April 10, 2020

Class & Collective Action Group Newsletter

Federal Appellate Courts

Decision in *Ramirez v. TransUnion LLC* (Ninth Circuit)

Key Issues

(1) Whether all members of a certified class must demonstrate Article III standing at the judgment phase of an action for money damages, and
(2) whether certain class plaintiffs suffered an Article III injury under *Spokeo, Inc. v. Robins*[1] when inaccurate information in their credit files was never distributed to third parties.

Background

Ramirez v. TransUnion LLC was a class action brought on behalf of individuals whose consumer credit reports had inaccurately identified them as belonging, or potentially belonging, on a federal list of persons forbidden from conducting business in the United States.[2] The Office of Foreign Assets Control ("OFAC") at the Treasury Department maintains a database of Specially Designated Nationals ("SDNs") who are prohibited from doing business in the United States, generally because they are suspected of involvement in terrorism, drug trafficking, or other activity that raises national security concerns.[3] Merchants who do business with an SDN can be subject to severe penalties.[4] Having identified a profit opportunity arising from businesses' concerns about the risk of transacting with SDNs, credit reporting agency TransUnion LLC developed a product called "OFAC Advisor," which placed a warning on the credit reports of consumers who were a potential match with names on OFAC's list of SDNs.[5]

In 2011, named plaintiff Sergio Ramirez attempted to purchase a new car. He was initially told that the dealership could not sell him a car because his credit report showed "he was on 'a terrorist list.'"[6] Mr. Ramirez's credit report stated that his name appeared on OFAC's SDN list, but listed as matches two individuals with only superficially similar names and with different birthdates from Mr. Ramirez.[7] When he contacted TransUnion, however, Mr. Ramirez was initially told that there was no OFAC warning on his credit report, and the

[1] 136 S. Ct. 1540 (2016) ("*Spokeo II*").

[2] *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1016 (9th Cir. 2020).

[3] *Id.* at 1026.

[4] *Id.* at 1016.

[5] *Id.* at 1018-19.

[6] *Id.* at 1017.

[7] *Id.*

copy of his report he requested did not include any mention of OFAC. A day after he received his report, Mr. Ramirez received a second notice explaining that he had been identified as a potential match with names in OFAC's SDN database. However, there was no summary-of-rights attached to the notice explaining how Mr. Ramirez could challenge the item on his credit report. Eventually, after Mr. Ramirez contacted a lawyer, he succeeded in having TransUnion remove the erroneous alert from his credit report.[8]

Mr. Ramirez brought suit under the Fair Credit Reporting Act ("FCRA") on behalf of a class of consumers erroneously identified as SDNs on their credit reports. The district court certified a class of 8,185 individuals whose credit reports had been incorrectly labeled, who had received copies of those reports with the OFAC alert redacted, and who had also received a separate mailing notifying them of the OFAC alert without any accompanying summary of their rights. However, only 1,853 of the erroneous reports had been transmitted to potential creditors during the relevant period.[9]

The case proceeded to trial, where a jury awarded the class approximately $60 million in statutory and punitive damages.[10] TransUnion appealed on a number of grounds. Among other things, it argued that every member of the class had to have Article III standing to recover, but that plaintiffs had failed to present evidence at trial that the bulk of the class had suffered any concrete injury, such that standing had not been established for them.[11] Pointing to the Supreme Court's decision in *Spokeo, Inc. v. Robins* ("*Spokeo II*"), TransUnion contended that, even if it had violated the FCRA's mandate to use "reasonable procedures" to ensure accuracy in credit reports, such inaccurate reports did no concrete injury to a plaintiff if those reports were never disseminated to a third party.[12] As for those absent class members whose reports had been sent to a third party, TransUnion argued that there was no evidence at trial showing that those individuals had been affected by this error, such as by a delay in obtaining credit.[13]

Decision

Noting that this was a question of first impression for the Ninth Circuit, a unanimous panel held 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."[14] Although earlier precedent had held that "only the representative plaintiff need allege standing at the motion to dismiss and class certification stages" and that no more is required at the judgement stage of actions involving only equitable relief, this precedent did not address class actions for money damages.[15] The court pointed to Supreme Court precedent holding that intervenors must independently demonstrate standing in order to obtain money damages, and also reasoned that adopting a contrary rule for class actions would contravene the Rules Enabling Act's prohibition on using rules of procedure to "enlarge or modify any substantive right."[16] Allowing absent class members to recover without Article III standing "would transform the class action—a mere procedural device—into a vehicle for individuals to obtain money judgments

8 *Id.* at 1019.

