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Weil

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Looking Beyond Predominance: A Survey of Alternatives to Defeat Class Certification

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Defendants faced with a class action often rely on predominance to prevent class certification, but there are an array of underutilized tools at their disposal. In this issue of the *Class Action Monitor*, we analyze several key arguments defendants can deploy to prevail at the class certification phase. One option is to assert the court lacks personal jurisdiction over certain absent class members by arguing that *Bristol-Myers Squibb* should apply to the class action context, which could substantially reduce class size and thus a defendant's overall exposure. Another alternative is utilizing Article III standing where the type of injury alleged is not analogous to any comparable injury at common law or any injury defined by statute. Defendants can also show typicality is not satisfied because the injuries or claims of the named plaintiffs are distinguishable from those of class members to the extent they arise from different causes. Finally, defendants can challenge ascertainability by arguing that plaintiffs cannot identify class members in a reliable and administratively feasible way because individualized fact-finding or mini-trials would be necessary to prove class membership. Defendants should utilize all of the arguments at their disposal—in this issue, we explore how and when defendants can implement various arguments successfully, depending on the facts or venue of the case.

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The Due Process Argument for Applying *Bristol-Myers Squibb* to Class Actions

In 2017, the Supreme Court held that a California court lacked personal jurisdiction over the defendants in a mass tort action as it related to the claims of nonresident plaintiffs injured out of state. *Bristol-Myers Squibb Co. v. Sup. Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017). Since then, defendants have—largely unsuccessfully—attempted to apply that decision to the class action context. The circuit courts that have addressed this argument have refused to extend *Bristol-Myers Squibb* to the class action context. *See Lyngaas v. Curaden AG*, 992 F.3d 412, 435 (6th Cir. 2021); *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447–48 (7th Cir. 2020). *But see Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 250–52 (5th Cir. 2020) (declining to address the question on a motion to dismiss); *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 299–300 (D.C. Cir. 2020) (same). But the question of *Bristol-Myers Squibb*'s reach is not entirely settled as some district courts have applied the holding to class actions citing concerns about defendants' due process rights. *See, e.g.*, *In re Dental Supplies Antitrust Litig.*, 2017 WL 4217115 (E.D.N.Y. Sept. 20, 2017). Moreover, vociferous dissents accompany the existing circuit court decisions. *See, e.g.*, *Lyngaas*, 992 F.3d at 438–46 (Thapar, J., concurring in part and dissenting in part); *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d at 305–09 (Silberman, J., dissenting). This uncertain landscape presents an opportunity—particularly where circuit courts have not yet weighed in—for defendants to argue that due process concerns compel the application of *Bristol-Myers Squibb* in class actions.

One court holding that *Bristol-Myers Squibb* applied to class actions focused on due process concerns stemming from the assertion of specific personal jurisdiction over a class action defendant for a claim that did not occur in the forum state. *In re Dental Supplies Antitrust Litig.*, 2017 WL 4217115, at *9. The court reasoned that because the "constitutional requirements of due process do not wax and wane when the complaint is individual or on behalf of a class," allowing courts to exercise personal jurisdiction over class action defendants, where there is no connection between the forum and the claims of certain unnamed class members, implicates serious concerns as to defendants' due process rights. *Id*. Further, as at least one judge has recognized, "nothing about the class action changes the basic rule—a court cannot adjudicate claims without jurisdiction." *Lyngaas*, 992 F.3d at 443 (Thapar, J., concurring in part and dissenting in part). As such, class action defendants can raise due process arguments to challenge the exercise of specific personal jurisdiction over defendants in the context of an out-of-state class action plaintiff where there is no connection between the nonresident's claim and the forum. *See Bristol-Myers Squibb*, 137 S. Ct. at 1781 ("there must be an affiliation between the forum and the underlying controversy, principally [an] activity or an occurrence that takes place in the forum state . . . . [w]hen there is no such connection, specific jurisdiction is lacking.").

