THE BRIEF

FINANCIAL SERVICES LITIGATION QUARTERLY

SUMMER 2021

HUNTON
ANDREWS KURTH

TABLE OF CONTENTS

DEVELOPING ISSUES IN CLASS ACTION JURISPRUDENCE

In the past decade, the Supreme Court has decided a number of cases that have clarified important issues concerning when and how Rule 23 class actions should be certified.

In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), the Court observed that the "common questions" required under Rule 23(a)(3) must be ones whose answers "resolve an issue that is central to the validity of each one of the claims in one stroke." In *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013), the Court clarified the requirements for predominance, holding that damages must be "capable of measurement on a classwide basis," and that courts must perform a "rigorous analysis" to ensure that that requirement is satisfied before certifying a Rule 23(b)(3) class.

But there are a number of important class certification issues that have not yet been resolved by the Supreme Court. We summarize below five of the most salient issues:

WHEN MUST ABSENT CLASS MEMBERS SHOW ARTICLE III STANDING?

It is well established that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, J., concurring). What is less certain is whether federal courts may certify a class before it has been shown that all its members have been injured. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 n.4 (2021) (declining to address question of whether absent class members must demonstrate standing before certification).

Courts in the Third, Seventh, Ninth, and Tenth Circuits have all held that a class can be certified even if absent members have not been injured. *See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 306-07 (3d Cir. 1998); *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 676-78 (7th Cir. 2009); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020-21 (9th Cir. 2011); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1197-98 (10th Cir. 2010). Other circuits, however, have held that, while class members need not submit evidence of standing, "no class may be certified, that contains members lacking Article III standing. The class must therefore be defined in such a way that anyone within it would have standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *accord Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010). The Eleventh Circuit has charted a middle course, allowing that a court might certify a class that includes "some" putative members who lack standing and

"deal with the problem later on in the proceeding,…before it awarded any relief." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019); *see id.* ("[T]here is a meaningful difference between a class with a few members who might not have suffered an injury traceable to the defendants and a class with potentially many more, even a majority, who do not have Article III standing.").

While courts on each side of this divide agree that each class member must have standing in order to recover, they disagree as to *when* absent class members' standing must be shown. That disagreement is likely to have a significant effect on class-action litigation. If, for example, plaintiffs must establish the standing of all absent class members before certification, the difficulty of certifying a class will likely increase significantly, and defendants will have an additional argument for opposing certification (or at least restricting the size of any certified class). If proof of standing can be deferred until after a class is certified, however, plaintiffs appear to have the edge, for once certification is granted, a defendant may find it impossible to resist settlement, rather than risk being found liable to an entire class – notwithstanding the potential for challenging the standing of individual class members.

MUST EXPERT EVIDENCE IN SUPPORT OF CERTIFICATION BE ADMISSIBLE?

Comcast established that a party seeking to certify a class must show at least one provision in Rule 23(b) is satisfied "through evidentiary proof." But circuits are divided as to whether the "evidentiary proof" required for class certification is evidence admissible under the Federal Rules of Evidence. This division largely concerns the use of expert testimony and the standard for admissibility under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

The Sixth, Eighth, and Ninth Circuits have held that class certification may be based on expert evidence that has not yet been found to be admissible. *E.g., In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 611-13 (8th Cir. 2011) (rejecting requirement that expert testimony be found admissible before considering whether it supports class certification, noting the "tentative," "preliminary," and "limited" scope of inquiry on class certification). Instead, these courts have applied a less stringent standard for allowing expert testimony at the class certification stage, such as a "tailored" *Daubert* analysis in which the court considers the reliability of the expert opinions "in light of the available evidence." *Id.* at 612; *see also Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018) (court should consider *Daubert* factors, to assess "ultimate admissibility" in light of "persuasiveness of the evidence presented").

In the Third, Fifth, Seventh, and Eleventh Circuits, however, expert testimony cannot be used to establish the requirements for class certification unless it clears the hurdle of admissibility. *E.g., Prantil v. Arkema Inc.*, 986 F.3d 570, 575 (5th Cir. 2021) ("[W]hen the cementing of relationships among proffered class members of liability or damages or both turns on scientific evidence should we insist that the metric of admissibility be the same for certification and trial. We answer that question in the affirmative.").

As with the question of standing for absent class members, the disagreement as to the admissibility of expert evidence concerns not *if*, but *when* such evidence must be found to be admissible. The answer to that question of timing is also likely to affect class-action litigation, for if plaintiffs have the burden of establishing admissibility before certification, defendants will have an additional arrow in their quiver of defenses against certification.

DOES *AMERICAN PIPE* TOLLING APPLY TO PLAINTIFFS WHO FILE INDIVIDUAL SUITS BEFORE CLASS CERTIFICATION IS DECIDED?

In *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), the Supreme Court held that when a class action is filed, the statute of limitations for the claims of all the purported class members is tolled until a decision on class certification is rendered.

While the rule appears simple, there are disagreements among the circuits about precisely how to apply it. The First and Sixth Circuits have held that if a plaintiff files her own lawsuit prior to a decision on class certification, she forfeits the benefit of any tolling at all. *See Wyser-Pratte Management Co. v. Telxon Corp.*, 413 F.3d 553, 568-69 (6th Cir. 2005); *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739 (1st Cir. 1983). As a consequence, an individual claim filed in those circuits before a class-certification decision may be time-barred but would not be time-barred if the plaintiff waited until after certification was denied. The Second, Third, Ninth, and Tenth Circuits have taken a contrary view,

holding that all class members get the benefit of *American Pipe* tolling, whether they file their individual claims before a decision on class certification or after it. *E.g.*, *Aly v. Valeant Pharms. Int'l Inc.*, 1 F.4th 168, 176 (3d Cir. 2021); *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1228 (10th Cir. 2008).

