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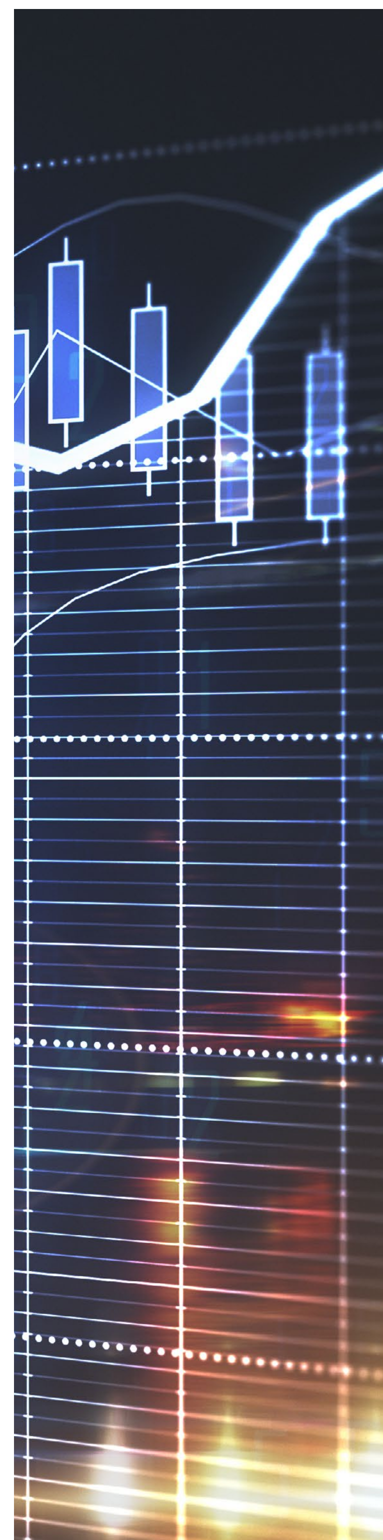


WHEN CAN STATISTICAL EVIDENCE BE USED TO SHOW RULE 23 PREDOMINANCE?—IMPLICATIONS OF *TYSON FOODS*

Rule 23(b)(3) requires that a court find that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" before certifying a class seeking damages.

This predominance requirement demands that a plaintiff provide evidence that the defendant's liability to all (or nearly all) class members can be established without considering each class member individually. This can be a challenge when the claim of any particular class member depends on his or her particular circumstances, e.g., when the class member's claim depends on his or her knowledge or is subject to a defense that he or she consented to the defendant's conduct. In such cases, plaintiffs sometimes use statistical sampling and analyses (such as regression analysis) to show that the defendant is liable to each member of a class or that each of those members has been injured by a defendant's wrongful conduct, without having to make the individual factual determinations that would bar certification.

The Supreme Court's decision in *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016), has encouraged the use of statistical methods to establish predominance. In *Tyson Foods*, the Supreme Court held that statistical sampling methods can be used to establish predominance as long as it is established that "each class member could have relied on that sample to establish liability if he or she had brought an individual action." *Id.* at 455. Under *Tyson Foods*, then, a plaintiff cannot establish that the requirements of Rule 23(b)(3) are satisfied simply by determining the liability of a representative sample of individual class members and then extrapolating those results to

the class as a whole, for as many courts have held, a defendant cannot be found liable to one individual simply because that defendant has been found to be liable to other individuals. In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), for instance, the plaintiffs proposed a so-called "Trial by Formula," in which the claims of a sample of class members would be adjudicated on an individualized basis and the proportion of those claims found to be valid would then be extrapolated to the class as a whole and used to determine liability on a class-wide basis. The Supreme Court rejected that "novel project" of holding a defendant liable to some class members solely on the basis of its being liable to other class members. *Id.* at 367; see also *Bais Yaakov of Spring Valley v. ACT, Inc.*, 12 F.4th 81, 104 (1st Cir. 2021) (Barron, J., concurring) (noting that "statistical evidence would neither have established that any single class member [had a valid claim] nor even provided a basis for finding by a preponderance that any one of them [did]"); *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 268 F.R.D. 604, 612 (N.D. Cal. 2010) ("Assume that the court permitted proof through random sampling of class members, and that the data, in fact, indicated that one out of every ten [employees] is exempt [and so have claims]. How would the finder of fact accurately separate the one exempt [employee] from the nine nonexempt [employees] without resorting to individual mini-trials.").

The Court's endorsement of statistical sampling in *Tyson Foods*, therefore, was highly qualified, for while it rejected any "categorical exclusion" of the use of statistical evidence, it also rejected the claim that statistical evidence could always be used to establish predominance, holding instead that whether such evidence was appropriate for establishing class-wide liability in a given case would "depend on the purpose for which the sample is being introduced and on the underlying cause of action." 577 U.S. at 454-55.

Because the Supreme Court did not identify precisely when the conditions were appropriate for the use of statistical evidence, it often remains unclear in particular cases when such evidence can properly be used to establish predominance and when it cannot, and even what factors a court should consider when deciding if such evidence is appropriate. *Compare, e.g., In re Processed Egg Prods. Antitrust Litig.*, 310 F.R.D. 134 (E.D. Pa. 2015) (plaintiff's statistical analysis "supports a finding that a successful supply-reduction conspiracy would have had an impact on the entire egg industry—i.e., virtually all class members"), with *Maeda v. Kennedy Endeavors, Inc.*, 2021 WL 2582574, at *17 (D. Haw. June 23, 2021) (statistical analysis of consumer-preference data could not establish predominance in deceptive-labeling class action).