Many courts that decline to extend *Bristol-Myers Squibb* even in the face of due process challenges cite to the procedural safeguards of Rule 23 of the Federal Rules of Civil Procedure as rectifying the due process concerns. But class action defendants can challenge that reasoning on two grounds. First, as one district court observed, "the procedural safeguards of Rule 23 are meant primarily to protect the absent **class members**," not to protect the due process rights of the class action defendants. *Carpenter v. PetSmart, Inc.*, 441 F. Supp. 3d 1028, 1036–37 (S.D. Cal. 2020); *see also Bristol-Myers Squibb*, 137 S. Ct. at 1783 (distinguishing between the "due process rights of *plaintiffs*" and defendants); *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d at 307–08 (Silberman, J., dissenting) ("Rule 23 and its state analogues are not a substitute for normal limits on personal jurisdiction."). Second, the Rules Enabling Act states that procedural rules implemented by the courts "shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with . . . the Rules Enabling Act[] . . . ."). Rule 23 cannot

"extend . . . the jurisdiction of the district courts," including personal jurisdiction. FED. R. CIV. P. 82; *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). Class action defendants should assert that the procedural mechanisms in Rule 23 cannot replace the constitutional due process requirements of exercising personal jurisdiction over a defendant as to the out of state claims of non-resident plaintiffs.

While the application of *Bristol-Myers Squibb* to unnamed class members may not defeat a class action, in many instances it could greatly limit the class—and as such limit class action defendants' potential liabilities. This could be a powerful tool, as class action defendants can shave off the claims of plaintiffs bringing out-of-state claims who may not otherwise pursue litigation without the benefits of being a member of a large class action. On the other hand, if class action plaintiffs are barred from joining a class due to personal jurisdiction challenges, they may bring claims in a wide range of forums, causing defendants to have to defend numerous cases across the country.

Disputing Article III Standing in Class Action Lawsuits in a Post-*TransUnion* World

In 2021, the Supreme Court issued the landmark decision *TransUnion LLC v. Ramirez*, which significantly impacted the analysis of Article III standing in class action lawsuits, and in particular, the requirement that plaintiffs demonstrate a "concrete harm" to establish standing in federal court. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203–04 (2021) (quoting *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992)). Recent circuit court decisions indicate that most courts have stayed close to the guidance of finding a common law analog to the named plaintiff's alleged injury when determining if the injury is in fact concrete. Similarly, in the context of informational injuries, courts have adhered to the requirement that a plaintiff must identify "downstream consequences from failing to receive the required information." *Id.* at 2214 (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990,1004 (11th Cir. 2020)).

One recent decision demonstrates how the common law analog requirement can limit the breadth of a class. In *Fox v. Saginaw County, Michigan*, plaintiff filed suit after his property was seized and sold by the county in which it was located after plaintiff failed to pay taxes on the property. 67 F.4th 284 (6th Cir. 2023). Plaintiff alleged the sale amounted to an unconstitutional taking because the county did not provide plaintiff with the surplus between the amount owed in taxes and the sale price of the property. *Id.* The plaintiff brought a class action suit, naming the county his property was located in, as well as twenty-six other counties that he alleged partook in similar conduct, as defendants. *Id.* at 300. The Sixth Circuit vacated the district court's order certifying the class, finding that the plaintiff lacked standing for the claims against the twenty-six counties where his property was not located because he was not able to identify "any historical analog that show[ed] that his broader class action was traditionally amenable to judicial resolution." *Id.* at 300 (internal citations omitted).

Courts have interpreted *TransUnion* to require a close look at the precise harm alleged to determine whether it is rooted in the common law. In *O'Leary v. TrustedID, Inc.*, the Fourth Circuit found that plaintiff did not have standing to bring suit because the alleged injury resulting from a violation of the Social Security Act did not have a "close relationship" to a traditional or common-law analog. 60 F.4th 240, 245 (4th Cir. 2023). O'Leary claimed that the defendant's website requiring those potentially affected by a security breach to enter six digits of their social security number to determine if they were indeed affected was prohibited by the Social Security Act. *Id.* But the court found that any privacy interest O'Leary had in his Social Security number itself (as opposed to the privacy interest in "stav[ing] off identity theft") was not rooted in tradition or the common law. *Id.*

