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# Beyond Predominance: Alternative Arguments Against Class Certification

Leveraging the Latest Court Decisions to Challenge Class Membership and Defeat Certification

THURSDAY, MARCH 18, 2021

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# Beyond Predominance: Alternative Arguments Against Class Certification

March 18, 2021

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# Contents


1 **Ascertainability**
Administratively Infeasible, Subjective, Fail-Safe, and Overbroad Classes

2 **Adequacy & Typicality**
Importance of the Named Plaintiffs

3 **Personal Jurisdiction**
The Aftermath of *Bristol-Myers Squibb*

4 **Article III Standing**
Standing in the Class Context

# 1 Ascertainability

# What is Ascertainability?

- Ascertainability = ease with which class members can be identified.
  - Class action defendants have long argued – and courts now generally recognize (to varying degrees) – that "ascertainability" is an implicit prerequisite to class certification.
  - Four Most Common Ascertainability Arguments:
    - » Administrative Feasibility
    - » "Fail-Safe Class"
    - » Overbroad Class
    - » Subjective Class

# Administrative Feasibility: Third Circuit Adopts

## *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013)

- Proposed class of weight-loss supplement purchasers.
- Parties stipulated that class members were unlikely to have proof of purchase, such as packaging or receipts.
- Third Circuit rejected plaintiff's proposed methods for ascertaining class membership.
- "Depending on the facts of a case, retailer records may be a perfectly acceptable method of proving class membership. But there is no evidence that a single purchaser of WeightSmart could be identified using records of customer membership cards or records of online sales."
- "A defendant has a similar, if not the same, due process right to challenge the proof used to demonstrate class membership as it does to challenge the elements of a plaintiff's claim."
- Under *Carrera*, a plaintiff must prove ***at the class certification stage*** that it is possible to reliably identify class members and cannot merely indicate that such evidence will be produced later.

# Administrative Feasibility: *Carrera* Results in Circuit Split

## Circuits Adopting:

- **Third Circuit** - *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013)
- **Fourth Circuit** - *EQT Prod. Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014)
- **Eleventh Circuit (Initially)** - *Karhu v. Vital Pharm., Inc.*, 2015 WL 3560722 (11th Cir. June 9, 2015)

## Circuits Rejecting:

- **First Circuit** - *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015)
- **Second Circuit** - *In re Petrobras Sec.*, 862 F.3d 250, 265 (2d Cir. 2017)
- **Fifth Circuit** - *Seeligson v. Devon Energy Prod. Co., L.P.*, No. 17-10320, 2019 WL 852060 (5th Cir. Feb. 20, 2019)
- **Sixth Circuit** - *Rikos v. Proctor & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015)
- **Seventh Circuit** - *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015)
- **Eighth Circuit** - *Sandusky Wellness Ctr. LLC v. Medfox Sci. Inc.*, 821 F.3d 992 (8th Cir. 2016)
- **Ninth Circuit** - *Briseno v. ConAgra Foods*, 844 F.3d 1121 (9th Cir. 2017)
- **Eleventh Circuit** - *Cherry v. Dometic Corp.*, No. 19-13242, -- F.3d -- , 2021 WL 346121 (11th Cir. Feb. 2, 2021)

# Administrative Feasibility: Ninth Circuit Rejects *Carrera*

## ***Briseno v. ConAgra Foods*, 844 F.3d 1121 (9th Cir. 2017)**

- Overview:
  - Plaintiffs sued ConAgra Foods based on "100% Natural" labels on Wesson-brand cooking oils.
  - Ninth Circuit affirmed certification, holding that there was no freestanding administrative feasibility requirement under Rule 23.
- Provides Rebuttal to *Carrera:*
  - Rejected *Carrera's* finding that an "administrative feasibility requirement" is needed "to mitigate the administrative burdens of trying a Rule 23(b)(3) class action," because "the manageability criterion of the superiority requirement" already does this.
  - Administrative feasibility not necessary to ensure notice because "[n]either Rule 23 nor the Due Process Clause requires actual notice to each individual class member."
  - Administrative feasibility not necessary to defend against illegitimate claims because "the risk of dilution based on fraudulent or mistaken claims seems low, perhaps to the point of being negligible" in consumer classes.
  - Court also expressed concern that an administrative feasibility requirement would bar "low-value consumer class actions."

# Administrative Feasibility: Eleventh Circuit Flip-Flops

## *Karhu v. Vital Pharm., Inc.*, 2015 WL 3560722 (11th Cir. June 9, 2015)

- Initially, the Eleventh Circuit agreed with *Carrera*, requiring that plaintiffs "propose an administratively feasible method by which class members can be identified."
- In *Karhu*, the court rejected plaintiff's "incomplete" plan to identify consumer class members through defendant's records, where defendant sold primarily to retailers and distributors.
- The court similarly rejected a proposal to allow consumers to self-identify through affidavits.

