The Consumer Finance Podcast: Year in Review and a Look Ahead: Unraveling the Threads of Class Action Litigation
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Chris Willis:

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper's Consumer Financial Services Regulatory Practice. Today, we're going to be giving you another in our series of the Year in Review and Look Ahead, this time talking about developments in consumer finance class action litigation. Before we jump into that topic, let me remind you to visit and subscribe to our blogs, ConsumerFinancialServicesLawMonitor.com and TroutmanPepperFinancialServices.com. Don't forget about our other podcasts. We have lots of them. We have the *FCRA Focus,* all about credit reporting. We have *Unauthorized Access*, our privacy and data security podcast. *The Crypto Exchange*, about all things crypto, and our newest podcast, *Payments Pros*, all about the payments industry. All of those are available on all popular podcast platforms.

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Now today, as I said, we're going to be talking about developments in 2023 and a look ahead for consumer finance class action litigation, which is a major part of our industry and a major part of our practice here at Troutman Pepper. Joining me to share his experience and insights is my partner, Tim St. George, who's a key member of our consumer financial services litigation team. Tim, thanks for being on the podcast to share this with us today.

Tim St. George:

Sure, my pleasure. Thanks for having me, Chris.

Chris Willis:

I mean, Tim, you're in these class actions all the time. So you're one of the perfect people on our team to sort of tell the audience what's going on and what we might expect in the year

ahead on some of the key issues that affect class action litigation. Let's just start running through some of the areas where we had developments that are worth noting from last year.

There were a number of decisions about sort of the ever-present sort of ethical issues associated with class actions in 2023. Why don't you start by talking to the audience about some of those?

Tim St. George:

Sure. Well, in class actions, of course, you are representing a cohort of individuals that are not present before the court. So you have one representative, or more, and then you have one set of counsel, or more, that are representing the named parties. But at all times, sort of the interest of this other unnamed putative group of people is lurking, and the courts protect the interests of those people.

We had a couple of decisions over the past year that I thought were pretty interesting from an ethics perspective and also from an attorney-client privilege perspective. So, we have this ongoing debate in class action arena over service awards. Service awards are essentially what are routinely paid to the named class representatives at the end of a case, usually as a byproduct of settlement, where the class representative will also share in whatever award is being presented to the class but will separately get their own monetary payment to essentially thank them for their service to the class, which is why we get the name service awards. The thought process being those people are the ones who took the time and effort to litigate the matter, sit for a deposition, et cetera. So they deserve some extra compensation.

Service awards have been under attack. About four years ago, the Eleventh Circuit really led the charge in a case called *Johnson*, holding that service awards were actually prohibited under two 19th-century Supreme Court cases, a case called *Trustees v. Greenough* and *Central Railroad and Banking Co. v. Pettus*. Basically that there wasn't an authorized mechanism for an award separately made to the class representatives under Rule 23. This was contrary to long-standing jurisprudence. Some courts have glommed on to this, and others have continued the practice of awarding service awards.

We had some authority from the Second Circuit this year in particular addressing service awards, where the Second Circuit weighed in and said that service awards are likely impermissible under Supreme Court precedent. But the Second Circuit also held that service awards in and of themselves were not sufficient to create a conflict of interest between the class representatives and the putative class members. So there is this ongoing debate which the Second Circuit didn't resolve definitively in the Second Circuit which persists nationwide over whether the awards are available in the first instance.

Assuming they are available, the Second Circuit at least held that they don't create a sufficient wedge between the class representative and the class to where you could claim that there's been collusion or that the class representative is an inadequate representative. Service awards in and of themselves are not regarded as collusive or creating the type of conflict that would cause the court to reject a settlement, although, again, their propriety is a whole separate issue.

Whether or not service awards are permissible and in what amount and whether they create a conflict, that's an issue that continues to be litigated on a circuit-by-circuit basis. It'll be very interesting to see where that ends up and if the Supreme Court ever takes it back up. Obviously, on a case-by-case basis, it's not the most significant issue in the world. Usually, we're talking about a few thousand dollars. But, of course, nationally, in the aggregate, the awards can get very large. They're a very important part of class settlements and, frankly, I think where the plaintiff's bar are able to convince their clients to participate in class settlements largely due to the existence of service awards.

Chris Willis:

Got it. Well, it also seems like another one of those sorts of age-old controversies in class actions is how to calculate the plaintiffs' lawyers' attorneys' fees, when either they prevail or they achieve a settlement for the class. Has there been any development in that regard this year?