In addition to being rooted in tradition, another critical requirement that arises in the context of informational injuries is whether the plaintiff can establish “downstream consequences” resulting from his claimed injury. *See TransUnion*, 141 S. Ct. at 2214. A downstream consequence exists when “a person lack[s] access to information to which he is legally entitled *and* the denial of that information creates a ‘real’ harm with an adverse effect.” *Dreher v. Experian Information Solutions, Inc.*, 856 F.3d 337, 345 (4th Cir. 2017). If a plaintiff fails to show that he suffered such “downstream consequences,” or adverse effects a court cannot find that he has standing. *Id.* For example, the Tenth Circuit determined there was no informational injury when information required by the Americans with Disabilities Act of 1990 to be posted online was not posted by defendant hotel and plaintiff “[did] not allege[] that she ha[d] any interest in using the information she obtained from [the Defendant’s website] beyond bringing [a] lawsuit. She did not intend to book a room and … ha[d] no intent to do so.” *Laufer v. Looper*, 22 F.4th 871, 881 (10th Cir. 2022). While there are some cases where a circuit court has strayed from the Supreme Court’s guidance that there must be downstream consequences to find an informational injury, these are in the distinct minority. *Compare Laufer v. Ahceson Hotels, LLC*, 50 F.4th 259 (1st Cir. 2022) (finding that the absence of information that is statutorily required to be provided is alone enough to establish an informational injury) *with Harty v. West Point Realty, Inc.*, 28 F.4th 435 (2d Cir. 2022) (finding that failing to provide information required by law is alone not enough to establish an informational injury, and the party alleging and informational information must show that they suffered adverse effects by not having access to such information).

In the wake of *TransUnion*, courts are looking closely to ensure there is a “concrete harm.” Alleged harms must have a direct link to an injury under the common law. And, informational injuries must lead to an adverse effect. Circuit courts’ close adherence to *TransUnion*’s guidance cue defendants into promising strategies for quashing class certification via Article III.

The Surprising Nuance of the Typicality Requirement

The typicality requirement for class certification requires that the named plaintiff has claims or defenses that are typical of the class as a whole. FED. R. CIV. P. 23(a)(3). Typicality has rarely been a point of major contention as this threshold has traditionally been considered fairly low, requiring only that the named plaintiff’s claims be similar to those of the class—either being based on the same event or occurrence, or based in the same legal or remedial theory. *Alpern v. UtiliCorp United, Inc*., 84 F.3d 1525, 1540 (8th Cir. 1996). But this relatively simple standard belies a surprisingly nuanced analysis of what facts make a plaintiff’s claim typical. Recent appellate cases present a perfect illustration of this.

The Third Circuit recently published two decisions rooted in the same typicality analysis, but with vastly different outcomes. In *Boley v. Universal Health Services, Inc.*, two named plaintiffs filed suit against their employer for breach of fiduciary duty in its retirement plan offerings. 36 F.4th 124 (3d Cir. 2022). The proposed class of employees had invested in thirty-seven different investment options, but the two named plaintiffs themselves had only invested in seven of these. However, the Eastern District of Pennsylvania ruled, and the Third Circuit affirmed, in favor of certification because while the named plaintiffs may have had claims that were different factually from other class members, their claims were still based on the same conduct by Universal Health, and therefore, could be considered typical. Importantly, the court held that the relatively pronounced factual differences between each plaintiff’s claims would not defeat a finding of typicality so long as the *cause* of the injury was the same.

In contrast, in *Duncan v. Governor of Virgin Islands*—another Third Circuit class action decided just a few months after *Boley*—the plaintiff initiated a class action challenging the government’s practice of delaying tax refund checks for most taxpayers, while expediting refunds for select favored taxpayers and government employees. 48 F.4th 195 (3d Cir. 2022). During class discovery, plaintiff received her long-overdue refund from the government, although one

that was worth significantly less than what she was owed. This, according to the District of the Virgin Islands and the Third Circuit, was sufficient to make her claim atypical of the class, and both courts ruled against certifying the class. They found that, while the plaintiff's claims were still challenging the same government conduct as all other class members, the incorrect refund she received was enough of a factual difference to transform the applicable legal theory underlying her claim from one on non-payment to one of incorrect payment.

