GIBSON DUNN

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FIRST QUARTER 2020 UPDATE ON CLASS ACTIONS

To Our Clients and Friends:

We hope that everyone is staying safe and healthy during these unprecedented times. This update provides an overview and summary of key class action developments during the first quarter of 2020 (January through March).

Part I covers three appellate interpretations of the U.S. Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), and whether federal courts may exercise personal jurisdiction over the claims of absent class members.

Part II reviews several critical appellate decisions relating to whether absent class members must have Article III standing, as well as further developments on the issue of Article III standing in class actions after *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

Part III discusses a Ninth Circuit decision denying discovery to find a new class representative.

Part IV analyzes two recent decisions addressing the certification of classes alleging claims under California's Unfair Competition Law and False Advertising Law.

I. Appellate Courts Begin to Consider How *Bristol-Myers* Applies to Class Actions

This quarter, appellate courts wrestled for the first time with the application of *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017), to class actions.

In *Bristol-Myers*, the Supreme Court held that the scope of a state court's power to exercise personal jurisdiction over a defendant requires a connection between the defendant's activity in the forum state and the specific claims in the litigation. As we detailed in a prior client alert, a group of plaintiffs (including California and non-California residents) filed a mass tort suit in California alleging that all had been injured by a drug produced by defendant, which was incorporated in Delaware and headquartered in New York. The Supreme Court held that California could not exercise jurisdiction over the claims brought by non-residents because there was no connection between the forum and those claims.

As Justice Sotomayor noted in her dissent, the Court did "not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there." *Id.* at 1789 n.4 (Sotomayor, J.,

dissenting). Three federal circuit courts have now weighed in on this question, and have reached varied conclusions.

In *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020), the plaintiff, an Illinois professional medical services corporation, received from the defendant two unsolicited faxes that failed to include the opt-out notice required by the Telephone Consumer Protection Act. *Id.* at 443. The plaintiff then brought a putative class action in Illinois on behalf of a nationwide class who had received similar unsolicited faxes. *Id.* The district court struck the class definition, reasoning that, under *Bristol-Myers*, absent class members each had to show minimum contacts between the defendant and the forum state when the defendant is not subject to general jurisdiction in the forum state. *Id.*

The Seventh Circuit reversed the order granting the motion to strike, holding that because *Bristol-Myers* was a mass tort action and not a class action, its principles "do not apply to the case of a nationwide class action filed in federal court under a federal statute." *Id.* It reasoned that in a mass tort action, all plaintiffs are considered "parties," because mass tort actions represent a consolidation of all possible individual claims. *Id.* at 447. In class actions, by contrast, the "proper characterization of the status of absent class members depends on the issue," *id.*, and absent class members "are not considered parties for assessing whether the requirement of diverse citizenship" has been met or "when a court decides whether it has the proper venue." *Id.* The court explained "[w]e see no reason why personal jurisdiction should be treated any differently from subject-matter jurisdiction and venue: the named representatives must be able to demonstrate either general or specific jurisdiction, but the unnamed class members are not required to do so." *Id.*

The D.C. Circuit took a different approach in *Molock v. Whole Foods Market Group*, 952 F.3d 293 (D.C. Cir. 2020). There, the court granted an interlocutory appeal after a district court denied a defendant's motion to dismiss all non-resident putative class members for lack of personal jurisdiction. It held that the motion to dismiss was premature (because the class had not yet been certified) and declined to reach the question of whether a court may assert specific personal jurisdiction over putative class action claims of unnamed non-resident class members. Like the Seventh Circuit, the D.C. Circuit noted the unique status of putative class members, stating that they are "*always* treated as nonparties." *Id.* at 297 (emphasis in original). "Putative class members become parties to an action—and thus subject to dismissal—only after class certification." *Id.* at 298.

Judge Silberman dissented, explaining that "the party status of absent class members seems to me to be irrelevant," because "a court's assertion of jurisdiction over a defendant exposes [the defendant] to that court's coercive power, so such an assertion must comport with due process of law." *Id.* at 307. He went on to say that whenever a court exercises its coercive power, a defendant is "entitled to due process protections—including limits on assertions of personal jurisdiction—with respect to all claims in a class action for which judgment is sought." *Id.* While the judges may have disagreed about whether *Bristol-Myers* bars claims by non-resident putative class members at the pleading stage, the D.C. Circuit, unlike the Seventh Circuit, did not appear to reject outright the possibility that *Bristol-Myers* could be relevant at the class certification stage and potentially bar non-residents from being part of the class.

The Fifth Circuit took a similarly proceduralist approach in *Cruson v. Jackson National Life Insurance Company*, 954 F.3d 240 (5th Cir. 2020). Like the D.C. Circuit in *Molock*, the Fifth Circuit ruled that any decision relating to a court's jurisdiction over the claims of non-resident putative class members must wait until certification. Specifically, the court held that a defendant who did not raise a defense of personal jurisdiction as to non-resident putative class members in its Rule 12 motion had not waived the defense because that defense was not yet "available" against non-resident putative class members who "were not yet before the court" when the Rule 12 motion was filed. *Id*. at 250. Whether or not the Fifth Circuit will rule that *Bristol-Myers* bars courts from asserting jurisdiction over claims brought by non-resident individuals in a class action remains an open question.

