August 2023

Skadden

The Class Action Chronicle

Post-*TransUnion*, A Closer Examination of Threshold for Article III Standing

Class action trials are rare. The potential magnitude of an adverse verdict, even when improbable, makes the risks of trial unpalatable for defendants in many cases following certification. Thus, parties frequently resolve class litigation through settlements, which are subject to court approval under Rule 23(e). Historically, that review has focused more on the fairness of the settlement and the compliance with the other dictates of Rule 23 than on other matters such as whether the named plaintiffs (or absent class members) have Article III standing — *i.e.*, whether they sustained a cognizable injury.

More recently, however, courts have begun to take a closer look at that threshold jurisdictional question, and increasingly so after the U.S. Supreme Court's recent decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). *TransUnion* reiterated the applicability of Article III standing limits in the class action context (including those applicable to absent class members specifically, at least when it comes time to award damages). The upshot of such increased scrutiny has been more frequent invalidation of class action settlements, which has forced parties to become more creative in crafting one of the most common methods of resolving aggregate litigation.

Eleventh Circuit's Stricter Approach in *Williams*

A recent example of this stricter approach was *Williams v. Reckitt Benckiser LLC*, 65 F.4th 1243 (11th Cir. 2023), in which a panel of the U.S. Court of Appeals for the Eleventh Circuit held — *sua sponte* — that a class settlement approved by the district court must be vacated because the plaintiffs lacked Article III standing as to the injunctive relief component of the settlement.

In *Williams*, California, Florida and New York plaintiffs filed putative class actions alleging that Reckitt Benckiser violated the consumer protection laws of their home states by using false and misleading statements to make consumers believe that its supplement Neuriva was clinically tested and proven to improve brain function. The parties reached a settlement that purported to provide the class with compensation, as well as injunctive relief requiring changes to Neuriva's labeling and marketing. The U.S. District Court for the Southern District of Florida granted preliminary approval of the settlement, finding that the monetary relief and injunctive relief constituted a fair, reasonable and adequate resolution for the class.

Theodore Frank, an unnamed class member and an attorney who frequently represents objectors to class action settlements, challenged the deal and appealed the district court approval. Mr. Frank argued that the settlement's monetary relief was illusory because few (if any) class members would actually submit claims, much less receive payment. According to Mr. Frank, the claimed value of the settlement ($8 million) was divorced from reality and manufactured to support a large attorneys' fee award ($2.9 million).

On appeal, the Eleventh Circuit reversed, but not on the ground advanced by Mr. Frank. Instead, the Court of Appeals raised the question of standing on its own, concluding that while the plaintiffs had standing to seek monetary relief based on their purchase of the supplement, they did not have standing to seek injunctive relief, rendering class certification and the approved settlement improper. As the court explained, the plaintiffs only alleged **past** harm as a result of the alleged misrepresentations concerning Neuriva, which did not create a likelihood of future harm.

The plaintiffs did allege that they would like to purchase Neuriva products in the future if the products actually improved brain performance. But the Eleventh Circuit concluded that these allegations were conjectural, hypothetical and implausible. In short, common sense dictated that there was no risk of future harm: The core of the plaintiffs' suit was that the product did not work, there was no reason to believe it would be reformulated and so there was no reason to believe the plaintiffs would ever buy it again.

Mr. Frank argued that it was not necessary to establish standing as to the injunctive relief specifically because it was undisputed that the plaintiffs had standing to assert past injuries and a right to monetary relief (which the agreement also conferred), which should suffice to create jurisdiction over the entire case. But the Eleventh Circuit rejected this argument, citing *TransUnion* for the proposition that a plaintiff must establish standing as to "each form of relief sought." And because the plaintiffs lacked standing to pursue injunctive relief, the court held that the district court abused its discretion in certifying the class and approving the settlement. (A petition for rehearing *en banc* was filed in May 2023 and remains pending.)