The Ninth Circuit's recent decision in *Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, 993 F.3d 774 (9th Cir. 2021), provides useful guidance regarding the narrow conditions under which statistical evidence can be used to satisfy the predominance requirements. The Court's decision there rested on *Tyson Foods*' guiding principle—that statistical sampling methods can be used to establish predominance only if those methods could have been used to prove that any one of the individuals in the class was injured by the defendant's conduct on which liability is based. The Court further stated that determining whether a proposed sampling methodology satisfies that requirement demands more than simply ascertaining that it might reliably demonstrate the defendant's liability for each class member; in addition, the district court must resolve—at the class certification stage—any factual disputes between the experts concerning whether the methodology in fact reliably shows liability on an individual class member basis.

The plaintiffs in *Olean* sought to certify classes of purchasers of tuna products against three defendants alleged to have engaged in price-fixing between June 2011 and July 2015. To establish predominance, the plaintiffs' statistical expert analyzed more than 1.5 million observations of tuna prices and sales from before, during, and after the scheme was alleged to have been in place. After controlling for several factors that might legitimately affect price—including product characteristics, input costs, customer type, and consumer preference and demand—the plaintiffs' expert concluded that on average, direct purchasers—retailers like Walmart and Target—were overcharged an estimated 10.28% as a result of the defendants' collusion, and that 94% of those direct purchasers were significantly overcharged. The plaintiffs' expert then used that estimated overcharge and data from distributors of the products to conclude that more than 99% of indirect purchasers—consumers who purchased the defendants' tuna from the direct purchasers—would have had the overcharge to direct purchasers passed through to them. The district court held that the plaintiffs' statistical analysis, supplemented with other factual

determinations, was "sufficient to show common questions predominate as to common impact," and so certified the plaintiffs' classes.

On appeal, the Ninth Circuit rejected the defendants' argument that statistical evidence generally cannot be used to satisfy Rule 23(b)(3)'s predominance requirement, and found that the plaintiffs' statistical evidence by itself was capable of establishing class-wide liability. However, the Court remanded the case for the district court to resolve certain disagreements between the parties' experts concerning whether, under the circumstances of the case, the plaintiffs' evidence in fact would establish liability for any individual class member.

The Court in *Olean* based its conclusion that plaintiffs' statistical evidence was, as required under *Tyson Foods*, capable of establishing liability for each class member individually on its determination that the statistical evidence offered by plaintiffs satisfied three key conditions.

First, the Court read *Tyson Foods* to require that statistical evidence must test the effect of the alleged wrongdoing on each member of the class, not just determine defendants' liability to a representative sample of class members and then extrapolate those findings to other class members. The plaintiffs' statistical analysis satisfied that requirement because it did not just extrapolate results from a sample of the class members to the entire class; rather, by comparing price data during the alleged scheme to price data from before and after that period, the plaintiffs' expert aimed to identify what the prices would have been for every class member during the relevant period, but for the alleged wrongdoing. As the court noted, such statistical analyses are commonly used in individual antitrust cases to establish a "baseline" that can be used to determine if the alleged misconduct resulted in an overcharge to the individual plaintiff. 993 F.3d at 788. Such analyses do not extrapolate factual findings made with respect to one individual to another individual, but quantify the effect of a defendant's conduct that, because of how the class is defined, must apply to each member of the class. *See, e.g., In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 60, 68-69 (1st Cir. 2013) (statistical evidence of increased cost resulting from alleged fraudulent marketing campaign was sufficient to show the effect of the alleged wrongdoing on a class-wide basis and so establish predominance).

Second, the Court held that statistical evidence must connect the injury of each class member to the defendants' alleged wrongdoing. Plaintiffs' statistical analysis satisfied that requirement because it did not simply compare the price of the defendants' products while the alleged scheme was in place with the prices before and after that period. Such an analysis might show that class members paid higher prices while the alleged scheme was in place than at other times, but if it does not control for other factors that might affect the prices class members paid, it cannot establish predominance, since it cannot show that the reason the class members paid more was the conduct for which the defendant is allegedly liable, rather than some other entirely legitimate factor. *Comcast Corp. v. Behrend*, 569 U.S. 27, 48 (2013) (analysis could not establish predominance because it "does

not purport to show precisely how Comcast's conduct led to higher prices in the Philadelphia area"). Plaintiffs' expert in *Olean* avoided that criticism by using a regression model, which allowed him to control for the effects of a variety of factors likely to affect the price of the product and so to isolate the average effect resulting from the defendants' alleged price-fixing, as opposed to those other factors. 993 F.3d at 789; *see also In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, 276 F.R.D. 364, 371 (C.D. Cal. 2011) ("Regression analysis can be used to isolate the effect of an alleged conspiracy on price, taking into consideration other factors that might also influence price, like cost and demand.").

