

SECOND QUARTER 2019 UPDATE ON CLASS ACTIONS

To Our Clients and Friends:

This update provides an overview and summary of key class action developments during the second quarter of 2019 (March through June).

- **Part I** discusses developments in the law governing class settlements, including loosened requirements for certifying settlement-only classes, the continued viability of multistate classes, and acceptance of third-party litigation funders.
- **Part II** discusses the continued divergent approaches that the federal appellate courts have adopted in order to assess whether putative class plaintiffs have standing under Article III after the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

I. Courts Continue to Address Important Questions Regarding Class Settlements

During this past quarter, the federal courts of appeals touched upon three important issues relating to class settlements.

A. *The En Banc Ninth Circuit Reaffirms Viability of Nationwide Settlement Classes*

In June 2019, an en banc panel of the Ninth Circuit endorsed the viability of multistate settlement classes in *In re Hyundai & Kia Fuel Economy Litigation*, reversing the prior three-judge panel decision.

As reported in our [first quarter 2018 update](#), in a 2-1 decision, a three-judge Ninth Circuit panel originally vacated the district court's certification of a nationwide settlement class because the district court had failed to analyze whether California law could be applied to the claims of a nationwide class, given potential differences in states' consumer protection laws. *In re Hyundai*, 881 F.3d 679, 702 (9th Cir. 2018). Judge Nguyen dissented, warning that the panel decision would “deal[] a major blow to multistate class actions” and “significantly burden[] . . . overloaded district courts” because it would “import[] . . . additional hurdle[s]” into the class certification process that are “found nowhere in [Rule 23].” *Id.* at 708, 712 (Nguyen, J., dissenting) (internal quotation marks omitted).

The Ninth Circuit reheard the case en banc and, in an 8-3 decision (authored by Judge Nguyen), overruled the three-judge panel and affirmed the district court's certification of a nationwide settlement class. 926 F.3d 539 (9th Cir. 2019) (en banc). The en banc court first observed that because the case involved certification of a settlement-only class, the question of “manageability [wa]s not a concern . . . [since] by definition, there will be no trial.” *Id.* at 556-57. On the choice-of-law issue, the court held that “[s]ubject to constitutional limitations and the forum state's choice-of-law rules, a court adjudicating a

multistate class action is free to apply the substantive law of a single state to the entire class.” *Id.* at 561. In particular, under California’s choice-of-law rules, because no party or objector timely argued that the law of another state should apply, the district court was not obligated to address choice-of-law issues at all, and the Ninth Circuit would not disturb the class certification decision “for lack of such analysis.” *Id.* at 562.

Importantly, the en banc Ninth Circuit left undisturbed its prior decision in *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012)—which held that a multi-state class could not be certified due to substantive differences in the law across dozens of jurisdictions—because it found the decision distinguishable. Specifically, the class in *Mazza* had been certified for litigation, rather than settlement purposes, and therefore the distinct laws of multiple jurisdictions would have presented significant trial manageability problems. *In re Hyundai*, 926 F.3d at 563. In the settlement context, however, the trial manageability concerns identified in *Mazza* had no relevance, according to the en banc Ninth Circuit. *Id.*

By reinstating the nationwide settlement class, the Ninth Circuit’s en banc opinion in *In re Hyundai* offers a roadmap for parties wishing to settle class actions on a nationwide basis. Yet at the same time, the Ninth Circuit reaffirmed that choice of law issues are still a legitimate reason to deny certification of a class action in which certification is sought for litigation, rather than settlement, purposes.

B. The Third Circuit Holds That District Court Overstepped by Voiding Agreements Assigning Class Claims to Third-Party Litigation Funders

Third-party litigation funders scored a victory in the Third Circuit in the second quarter of 2019.