9 *Id.* at 1022.

10 *Id.*

11 Brief for Appellant at 30, *Ramirez*, No. 17-17244 (9th Cir. Mar. 26, 2018).

12 *Id.* at 31.

13 *Id.* at 33.

14 *Ramirez*, 951 F.3d at 1023.

15 *Id.* at *7 (citing *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007)).

16 *Id.* at *8.

in federal court even though they could not show sufficient injury to recover those judgments individually."[17]

However, turning to the merits of the standing inquiry, the majority of the panel held that the absent class members had sufficiently demonstrated Article III standing. The court pointed to its 2017 *Robins v. Spokeo, Inc.* ("*Spokeo III*") opinion,[18] which analyzed standing questions remanded by the Supreme Court in *Spokeo II*.[19] In *Spokeo III*, the Ninth Circuit held that "the violation of a statutory right constitutes a concrete injury" when two criteria are met: (1) the relevant statutory provisions "protect [the plaintiff's] concrete interests (as opposed to purely procedural rights)," and (2) "the specific procedural violations alleged . . . actually harm, or present a material risk of harm to, such interests."[20]

Applying those criteria to the *Ramirez* class, the majority was satisfied that all class members, even those whose credit reports had never been disseminated to third parties, satisfied Article III requirements. It noted that credit reports are of such great importance to consumers—affecting employment, home ownership, and consumers' ability to make other major purchases—that they had a concrete interest in ensuring their accuracy.[21] Because the potential consequences of this particular inaccuracy were so great, there had been at least a risk of "uncertainty and stress" for class members who received letters informing them they had been labeled as potential SDNs.[22] And because credit reports were readily available to third-party inquirers, there was a "material risk" that the reports would be distributed and therefore a "material risk of harm to the concrete interests of all class members," even those whose credit reports had never actually been distributed to a third party.[23] Thus, the *Ramirez* plaintiffs had successfully met the standing requirement that the defendant had persuaded the Ninth Circuit to impose.[24]

Dissenting in part, Judge McKeown argued that the Article III injuries identified by the majority were still too speculative to constitute a "material risk" of harm. Plaintiffs, the dissent contended, had simply failed to present evidence that inaccurately labeled credit reports were likely to be released to third parties; so even if this was a believable hypothesis, there had been no evidentiary showing of a material risk to individual consumers whose reports had been released only to them.[25] Moreover, plaintiffs had presented no evidence that any class member other than Ramirez had even opened the letter they received from TransUnion about their OFAC alerts. There was therefore no evidence that anyone other than Ramirez experienced the emotional distress that gave him standing with respect to TransUnion's inaccurate disclosures about his credit report's OFAC alerts.[26]

The majority responded that the very nature of credit reports—the fact that they are designed to be distributed to third parties—created an inherent risk that class members' erroneous OFAC designations would be distributed to third parties.[27] In part because "the nature of the inaccuracy [was] severe,"

[17] *Id.*

[18] 867 F.3d 1108 (9th Cir. 2017).

[19] *Spokeo II*, 136 S. Ct. 1540.

[20] *Ramirez*, 951 F.3d at 1025 (citing *Spokeo III*, 867 F.3d at 1113).

[21] *Id.*

[22] *Id.*

[23] *Id.* at 1027, 1029-30.

[24] *Id.* at 1030.

[25] *Id.* at 1039-40 (McKeown, J., concurring in part and dissenting in part).

[26] *Id.* at 1041 (McKeown, J., concurring in part and dissenting in part).

[27] *Id.* at 1026-27, 1028 n.9.

the court asserted that a material risk of such "damaging" inaccuracies was itself a sufficiently concrete injury to warrant Article III standing.[28]

Thoughts & Takeaways

The Ninth Circuit's requirement that, in cases for money damages, all class members must have Article III standing at the final judgment stage could provide a check on the certification of broad classes based on the Article III standing of a few representative plaintiffs. It is still true that plaintiffs can pursue class actions even if they can only show standing for a few plaintiffs at the motion to dismiss or class certification stage. But the court urged "district courts and parties [to] keep in mind that they will need a mechanism for identifying class members who lack standing at the damages phase."[29] The Ninth Circuit has previously rejected the idea that Rule 23 implicitly requires the proponent of a class to show that it will be "administratively feasible" to identify the members of that class.[30] Without actually imposing an "administrative feasibility" requirement, this language might encourage district courts in the Ninth Circuit to consider this problem at the class certification stage in a different guise.

