View on our website.

GIBSON DUNN

Class Actions Update October 28, 2024

Third Quarter 2024 Update on Class Actions

This update provides an overview of key class action-related developments during the third quarter of 2024 (July to September).

Table of Contents

I. The Eighth, Ninth, and Eleventh Circuits Reject Class Certification on the Ground That Individualized Issues Would Predominate

This past quarter, three courts of appeals enforced Rule 23's rigorous predominance requirement, clarifying that no class can be certified when adjudicating class members' entitlement to relief and available defenses would require resolving individualized issues.

In *Carter v. City of Montgomery*, 108 F.4th 1334 (11th Cir. 2024), Montgomery residents brought a putative class action in connection with the city's practice of jailing certain traffic offenders for failing to pay their fines. The Eleventh Circuit affirmed the denial of class certification for lack of predominance, holding that each class member's claim would ultimately depend on resolving individualized issues, including whether she (1) was individually denied certain legal rights, (2) was on probation, or (3) had a history of payments or missed payments. *Id.*at 1345-46.

Similarly, in *Black Lives Matter v. City of Los Angeles*, 113 F.4th 1249 (9th Cir. 2024), the Ninth Circuit reversed certification of classes alleging claims for excessive force and arrests for protected activity, holding that the district court did not conduct a sufficiently rigorous analysis of whether common issues would predominate. The court of appeals held that individual inquiries—including how any injury was caused, whether the challenged conduct was reasonable under the circumstances, the specific conditions of each arrest, and whether officers had probable cause to arrest—would be required, making it unlikely that the case could be resolved via classwide evidence. *Id.* at 1259-61.

And in *Ford v. TD Ameritrade*, 115 F.4th 854 (8th Cir. 2024), the Eighth Circuit reversed certification of a class of investors who transacted through TD Ameritrade and who claimed that TD Ameritrade violated its "duty of best execution," which requires brokers to "use reasonable efforts to maximize the economic benefit of the client in each transaction." *Id.* at 858. Although the commission investors paid was a flat rate, the court of appeals held that was insufficient to establish common questions about economic loss because of individualized issues about what the best price reasonably available would be under the circumstances, the existence of alternative brokers, the fees of those brokers, and the prices those brokers could have obtained for each trade. *Id*. at 861.

II. The Fifth Circuit Addresses Whether Named Plaintiffs Have Standing to Litigate Class Actions on Behalf of Absent Class Members with Different Theories of Injury

In July, the Fifth Circuit addressed an issue subject to a longstanding circuit split: whether a named plaintiff has standing to litigate absent class members' injuries that are similar, but "not precisely analogous," to those suffered by the named plaintiff. *Chavez v. Plan Benefit Servs., Inc.*, 108 F.4th 297, 307 (5th Cir. 2024).

In *Chavez*, the three named plaintiffs were employed by the same company, which disbursed their retirement and healthcare plan benefits through two trusts managed by the defendant. The plaintiffs alleged that the defendant mismanaged employer-contributed funds based on the plaintiffs' enrollment in certain benefit plans. The district court certified classes consisting of "all participants and beneficiaries of plans that provide employee benefits through" each trust. *Id.* at 305. On appeal, the defendant argued that the plaintiffs lacked "standing to challenge fees that they were never subjected to, in plans that they never participated in, relating to services that they never received, from employers for whom they never worked." *Id.* at 306.

The Fifth Circuit outlined two analytical approaches to standing arguments based on a "disjuncture" between the injury alleged by a named plaintiff and the injuries purportedly suffered by the broader class. Under the "class certification approach" favored by the First, Third, and Sixth Circuits, a court decides whether a named plaintiff has standing to bring her own claims

and, if so, addresses any "disjuncture" between the plaintiff's and the absent class members' injuries as part of the Rule 23 analysis. *See, e.g.*, *In re Asacol Antitrust Litig.*, 907 F.3d 42, 49 (1st Cir. 2018); *Boley v. Universal Health Servs., Inc.*, 36 F.4th 124, 133 (3d Cir. 2022); *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 424 (6th Cir. 1998). Under the "standing approach" taken in other circuits, a court "simply find[s] that the class representative lacks standing to pursue the class members' claims because she did not suffer their injuries." *Chavez*, 108 F.4th at 307. Courts of appeals have applied this approach with varied degrees of strictness, with the Second and Eleventh Circuits applying the most rigorous formulations. *See, e.g.*, *Barrows v. Becerra*, 24 F.4th 116, 129 (2d Cir. 2022); *Fox v. Ritz-Carlton Hotel Co., LLC*, 977 F.3d 1039, 1046 (11th Cir. 2020). The Ninth Circuit has followed both the class certification approach and a more lenient version of the standing approach. *Compare B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957, 967 (9th Cir. 2019) (class certification approach), *with Armstrong v. Davis*, 275 F.3d 849, 867 (9th Cir. 2001) (lenient standing approach).

The Fifth Circuit in *Chavez* declined to adopt either approach. *Chavez*, 108 F.4th at 314. The court of appeals held that the named plaintiffs had standing for their own claims because the defendant's alleged mismanagement of the trusts devalued their benefits, and thus any doubts about their adequacy as class representatives could be resolved under Rule 23(a). *Id.* at 312. The court also held that the plaintiffs' alleged injuries were not "so unique" that they warranted "an isolated remedy that would be inappropriate if extended to other class members," nor did their injuries implicate "a significantly different set of concerns" from the other class members. According to the court, the plaintiffs therefore satisfied even the strictest formulations of the "standing approach." *Id.* at 312-13.

