

## Class Action Litigation Update: **Six Key Developments You May Have Missed from Third Quarter 2021**



There were several notable class action developments in the third quarter of 2021. The D.C. and Ninth Circuits accepted appeals to decide if evidence of uninjured absent members precludes class certification. The Second and Ninth Circuits clarified when defendants may raise merits and personal jurisdiction arguments. The Third and Sixth Circuits examined applications of American Pipe tolling and issue classes. And a busy Ninth Circuit issued four decisions on arbitration agreements.

### 1

#### **D.C. and Ninth Circuits to Decide if Evidence of Uninjured Absent Members Defeats Class Certification.**

Two federal appellate courts are set to address the circumstances under which a class that includes many uninjured class members may be certified. In the Ninth Circuit, the *en banc* court agreed to decide if a class that includes more than a *de minimis* number of uninjured class members can satisfy the predominance requirement of Rule 23(b)(3). See *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 5 F.4th 950 (9th Cir. 2021). An earlier panel held, in a 2-1 decision, that predominance does not exist as a matter of law in such circumstances. See *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774 (9th Cir. 2021). Meanwhile, the D.C. Circuit—which embraced the *de minimis* rule in 2019—accepted an interlocutory appeal to review what it called a “questionable” decision to certify a class, after the defendants complained that the district court intended to wait until after certification to determine whether the class contained uninjured members. See *In re Visa Inc.*, No. 21-8005 (D.C. Cir. Oct. 1, 2021). Both cases could make it significantly more difficult for plaintiffs to obtain certification if plaintiffs are required to show that nearly all of the proposed class suffered an injury to satisfy the predominance requirement of Rule 23(b)(3).

### 2

#### **Ninth Circuit Confirms Personal Jurisdiction Challenges to the Claims of Absent Class Members should be Raised at Class Certification.**

The Ninth Circuit recently held that personal jurisdiction defenses as to absent class members should be raised at the class-certification stage. *Moser v. Benefytt, Inc.*, 8 F.4th 872 (9th Cir. 2021), vacated a district court order that certified two nationwide classes despite the defendant’s objection that the district court lacked personal jurisdiction as to the claims of absent class members. The district court had deemed the argument waived because the defendant had failed to raise it on a motion to dismiss. The Ninth Circuit disagreed, explaining that the defendant could not have asserted a personal jurisdiction defense against the claims

**COVINGTON**

BEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG LONDON LOS ANGELES  
NEW YORK PALO ALTO SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

[www.cov.com](http://www.cov.com)

of unnamed putative class members at the pleading stage, and that the first opportunity to raise such a defense arose when a motion for class certification was filed. (There was no dispute that the district court had specific personal jurisdiction as to the named plaintiff's claims.) The ruling provides important guidance to defendants on when such personal jurisdiction defenses should be asserted.

### 3

#### **Second Circuit Reaffirms Usefulness of Early Merits Arguments to Defeat Class Actions.**

The Second Circuit recently reaffirmed the potential benefits of front-loading merits arguments as a strategy to defeat class actions. *Kaye v. Merck & Co.*, 852 F. App'x 569 (2d Cir. 2021), affirmed a district court's order granting summary judgment for the defendant in an action under the Telephone Consumer Protection Act where the fax advertisement at issue fell within the scope of the consent granted by the plaintiff. When the plaintiff objected to the district court's decision to strike class allegations, the Second Circuit further explained that, since the named plaintiff had no viable claim, he was not an adequate class representative and could not have obtained class certification.

### 4

#### **Third and Sixth Circuits Weigh in on Applicability of *American Pipe* Tolling Prior to Class Certification and upon Dismissal.**

Under *American Pipe and Construction Company v. Utah*, the filing of a class complaint tolls the limitations period governing the individual claims of putative class members. 414 U.S. 538 (1974). How such tolling applies on a case-by-case basis can present difficult questions.

One such question is whether *American Pipe* tolling applies to individual claims filed before a certification decision is made. In *Aly v. Valeant Pharmaceuticals International Inc.*, 1 F.4th 168 (3d Cir. 2021), the Third Circuit joined the Second, Ninth, and Tenth Circuits in holding that *American Pipe* tolling applies to individual claims filed both before and after the class-certification stage. Only the Sixth Circuit has reached a different conclusion. The Third Circuit's decision reinforces the majority view that plaintiffs may assert individual claims prior to a certification decision without losing the benefit of *American Pipe* tolling.