Underlying this split are two fundamentally different views of the purpose of *American Pipe* tolling. For those that apply the doctrine to every plaintiff (including those who bring their individual suits while a class action is pending), the primary purpose is "to protect class members from being forced to file individual suits in order to preserve their claims." *In re Worldcom Sec. Litig.*, 496 F.3d 245, 256 (2d Cir. 2007) (emphasis in original). For those that decline to extend it to plaintiffs who bring their own suits, the purpose of *American Pipe* tolling is principally a matter of efficiency, and the doctrine aims to prevent plaintiffs from racing to court to assert their individual claims in case class certification is denied. That purpose would be thwarted if it were applied to those who do not wait until a class-certification decision to file suit, which in turn would encourage the "multiplicity" of individual cases that, according to the court in *American Pipe*, Rule 23 was designed to prevent. Precisely how the clash between those competing views of the purpose of *American Pipe* tolling will be resolved is unclear and may ultimately require further guidance from the Supreme Court.

MUST THERE BE AN "ADMINISTRATIVELY FEASIBLE" METHOD OF DETERMINING CLASS MEMBERSHIP?

Another split among the circuits concerns whether, in addition to the requirements of Rule 23(a) and (b), named plaintiffs must also establish that there is an "administratively feasible" method of ascertaining the membership of a class as a condition of certification.

The First, Third, and Fourth Circuits treat administrative feasibility as a prerequisite to class certification. *E.g.*, *Byrd v. Aaron's, Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (requiring "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition" before certification); *see also Peters v. Aetna Inc.*, 2 F.4th 199, 241-42 (4th Cir. 2021) ("Rule 23 contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'"). These courts have characterized "administrative feasibility" in terms of whether class membership can be determined without engaging in "extensive and individualized fact-finding" or "numerous fact-intensive inquiries." *Id.* at 242; *Carrera v. Bayer Corp.*, 727 F.3d 300, 308 (3d Cir. 2013).

The Second, Sixth, Seventh, Eighth, Ninth, and the Eleventh Circuits, on the other hand, hold that, while a proposed class must be defined so that its membership is "capable of determination," "administrative

feasibility" – understood as a "convenient" way of determining class membership – "is not a requirement for certification under Rule 23." *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1303-04 (11th Cir. 2021); see also *In re Petrobras Sec. Litig.*, 862 F.3d 250, 268 (2d Cir. 2017) ("We conclude that an implied administrative feasibility requirement would be inconsistent with the careful balance struck in Rule 23, which directs courts to weigh the competing interests inherent in any class certification decision."). For these courts, the ease with which class membership can be determined is relevant to certification but only insofar as it is one factor among many that affects the manageability of the case as a class action under Rule 23(b)(3). *E.g.*, *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1127 (9th Cir. 2017).

The disagreement between those courts that require a plaintiff to show on class certification that class membership can be "readily" or "feasibly" identified and those that do not may have a significant effect on the prospects for some types of class actions. For instance, it may be very difficult for a plaintiff to satisfy an administrative feasibility requirement in cases involving low-cost consumer purchases, in which membership likely can be determined only if class members keep their receipts. The Supreme Court has declined to take up the question of ascertainability in recent cases, *e.g.*, *ConAgra Brands, Inc. v. Briseno*, 138 S. Ct. 313 (2017) (denying certiorari), and *Direct Digital, LLC v. Mullins*, 577 U.S. 1138 (2016) (same), which suggests that the current split is likely to continue for the foreseeable future.

MUST A COURT HAVE PERSONAL JURISDICTION OVER ABSENT CLASS MEMBERS?

In *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), the Supreme Court held that a California state court did not have specific jurisdiction over several out-of-state plaintiffs in a mass tort case who were not injured in California. As Justice Sotomayor noted in her dissent, the Court did not consider how its decision would apply to a class action in which absent class members were not injured in the forum state. *Id*. at 1789 n.4.

Several district courts subsequently did apply *Bristol-Myers* to class actions, striking from proposed classes absent class members over whom the court did not have personal jurisdiction. *See Am.'s Health & Res. Ctr., Ltd. v. Promologics, Inc.*, 2018 WL 3474444 (N.D. Ill. July 19, 2018) (collecting cases). The D.C., Sixth, and Seventh Circuits have pushed back on those decisions to uphold the "general consensus" that absent class members are for most purposes not considered "parties," which makes personal jurisdiction for absent class members irrelevant before the class is certified. *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 299 (D.C. Cir. 2020); *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 445 (7th Cir. 2020); *Lyngaas v. Curaden AG*, 992 F.3d 412, 433 (6th Cir. 2021).

But, while the tide is against the application of *Bristol-Myers* to class actions, its fate has yet to be conclusively resolved. Dissenters in both *Lyngaas* and *Molock* have raised serious questions as to whether that "general consensus" is consistent with due process for the defendant and the extent to which Rule 23's requirements are an "adequate substitute for normal principles of personal jurisdiction." *Molock*, 952 F.3d at 307-08 (Silberman, J., dissenting); *Lyngaas*, 992 F.3d at 438-41 (Thapar, J., dissenting).

At least one district court has agreed with those dissenters, holding in a thoughtful opinion that "the due process concerns recognized in *Bristol-Myers* and other Supreme Court precedent would foreclose a nationwide class action that is not limited to a nonresident defendant's conduct in the forum state." *Stacker v. Intellisource, LLC*, 2021 WL 2646444, at *8 (D. Kan. June 28, 2021). Such a result, of course, would not be an absolute barrier to nationwide class actions. It would, however, likely change where such cases are filed (i.e., in the defendant's own state) or encourage more statewide class actions, and so have a significance effect on the contours of class-action litigation generally.