Additionally, because a portion of a certified class might be at risk of being knocked out on Article III grounds late in a case, *Ramirez* might also lower the settlement value of a broad class certification.

Finally, because challenges to subject matter jurisdiction can be raised at any time, the holding might be the basis for late-stage motions to dismiss based on fact discovery about the nature or extent of the class's injuries.

On the other hand, the impact of the holding may be softened by the Ninth Circuit's continued generous approach to plaintiffs alleging procedural injuries based on federal statutes. The majority of the panel was satisfied with limited evidence of the actual risks borne by absent class members whose credit reports had been inaccurately flagged. While plaintiffs seeking money damages may have to demonstrate the standing of all class members at the final judgment stage, they might not face a high threshold in order to do so. A persuasive theory that the defendant's conduct posed a material risk to the plaintiff might be enough to pass Article III muster in the Ninth Circuit; substantial evidence of actual harm may not be needed. It is also possible that, as Article III standing jurisprudence continues to evolve, this generosity to plaintiffs might eventually require the Supreme Court to issue a sterner rebuke to the Ninth Circuit than was delivered in *Spokeo II*.

Read the decision here.

[28] *Id.* at 1026-27.

[29] *Id.* at 1023 n.6.

[30] *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125-26 (9th Cir. 2017).

Federal District Courts

Decision in *Stoyas v. Toshiba Corp.* (C.D. Cal.)

Key Issue

Whether a U.S. securities fraud plaintiff can maintain a suit against a foreign issuer based on losses stemming from the plaintiff's purchase of a third party's U.S. securities referencing the foreign issuer's foreign securities.[31]

Background

In 2015, plaintiffs filed a putative class action in the Central District of California against Toshiba Corporation ("Toshiba") arising from alleged fraudulent accounting practices that resulted in a restatement and a 40% drop in the price of Toshiba securities.[32] Toshiba is a Japanese company and does not issue securities in the United States; however, independent third parties issued American Depositary Receipts (the "Unsponsored ADRs"), which referenced the prices of Toshiba's common stock, which traded on Japanese exchanges. The Unsponsored ADRs themselves traded on the U.S. Over-the-Counter ("OTC") Market.[33]

Plaintiffs' First Amended Complaint ("FAC") brought claims under sections 10(b) and 20(a) of the Securities Exchange Act and Rule 10b-5, as well as claims under Japan's Financial Instruments & Exchange Act, on behalf of all persons who acquired Unsponsored ADRs on the U.S. OTC Market and all U.S. citizens and residents who acquired Toshiba common stock traded on Japanese exchanges during the proposed class period.[34]

In May 2016, the district court granted Toshiba's motion to dismiss with prejudice.[35] The court based its decision primarily on *Morrison v. National Australia Bank Ltd.*, which limited exposure under the federal securities laws to claims involving transactions on a domestic exchange and other domestic transactions.[36] Prior to the Supreme Court's decision in *Morrison*, U.S. securities fraud plaintiffs were increasingly bringing actions with little to no U.S. nexus, including so-called "foreign-cubed" actions—actions brought in the U.S., under U.S. securities laws, by (1) foreign plaintiffs against (2) foreign issuers relating to (3) transactions on foreign exchanges. *Morrison* clarified the limits on the extraterritorial reach of the U.S. securities laws.[37]

In this case, only the Unsponsored ADRs were alleged to have been traded domestically, and Toshiba argued that the depositary banks that issued the Unsponsored ADRs had participated in domestic transactions, but Toshiba had not.[38] Importantly, unsponsored ADRs can be issued by U.S. banks without the participation, consent, or even knowledge of the company whose foreign securities' prices are referenced.

[31] *Stoyas v. Toshiba Corp.*, —F. Supp. 3d—, No. 15-cv-4194 DDP (JCx), 2020 WL 466629 (C.D. Cal. Jan. 28, 2020).

[32] *Id.* at *1-2.

[33] *See id.* at *1-3.