## *Cherry v. Dometic Corp.*, 2021 WL 346121 (11th Cir. Feb. 2, 2021)

- The Eleventh Circuit reversed course in 2021, vacating denial of class certification in a case involving refrigerators on administrative feasibility grounds.
- "Proof of administrative feasibility cannot be a precondition for certification," ***but*** "administrative feasibility has relevance . . . in the light of the manageability criterion of Rule 23(b)(3)(D)."
- Remanded for further proceedings but indicated administrative feasibility alone won't sink a class.

# Administrative Feasibility: Recent Developments

**District courts in Circuits that follow *Carrera*:**

- *In re Niaspan Antitrust Litig.*, 464 F. Supp. 3d 678 (E.D. Pa. 2020) (rejecting expert's proposed method for identifying proposed class members and rejecting certification, noting that "[m]ere assurances that a model w[ould] be effective to ascertain class members is insufficient")
  - *But see In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-MD-2836, 2020 WL 5778756 (E.D. Va. Aug. 14, 2020) (certifying plaintiffs' proposed class as ascertainable where the same expert used in *Niaspan* proposed the same methodology to identify class members, but with more detail)
- *Adams Pointe I, L.P. v. Tru-Flex Metal House Corp.*, No. 2:16-CV-00750-CB, 2020 WL 4199557 (W.D. Pa. July 17, 2020) (denying certification of a class of homeowners whose homes contained defective piping; defendant's records could not be used to identify class members because it sold primarily to wholesalers, retailers, and big-box stores, not end users)
  - *But see Hargrove v. Sleepy's LLC*, 974 F.3d 467 (3d. Cir. 2020) (certifying a class of independent contractors despite gaps in defendant's records where defendant's failure to keep records was a violation of the state's wage and hour law)

# Administrative Feasibility: Recent Developments

<u>**District courts in Circuits that do not follow *Carrera*:**</u>

- Still reject classes on administrative feasibility grounds, describing it as a "manageability" issue:
  - *Vandenberg & Sons Furniture, Inc. v. All. Funding Grp.*, No. 1:15-CV-1255, 2021 WL 222171 (W.D. Mich. Jan. 22, 2021) (declining to certify a class of junk fax recipients, noting that there would be "no objective data to verify" class membership and no "way to provide notice to the" class members without a fax log)

- In the Ninth Circuit, difficult-to-identify classes are most likely to fail where there are incentives to opt out:
  - *Wetzel v. CertainTeed Corp.*, No. C16-1160JLR, 2019 WL 3976204 (W.D. Wash. Mar. 25, 2019) (rejecting class of owners of homes with defective roofing shingles; because class members would have damages "in the thousands of dollars and perhaps tens of thousands," as well as warranty claims that plaintiff had abandoned, the "inability to locate absent class members" was far more determinative than in *Briseno*)
  - *Cover v. Windsor Surry Co.*, No. 14-CV-05262-WHO, 2017 WL 9837932 (N.D. Cal. July 24, 2017) (declining to certify a class of owners of homes with defective trim boards; unlike *Briseno*, the harm in failing to identify and give notice to class members was not "negligible" where class members had "relatively high projected individual damages" and a potentially more convenient forum in Rhode Island)

# Fail-Safe Classes

- Fail-safe classes = class definition that incorporates a legal conclusion, resulting in a class where class members are only bound if defendant is liable.
- Most courts will deny certification of fail-safe classes:
  - *Russell v. Tyson Farms, Inc.*, No. 5:19-CV-1179-LCB, 2020 WL 3051241 (N.D. Ala. June 8, 2020) (class of all residents "who have experienced personal injury, pain, suffering, monetary damages, mental anguish, emotional distress, and/or humiliation")
  - *White v. Hilton Hotels Ret. Plan*, No. CV 16-856 (CKK), 2020 WL 5946066 (D.D.C. Oct. 7, 2020) (class of all persons who "have vested rights to retirement benefits that have been denied")
  - *Ratnayake v. Farmers Ins. Exch.*, No. 2:11-cv-01668-APG-CWH, 2015 WL 875432 (D. Nev. Feb. 27, 2015) (class of insureds who had received "insufficient discounts under Nevada law")
- The Fifth and Ninth Circuits may not always reject fail-safe classes:
  - *In re Rodriguez*, 695 F.3d 360 (5th Cir. 2012) (Fifth Circuit has "rejected a rule against fail-safe classes")
  - *Melgar v. CSK Auto, Inc.*, 681 F. App'x 605 (9th Cir. 2017) ("We further note, though we do not hold, that our circuit's caselaw appears to disapprove of the premise that a class can be fail-safe.")

