Class Action Monitor

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Eleventh Circuit Holds that a Statutory Violation is Insufficient for Standing and Settlement

By Edward Soto, Pravin R. Patel, and Alli G. Katzen

In *Muransky v. Godiva*, the Eleventh Circuit held that a violation of the Fair and Accurate Credit Transactions Act ("FACTA") was insufficient to allege a concrete injury for standing purposes.

Background

Dr. David Muransky filed a class action complaint against Godiva Chocolatier after he received a printed credit card receipt that contained credit card information in excess of the permissible number of digits under FACTA. One of the goals of FACTA is to prevent identity theft. In seeking to achieve that goal, FACTA restricts anyone conducting credit card transactions for business from printing more than five digits of a card number on a receipt. Dr. Muransky, on behalf of approximately 350,000 similarly situated people, alleged that Godiva printed more than the allowed five digits in violation of FACTA.

Because both the putative class and Godiva knew that the Supreme Court was set to determine this relevant standing issue in the *Spokeo v. Robins* case, the parties settled before *Spokeo* was decided.

The issue in *Spokeo* was whether a "bare procedural violation" of the Fair Credit Reporting Act ("FCRA") was sufficient to establish a concrete injury for standing purposes. The defendant in *Spokeo* operated a website that produced reports about people, some of which allegedly contained false information. While this definitively violated the FCRA, the Supreme Court ultimately decided that such a violation is not sufficient to establish the injury required for standing because the nature of the false information is not the kind that would likely cause injury. For example, some of the reports allegedly

contained incorrect zip codes. The Supreme Court stated that "[i]t is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm."

Though the *Muransky* parties reached an agreement before the *Spokeo* decision, almost avoiding the standing issue, not long after *Spokeo* was decided, class member Eric Alan Isaacson objected to the district court's settlement approval. Mr. Isaacson contended that Dr. Muransky lacked standing. An Eleventh Circuit panel affirmed the settlement approval, leaning on congressional findings that caused FACTA's conception in the first place. The full Eleventh Circuit granted a rehearing en banc and vacated the panel and district court's opinions.

The Eleventh Circuit held that, much like a report with an incorrect zip code, a receipt with more than five credit card digits is insufficient grounds to allege a concrete injury. Quoting *Spokeo*, the Eleventh Circuit declared that a plaintiff does not automatically have standing "to sue to vindicate [a statutory] right" that was violated. Rather, there must be an additional finding of concrete harm to the plaintiff. The Eleventh Circuit reasoned that because "no one's identity is stolen at the moment a receipt is printed with too many digits," such a violation is not a concrete injury.

There were three dissenting opinions, which analyzed both the statute and its legislative history, and concluded that at the time the receipt is printed, a concrete injury occurs. They argued that even if identity theft does not occur immediately upon printing more than five credit card numbers, it does increase the risk of identity theft. The dissenters explained that the goal of FACTA is not only to prevent identity theft, but also "to protect a consumer's interest in using a credit or debit card without incurring the *heightened risk* of identity theft." They further noted that FACTA provides for statutory damages when a business prints more than five credit card numbers, rather than when a resulting identity theft occurs. They also pointed to FACTA's statute of limitations, which begins to run when the receipt is printed, rather than when a criminal uses the receipt to commit identity theft.

Nonetheless, the Eleventh Circuit held that a FACTA violation does not constitute a concrete harm or a material risk of harm. As a result, the case was dismissed and the settlement thrown out.

Conclusion

In analyzing potential class action litigation, including the prospects of settlement, it is critical for practitioners to consider standing. The decision in *Muransky* indicates that even if standing has not been raised as an issue in the case, a court may not approve a class settlement absent a showing of standing.

Class Action "Reform:" Envisioning a World without Predominance

By Carrie Mahan, Pravin R. Patel, and Drew Cypher

On October 6, 2020, the U.S. House Judiciary's Committee on Antitrust, Commercial, and Administrative Law issued its report on competition in digital markets. One of the Report's objectives is to provide recommendations for areas of legislative activity and, with Democrats having recently gained control of the Senate, the Report's recommendations are likely to be viewed with interest by legislators.

The Report recommends, among other things, "reducing procedural obstacles to litigation through eliminating…undue limits on class action formation," citing *Comcast v. Behrend* specifically. In *Comcast*, the Supreme Court held that in order to certify a class, class plaintiffs must show that damages can be measured and quantified on a class-wide basis and that those damages must be tied to plaintiffs' theory of damages. A legislative overhaul of *Comcast* (and its Rule 23 predominance requirement underpinnings) would, no doubt, have a wide-ranging impact on the future of class action litigation.

