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GIBSON DUNN

Class Actions Update August 5, 2024

Second Quarter 2024 Update on Class Actions

This update provides an overview of key class action-related developments during the second quarter of 2024 (April to June).

Table of Contents

I. The Ninth Circuit Reverses Class Certification Because Individualized Causation Issues Would Predominate

The Ninth Circuit's decision in *White v. Symetra Assigned Benefits Service Co.*, 104 F.4th 1182 (9th Cir. 2024), reversing class certification on predominance grounds, will prove useful in future class actions presenting causation issues or other elements requiring individualized inquiry.

The district court in *White* certified two nationwide classes of about 2,000 people who, after receiving structured settlement annuities to resolve their tort claims, chose "factoring" arrangements in which they exchanged the right to future payments for a discounted lump sum. 104 F.4th at 1185. These factoring agreements are subject to approval by a state court, which must find the agreement "in the payee's 'best interest.'" *Id.* at 1187. In bringing class claims, the plaintiffs alleged that the defendants unlawfully induced them to enter detrimental factoring agreements using unfair and deceptive business practices. *Id.* at 1192-93. The district court certified the classes, focusing on the "common, uniform marketing materials that the defendants used to solicit annuitants for factoring transactions." *Id.* at 1190 (cleaned up).

On interlocutory review under Rule 23(f), the Ninth Circuit reversed class certification, holding that "individual issues of causation will predominate over common ones when evaluating whether defendants' acts and omissions caused the plaintiffs to enter factoring transactions and incur their alleged injuries." *White*, 104 F.4th at 1192. Determining whether the defendants' conduct actually induced each class member to enter a factoring agreement would require examination of "the unique circumstances that led the annuitant to consider factoring, the details of each plaintiff's one-on-one communications with the defendants, and the disclosures made to each plaintiff." *Id.* at 1195. The court would also need to "consider the state court proceedings that ... approved the factoring transactions as in the annuitants' best interest," which "were necessarily individualized to each annuitant, and ... would also differ across states." *Id.* The Ninth Circuit concluded that, "[g]iven the personalized nature of the factoring transactions and the accompanying state court review process, the causal chain" was "too individualized" to support a finding of predominance. *Id.* at 1195-96.

II. The Third and Seventh Circuits Toss State-Law Claims for Lack of Standing

In two decisions this quarter, *Lewis v. GEICO*, 98 F.4th 452 (3d Cir. 2024), and *In re Recalled Abbott Infant Formula Products Liability Litigation*, 97 F.4th 525 (7th Cir. 2024), the Third and Seventh Circuits addressed Article III standing in putative class actions in the wake of the Supreme Court's landmark decision in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021).

In *Lewis*, the plaintiffs sued GEICO for breach of their insurance policy, claiming that GEICO applied an improper downward adjustment in estimating the value of their totaled car. The district court certified a class, but the Third Circuit vacated with instructions to dismiss for lack of standing. 98 F.4th at 458, 461. The court explained that the plaintiffs could not rely on the downward adjustment alone because it was not the end of the valuation process—GEICO had applied the adjustment but then increased its valuation of the plaintiffs' car, and then applied a further upward adjustment in negotiating with the plaintiffs. *Id.* at 460. The Third Circuit explained that "to ignore these later steps and treat the [downward] adjustment alone as a harm ... would impermissibly divorce their standing to sue from any real-world financial injury." *Id.* at 460. And the court emphasized that even if the downward adjustment the plaintiffs challenged were illegal, the plaintiffs could not rely on such a "'bare procedural violation[], divorced from any concrete harm.'" *Id.* at 461.

In *Recalled Abbott Infant Formula*, the Seventh Circuit affirmed dismissal of a putative class action for lack of standing. 97 F.4th at 527. Following a recall of infant formula, the plaintiffs brought various state-law claims based on an alleged risk that the products were contaminated.