# Overbroad Classes

- Overbroad classes are ones that include all users of a product or service, regardless of whether everyone suffered an injury or had complaints about the product or service.
- Some courts have denied certification of these classes on ascertainability grounds:
  - *Vann v. Dolly, Inc.*, No. 18 C 4455, 2020 WL 902831 (N.D. Ill. Feb. 25, 2020) (denying certification of employment class defined to include "all individuals employed by Defendant" when the alleged injury at issue was limited to a certain type of worker)
  - *Moore v. Apple Inc.*, 309 F.R.D. 532 (N.D. Cal. 2015) (denying certification of a class of all people who switched from Apple to non-Apple cellphones, which could cause text messages to be lost, as some class members would never have had the contractual right to receive text messages from service providers in the first place)
- However, many courts consider these classes ascertainable or allow the plaintiff to redefine the class:
  - *Whirlpool Corp. v. Glazer*, 678 F.3d 409 (6th Cir. 2012) (affirming certification of a class even though 97 percent of class members never complained about their washers)
  - *Hockenbury v. Hanover Ins. Co.*, No. CIV-15-1003-D, 2016 WL 552967 (W.D. Okla. Feb. 10, 2016) (denying certification of a class of all insureds who made claims—as some may not have been injured in the claims process—but granting leave to file an amended complaint)

# Subjective Classes

- Courts have also rejected class definitions that turn on subjective criteria, such as a proposed class member's mental state:

  - *Hoekman v. Educ. Minnesota*, 335 F.R.D. 219 (D. Minn. 2020) (denying class certification where, inter alia, the class was defined to include individuals "reluctant" to join a union and plaintiffs proposed having class members self-identify through surveys)

  - *Rietdorf v. City of Fort Wayne*, No. 1:15-CV-113 JVB, 2016 WL 245253 (N.D. Ind. Jan. 21, 2016) (denying certification of a class of people unconstitutionally detained by police where determining class membership required a subjective inquiry as to whether someone was "detained against his will")

# 2 Adequacy & Typicality

# Adequacy & Typicality

- Individualized issues affecting the named plaintiff can be used as strong arguments in areas besides predominance, such as adequacy and typicality under Rule 23(a).

- Courts have denied certification on these grounds where individualized issues make a potential named plaintiff an inadequate class member or make her claims atypical of the class.

- Practice Point - Four key areas of attack:
  - Named Plaintiff Is Subject to Unique Defenses
  - Named Plaintiff Has Credibility Problems
  - Named Plaintiff Has Independence Issues
  - Named Plaintiff Makes A Mistake

# Named Plaintiff Is Subject To Unique Defenses

- A named plaintiff's deposition testimony can be critical to identifying defenses that are unique to her.
- The existence of such defenses could make her an inadequate class representative under Rule 23(a)(4):
  - *Al Haj v. Pfizer Inc.*, No. 17 C 6730, 2020 WL 1330367, -- F.R.D. -- (N.D. Ill. Mar. 23, 2020)
    - Plaintiff sought certification of a class of purchasers of "Maximum Strength" Robitussin who were allegedly deceived into believing it contained a higher concentration of the active ingredient than "Regular Strength" Robitussin.
    - At deposition, plaintiff admitted that she "did not purchase Maximum Strength Robitussin believing it had a greater concentration of active ingredients, continued to purchase the product even after learning that its recommended adult dose was double that of Regular Strength Robitussin, and ultimately switched to an even more expensive cough syrup with the same concentration of active ingredients."
    - Court denied summary judgment on plaintiff's claims prior to class certification but still considered her testimony to be a "unique defense" that would be a "substantial obstacle" that other class members would not face.

# Named Plaintiff Is Subject To Unique Defenses

- Some courts will consider unique defenses to be a typicality issue under Rule 23(a)(3) as well:
  - *Arthur v. United Indus. Corp.*, No. 217CV06983CASSKX, 2018 WL 2276636 (C.D. Cal. May 17, 2018)
    - » The front label of an herbicide concentrate stated that the concentrate "Makes up to [x] gallons" of herbicide, while the mixing instructions on the back noted that such dilution would only kill "newly emerged weeds." Plaintiff alleged that the front label was deceptive to the reasonable consumer, who would expect the concentrate to make "[x] gallons" of herbicide capable of killing established weeds.
    - » In his deposition, plaintiff admitted that "[t]he first time [he] saw the back of the bottle was when [he] saw it in the complaint" because he mixed the herbicide based on his own calculations.
    - » Key to the class claims, though, was that "the Concentrate products 'do not yield the volume, in gallons, as promised on the label, *if following the instructions prominently stated on the product's back panel,*'" which plaintiff had never read.
    - » Court found that there was a "reliance and causation problem unique to plaintiff['s]" claim and that there were "fundamental distinctions" between plaintiff's injuries and those allegedly sustained by the proposed class, rendering his claim atypical.
    - » Court also considered plaintiff an inadequate representative on the same grounds.