Tim St. George:

Yes. That's sort of the second consideration in a class settlement or even in litigated judgments is how do the attorneys get paid. Obviously, it's well-accepted that under Rule 23, even in cases where there isn't a fee-shifting mechanism, that if a pool of money is established for the benefit of the class, the Rule 23 will allow the plaintiff's lawyers to share in that pool of money in a reasonable amount.

There's generally two ways that that reasonable amount has been calculated. The first is a lodestar method. The lodestar method is simply tell me your billable hours. Tell me your reasonable hourly rates that you spent working on the case. We'll add those up. That's your lodestar. That's what you can share in. You get your amount worked times reasonable hourly rates, and you can share in that percentage of the fund and in that amount.

The other way and perhaps the more common way of attorneys getting paid, particularly in the settlement context, is what's called a percentage of the fund basis. So there's a percentage that's available to the plaintiffs' lawyers off of the settlement fund. That's usually an amount, the same types of amounts you would generally see validated in contingent fee arrangements. Say somewhere between 25 to 40 percent at the extreme outset. That generally flexes with the size of the fund.

So-called mega fund settlements, like really large settlement amounts, there's more scrutiny drawn to a percentage of the fund award, simply because a percentage of a very large fund could be seeing as have the possibility of a windfall. Even when a percentage of the fund award is allowed, you generally have what's called a lodestar cross-check, which means the court will make sure that the percentage recovery is not wildly out of whack with what the lodestar ended up.

Generally, you'll see what's called a multiplier allowed. Maybe you can get two, three, four times your lodestar in a percentage of the fund. Of course, it varies by circuit. It varies by court. But that can be deemed reasonable, as long as the lodestar cross-check keeps you within a low single-digit multiplier. Then you should be good to go. So you continue to have courts however

grapple with these concepts and making sure that the class is protected and that they're sharing in the majority of the award, while still making sure that the lawyers who have taken the time to litigate the case do get paid in one method or the other.

We do have at least one decision from the Tenth Circuit this past year, where just reiterating the concept, for instance, that courts can award fees on a percentage of the fund basis. Again, that's extremely common. But because that's not necessarily tethered to the work performed, it's been subject to attack. The Tenth Circuit affirms that that concept is ready. It's available, subject to a lodestar cross-check, subject to these mega fund restrictions that I've mentioned. But it remains a viable way for a plaintiffs' attorneys to get paid coming out of a settlement or a verdict.

Chris Willis:

Thanks. Another interesting sort of somewhat ethical issue is what's the relationship between plaintiffs' counsel and the members of an uncertified class? Because if there's communications there, the defendants, of course, want to get discovery of what those communications are because, hey, those are nonparties to the class who the plaintiffs' lawyer doesn't represent yet until the class is certified. My view of that isn't necessarily the view that courts always take. What development was there in that regard this year?

Tim St. George:

Yes, absolutely. Whether absent class members can be contacted and how they can be contacted and by whom they can be contacted, these are all issues that crop up all the time. There's all sorts of privilege issues and disclosure issues and privacy issues that pop up. Courts are really protective of absent class members and making sure that they're not being unduly influenced, or they're not being harassed.

These issues cut both ways. Sometimes, the defendant has an interest in talking to absent class members. Sometimes, a plaintiff does. So you really need to be cognizant of kind of the ethical pitfalls that can befall you if you are unilaterally contacting absent class members. Of course, all that is in addition to what a protective order might allow or not allow in the context of a case and whether there are separate court orders that might restrict communication with class members.

Assuming that communication occurs, there's a separate question. Is it privileged? Typically, we would regard a communication with a third party in the middle of litigation and is either not privileged. Or if nothing else, subject to a work product privilege, assuming that the communication was made in confidence and expecting to remain confidential.

But we did have one interesting development from the Northern District of West Virginia this past year, where a district court in West Virginia did rule that even the attorney-client privilege attached to communications between putative class members and class counsel prior to class certification. It essentially held that there was a sufficient attorney-client relationship to extend an attorney-client privilege in that context. Of course, that privilege then shielded the communications from disclosure, assuming that they were properly logged.

The concept of being able to take discovery of these communications is also up in the air. I certainly wouldn't regard that decision from West Virginia as the norm, but it gives further support to the concept that although there's not technically an attorney-client relationship between those absent class members and putative class counsel at that point that the attorney-client privilege can still protect those communications.

Again, just something to be aware of and explore in your particular district if you're thinking about communicating with absent class members or you're aware of other communications that you might want to take discovery of.