Third, the Court held that, to establish predominance, statistical methods must be applied in a way that ensures that the effects of averaging do not mask individual differences relevant to liability. The defendants' expert argued that because the plaintiffs' expert estimated overcharge of 10.28% was an average for each class member, it could not show that each class member was injured, since some would have been overcharged more and some less—or not overcharged at all. The defendants' expert made different individual estimates of the overcharge for several hundred individual class members and found that 28% of those direct class members had not been overcharged at all—significantly more than the 6% that the plaintiffs' expert's analysis found, and likely too many to satisfy Rule 23. *Id.* at 782-83. The defendants thus argued that by assuming that all class members were subject to the same overcharge and estimating that single value, the plaintiffs essentially "assum[ed] away the very differences that make the case inappropriate for classwide resolution," and masked significant differences among class members that should defeat predominance. *Id.*; *see also In re Plastics Additives*, 2010 WL 3431837 , at *6 (E.D. Pa. Aug. 31, 2010) (holding regression analysis could not establish predominance because it provided an estimate of the average overcharge paid by class members, rather than calculating the overcharge paid by each individual class member considered in isolation).

The Ninth Circuit acknowledged defendants' general point that, by assuming each class member was subject to the same overcharge, the plaintiffs' analysis inevitably "papered over" individual differences among class members—e.g., their purchasing power and retail price strategies—that could affect the price they paid for defendants' products. *Id.* at 790; *see also In re Mushroom Direct Purchaser Antitrust Litig.*, 319 F.R.D. 158, 202 (E.D. Pa. 2016) (agreeing with defendants that "without more, [plaintiff's expert's] average effects regression would not be sufficient to show that common impact predominates"). The Court, however, noted that such averaging is implicit in all regression analyses, and to hold that such analyses were therefore improper on class certification would run contrary to *Tyson Foods*' holding that a "categorical exclusion" of regression analyses would "make little sense."

In the case before it, the Ninth Circuit suggested reasons that could justify the decision to assume all class members were subject to a single overcharge, and so show that the plaintiffs' expert's analysis was sufficiently reliable to establish predominance. *E.g.*, *Id.* at 790 (estimating a single overcharge instead of individual overcharges might be more "statistically robust"). Ultimately, however, the Court held that the fact that the plaintiffs' expert's analysis might demonstrate that the defendants are liable to each class member is not enough to satisfy the predominance requirement of Rule 23(b)(3). Although the Court acknowledged that the district court had "walked through the strengths and weaknesses of the experts' competing testimony," it "needed to go further" and actually decide which experts' analysis was correct. 993 F.3d at 793-94. Because the district court had failed to make that additional determination, its decision to rely on the plaintiffs' expert's analysis to certify the class was an abuse of its discretion.

As *Olean* shows, statistical evidence and analyses can, in the proper circumstances, be a powerful tool for plaintiffs in demonstrating predominance. At the same, the court made clear that the use of statistical methods is not a panacea for difficulties in establishing predominance, and that the use of those methods must be carefully policed by the courts to protect the defendant's right to have its liability to any particular class member decided by evidence pertaining to that individual class member.

COURTS DIVIDED ON TOLLING OF CLASS CLAIMS AFTER *CHINA AGRITECH*

Defendants often face multiple individual and class actions after the filing of an initial class action. Plaintiffs may invoke equitable tolling to extend the statute of limitations deadline to file these subsequent claims. When can a defendant be certain that a statute of limitations bars a follow-on class action?

In *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), the US Supreme Court held that commencement of a class action suspends the running of the statute of limitations for individual claims brought by members of the proposed class until certification of the class is denied. In 2018, in response to a circuit split regarding American Pipe's application to follow-on class actions, the Supreme Court in *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1804 (2018) considered and answered the following question:

> Upon denial of class certification, may a putative class member, in lieu of promptly joining an existing suit or promptly filing an individual action, commence a class action anew beyond the time allowed by the applicable statute of limitations? Our answer is no. *American Pipe* tolls the statute of limitations during the pendency of a putative class action, allowing unnamed class members to join the action individually or file individual claims if the class fails. But American Pipe does not permit the maintenance of a follow-on class action past expiration of the statute of limitations.

The district court in *China Agritech* had denied certification of the original class action. The Supreme Court thus framed the issue as whether "upon denial of class certification" a class member could rely on *American Pipe* tolling to bring class claims that otherwise would be out of time. But what of instances in which class claims are dismissed, or dropped, without the district court entering an order addressing class certification? For example, a district court may deny certification without prejudice on procedural rather than merits-based grounds (for example, because the motion is untimely, or to allow for additional discovery), or a class representative may dismiss the class claims or voluntarily narrow the proposed class. In these circumstances, are follow-on class claims tolled because there is no denial of class certification, or does *China Agritech* cut off tolling regardless of whether a district court addresses the merits of class certification?

Two 2021 district court opinions show how the courts are split addressing this question. In *Ochoa v. Pershing LLC,* plaintiffs brought a putative class action concerning the Allen Stanford Ponzi scheme. No. 3:16-CV-1485-N, 2021 WL 5163196 (N.D. Tex. Nov. 5, 2021). The putative class consisted of borrowers that had been carved out of a prior class action when the class representative voluntarily narrowed the class. Plaintiffs in the follow-on

action argued that, because there had been no denial of certification while their claims were part of the original action, their claims were tolled until they were dropped from the narrowed original class and, therefore, timely. The *Ochoa* court disagreed and held that *China Agritech* cut off *American Pipe* tolling of class claims regardless of whether the court in the original class action adjudicated class certification: "[a] chieving robust involvement by multiple constituencies at the outset of class litigation favors applying [*China Agritech's*] holding to any attempt to bring a follow-on class action, regardless of whether denial has occurred in the original action or not." *Id.* at *3 (emphasis original).