# Named Plaintiff Is Subject To Unique Defenses

- *Jensen v. Cablevision Sys. Corp.*, 372 F. Supp. 3d 95 (E.D.N.Y. 2019), *appeal dismissed, leave to appeal denied*, No. 19-628, 2019 WL 4296129 (2d Cir. Aug. 28, 2019)
  - Plaintiff sought to be named representative of a class of internet service users alleging deceptive trade practices.
  - Plaintiff, however, had opted out of the standard class-waiver and arbitration provisions of the contract when signing up for the service.
  - Court found plaintiff's claims atypical of the class and found plaintiff to be an inadequate class representative "because the vast majority of the potential class is subject to unique defenses which go to the heart of the litigation."
- *Mooradian v. FCA US, LLC*, 286 F. Supp. 3d 865 (N.D. Ohio 2017)
  - Plaintiff sought to be named representative of a class of Jeep owners with defective radiators.
  - At counsel's behest, plaintiff took his Jeep in to be serviced without defendant's permission, resulting in spoliation sanctions.
  - Court held that the plaintiff's "actions have made him an atypical member of the class by giving [defendant] numerous possible defenses against him that would not apply to the class as a whole."

# Named Plaintiff Has Credibility Problems

- Criminal Convictions
  - Courts may refuse class certification when a defendant can show that a named plaintiff's criminal conviction will directly impact the case at hand:
    - » *Pines Nursing Home (77), Inc v. Rehabcare Grp., Inc.*, No. 1:14-CV-20039-UU, 2014 WL 12531512 (S.D. Fla. June 20, 2014) (denying class certification where plaintiff's owners were currently charged with Medicaid fraud, as it created a "significant risk" that one owner may be convicted before the trial and that they may undermine their credibility by invoking Fifth Amendment rights during questioning)
  - However, courts generally will not deny certification solely because the named plaintiff has a criminal conviction:
    - » *Benedict v. Altria Grp., Inc.*, 241 F.R.D. 668 (D. Kan. 2007) (criminal history including crimes of dishonesty, false statements, felony theft, burglary, writing bad checks, and possession of drug paraphernalia did not disqualify plaintiff as class representative)
    - » *Sloane v. Gulf Interstate Field Servs., Inc.*, No. CV 15-1208, 2016 WL 878118 (W.D. Pa. Mar. 8, 2016) (convictions for crimes of dishonesty did not render plaintiff an inadequate class representative)

# Named Plaintiff Has Independence Issues

- Personal Relationships with Class Counsel
  - Defendants must show that a personal relationship will cause a conflict of interest such that a class representative cannot be trusted to protect class interests:
    - *Vision Constr. Ent., Inc. v. Argos Ready Mix, LLC*, No. 3:15cv534-MCR-HTC, 2019 WL 11075886 (N.D. Fla. Nov. 7, 2019) (plaintiff was an inadequate representative where he had a "close financial and business relationship" with class counsel given his partnership with class counsel and ownership of 50% of the office building they leased)
    - *Gordon v. Sonar Capital Mgmt. LLC*, 92 F. Supp. 3d 193 (S.D.N.Y. 2015) (class representative inadequate where his cousin, an attorney, was involved behind the scenes and would collect a 5% referral fee from class counsel, potentially far exceeding plaintiff's recovery)
    - *Alhassid v. Bank of Am.*, 307 F.R.D. 684 (S.D. Fla. 2015) (plaintiff was an inadequate representative where she was potentially financially interdependent on class counsel, who were her daughter and son-in-law)
  - *But see O'Shea v. Epson Am., Inc.*, No. CV 09-8063 PSG CWX, 2011 WL 4352458 (C.D. Cal. Sept. 19, 2011), *aff'd sub nom. Rogers v. Epson Am.*, Inc., 648 F. App'x 717 (9th Cir. 2016) (plaintiff was adequate as a representative despite having been an attorney at class counsel's firm, as a "mere potential for a conflict of interest is not sufficient")

