GIBSON DUNN

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THIRD QUARTER 2022 UPDATE ON CLASS ACTIONS

To Our Clients and Friends:

This update provides an overview of significant class action developments during the third quarter of 2022 (July to September).

> **Part I** summarizes an important Ninth Circuit decision reversing class certification on predominance grounds;
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> **Part II** analyzes recent Eleventh and Third Circuit opinions addressing Article III standing in putative class actions;
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> **Part III** discusses decisions from the Second and Eleventh Circuits addressing standing issues in the class settlement context; and
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> **Part IV** covers a Third Circuit decision addressing the applicability of *Bristol-Myers Squibb v.Superior Court*, 137 S. Ct. 1773 (2017), to claims by out-of-state plaintiffs in an opt-in collective action.

I. The Ninth Circuit Reverses Certification in Employment Misclassification Case Because of Individualized Questions Regarding Injury and Damages

In July, the Ninth Circuit published an important decision analyzing Rule 23(b)(3)'s predominance requirement in a worker misclassification action. In *Bowerman v. Field Asset Services, Inc.*, 39 F.4th 652, 662 (9th Cir. 2022), the Ninth Circuit reversed class certification based on individualized injury and damages issues. This decision refutes a frequent argument by plaintiffs' counsel that individualized damages issues are irrelevant to class certification.

Bowerman involved a putative class of workers whom the defendant allegedly misclassified as independent contractors rather than employees. As a result, the plaintiffs claimed they were owed overtime and business expenses. *Id*. at 657. The plaintiffs did not dispute that they lacked common proof showing that the putative class members worked overtime hours or that claimed expenses were reimbursable, but argued that under the Ninth Circuit's decision in *Leyva v. Medline Industries Inc.*, 716 F.3d 510 (9th Cir. 2013), "the presence of individualized damages cannot, by itself, defeat class certification." *Id.* at 661–62 (quoting *Leyva*, 716 F.3d at 514).

The Ninth Circuit reversed, holding that class certification was improper for several reasons:

- *First*, the court distinguished between "the *calculation* of damages and the *existence* of damages in the first place." *Id*. at 662. The problem in *Bowerman* was the latter: The defendant's "liability to any class member . . . would implicate highly individualized inquiries on whether that particular class member ever worked overtime or ever incurred any 'necessary' business expenses." (emphases omitted).

- *Second*, even damages issues (as opposed to liability) can defeat class certification if the class members' purported damages are not capable of measurement on a classwide basis. In *Bowerman*, the plaintiffs lacked common proof of entitlement to overtime wages or expense reimbursement, so they failed to show that "the whole class suffered damages traceable to the same injurious course of conduct underlying the plaintiffs' legal theory," as required by *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). 39 F.4th at 663.

- *Third*, the court also noted that class certification may be denied where calculating classwide damages "isn't easy." In *Bowerman*, because determining individual class members' damages would require "the individual testimony of self-interested class members," the plaintiffs had failed to "present[] a method of calculating damages that is not excessively difficult," and therefore "failed to satisfy *Comcast*'s simple command that the case be 'susceptible to awarding damages on a class-wide basis.'" *Id.* (quoting *Comcast*, 569 U.S. at 32 n.4).

II. The Eleventh and Third Circuits Further Opine on Standing and Article III Injury in Putative Class Actions

Questions about standing and Article III injury continue to confront the federal courts of appeals, with the Eleventh and Third Circuits being the latest to analyze these questions during this past quarter.

In *Hunstein v. Preferred Collection & Management Services*, 48 F.4th 1236 (11th Cir. 2022), a divided en banc Eleventh Circuit held that a statutory violation of the Fair Debt Collection Practices Act (FDCPA) was insufficient to establish an injury giving rise to Article III standing.

The plaintiff had alleged a debt collection agency violated the FDCPA when it disclosed information about his debt to a mail vendor that sent out debt-collection notices. *Id.* at 1240. In analyzing Article III standing, the en banc Eleventh Circuit agreed the common-law comparison approach (endorsed by the Supreme Court in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021)) was appropriate, but it ultimately concluded there was no "close relationship" between the alleged statutory violation and the common-law tort analogue. 48 F.4th at 1243–45 (explaining that under *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016), a statutory violation qualifies as a concrete harm if it has a "close relationship" to a harm traditionally recognized in tort law). The court explained that even though the alleged statutory harm need not be an "exact duplicate" of a traditionally recognized harm, there is no "close relationship" when an element "essential to liability" for the common-law analogue is missing. 48 F.4th at 1242. Here, a "public disclosure" was essential to the tort of "public disclosure of private facts," yet the plaintiff did not allege their information had been disclosed to anyone other than a single third-party mail vendor. *Id.* at 1248. Without the critical element of public disclosure, the plaintiff's statutory violation was not analogous to a common-law tort and did not confer standing—and the court stated that finding

otherwise would be tantamount to "hammering square causes of action into round torts." *Id.* at 1241, 1249.

In *Adam v. Barone*, 41 F.4th 230 (3d Cir. 2022), the Third Circuit held that the offer of a pre-litigation refund did not extinguish the plaintiff's standing to sue. *Id.* at 236. The case involved a plaintiff who alleged that she was fraudulently charged $100 for beauty products that the defendants marketed as free samples. *Id.* at 232. Before the lawsuit was filed, defendants offered her a full refund in the ordinary course of business, which the plaintiff refused. *Id.* The district court held the refund offer mooted the plaintiff's claim and dismissed the case. *Id.* at 233, 236.