Chris Willis:

Got it. Now, moving beyond the sort of ethical issues we've been talking about thus far, it seems like for years there's been this debate among federal courts about whether ascertainability is a requirement for class certification, the idea that you have to be able to identify the members of the class with some relatively easy way of doing so. That battle, I assume, continues to rage on. What's happened in that arena this year?

Tim St. George:

Yes. It absolutely does. Ascertainability is the concept that there's an implicit element and kind of threshold element of Rule 23 that requires the class not to only be numerous and common and have common issues predominate and the class rep be typical and adequate. But that the class definition in and of itself needs to be ascertainable. So it needs to be the product of objective criteria, and there needs to be an administratively feasible way to determine the identity of class members from the records that are held by the defendant in the case.

You can think of it as really a data-driven analysis, frankly, that there's an objective and viable way to go into the records held by the defendant and determine based on the criteria advanced you're in and you're out. So that's the concept of ascertainability. Because it's not specifically baked into Rule 23, some courts have held that there is no threshold requirement of ascertainability. That we stick to the Rule 23 analysis and that's what Congress has mandated.

The majority of courts have held that there is this implicit requirement that the class be ascertainable, and that sort of supervenes the Rule 23 requirements. I will say, even in the jurisdictions where ascertainability is not a standalone inquiry, most courts in those jurisdictions might graft it on to the superiority requirements of Rule 23(b)(3) that if there is not a superior way to determine class identities in a way that's more efficient, then individual litigation and the class actions fail. But if you have it as a freestanding element that most circuits have recognized, we think that it has more teeth.

The Third Circuit, again, is a circuit that has adopted in principle the concept of ascertainability. So there was a case in the Third Circuit this year that really just took on the ascertainability standard and how much teeth does it actually have. The Third Circuit, again, reaffirmed its standard that it is a valid element and that it does have teeth. It really adopted kind of the heightened administrative feasibility standard that's in play in the First and Fourth Circuits specifically, where ascertainability is itself a fairly powerful sword against class certification. The Third Circuit made clear that not only is there that standard of administrative feasibility but that

the standard has teeth and that it does matter and that they're not going to adopt some anemic standard of ascertainability. Now, of course, how that plays out in any given case depends on the specific facts. But not only does it exist in the Third Circuit, the Third Circuit affirmed it matters.

Chris Willis:

Got it. Well, and one of the other issues that's all the rage to litigate in federal court these days is the issue of standing. After a couple of Supreme Court cases like *Ramirez*, for example, that have put what seems like heightened requirements on the injury and fact aspect of standing, there's regular litigation now in consumer finance cases about whether the plaintiff has standing or not.

In the class context, there's an additional wrinkle about when should the court look at whether the absent class members may have standing or not. What's going on in that regard, that aspect of sort of the *Ramirez*-related standing litigation?

Tim St. George:

Yes. *Ramirez* itself and its meaning continues to be the subject of dozens and dozens of decisions every year. Because it's not that old, it continues to percolate up to the court of appeals level, and we're seeing a fractured analysis on a circuit-by-circuit basis as to what *Ramirez* means and both for things like informational injury but also sort of more traditional types of monetary injuries and what really is the standard for Article III standing and injunctive relief. It's all over the map still, and it continues to be litigated on a case-by-case basis.

Another interesting thing that the Supreme Court did not resolve in *Ramirez* and explicitly so is when the standing analysis has to be conducted. Recall that in *Ramirez*, the case had gone all the way through trial and a judgment. So the defendant in that case had actually lodged a standing attack in a post-judgment posture, where there was no question that by the time that a class member is participating in a judgment, that class member has to have standing.

But the open question of when that issue needs to be decided in a prejudgment posture is one that the Supreme Court explicitly punted on in a footnote in *Ramirez*. So you've got this ongoing debate over when someone moves for class certification, is that the time when all of the class members have to have standing? Or at that point in time, do only named class members have to have standing subject to further revisiting of the issue on behalf of the class after the Rule 23 issues are decided?

That procedural issue continues to play out. We saw some additional approaches on it this year. There were a couple interesting cases out of the Fifth Circuit where the Fifth Circuit described this current circuit split in great detail. It noted the existence of the split in terms of this timing issue, but it declined to adopt a specific approach because it found in both cases that the representative plaintiffs there had actually satisfied both approaches. So whether standing was assessed at that point in time or whether it was deferred later was academic because the Fifth Circuit held that standing had been established sufficiently on behalf of the proposed class as well, even at the class certification stage.