# Named Plaintiff Makes A Mistake

- Sometimes, named plaintiffs make strange decisions that can lead to class decertification:
  - *Stampley v. Altom Transp., Inc.*, No. 14 CV 3747, 2018 WL 11219633 (N.D. Ill. Feb. 20, 2018), *aff'd*, 958 F.3d 580 (7th Cir. 2020)
    - » Plaintiff sought to certify class of truckers under contract with defendant, each of whom had signed a fee agreement stating that they must dispute their fees within 30 days of notice or they would waive all objections to the fees.
    - » Because plaintiff failed to waive his fees under the contract, the court certified a class only as to those truckers who had similarly failed to waive their fees in a timely manner.
    - » Prior to class notice being sent, plaintiff filed a motion for summary judgment on the issue of whether the waiver clause was enforceable—a move that could potentially enlarge the class to include all truckers under contract.
    - » Court decertified the class, inferring from plaintiff's motion that he "d[id] not want to represent the class as [the court] certified it," making him an inadequate representative of that class.
    - » Seventh Circuit affirmed, noting that such a move showed that plaintiff was "clearly focused on protecting his own claim against a contractual defense, rather than representing the class as constituted."

# 3 Personal Jurisdiction

# Personal Jurisdiction: Introduction & Overview

- Class actions often include many members who are not subject to personal jurisdiction in the court.
- This presents a question: Does personal jurisdiction present a barrier to class certification or grounds for early dismissal?
- The Supreme Court’s decision in *BMS* has helped this issue gain traction, with courts reaching different outcomes:
  - Some courts find personal jurisdiction over absent class members is unnecessary.
  - Some courts hold personal jurisdiction over out-of-state class members is required.
  - Some courts defer personal jurisdiction issues until after class certification.
- Issue is currently on appeal to the Sixth & Ninth Circuits.
- Possible Supreme Court review and arguments in the meantime.

# Personal Jurisdiction: *Bristol-Myers Squibb*

- Supreme Court addressed personal jurisdiction in *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cty.*, 137 S. Ct. 1773 (2017):
  - "Before the Supreme Court's decision in [*BMS*], there was a general consensus that due process principles did not prohibit a plaintiff from seeking to represent a nationwide class in federal court . . . ."
    - *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 445 (7th Cir. 2020).
  - *BMS* ruled that out-of-state plaintiffs who could not establish personal jurisdiction could not bring claims in consolidated mass action even if it included in-state plaintiffs.
  - California courts therefore lacked jurisdiction over the claims of the plaintiffs who were not California residents and had not purchased, used, or been injured by Plavix in California.
  - *BMS* was a game changer – but how it impacts class actions is still developing.

# Personal Jurisdiction: *Bristol-Myers Squibb*

- *BMS* left two questions unresolved:
  - Whether the Court's holding applies in federal court:
    - "[W]e leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."
    - Most federal courts to consider the question have concluded that *BMS* does apply in federal court, particularly when diversity of citizenship is the basis for jurisdiction.
  - Whether the Court's holding applies to class actions:
    - "The Court today does not confront the question whether its opinion here would also apply to a class action." (Sotomayor, J., dissenting)
    - Courts since *BMS* have reached different conclusions when confronting this issue.

# Personal Jurisdiction: *Mussat v. IQVIA* (Seventh Circuit)

- *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 445 (7th Cir. 2020)
  - Recipient of unsolicited faxes brought class action against sender under TCPA.
  - N.D. Ill. court struck proposed nationwide class based on *BMS* and personal jurisdiction.
  - Seventh Circuit found *BMS* does not apply to class actions:
    - “We 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 personal jurisdiction, but the unnamed class members are not required to do so.” *Id.* at 447.
    - “Nonnamed class members . . . may be parties for some purposes and not for others. The label ‘party’ does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context.” *Id.* (relying on pre-*BMS* precedent).
    - Applying *BMS* to class actions would “urge[] a major change in the law of personal jurisdiction and class actions [and is] not warranted by the Supreme Court’s decision in *Bristol-Myers*.” *Id.* at 448.
- Rehearing en banc and cert. both denied.

# Personal Jurisdiction: *Molock v. Whole Foods* (D.C. Circuit)

- *Molock v. Whole Foods*, 952 F.3d 293 (D.C. Cir. 2020)
  - Employees brought nationwide class action against employer alleging manipulation of bonus program.
  - D.D.C. court denied motion to dismiss for lack of personal jurisdiction over nonresident class members.
  - D.C. Circuit affirmed, finding motion to dismiss premature until class is certified: "Any decision purporting to dismiss putative class members before [class certification] would be purely advisory."
  - Rehearing en banc denied May 7, 2020.
  - No cert. petition filed.

