GIBSON DUNN

First Quarter 2022 Update on Class Actions

Client Alert | April 28, 2022

Click for PDF

This update provides an overview of key class-action-related developments during the first quarter of 2022 (January through March).

> **Part I** discusses cases from the Eleventh and Ninth Circuits regarding the diversity and amount-in-controversy requirements for federal court jurisdiction under the Class Action Fairness Act of 2005 ("CAFA").
>
> **Part II** covers a recent decision from the Seventh Circuit analyzing when an intangible harm from a statutory violation is sufficient for Article III standing in putative class actions.

In addition, while not covered in this update, the Ninth Circuit recently issued a significant en banc opinion regarding class certification issues in *Olean Wholesale Grocery v. Bumble Bee Foods*, — F.4th —, 2022 WL 1053459 (9th Cir. Apr. 8, 2022) (en banc), including the evidentiary burden for a plaintiff seeking class certification, the assessment of expert testimony at the class certification stage, and the interplay between Rule 23 and injury and Article III standing. *Olean* is discussed in our separate client alert.

I. The Eleventh and Ninth Circuits Adopt Expansive Views of CAFA Jurisdiction

This past quarter, the Eleventh and Ninth Circuits issued noteworthy decisions relating to aspects of federal court jurisdiction under CAFA (minimal diversity and amount in controversy).

In *Cavalieri v. Avior Airlines C.A.*, 25 F.4th 843 (11th Cir. 2022), the Eleventh Circuit addressed CAFA's "minimal diversity" requirement, which provides for federal jurisdiction over a class action if there is more than $5 million in controversy and "any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state." 28 U.S.C. § 1332(d)(2)(C). The court held that this requirement can be met in a foreign-defendant case by plausible allegations that a nationwide class includes at least one U.S. citizen.

In *Cavalieri*, two Venezuelan citizens, one of whom is a legal permanent resident of the United States, filed a putative class action against a Venezuelan airline for breach of contract. 25 F.4th at 848. On appeal, the Eleventh Circuit *sua sponte* considered whether plaintiffs had sufficiently alleged diversity jurisdiction. *Id.*

The court first held that a foreign citizen who is a permanent resident does not qualify as a "citizen[] of a State" under the 2011 amendments to CAFA—which meant that the case did not satisfy the general diversity requirements because both the plaintiffs and the defendant were noncitizens. 25 F.4th at 848–49 (citing 28 U.S.C. § 1332(a)). Nonetheless, the Eleventh Circuit concluded that the allegations supported minimal diversity jurisdiction

Related People

Jessica M. Pearigen

Gillian B. Miller

Yan Zhao

Wesley Sze

Lauren M. Blas

Bradley J. Hamburger

Kahn A. Scolnick

Christopher Chorba

under CAFA because the plaintiffs had plausibly alleged that "'at least one unnamed class member is a U.S. citizen and resident and, thus, is diverse from'" the Venezuelan airline. *Id.* at 849. The court added that it was for "a later stage in the litigation for the district court to make the factual determination on whether there is indeed jurisdiction." *Id.* at 850 (citation omitted).

The Ninth Circuit addressed CAFA's amount-in-controversy requirement in *Jauregui v. Roadrunner Transportation Services, Inc.*, 28 F.4th 989 (9th Cir. 2022). In that case, the plaintiff filed a putative wage-and-hour class action on behalf of all current and former hourly workers of the defendant. *Id.* at 991. Although the defendant removed the case to federal court under CAFA and presented substantial evidence to establish the amount-in-controversy requirement, the district court nevertheless remanded the case to state court. *Id.*

