain an uphill battle given the strong federal policy in favor of arbitration.

C. The California Supreme Court Holds That Whether Parties Have Agreed to Class Arbitration Is Presumptively a Question for Arbitrators, Not Courts

In *Sandquist v. Lebo Automotive, Inc.*, the California Supreme Court in a 4-3 decision addressed an important and recurring question: whether courts or arbitrators should decide if an arbitration agreement permits or prohibits classwide arbitration. Breaking with several decisions of the federal courts of appeals, a majority of the California Supreme Court held that under the FAA the availability of class arbitration is presumptively a question for the arbitrator.

The California Supreme Court in *Lebo* held that while "[n]o universal one-size-fits-all rule allocates that question to one decision maker or the other in every case," under California law there is a "presumption" that favors "allocating the class arbitration availability question to the arbitrator." 1 Cal. 5th 233, 243, 247 (2016). The court further concluded that the FAA did not "impose[] an interpretive presumption that, as a matter of federal law, preempts" that California law presumption. *Id.* at 251. The court reasoned that "a presumption that arbitrators decide the availability of class arbitration is more consistent with the desire for 'expeditious results' that motivates many an arbitration agreement." *Id.* (quoting *Mitsubishi Motors v. Soler Chrysler–Plymouth*, 473 U.S. 614, 633 (1985)). It also emphasized that, in applying the FAA, "if it is uncertain whether the issue is one for the courts or the arbitrator, we are well advised to allocate it to the arbitrator." *Id.* at 255.

The dissenting opinion in *Lebo* disagreed with the majority's interpretation of the FAA, and instead read the U.S. Supreme Court's "cases as indicating that classwide arbitrability is a gateway question for purposes of the FAA." *Id.* at 262 (Kruger, J., dissenting). And while the U.S. Supreme Court has yet to squarely address this issue, "every federal court of appeals to consider the issue on the merits has held that the availability of class arbitration is a question of arbitrability for a court, rather than an arbitrator." *Id.* at 266.

Although U.S. Supreme Court review was not sought in *Lebo*, given the conflict the California Supreme Court's decision creates, it is likely that in a future case the Court will weigh in and conclusively resolve whether a court or an arbitrator should decide whether class arbitration is available under an arbitration agreement.

III. The Circuit Conflict Over Ascertainability Deepens

The circuit conflict over the ascertainability requirement, which we outlined in our 2015 Year-End Update, remains unresolved, and has recently deepened after the Ninth Circuit's decision in *Briseno v. ConAgra Foods, Inc.*, No. 15-55727, 2017 WL 24618 (9th Cir. Jan. 3, 2017). Given the intractable conflict over both the existence and meaning of the ascertainability requirement, it is increasingly likely that the Supreme Court will ultimately need to address this important issue.

In *Briseno*, the Ninth Circuit joined the Sixth and Seventh Circuits in declining to adopt the Third Circuit's requirement that a plaintiff seeking class certification identify an "administratively feasible" means of ascertaining the identity of class members. The court ruled that "the language of Rule 23 neither provides nor implies that demonstrating an administratively feasible way to identify class members is a prerequisite to class certification, and the policy concerns that have motivated the Third

Circuit to adopt a separately articulated requirement are already addressed by the Rule." *Id.* at *10. The court also explained that, in its view, "Rule 23's enumerated criteria already address the interests that motivated the Third Circuit"--(1) mitigating administrative burdens; (2) safeguarding the interests of absent and bona fide class members; and (3) protecting the due process rights of defendants--and therefore "an independent administrative feasibility requirement is unnecessary." *Id.* at *5.

While *Briseno* counted the Eighth Circuit among the courts that have rejected the Third Circuit's approach to ascertainability, the Eighth Circuit's articulation of its position was not nearly so definitive. In *Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.*, 821 F.3d 992 (8th Cir. 2016), the Eighth Circuit stated that while it had "not outlined a requirement of ascertainability," it nonetheless "adheres to a rigorous analysis of the Rule 23 requirements, which includes that a class 'must be adequately defined and clearly ascertainable.'" *Id.* at 996. *Sandusky* concluded that this standard is met where a class is defined using "objective criteria that make [the class member] clearly ascertainable." *Id.* at 997.

While significant confusion and conflict over the ascertainability requirement remains, there is one area of emerging agreement among courts: that no ascertainability requirement applies to class actions seeking only injunctive relief under Rule 23(b)(2). For example, the Sixth Circuit reached that conclusion in *Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir. 2016), and adopted the Third Circuit's reasoning in *Shelton v. Bledsoe*, 775 F.3d 554 (3d Cir. 2015), which was one of the decisions we discussed in last year's update.

IV. Proposed Amendments to Rule 23

Additional amendments to Rule 23 have been in the works for several years, and they are finally nearing completion. The proposed amendments were published in August 2016, and public comments are due February 15, 2017. These amendments, if ultimately approved, would likely not take effect until December 2018.

The proposed amendments (summarized below) do not amend the core provisions of Rule 23 governing the standards for class certification, but instead are focused on procedural issues of class settlement and notice to absent class members. The most significant proposed amendments list factors for courts to consider in evaluating proposed class settlements, and add provisions designed to curtail bad faith objections to class settlements.

Standards for Settlement Approval: To assist courts in determining whether a settlement is "fair, reasonable, and adequate," amended Rule 23(e)(2) would direct courts to consider: (1) the adequacy of representation; (2) whether "the proposal was negotiated at arm's length"; (3) the adequacy of relief, taking into account various factors; and (4) whether "class members are treated equitably relative to each other." The comments specifically note that the proposed amendment is not intended to displace other factors courts have used to determine fairness, reasonableness, and adequacy.

Addressing "Bad Faith" Objectors: The proposed amendments attempt to deter "bad faith" objections to class settlements in two ways. First, amended Rule 23(e)(5)(A) would require objectors to state specific grounds for any objection and whether the objection applies to the entire class, a subset of the

class, or just the objector. Second, a new provision--Rule 23(e)(5)(B)--would prohibit an objector from receiving consideration for withdrawing an objection except with court approval. These changes are designed to curb meritless objections that are asserted by objectors in order to obtain payoffs in return for withdrawing the objections--a disturbing trend that has increased in recent years.

Standards for Approving Notice of Proposed Class Settlement: The amendments would change Rule 23(e)(1) to mandate that a court determine that a proposed settlement is likely to earn final approval before sending notice to the class, and to require parties to submit information sufficient for the court to make that determination. The amendment aims to prevent situations in which a court is asked to order notice based on insufficient information, and thereafter must order a second notice, which is both wasteful and confusing to class members. We anticipate that plaintiffs and defendants alike will appreciate this accelerated consideration of the merits of a settlement before incurring the costs of class notice.

Electronic Notice to Rule 23(b)(3) Classes: Rule 23(c)(2)(B), which governs notice for Rule 23(b)(3) classes, would be amended to expressly permit notice via electronic or other means (so long as the requirement that notice is the best practicable under the circumstances is satisfied).

Clarification to Rule 23(f): Rule 23(f), which permits parties to seek permission to pursue an interlocutory appeal of an order granting or denying class certification, would be amended to clarify that it does not apply to an order to give notice of proposed settlement under Rule 23(e)(1). An order to give notice under Rule 23(e)(1) is sometimes called "preliminary approval" or "conditional certification," even though the act of giving notice does not grant or deny certification. The proposed amendment thus clarifies that orders under Rule 23(e)(1) cannot be appealed under Rule 23(f).

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