# Personal Jurisdiction: *Molock v. Whole Foods* Dissent

- Judge Silberman dissented in *Molock.*
- Judge Silberman opined that *BMS* applies in class actions and the claims of out-of-state class members should have been dismissed.
- Judge Silberman reasoned as follows:
  - "Although the Supreme Court avoided opining on whether its reasoning in the mass action context would apply also to class actions, it seems to me that logic dictates that it does. After all, like the mass action in Bristol-Myers, a class action is just a species of joinder, which "merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Id.* at 308 (Silberman, J., dissenting) (citing *Shady Grove*).
  - "And since the requirements of personal jurisdiction must be satisfied independently for 'the specific claims at issue,' [*BMS*], I think that personal jurisdiction over claims asserted on behalf of absent class members must be analyzed on a claim-by-claim basis."

# Personal Jurisdiction: *Cruson v. Jackson Nat'l* (Fifth Circuit)

- Fifth Circuit reached a similar decision to the *Molock* court in *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240 (5th Cir. 2020).
- Court held that a motion to dismiss based on personal jurisdiction is premature before class certification.
  - "[Defendant's] objection to personal jurisdiction concerned only class members who were non-residents of Texas. Those members, however, were not yet before the court when Jackson filed its Rule 12 motions. What brings putative class members before the court is certification: Certification of a class is the critical act which reifies the unnamed class members and, critically, renders them subject to the court's power." *Id.* at 250.
- *Molock* and *Cruson* thus leave the question of whether personal jurisdiction requires dismissal of out-of-state plaintiffs until after certification.
- This may present a basis for arguing the class should not be certified if personal jurisdiction raises individual issues.

# Personal Jurisdiction: Circuits Where Issue Is Pending

- Ninth Circuit: *Moser v. Benefytt Tech.*
  - Defendants appeal from class certification order and raise personal jurisdiction arguments based on *BMS*.
  - Issue has been fully briefed and will be argued on May 13, 2021.
  - US Chamber of Commerce submitted amicus brief in support of defendants and arguing that *BMS* applies to class actions just as it applies to mass actions. *See* 2020 WL 5820917.
- Sixth Circuit: *Lyngaas v. Curaden AG*
  - Plaintiffs brought nationwide class action raising TCPA claims.
  - Defendants appealed from final judgment after bench trial.
  - District court held that *BMS* did not apply to class action, and defendants appealed.
  - Appeal was argued on January 13, 2021 and decision forthcoming.

# Personal Jurisdiction: District Court Decisions

- District court decisions vary – some cases apply *BMS*, some refuse to apply *BMS*, and some defer personal jurisdiction issues:
  - *Carpenter v. PetSmart*, 441 F. Supp. 3d 1028 (S.D. Cal. 2020) (applying *BMS*) – "Court agrees with these latter cases finding that [*BMS*] applies in nationwide class action context."
  - *Noohi v. Kraft Heinz*, 2020 WL 5554255 (C.D. Cal. 2020) (holding *BMS* does not apply) – "To the extent the court *in Carpenter v. PetSmart, Inc.* held that a personal jurisdiction defense can be asserted as to unnamed members of a putative nationwide class at the motion to dismiss stage, . . . this Court disagrees as it relates to this case."
  - *Chizniak v. CertainTeed*, 2020 WL 49512 (N.D.N.Y. 2020) – "Like the other courts in this District, the Court interprets [*BMS*] to extend to nationwide class actions and declines to exercise specific personal jurisdiction over Defendant CertainTeed with regard to the Out-of-State Plaintiffs' claims."
  - *Simon v. Ultimate Fitness*, 2019 WL 4382204 (S.D.N.Y. 2019) – "The Court agrees that it is appropriate to defer questions regarding the class claims until class certification."

# Personal Jurisdiction: Possible Supreme Court Review?

- Supreme Court denied cert. in *Mussat* on January 21, 2021.
- Personal jurisdiction issues are presented in the *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.* appeal from Montana state court:
  - 443 P.3d 407, *cert. granted,* 140 S. Ct. 917 (2020).
  - Question presented: Whether specific jurisdiction's “arising out of or relating to” requirement is satisfied “when none of the defendant's forum contacts caused the plaintiff's claims.”
  - Case was argued on Oct. 7, 2020.
  - Decision will elucidate *BMS* and may have implications for arguments in class actions.
- Application of *BMS* to class actions is also percolating at the Circuit level, and losing party in Sixth or Ninth Circuit may seek cert.
- How would current Court view that issue?