The ad hoc approach to typicality illustrated by these cases is not limited to the Third Circuit. In *Doster v. Kendall*, the fact that the named plaintiffs' claims relied on the same pattern of conduct and asserted the same theories as those of the class meant that the typicality requirement *was* met, even though the named plaintiffs were subject to unique defenses and the underlying claims required an individualistic analysis. 54 F.4th 398 (6th Cir. 2022). On the other hand, in *Woodall v. Wayne Cty*., the court determined that the "individualized determination" required by each claim and a statute of limitations defense that applied to named plaintiffs but not the putative class meant the typicality requirement was *not* met. 2021 WL 5298537 (6th Cir. 2021).

In a similar vein, the Federal Circuit, which has long described its own standard as a low bar, *Elec. Welfare Trust Fund v. United States*, 160 Fed. Cl. 462, 468 (2022) (quoting *Filosa v. United States*, 70 Fed. Cl. 609, 620 (2006)), has determined that typicality was not met when the plaintiffs lacked specificity in arguing typicality. In *Crawley v. United States*, the undetailed allegation that the harm arose out of the same systemic policy meant the plaintiffs had "failed to carry their burden" on the typicality factor. 2021 WL 252838, at *10 (Jan. 25, 2021). And in *Oztimurlenk v. United States*, the court chastised the plaintiffs for demonstrating the typicality requirement "only in the most general sense," which was insufficient to render the class certifiable. 162 FED. CL. 658, 693 (2022).

The typicality requirement is not just a simple checkbox on the path to class certification. Defendants should keep the following points in mind in order to develop a successful typicality defense:

1. **Remember that the burden is on the plaintiff.** As a threshold matter, defendants should remember that the plaintiff has to show that her claim is typical of the class. While the bar is typically low, defendants have been successful in arguing that plaintiffs fail to meet their burden when their claims for typicality are not properly supported.
2. **Focus on the claim rather than the facts.** By differentiating a plaintiff based on the nature of her claim rather than arguing that their factual situation is atypical, courts will be more likely to find that the typicality requirement is not satisfied.
3. **Consider the applicability of defenses.** Even if a named plaintiff's claims seem to be based on the same legal theories as other class members, if she is subject to unique defenses, courts may still find that her claims are atypical of the class.

The Uncertain Ascertainability Standard

The differing standards that courts have implemented for plaintiffs to fulfill the court-made ascertainability requirement provide defendants certain opportunities to defeat class certification, albeit more easily in certain circuits than others. The First, Third, and Fourth Circuits follow the heightened standard, which the Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have rejected. The Fifth, Tenth, Federal, and D.C. Circuits have not weighed in, and neither has the Supreme Court.

Heightened Standard Approach

In *Carrera v. Bayer Corp.,* the Third Circuit held that a class action plaintiff must "by a preponderance of the evidence," "demonstrate his purported method for ascertaining class members is reliable and administratively feasible," and such evidence can be challenged by the defendant. 727 F.3d 306–07 (3d Cir. 2013). Although there are no identifiable trends since the adoption of the standard, recent cases provide potential litigants with some guidance.

Defendants have defeated class certification in circuits that use the heightened standard based on a wide variety of arguments. Courts in these circuits almost always strike class certification if meeting the ascertainability standard would require mini-trials and individualized fact finding to identify the class members. *See Anderson v. Lab'y Corp. of Am. Holdings,* 2023 WL 1970953, at *14 (M.D.N.C. Feb. 13, 2023); *see also Martinez v. TD Bank USA, N.A.*, 15-cv-7712, 2017 WL 2829601, at *11–13 (D.N.J. Jun. 30, 2017). In *Anderson*, the court found class certification was inappropriate where there was no objective criteria to identify potential class members, and the method proposed would require the court to conduct a factual inquiry to determine whether each person was a member of the class. *Id.* The plaintiffs' method also cannot just assume what it needs to prove. *See In Re Niaspan Antitrust Litigation*, 67 F.4th 118, 135 (3d Cir. 2023). For example, plaintiffs' supposed method of using various data sets was found unreliable because plaintiffs' did not actually show how it would be able to identify all class members, or verify that the class members would be included in such information. *Id.* And if the purported evidence to identify class members does not help resolve a significant issue in the case, class certification may be denied. *See Mladenov v. Wegmans Food Markets, Inc.,* 124 F. Supp. 3d 360, 371 (D.N.J. 2015). Even where receipts showed an individual had purchased an item from defendant, but the receipt did not prove whether the product was advertised in a certain matter, which was a key issue in the case, the District of New Jersey denied class certification. *Id.*

