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Class Action Honors

Ninth Circuit Holds that All Class Members Must Have Article III Standing to Recover Monetary Damages

By David R. Singh, Pravin R. Patel and Neeckaun Irani

In *Ramirez v. TransUnion LLC*, a 2-1 Ninth Circuit panel held that all Rule 23 class members must have Article III standing at final judgment to recover monetary damages. Although the Ninth Circuit has made similar determinations at earlier stages of litigation, *Ramirez* marks the first time the Ninth Circuit has addressed the issue at the final judgment stage.

Background

TransUnion is an American consumer credit reporting agency which collects and aggregates information on over a billion consumers in over thirty countries. In the early 2000s, TransUnion began a program which matched names of persons to the United States government's list of Specially Designated Nationals ("SDNs"). SDNs include terrorists, drug traffickers, and others with whom persons in the United States are prohibited from doing business pursuant to the Treasury Department's Office of Foreign Assets Control ("OFAC") regulations. TransUnion began this matching program in order to help businesses avoid penalties resulting from engaging in business with SDNs.

At the request of the named Plaintiff, Sergio Ramirez, a car dealership obtained Mr. Ramirez's TransUnion credit report. The dealership told Mr. Ramirez they would not sell him a car because the report indicated he was on a terrorism watch list. Mr. Ramirez, on behalf of himself and a putative class, filed suit alleging TransUnion violated the Fair Credit Reporting Act ("FCRA") by placing false OFAC alerts on consumers' credit reports and later sending misleading and incomplete disclosures about the alerts.

The United States District Court for the Northern District of California certified a class of "all natural persons in the United States . . . to whom TransUnion sent a [similar letter to that of Ramirez] . . . regarding the [OFAC Database]." This class definition resulted in a putative class of 8,000 individuals who alleged they had improperly been listed with terrorist-type alerts. The class was certified and a jury trial returned a verdict in the Plaintiffs' favor for over $60 million in statutory and punitive damages for three willful violations of the statute.

TransUnion moved for judgment as a matter of law, or in the alternative, for a new trial, remittitur, or an amended judgment. The district court denied the motion. TransUnion appealed to the Ninth Circuit. Among other things, TransUnion argued that not all class members had standing because not all class members actually had their credit reports disclosed.

Although the Ninth Circuit agreed with TransUnion in principle that all class members must satisfy Article III standing requirements at the final judgment stage, it found that that the evidence established that all class members had standing. Specifically, the Ninth Circuit found the class members had suffered a concrete injury because (1) of the severity and nature of the inaccuracy, (2) of the risk of sharing the information with its third-party vendor which was made worse by TransUnion's failure to follow its normal data storage procedures, and (3) the reports were easily available to potential creditors or employers at a moment's notice, even without the consumers' knowledge in some instances. The Ninth Circuit held that, although not all class members actually had their credit reports disclosed to third parties, the statutory violations and material risk of disclosure were sufficient to establish a concrete injury-in-fact sufficient for Article III standing purposes.

Conclusion

In *Spokeo v. Robins*, 136 S. Ct. 1540 (2016), the Supreme Court held that Article III standing requires a concrete injury and that an allegation of a violation of a statutory right is insufficient injury to qualify for standing. However, since *Spokeo*, dozens of federal courts have often inconsistently applied the Supreme Court's reasoning in determining what degree of harm, or threat or likelihood of harm, is sufficient to be deemed concrete. *Ramirez* marks the latest decision in the evolution of Article III standing requirements in the class action context post-*Spokeo*. The Ninth Circuit charted new waters by holding that, although early in a litigation, such as at the motion to dismiss stage, only the named plaintiff needs to establish Article III standing, every class member needs standing to recover damages at the final judgment stage. Practitioners should keep in mind, however, that the Ninth Circuit noted that evidence of standing need not always be individualized and may, in certain cases, be established through class wide methods such as "expert testimony, representative class members, and credit agency protocol[s]," and individual evidence need not "be proffered as to each class member." Accordingly, arguments marshalled to attack purported class evidence at the class certification stage continue to be relevant after a class certification order. Defendants should continue to attack the purported methods of establishing class-wide injury through and after trial.