# Personal Jurisdiction: Implications & Possible Arguments

- Based on the current landscape, it appears that defendants may consider raising possible personal jurisdiction arguments (assuming out-of-state class members have no basis for personal jurisdiction):
  - As a basis for dismissal (outside of the Fifth, Seventh, and D.C. Circuits).
  - As a reason why class certification should be denied given individual issues would be necessary to resolve the defense (outside of the Seventh Circuit).
  - As a basis for dismissal or summary judgment if a class is certified (outside of Seventh Circuit).
- Potential application of defense is case-specific.
- Defendants can preserve the argument in the Seventh Circuit pending possible Supreme Court review.

# 4 Article III Standing

# Article III And Uninjured Class Members: Overview

- The problem of uninjured class members – Article III vs. Rule 23:
  - "The question of how to handle classes that may include uninjured class members has received considerable attention among our sister circuits in recent years . . . *As these thoughtful opinions demonstrate, this question can be seen as implicating either the jurisdiction of the court under Article III or the procedural issues embedded within Rule 23's requirements for class certification. At times, the discussion of these two issues has run together*." *Krakauer v. Dish Network*, 925 F.3d 643, 652 (4th Cir. 2020).
  - *Krakauer* found absent class members had suffered injury-in-fact and thus did not decide whether Article III's injury-in-fact requirement applies to absent class members.
- "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring).
- In *Spokeo v. Robins*, 578 U.S. 330 (2016), the Supreme Court addressed Article III standing.
  - Courts applying *Spokeo* have since reached inconsistent conclusions.
  - *Spokeo* might inform whether class reps or absent class members have standing.

# Article III And Uninjured Class Members: Possible Supreme Court Review?

- *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020) – cert. granted and argument set for March 30, 2021:
  - The Court may address whether absent class members need Article III standing in *Transunion*.
  - Supreme Court granted cert. to address the following question presented:
    - » "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."
  - There is, however, reason to think the Court will not reach this issue:
    - » (1) the question presented is a mischaracterization of the case, which turned on whether class members suffered injury under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).
    - » (2) the briefs address a much narrower question – whether Transunion's false alerts brought *the risk of real harm* sufficient to satisfy *Spokeo.*
    - » (3) the Court has had other recent opportunities to address the question presented more directly, but did not grant cert.
      - › (E.g., *Huang v. Schultz* presented question whether unnamed class members under Rule 23 must have Article III standing for class certification under Rule 23. The Supreme Court denied cert. October 5, 2020)

# Article III And Uninjured Class Members: Current Landscape

- Until the Court addresses the issue, Circuits have taken different approaches when considering Article III and class certification:
  - **First, Third, & Seventh Circuits** – Absent class members do not need to show Article III standing to obtain certification.
  - **Fifth Circuit** – Article III standing not relevant if the class fails under Rule 23.
  - **Ninth Circuit** – Only class reps need to establish standing for certification, but absent class members must have standing to recover.
  - **Eleventh Circuit** – Only class reps need standing for certification, but issues related to Article III injury-in-fact are relevant to whether Rule 23 requirements are met, since absent class members need standing to recover.
  - **Second & Eighth Circuit** – If absent class members lack Article III standing, class should not be certified.
- What arguments do these authorities permit?

# Article III And Uninjured Class Members: First & Third Circuits

- *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018)
  - Plaintiffs brought class action under state antitrust laws alleging overpayment for pharmaceutical drugs. Massachusetts court certified class.
  - First Circuit ruled that Article III standing need not be demonstrated for all class members to obtain certification: “We have not previously required every class member to demonstrate standing when a class is certified, nor do we do so today.”
  - But it recognized that uninjured class members may preclude certification “where injury-in-fact is a required element of a claim” and that “a class cannot be certified based on an expectation that the defendant will have no opportunity to press at trial genuine challenges to allegations of injury-in-fact.”
- *Neale v. Volvo Cars of N. Am.*, 794 F.3d 353 (3d Cir. 2015)
  - Plaintiffs brought class action against an automobile manufacturer for defective sunroofs. D.N.J. court certified class.
  - Third Circuit: “We now squarely hold that unnamed, putative class members need not establish Article III standing. Instead, the ‘cases or controversies’ requirement is satisfied so long as a class representative has standing, whether in the context of a settlement or litigation class.” *Id.* at 362.

# Article III And Uninjured Class Members: Seventh Circuit

- *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672 (7th Cir. 2009)
  - Investors brought class action against investment firms. N.D. Ill. court certified class.
  - Seventh Circuit affirmed, rejecting defendants' standing arguments.
  - "PIMCO argues that before certifying a class the district judge was required to determine which class members had suffered damages. But putting the cart before the horse in that way would vitiate the economies of class action procedure; in effect the trial would precede the certification. It is true that injury is a prerequisite to standing. But as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied."
  - "What is true is that a class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification."