You also had some interesting decisions out of the 11th Circuit with the 11th Circuit weighing in on the side of the ledger that this really is something that should be taken up at the class certification stage, that the differences between the injuries of the class members and the class representative should be assessed at certification. That was in the data breach context. Again, the court held that at that point in time, only the name of plaintiffs had to show Article III standing and that the Article III standing analysis could be assessed later on for the putative class.

They took it up at the class certification stage, but they didn't really reach the result that was desired by the defense bar and that other courts have held, which is that even if we're going to address it at the class certification stage, we really need to assure ourselves that consistent with Rule 23, standing can be assessed later on.

Now, recall and remember that a standing is not a merits-based determination. It always can be a double-edged sword when you make a standing argument, whether or not you simply can have a refiled case in state court. But it is an important argument to make it the Rule 23 stage, and you just need to be aware of where you are in the current state of the law in that circuit as to whether absent class member standing is a live issue at the Rule 23 stage or later.

Chris Willis:

Got it. Thanks for that. Let's turn to another issue that I feel like has been evolving ever since I've been practicing law, which is the idea of judicial scrutiny of class action settlements. I feel like there's been sort of a trend of increased judicial scrutiny of settlements dating back all the way to like the coupon settlement provisions in the Class Action Fairness Act from the nineties. So, I imagine that's been an area of continued activity in the federal courts this past year. What have you seen in that regard, Tim?

Tim St. George:

Yes. So, Rule 23(e) requires the district courts evaluate whether a settlement is “fair, reasonable, and adequate.” So, district courts and circuit courts have a required policing role under Rule 23. Again, that's because you're securing releases from absent class members. You're affecting the rights of absent class members, and there's the potential for collusion or a conflict of interest. Courts really take that seriously and are required to review settlement proposals for adequacy and reasonableness.

We've seen a lot of developments in the Ninth Circuit. The Ninth Circuit is out in front on this issue nationally and really requires courts to take a very hard look at class settlements. They also take a look at individual settlements of putative class actions. But for proposed class settlements, the Ninth Circuit is probably the most rigorous circuit that there is in terms of really scrutinizing the awards and the relief that's going to class members.

That's not to say, however, that the Ninth Circuit isn't going to allow class settlements. You had one case out of the Ninth Circuit this year that I thought was fairly interesting, where the court actually affirmed a fee award that was 30 times larger than the actual amount that was paid out to class members. In this case, you had the fee award that was supported by the work that was put into the case under the lodestar method that I talked about earlier. Courts will award large

fee awards, even when the ultimate recovery can be relatively small, when the recovery is still far-reaching, and when the recovery is the byproduct of a heavily litigated case.

It's not to say that fee awards necessarily hinge on the size of the recovery to the class. Again, there is going to be that lodestar cross-check. If the fee award is separately negotiated and there's a sufficient lodestar cross-check, the Ninth Circuit is saying that that can be acceptable. But, again, I thought that was significant because of the exponentially larger fee award when compared to the amount in recovery, which is why a lot of people think that class action settlements often aren't worth the paper that they're printed on, Chris, your reference to coupon settlements and the like.

Then we've got some other courts that are scrutinizing settlement through the lens of Article III standing. Again, recall that a settlement does result in a final judgment. So you're much closer to the *Ramirez* stage, where standing has to be assured because at the end of the day, coming out of a class settlement, there will be a final judgment entered. That final judgment will bind all of the class members who presumably will also release their claims. The court is assuming jurisdiction over all of those claims and all of their releases at the final judgment stage.

So there does have to be standing, and you got the Eleventh Circuit weighing in and saying that at the class settlement stage, all of the people who are participating in that settlement have to have standing to get relief and to get a final judgment from an Article III federal district court. In that case, the Eleventh Circuit actually remanded to the district court and instructed the district court to only account for relief that the name of plaintiffs had standing to pursue and that they could only account for that Article III relief when assessing the overall fairness of any settlement.

I thought that that was interesting because not only is it the Eleventh Circuit affirming that at the settlement stage, you have to have Article III standing. But the Eleventh Circuit is also saying that only relief that's cognizable under Article III can serve as the basis for a fair, reasonable, and adequate settlement under Rule 23(e).

Chris Willis:

That is very interesting. Well, there's one more issue I'd like to ask you about, Tim, and it stems from a really interesting Supreme Court decision from a few years back about personal jurisdiction. Of course, normally, when we think about personal jurisdiction, we think about the defendant and the defendant's minimum context with the forum. But the case I'm talking about had to do with whether the plaintiff's claims were sufficiently related to the forum, such that it was fair to have litigation of them in the forum state.