The Southern District of New York took the opposite view in a case with indistinguishable facts. Plaintiffs in *Famular v. Whirlpool Corporation*, 16-cv-944(VB), 2021 WL 395468 (S.D.N.Y. Feb. 3, 2021), were part of a New York subclass that had been voluntarily dismissed from a nationwide class action pending in New Jersey district court. The Southern District court held that the New York class's claims were tolled until the time they were dropped from the nationwide class, regardless of whether certification had been adjudicated in the original class action, because holding otherwise would force subclasses to bring suit while an original class action remained pending, which would "create 'a multiplicity of litigation that squanders resources and undermines judicial economy.'" *Id.* at *2, quoting *Chavez v. Occidental Chem. Corp.*, 35 N.Y.3d 492, 503-04 (2020).

The *Ochoa* and *Famular* courts thus agree broadly that considerations of efficiency and judicial economy drive the answer to the tolling question, but arrive at different conclusions on which outcome best serves those purposes. To date only the First and Third Circuits have considered this issue on appeal. Both hold, like *Ochoa*, that *China Agritech* prohibits *American Pipe* tolling for follow-on class actions even when the original class action did not reach a decision on the merits of class certification. *See, In re Celexa and Lexapro Marketing and Sales Practices Litig.*, 915 F.3d 1, 16 (1st Cir. 2019); *Blake v. JP Morgan Chase Bank NA*, 927 F.3d 701, 708 (3d Cir. 2019); *Weitzner v. Sanofi Pasteur Inc.*, 909 F.3d 604, 614 (3d Cir. 2018). This view is emerging as the majority position, as district courts in the Fifth (in *Ochoa*), Seventh, Eighth, and Ninth Circuits have also adopted it,[1] though most district courts within the Second Circuit, and at least one in the Ninth Circuit, reach the opposite conclusion.[2] For now, the weight of authority and the initial trend suggest *China Agritech* prohibits *American Pipe* tolling for follow-on class claims regardless of whether the court in the original class action ruled on class certification. The issue though will almost certainly receive additional attention soon in the appellate courts.

[1] *Prac. Mgmt. Support Servs., Inc. v. Cirque du Soleil Inc.*, No. 14 C 2032, 2018 WL 3659349, at *4 (N.D. Ill. Aug. 2, 2018); *Dormani v. Target Corp.*, No. 17-CV-4049 (JNE/SER), 2018 WL 3014126, at *2 (D. Minn. June 15, 2018), aff'd, 970 F.3d 910 (8th Cir. 2020); *Torres v. Wells Fargo Bank*, No. CV179305DMGRAOX, 2018 WL 6137126, at *3 (C.D. Cal. Aug. 28, 2018); *Carmel v. Mizuho Bank, Ltd.*, No. LACV1802483JAKEX, 2019 WL 10186488, at *21 (C.D. Cal. Nov. 14, 2019); *Fabian v. LeMahieu*, No. 19-CV-00054-YGR, 2019 WL 4918431, at *9 (N.D. Cal. Oct. 4, 2019).

[2] *Betances v. Fischer*, 403 F. Supp. 3d 212, 224 (S.D.N.Y. 2019); *Hart v. BHH, LLC*, No. 15CV4804, 2018 WL 5729294, at *2 (S.D.N.Y. Nov. 2, 2018); *Bos. Ret. Sys. v. Uber Techs., Inc.*, No. 19-CV-06361-RS, 2021 WL 4503137, at *3 (N.D. Cal. Oct. 1, 2021); *but see Dennis v. JPMorgan Chase & Co.*, 439 F. Supp. 3d 256, 266 (S.D.N.Y. 2020).

NOTEWORTHY

SIXTH CIRCUIT HOLDS THAT INJURIES CAUSED BY A PLAINTIFF'S OWN DECISION CAN CREATE ARTICLE III STANDING

Since the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), courts have struggled to determine exactly when a statutory violation causes a concrete harm and when it does not. In *Krueger v. Experian Info. Sols., Inc.*, 2021 WL 4145565 (6th Cir. Sept. 13, 2021), the Sixth Circuit faced that question with respect to an alleged violation of the Fair Credit Reporting Act ("FCRA"), with the added wrinkle that the alleged injury resulting from the FCRA violation was directly the result of the plaintiff's own decision.

In *Krueger*, the plaintiff alleged that, for over a year, the defendant had reported his loan as past due to credit-reporting agencies, despite knowing that it had been discharged in bankruptcy. The plaintiff did not allege that he had been denied credit or had to pay a higher interest rate because of the defendant's failure to correctly report the status of his loan. Instead, he claimed that he had been injured because his credit score—which was lowered by defendant's false report—caused him to decide not to purchase a new car, with the result that he continued to drive a car that, he claimed, was not "always in the best of shape." *Id.* at *2. The trial court concluded that the plaintiff lacked standing and granted the defendant summary judgment, noting that the plaintiff "concede[d] that he did not apply for credit" and so "cannot demonstrate that any alleged misreporting 'caused the loss of credit or some other harm.'" *Krueger v. Experian Info. Sols., Inc.*, 2020 WL 5801214, at *7 (E.D. Mich. Sept. 29, 2020).

