GIBSON DUNN

August 23, 2021

SECOND QUARTER 2021 UPDATE ON CLASS ACTIONS

To Our Clients and Friends:

This update provides an overview of key class action developments during the second quarter of 2021. **Part I** covers *TransUnion v. Ramirez*, 141 S. Ct. 2190 (2021), an important decision from the Supreme Court about Article III standing and its application to damages class actions. Significantly, the Supreme Court for the first time held that all class members seeking to recover damages must have Article III standing. **Part II** reports on developments in a closely watched Ninth Circuit appeal that also concerns the application of Article III standing in putative class actions.

I. The Supreme Court Issues Important Ruling on the Application of Article III Standing to Damages Class Actions in *TransUnion v. Ramirez*

In the years since *Spokeo, Inc. v. Robins*, 578 U. S. 330 (2016), the courts of appeals have wrestled with applying Article III standing principles to putative class actions. On June 25, 2021, the Supreme Court revisited the issue of Article III standing for the first time since *Spokeo*. In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the Court reversed a judgment on the claims of more than 6,000 class members whose internal credit reports contained inaccuracies that were never published to any third parties. In so holding, the Court clarified an issue left ambiguous in *Spokeo*: whether the violation of a federal statute, standing alone, confers Article III standing. The Court held that it does not. If a plaintiff does not suffer a real harm and the risk of future harm never materializes, there is no concrete injury and thus no standing to assert a damages claim. And importantly, the Court held that "every class member"—not just the named plaintiff—is required to meet this standard in order to recover individual damages.

As covered in a previous update, *Ramirez* concerned a jury verdict awarding $60 million in damages to a class of over 8,000 consumers. The plaintiff alleged that TransUnion violated the Fair Credit Reporting Act ("FCRA") by inaccurately labelling him and his fellow class members as potential terrorists, drug traffickers, and other threats to national security on their consumer credit reports. The Ninth Circuit noted 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," but it found that each of the 8,185 class members had done so. 951 F.3d 1008, 1023 (9th Cir. 2020). Even though 75% of the class never had an inaccurate credit report disseminated to any third party, the Ninth Circuit ruled that each class member had standing because they were subjected to a real risk of harm to their privacy, reputational, and informational interests protected by the FCRA. *Id.* at 1027.

The Supreme Court, in a 5-4 decision, reversed. The core of the Court's ruling was premised on the straightforward Article III principle: "No concrete harm, no standing." 141 S. Ct. at 2200. The Court explained that under *Spokeo*, each class member must have suffered a "concrete" harm bearing a "close

relationship" to traditional harms—like physical injury, monetary injury, or intangible injuries like damage to reputation—to have standing. *Id*. And even though "Congress may create causes of action for plaintiffs to sue defendants who violate . . . legal prohibitions or obligations," "an injury in law is not an injury in fact." *Id.* at 2205. Thus, only those class members whose inaccurate credit reports were actually provided to third parties had Article III standing to pursue the FCRA claim. *Id*. at 2209–10. By contrast, the remaining 75% of class members, "whose credit reports were not provided to third-party businesses," did not have Article III standing because the "mere existence of inaccurate information" does not constitute a "concrete injury." *Id*. at 2209. The Court left it to the Ninth Circuit to "consider in the first instance whether class certification is appropriate in light of [the] conclusion about standing." *Id*. at 2214.

Although the Court's decision clarifies the Article III standard, and confirms that all class members seeking damages must satisfy it, the decision still left unresolved the question "whether every class member must demonstrate standing *before* a court certifies a class," *id*. at 2208 n.4 (emphasis added), and whether the lead plaintiff's claims were typical of those of the class, *id.* at 2216 n.1. As a practical matter, it makes little sense for either party to defer this question until after class certification, because time and resources spent litigating a faulty class action benefits no one. At minimum, the issue of how Article III standing can be proven in a class trial should be part of the Rule 23 calculus. But we expect that in the coming months, the lower courts will grapple with these important issues as they seek to apply *TransUnion*.

II. The Ninth Circuit Grants Rehearing *En Banc* in *Olean v. Bumble Bee Foods*

As we discussed in our First-Quarter 2021 Update, the Ninth Circuit issued an important decision in April 2021 in *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774 (9th Cir. 2021), concerning the standards for establishing predominance in putative class actions under Rule 23(b)(3). In a 2-1 decision, the court held that even though plaintiffs may establish predominance using statistical evidence, district courts must still scrutinize the reliability of that evidence before certifying a class. *Id*. at 791. Additionally, the court stated that the inclusion of uninjured individuals in a class "must be de minimis," and suggested "that 5% to 6% constitutes the outer limits of a de minimis number." *Id*. at 792-93. Consistent with the Supreme Court's subsequent holding in *TransUnion*, the court also acknowledged that the presence of uninjured class members presented "serious standing implications under Article III," but did not reach the issue because class certification failed under Rule 23(b)(3). *Id*. at 792 n.7.

On August 3, 2021, the Ninth Circuit vacated this split-panel decision and agreed to rehear the matter *en banc.* 5 F.4th 950 (9th Cir. 2021). Although the court's order did not specify the issues the court will consider, it will likely provide guidance on the interplay between Article III and Rule 23 in the wake of the Supreme Court's decision in *TransUnion*, and potentially address whether Rule 23(b)(3) requires a district court to find that no more than a "de minimis" number of class members are uninjured before certifying a class.

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