

SECOND QUARTER 2020 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 2020 (April through June).

Part I discusses two significant decisions addressing Rule 23's commonality and predominance requirements.

Part II analyzes a decision from this past quarter relating to equitable restitution, an oft-discussed issue in consumer class actions.

Part III covers recent decisions on the injury-in-fact requirement for Article III standing in class actions after *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)—a subject of ongoing coverage in these class action alerts.

I. Federal Circuit Courts Continue to Emphasize the Rigorous Analysis Required at the Class Certification Stage

This past quarter, the Ninth and Third Circuits issued two decisions that emphasized the need for district courts to conduct a rigorous analysis in assessing whether Rule 23's commonality and predominance requirements are satisfied.

The Ninth Circuit in *Grodzitsky v. American Honda Motor Co.*, 957 F.3d 979 (9th Cir. 2020), issued a significant ruling that makes clear that district courts must assess expert testimony submitted in support of class certification under *Daubert*. *Id.* at 984. The district court in *Grodzitsky* had denied class certification on commonality grounds because the plaintiffs could not establish that an alleged defect in defendant's vehicles was common to all putative class members. *Id.* Although plaintiffs offered expert testimony to support the existence of a common defect, the district court excluded that testimony under *Daubert*, finding deficiencies in the expert's methodology and a lack of supporting studies or testing to corroborate the expert's conclusions. *Id.* In affirming the district court's denial of class certification, the Ninth Circuit held that the court had properly applied *Daubert* at the class certification stage, and that the exclusion of the expert's testimony was fatal to certification given the "rigorous analysis" of commonality that the court was required to undertake. *Id.* at 986–87.

In another expert-focused class certification ruling, the Third Circuit in *In re Lamictal Direct Purchaser Antitrust Litigation*, 957 F.3d 184 (3d Cir. 2020), emphasized that Rule 23 requires a rigorous analysis of competing expert evidence. The plaintiffs there alleged that an agreement between two drug manufacturers to settle a patent dispute was an impermissible "reverse payment agreement" that violated antitrust laws. *Id.* at 189. Notwithstanding the complexity of individual factors relevant to the amount that a particular direct purchaser actually paid for the drugs, the plaintiffs relied on an expert's model

using an “average hypothetical price” to establish that the entire class suffered a competitive injury; the district court then relied on this model to certify a class of all companies that purchased drugs from the defendants. *Id.* at 193–94. The Third Circuit reversed the order granting class certification, holding that the district court abused its discretion by assuming that “averages are acceptable” to prove that “common issues predominated by a preponderance of the evidence.” *Id.* at 194. To the contrary, relying on averages without conducting the requisite analysis was not acceptable because that could “mask individualized injury.” *Id.*

The Third Circuit specifically rejected plaintiffs’ argument that the Supreme Court had held in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), that so-called “representative” evidence was sufficient to satisfy Rule 23’s predominance requirement unless “no reasonable juror could believe the common proof at trial.” *Lamictal*, 957 F.3d at 191–92. The Third Circuit emphasized that *Tyson Foods* was grounded in a special rule for certain actions under the Fair Labor Standards Act, and thus did not relieve plaintiffs in an antitrust action of their obligation to “prove their claim is capable of common proof by a predominance of the evidence” at the class certification stage. *Id.* at 192.

II. The Ninth Circuit Addresses the Availability Equitable Remedies in Consumer Class Actions Litigated in Federal Court

In an important decision addressing California’s consumer protection laws, the Ninth Circuit held in *Sonner v. Premier Nutrition Corp.*, 962 F.3d 1072 (9th Cir. 2020), that federal courts cannot entertain equitable claims when an adequate legal remedy exists, even when state law would permit issuance of equitable relief. This is a potentially significant limitation on consumer class actions brought in, or removed to, federal courts within the Ninth Circuit.

The plaintiff in *Sonner* brought a putative class action against a dietary supplement manufacturer. The operative complaint alleged false advertising and demanded injunctive relief and restitution under California’s Unfair Competition Law (“UCL”) and Consumers Legal Remedies Act (“CLRA”), as well as damages under the CLRA. After the class was certified and after the plaintiff defeated the defendant’s motion for summary judgment, the plaintiff filed an amended complaint and dropped her CLRA damages claim to avoid a jury trial. The district court dismissed the claim for equitable restitution on the ground that the plaintiff “failed to establish that she lacked an adequate legal remedy for the same past harm for which she sought equitable restitution.” *Id.* at 1075–76.