On June 24, 2020, the Ninth Circuit granted a motion to stay its mandate pending TransUnion's filing of a writ of certiorari to the Supreme Court. As of the date of this article, TransUnion is yet to file its writ. Weil will continue to closely monitor this case.

Defendant Class Actions: Rare Birds Evoking Both Novel Efficiencies and Unique Barriers

By Edward Soto, Pravin R. Patel, Cameron Mae Bonk and Lorell Guerrero

While class action suits brought by a named plaintiff or plaintiffs on behalf of a class of similarly situated individuals against individual defendants are common-place in today's legal landscape, suits brought against a class of *defendants* are anything but routine. Defendant class actions have been referred to as "one of the rarest types of complex litigation," in fact "so rare they have been compared to 'unicorns.'" *Bell v. Brockett*, 922 F.3d 502, 504 (4th Cir. 2019). These "unicorns" carry with them various procedural advantages and efficiencies, but also run up against hurdles that at times make such suits difficult to maintain.

Unique Challenges in Meeting Federal Rule 23(a) and (b) Prerequisites

The filing of a suit against a proposed class of defendants can act as a sort of innovative joinder device that seeks to impose the desired relief upon a large group of like-situated defendants without the challenges associated with filing individual suits against or formally joining every defendant. In order to obtain this kind of result, the proposed defendant class must satisfy the same procedural requisites of Federal Rule of Civil Procedure 23 commonly applied to plaintiff classes. However, these familiar requirements can present unique challenges in the defendant class context.

Adequate representation is the Rule 23(a) requirement that presents one of the greatest barriers to certification of a defendant class. "Rule 23[(a)(4)]'s adequacy requirements provide critical safeguards against the due process concerns inherent in all class actions." *Brockett*, 922 F.3d at 511. However, these requirements "are especially important for a defendant class action where due process risks are magnified," because in these suits "an unnamed class member can be brought into a case…and even be subjected to a judgment compelling the payment of money or other relief without ever being individually served with a lawsuit." *Id.*

Due to these concerns, some courts have declined to certify defendant classes in part due to a failure of adequate representation. *E.g.*, *Brown v. Kelly*, 609 F.3d 467, 479 (2d Cir. 2010) (defendant class representatives "inadequately fill[ed] the role" because they "possess[ed] weaker incentives to defend against the injunctive relief" than other class members and faced "a host of legal and factual issues unique to them"). Other courts have disagreed and certified defendant classes even where the class representative is unwilling and seeks to withdraw from the position. *E.g.*, *Strawser v. Strange*, 190 F. Supp. 3d 1078, 1080 (S.D. Ala. 2016) (to "permit [defendant class representatives] to abdicate so easily would utterly vitiate the effectiveness of the defendant class action").

In addition, some courts have expressed skepticism where class members have no ability to opt-out; i.e., actions brought under any subsection but Rule 23(b)(3). "Defendant classes, initiated by those opposed to the interests of the class, are more likely than plaintiff classes to include members whose interests diverge from those of the named representatives, which means they are more in need of the due process protections afforded by (b)(3)'s safeguards." *Ameritech Ben. Plan Comm. v. Commc'n Workers of Am.*, 220 F.3d 814, 820 (7th Cir. 2000). Accordingly, attempts to certify defendant classes under Rule 23(b)(2) have received varied treatment across federal jurisdictions. *See* § 1775 Class Actions for Injunctive or Declaratory Relief Under Rule 23(b)(2)—In General, 7AA Fed. Prac. & Proc. Civ. § 1775 (3d ed.). Notably, the Courts of Appeal for the Fourth, Sixth, and Seventh Circuits have refused to certify such proceedings under Rule 23(b)(2), holding that the language of the Rule "contemplates certification of a plaintiff class against a single defendant, not the certification of a defendant class." *Thompson v. Bd. of Educ. of Romeo Cmty. Sch.*, 709 F.2d 1200, 1204 (6th Cir. 1983); *see also Paxman v. Campbell*, 612 F.2d 848, 854 (4th Cir. 1980); *Henson v. E. Lincoln Twp.*, 814 F.2d 410, 417 (7th Cir. 1987); *Greenhouse v. Greco*, 617 F.2d 408, 413, n.6 (5th Cir. 1980).