SUPREME COURT CLARIFIES LITTLE ABOUT *SPOKEO* AND STANDING IN *TRANSUNION LLC V RAMIREZ*

The U.S. Supreme Court closed its 2020-21 term with a decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), a decision again addressing injury in fact as a predicate to Article III standing. The decision was expected to clarify the "concrete harm" test the Court announced in *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016). *Ramirez* does little to alter the landscape on standing, though it invites focus on when standing must be assessed in class actions and may help defendants opposing the certification of classes seeking redress for technical statutory violations.

The plaintiff in *Ramirez* applied for a car loan at a dealership. The dealer requested a credit report from TransUnion. The report flagged plaintiff as a possible match to a person on the Office of Foreign Asset Control's list of potential terrorists and other serious criminals. After plaintiff inquired with TransUnion about his report, TransUnion sent him a copy of his credit report, which omitted mention of the possible OFAC match but included a summary of his right to request corrections. TransUnion then sent a second letter that referred to the possible OFAC match but did not advise plaintiff of his right to request a correction.

Plaintiff alleged that TransUnion violated FCRA by failing to use reasonable procedures to ensure the accuracy of its credit files and by failing to include in its second mailing a summary of his right to dispute items in his file. Plaintiff brought his claims individually and on behalf of a class of persons that also had OFAC references in their credit files.

The Court held in *Spokeo* that a "bare procedural violation [of a statute], divorced from any concrete harm" was insufficient to satisfy the injury requirement for Article III standing. The decision in *Spokeo* left for another day what exactly constitutes a "concrete harm." In the five years since *Spokeo* was decided, lower

federal courts have struggled to implement its guidance on standing in a uniform and predictable manner. Some observers had expected a clarification in *Ramirez* that would help the lower courts resolve standing issues consistently.

The Court held in *Ramirez* that tangible harms, such as physical and monetary harms, readily qualify as concrete harms. The Court also held that intangible harms could be concrete, and thus suffice for standing purposes, if the injury had "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *Ramirez*, 141 S. Ct. at 2204.

For about 23 percent of the class, credit reports with the misleading OFAC information had been sent to third parties. The Court held that this group of class members had standing because providing misleading information was akin to defamation, a harm traditionally recognized as providing a basis for a lawsuit in an American court. But, for the other 77 percent of the class, the OFAC reports had not been provided to any third party. This group therefore lacked standing because their reports were not disclosed to third parties, so they suffered no harm that traditionally provided a basis for a lawsuit in the US.

The Court also held that the risk for the 77 percent group that the misleading information may be disclosed in the future was insufficient to confer standing because they suffered no injury from the risk itself. *Ramirez*, 141 S. Ct. at 2210-11. A risk of future harm, the Court held, only confers standing if "exposure to the risk of future harm itself causes a *separate* concrete harm," e.g., a cognizable emotional injury. *Id.* at 2211. The whole class further lacked standing as to the FCRA claim for failure to provide a summary of rights because there was no evidence that class members other than the named plaintiff even opened the communications, so there was no harm.

The Court's analysis in *Ramirez* broke little new ground with respect to discerning what statutory violations are not actionable in the federal courts because the harm resulting from them is not sufficiently concrete. In *Spokeo*, the Court suggested that the standing analysis should be rooted in an assessment of whether the alleged injury had a "close relationship" to a harm "traditionally" recognized as providing a basis for a lawsuit in English or American courts. *Spokeo*, 578 U.S. at 341. *Ramirez* largely reiterates the *Spokeo* holding and therefore seems unlikely to do much to curb the deluge of cases in the lower courts contesting the concreteness of statutory injuries. Continued uncertainty over standing may push claims for technical statutory violations from federal court into state courts, where standing requirements can be more lenient, though *Ramirez* does little to change the landscape and so seems unlikely itself to have a significant effect on where such cases are filed.

Ramirez leaves one question unresolved, though it is one with significant implications for financial services providers: when in a class action should standing be addressed? The Court specifically left this question unaddressed – "[w]e do not here address the distinct question whether every class member must demonstrate standing before a court certifies a class" (141 S. Ct. at 2208 n.4) – though it then cited to an Eleventh Circuit decision, *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259 (2019), where the court stated that absent class members' lack of standing "poses a powerful problem under Rule 23(b)(3)'s predominance factor." The *Ramirez* opinion then ends with this sentence: "On remand, the Ninth Circuit may consider in the first instance whether class certification is appropriate in light of our conclusion about standing." 141 S. Ct. at 2214.

When standing is assessed is an important issue for financial institutions, because requiring all or a majority of class members to show standing could be a significant hurdle for plaintiffs to clear at the class certification stage, whereas allowing standing to be determined after certification would allow plaintiffs to wield certification as leverage in settlement negotiations, even though some or even the majority of class members may lack standing. *Ramirez* provides an opening for defendants in class actions alleging technical statutory violations to push courts to resolve standing issues before certifying a class.