[34] FAC ¶¶ 1-2, *Stoyas v. Toshiba Corp.*, No. 15-cv-04194- DDP(JCx), 2015 WL 10793167 (C.D. Cal. Dec. 17, 2015).

[35] *Stoyas v. Toshiba Corp.*, 191 F. Supp. 3d 1080 (C.D. Cal. 2016).

[36] 561 U.S. 247 (2010).

[37] *Id.*

[38] *Stoyas*, 191 F. Supp. 3d at 1091.

Plaintiffs appealed, and in July 2018 the Ninth Circuit reversed.[39] The Ninth Circuit adopted the Second Circuit's "irrevocable liability" test, which defines a "domestic transaction" as occurring when irrevocable liability for a transaction is incurred or title is transferred in the United States, and found that the existence of a domestic transaction under this analysis is sufficient to satisfy *Morrison*.[40] Furthermore, while the district court had found that the question of Toshiba's involvement in sales of the Unsponsored ADRs was relevant to the extraterritoriality inquiry under *Morrison*, the Ninth Circuit held that this issue should be considered under the separate "in connection with" requirement of Rule 10b-5.[41] The court agreed with the decision below that the FAC did not allege a domestic ADR transaction or Toshiba's participation in the issuance, but remanded to allow plaintiffs leave to amend.[42]

The Supreme Court denied certiorari, and plaintiffs filed a Second Amended Complaint ("SAC") in August 2019, which added further allegations describing ADRs and unsponsored ADRs generally, the establishment of the Unsponsored ADRs specifically, and the OTC Market.[43] Plaintiffs also alleged Toshiba's "plausible consent to the sale of its stock in the United States as ADRs" and that, given the size of the third-party issuer's position in Toshiba common stock, "it is unlikely that [that] many shares could have been acquired on the open market without the consent, assistance or participation of Toshiba."[44] Toshiba moved to dismiss.

Decision

The district court denied Toshiba's motion to dismiss, finding that plaintiffs had sufficiently alleged (1) the existence of a domestic transaction, and (2) Toshiba's involvement in the issuance of the Unsponsored ADRs, satisfying the "in connection with" requirement.[45]

With regard to its *Morrison* analysis, the court found that plaintiffs had alleged sufficient facts to establish at the pleading stage that the transactions in the Unsponsored ADRs occurred in the U.S.[46] The court focused on plaintiffs' "allegations regarding the location of the broker, the tasks carried out by the broker, the placement of the purchase order, the passing of title, and the payment made," which together "provide sufficient indicia" that irrevocable liability was incurred in the U.S.[47]

More significantly, as to the "in connection with" element and Toshiba's involvement (or lack thereof) in the issuance of the Unsponsored ADRs, the court pointed to plaintiffs' description of the circumstances surrounding the issuance, including details regarding "the nature of the [] ADRs, the OTC Market, [and] the Toshiba ADR program, including the depositary institutions that offer Toshiba ADRs."[48] In particular, the court pointed to a section of the SAC that alleged that one of the third-party issuers "had a practice of contacting issuers before an unsponsored [ADR] program was established," and that "it was customary for the

[39] *Stoyas v. Toshiba Corp.*, 896 F.3d 933 (9th Cir. 2018).

[40] *Id.* at 948, 951.

[41] *Id.* at 951.

[42] *Id.* at 951-52.

[43] SAC ¶¶ 37-90, *Stoyas*, No. 15-cv-04194-DDP(JCx), 2019 WL 5417832 (C.D. Cal. Aug. 8, 2019).

[44] *Stoyas*, 2020 WL 466629, at *5 (citation omitted). The SAC also added claims concerning Toshiba stock sold as F-shares on the U.S. OTC Market, but, since no named plaintiff was alleged to have purchased F-shares, the ultimate decision did not address these claims.

[45] *Id.* at *4-5. Undertaking an analysis resembling the *Morrison* analysis itself, the court also rejected Toshiba's argument that comity required dismissal, holding that the existence of a domestic transaction, as well as the plaintiffs' and proposed class's status as U.S. nationals, weighed in favor of proceeding in the U.S. *Id.* at *5-6.

[46] *Id.* at *3-4.

[47] *Id.* at *3.

[48] *Id.* at *5.