The Sixth Circuit, meanwhile, recently addressed a different set of *American Pipe* tolling issues. *Potter v. Commissioner of Social Security*, 9 F.4th 369 (6th Cir. 2021), held that a district court's administrative denial of class certification as a matter of docket management did not end *American Pipe* tolling. The Sixth Circuit recognized that its conclusion likely created a split with an earlier Fourth Circuit ruling adopting a "bright-line rule" that *American Pipe* tolling continues until class certification is denied "for whatever reason." *Potter* also held that outright dismissal of an uncertified class complaint ends *American Pipe* tolling even if the dismissal is subject to a pending appeal—joining the conclusion reached by every other court of appeals to have considered the issue.

## 5

### **Third Circuit Makes it More Difficult for Plaintiffs to Use Issue Classes to Avoid Predominance Problems.**

To circumvent predominance issues, plaintiffs sometimes will ask a court to certify an issue class under Rule 23(c)(4). The Third Circuit recently made it more difficult for plaintiffs to do so by making clear that the issue underlying such a request for class certification must independently satisfy one of the requirements of Rule 23(b). *See Russell v. Educational Comm'n for Foreign Medical Graduates*, 2021 WL 4343657 (3d Cir. 2021). But the Third Circuit stopped short of embracing a rule that only issues that would resolve a defendant's liability are appropriate for issue-class treatment, instead concluding that such an inquiry can be resolved only on a case-by-case basis.

## 6

### **Busy Ninth Circuit Issues Four Important Decisions on Arbitration.**

Companies that rely on arbitration provisions should take note of four significant decisions from the Ninth Circuit in September 2021. One decision held that the Federal Arbitration Act does not preempt a state-law rule prohibiting employers from requiring employees to agree to arbitration, even if the employees have an opportunity to opt out of the arbitration agreement. *See Chamber of Commerce v. Bonta*, 2021 WL 4187860 (9th Cir. 2021). Another decision narrowly defined “public injunctive relief” within the meaning of California’s *McGill* rule. *See Hodges v. Comcast Cable Commc'ns, LLC*, 2021 WL 4127711 (9th Cir. 2021). A third decision adopted a restrictive view of the circumstances under which courts may entertain unenforceability challenges to delegation clauses within arbitration agreements. *See Brice v. Plain Green, LLC*, 2021 WL 4203337 (9th Cir. 2021). And a fourth decision authorized companies to file early motions to defeat class certification if most of the class has agreed to arbitration. *See Lawson v. Grubhub, Inc.*, 2021 WL 4258826 (9th Cir. 2021). Covington’s Class Action Litigation team summarized these decisions, and their future implications, in a client alert available [here](#).

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

<b><u>Sonya D. Winner</u></b>	+1 415 591 7072	<a href="mailto:swinner@cov.com">swinner@cov.com</a>
<b><u>Andrew Soukup</u></b>	+1 202 662 5066	<a href="mailto:asoukup@cov.com">asoukup@cov.com</a>
<b><u>Emily Johnson Henn</u></b>	+1 650 632 4715	<a href="mailto:ehenn@cov.com">ehenn@cov.com</a>
<b><u>Eric C. Bosset</u></b>	+1 202 662 5606	<a href="mailto:ebosset@cov.com">ebosset@cov.com</a>
<b><u>Kathryn E. Cahoy</u></b>	+1 650 632 4735	<a href="mailto:kcahoy@cov.com">kcahoy@cov.com</a>
<b><u>Simon J. Frankel</u></b>	+1 415 591 7052	<a href="mailto:sfrankel@cov.com">sfrankel@cov.com</a>
<b><u>Cortlin H. Lannin</u></b>	+1 415 591 7078	<a href="mailto:clannin@cov.com">clannin@cov.com</a>
<b><u>Henry Liu</u></b>	+1 202 662 5536	<a href="mailto:hliu@cov.com">hliu@cov.com</a>
<b><u>Megan L. Rodgers</u></b>	+1 650 632 4734	<a href="mailto:mrodgers@cov.com">mrodgers@cov.com</a>
<b><u>Andrew A. Ruffino</u></b>	+1 212 841 1097	<a href="mailto:aruffino@cov.com">aruffino@cov.com</a>
<b><u>Ashley M. Simonsen</u></b>	+1 424 332 4782	<a href="mailto:asimonsen@cov.com">asimonsen@cov.com</a>
<b><u>Robert D. Wick</u></b>	+1 202 662 5487	<a href="mailto:rwick@cov.com">rwick@cov.com</a>
<b><u>Kanu Song</u></b>	+1 415 591 7024	<a href="mailto:ksong@cov.com">ksong@cov.com</a>

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to [unsubscribe@cov.com](mailto:unsubscribe@cov.com) if you do not wish to receive future emails or electronic alerts.

© 2021 Covington & Burling LLP. All rights reserved.