GIBSON DUNN

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YEAR-END AND FOURTH QUARTER 2020 UPDATE ON CLASS ACTIONS

To Our Clients and Friends:

Our year-end 2020 report provides an update on the application of Article III in class and other complex litigation. First, we discuss the significance of the Supreme Court's recent grant of certiorari in *TransUnion LLC v. Ramirez*, No. 20-297, __ S. Ct. __, 2020 WL 7366280 (U.S. Dec. 16, 2020), which concerns the propriety of certifying class actions with uninjured class members.

Second, we review recent cases in which courts have continued to grapple with issues of Article III standing in the wake of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), often reaching divergent conclusions in similar cases involving claims under consumer credit, privacy, and related laws.

I. The Supreme Court Will Resolve Whether Uninjured Class Members Can Be Part of a Certified Class Action

On December 16, 2020, the Supreme Court granted certiorari in *TransUnion LLC v. Ramirez* to resolve a very important class action issue that has split the federal courts of appeals for years: "whether either Article III or Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered."

In *Ramirez*, the plaintiff asserted that TransUnion violated the Fair Credit Reporting Act (FCRA) by inaccurately labelling class members as potential terrorists, drug traffickers, and other threats to national security on their consumer credit reports. *See Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1017 (9th Cir. 2020). After a jury awarded $60 million in damages, TransUnion appealed, arguing that the verdict "cannot stand because only Sergio Ramirez, the representative plaintiff, suffered a concrete and particularized injury as a result of TransUnion's unlawful practice." *Id.*

As discussed in a prior update, the Ninth Circuit agreed with TransUnion on this point and held that "each member of a class certified under Rule 23 must satisfy the bare minimum of Article III standing at the final judgment stage of a class action in order to recover monetary damages in federal court." *Id.* at 1023. Citing Chief Justice Roberts's observation that "'Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not,'" the Ninth Circuit reasoned that a contrary rule would "transform the class action—a mere procedural device—into a vehicle for individuals to obtain money judgments in federal court even though they could not show sufficient injury to recover those judgments individually." *Id.* at 1023–24 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring)); *see also Castillo v. Bank of Am., NA*, 980 F.3d 723, 730 (9th Cir. 2020) (reiterating that a district court has the duty to ensure that any proposed "class

is not defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct").

Nonetheless, the Ninth Circuit upheld the verdict upon finding that each class member had Article III standing. *Ramirez*, 951 F.3d at 1017. The court reasoned that even though plaintiff had stipulated that more than 75% of the absent class members did not have a credit report disseminated to any third party during the class period, FCRA was enacted to protect consumers' concrete interests and "the fact that TransUnion made the reports available to numerous potential creditors," along with "the highly sensitive and distressing nature of the [Office of Foreign Assets Control] alerts," was "sufficient to show a material risk of harm to the concrete interests of all class members." *Id.* at 1027.

In a separate opinion, Judge McKeown disagreed with the certification of absent class members' claims. In particular, she was troubled by the lack of evidence that any absent class members were injured at all: although the named plaintiff and "a limited number of class members" had their "credit report[s] disclosed to third parties, there was no evidence of any harm or damages to remaining class members." *Id.* at 1038 (McKeown, J., concurring-in-part and dissenting-in-part). Thus, not only did the named plaintiff's "stark atypicality as the lone class representative" "strain Rule 23's typicality requirements," but the absence of evidence regarding the actual experiences of the absent class members made the "harm as to the bulk of the class … conjectural," and therefore falling far short of showing a constitutionally cognizable injury. *Id.* at 1038–40.

The disagreement between the majority panel's decision in *Ramirez* and Judge McKeown's dissent highlights an issue that frequently arises in class litigation: whether and to what extent (including at what stage of the case) absent class members must satisfy Article III standing requirements. Different courts have reached different conclusions on this question. *Compare Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing."), *with Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009) ("[A]s long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied."). By agreeing to review *Ramirez*, the Supreme Court will have an opportunity to address this important issue and provide guidance on whether uninjured class members can be part of a certified class action.

II. Courts Continue to Reach Diverging Results on What Constitutes a Concrete Injury Sufficient to Establish Standing Under *Spokeo, Inc. v. Robins*

As reported in our second quarter 2019 update, in *Muransky v. Godiva Chocolatier, Inc.*, a three-judge panel of the Eleventh Circuit held that a retailer's failure to truncate a credit card number on a receipt in violation of the Fair and Accurate Credit Transactions Act (FACTA) was sufficient to create standing. 922 F.3d 1175 (11th Cir. 2019). In October 2020, the Eleventh Circuit reversed that decision en banc, holding that a bare procedural violation of FACTA, devoid of any claim of individual injury, is insufficient to confer Article III standing. *Muransky v. Godiva Chocolatier*, 979 F.3d 917 (11th Cir. 2020) (en banc).