[third-party issuers] to contact foreign issuers before an unsponsored program is established to obtain their consent or nonobjection to the program."[49] The same section of the SAC concluded that "based on the foregoing information and belief, one or more of the [third-party issuers], consistent with their business practices and the custom in the industry, contacted Toshiba before the [Unsponsored ADR] program was established and before any [ADRs] were registered or sold in the United States," and that "Toshiba either provided its affirmative consent to the sale of its [] shares as ADSs in the United States or its consent may be implied under the circumstances."[50]

Based on these allegations, the court found that plaintiffs had sufficiently alleged "Toshiba's plausible consent to the sale of its stock in the United States as ADRs."[51] The court also highlighted plaintiffs' allegation that the fact that one of the third-party issuers had accumulated approximately 55 million Toshiba shares implied "the consent, assistance or participation of Toshiba."[52]

Thoughts & Takeaways

The decision has the potential to expand the exposure of foreign issuers to liability under the U.S. securities laws and seems to be in tension with the Supreme Court's decision in *Morrison*, which sought to limit the application of the U.S. securities laws to claims lacking a sufficient nexus to the United States. As a result of the Ninth Circuit's decision in *Stoyas*, the extraterritoriality analysis in this case was straightforward, since the Ninth Circuit only required plaintiffs to allege the existence of a domestic transaction, which plaintiffs could easily do because the Unsponsored ADRs traded on U.S. OTC markets. However, *Morrison* itself was meant to address, among other things, the "fear that [the U.S.] has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets."[53] The outcome of *Stoyas* seems to flout that goal, opening the door to U.S. securities plaintiffs who can now more easily manufacture allegations that can satisfy the "in connection with" requirement.

This is all the more significant in light of the low bar the district court set for plaintiffs to establish the "in connection with" requirement. As discussed above, plaintiffs supported this by pleading various allegations—some of which were "on information and belief"—that essentially outlined (1) the general process for the issuance of ADRs and (2) market practices with regard to unsponsored ADRs generally.[54] Arguably, the only allegations specific to Toshiba and its Unsponsored ADRs were that one of the third-party issuers had amassed a significant number of Toshiba common shares and that Toshiba published regulatory filings in English.[55] It is unclear what Toshiba could have done to avoid this outcome, as its consent was not required for the establishment of the Unsponsored ADRs, such that it could not have prevented them from being created, nor did Toshiba control an independent U.S. bank's purchases of its securities.

Foreign defendants in such cases could consider moving for bifurcated discovery, with the first phase

---

49 SAC, *supra* note 43, ¶ 69(a)-(b).

50 *Id.* ¶¶ 70-71.

51 *Stoyas*, 2020 WL 466629, at *5.

52 *Id.* (citation omitted).

53 *Morrison*, 561 U.S. at 270.

54 SAC, *supra* note 43, ¶¶ 37-90.

55 *Id.* ¶ 74.

restricted to the question of the foreign issuer's involvement in the issuance of unsponsored ADRs.[56] But before doing so, it would make sense to pay careful attention to any statements that the foreign issuer made (either internally or externally) about the existence of the unsponsored ADRs and any benefits to the foreign issuer of their presence in the U.S. market.

Read the decision here, and read Cleary Gottlieb's full alert memorandum here.

Decision in *Earl v. Boeing Co.* (E.D. Tex.)

Key Issue

Whether plaintiffs who had purchased tickets for flights during the period of operation of Boeing's 737 MAX 8 aircraft had alleged a cognizable economic injury sufficient for Article III standing.[57]

Background

In October 2018 and March 2019, Boeing's 737 MAX 8 aircraft were involved in two fatal crashes. The MAX 8 was subsequently grounded in the United States by the Federal Aviation Administration ("FAA"), as well as by regulators in other countries.

Plaintiffs sued Boeing and Southwest Airlines in July 2019 on behalf of a putative class of consumers who had purchased tickets to fly on Southwest or American Airlines aircraft between August 29, 2017, when Southwest first received delivery of the MAX 8, and March 13, 2019, when the FAA grounded the MAX 8.[58] Plaintiffs alleged that defendants knew that the aircraft had a fatal design defect, that Boeing made misrepresentations to regulators during the MAX 8 approval process and that Southwest was involved in the development and testing of the MAX 8, that the purpose of these misrepresentations was to signal that the aircraft was safe so as to keep demand and ticket prices up, and that only after the FAA grounded the MAX 8 did defendants make "calculated admissions" regarding their knowledge and actions.[59]