Id. at 527-28. The plaintiffs asserted economic injury based on two theories: (1) they did not get the benefit of their bargain because the formula was at risk of contamination, and (2) they paid a premium for the formula that they would not have paid had they known of the risk. *Id.* at 528. On appeal, the Seventh Circuit rejected both theories of standing. It explained that the plaintiffs' "alleged injury is hypothetical or conjectural" because, at the time they bought the formula, there was "no known risk of contamination and no loss of the benefit of the bargain or premium price paid," and once the plaintiffs became aware of the risk, "they were told not to use the formula, and Abbott offered a refund." *Id.* at 529. The plaintiffs' alleged injury was also not particularized because "they do not allege that any of the products they purchased were contaminated" or that contamination was "sufficiently widespread" to plausibly affect the products they purchased. *Id.*

III. The Ninth Circuit Holds That District Courts May Rely on Evidence Without Assessing Its Admissibility at Class Certification

In *Lytle v. Nutramax Laboratories, Inc.*, 99 F.4th 557 (9th Cir. 2024), the plaintiffs sought certification of a class of people who bought a product that was labeled (allegedly misleadingly) as promoting canine joint health. *Id.* at 566. In support of their bid for certification, they offered an expert who proposed a model that would use a survey to establish classwide damages. *Id.* at 567. But at the time of certification, the expert had neither executed the survey and calculated damages nor even collected the data and formulated the questions he would use in the survey. *Id.* at 567, 575, 577. The district court certified the class anyway, finding that the proposed-but-unexecuted model was an acceptable way to measure classwide damages in mislabeling cases and that it was unnecessary to actually complete the survey to establish that damages are "capable" of classwide resolution. *Id.* at 567.

The Ninth Circuit affirmed. It held that plaintiffs may rely on evidence that is not "in an admissible form" to support class certification, stating that admissibility goes merely to the evidence's weight. *Lytle*, 99 F.4th at 570-71. It also held that plaintiffs need not prove that classwide damages exist to obtain certification, *id.* at 571, because even if some plaintiffs ultimately cannot recover and some can, these categories can be separated at a later stage, *id.* at 572. And it held that the district court need conduct only a "limited" *Daubert* analysis at the class certification stage if an expert's model is not "fully developed." *Id.* at 576-77.

The decision in *Lytle* conflicts with the Ninth Circuit's prior decision in *Olean Wholesale Grocery v. Bumble Bee Foods*, 31 F.4th 651 (9th Cir. 2022) (en banc), in which the Circuit held *en banc* that plaintiffs "may use any *admissible* evidence" to satisfy their burden at class certification. *Id.* at 665 (emphasis added). And *Lytle*'s approval of a more limited *Daubert* analysis at class certification contradicts *Olean*'s holding that "defendants may challenge the reliability of an expert's evidence under *Daubert*" when opposing class certification. *Id.* at 665 n.7.

The decision in *Lytle* also deepens a circuit split on the role of *Daubert* and admissibility at class certification. On one side, the Eighth Circuit permits a limited *Daubert* analysis for Rule 23 purposes, *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 611-14 (8th Cir. 2011), and the Sixth Circuit has endorsed the use of at least nonexpert evidence that may not be admissible, *Lyngaas v. Curaden AG*, 992 F.3d 412, 428-29 (6th Cir. 2021). On the other side, the Third, Fifth, and Seventh Circuits all require a full-bore *Daubert* analysis and finding of admissible evidence before a class can be certified. *Prantil v. Arkema Inc.*, 986 F.3d 570, 575-76 (5th Cir. 2021); *In re*

Blood Reagants Antitrust Litig., 783 F3d 183, 186-88 (3d Cir. 2015); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010).

The defendants in *Lytle* petitioned for rehearing and rehearing *en banc*, and the Ninth Circuit ordered a response. The petition remains pending as of this update.

IV. The Supreme Court and the Ninth Circuit Elaborate on the FAA's Transportation-Worker Exemption

Finally, the Supreme Court and Ninth Circuit issued decisions this quarter analyzing Section 1 of the Federal Arbitration Act, which exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the Act's pro-arbitration mandate. 9 U.S.C. § 1.

The Supreme Court previously held that the Section 1 exemption applies only to transportation workers. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). In *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246 (2024), the Court granted certiorari to address whether, to invoke the exemption, a worker must be employed in the transportation *industry*. And the Court held that "[a] transportation worker need not work in the transportation industry to fall within the exemption." *Id.* at 256. The circumstances of the worker, rather than the industry in which he or she works, determine whether the exemption applies. *Id.* at 252-56.

The Ninth Circuit also considered the transportation-worker exemption in *Fli-Lo Falcon, LLC v. Amazon.com, Inc.*, 97 F.4th 1190 (9th Cir. 2024). The plaintiffs there were delivery *businesses*, not individuals. The Ninth Circuit rejected their invocation of the Section 1 exemption, holding that "no business entity is similar in nature to the actual human workers enumerated by the text of the transportation worker exemption." *Id.* at 1196.

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