The Third Circuit reversed. It held that a pre-litigation "refund offer . . . made in the ordinary course of business" is not a categorical bar to a plaintiff's standing to sue. *Id.* at 234 . In particular, the $100 charge qualified as an "injury in fact" because the plaintiff "neither received a refund nor accepted any alternative to a refund," and, applying traditional contract principles, the rejection of the refund offer "le[ft] the matter as if no offer had ever been made." *Id.* at 234–35 (citing *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 162 (2016)).

III. The Second and Eleventh Circuits Consider Standing in the Context of Class Action Settlements

The Second and Eleventh Circuits also weighed in on how the Article III standing requirements should be applied in the specific context of class settlements.

In *Hyland v. Navient Corp.*, 48 F.4th 110 (2d Cir. 2022), the Second Circuit affirmed the district court's certification of a Rule 23(b)(2) injunctive relief settlement class and held that class standing was satisfied even though some class members no longer had any relationship with the defendant. The case was filed by a group of public servants whose loans were not forgiven through the federal Public Service Loan Forgiveness program, allegedly because the defendant loan service companies misled them regarding their eligibility for the program. *Id.* at 115. The parties agreed to a nationwide non-monetary settlement class while also preserving class members' rights to file individual claims for money damages. *Id.* at 114. In return, the defendants agreed to changes in their business practices and funded a *cy pres* award of $2.25 million to establish a loan counseling nonprofit. *Id.* at 116. The district court approved the settlement and several class members objected.

On appeal, the objectors argued that because "[s]ome class members were no longer using the company to service their loans when the class was certified, . . . the class as a whole . . . lacked standing to pursue injunctive relief." *Id.* at 117. The Second Circuit rejected this argument, stating that "[s]tanding is satisfied so long as at least one named plaintiff can demonstrate the requisite injury." *Id.* at 117–18 (citing cases). The court noted that the named plaintiffs alleged they "were likely to suffer future harm because they continued to rely on [the company] for information about repaying their student loans," and at least six of them still had a relationship with the company. *Id.* at 118. In the injunctive relief context, at least, these allegations were therefore "enough to confer standing on the entire class." *Id.* (citing *Amador v. Andrews*, 655 F.3d 89, 99 (2d Cir. 2011) ("In a class action, once standing is established for a named plaintiff, standing is established for the entire class.")).

In *Drazen v. Pinto*, 41 F.4th 1354 (11th Cir. 2022), the Eleventh Circuit confronted a similar issue in the context of a damages class. There, it vacated and remanded a class settlement after determining that not all settlement class members had experienced an Article III injury. The plaintiffs alleged the defendant violated the Telephone Consumer Protection Act by sending them unauthorized calls and text messages. Even though the Eleventh Circuit had previously held that the receipt of a single unwanted text message is not enough to constitute an Article III injury, the district court nevertheless approved the settlement, reasoning that "only the named plaintiffs must have standing." *Id.* at 1357. Only a small percentage (~7%) of the settlement class members had received a single text message. *Id.*

The Eleventh Circuit reversed. The court first stated that "even at the settlement stage of a class action, we must assure ourselves that we have Article III standing at every stage of the litigation." *Id.* at 1360. The court further reasoned that under *TransUnion*, "[t]o recover individual damages, all plaintiffs within the class definition must have standing," such that "when a class seeks certification for the sole purpose of a damages settlement under Rule 23(e), the class definition must be limited to those individuals who have Article III standing." *Id.* at 1361. And here, because the settlement class may have included individuals who only received a single unwanted text message, approving the settlement would allow "individuals without standing [to] receiv[e] what is effectively damages in violation of *TransUnion*." *Id.* at 1362.

IV. Joining the Sixth and Eighth Circuits, the Third Circuit Holds that *Bristol-Myers Squibb* Requires Out-of-State Plaintiffs in FLSA Collective Actions to Show Specific Jurisdiction Over Their Individual Claims

In *Fischer v. Federal Express Corp.*, 42 F.4th 366 (3d Cir. 2022), the Third Circuit joined the Sixth and Eighth Circuits in concluding that *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017)—which held that a state court lacks jurisdiction over out-of-state plaintiffs' claims unless their claims are sufficiently connected to the forum—also prohibits a district court from exercising jurisdiction over the claims of opt-in plaintiffs in a Fair Labor Standards Act (FLSA) collective action unless such a connection is established.

Fischer involved an FLSA collective action filed by a Pennsylvania resident against FedEx in the Eastern District of Pennsylvania, alleging FedEx misclassified employees in her position as exempt from the FLSA's overtime rule. 42 F.4th at 371. Two former, non-resident FedEx employees sought to join the collective action in Pennsylvania, but the district court denied their request. *Id.* Relying on *Bristol-Myers*, the district court reasoned that it lacked personal jurisdiction over FedEx with respect to those employees' claims since they did not work for FedEx in Pennsylvania, and thus, their claims did not "arise out of or relate to the defendant's minimum contacts with the forum state." *Id.* at 371.

The Third Circuit affirmed, holding that under *Bristol-Myers*, a district court can exercise specific jurisdiction over the out-of-state plaintiffs' claims under the FLSA only if the claims arise out of or relate to the defendant's minimum contacts with the forum state. *Id.* at 370. In so holding, the Third Circuit joined the Sixth and Eighth Circuits (*Canaday v. Anthem Cos.*, 9 F.4th 392 (6th Cir. 2021); *Vallone v. CJS Sols. Grp., LLC*, 9 F.4th 861 (8th Cir. 2021)), and widened a split with a First Circuit case reaching the opposite conclusion (*Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84 (1st Cir. 2022)).

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