In contrast, courts have granted class certification when plaintiffs have been able to show that class members are readily identifiable by way of self-identifying affidavits in combination with pertinent records. *See City Select Auto Sales Inc. v. BMW of N. Am. Inc.,* 867 F.3d 434, 441 (3d Cir. 2017); *see also In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.,* 341 F.R.D. 128, 145 (D. Md. 2022). In *City Select Auto Sales v. Bank of N.A.*, the Third Circuit reversed and remanded a decision denying class certification on ascertainability grounds and directed the lower court to require production of an electronic contacts database that could help determine class membership. The court strongly suggested that the class should be certified on remand because the class would be identifiable using the contacts database, and further narrowed using individual affidavits, if necessary. The holding in *City Select Auto Sales v. Bank of N.A.*, suggests that answering factual identification questions through affidavits or other records does not necessarily require individualized fact finding, and may be enough to meet the standard when presented in combination.

Rejection of the Heightened Standard

Defeating class certification via ascertainability is more challenging in circuits that have rejected the "heightened" standard because these courts have found that "administrative feasibility is relevant under Rule 23(b)(3), but it is not a prerequisite for certification." *Cherry v. Dometic Corp.,* 986 F.3d 1286, 1302–03 (11th Cir. 2021). Notably, the Eleventh Circuit has recently deviated from prior decisions that applied a heightened standard for ascertainability. *Karhu v. Vital Pharms., Inc.*, 621 F. App'x 945, 947–48 (11th Cir. 2015); *see also Bussey v. Macon Cty. Greyhound Park, Inc.*, 562 F. App'x 782, 788 (11th Cir. 2014).

Despite the Eleventh Circuit's decision in *Cherry*, parties have continued to raise administrative feasibility as a defense to class certification, *see, e.g., Haines v. Fid. Nat'l Title of Fla., Inc.*, 2022 WL 1095961, at *7 (M.D. Fla. Feb. 17, 2022), *report and recommendation adopted,* 2022 WL 612099 (M.D. Fla. Mar. 2, 2022), but courts are unpersuaded by arguments "repacking" the administrative feasibility test that *Cherry* rejected. *Id.* at *7, 11; *McCullough v. City of Montgomery*, 2021 WL 2044900, at *11–12 (M.D. Ala. May 21, 2021); *Morris v. Walmart Inc.*, 2022 WL 1590474, at *6 (N.D. Ala. Mar. 23, 2022). While defendants can no longer rely on raising the issue of administrative feasibility to defeat class certification in the Eleventh Circuit, *Haines*, 2022 WL 1095961, at *7; *McCullough*, 2021 WL 2044900, at *11–12; *Morris*, 2022 WL 1590474, at *6, Rule 23(b)(3)(D)'s "manageability" factor is still relevant in circuits that utilize the "weakened" standard. 2022 WL 16695130, at *10 (M.D. Fla. Nov. 3, 2022). For example, the court in *Scoma Chiropractic, P.A. v. Nat'l Spine & Pain Centers LLC*, found that plaintiff's inability to identify a large portion of the class would create manageability issues that were not outweighed by any advantages of proceeding as a class action. *Id.* at *12. Still, defendants in these circuits will have a difficult time defeating class certification with ascertanability arguments because the administrative feasibility threshold for "manageability" is separate and apart from the standalone administrative feasibility requirement that has been rejected. *Id.* at *10.

Conclusion

Regardless of jurisdiction, defendants should consider ascertainability, or the components underlying the defense, as an opportunity in arguing against class certification.

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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.

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