The Second Circuit in *Berni*

In another case decided a year before *TransUnion*, the U.S. Court of Appeals for the Second Circuit took a similar approach to the question of Article III standing with respect to putative class members in *Berni v. Barilla S.P.A.*, 964 F.3d 141 (2d Cir. 2020). In *Berni*, consumers brought a putative class action against Barilla, a pasta manufacturer, alleging deceptive business practices by including misleading empty space in pasta packages in violation of New York law.

The parties agreed to a settlement requiring a minimum "fill line" on all Barilla boxes going forward to indicate the amount of pasta in each box. An unnamed class member objected that class members were unlikely to purchase the product in the future and therefore would not be eligible for injunctive relief.

The Second Circuit agreed with the objector on a ground similar to but somewhat different from the one the Eleventh Circuit cited in *Williams*. It noted that if any class member's injury could not be remedied by injunctive relief, then the class may not be certified under Rule 23(b)(2). Applying the principle, the Second Circuit determined that injunctive relief was not proper on an individualized basis and therefore would not be proper for the class as a whole, because past purchasers are unlikely to encounter any future harm (*i.e.*, purchase the allegedly fraudulently marketed product) once they are aware of the purported fraud.

A More Permissive View of Article III in *In Re Apple*

In contrast to the stringent approach embraced by the Eleventh and Second Circuits, some courts have viewed Article III standing more permissively at the class settlement stage, notwithstanding the Supreme Court's recent standing decisions. In *In re Apple Inc. Device Performance Litigation*, 50 F.4th 769 (9th Cir. 2022), for example, consumers brought a class action against Apple, asserting violations of California's Data Access and Fraud Act and the federal Computer Fraud and Abuse Act based on allegations that certain iPhones suffered from degraded system performance following software upgrades.

The parties agreed on a settlement purporting to compensate former or current U.S. owners of certain iPhone models who attested that their smartphones suffered performance issues from the upgrades, for up to a minimum of $310 million and a maximum of $500 million for the class. Although the U.S. Court of Appeals for the Ninth Circuit vacated the settlement agreement on the ground that the district court erred in citing the wrong legal standard when examining the settlement's fairness, the appellate court reasoned that the possibility that some class members suffered no injury (*i.e.*, no performance loss) did not mean they lacked standing to recover as part of the class.

Citing *TransUnion*, the Ninth Circuit explained that while class members must maintain their personal interest in the dispute at all stages of litigation, general factual allegations of injury resulting from the defendant's conduct may suffice to establish standing at the pleading stage. And because the parties settled prior to class certification, the plaintiffs' allegations that all putative class members experienced degraded performance due to phone upgrades sufficiently established standing. As part of its reasoning, the Court of Appeals suggested that the outcome might have been different had the standing question arisen at trial (as in *TransUnion*), where each class member must prove injury to recover individual damages.

Takeaways

A juxtaposition of the cases discussed above reveals an array of approaches to Article III standing in class action settlements. At one end of the spectrum is the Eleventh Circuit's decision in *Williams* and the Second Circuit's ruling in *Berni*, which looked for a concrete showing that everyone participating in the settlement can establish injury. By contrast, *In re Apple* took a more flexible approach based on the procedural posture of the case at the time it settled and thus would allow settlement participants to escape closer scrutiny of proof of injury.

It remains to be seen how other federal appeals courts will view the question of Article III standing when evaluating class settlements. However, given the renewed focus on standing limitations generated by the Supreme Court's decision in *TransUnion*, it is likely that there will be more decisional law in this area, particularly in circuits where no definitive ruling yet exists on the issue at the appellate level.

If the approaches of the Second and Eleventh Circuits prevail, one potential outcome is that it could become more difficult to settle class actions because of more demanding application of standing requirements at the settlement stage. Alternatively, more demanding standing requirements could pressure parties to agree to narrower settlements with more rigorous standards for participation (*i.e.*, proof of injury). Either result will have significant implications for all parties, particularly with respect to class counsel justifying attorney fee demands.