The Sixth Circuit reversed and rejected the defendant's argument that, because the plaintiff himself decided not to apply for a loan for a new car, he could not trace his injury to the defendant's conduct. The court instead held that the plaintiff's role in causing his own injury was not significant enough to "break the causal chain" between the defendant's violation and his injury. 2021 WL 4145565, at *2. The court noted that the plaintiff's credit score was 515 while the defendant was reporting the loan as past due, and the court took that low score to be evidence that the plaintiff's injury (i.e., not being able to replace his car) was caused by the defendant's action, rather than the plaintiff's decision not to apply for a loan.

It is unclear what standard the court used to decide that the plaintiff's credit score resulting from the FCRA violation was sufficiently low to show that his injury was caused by that violation and not his own decision. Krueger is thus a reminder that the thorny question of when a statutory violation satisfies *Spokeo's* concrete-injury requirements may be exacerbated by other questions concerning standing, such as determining whether a plaintiff's own conduct is a significant enough factor to break the causal link between a defendant's violation and the injury alleged.

SEVENTH CIRCUIT REAFFIRMS CONDITION IN WHICH A FAILURE TO PROVIDE STATUTORILY REQUIRED INFORMATION CAN CONFER ARTICLE III STANDING

Over the past few years, the Seventh Circuit has issued a series of decisions concerning when a violation of the Fair Debt Collection Practices Act ("FDCPA") constitutes a concrete injury that confers Article III standing and when it is a "bare procedural violation" that cannot create subject-matter jurisdiction. Its decision in *Wadsworth v. Kross, Lieberman & Stone, Inc.*, 12 F.4th 665 (7th Cir. 2021), is one of the latest in that series of decisions.

Wadsworth arose out of an employment agreement that promised the plaintiff a bonus after 180 days of employment but required the plaintiff to return the bonus if she left voluntarily or was terminated for cause within 18 months of receiving that payment. The plaintiff received the bonus but was fired a year later. A week after her termination, the defendant, a debt collector, contacted the plaintiff by letter and telephone to claw back the bonus. *Id.* at 666.

The plaintiff then sued, alleging violations of the FDCPA because she was not given "complete written notice of her statutory rights within five days of the initial communication" and because the person who called her did not identify herself as a debt collector or say she was attempting to collect a debt. *Id.* at 666-67. The district court granted the plaintiff summary judgment. *Id.* at 667.

The Seventh Circuit reversed. While the defendant did not challenge the plaintiff's standing on appeal, the court held *sua sponte* that the plaintiff had not suffered a concrete injury and so lacked standing. The court based its holding on a principle articulated in its recent decisions that a debt collector's failure to inform a debtor of her statutory rights can constitute a concrete injury only if that lack of information "impairs the [debtor's] 'ability to use [that information] for a substantive purpose that the statute envisioned.'" *Id.* at 668 (quoting *Bazile v. Fin. Sys. of Green Bay, Inc.*, 983 F.3d 274, 280 (7th Cir. 2020)).

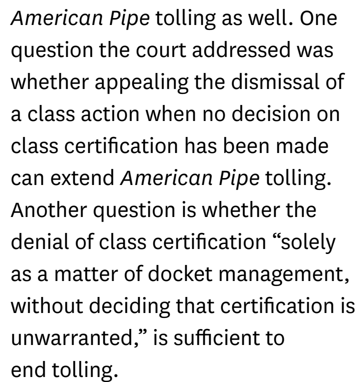
As applied in *Wadsworth*, that principle implied that the defendant's violation did not result in a concrete injury because the plaintiff admitted that she had not repaid the bonus after receiving the collection letter and calls, and so the alleged lack of information must not have impaired her ability to keep the bonus. The plaintiff thus "offered … no basis to believe that her substantive interests under the Act would have been better protected if [the defendant] had complied with the FDCPA." *Id.* at 668.

Wadsworth thus represents the Seventh Circuit's commitment to the principle articulated in *Bazile* that the failure to provide statutorily required information by itself cannot constitute a concrete injury sufficient to confer standing.

SIXTH CIRCUIT CLARIFIES CONTOURS OF *AMERICAN PIPE* TOLLING[1]

Under the equitable tolling doctrine established by the Supreme Court in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), the statute of limitations for absent class members is tolled from the time the class action is filed until there is a decision on class certification. It is clear from *American Pipe* that, once the district court finds that a lawsuit cannot proceed as a class action, the tolling period ends. As the court in *Potter v. Comm'r of Soc. Sec.*, 9 F.4th 369, 371 (6th Cir. 2021), recently observed, however, other events might end

[1] For further discussion of *American Pipe* tolling, see "Courts Divided on Tolling of Class Claims after *China Agritech*" on page 7 of this issue.



American Pipe tolling as well. One question the court addressed was whether appealing the dismissal of a class action when no decision on class certification has been made can extend *American Pipe* tolling. Another question is whether the denial of class certification "solely as a matter of docket management, without deciding that certification is unwarranted," is sufficient to end tolling.

The court answered the first question in the negative. The plaintiffs in *Potter* argued that the 60-day statute of limitations for seeking judicial review of the denials of their claims for Social Security disability benefits was tolled during the pendency of two class actions, *Martin v. Commissioner of Social Security*, No. 7:15-cv-00046 (E.D. Ky. 2015), and *Hughes v. Commissioner of Social Security*, No. 5:16-cv-00352 (E.D. Ky. 2016). *Martin* was dismissed in 2015 without a decision on class certification because the plaintiffs in that case failed to exhaust their administrative remedies. The plaintiffs in *Martin* appealed that dismissal; that appeal was resolved on January 16, 2018, after those plaintiffs properly filed separate individual actions. One of the plaintiffs in *Potter* argued that the statute of limitations on his claim, which had accrued while *Martin* was pending, should have been tolled while the appeal of the dismissal in *Martin* was pending. 9 F.4th at 380. The Sixth Circuit rejected that claim, noting that "the courts of appeals that have considered this issue are unanimous that the dismissal of an uncertified class action terminates *American Pipe* tolling and resumes the running of statutes of limitations as to absent class members." *Id.* On that issue, the Sixth Circuit joined the Fifth, Seventh, and Federal Circuits in holding that the dismissal of a class action terminates *American Pipe* tolling, even if that dismissal is appealed.