# Article III And Uninjured Class Members: Fifth Circuit

- *Flecha v. Medicredit*, 946 F.3d 762 (5th Cir. 2020)
  - Debtor brought class action under Fair Debt Collection Practices Act against debt collector and bondholder. W.D. Tex. court certified class.
  - Fifth Circuit concluded that Rule 23 was not satisfied and thus there was no reason to reach Article III arguments: “There are undoubtedly many unnamed class members here who lack the requisite injury to establish Article III standing . . . That said, we do not reach the issue. That is because the Supreme Court has repeatedly instructed that we should first decide whether a proposed class satisfies Rule 23, before deciding whether it satisfies Article III.” *Id.*

# Article III And Uninjured Class Members: Ninth Circuit

- *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020), *cert. granted in part*, 2020 WL 7366280 (U.S. Dec. 16, 2020)
  - Consumer brought class action under Fair Credit Reporting Act. N.D. Cal. court certified class. After trial and resulting judgment for plaintiff, defendant appealed.
  - Ninth Circuit affirmed class certification but concluded that each class member must have standing to recover.
  - The court explained 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. Although this is an issue of first impression for this Court, our holding today clearly follows from Supreme Court precedent, as well as the fundamental nature of our judicial system."
  - The court noted that "[t]o hold otherwise would directly contravene the Rules Enabling Act, because it 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."

# Article III And Uninjured Class Members: Eleventh Circuit

- *Cordoba v. DirecTV*, 942 F.3d 1259 (11th Cir. 2019)
  - Consumer brought class action raising TCPA claims. N.D. Ga. court certified class.
  - Eleventh Circuit reversed. The court acknowledged that only class representatives need to establish Article III standing at the class certification stage, but explained that all class members must have standing to recover.
  - Eleventh Circuit thus reasoned that district courts should consider Article III standing as part of the Rule 23 analysis.
  - "If many or most of the putative class members could not show that they suffered an injury fairly traceable to the defendant's misconduct, then they would not be able to recover, and that is assuredly a relevant factor that a district court must consider when deciding whether and how to certify a class."

# Article III And Uninjured Class Members: Second & Eighth Circuits

- *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006)
  - Taxpayers who bought currency options sued defendants (Deutsche Bank, law firm, its accounting firm, and others) alleging violations of RICO and NY state law.
  - S.D.N.Y. court certified class and approved settlement. The parties appealed when the court refused to amend the judgment.
  - Second Circuit explained that "[n]o class may be certified that contains members lacking Article III standing."
  - It then ruled that all class members in *Denney* had Article III standing and affirmed.
- *Avritt v. Reliastar Life Ins.*, 615 F.3d 1023 (8th Cir. 2010)
  - Purchasers of deferred annuities brought class action against seller alleging breach of contract and consumer fraud. D. Minn. court denied class cert.
  - Eighth Circuit affirmed: "Although federal courts 'do not require that each member of a class submit evidence of personal standing,' a class cannot be certified if it contains members who lack standing." (citing *Denney*)
- *Halvorson v. Auto-Owners Ins.*, 718 F.3d 773 (8th Cir. 2013)
  - Plaintiffs brought class action against automobile insurer based on breach of contract and bad faith.
  - Following removal, D.N.D. court granted class cert of North Dakota policy holders and denied class cert for Minnesota holders.
  - Eighth Circuit reversed certification of North Dakota claims, concluding predominance was not met where many class members lacked standing: "the constitutional requirement of standing is equally applicable to class actions . . . each [class] member must have standing."

# Article III And Uninjured Class Members: Implications and Possible Arguments

- Assuming the Supreme Court does not address issue in *Transunion*, what arguments exist?
  - In the Second & Eighth Circuits, there is caselaw stating that absent class members must show standing and that absent class members' lack of Article III standing defeats class certification.
  - Elsewhere, defendants also can argue uninjured absent class members preclude class certification.
  - Basic argument – courts must consider whether absent class members have Article III standing at the certification stage if injury-in-fact is individual, since the court should not certify if many members cannot recover and mini-trials are necessary to determine who can.
    - This arguments is especially strong in the Eleventh Circuit given decision in *Cordoba*.
    - Ninth Circuit recognizes the need for absent class members to establish standing to recover and supports this argument.
    - Justice Roberts' statements in *Tyson Foods, Inc. v. Bouaphakeo* support this argument (and provide response to caselaw in First, Third, & Seventh Circuits).
    - Rules Enabling Act and predominance/superiority provide further support for this argument.
  - In addition to Article III, many claims also require injury-in-fact as an element.

# Q&A

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