Class Action Litigation Update: Nine Key Developments From Third Quarter 2020

There were several notable developments in the third quarter of 2020 affecting class actions, including:

- The Judicial Panel of Multidistrict Litigation denied multiple requests to consolidate lawsuits related to the COVID-19 pandemic on an industry-wide basis.
- The Eleventh Circuit unexpectedly banned incentive awards to class representatives.
- The Sixth Circuit rejected a district court's attempt to create a novel "negotiation" class.
- And other decisions provide further guidance to defendants when settling class actions or litigating class certification issues.

1 Industry-Wide MDLs Continue To Remain Disfavored Even In Cases Involving COVID-19 Issues.

Outside of the antitrust or products liability context, the Judicial Panel for Multidistrict Litigation (JPML) has hesitated to create industry-wide MDLs. This summer, the JPML faced an unusually high number of requests to create industry-wide MDLs in cases arising out of the COVID-19 pandemic, as parties attempted to argue that common legal questions were sufficient to support the creation of an MDL. In every case, the JPML declined to create an industry-wide MDL, finding both that the creation of an industry-wide MDL was not permissible because the cases lacked a common factual question and because consolidation would neither improve judicial efficiency nor serve the convenience of the parties and witnesses. The cases where consolidation was denied include class actions involving:

- Coverage lawsuits filed against hundreds of insurers for COVID-19-related losses, the JPML created only one single-insurer MDL;
- Agents alleging that banks improperly denied them fees for preparing Paycheck Protection Program loan applications for small businesses;
- Small businesses alleging that banks failed to properly process applications for loans under the Paycheck Protection Program; and
- Ticket purchasers alleging that ticket sellers wrongfully changed their refund policies for shows or events delayed or canceled due to the COVID-19 pandemic.

These decisions confirm that the JPML remains hesitant to consolidate cases simply because there is a common theory of liability against defendants within the same industry.

2 Eleventh Circuit Bans Class Representative Incentive Awards.

Although class representative incentive awards are commonplace in class action settlements, the Eleventh Circuit issued a surprising decision banning them entirely. *Johnson v. NPAS Solutions, LLC*, 2020 WL 5553312 (11th Cir. 2020). In a 2-1 decision, the Eleventh Circuit held that such awards are not permitted under two Supreme Court cases from the Nineteenth Century. As the Eleventh Circuit explained, those decisions "prohibit the type of incentive award that the district court approved here—one that compensates a class representative for his time and rewards him for bringing a lawsuit. Although it's true that such awards are commonplace in modern class-action litigation, that doesn't make them lawful, and it doesn't free us to ignore Supreme Court precedent forbidding them." *Id*. at *12.

Judge Martin dissented from this conclusion, noting that no other circuit court has imposed a rule prohibiting incentive awards, and warning that the majority's decision to eliminate incentive awards for class representatives "will have the practical effect of requiring named plaintiffs to incur costs well beyond any benefits they receive from their role in leading the class[,]" which will make potential plaintiffs "less willing to take on the role of class representative in the future." *Id*. at *15. The class representative has announced his intention to seek *en banc* review.

3 Ninth Circuit Requires Plaintiffs To Show Inadequate Remedy At Law To Proceed With California Restitution Claims In Federal Court.

In *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020), the plaintiff filed a class action lawsuit, charging that the defendant had engaged in false advertising and asserting claims for damages under the California Consumer Legal Remedies Act (CLRA) and for equitable restitution and injunctive relief under California's Unfair Competition Law (UCL) and the CLRA. On the eve of trial, the plaintiff made a strategic decision to drop her CLRA damages claim in order to "try the class action as a bench trial rather than to a jury." *Id*. at 837.

In a decision that may present a significant hurdle to plaintiffs seeking to maintain restitution claims in federal court under the UCL or CLRA, the Ninth Circuit held that a plaintiff seeking to pursue equitable restitution under these statutes must show that he or she lacks an adequate remedy at law. The Ninth Circuit reasoned that "even if a state authorizes its courts to provide equitable relief when an adequate legal remedy exists, such relief may be unavailable in federal court because equitable remedies are subject to traditional equitable principles unaffected by state law." *Id*. at 841.

4 Sixth Circuit Rejects Unprecedented "Negotiation Class" In Opioid MDL.

In *In re Nat'l Prescription Opiate Litig.*, 2020 WL 5701916 (6th Cir. 2020), the Sixth Circuit reversed a district court order certifying a novel "negotiation class." The negotiation class was intended to facilitate a global settlement of the claims in thousands of individual cases brought by cities and counties across the United States, while still allowing each plaintiff's case to proceed separately in litigation until and unless such a collective settlement was reached. The order adopted an innovative structure under which class members could learn, before deciding whether to opt out, the percentage of any eventual settlement they could expect to receive but would not know the actual settlement amount; once the opt-out period ended, all remaining class members would be bound by any class settlement that was later reached, provided that the deal received approval by a supermajority vote of class members.