The court also answered the second question in the negative, holding that an "administrative denial" does not terminate tolling. *Hughes* was stayed in 2017 pending the outcome of another case that was likely to control the outcome, and the pending motion for certification was dismissed "without prejudice" to clear the court's docket. On August 13, 2019, the claims in *Hughes* were remanded to the Social Security Administration, and three plaintiffs in *Potter*, believing their claims had been tolled by *Hughes* until August 13, 2019, filed their lawsuits within the statutory period. *Id.* at 372.

All three plaintiffs' claims were dismissed as untimely, with the district court holding that the dismissal of the certification motion "without prejudice" in *Hughes* restarted the clock on the plaintiffs' claims. The Sixth Circuit reversed, holding that their claims continued to be tolled after the purely administrative dismissal of the motion. Stressing that the purpose of *American Pipe* tolling was to "encourage absent members to rely on representatives to vindicate their rights," *Id.* at 371, the court found that "a reasonable absent class member" would have seen the dismissal as "a case management tool meant only to clear [the court's] docket ahead of a long stay" and so held that "the reasonable reliance interests of the putative *Hughes* class members favor applying *American Pipe* tolling to these circumstances." *Id.* at 378.

ELEVENTH CIRCUIT REVISITS HOLDING SUBJECTING COMMUNICATIONS BETWEEN DEBT COLLECTORS AND THEIR VENDORS TO FDCPA LIABILITY

In an April 21, 2021, decision with potentially far-reaching effects on the business practices of debt collectors, a three-judge panel of the Eleventh Circuit held unanimously that a plaintiff stated a claim against a defendant debt collector by alleging that the defendant violated the Fair Debt Collection Practices Act ("FDCPA") by transmitting personal information about his debt to a vendor for the purpose of printing and mailing a collection letter. *Hunstein v. Preferred Collection & Mgmt. Servs.*, Inc., 994 F.3d 1341, 1349-52 (11th Cir. 2021). The court further held that that procedural violation constituted a concrete injury sufficient for Article III standing. *Id.* at 1345-49. On May 26, 2021, the defendant in *Hunstein* petitioned the Eleventh Circuit for a rehearing.

A month after the petition for rehearing was filed, the Supreme Court decided *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), which held, among other things, that class

members whose misleading credit reports were provided to third-party businesses had a concrete injury, while those whose reports were not disclosed to third parties did not have a concrete injury. *Id.* at 2208-13. In a footnote, the Supreme Court also said that courts had not "necessarily recognized disclosures to printing vendors as actionable publications" and suggested that in such a case a plaintiff might need to provide evidence that "the document was actually read and not merely processed." *Id.* at 2210 n.6.

On October 28, 2021, the Eleventh Circuit panel, citing the petition for rehearing, seventeen amicus briefs, and the Supreme Court's decision in *TransUnion*, vacated its April decision and substituted another that again held—albeit with a dissent this time—that the plaintiff had standing and had stated a claim based on the debt collector's disclosure of information about his debt to a vendor. *Hunstein v. Preferred Collection & Mgmt. Servs.*, Inc., 17 F.4th 1016 (11th Cir. 2021).

The court relied on *TransUnion's* holding that, when a plaintiff alleges an injury caused by a statutory violation, that injury need not be an "exact duplicate" of a common-law cause of action to create standing; it is sufficient that the alleged injury be similar in kind to one addressed under the common law, even though the degree of the injury is not actionable as a common-law tort. *Id.* at 1025-27. The court also distinguished the Supreme Court's footnoted suggestion that the mere transmission of information between a debt collector and its vendor does not, in itself, constitute an actionable injury as *dicta*. It further explained that to read that *dictum* as barring the plaintiff's claim would be inconsistent with *TransUnion's* holding, since it would effectively require a "perfect match" between the plaintiff's alleged injury and a common-law cause of action. *Id.* at 1031-32.

But even this new decision has not resolved the controversy over *Hunstein* because, on November 17, 2021, the Eleventh Circuit *sua sponte* ordered the decision to be reheard *en banc*. Briefing on that rehearing is scheduled to be complete by February 22, 2021.

THIRD CIRCUIT APPROVES THE CERTIFICATION OF ISSUES CLASSES, EVEN IF RESOLUTION OF THOSE ISSUES WILL NOT DETERMINE LIABILITY

Rule 23(c)(4) allows district courts to certify particular issues for class treatment. In *Russell v. Educ. Comm'n for Foreign Med. Graduates*, 15 F.4th 259 (3d Cir. 2021), the Third Circuit addressed whether Rule 23(c)(4) can be used to certify an issue class, even if the resolution of that issue will not resolve the question of liability. The court decided that such an issue class could be certified as long as certification "substantially facilitates the resolution of the civil dispute, preserves the parties' procedural and substantive rights and responsibilities, and respects the constitutional and statutory rights of all class member and defendants." *Id.* at 270.