Background

Subscribers to Comcast's cable television services brought a class action against Comcast and its subsidiaries alleging that Comcast anticompetitively increased its market share of cable television services in Philadelphia between 1998 and 2007. More specifically, plaintiff-subscribers alleged that Comcast engaged in "clustering," whereby it purchased competitors' systems and contracted to "swap" cable systems it owned outside of Philadelphia. Plaintiffs successfully sought certification of a purported class of 2 million past and present Comcast subscribers. This certification was subsequently affirmed by a divided Third Circuit, which found that plaintiffs' theory of antitrust impact – that "overbuilder" companies were deterred from building competing cable networks in Philadelphia – was capable of classwide proof, even though plaintiffs' damages model failed to attribute any damages resulting from overbuilder deterrence. The court noted that at the class certification stage, respondents were not required to "tie each theory of antitrust impact to an exact calculation of damages." *Comcast v. Behrend*, 569 U.S. 27 (2013) (citing 655 F.3d 182, 207 (CA3 2011)).

On further appeal, the Supreme Court noted that to satisfy Rule 23(b)(3)'s predominance requirement, the plaintiffs in *Comcast* were required to show that the alleged antitrust impact was "capable of proof at trial through evidence that is common to the class rather than individual to its members" and (2) that the damages resulting from that injury were measurable "on a class-wide basis" through use of a "common methodology." *Comcast v. Behrend*, 569 U.S. 27 (2013) (citing 264 F.R.D. 150, 154 (ED Pa. 2010)). The Supreme Court disagreed with the lower courts that these requirements had been satisfied and held that "[i]n light of [respondents' damages] model's inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class."

Possible "Reform"

Comcast can be a powerful tool for defendants seeking to avoid drawn-out class action litigation. Class certification is crucial and, in many cases, outcome determinative in class action litigation where the pressure by companies to settle antitrust cases after certification is often divorced from the merits of the underlying claims.

If Congress were to amend Rule 23, thereby easing the certification of classes, defendants should be prepared to either litigate claims against them at summary judgment or trial or aim to heighten class certification requirements in other ways. A few affirmative points, and cautionary notes, are in order:

- Any Rule 23 amendment quite possibly could come with the clear legislative directive that courts should not analyze the merits of the case at the class certification stage. Class certification, therefore, will largely depend upon the quality of the plaintiffs' brief and less on the substantive merits of plaintiffs' case.
- Proponents of plaintiff-friendly reform also seek to significantly overhaul Rule 23(b)(3)'s requirements. At the extreme, the predominance requirement and its enumerated factors could be removed while still allowing for the "adventuresome" class action created by the 1966 amendments. Rule 23(a), however, still requires plaintiffs to satisfy a number of factors, including commonality, which, today, carry little weight. One possible explanation for a "weak" commonality requirement – requiring that plaintiffs' claims be amenable to resolution in one stroke – is its interrelatedness with the predominance inquiry. If the predominance requirement were removed, however, such questions of common proof and individualized evidence would, or could, fall into commonality, leaving defendants a doctrine ripe for development.
- Finally, in the event that defendants are required to litigate the merits more often, defendants may be able to routinely mount an as-applied constitutional attack on an amended Rule 23(b)(3). Rule 23(b)(3), absent a predominance requirement (as envisioned above), will likely be interpreted by many courts to modify defendants' substantive rights by permitting aggregated and averaged evidence against defendants, while limiting their ability to *defend* against such attacks using individualized evidence. More pointedly, defendants can plausibly argue that although putative class counsel believe they can prove *their* case using common proof, the Constitution and, in federal courts, the Rules Enabling Act, require that defendants be afforded the opportunity to *contest* liability using individualized evidence. This is particularly true of antitrust class actions, where plaintiffs lack the securities equivalent of a fraud on the market theory that negates the utility, or necessity, of individualized evidence.

Conclusion

Although congressional action in favor of "reducing procedural obstacles" to class action litigation does not appear to be on the *immediate* horizon, plaintiff-friendly class action reform is steadily gaining momentum. If Congress does pass legislation aimed at easing class certification requirements, defendants should be prepared to litigate claims against them at trial or, otherwise, aim to heighten Rule 23's other procedural requirements.

About Weil's Class Action Practice

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Whether our clients face a nationwide class action in one court or statewide class actions in courts across the country, we develop tailored litigation strategies based on our clients' near- and long-term business objectives, and guided by our ability to exert leverage at all phases of the case – especially at trial. Our principal focus is to navigate our clients to the earliest possible favorable resolution, saving them time and money, while minimizing risk and allowing them to focus on what truly matters—their businesses.

For more information on Weil's class action practice please visit our website.

Class Action Honors (cont.)

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Ranked among the top 5 firms nationally for Consumer Class Actions.

***— Chambers USA*, 2021**

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