In *In re NFL Players’ Concussion Injury Litigation*, 923 F.3d 96 (3d Cir. 2019), the district court approved a \$1.5 billion class settlement between former NFL players and the NFL arising from concussion-related injuries. Some class members assigned their claims to third-party litigation funders in exchange for receipt of an immediate cash payment, even though the settlement contained an anti-assignment clause. *Id.* at 100. The district court subsequently entered an order “purporting to void all such agreements,” reasoning that its order was “necessary to protect vulnerable class members from predatory funding companies.” *Id.* at 100, 103.

The litigation funders appealed, and the Third Circuit reversed. While recognizing that the district court had the power to administer the settlement, and that true assignments of settlement proceeds were void *ab initio* under the class settlement’s anti-assignment clause, the court held that the district court “went beyond its authority when it purported to void the cash advance agreements in their entirety.” *Id.* at 111. Because there were other “portions of the cash advance agreements that may be enforceable even after any true assignments are voided,” the district court “had the option of invalidating only the assignment portions of the agreements containing true assignments . . . without voiding the agreements in their entirety.” *Id.* The court also seemed troubled that the district court voided the cash advance agreements “without affording the [third-party funders] notice and a hearing.” *Id.* at 112. The Third Circuit added, however, that “once the funds are disbursed to the players, the District Court’s power over the funds—and any contracts affecting the funds—is at an end.” *Id.* at 111.

In light of the increasing prevalence of third-party litigation funding, the Third Circuit’s ruling provides important guidance regarding the contours of the role that funders may play in class action litigation.

C. The Ninth Circuit Addresses the Preclusive Effect of Class Settlement on Subsequent Class Actions

The Ninth Circuit also addressed the scope of class settlement releases in *Wojciechowski v. Kohlberg Ventures, LLC*, 923 F.3d 685 (9th Cir. 2019). The case involved a plaintiff who had settled a class action against his former employer, in which he had alleged that the employer had terminated employees without the advance notice required under the Worker Adjustment and Retraining Notification Act (“WARN Act”). *Id.* at 688. As part of the class settlement, the class (including the plaintiff) released all claims against the employer. *Id.* But the release expressly preserved claims against third parties affiliated with the employer, including an affiliated venture capital firm, Kohlberg Ventures LLC (“Kohlberg”). *Id.*

After entering the settlement, the plaintiff filed a new putative action against Kohlberg, alleging that Kohlberg was also liable as a “single employer” under the WARN Act. *Id.* at 688–89. The district court dismissed the plaintiff’s claims, holding that the earlier class action barred the new suit, and reasoning that because Kohlberg was not a party to that first lawsuit, it could not be bound by the prior settlement agreement (including the provision preserving the class’s claims against Kohlberg). *Id.* at 689.

The Ninth Circuit reversed and allowed the plaintiff to proceed with his claims against Kohlberg. When a court dismisses an action because of a settlement, the Ninth Circuit held, “the settlement agreement—and in particular, the intent of the settling parties—determines the preclusive effect of the previous action.” *Id.* at 688. The court explained that because “the settlement and release of claims . . . is stamped with the imprimatur of [a] court with jurisdiction,” “[t]he settlement and release become a ‘final judgment’ and ‘not simply a contract entered into by . . . private parties.’” *Id.* at 690-91. Accordingly, to determine the preclusive effect of the prior settlement, the district court had to consider “whether the settling parties intended to preclude [plaintiff’s] current claim.” *Id.* at 691. Because it was undisputed that the parties from the first settlement agreement did not intend to release claims against Kohlberg, the Ninth Circuit reversed and remanded for further proceedings. *Id.*

Wojciechowski underscores the importance of clearly spelling out the intended scope of a class settlement release, as that intent should determine the preclusive effect of the settlement.