The plaintiff argued that “state law alone decides whether she must show a lack of an adequate legal remedy before obtaining restitution . . . [and] the California legislature abrogated the state’s inadequate-remedy-at-law doctrine for claims seeking equitable restitution under the UCL and CLRA.” *Id.* at 1076. But the Ninth Circuit disagreed, holding that “federal courts must apply equitable principles derived from federal common law to claims for equitable restitution under [the UCL and CLRA].” *Id.* at 1074.

The Ninth Circuit went on to apply the Supreme Court’s decision in *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945), which held that because state law cannot expand a federal court’s equitable powers, “even if a state authorizes its courts to provide equitable relief when an adequate legal remedy exists, such relief may be unavailable in federal court because equitable remedies are subject to

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traditional equitable principles unaffected by state law.” *Sonner*, 962 F.3d at 1078–79. According to the Ninth Circuit, “the strong federal policy protecting the constitutional right to a trial by jury[,]” which the adequate-remedy-at-law doctrine is meant to vindicate, “outweighs [the] procedural interest” afforded by the CLRA and UCL. *Id.* at 1079.

Applying these principles, the Ninth Circuit concluded that the plaintiff failed to make a showing of an inadequate legal remedy because she sought “the same sum in equitable restitution [under the UCL] as she requested in damages [under the CLRA] to compensate her for the same past harm.” *Id.* at 1081.

III. Courts Wrestle with Article III Standing in Putative Class Actions

Over the past four years, the federal courts of appeals have issued a steady stream of decisions interpreting and applying the Supreme Court’s landmark Article III standing decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), to putative class actions. (For recent coverage of post-*Spokeo* decisions, please see the following quarterly updates: [First Quarter 2020 Update on Class Actions](#), [Year-End and Fourth Quarter 2019 Update on Class Actions](#), and [Third Quarter 2019 Update on Class Actions](#)). This past quarter was no exception, with two decisions finding that plaintiffs had Article III standing under *Spokeo*.

First, the Ninth Circuit held that even temporary financial loss can create an injury-in-fact for Article III purposes. In *Van v. LLR, Inc.*, 962 F.3d 1160 (9th Cir. 2020), the plaintiff alleged that she was injured when, as a result of a related lawsuit, the defendant refunded certain improperly charged sales taxes (approximately \$531) but failed to pay interest on the refunded funds (alleged to equal \$3.76). The defendant moved to dismiss for lack of Article III standing, arguing that the plaintiff could not establish injury-in-fact because she had received a full refund of the tax charges and “her claim for interest alone was insufficient to establish standing.” *Id.* at 1161. The Ninth Circuit rejected this argument, holding that “the loss of a significant amount of money . . . for a substantial amount of time . . . is not too trifling to support standing.” *Id.* at 1162. The court likewise rejected the defendant’s argument that the lost time value of money, standing alone, was too speculative an injury to support Article III standing. *Id.* at 1162–63.

Second, the Seventh Circuit in *Bryant v. Compass Group USA, Inc.*, 958 F.3d 617 (7th Cir. 2020), held that the alleged collection of an employee’s fingerprints without first obtaining her written consent, as required by the Illinois Biometric Information Privacy Act, was sufficiently concrete for Article III standing. Applying *Spokeo*, the Seventh Circuit reversed the district court’s ruling to the contrary, and emphasized that an injury need not be “tangible” in order to satisfy Article III’s concreteness requirement. *Id.* at 620. According to the Seventh Circuit, the plaintiff had not only alleged a concrete “invasion of her private domain,” but also an informational injury, insofar as information was withheld from her and “impaired her ability to use the information in a way the statute envisioned.” *Id.* at 624. The Seventh Circuit, however, held that the company’s failure to make its biometric retention schedule available to the public was not an injury-in-fact because the statutory duty to disclose was owed to the public generally, and the plaintiff therefore “did not suffer a concrete and particularized injury.” *Id.* at 626.

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