Class Action Litigation Update: **Key Developments from Fourth Quarter 2020**

There were several notable developments in the fourth quarter of 2020 affecting class actions. The Supreme Court is poised to decide whether a damages class can be certified when a large portion of the class lacks Article III standing. Multiple cases were decided relating to the interpretation and impact of arbitration provisions on class actions and other types of complex litigation. And an increasing number of derivative shareholder lawsuits have arisen relating to anti-discrimination and diversity issues on corporate boards.

1 The Supreme Court Will Consider Whether Article III or Rule 23 Permit a Class Action to Proceed Where the Majority of the Class Suffered No "Actual Injury" Under *Spokeo*.

In a case that has the potential to create significant obstacles for class certification, the Supreme Court agreed to decide whether a damages class can be certified if the vast majority of the class suffered no actual injury. In *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020), the Ninth Circuit affirmed a $60 million jury award to a damages class that accused TransUnion of violating the Fair Credit Reporting Act. Although the class sought damages on the theory that TransUnion linked law-abiding customers to similarly named criminals and terrorists, which had the potential effect of precluding those customers from obtaining credit from certain lenders, TransUnion argued that a damages class could not be certified because it contained large swaths of individuals who had not suffered actual injury sufficient to confer Article III standing under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). The Ninth Circuit disagreed with TransUnion's argument.

TransUnion LLC v. Ramirez will likely be argued in the spring, with a decision to follow by the end of the summer. In addition to the standing issue, the case also presents the related question of whether a named plaintiff who suffered concrete harm arising from a statutory violation is atypical of a class of individuals containing a significant number of individuals who suffered no such harm.

2 Class Action Plaintiffs Must Satisfy Article III to Settle Class Actions.

As a recent en banc decision from the Eleventh Circuit illustrates, a class action settlement can vaporize if the named plaintiff lacks Article III standing. In *Muransky v. Godiva Chocoliatier, Inc.*, 979 F.3d 917 (11th Cir. 2020), the plaintiffs accused Godiva of printing more of their credit card digits on their receipts than was permitted under the Fair and Accurate Credit Transactions Act (FACTA). A class member objected to the settlement on the ground that the plaintiff lacked standing, but the district court approved the settlement, and the panel of judges on the Eleventh Circuit affirmed.

The full Eleventh Circuit, in a 7-3 decision, vacated the settlement. The court held that the named plaintiff cannot pursue a class action—either in litigation or through settlement—unless the plaintiff satisfied Article III's standing requirements. Joining four other circuits, the Eleventh Circuit then held that a mere violation of FACTA, without alleging a plausible allegation of other tangible harm or heightened risk of such harm, was insufficient to satisfy Article III's injury-in-fact requirement. Because the plaintiff had not alleged an injury-in-fact, the Eleventh Circuit held that the plaintiff lacked Article III standing and that federal courts are "powerless to approve a proposed class settlement" if "no named plaintiff has standing."

---

3 A District Court Does Not Abuse Its Discretion in Denying Rule 23(c)(4) Issue-Class Certification When Individualized Issues Affect Liability.

Plaintiff's counsel have sometimes relied on the availability of "issue classes" under Rule 23(c) to avoid obstacles to class certification posed by Rule 23's other requirements. In *Reitman v. Champion Petfoods USA, Inc.*, 2020 WL 7238439 (9th Cir. Dec. 9, 2020), the Ninth Circuit cast doubt on this strategy, holding that "numerous individualized issues affecting determinations of liability [rendered] Rule 23(c)(4) certification inefficient." *Id.* at *2. Notably, *Reitman* based its holding not on Rule 23(b)'s predominance requirement but instead on the general principle that Rule 23(c)(4) certification should "materially advance the disposition of the litigation as a whole." *Id.*

---

4 Plaintiffs Cannot Evade Arbitration under the *McGill* Rule If They Lack Standing to Pursue Public Injunctive Relief.

Businesses that include arbitration provisions in consumer contracts should be wary of the so-called *McGill* rule, which establishes that an arbitration provision which waives a plaintiff's right to seek public injunctive relief in all fora is not enforceable under California law. But in *Stover v. Experian Holdings*, 978 F.3d 1082 (9th Cir. 2020), the Ninth Circuit held that a plaintiff could not invoke *McGill* to invalidate an arbitration clause when the plaintiff lacked standing to seek public injunctive relief.

