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Litigation Alert

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Top Five Developing Issues in Class Action Litigation

Class action litigation is a rapidly developing area of the law. Here are the top five trends to keep an eye on as we approach the new year:

1. Standing to Pursue Statutory Claims

In June 2016, the U.S. Supreme Court held in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), that "Article III standing requires a concrete injury even in the context of a statutory violation," clarifying that Congress' enactment of a statutory right, by itself, is not necessarily enough to confer standing. Under *Spokeo*, the allegation of "a bare procedural violation, divorced from any concrete harm" is insufficient to establish standing.

Seizing on the Spokeo decision, defendants—particularly in class actions—have attacked the standing of plaintiffs pursuing claims under federal statutes, such as the Fair Credit Reporting Act (FCRA), Fair and Accurate Credit Transactions Act (FACTA), Telephone Consumer Protection Act (TCPA) and Fair Debt Collection Practices Act (FDCPA). These challenges have resulted in hundreds of judicial decisions by federal courts around the country.

While the decisions have varied widely, some trends have emerged. For example, while a growing majority of courts have found standing in TCPA and FDCPA cases, courts are about evenly split in FCRA cases, and a majority of courts have found no standing in FACTA cases. Many courts have reached opposite conclusions despite being confronted with indistinguishable facts. We expect that it may take years for the law to crystallize on these issues as the judicial decisions work their way up through circuit courts and perhaps back to the Supreme Court.

For additional information on standing to pursue statutory claims, please see:

- 9th Circuit Clarifies Standard For Article III Standing Based On Statutory Violations
- Defeating Class Actions: When to Target Plaintiffs' Standing Claims and Damages Models

2. Ascertainability Requirement

For a class to be certified, the class definition must provide objective criteria for determining whether a particular individual is a member of the proposed class. This requirement is referred to as "ascertainability." While Federal Rule of Civil Procedure 23 does not expressly refer to ascertainability, most courts have held that the ascertainability requirement is implicit in Rule 23.

Courts differ, however, as to what a plaintiff must show at the class certification stage to satisfy the ascertainability requirement. The 3rd Circuit and some lower courts have held class action plaintiffs to a "heightened ascertainability" standard by requiring that, in addition to defining the outer boundaries of a

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class using objective criteria, there must also be an “administratively feasible” method to identify class members. *See, e.g., Carrera v. Bayer Corp*., 727 F.3d 300, 305-07 (3d Cir. 2013). By contrast, the 2nd, 6th, 7th, 8th and 9th Circuits, and the majority of lower courts have held that there is no “heightened ascertainability” requirement in those jurisdictions. *See, e.g., Sandusky Wellness Ctr., LLC, v. Medtox Sci., Inc*., 821 F.3d 992, 995-96 (8th Cir. 2016); *Rikos v. Procter & Gamble Co*., 799 F.3d 497, 525 (6th Cir. 2015); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 658 (7th Cir. 2015). The Supreme Court has not addressed this issue, but many court watchers expect that to change in the near future.

For additional information on the ascertainability requirement, please see:

- The 2nd Circuit Clarifies that Administrative Feasibility Is Not a Requirement for Class Certification
- The 9th Circuit Declines to Adopt Administrative Feasibility Requirement for Class Certification
- Class Action Split Deepens

3. Fairness in Class Action Litigation Act of 2017

Currently gaining traction in the Senate is the Fairness in Class Action Litigation Act of 2017, which passed the U.S. House of Representatives on March 9 by a vote of 220-201. The bill would make a number of changes to class action requirements and procedures, many of which would serve to benefit defendants and impose additional requirements and risks for class counsel. For example:

- The bill would require, for class certification, that each member of the proposed class must have suffered the same “type and scope” of injury (which would effectively eliminate classes containing uninjured members), and would impose an “administrative feasibility” requirement (which, as discussed above, many courts have found is not required for certification under Rule 23).
- The bill would impose an automatic stay of discovery pending a motion to transfer or motion to strike class allegations, reducing costs and burdens on defendants in the early stages of litigation, and would also create a right to immediately appeal from class certification orders (which currently lies in the discretion of appellate courts and is often denied).
- On top of these changes, the bill would put additional pressure on plaintiffs’ attorneys by requiring that attorney’s fees be calculated based on the actual class recovery, requiring class action complaints to disclose any relationships and potential conflicts of interest between proposed class representatives and their class counsel, and creating new disclosure requirements relating to class settlements and third-party funding.