The *Chavez* defendant has filed a petition for certiorari seeking U.S. Supreme Court review (No. 24-426), and the petition remains pending.

III. The Seventh Circuit Joins the Third, Sixth, and Eighth Circuits, in Holding That Courts Need Personal Jurisdiction Over Each Plaintiff Joining a FLSA Collective Action

The Seventh Circuit in August reversed a district court's decision holding that a court overseeing a collective action under the Fair Labor Standards Act need not secure personal jurisdiction over each plaintiff's claim individually (whether representative or opt-in). *Luna Vanegas v. Signet Builders, Inc.*, 113 F.4th 718, 724 (7th Cir. 2024). In *Luna Vanegas*, the court of appeals applied the holding in *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. 255 (2017), which requires a "claim-by-claim personal jurisdiction analysis" in *mass* actions. *Id.* at 265. The Seventh Circuit explained that an FLSA collective action is like a mass action because it is a "consolidation of individual cases, brought by individual plaintiffs." *Luna Vanegas*, 113 F.4th at 725. As the court of appeal detailed, that distinction makes mass and FLSA collective actions, in which the individuals seeking recovery participate *as parties*, different from class actions under Rule 23, in which representative plaintiffs litigate the claims of absent, non-party class members. *Id.* at 724. The court thus joined the Third, Sixth, and Eighth Circuits in holding that FLSA collective actions, like mass actions, require courts to have personal jurisdiction over each plaintiff. *Id.* at 724.

The Seventh Circuit's decision adds to an existing, if lopsided, circuit split: only the First Circuit has declined to follow that line of decisions and instead has held that courts need not have

personal jurisdiction over every opt-in plaintiff in FLSA cases. *Waters v. Day & Zimmerman NPS, Inc.*, 23 F.4th 84, 93 (1st Cir. 2022).

IV. Multiple Circuits Address What Constitutes Reasonable Notice of and Assent to Online Arbitration Agreements

This past quarter, the First, Fourth, and Seventh Circuits all addressed what constitutes reasonable notice of and assent to online arbitration agreements, clarifying that litigants can be bound to arbitrate based on their actions in signing up for and logging into websites in view of conspicuous disclosures of terms requiring arbitration.

In *Toth v. Everly Well, Inc.*, — F.4th —, 2024 WL 428467 (1st Cir. Sept. 25, 2024), the First Circuit affirmed an order granting a motion to compel arbitration, reasoning that the account-creation page the plaintiff used in connection with an at-home lab test gave her proper notice of the contract and that the defendant secured meaningful assent by having the plaintiff click a checkbox indicating that she read and accepted certain terms and conditions before creating her account. *Id.* at *5-7. Similarly, in *Domer v. Menard, Inc.*, 116 F.4th 686 (7th Cir. 2024), the Seventh Circuit affirmed an order granting a motion to compel arbitration, holding that the website operator of an online paint company provided reasonably conspicuous notice of the terms to which the plaintiff would be bound when he ordered paint through the defendant's website. The court held that the plaintiff assented to the arbitration provision by clicking "submit order" because the reasonably conspicuous notice—advising consumers that "[b]y submitting [their] order [they] accept [the] Terms" that were hyperlinked for easy review—would have put a reasonable user on inquiry notice of the terms. *Id.* at 696-97. The Seventh Circuit also expressly rejected the plaintiff's argument that there had to be standalone "I agree" language to manifest assent. *Id.* at 700.

Conversely, in *Marshall v. Georgetown Memorial Hospital*, 112 F.4th 211 (4th Cir. 2024), the Fourth Circuit affirmed the denial of the defendant's motion to compel arbitration for failure to show formation of an agreement to arbitrate. There, the plaintiff filed a putative class action alleging disability discrimination after the defendant didn't hire her following a failed physical agility test. The court held that the defendant's website did not offer reasonable notice of the agreement to arbitrate for two main reasons: (1) although the plaintiff could have scrolled down to see the arbitration agreement at the bottom of the webpage, she was not required to do so to submit her employment application, and (2) even though the webpage contained an arbitration notice, it informed the plaintiff only that her application would be subject to South Carolina arbitration law, not that it was subject to specific contract terms that could be reviewed by scrolling down or clicking a hyperlink. *Id*. at 221. The Fourth Circuit also agreed with the district court that the plaintiff did not assent to arbitration because she only had to click a "Submit" button at the top of the webpage. As the court explained, "The word 'submit,' in its ordinary meaning," does not "manifest assent to an agreement or acceptance of contract terms," and there was no "notice near the relevant button to explain that by clicking 'submit,' the applicant is agreeing to any terms and conditions or that she would be bound to an arbitration agreement." *Id*. at 223.

The following Gibson Dunn lawyers contributed to this update: Kory Hines, Nasim Khansari, Milene Minassians, Matt Aidan Getz, 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)

Lauren R. Goldman – Co-Chair, Technology Litigation Practice Group, New York (+1 212.351.2375, lgoldman@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)

Michael Holecek – Los Angeles (+1 213.229.7018, mholecek@gibsondunn.com)

Lauren M. Blas – Los Angeles (+1 213.229.7503, lblas@gibsondunn.com)