Types of Defendant Classes More Likely to Succeed and Associated Efficiencies

Although defendant classes are rare, they have been employed in "various types of cases, including, but not limited to, patent infringement cases, suits against local officials challenging the validity of state laws, securities litigation, and actions against employers." Robert R. Simpson; Craig Lyle Perra, Defendant Class Actions, 32 Conn. L. Rev. 1319 (2000) at 1323 (internal citations omitted). In the government actor context, for example, the Second Circuit upheld the certification of a defendant class action brought under Rule 23(b)(3) against the New York State Board of Equalization and Assessment, along with several tax assessing and tax collecting jurisdictions, alleging discriminatory taxation. *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473 (2d Cir. 1995); *see also Coal. Econ. Equity v. Wilson*, 1996 WL 788376 (N.D. Cal. Dec. 16, 1996) (challenging state proposition codified as part of CA constitution). In *Consolidated Rail*, due to the approximately one-thousand tax collecting and assessing jurisdictions in New York, "individual adjudications of [Plaintiff's] claims would be unnecessarily expensive and time-consuming and enormously burdensome on the courts," in addition to making "joinder of individual members…impracticable." *Id.* at 483 (citation omitted). Similarly, the court found that "[l]itigating in one forum the narrow issue of the proper method for determining true market value….would adequately serve the interests of all [defendants] instead of repeatedly litigating the same issue and possibly getting conflicting results." *Id.* In addition, a number of federal courts have also certified defendant classes in Securities Act cases. *E.g.*, *In re Victor Tech. Sec. Litig*., 102 F.R.D. 53 (N.D. Cal. 1984) (certifying defendant class under Rule 23(b)(3) only); *In re Gap Stores Sec. Litig*. 79 F.R.D. 283 (N.D. Cal. 1987) (certifying defendant class alleging material misstatement in registration statement).

Practice Pointers

- **Successfully Employed in Certain Contexts.** Although defendant classes only constitute a small fraction of all class actions, they have been successfully employed in various contexts, including in challenging state laws, regulations, or practice, and in Securities Act matters.
- **Bilateral Classes Present Additional Challenges.** "There is great judicial reluctance to certify a defendant class when the action is brought by a plaintiff class," known as a bilateral class action, instead of individual plaintiff(s). *Thillens, Inc. v. Cmty. Currency Exch. Ass'n of Illinois, Inc.*, 97 F.R.D. 668, 675 (N.D. Ill. 1983). Courts' main concern here "is a fear that each plaintiff member has not been injured by each defendant member." *Id*.
- **Courts Are Wary Without Opt-Out Mechanisms.** Where courts often curtail damages class suits by *plaintiffs* under Rule 23(b)(3) due to the heightened predominance requirement, defendant classes are more susceptible to certification barriers in the class subtypes set forth in Rule 23(b)(1) and (b)(2). "Failure to provide notice and/or opt out rights may deprive an unnamed defendant class member of the ability to challenge issues such as personal jurisdiction, venue and choice of law." *Brockett*, 922 F.3d at 511 n.3.
- **Potential Trend: Prohibition of Defendant Classes.** Citing due process concerns, the Maryland Court of Appeals recently abolished the certification of defendant classes, becoming the first state to explicitly do so, and potentially setting the stage for other jurisdictions to follow suit. *See* Md. Rules 2-231; Standing Committee on Rules of Practice and Procedure, Notice of Proposed Rules Changes, 1-3, https://www.mdcourts.gov/sites/default/files/rules/reports/200threport.pdf (Mar. 5, 2019).

About Weil's Class Action Practice

Weil offers an integrated, cross-disciplinary class action defense group comprising lawyers with expertise across our top-rated practices and hailing from our eight offices across the U.S.

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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If you have questions concerning the contents of this issue of Class Action Monitor, or would like more information about Weil's Class Action practice, please speak to your regular contact at Weil or to the editors listed below:

Editor:

David Singh	View Bio	david.singh@weil.com	+ 1 650 802 3010

Associate Editor:

Pravin Patel	View Bio	pravin.patel@weil.com	+ 1 305 577 3112

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