Because most circuits have not definitively resolved whether a *Bristol-Myers* challenge is appropriate at the pleadings stage, defendants should continue to assert such arguments early in the case to avoid a finding of waiver.

II. Courts Consider the Interplay Between Article III Standing and Class Actions

In the opening months of 2020, federal appellate courts issued decisions addressing whether and when absent class members and named plaintiffs must satisfy the United States Constitution's standing requirements, as well as what types of concrete injuries are necessary to establish standing in the wake of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

In *Flecha v. Medicredit, Inc.*, 946 F.3d 762 (5th Cir. 2020), the Fifth Circuit considered whether absent class members must establish standing at the class-certification stage—a question that, as we explained in a previous update, continues to divide the federal courts of appeal. Unfortunately, however, the Fifth Circuit ultimately declined to provide a clear answer. In that case, the plaintiff brought a putative class action under the Fair Debt Collection Practices Act on behalf of a putative class of all Texans who had received a purportedly misleading debt-collection letter from defendant. *Id.* at 765. While the court acknowledged that "there are undoubtedly many unnamed class members here who lack the requisite injury to establish Article III standing," the court concluded that it did not (and ought not) reach the question because the putative class could not be certified under Rule 23 in any event. *Id.* at 768–69. But Judge Oldham wrote separately to note his view that "Article III is just as important in class actions as it is in individual ones," and that a putative class that includes absent members who lack standing should not be certified. *Id.* at 771 (Oldham, J., concurring) (citations and quotation marks omitted).

Consistent with Judge Oldham's concurrence, the Ninth Circuit held in *Ramirez v. Transunion LLC*, 951 F.3d 1008 (9th Cir. 2020), 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,'" *id.* at 1023 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring)), the court 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.

Although *Ramirez* limited the obligation of absent class members to establish Article III standing to the "final judgment stage" of a class action, it cautioned that "district courts and parties should keep in mind that they will need a mechanism for identifying class members who lack standing at the damages phase" when they consider class certification. *Id.* at 1023 n.6. This decision provides a strong basis for arguing that a class may not be certified in the first place—or must be decertified—where there is no manageable method for ultimately assessing absent class members' standing. That reading of *Ramirez* would align the Ninth Circuit with the Eleventh Circuit's decision last year in *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259 (11th Cir. 2019), which vacated a class-certification order where "individualized questions" about which class members had standing "may predominate over common issues susceptible to class-wide proof." *Id.* at 1275, 1277.

In addition to analyzing *when* absent class members must prove they have standing, *Ramirez* also analyzed *what kind* of injury suffices, and it held that each of the absent class members had suffered a concrete injury under Article III under a "two-part inquiry" that asks "(1) whether the statutory provisions at issue were established to protect [the plaintiff's] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged . . . actual harm, or present a material risk of harm to, such interests." 951 F.3d at 1025 (quotations omitted). In *Ramirez*, a credit-reporting agency allegedly violated the Fair Credit Reporting Act ("FCRA") by misidentifying class members as potential terrorists and drug traffickers. *Id.* at 1022. Although not all class members' credit reports were actually disclosed to third parties, the Ninth Circuit reasoned that the 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 OFAC alerts," was "sufficient to show a material risk of harm to the concrete interests of all class members." *Id.* at 1027.

The Ninth Circuit offered another glimpse into how it will evaluate Article III's "concrete injury" requirement post-*Spokeo* in *Campbell v. Facebook, Inc.*, 951 F.3d 1106 (9th Cir. 2020), which involved claims that Facebook violated various privacy statutes by allegedly misusing private messages sent by users on the social-networking platform. (Gibson Dunn represented Facebook in this litigation.) Although the primary issue in the case involved an appeal of a class action settlement, following *Spokeo* and *Frank v. Gaos*, the Ninth Circuit ordered supplemental briefing after expressing doubt at oral argument that the named plaintiffs suffered any actual injury in fact, given that the challenged practices had ceased long ago. *Id.* at 1116. The court noted that where "we deal with an 'intangible harm' that is linked to a statutory violation, we are guided in determining concreteness by 'both history and the judgment'" of the legislature. *Id.* Tracking its analysis in last year's decision in *Patel v. Facebook*, 932 F.3d 1264 (9th Cir. 2019), and relying heavily on its post-*Spokeo* decision, the court wrote that because "[t]he harms protected by the[] statutes bear a 'close relationship' to ones that have 'traditionally been regarded as providing a basis for a lawsuit,'" including intrusion upon the seclusion of another, the plaintiffs had Article III standing even without a tangible harm. *Id.* at 1117. This conclusion was confirmed by the fact that, "under the privacy torts that form the backdrop for these modern statutes, '[t]he intrusion itself makes the defendant subject to liability.'" *Id.* Determining that the named plaintiffs had Article III standing, the Ninth Circuit affirmed the District Court's decision approving the class settlement.