This issue remains far from settled, however, as litigants and district courts must now attempt to square the holding and reasoning of *Wojciechowski* with the Ninth Circuit’s prior decision in *Hesse v. Sprint Corp.*, 598 F.3d 581 (9th Cir. 2010). In *Hesse*, the court retroactively limited the effect of a prior class settlement release, reasoning that regardless of the language or intent of the release, the preclusive effect of that release can go no further than claims that share an “identical factual predicate” with the claims in the first settled class action. *Id.* at 592. In future cases, class plaintiffs seeking to avoid prior class settlement releases will continue to rely on *Hesse*, and defendants invoking prior class settlement releases will cite *Wojciechowski* and argue that *Hesse* can be limited to its unique facts. In short, the issue will likely be back in front of the Ninth Circuit before too long.

II. The Federal Courts of Appeals Continue To Apply a Divergent Range of Approaches to Assessing Article III Standing After *Spokeo*

As we have discussed in prior updates, the federal courts of appeals continue to grapple with the Supreme Court's 2016 decision on Article III standing in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), with circuit splits continuing to emerge or deepen regarding *Spokeo*'s meaning and application to various statutes.

On one end of the spectrum, the Sixth and Seventh Circuits applied a more demanding standard in this quarter, finding that violations of consumer protection statutes did not constitute injuries under Article III. In *Huff v. Telecheck Services, Inc.*, the plaintiff filed a putative class action under the Fair Credit Reporting Act, alleging that Telecheck provided him an incomplete report of its records about his check-writing history and accounts. 923 F.3d 458, 461-62 (6th Cir. 2019). While acknowledging that the "border between what Congress may do in creating cognizable intangible injuries and what it may not do remains elusive," the Sixth Circuit, citing *Spokeo*, agreed with the district court that he lacked standing, notwithstanding the statutory violation, and declared that under *Spokeo*, "Congress cannot conjure standing by declaring something harmful that is not, by saying anything causes injury because the legislature says it causes injury." *Id.* at 465. Because Telecheck's disclosure "never harmed" plaintiff Huff and "did not create a material risk that Huff would suffer a check decline, Huff has not suffered an injury in fact." *Id.* at 468.

The Seventh Circuit came to a similar conclusion in a case arising under the Fair Debt Collection Practices Act. In *Casillas v. Madison Avenue Associates, Inc.*, the defendant sent the plaintiff a debt-collection letter which omitted required language explaining "that she had to communicate in writing to trigger the statutory protections" of the statute. 926 F.3d 329, 331 (7th Cir. 2019). Like the court in *Huff*, the Seventh Circuit held "no harm, no foul." *Id.* Because the plaintiff "complained only that her notice was missing some information that she did not suggest that she would ever have used," *id.* at 334, she lacked an injury in fact sufficient to create Article III standing.

Reflecting the unsettled state of the law in this area, both *Huff* and *Casillas* garnered dissents: one member of the Sixth Circuit panel would have held that Telecheck's omission "present[ed] a material risk of real harm to [a] concrete interest," and thus was sufficient to confer standing on the plaintiff. 923 F.3d at 469 (White, J., dissenting) (quotation omitted). And in *Casillas*, three judges dissented from the denial of rehearing en banc, concluding there was a "fair inference" in the pleading of "imminent risk of losing the many protections" provided by the statute, and warning against imposing "unnecessarily heightened requirements" for pleading. 926 F.3d at 340-41 (Wood, J., dissenting from the denial of rehearing en banc).

On the other side of the *Spokeo* divide, the Second and Fourth Circuits found standing in Telephone Consumer Protection Act cases, and the D.C. and Eleventh Circuits found that a heightened risk of identity theft was a sufficient injury to create Article III standing.