NOTEWORTHY

FLORIDA ENACTS "MINI-TCPA" TO APPLY TO TELEMARKETERS

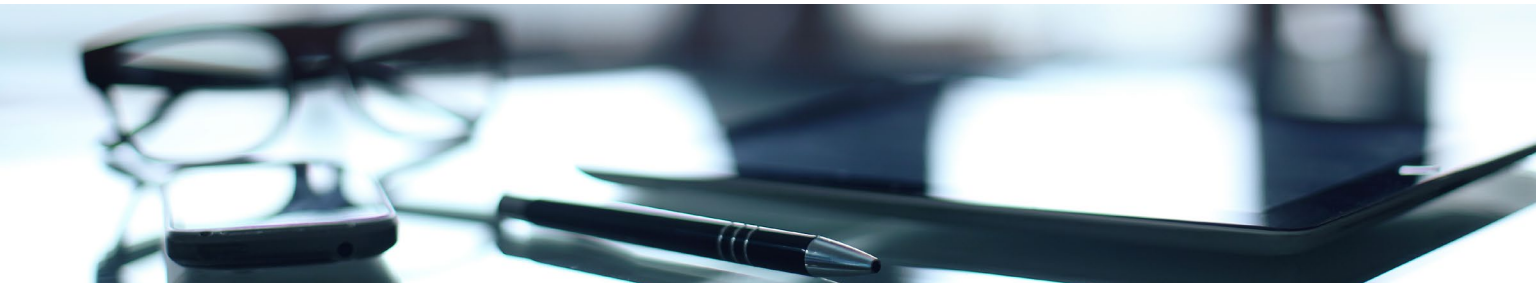
Since 1992, the Telephone Consumer Protection Act ("TCPA") has placed federal restrictions on the use of autodialers and pre-recorded messages. In its recent decision in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), the Supreme Court held that the TCPA's restrictions on the use of autodialers apply only to devices that have the capacity to store a telephone number using a random or sequential number generator or to produce a telephone number using a random or sequential number generator. As a result, those restrictions on the use of autodialers do not apply to devices that dial from lists of numbers, rather than employing a random or sequential number generator.

In the wake of *Duguid*, Florida has amended its Telemarketing Act to create its own "mini-TCPA" that restricts some uses of autodialers that now fall outside the scope of the TCPA. The amendment, which took effect on July 1, 2021, prohibits making "telephonic sales calls" that involve "an automated system for the selection or dialing of telephone numbers or the playing of a recorded message" when the call is made "without the prior express written consent of the called party." The statute which also specifies the disclosures that must be made to individuals before obtaining their written consent to be called with an autodialer, bars a party from requiring such consent as a condition of any purchase, restricts the time and number of telemarketing calls that can be made and makes the use of "spoofing" technology that conceals the identity of the caller from the recipient a misdemeanor.

Because the Florida statute applies to any "automated system for the selection or dialing of telephone numbers or the playing of a recorded message" and requires prior written consent, liability under Florida's mini-TCPA is potentially broader than liability under its federal analogue. At the same time, however, the Florida statute is limited to telemarketing calls and so would not apply to autodialers used by debt collectors and other businesses who use such devices to make non-telemarketing calls to their customers. Florida's version of the TCPA thus appears to balance a concern for limiting unsolicited sales calls against the legitimate interests of other businesses that need a cost-effective means of communicating with their customers and so it may provide a model for similar state statutes.

EIGHTH CIRCUIT HOLDS "BOILERPLATE" DISCLOSURES DO NOT SHOW COMMUNICATIONS ARE "IN CONNECTION WITH THE COLLECTION OF A DEBT" FOR PURPOSES OF THE FDCPA

The Fair Debt Collection Practices Act ("FDCPA") bars debt collectors from using any "false, deceptive, or misleading representation" "in connection with the collection of any debt." 15 U.S.C. § 1692e. In *Heinz v. Carrington Mortg. Servs., LLC*, 3 F.4th 1107 (8th Cir. 2021), the Eighth Circuit joined the Sixth and Seventh Circuits in holding that some communications from debt collectors should not be treated as having been made "in connection with the collection of any debt" – and so not be subject to liability under the FDCPA – even though they expressly state that they are for the purpose of collecting a debt.



Heinz arose from a debtor's claim that the servicer of his mortgage loan made false representations to him about the state of his loss-mitigation assistance application and the foreclosure sale of his property. The letters at issue told the debtor that his loss-mitigation assistance application had been canceled because he had not provided all of the required information but said nothing about the loan (e.g., amount owed or in arrears) beyond the property address and loan number. The district court granted the servicer summary judgment, holding that under the "animating purpose" test, which holds that a communication is in connection with the collection of a debt only if its purpose is to "induce payment by the debtor," the servicer's communications were not made in connection with the collection of a debt.

On appeal, the debtor argued that the Supreme Court's recent statement in *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1036 (2019), that "foreclosure is a means of collecting a debt" rendered all of the servicer's letters regarding the foreclosure "attempts to collect a debt." The debtor also noted that each letter contained a "mini-Miranda" statement that "[t]his communication is from a debt collector and it is for the purpose of collecting a debt and any information obtained will be used for that purpose."

The Eighth Circuit distinguished *Obduskey*, holding that that case was relevant only for determining if a party was a "debt collector" for purposes of the FDCPA but not for deciding if a communication was an attempt to collect a debt. It acknowledged, however, that the inclusion of the "mini-Miranda" was "[m]ore troublesome" for the servicer's claim that those letters were actually not for the purpose of collecting a debt. Nonetheless, it held that such "boilerplate" disclosures are insufficient to show that the letters were in connection with the collection of a debt and that a court must instead look to the *substance* of the letters to decide if the "animating purpose" was "to induce payment by the debtor." The court thus held that "a routine disclosure statement that is at odds with the remainder of the letter does not turn the communication into something that it is not—in this case, a communication made in connection with the collection of a debt for the purposes of the FDCPA," and affirmed summary judgment for the servicer.