It remains to be seen what will happen to the bill in the Senate. Many commentators believe that changes to the bill are likely.

For more information on the Fairness in Class Action Litigation Act of 2017, please see:

- Examining the GOP’s class action reform plan

4. CFPB's Prohibition of Consumer Arbitration Agreements

On July 10, 2017, the Consumer Financial Protection Bureau (CFPB) issued a new rule prohibiting banks and credit card companies from including class action waivers in their arbitration agreements with consumers. Without such waivers, consumers are able to consolidate their cases into class actions, provided that they are able to meet other legal requirements for filing class actions.

In addition to prohibiting class action waivers in arbitration agreements, the rule imposes significant reporting requirements on banks and credit card companies that choose to continue using arbitration agreements. Companies are required to provide records to the CFPB regarding their arbitrations, including claims sought, counterclaims raised, other filings and final awards that are issued. The CFPB intends to post these materials (after redacting consumers' personal information) on its website beginning in July 2019.

The new rule has received widespread criticism, with opponents arguing that the rule is anti-consumer and anti-business, and promotes frivolous litigation. Congress can, and likely will, take action to nullify the new rule before it goes into effect next year, which would also prohibit the CFPB from attempting to enact any similar type of rule in the future. Even if Congress does not act, substantial political and legal challenges threaten to undercut the power of the CFPB, and of its Director, Richard Cordray, in particular. Cordray has vigorously defended the rule, since speculation has grown that he plans to run for governor of Ohio in 2018.

For additional information on arbitration agreements in the class action context, please see:

- A New Wave of Class Actions Against Banks and Credit Card Companies? The CFPB's New Rule and Its Likelihood for Survival
- *McGill v. Citibank* and Arbitration Agreements
- Waffle House Arbitration Ruling May Reach Past 11th Circ.

5. Mooting Class Actions Through Unaccepted Offers of Judgment

In *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), the Supreme Court held that, prior to certification of a class, an unaccepted offer of judgment in full satisfaction of the named plaintiff's claims does not moot the case. Quoting Justice Kagan's dissenting opinion in an earlier case, the Court reasoned that "[a]n unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect." However, the Court expressly left open the possibility that the result may be different where a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff and the district court then enters judgment for the plaintiff in that amount.

Since the *Gomez* decision, several defendants have attempted to defeat putative class action cases by following the Supreme Court's suggestion. These efforts have been unsuccessful. In *Chen v. Allstate Inc. Co.*, 819 F. 3d 1136 (9th Cir. 2016), the 9th Circuit held that depositing funds into an escrow account payable to the plaintiff, followed by entry of judgment for the plaintiff, was ineffective to moot the case. The court reasoned that placing the funds in an escrow account is not the same as actual receipt of funds by the plaintiff and that it would be inappropriate to enter judgment before the plaintiff had a fair opportunity to move for class certification. The 7th Circuit reached a similar holding in *Fulton Dental, LLC v. Bisco, Inc*., 860 F. 3d 541 (7th Cir. 2017).

However, courts have recognized that an unaccepted settlement offer can defeat an individual plaintiff's claims after a motion for class certification has been considered and denied. In *Leyse v. Lifetime Entm't Servs., LLC*, 679 F. App'x 44 (2d Cir. 2017), the 2nd Circuit held that, while such an offer "does not *moot* a case—that is, it does not strip the district court of jurisdiction over the case—such an offer, if rejected, may nonetheless permit a court to enter a judgment in the plaintiff's favor." Stay tuned for further developments in this area.

For additional information about attempts to moot class actions by picking off lead plaintiffs, please see:

- 7th Circuit Balks At Class Action Defendant's Attempt To Pick-Off Lead Plaintiff.

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