III. The Ninth Circuit Holds That Discovery Cannot Be Used to Find a Named Plaintiff Before a Class Action Is Certified

The Ninth Circuit recently confronted a recurring issue in class action litigation—whether and to what extent the federal discovery process may be used to secure a new named plaintiff before class certification. In a significant win for defendants, *In re: Williams-Sonoma, Inc.*, 947 F.3d 535 (9th Cir. 2020), held that "using discovery to find a client to be the named plaintiff before a class action is certified is not within the scope of Rule 26(b)(1)." *Id.* at 540.

The original plaintiff in the matter, a Kentucky resident, filed a putative class action against Williams-Sonoma in California, alleging that he had been injured by his purchase of deceptively advertised bedding. *Id.* at 537. Before a class was certified, however, the district court determined that Kentucky law, which prohibits class actions, governed his claims. *Id.* at 538. Because the named plaintiff could no longer represent the class, the district court ordered Williams-Sonoma to produce a "list of all California customers who purchased bedding products of the type referred to in [plaintiff's] complaint" since January 2012. *Id.* Defendants sought a writ of mandamus, and the Ninth Circuit—which rarely grants such requests—reversed, concluding that the order was clearly erroneous because it ran afoul of the Supreme Court's decision in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), and Federal Rule of Civil Procedure 26(b)(1), which limits discovery to "matter that is relevant to any party's claim or defense." *Id.* at 539 (quotation marks omitted). Because "seeking discovery of the name of a class member" is not "relevant" within the meaning of Rule 26 where a class has not been certified, the discovery was impermissible. *Id.*

Defendants should invoke *Williams-Sonoma*'s gatekeeping rationale to prevent burdensome fishing expeditions by plaintiffs in search of a more suitable named plaintiff before class certification.

IV. Appellate Courts Wrestle with the Issue of "Exposure" in California Unfair Competition and False Advertising Class Actions

During the first quarter of 2020, the Ninth Circuit and California Court of Appeal took divergent approaches to a recurring issue in class actions under California's Unfair Competition Law ("UCL") and False Advertising Law ("FAL"): whether class members have been "exposed" to the allegedly misleading representations at issue.

In *Downey v. Public Storage, Inc.*, 44 Cal. App. 5th 1103 (2020), the California Court of Appeal held that plaintiffs in an FAL lawsuit must prove that exposure and deception are "susceptible of common proof." *Id.* at 1119–20. The plaintiffs in that case brought a putative class action claiming that "Public Storage's $1 promotional rate was deceptive." *Id.* at 1111. The trial court denied class certification because many class members had not been exposed to the allegedly deceptive advertisements and the advertisements were not uniform. *Id.* at 1112.

The California Court of Appeal affirmed, holding that California's "community of interest" requirement for class certification demands in a false advertising case that exposure and deception be susceptible of common proof. *Id.* at 1115. The plaintiffs did not satisfy this requirement chiefly because the evidence showed that customers could have purchased storage without seeing the allegedly misleading

advertisements. *Id.* at 1117. The court also credited the fact that many of the advertisements contained disclosures which, as Public Storage showed, actually impacted consumers' choices. *Id.* at 1118–19.

Under Federal Rule 23(b)(3), plaintiffs must show "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). California applies a similar requirement. Applied in UCL and FAL cases, this requires a showing of classwide exposure to the allegedly misleading statements, such that it is subject to common proof. Here, the court rejected the plaintiffs' argument that *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009), a leading California Supreme Court case on the issue of exposure and reliance, "abrogated the requirements of exposure and deception." *Public Storage*, 44 Cal. App. 5th at 1120. The court reasoned that *Tobacco II* chiefly concerned the standing requirements for the named plaintiff, not California's community of interest requirement and its mandate that exposure and deception be susceptible of common proof.

The Ninth Circuit, meanwhile, held that if the defendant in a UCL case raises questions as to whether members of the class have been "exposed" to a particular representation, a district court has discretion to define the class in a way that automatically gives rise to a presumption of reliance on the allegedly misleading statement, and need not necessarily deny class certification. *Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624, 634 (9th Cir. 2020).

There, a proposed class sued an insurance seller, alleging that its illustrations forecasting financial returns were misleading. *Id.* at 627. Some customers received a "pre-application" illustration of projected returns before or at the same time they applied for a policy, while others received a "batch" illustration of projected returns *after* approval of a policy application. *Id.* Sidestepping the practical difficulties of identifying which putative class members were exposed to which illustration, the district court defined the class by limiting it to customers who received the pre-application illustration, thereby embedding the exposure issue into the class definition. *Id.* at 628. As a matter of first impression, the Ninth Circuit held that a court can define a class in a way that "automatically gives rise to a presumption of reliance." *Id.* at 634.

The different outcomes in these cases seemed to turn on whether it was possible to identify which putative class members had been exposed to the representations at issue. In *Walker*, the class could be limited to those people who receive the "pre-application" illustration, which meant classwide exposure was assured. In *Downey*, by contrast, there was a far broader range of statements alleged to be at issue, and determining who saw which statements and when was not possible without individualized inquiries. Defendants facing putative UCL and FAL class actions should keep this distinction in mind.

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