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Recent Class Action Developments: Third Quarter 2023

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The third quarter of 2023 was relatively quiet, but we did see opinions addressing mootness, standing, and interpretations of Federal Rule 23(c)(4) and (f).

The Eleventh Circuit again says no to "picking off" representative plaintiffs

The decision in *Sos v. State Farm Mutual Automobile Insurance Co.*, No. 21-11769, 2023 WL 5608014 (11th Cir. Aug. 30, 2023), primarily addressed State Farm's unsuccessful attempt to pick off the class representatives by sending them checks to compensate them for their alleged damages. The Eleventh Circuit rejected this attempt, holding: (1) because the checks did not include prejudgment interest, they were not "complete relief" and therefore did not moot the class representatives' claims; and (2) even if they provided "complete relief," they would not moot the claims in any event because the claims were transitory.

The general rule is that a case must be dismissed as moot when no justiciable claims are before the district court. The *Sos* decision discussed two exceptions to the general rule: (1) "transitory claim," where the claim is so inherently transitory that the trial court will not have enough time to rule on a motion for class certification before the proposed representative's individual interest expires; and (2) "picking off," where payment or voluntary cessation of challenged conduct does not moot a case unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. As the panel explained, the two exceptions go hand-in-hand—when a defendant can pick off the named plaintiff's claims before the district court rules on class certification, those claims are transitory, and the putative class action remains live. *See* 2023 WL 5608014, at *7–14.

Having addressed the "pick off" issue, the Eleventh Circuit had little trouble affirming the district court's grant of class certification (*id.* at *14–18), its grant of summary judgment in favor of the class (*id.* at *18–19), and its award of prejudgment interest to the class. *Id.* at *19. But it reversed the award of attorney's fees to the class, finding the district court applied the wrong legal standard in determining the appropriate hourly rate and applying a multiplier. *Id.* at *20–23.

Judge Luck, dissenting, concluded that Sos had mooted his claims by his own actions in pressing for summary judgment on his individual claims before class certification and that the "narrow mootness exceptions do not apply here." *Id.* at *23–29 (Luck, J., dissenting).

The Fifth and Eleventh Circuits address standing

As reported last quarter, there is a circuit split as to whether the issue of standing relative to unnamed class members should be decided at the beginning of the case or is an issue of commonality or typicality that should be decided on a motion for class certification. The Fifth Circuit addressed this issue last quarter in *Angell v. Geiko Advantage Ins. Co.*, 67 F.4th 727 (5th Cir. 2023), but declined to adopt a specific

approach because the representative plaintiffs there satisfied both approaches.

In *Chavez v. Plan Benefit Services, Inc.*, 77 F.4th 370 (5th Cir. 2023), the Fifth Circuit again declined to adopt one of the two approaches, reaching the same result as in *Angell*.

Meanwhile, in *Green-Cooper v. Brinker Int'l,* 73 F.4th 883 (11th Cir. 2023), the Eleventh Circuit confirmed its position that divergences between the injuries of the representative plaintiff and absent class members should be addressed at certification. The *Green-Cooper* case involved a data breach at Chili's restaurants that resulted in the theft of the class members' credit card information and its posting for sale on the dark web. The panel confirmed that only the named plaintiffs had to show Article III standing and that the plaintiffs had sufficiently alleged a concrete injury by alleging that the hackers "took these individuals' data and posted it on" the dark web. *Id.* at 889. In conducting its "rigorous" Rule 23 analysis, however, the panel relied on interrogatory responses and other evidence to find that, contrary to the plaintiffs' allegations, two of the three named plaintiffs faced a "fatal causation issue" that negated their standing because they visited the Chili's restaurant outside the relevant time period, meaning their data was not compromised. *Id.* at 890–91. Moreover, the sole remaining plaintiff lacked standing to bring California state law claims, and thus the "California class cannot survive." *Id.* at 893.

While the majority affirmed certification of the remaining class claims, Judge Branch specially concurred in part and dissented in part, disagreeing with the majority that the plaintiffs had presented an appropriate class damages methodology. *Id.* at *894–900 (Branch, J., specially concurring in part and dissenting in part).

The Third and D.C. Circuits address specific procedural issues under Rule 23

In *Wolff v. Aetna Life Insurance Co.*, 77 F.4th 164 (3d Cir. 2023), the Third Circuit clarified that a modified class certification order only resets the 14-day time period for seeking review under Rule 23(f) where the modification materially alters the class certification order. Otherwise, the time starts running upon entry of the original order. *Id.* at 171–73. Although Aetna filed its Rule 23(b) petition within 14 days of the district court's denial of a motion for reconsideration, the district court did not materially modify the original certification order, and thus Aetna's petition was dismissed as untimely. *Id.* at 173–74.

Finally, in *Harris v. Medical Transport Management, Inc.*, 77 F.4th 746 (D.C. Cir. 2023), the D.C. Circuit confirmed that a plaintiff seeking to certify an issue class under Rule 23(c)(4) must still satisfy the Rule 23(a) and (b) requirements for class certification and the obligation to give notice. Thus, a district court considering issue certification must still undertake a rigorous analysis to ensure that the requirements of Rule 23(a) and one of the subdivisions of Rule 23(b) have been met. *Id.* at 757–59. If an issue class will be certified under subdivision (b)(3), moreover, an appropriate notice plan must be presented. *Id.* at 760. The named plaintiff in *Harris* sought issue certification under Rule 23(b)(3) but the district court undertook no predominance or superiority analysis and did not discuss notice. Accordingly, the D.C. Circuit remanded. *Id.* at 763–64. *See also D.C. Circuit: issue class must still meet all Rule 23 requirements, including showing that resolution of the certified issues will enhance resolution of the entire litigation* (Sep. 29, 2023).