Recent Class Action Decisions of Note

Third Circuit Signals Commitment to Strict and Independent Ascertainability Requirement

***In re Niaspan Antitrust Litig.*, 67 F.4th 118 (3d Cir. 2023)**

The U.S. Court of Appeals for the Third Circuit, in an opinion by Judge Kent A. Jordan, refused to "reconsider [its] ascertainability requirement" in a decision affirming a district court's denial of class certification. In *Niaspan*, consumers and end payors filed antitrust suits alleging a settlement agreement between name brand and generic pharmaceutical manufacturers constituted an unlawful "reverse payment" in violation of antitrust laws. The district court declined to certify a class of end payors, holding the plaintiffs had "not presented an administratively feasible mechanism to distinguish between class members and mere intermediaries such as fully insured plans" that had not suffered cognizable injuries.

On appeal, the end payors argued both that "the District Court applied the wrong ascertainability standard" and that the Third Circuit "should reconsider whether [its] 'implicit' ascertainability requirement is consistent with Rule 23." After walking through its precedents regarding ascertainability, the appellate court squarely rejected the argument that ascertainability should not be construed as an independent hurdle to certification. The court noted as a threshold matter that, sitting as a three-judge panel, it did not possess "authority to overrule [its] existing precedent."

But even setting aside such procedural considerations, the court made clear that it "would decline to" overrule its precedent even if it could. Specifically, the court held that "when members of a Rule 23(b)(3) class cannot be identified in an economical and administratively feasible manner, the very purpose of the rule is thwarted." The panel underscored how an ascertainability requirement bolsters the efficiency goals underlying Rule 23 by "insisting on the easy identification of class members," guarding the rights of absent class members by "facilitating the 'best notice practicable'" and protecting defendants by ensuring it will be easy to identify those bound by any final judgment for preclusion and *res judicata* purposes.

Finally, the court dismissed the assertion that it stood as an outlier among its fellow appellate courts and instead noted "[s]everal of our sister circuits have followed our lead and apply our ascertainability standard, or a standard that is substantively the same." Ultimately, the panel held firm to its precedent because "[t]he ascertainability standard, including the administrative feasibility principle it contains, is true to the text, structure, and purpose of Rule 23."

California District Court Certifies Nationwide Class of Third-Party Payors in Actos Medication Case

***Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharm. Co.*, No. 2:17-CV-07223-JWH-AS, --- F. Supp. 3d ----, 2023 WL 4191651 (C.D. Cal. May 24, 2023)**

Judge John W. Holcomb of the U.S. District Court for the Central District of California certified a nationwide class of third-party payor (TPP) plaintiffs alleging pharmaceutical companies violated federal Racketeer Influenced and Corrupt Organizations Act (RICO) law by fraudulently concealing cancer risks associated with the use of the medication Actos. Despite evidence illustrating significant individualized issues on causation, injury and reliance, the court held that predominance had been met and certified claims brought on behalf of the TPP class (but declined to certify a California state class of consumer protection claims).

The defendants first argued that individualized evidence regarding RICO injury and standing doomed the TPP class on predominance grounds. Specifically, the defendants pointed to evidence demonstrating 40% of TPPs would have paid for Actos prescriptions regardless of the alleged fraud. The defendants argued that this evidence raised serious questions about how to determine on a classwide basis whether a given TPP suffered injury from the alleged fraud — and therefore had standing.

But the court found that the plaintiffs' proposal to limit the class to TPPs "that paid for at least five Actos prescriptions" meant it would be limited to TPPs that had "a 98.5% chance of suffering an injury" from the alleged concealment, which sufficiently addressed standing concerns. The court also rejected arguments that individualized evidence would be required to determine which class members switched to more costly alternative treatments because the only evidence proffered by the defendants that such substitute behavior occurred related to **patient** rather than TPP behavior. Finally, the court found that "most of the evidence related to the element of but-for causation (from either party) is common to the class."