ELEVENTH CIRCUIT HOLDS THAT STEPS TO MITIGATE EFFECTS OF A DATA BREACH ARE SUFFICIENT "INJURY IN FACT" TO BESTOW STANDING

Data breaches pose an increasingly serious threat to the privacy and finances of consumers. One of the principal challenges for consumers whose data has been compromised by such a breach and who seek a remedy in federal court is to establish that they have suffered a concrete injury, as required to demonstrate Article III standing. The Eleventh Circuit's recent decision in *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247 (11th Cir. 2021), may help consumers in that regard but at the same time highlights the uncertainty concerning what constitutes a concrete injury.

The case arose from a class-action settlement of claims against Equifax following a data breach involving the social security numbers, names, addresses, and birth dates of almost 150 million individuals. Several objections were raised against the settlement and dismissed by the district court, including the claim that the plaintiffs lacked Article III standing. On appeal, the Eleventh Circuit held that the plaintiffs "have easily shown an injury in fact." That was clearly true for those plaintiffs whose data had *actually* resulted in identity theft, since they had to "spen[d] time, money, and effort trying to mitigate their injuries, including disputing fraudulent activity, filing police reports, and otherwise dealing with identity theft." *Id.* at 1263. But the court also held

that other plaintiffs who were not victims of actual identity theft had also suffered an injury-in-fact by virtue of the risk of identity theft and because those plaintiffs had suffered "mitigation injuries" by having to "spen[d] time, money, and effort mitigating the risk of identity theft." *Id*.

While the court's decision should be reassuring to consumers who seek relief in federal court for the risk of injury posed by large data breaches, there remain serious questions as to precisely which injuries are sufficient to create Article III standing. For instance, while the court held that "mitigation injuries" by those who were not actually harmed by identity theft was sufficient for standing, that decision is in apparent conflict with another of its decisions earlier this year, *Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332, 1335 (11th Cir. 2021), in which it held that the plaintiff's "efforts to mitigate the risk of future identity theft" did not comprise "a present, concrete injury sufficient to confer standing." The court in *In re Equifax* cited *Tsao* but made no attempt to reconcile the apparent tension with its earlier decision. In so doing, it may have simply added to the existing uncertainty regarding what counts as a concrete injury.

SEVENTH CIRCUIT ARTICULATES ITS "FUNDAMENTAL PRINCIPLE" FOR ALLEGING A CONCRETE INJURY UNDER § 1692(C) OF THE FDCPA

Over the past year, the Seventh Circuit has issued a series of decisions in which it has sought to clarify the requirements for Article III standing under the Fair Debt Collection Practices Act ("FDCPA"). On July 14, 2021, the court issued yet another such decision in *Dahl v. Kohn L. Firm*, 853 F. App'x 1 (7th Cir. 2020), holding that the plaintiff there had not alleged an injury-in-fact and quoting its "fundamental principle," articulated in *Markakos v. Medicredit, Inc.*, 997 F.3d 778, 779 (7th Cir. 2021), that "a violation of the FDCPA 'does not, by itself, cause an injury in fact' sufficient to confer Article III standing."

The plaintiff in *Dahl* alleged a debt collector had sent her letters after she had told her creditors not to contact her and so violated 15 U.S.C. § 1692c(c), which states that "[i]f a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt." The defendant moved to dismiss, arguing that § 1692(c) applies only if the notices to cease communication are sent directly to the debt collector, not the creditor. The defendant also argued that the letters – which simply informed the plaintiff that the defendant had been retained in connection with her two accounts – were themselves mandated under § 1692(g) of the FDCPA. The district court agreed with defendant and dismissed the complaint for failure to state a claim.

On appeal, the Seventh Circuit focused not on whether the plaintiff had stated a claim, but on whether she had alleged a concrete injury sufficient for standing. She had alleged that the letters "made [her] believe that her attempt to exercise her rights under the FDCPA had been futile[ ] and that she did not have the rights Congress had granted her under the FDCPA." The court held that those amounted only to the allegation that she had been confused by the letters, which, under its decision in *Pennell v. Glob. Tr. Mgmt., LLC*, 990 F.3d 1041 (7th Cir. 2021), does not qualify as a concrete injury sufficient for Article III standing.

The court in *Dahl* did not suggest that the plaintiff could not have alleged a concrete injury under the circumstances. Instead, it indicated that under its decision in *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020), the plaintiff *would* have had standing if she had described her injury in her complaint as an invasion of privacy caused by the unwanted letters. As such, the "fundamental principle" for standing – at least under § 1692(c) of the FDCPA – may simply amount to a requirement that plaintiffs describe their alleged injuries in a particular manner rather than a substantive requirement for such injuries.

ELEVENTH CIRCUIT HOLDS THAT OUTSOURCING THE PRINTING OF DEBT-COLLECTION LETTERS RISKS LIABILITY UNDER THE FDCPA'S RESTRICTIONS ON TRANSMITTAL OF CONSUMERS' DEBT INFORMATION

Businesses of all sorts commonly outsource mass printing and mailing services to third-party vendors, rather than perform those tasks in-house. The Eleventh Circuit's recent decision in *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 994 F.3d 1341 (11th Cir. 2021), however, has raised questions as to whether using such vendors can subject businesses to liability under the Fair Debt Collection Practices

Act's ("FDCPA") restrictions on disclosing consumers' personal information "in connection with the collection of any debt."

In *Hunstein*, the court heard as a matter of first impression whether a debt collector's transmittal of information concerning a consumer's debt (including his name, outstanding balance, and the nature of his debt) to a third-party vendor to print and mail the consumer a dunning letter violated 15 U.S.C. § 1692c(b)'s prohibition on debt collectors from sharing consumers' personal information to third parties "in connection with the collection of any debt." The district court dismissed plaintiff's claim, holding he had not alleged that the transmittal of that information to the vendor was a communication "in connection with the collection of any debt."