That case was not a class action, as I recall, and I think there's been a lot of discussion among the federal courts about how, if at all, that principle applies in the context of class actions. Can you tell the audience like what's going on with that issue?

Tim St. George:

Yes, yes. *Bristol-Myers Squibb*, to me, is an issue that I find maybe as a class action wonk to be very, very interesting, and it's unfolded in a way that I would have not have predicted, frankly. I

was wrong on the impact that *Bristol-Myers Squibb* would have nationally. I thought that *Bristol-Myers Squibb* would be uniformly applied to limit class actions to individuals within the forum state that could have personal jurisdiction over the defendant.

So what I thought *Bristol-Myers Squibb* was going to do was going to say, if you're going to advance a nationwide class action, you have to do it essentially in the location where the defendant has its principal place of business or where it's incorporated or organized because those are generally the two locations where general personal jurisdiction would be available against the defendant. Meaning anybody can come in and sue the defendant in those states for any reason. There's not going to be a jurisdictional defense there.

You oftentimes will see putative nationwide class actions filed by a plaintiff in the plaintiff's home state, and that home state being not where the defendant resides in any way. So, I thought *Bristol-Myers Squibb* was going to rein that in. It would say, if you're going to file a class action based on your personal jurisdiction in your state, that class action definition has to be limited to individuals that are also within that forum state, essentially kind of a checkerboard 50-state class action.

What I thought that would do is I thought that was going to force a lot more class actions to be filed in the states, the home states of the defendants. So, you would essentially consolidate class action practice in the jurisdictions where the defendants reside. But I haven't been right. So far, most of the court of appeals that have addressed the issue, and it's not every court of appeals, have held that *Bristol-Myers Squibb*, which, Chris, as you noted, was a decision that actually dealt with a mass action and not a class action. Those principles do not automatically apply to the class action context. So you've got the Sixth Circuit and the Seventh Circuit holding that *Bristol-Myers Squibb* and its personal jurisdiction limitations do not apply in the class action context.

You've also had some other courts weigh in but only from a timing perspective. So there's also this issue of when you have to make a *Bristol-Myers Squibb* personal jurisdiction argument because, typically, if you don't assert personal jurisdiction out of the gate, it's waived. But in a class action context, there's no jurisdictional argument to make against the proposed class until you reach the certification stage, until the plaintiffs' counsel and the plaintiff try affirmatively to bring in other people to the case where a jurisdictional defense would be live.

In this way, sense at least, you have had some defendant-friendly moves. The Fifth and the Ninth Circuit at least have affirms that this *Bristol-Myers Squibb* defense that I have envisioned isn't a use or lose it defense at the pleading stage, that it's not ripe essentially until you reach the class certification stage. Now, that's not to say that you shouldn't consider raising it on the front end, or you shouldn't at least put it as an affirmative defense in your answer. Those are all good things to think about. But at least the Fifth and Ninth Circuit rejected assertions of waiver of the defense when it wasn't raised at the initial pleading stage, where all you had at that point in time was a class representative that had not yet made any effort to join other absent class members to the case.

You've still got a couple district court decisions that have gone the way that I would have predicted, which actually have a more literal reading of *Bristol-Myers Squibb* and have applied them in the class action context. But generally, the issue has not gained a ton of traction at the

circuit court or district court level yet. But ultimately, the Supreme Court hasn't taken it up. So there was a petition for cert this year before the Supreme Court that would have specifically tendered this issue to the court. But the court denied cert. They're going to let this issue continue to percolate up.

Now, ultimately, will we see this back before the Supreme Court? I wouldn't be surprised, but we're probably going to going to need to see more of a circuit split than we're seeing now before the Supreme Court decides to weigh in. So, stay tuned. Keep the argument in your back pocket. Keep advancing the argument, but know that at this point in time, there are some headwinds to defendants that want to make that argument and especially in the Seventh and Sixth Circuits where this court of appeals have at least rejected it outright.

Chris Willis:

Well, Tim, this has been a great recap of kind of the big issues in class action litigation that are kind of percolating in the federal courts. So I really appreciate you coming on the show and sharing your knowledge and insights with our audience. Of course, thanks to our audience for listening in to today's episode as well. Don't forget to visit and subscribe to our blogs, ConsumerFinancialServicesLawMonitor.com and TroutmanPepperFinancialServices.com.

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