The panel had noted that Congress set forth the remedial procedures in FACTA to minimize a risk of harm to a concrete interest (namely, preventing identity theft), and held that any violation presenting even a marginal risk of harming that interest should be "sufficient to constitute a concrete injury." 922 F.3d at 1188. The en banc Eleventh Circuit disagreed, and criticized the panel's standard as essentially adopting a presumption that statutory injury alone can constitute Article III injury, which was what the Supreme Court had rejected in *Spokeo*. 979 F.3d at 930. Instead, the en banc court focused on whether the violation in question caused actual harm or posed a material risk of harm to the plaintiff.

The en banc court concluded that even though the plaintiff had received a noncompliant receipt that contained his private information, he had not alleged any actual harm more concrete than time spent "safeguarding" his receipt and experiencing a "breach of confidence." *Id.* at 931. The court rejected both theories. As for "safeguarding" the receipt, the court noted that under *Clapper v. Amnesty International USA*, 568 U.S. 398, 416 (2013), self-inflicted harm alone cannot constitute injury under Article III. *Id.* at 931. As for the "breach of confidence," the court was skeptical that the analogy to the common law breach of confidence was appropriate, and even if it were, it would require third-party disclosure of private information, and the plaintiff had not alleged that anyone else had seen the receipt. *Id.* at 931–32.

The Sixth Circuit took a markedly different approach when addressing similar facts in *Donovan v. FirstCredit, Inc.*, 983 F.3d 246 (6th Cir. 2020). The plaintiff alleged that a creditor sent a letter inside an envelope with an envelope window that revealed language describing the plaintiff as a debtor. *Id.* at 249. The plaintiff sued under the Fair Debt Collection Practices Act's (FDCPA) provisions regulating the language and symbols debt collectors may employ on envelopes when communicating with consumers, alleging that the letter had violated these provisions by revealing the plaintiff's status as a debtor. *Id.*

The Sixth Circuit held that the exposure of information through an envelope window, even if "benign," created a sufficient risk that the plaintiff's status as a purported debtor would be disclosed, which established an injury-in-fact under the FDCPA. *Id.* at 252–53. The court reasoned that because the letter had actually been sent in the mail, and an invasion of privacy is a "harm that has traditionally been regarded as providing a basis for a lawsuit," the mailing of the letter with the exposed information provided "a degree of risk sufficient to meet the concreteness requirement" under *Spokeo*. *Id.* at 253.

The Seventh and Ninth Circuits this past quarter also addressed standing in putative class actions. In *Fox v. Dakkota Integrated Systems, LLC*, 980 F.3d 1146 (7th Cir. 2020), the Seventh Circuit addressed allegations that the defendant had failed to develop, publicly disclose, and comply with a data-retention schedule and guidelines for the permanent destruction of biometric data under the Illinois Biometric Information Privacy Act (BIPA). In particular, the plaintiff alleged that the defendant had retained her biometric data after her employment ended, in violation of BIPA's requirements. *Id.* at 1149.

The Seventh Circuit acknowledged that in a prior related case, it had held that merely alleging the non-disclosure of data-retention and data-destruction policies was insufficient to show injury-in-fact under Article III. *Id.* at 1153–54 (citing *Bryant v. Compass Grp. US, Inc.*, 958 F.3d 617, 619 (7th Cir. 2020)). But the court noted that in this specific case, the defendant's alleged failure to disclose those policies had led to an unlawful retention of the plaintiff's handprint and also to her biometric data being

unlawfully shared with a third party. *Id.* at 1154. Analogizing this unlawful *retention* of data to the unlawful *collection* of data (which the court had previously found conferred standing in *Bryant*), the court reasoned that "the invasion of a legally protected privacy right, though intangible, is personal and real," and therefore sufficient to plead an injury in fact. *Id.* at 1155.

The Ninth Circuit addressed standing in *McGee v. S-L Snacks National*, 982 F.3d 700 (9th Cir. 2020), a putative consumer class action. The plaintiff alleged that she had purchased and consumed defendant's popcorn containing trans fats, despite the FDA's determination that trans fats are no longer "generally recognized as safe," and she brought claims under both California's Unfair Competition Law and for present and future physical injury from the ingestion of trans fats. *Id.* at 703. In support of her claim for physical injury, the plaintiff estimated that she had consumed 0.2 grams of trans fats per day, and cited studies showing a link between consuming trans fats and organ damage. *Id.* at 709.

The Ninth Circuit held that the plaintiff did not have standing to bring claims for her alleged physical injury. *Id.* at 710. Even though the plaintiff's cited studies showed a connection between trans fats and organ damage, they did not show that the consumption of trans fats *invariably* lead to such damage, which is required to establish concrete injury without any individual medical evidence of harm. *Id.* at 708. As for future injury, the court noted that the plaintiff cited studies involving far greater levels of trans fats consumption, such that the plaintiff had alleged no substantial risk of future health consequences to her. *Id.* at 710.

The following Gibson Dunn lawyers contributed to this client update: Christopher Chorba, Theane Evangelis, Kahn Scolnick, Bradley Hamburger, Lauren Blas, Jillian London, Wesley Sze, Jessica Pearigen, and Jonathan Haderlein.

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)
Lauren M. Blas – Los Angeles (+1 213-229-7503, lblas@gibsondunn.com)