On appeal, the Eleventh Circuit started its analysis by asking if the plaintiff even had standing to assert his claim. It held that the plaintiff had not suffered a tangible injury and had not alleged a risk of harm, but that under *Spokeo, Inc. v. Robins*, 578 U.S. 856 (2016), the statutory violation plaintiff alleged was sufficient for standing. In so holding, the court drew a parallel between the purposes of the FDCPA and the common-law tort of invasion-of-privacy and noted that when enacting the FDCPA, Congress expressly identified the "invasion[] of individual privacy" as one of the harms against which the statute is directed. 994 F.3d at 1347-49. Having found that the statutory violation was sufficient for standing, the court then went on to hold that the transmittal of debt-specific information from the debt collector to the vendor was a communication "in connection with the collection of [a] debt." *Id.* at 1349.

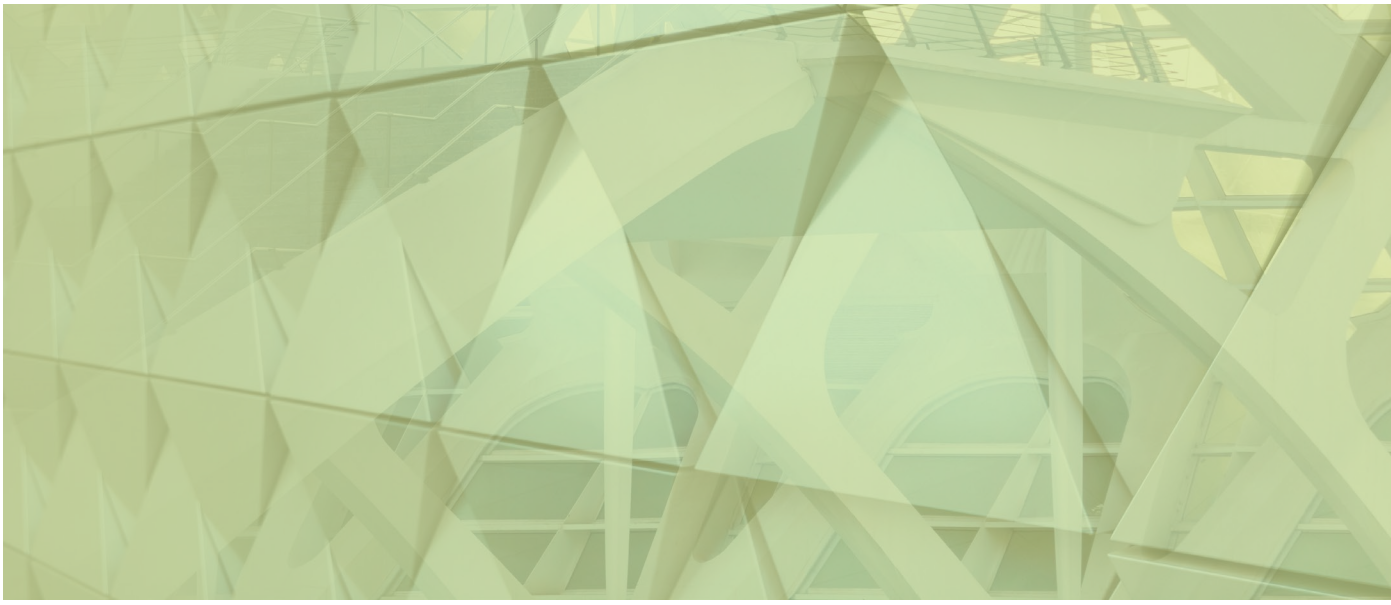
As the court recognized, its standing analysis raises practical problems for any debt collector that outsources its printing and mailing services to third parties and "runs the risk of upsetting the status quo in the debt-collection industry" by compelling debt collectors to "in-source many of the services that they had previously outsourced, potentially at great cost." *Id.* at 1352. However, it rejected that practical concern as irrelevant to its decision and suggested that the proper remedy for the undesirable consequences of its decision is a matter for Congress, not the courts.

THIRD CIRCUIT HOLDS NO ARTICLE III STANDING FOR A SINGLE TCPA VIOLATION

In the years since the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 578 U.S. 856 (2016), courts have sought to clarify the conditions under which a statutory violation will constitute a concrete injury sufficient to create Article III standing. Courts have often considered this question in the context of the Fair Debt Collection Practices Act ("FDCPA"). (See, for instance, the discussions of *Dahl* and *Hunstein* in this issue of *The Brief*.) The Third Circuit's decision in *Leyse v. Bank of Am. Nat'l Ass'n*, 2021 WL 1997452 (3d Cir. May 19, 2021), highlights this uncertainty in the context of another statute, the Telephone Consumer Protection Act ("TCPA").

In *Leyse*, the district court granted summary judgment to the defendant on the plaintiff's claim for a single violation of the TCPA's prohibition on the use of prerecorded telephone messages. The district court held that, because the plaintiff did not allege that he suffered annoyance, nuisance, or wasted time from that one violation, he did not allege a concrete injury and so did not have Article III standing. The Third Circuit affirmed on appeal, holding that "the TCPA is intended to prevent harm stemming from nuisance, invasions of privacy, and other such injuries," and so the plaintiff "must allege one of those injuries" to have standing; merely alleging a violation of the statute is not enough. *Id.* at *2.