The Sixth Circuit found the negotiation class "simply is not authorized by the structure, framework, or language of Rule 23." *Id.* at *8. While Rule 23 contemplates certification of litigation and settlement classes, it does not support a negotiation class, and district courts are not free to employ "judicial inventiveness" in inventing new kinds of classes. *Id.* at *5 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)).

The Sixth Circuit's ruling makes clear that courts are bound by the requirements of Rule 23 and "are not free to amend [the] rule outside the process Congress ordered." *Id.*

5 Past Purchasers Of Allegedly Deceptive Products Lack Article III Standing To Seek Injunctive Relief.

In *Berni v. Barilla S.p.A.*, 964 F.3d 141 (2d Cir. 2020), the Second Circuit held that when there is no likelihood of future harm, there is no standing to seek an injunction and no possibility of certification under Rule 23(b)(2). This decision will help consumer goods companies defeat claims brought by past purchasers of an allegedly deceptive product who seek injunctive relief forcing changes in the product's labeling.

6 Choice-of-law Analysis Not Required For Predominance Inquiry In Settlement Context.

When confronted with a proposed class-action settlement, the Ninth Circuit held that a district court need not conduct a choice-of-law analysis before determining that common issues predominate. *Jabbari v. Farmer*, 965 F.3d 1001 (9th Cir. 2020). Instead, when a federal claim exists, predominance is satisfied if "the federal claim [is] provable collectively and important enough to the litigation's resolution to bind the class together." *Id.* at 1008. *Jabbari* makes clear that "[f]or purposes of a settlement class, differences in state law do not necessarily, or even often, make a class unmanageable." *Id.* at 1007.

7 Sixth Circuit Provides Guidance To Defendants Negotiating Class Counsel Fee Awards.

The Sixth Circuit's decision in *Linneman v. Vita-Mix Corp.*, 970 F.3d 621 (6th Cir. 2020) provides a cautionary tale for defendants when negotiating attorneys' fee provisions in settlement agreements. The parties in *Linneman* entered into a settlement, pursuant to which the defendants agreed to pay the plaintiffs' reasonable attorneys' fees and expenses, but the parties could not agree on the amount of fees. The settlement agreement permitted class counsel to file a motion seeking an award of attorneys' fees to resolve that question under Rules 23(h) and 54(d)(2), which provide for "reasonable" attorneys' fees. That language, the Sixth Circuit held, permitted a district court to use a multiplier in determining a fee award. In addition, the Sixth Circuit held that the settlement agreement was drafted in such a way that it allowed class counsel to recover fees for the time they spent litigating the fee award. At the same time, the Sixth Circuit held that courts' analysis of a "reasonable" attorney's fee must take into account a defendants' reasonable settlement offer—and courts should exclude from a fee calculation hours worked after rejecting such an offer, if reasonable.

8 Commonality Exists Even When The Common Question Has Already Been Resolved In Plaintiffs' Favor.

When a district court resolves a legal question of law at the motion-to-dismiss stage, the Sixth Circuit held that question may nevertheless be used to satisfy the commonality requirement of Rule 23(a). *See Hicks v. State Farm Ins. Co.*, 965 F.3d 452 (6th Cir. 2020). In upholding an order certifying a class of insurance policyholders, the Sixth Circuit held that the interpretation of the insurance contract—which the district court had already resolved at the motion-to-dismiss stage—could satisfy commonality: "whether a common question is capable of classwide resolution is not undermined when a party concedes an issue, or the issue is resolved in the plaintiffs' favor." *Id*. at 458.

9 Defendants May Not Rely On Their Inadequate Records To Defeat The Third Circuit's Ascertainability Requirement.

Before a class may be certified in the Third Circuit, the plaintiff must demonstrate that a class can be identified. But when a defendant's lack of records makes it more difficulty to identify putative class members, the Third Circuit has now held that its ascertainability requirement can be satisfied if the plaintiffs proffer sufficient alternative evidence that show class members can be identified—it is not necessary to actually identify class members at the certification stage. In *Hargrove v. Sleepy's LLC*, 2020 WL 5405596 (3rd Cir. 2020), the plaintiffs overcame holes in the defendant's records through affidavits and inferences drawn from documents the

defendant had produced in discovery to explain how class members could be identified. *Hargrove* suggests that the Third Circuit may be taking a small step back from its heightened ascertainability requirement.

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