In *Russell*, plaintiffs sought to assert claims for negligent infliction of emotional distress on behalf of a class against the Educational Commission for Foreign Medical Graduates ("Commission"), an

organization that certifies that graduates of foreign medical schools satisfy certain requirements. Plaintiffs alleged the Commission had been negligent in certifying an applicant who fraudulently obtained a medical license and went on to treat each class member. *Id.* at 263-64. The district court certified for class treatment the questions of (i) whether the Commission owed legal duties to class members that were then breached and (ii) whether the Commission owed duties to hospitals and medical boards that would allow it to be held liable by class members. *Id.* at 264-65. The Commission's liability to each of the class members would then be determined in individual cases.

On appeal, the Third Circuit vacated the certification of those issues classes and remanded the case to the district court, holding that the district court had erred by failing to determine whether the issues to be certified—i.e., the duty and breach elements of the plaintiffs'

claims—satisfied Rule 23(b)(3). *Id.* at 271. At the same time, the court clarified its leading Rule 23(c)(4) decision, *Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2011), to make clear that certification of issues classes could be proper even if the liability of the defendant had to be left to individual adjudication, as in the case before it. 15 F.4th at 269. In support of that holding, the court held that the text of Rule 23(c)(4) expressly "permits an action to be brought or maintained as a class action 'with respect to particular issues,' not just those that decide liability." *Id.* at 270.

The court also reaffirmed its holding in *Gates* that certification of an issue class can be proper even if the action as a whole cannot be certified under Rule 23(b)(3) for lack of predominance, rejecting the Fifth Circuit's minority view holding that "a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial." *Id.* at 274 (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996)). Finally, it also expressed skepticism that allowing the certification of issues classes that do not themselves determine liability would "permit a flood of abusive class actions" because, it speculated, the plaintiffs' attorneys whose "payday" arises from a damages award would not have an incentive to seek certification of issues classes. *Id.* at 275. Whether the court's speculations as to the incentive of plaintiffs' attorneys and their use of issues classes are correct remains to be seen.

NINTH CIRCUIT RULING RESTRICTS THE USE OF COMMON CONTRACTS FOR CLASS-WIDE PROOF OF ACTUAL RELIANCE

Establishing that the predominance requirement for a Rule 23(b)(3) class is generally difficult for claims involving fraud, since actual reliance is required to establish liability. In such cases, plaintiffs seeking certification often argue that predominance is satisfied because class members have been exposed to a common agreement that either includes misleading information or omits material information. The Ninth Circuit's recent 2-1 decision in *Woolley v. Ygrene Energy Fund, Inc.*, 2021 WL 4690971 (9th Cir. Oct. 7, 2021), however, suggests that even a common contract may be insufficient to overcome the predominance hurdle, although that decision appears to be in tension with existing Ninth Circuit precedent.

In *Woolley*, each of the plaintiffs had taken out Property Assessed Clean Energy ("PACE") loans. They alleged California statutory and common-law fraud claims against the defendant, whom they alleged had misrepresented their ability to transfer their loan balances without paying an additional fee. The district court denied the plaintiffs' motion for class certification under Rule 23(b)(3), holding that individualized questions regarding the reliance element of the fraud action defeated commonality, typicality, and predominance. *Id.* at *1.

The Ninth Circuit affirmed the denial of class certification. The plaintiffs argued that class-wide reliance was established because the PACE loan agreements for each of the putative class members "both misrepresented and omitted material information concerning transferability." Notwithstanding the fact that California law presumes that a party who signs an agreement has "read it and... understands its contents," the majority held that, in finding individual reliance, the district court would also have to "individually determine whether disclosure of the complained-of omissions would have impacted the putative class members' contracting decision." The court thus concluded that plaintiffs could not establish actual reliance on a class-wide basis. *Id.* at *1-2. The majority justified its decision by noting that the plaintiffs' argument that a common contract could establish actual reliance on a class-wide basis "turns the concept of actual reliance on its head" by

"stacking" one "bare inference"— i.e., that parties are deemed to understand the terms of their contracts – on another— i.e., that those parties would have behaved differently if the omitted terms are ones that a reasonable person would consider important. *Id.* at *2.

The majority's reasoning suggests that the mere exposure to a common contract would never be sufficient to establish class-wide actual reliance, since any such argument would appear to require "stacked" inferences as to what the contracting parties understood and what effect disclosure of that omitted information would have led them to do. As the dissent noted, however, that conclusion is apparently inconsistent with the Ninth Circuit's recent decision in *Walker v. Life Insurance Co. of the Southwest*, 953 F.3d 624 (9th Cir. 2020), that a class defined as including just those individuals who were exposed to alleged misrepresentations may "automatically trigger" a presumption of reliance. The majority did not explain how that apparent tension might be resolved, suggesting that it will be an issue that the court will need to address in the future.

NINTH CIRCUIT RULING HIGHLIGHTS THE RISKS OF CLASS-ACTION SETTLEMENTS WITH NON-CASH RELIEF

Rule 23(e) requires court approval of any class-action settlement and requires that, before issuing such approval, the court must hold a hearing and find that the settlement is "is fair, reasonable, and adequate." Under the 2018 amendments to Rule 23(e), the court making that finding must consider "the terms of any proposed award of attorney's fees…" The Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1711 *et seq.*, also requires "[j]udicial scrutiny" of class-action settlements in which claimants receive "coupons," rather than a cash payment, and also places conditions on how attorney's fees must be calculated in such a case. 28 U.S.C. § 1712(b), (c) & (e). As the Ninth Circuit's decision in *McKinney-Drobnis v. Oreshack*, 16 F.4th 594 (9th Cir. 2021), indicates, inattention to those restrictions may doom a settlement.