The Third Circuit thus joins the Eleventh Circuit in limiting the conditions under which a TCPA violation is sufficient for standing. As the Eleventh Circuit held in *Salcedo v. Hanna*, 936 F.3d 1162, 1172 (11th Cir. 2019), while repeated violations of the TCPA may be sufficient for standing, a single violation is "the kind of fleeting infraction upon personal property that tort law has resisted addressing" and so under *Spokeo* is not sufficient to confer Article III standing. The Third and Eleventh Circuits' view on standing for TCPA claims, therefore, conflicts with the views of the Second, Fifth, Seventh, and Ninth Circuits, which



have held that the injury caused by even one or two violations is sufficient for standing. *E.g.*, *Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686, 688 (5th Cir. 2021) (standing for one violation); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (standing for two violations).

THIRD CIRCUIT RULES DENIAL OF CLASS CERTIFICATION NOT REQUIRED FOR *AMERICAN PIPE* TOLLING

In *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), the Supreme Court held that the filing of a class action tolls the statute of limitations for the claims of members of the putative class who file individual claims after class certification is denied. The court in *American Pipe*, however, did not say what happens if a putative class member decides to opt-out and file her own individual claim *before* the court rules on class certification. Does such a plaintiff still receive the benefit of *American Pipe* tolling of her individual claim before the court decides class certification?

The Third Circuit addressed this issue in *Aly v. Valeant Pharm. Int'l Inc.*, 1 F.4th 168 (3d Cir. 2021). In 2015, a class action was filed against Valeant Pharmaceuticals Inc. for alleged violations of Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5. By late 2018, the District Court had not ruled on class certification. Rather than wait for a certification decision, four putative members of the class filed their own "opt-out" complaint, asserting the same claims in their individual capacities against Valeant. The District Court dismissed the opt-out complaint under the applicable two-year limitations period, holding that *American Pipe* tolling did not apply to such individual claims because they were filed before a certification decision was made.

The Third Circuit reversed. Siding with the Second, Ninth, and Tenth Circuits, the Third Circuit held that that *American Pipe* tolls the limitations period for individual claims filed both before and after the certification stage. The Third Circuit reasoned that requiring putative class members to delay filing individual claims indefinitely to benefit from *American Pipe* tolling would serve "no compelling purpose" and lead to "counterintuitive results." The Court also explained that the importance of judicial economy cannot be used to construe the *American Pipe* doctrine in a way that would undermine its primary purpose—to protect the individual rights of putative class members.

The Third Circuit's decision in *Aly* shows a growing consensus that *American Pipe* tolling applies to individual claims even if they are filed prior to a decision on certification. However, the Court in *Aly* noted that not all Circuits are in accord, citing *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739 (1st Cir. 1983), and *Wyser-Pratte Mgmt. Co., Inc. v. Telxon Corp.*, 413 F.3d 553 (6th Cir. 2005), which reached the opposite conclusion. The growing majority view may set the stage for the Supreme Court to resolve the Circuit split.

NINTH CIRCUIT HOLDS AMENDMENTS TO FRCP 23(E) REQUIRE HEIGHTENED SCRUTINY OF ATTORNEY'S FEES IN CLASS SETTLEMENTS

For decades, Rule 23(e) has required courts to ensure that class settlements are "fair, reasonable, and adequate." In December 2018, Congress and the Supreme Court amended Rule 23(e)(2)(C) to enumerate a list of four issues for the court to take into account in assessing whether "the relief provided for the class is adequate."

The third of those newly enumerated issues, Rule 23(e)(2)(C)(iii), directs courts to consider "the terms of any proposed award of attorney's fees." In *Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021), the Ninth Circuit became the first Court of Appeals to address what this provision requires. The Court explained that, even in post-class certification settlements, "a court must examine whether the attorneys' fees arrangement shortchanges the class." The Court highlighted the rationale for the rule: while a defendant has powerful incentives to minimize the total cost of a settlement, it usually is not concerned with how that total is divided between the class and class counsel.

The Ninth Circuit held that a court must assess class settlement attorney's fees under the "heightened scrutiny" previously set forth in *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 941 (9th Cir. 2011). *Bluetooth* identified three "warning signs" of potential collusion between class counsel and the defendant regarding fees: (i) counsel's receiving a disproportionate distribution of the settlement; (ii) "clear sailing arrangements," under which the defendant agrees not to challenge a request for an agreed-upon attorney's fee; and (iii) "kicker" or "reverter" clauses that return unawarded fees to the defendant, rather than the class.

The Ninth Circuit found that the settlement agreement shortchanged the class by exhibiting all three of the *Bluetooth* warning signs. The court first held that the attorney's fees of $6.85 million constituted a disproportionate share of the settlement, since under the claims-made settlement, class members received "relative scraps," i.e., less than $1 million, substantially less than the potential recovery of $67.5 million if every one of the 15 million class members filed claims. The court also noted that the settlement included both a clear-sailing agreement and reverter clause. Accordingly, the Ninth Circuit found that the district court had abused its discretion in approving the class settlement under Rule 23(e).

SECOND CIRCUIT HOLDS VIOLATIONS OF STATE STATUTES CAN SATISFY THE "INJURY-IN-FACT" REQUIREMENT FOR ARTICLE III STANDING

The "injury-in-fact" prong of Article III standing is often a sticking point in class actions alleging statutory violations. The Supreme Court has consistently held that Congress has the power to confer legal interests on individuals through the enactment of statutes, and that a violation of such interests can satisfy Article III's injury-in fact requirement. But do state legislatures have similar power?

The Second Circuit confronted this question in *Maddox v. Bank of New York Mellon Tr. Co., N.A.*, 19-1774, 2021 WL 1846308 (2d Cir. May 10, 2021). Joining the Third, Seventh, Ninth, and Tenth Circuits, the Second Circuit held that a state legislature also has the power to create legal interests via statute, the violation of which can satisfy Article III. However, following the Supreme Court's guidance in *Spokeo, Inc. v. Robins*, 578 U.S. 856 (2016), the Second Circuit noted that "a bare procedural violation" does not satisfy the injury-in-fact requirement of Article III; the harm to the plaintiff must also be "particularized" and "concrete."