---

5 The Ninth Circuit Found Removal to Federal Court Improper Due to "Grossly Exaggerated" Amount-in-Controversy Estimate.

Although courts often have taken a relatively permissive approach towards litigants' assertions of the amount in controversy for a given case, a recent case illustrates there are limits to that flexibility. In 2019, plaintiffs filed a lawsuit in California state court alleging a number of state labor law violations against KM Industrial. The company removed the case to federal court under the Class Action Fairness Act, asserting that the amount in controversy exceeded $5 million. On appeal, the Ninth Circuit reversed the removal, explaining that the $5+ million estimate by the company relied on a number of untenable assumptions. *See Harris v. KM Industrial, Inc.*, 980 F.3d 694 (2020). The court emphasized that the burden is on the proponent of federal court jurisdiction to prove that the requirements were met and explained that estimates of the amount in controversy can be subject to significant scrutiny if they do not appear to be based on reasonable evidence.

---

6 Attempts to Contact Members of Certified Class Constituted Sanctionable Conduct.

In December 2020, the Southern District of California sanctioned defendant Royal Seas Cruises, for attempting to contact over 500 members of a certified class in a Telephone Consumer Protection Act suit. *See McCurley v. Royal Seas Cruises, Inc.*, 2020 WL 7074948 (S.D. Cal. Dec. 3, 2020). Defense counsel prepared a script to call the class members to ask them to fill out surveys related to the pending litigation. The court found that the surveys operated effectively as affidavits elicited with the intention of preventing class plaintiffs from obtaining relief. Practitioners should keep this and other similar cases in mind when seeking to contact putative or actual class members for litigation purposes.

---

7 Class Counsel Does Not Hold an Elevated Fiduciary Duty to Class Representatives Distinct from the Fiduciary Duty Owed to the Class.

The Eleventh Circuit recently weighed in on the scope of class counsel's duty to the class as compared to class representatives in *Medical & Chiropractic Clinic, Inc. v. Oppenheim*, 981 F.3d 983 (11th Cir. 2020). In that case, counsel for a class (i) moved to another firm after an unsuccessful mediation, (ii) brought a separate class action raising the same claims as the first class, and then (iii) quickly reached a proposed settlement with the defendants. Counsel's original firm brought suit to challenge the settlement, arguing that counsel owed duties of confidentiality and loyalty to the class representatives of the class represented by the original firm, and that counsel violated these duties by using confidential information to bring and settle a new class action with a different class representative. The Eleventh Circuit rejected this argument, holding that "[o]ne cardinal rule defines the scope of counsel's ethical obligations in class actions: class counsel owes a duty to the class as a whole and not to any individual member of the class."

---

8 Boards of Public Companies Continue to Be the Targets of Consolidated or Class-Action Shareholder Derivative Lawsuits Relating to Diversity Issues and Responses to Sexual Harassment Allegations.

In October 2020, a California judge approved Alphabet Inc.'s settlement deal for $310 million in diversity initiatives to settle a number of consolidated derivative shareholder suits accusing

Google's parent company of covering up sexual misconduct and harassment allegations. These suits were initially filed in California state court in early 2019 and came alongside a number of other shareholder derivative suits directed at the boards of large public companies allegedly failing to deliver on their commitments to diversity.

Other notable cases over the last year included a claim against both Oracle and certain of its directors for allegedly failing to monitor the company's compliance with anti-discrimination laws (*see Dinsmore v. Ellison*, No. 20-cv-04602, N.D. Cal.) and a claim against Qualcomm and certain of its directors for alleged gender-based pay disparities (*see Kiger v. Mollenkopf*, No. 20-cv-01355, S.D. Cal.). Similar lawsuits also have been filed against Cisco, Danaher, Gap, Monster Beverage, and NortonLifeLock. These cases may continue to arise, especially in California given the state's recent enactment of AB 979, which institutes certain diversity requirements for corporate boards.

If you have any questions concerning the material discussed in this update, please contact the following members of our Class Actions Litigation practice:

Sonya D. Winner	+1 415 591 7072	swinner@cov.com
Andrew Soukup	+1 202 662 5066	asoukup@cov.com
Emily Johnson Henn	+1 650 632 4715	ehenn@cov.com
Eric C. Bosset	+1 202 662 5606	ebosset@cov.com
Kathryn E. Cahoy	+1 650 632 4735	kcahoy@cov.com
Simon J. Frankel	+1 415 591 7052	sfrankel@cov.com
Cortlin H. Lannin	+1 415 591 7078	clannin@cov.com
Henry Liu	+1 202 662 5536	hliu@cov.com
Megan L. Rodgers	+1 650 632 4734	mrodgers@cov.com
Andrew A. Ruffino	+1 212 841 1097	aruffino@cov.com
Ashley M. Simonsen	+1 424 332 4782	asimonsen@cov.com
Robert D. Wick	+1 202 662 5487	rwick@cov.com
Andrew Chang	+1 202 662 5039	achang@cov.com