In *McKinney-Drobnis*, the defendant, a membership-based spa, settled a class action by former members and agreed to provide claimants a voucher for future purchases from the defendant. The settlement was approved over the objection that the vouchers were coupons under CAFA and that the provisions of the settlement regarding attorney's fees did not comply with CAFA's restrictions triggered by the use of those coupons. The objector further argued that, even if CAFA did not apply, the district court disregarded warning signs of collusion. *Id.* at 600-01.

The Ninth Circuit vacated the approval. The court first held the district court erred in applying the factors used to decide whether the settlement's vouchers were "coupons" under CAFA, i.e., "(1) whether class members have 'to hand over more of their own money before they can take advantage of' a credit, (2) whether the credit is valid only 'for select products or services,' and (3) how much flexibility the credit provides…" *Id.* at 602 (quoting *In re Easysaver Rewards Litig.*, 906 F.3d 747, 755 (9th Cir. 2018)). While the court found that the third factor did not support considering the vouchers to be coupons, it held that

the first and second factors did, since the smallest voucher was not enough to pay for the defendant's main service—a massage—and because the defendant sold only specialized products, none of which are available for online sales. *Id*. at 604-05.

The court further held that the district court failed to "substantively grapple" with the "potentially problematic… relationship between attorneys' fees and the benefit to the class." *Id*. at 606. The court was particularly concerned about how the settlement's combination of a clear-sailing provision and a reverter provision might undermine the incentives of class members to object to unreasonably high fee requests, since only the defendant—not the class members—would benefit from having the fee request reduced, and so class members would be unlikely to challenge the request. *Id*. at 610. While the district court acknowledged the existence of those two features of the settlement agreement, the Ninth Circuit held that it did not conduct the required "heightened inquiry" or "provide the necessary explanations" for why those warning signs did not suggest collusion in the settlement.

McKinney-Drobnis thus is a warning to settling parties of the risks posed by some commonly used settlement terms and by the use of non-cash relief, all of which may subject them to heightened scrutiny by the certifying court and the denial of their settlement.

SEVENTH CIRCUIT FINDS NO FDCPA LIABILITY FOR DEBT COLLECTOR SEEKING "FEES-ON-FEES"

The Fair Debt Collection Practices Act ("FDCPA") prohibits the use of "unfair or unconscionable means to collect or attempt to collect any debt," including the "collection of any amount… unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f(1). On its face, that provision suggests that a debt collector violates the FDCPA if it seeks to recover not just the debt owed, but also the costs it incurred in recovering the debt if the agreement creating the debt does not require the debtor to pay those costs. The Seventh Circuit's recent decision in *Robbins v. MED-1 Sols.*, LLC, 13 F.4th 652 (7th Cir. 2021), however, suggests that debt collectors may be able to collect such fees, even if the relevant agreement is silent as to those costs.

In *Robbins*, the plaintiff alleged a debt collector, MED-1, violated the FDCPA by seeking payment for medical bills along with $375 in attorney's fees incurred for collecting the debt. The plaintiff paid the debt, but refused to pay the attorney's fees, despite the fact that she had agreed to pay the "costs of collection, including attorney['s] fees and interest." MED-1's counsel informed her that if she did not pay the attorney's fees, she would also be liable for the additional fees incurred by MED-1 to collect the $375 in attorney's fees—the "fees-on-fees." *Id*. at 656. The plaintiff alleged that the cost-of-collection provision in her agreement did not cover fees-on-fees, and so MED-1's efforts to collect those additional fees violated § 1692f(1). She further argued that, by claiming that it was entitled to the fees-on-fees, MED-1 made a false representation of the legal status of the debt, and so also violated § 1692e. The magistrate judge rejected plaintiff's arguments and granted MED-1 summary judgment.

The Seventh Circuit affirmed. It first held that, by agreeing to pay the "costs of collection," plaintiff had agreed to pay "all costs associated with collection, including the cost of collecting attorney's fees." *Id*. at 659 (emphasis in original). More significantly, perhaps, the court further stated that, even if its contract interpretation was wrong, MED-1 may not have violated the FDCPA at all by seeking to recover fees-on-fees. The court reasoned that the purpose of the FDCPA is to protect debtors from unfair practices, not to "provide a windfall for debtors who prevail against debt collectors who bring nonfrivolous collection suits." *Id*. The court thus suggested that fees-on-fees and other collection-related amounts may be subject to a general equitable exception to the requirement that amounts to be collected must be "expressly authorized" in the agreement.

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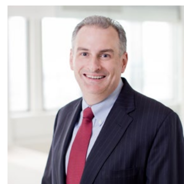

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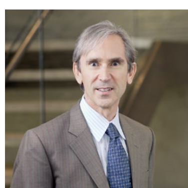

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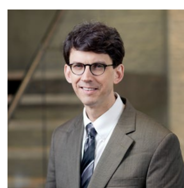

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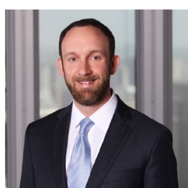

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