The Ninth Circuit reversed. It held that by improperly discounting the defendant's substantial evidence showing the amount in controversy was satisfied, the district court had impermissibly imposed a "heavy burden" on the defendant that "contravenes the text and understanding of CAFA and ignores precedent." 28 F.4th at 992. In particular, the district court improperly "put a thumb on the scale against removal" by assigning a $0 value to most of the plaintiff's claims simply because it disagreed with the assumptions underlying the defendant's estimates. *Id.* at 992. But "merely preferring an alternative assumption is not an appropriate basis to zero-out a claim," and "at most, it only justifies reducing the claim to the amount resulting from the alternative assumption." *Id.* at 994. Thus, the district court's approach "turn[ed] the CAFA removal process into an unrealistic all-or-nothing exercise of guess-the-precise-assumption-the-court-will-pick—even where . . . the defendant provided substantial evidence and analysis supporting its amount in controversy estimate." *Id.* The Ninth Circuit also reaffirmed the "expansive understanding of CAFA" under circuit precedent, and encouraged district courts to give defendants "latitude" when analyzing removal "as long as the [defendant's] reasoning and underlying assumptions are reasonable." *Id.* at 993.

II. The Seventh Circuit Addresses When a Violation of Consumer Financial Protection Statutes Gives Rise to Article III Standing

As reported in our prior updates, the federal courts have continued to apply a mix of approaches in determining whether plaintiffs asserting statutory violations have alleged a concrete injury to satisfy Article III under *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). The Seventh Circuit weighed in this quarter in a case analyzing standing under the Fair Debt Collection Protection Act ("FDCPA").

In *Ewing v. MED-1 Solutions, LLC*, 24 F.4th 1146 (7th Cir. 2022), the Seventh Circuit held that debt collectors' failure to report a customer's dispute of a debt to credit agencies is a concrete injury sufficient to support standing under the FDCPA. Although the defendants argued the plaintiffs lacked standing under *TransUnion* because "there is no evidence that [the credit agencies] sent the [plaintiffs'] credit reports to potential creditors," the court disagreed. 24 F.4th at 1150, 1152. "In the wake of *TransUnion*," the Seventh Circuit framed the standing analysis as asking "whether the [plaintiffs] suffered a concrete injury when the [debt collectors] communicated false information (i.e., the reports of debts not being disputed) about them to a credit-reporting agency." *Id.* at 1152. Because the FDCPA protects against "reputational harm"—which "is analogous to the harm caused by defamation, which has long common law roots"—the claim satisfied *TransUnion*'s requirement that the injury bear a close relationship to a traditionally recognized harm. *Id.* at 1153. Additionally, the fact the credit reporting agencies did not publish the credit reports to third parties was "a red herring," because the debt collectors published false information to the credit agency, and plaintiffs did not need to show that the credit agency then "*also* shared that false information" to further third parties. *Id.* at 1152–53.

The following Gibson Dunn lawyers contributed to this client update: The following Gibson Dunn lawyers contributed to this client update: Jessica Pearigen, Gillian Miller, Yan Zhao,

Wesley Sze, Lauren Blas, Bradley Hamburger, Kahn Scolnick, and Christopher Chorba.

Gibson Dunn attorneys are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Class Actions, Litigation, or Appellate and Constitutional Law practice groups, or any of the following lawyers:

Theodore J. Boutrous, Jr. – Los Angeles (+1 213-229-7000, tboutrous@gibsondunn.com)
Christopher Chorba – Co-Chair, Class Actions Practice Group – Los Angeles (+1 213-229-7396, cchorba@gibsondunn.com) Theane Evangelis – Co-Chair, Litigation Practice Group, Los Angeles (+1 213-229-7726, tevangelis@gibsondunn.com) Kahn A. Scolnick – Co-Chair, Class Actions Practice Group – Los Angeles (+1 213-229-7656, kscolnick@gibsondunn.com) Bradley J. Hamburger – Los Angeles (+1 213-229-7658, bhamburger@gibsondunn.com) Lauren M. Blas – Los Angeles (+1 213-229-7503, lblas@gibsondunn.com)

Related Capabilities

Appellate and Constitutional Law

Class Actions

Litigation