In contrast to the TPP class, the court declined to certify California state consumer protection claims because it found that "[a] mix of common and individualized evidence would likely come into play with respect to materiality, exposure, and the statute of limitations." The court found the plaintiffs failed to put forth a similar method or model like the RICO injury theory with respect to the Unfair Competition Law, False Advertising Law or Consumers Legal Remedies Act claims that would allow for a presumption of reliance.

Third Circuit Prohibits Defendants From Using CAFA for Subject Matter Jurisdiction in MMWA Cases

***Rowland v. Bissell Homecare, Inc.*, 73 F.4th 177 (3d Cir. 2023)**

In a consolidated appeal arising from four putative class actions, a Third Circuit panel held that Magnuson-Moss Warranty Act (MMWA) cases that fail to meet the MMWA requirements for federal subject matter jurisdiction cannot be removed by defendants on the basis of the Class Action Fairness Act (CAFA).

In *Rowland*, the plaintiffs filed single-count putative class actions in state court alleging certain defendants violated the MMWA by either concealing written warranties or prohibiting the plaintiffs from pursuing repairs from third parties. After the defendants removed the actions to federal court on the basis of CAFA, the district court held remand was appropriate because (1) the MMWA's jurisdictional requirements were not met, and (2) defendants could not use CAFA to circumvent the MMWA in an effort to bring the actions to federal court.

The Third Circuit reviewed three possible bases for federal subject matter jurisdiction: MMWA, CAFA and traditional diversity. First, the court noted that the MMWA only provides for a narrow path into federal court. It provides that "[n]o claim shall be cognizable" in federal district court if "the amount in controversy of any individual claim is less than the sum or value of $25," "if the amount in controversy is less than the sum or value of $50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit," or "if the action is brought as a class action, and the number of named plaintiffs is less than one hundred."

The Third Circuit reasoned that, "[b]y imposing additional requirements for federal jurisdiction, Congress manifested an intent to restrict access to federal court for MMWA claims." The defendants had never argued the MMWA basis for federal jurisdiction could ever be met, which sufficed to resolve the first basis for jurisdiction.

Next, the panel "examine[d] whether CAFA provides an independent basis for federal jurisdiction over MMWA claims even where the MMWA federal jurisdictional requirements are not satisfied." Despite the fact that CAFA's requirements were met, the court held that "the MMWA's stringent jurisdictional requirements are irreconcilable with CAFA." It reasoned that "applying CAFA in this context would render the MMWA's named-plaintiff requirement meaningless."

The court ultimately held that CAFA simply does not furnish a basis for federal court jurisdiction over MMWA matters. Nor did the court believe that its ruling would "render either statute unenforceable" because "[t]he statutes can coexist." CAFA continues to govern "outside the narrow context of MMWA class actions."

Finally, the court also considered whether individual claims asserted by the plaintiffs could be removed on traditional diversity grounds. Turning again to the language of the MMWA, the Third Circuit panel concluded that federal jurisdiction would exist only if both the traditional diversity requirements and the MMWA requirements governing individual claims were met. Construed together, that meant that "the amount in controversy would need to exceed $75,000, $50,000 of which could not be attorneys' fees." And because the defendants relied "exclusively on attorneys' fees to assert that they have established the amount in controversy," they could not establish federal jurisdiction.

Contacts

John H. Beisner
Partner / Washington, D.C.
202.371.7410
john.beisner@skadden.com

Geoffrey M. Wyatt
Partner / Washington, D.C.
202.371.7008
geoffrey.wyatt@skadden.com

Jordan M. Schwartz
Counsel / Washington, D.C.
202.371.7036
jordan.schwartz@skadden.com

Rachel E. Moore
Associate / New York
212.735.2571
rachel.moore@skadden.com

Asher S. Trangle
Associate / New York
212.735.2676
asher.trangle@skadden.com

One Manhattan West
New York, NY 10001
212.735.3000

1440 New York Ave., N.W.
Washington, D.C. 20005
202.371.7000