In *Melito v. Experian Marketing Solutions, Inc.*, the Second Circuit considered a putative class action alleging unsolicited spam text messages. It concluded that "receipt of the unsolicited text messages, sans

any other injury” was sufficiently concrete to establish standing. 923 F.3d 85, 88 (2d Cir. 2019). This conclusion was based on the court’s view that “nuisance and privacy invasion . . . are the very harms with which Congress was concerned when enacting” the statute, and that “such injuries were traditionally regarded as providing bases for lawsuits in English and American courts.” *Id.*

In *Krakauer v. Dish Network, L.L.C.*—which involved calls to numbers on the Do-Not-Call registry—the Fourth Circuit found standing for similar reasons. 925 F.3d 643 (4th Cir. 2019). “Looking both to Congress’s judgment and historical practice, as *Spokeo* instructs,” the Fourth Circuit held that “the private right of action [at issue] plainly satisfies the demands of Article III.” *Id.* at 653. The court noted that Congress had created a right of action for an individual who “receive[s] a call on his own residential number, a call that he previously took steps to avoid,” and that “[o]ur legal traditions, moreover, have long protected privacy interests in the home.” *Id.* In reaching this conclusion, the court rejected a standing inquiry that would require courts to conduct an element-by-element analysis of whether a violation would have supported a common-law tort, holding instead that the standing analysis considers only the “types of harms protected at common law, not the precise point at which those harms become actionable.” *Id.* at 654.

Also taking a broad view of Article III standing, the Eleventh and D.C. Circuits found standing based on the mere potential for identity theft. In *Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175 (11th Cir. 2019), the Eleventh Circuit considered claims under the Fair and Accurate Credit Transactions Act (FACTA), alleging that the defendant violated the statute by printing the first six and last four digits of credit card numbers on cash register receipts. *Id.* at 1181. The court found *Spokeo*’s requirements satisfied for two separate reasons. First, Congress had deemed “the risk of identity theft . . . to be sufficiently concrete” to create a cause of action when it enacted the FACTA, and—in this particular case—the pleadings were sufficient to establish a heightened risk of identity theft. *Id.* at 1188-89. Departing from the Third Circuit, the Eleventh Circuit separately held that standing existed because “the risk of identity theft bears a close enough relationship to the common law tort of breach of confidence.” *Id.* at 1187, 1191.

The D.C. Circuit addressed a similar issue in *In re U.S. Office of Personnel Management Data Security Breach Litigation*, __ F.3d __, 2019 WL 2552955 (D.C. Cir. June 21, 2019). The case involved related suits by individuals whose personal information was stolen in cyberattacks on a database of federal background investigations for government employees and contractors. The D.C. Circuit explained that it had held previously that identity theft can qualify as a “concrete and particularized injury,” and then proceeded to reverse the district court’s holding that the risk of identity theft to the plaintiffs was insufficient in this case to confer standing. *Id.* at *5. Based on the allegations of identity theft incidents that had already occurred, the D.C. Circuit concluded there was a “substantial—as opposed to a merely speculative or theoretical—risk of future identity theft.” *Id.* at *6.

These decisions illustrate how Article III standing continues to be a moving target, with diverging authority regarding *Spokeo*’s application under particular statutes and factual circumstances.

GIBSON DUNN



The following Gibson Dunn lawyers prepared this client update: Christopher Chorba, Theane Evangelis, Kahn Scolnick, Bradley Hamburger, Lauren Blas, Martie Kutscher Clark, David Schnitzer, and Wesley Sze.

Gibson Dunn attorneys are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Class Actions or Appellate and Constitutional Law practice groups, or any of the following lawyers:

Theodore J. Boutrous, Jr. - Co-Chair, Litigation Practice Group - Los Angeles (+1 213-229-7000, tboutrous@gibsondunn.com)

Christopher Chorba - Co-Chair, Class Actions Practice Group - Los Angeles (+1 213-229-7396, cchorba@gibsondunn.com)

Theane Evangelis - Co-Chair, Class Actions Practice Group - Los Angeles (+1 213-229-7726, tevangelis@gibsondunn.com)

Kahn A. Scolnick - Los Angeles (+1 213-229-7656, kscolnick@gibsondunn.com)

Bradley J. Hamburger - Los Angeles (+1 213-229-7658, bhamburger@gibsondunn.com)

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