In *Maddox*, the Second Circuit held that the bank's violation of New York's mortgage-satisfaction-recording statutes was sufficient to confer Article III standing on plaintiffs. The Court first evaluated the state law itself, and concluded, "that the New York Legislature intended to create a legally protected interests that, if violated, would permit individuals to seek judicial redress." Next, the Court found that a violation of the mortgage-satisfaction-recording statutes produced a "concrete" harm in the form of a clouded title and damage to reputation, both of which are traditional bases for actions at common law. Moreover, the harm was "particular" to plaintiffs, as the appearance that plaintiffs had not paid their mortgage "created a real risk of financial harm that affected the [plaintiffs] in a personal and individual way." Accordingly, the Court found that plaintiffs had satisfied Article III's "injury-in-fact" requirement.

FOURTH AND ELEVENTH CIRCUITS REACH CONFLICTING RESULTS ON "ADMINISTRATIVE FEASIBILITY"

In addition to Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy, a heightened showing is required in some circuits: that identification of class members must be "administratively feasible." Recent appellate decisions in the Fourth and Eleventh Circuits, decided only a week apart, highlight the disagreement over whether Rule 23 includes this implied administrative feasibility requirement. The Fourth Circuit held that class members must be "readily identifiable;" the Eleventh Circuit disagreed, holding that there is in fact no such requirement.

In *Peters v. Aetna Inc.*, 2 F.4th 199 (4th Cir. 2021), a putative ERISA class action, the Fourth Circuit took up the district court's denial of plaintiff's motion for class certification. The district court had focused on plaintiff's claims for monetary damages and the idea that it "would be forced to engage in a highly individualized inquiry of *every* plan, *every* participant and *every* claim in those participants' claim histories" to ascertain the members of the proposed class. *Id.* at 241. The Fourth Circuit determined that the district court analyzed ascertainability too rigidly, particularly in light of plaintiff's equitable claims. The court vacated the district court's ruling and remanded the case for a full reevaluation of the motion for class certification. The appellate court recognized an implicit threshold requirement that all members of a proposed class be readily identifiable using objective criteria. *Id*. at 242-44. The appellate court explained that, while a plaintiff is not required to identify every class member at the time of certification, it is an error to certify a class if the trial court cannot identify class members without extensive and individualized fact-finding or mini-trials. *Id*.

In contrast, the Eleventh Circuit's decision in *Rensel v. Centra Tech, Inc.*, 2 F.4th 1359, 2021 U.S. App. LEXIS 19275 (11th Cir. 2021), applied a starkly different legal standard to the identification of class members. The *Rensel* trial court addressed class-wide allegations of securities fraud in connection with an ICO (an Initial Coin Offering, the cryptocurrency analog of an IPO). The district court denied class certification, requiring the plaintiffs to demonstrate an "administratively feasible" method of identifying class members that was "manageable" and did "not require much, if any, individual inquiry." *Id*. at *23. The Eleventh Circuit reversed, consistent with its decision in *Cherry v. Dometic Corp.*, 986 F.3d 1296 (11th Cir. 2021) (summarized in the Spring 2021 edition of *The Brief*). The court noted that administrative feasibility (a phrase that appears nowhere in Rule 23) may be relevant to the manageability criterion of FRCP 23(b)(3)(D), which involves a comparative analysis. But the court clarified that a plaintiff is not required to explain exactly how class members can be identified in a convenient manner. *Id*. at *25. The crucial question is whether class membership is capable of determination, and plaintiffs are not required to explain precisely how class members will be identified. *Id*. This is not quite the same approach as the Fourth Circuit in Peters.

In rejecting an administrative feasibility requirement and relegating it to an aspect of the manageability analysis, the Eleventh Circuit aligned itself with the Second, Sixth, Seventh, Eighth, and Ninth Circuits. The Fourth Circuit, on the other hand, stayed the course and required a showing of administrative feasibility as a prerequisite to class certification, as do the First and Third Circuits. Will the Supreme Court step in to resolve this circuit split?

CONTRIBUTORS

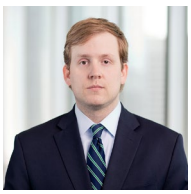
BRIAN V. OTERO
Co-Head, Financial Services Litigation
botero@HuntonAK.com
+1 212 309 1020

RYAN A. BECKER
Partner
rbecker@HuntonAK.com
+1 212 309 1055

STEPHEN R. BLACKLOCKS
Partner
sblacklocks@HuntonAK.com
+1 212 309 1052

ERIC TAYLOR
Partner
etaylor@HuntonAK.com
+1 404 888 4109

MICHAEL B. KRUSE
Counsel
mkruse@HuntonAK.com
+1 212 309 1387



GRAYSON L. LINYARD
Counsel
glinyard@HuntonAK.com
+1 214 468 3313

SIMA KAZMIR
Associate
skazmir@HuntonAK.com
+1 212 309 1112

ANDREW S. KOELZ
Associate
akoelz@HuntonAK.com
+1 404 888 4121

Hunton Andrews Kurth's Financial Services Litigation Team—based in New York, Dallas, Miami, Atlanta and Washington, DC—has the knowledge, skill and experience necessary to represent clients nationwide.

Our partners have represented many of the country's largest businesses in high-profile disputes presenting multifront challenges to fundamental business practices.

If you would like to receive our quarterly newsletter and other Financial Services Litigation news and alerts, please subscribe here.

HUNTON
ANDREWS KURTH

21532_08.21