Plaintiffs' complaint asserted causes of action for violations of the Racketeer Influenced and Corrupt Organization Act ("RICO"), fraud by concealment, fraud by misrepresentation, negligent misrepresentation, unjust enrichment, negligence, and various claims brought on behalf of six state subclasses.[60]

Plaintiffs had alleged two theories of economic injury. First, that "had Plaintiffs known about the risk of physical harm, they would never have purchased tickets and are now entitled to a refund."[61] Second, that "Defendants' RICO enterprise and fraudulent actions allowed Defendant Southwest to overcharge Plaintiffs for their tickets."[62]

Boeing and Southwest moved to dismiss, arguing, among other things, that plaintiffs had not alleged an injury in fact as required for Article III standing.

Decision

On February 14, 2020, the district court granted in part and denied in part the motions to dismiss, in an opinion that included extensive discussion of

[56] Toshiba has, in fact, moved for bifurcated discovery in *Stoyas*, with the first phase centered on "the threshold issue of how Toshiba's common stock was initially purchased and converted into Plaintiffs' unsponsored ADRs, and whether Toshiba acted in connection with such conversion." Notice of Motion at 5, *Stoyas*, No. 15-cv-04194-DDP(JCx) (C.D. Cal. Feb. 26, 2020), ECF No. 93.

[57] *Earl v. Boeing Co.*, —F. Supp. 3d—, No. 19-cv-00507-ALM, 2020 WL 759385 (E.D. Tex. Feb. 14, 2020).

[58] Complaint ¶ 64, *Earl v. Boeing Co.*, No. 4:19-cv-00507, 2019 WL 3033532 (E.D. Tex. July 11, 2019).

[59] *Earl*, 2020 WL 759385, at *1-2.

[60] Complaint, *supra* note 58, ¶¶ 327-526.

[61] *Earl*, 2020 WL 759385, at *5.

[62] *Id*.

whether plaintiffs had sufficiently alleged that they had suffered an injury in fact and thus established standing.

With respect to the first theory (that plaintiffs would not have purchased their tickets at all had they known of the defect and are thus entitled to a refund), the court concluded that plaintiffs had not pleaded an economic injury in fact, describing this theory as "the type of no-injury products liability claim"[63] foreclosed by the Fifth Circuit's decision in *Rivera v. Wyeth-Ayerst Labs*.[64] The court stated that "Plaintiffs cannot establish an injury by pointing to an alleged design defect that injured others but did not injure Plaintiffs" and that "[p]ointing to the tragic fatalities of *other* passengers at the hands of a potentially defective airplane is not a basis that Plaintiffs can use to show that they were injured because they paid money for a ticket."[65]

With respect to the second theory (that plaintiffs were overcharged as a result of defendants' fraudulent scheme), the court concluded that plaintiffs *had* pleaded a cognizable economic injury, and that the alleged overcharge constitutes an injury in fact.[66] In so concluding, the court separated the economic injury from any risk of physical harm, stating that "[t]he two MAX 8 crashes are what *alerted* Plaintiffs to the Defendants' alleged scheme of concealing the MAX 8's defect in order to overcharge customers; the economic injury does not stem from the risk of physical injury."[67] The court further explained that "Plaintiffs' economic injury centers around a design defect that, once revealed, allowed Plaintiffs to identify an economic injury that occurred at the moment of purchase" and that plaintiffs' allegations that "Defendants' fraudulent scheme . . . inflated the price of the tickets" were sufficient to show injury in fact at the pleading stage.[68] Additionally, the court rejected defendants' argument that plaintiffs lack standing "because they received the benefit of the flight they paid for," describing that argument as "antithetical to the purpose and principles of Article III standing."[69]

The court also held that plaintiffs stated plausible claims for purposes of defeating a Rule 12(b)(6) motion to dismiss with respect to civil RICO violations under 18 U.S.C. §§ 1962(c) and (d), as well as state-law fraud by concealment, fraud by misrepresentation, and negligent misrepresentation claims.[70] However, the court then held that those state-law claims were preempted by the Airline Deregulation Act, finding that: "(1) Plaintiffs' claims have a connection with or reference to a price, route, or service of an air carrier; and (2) Plaintiffs' claims are based on a state-imposed obligation rather than an obligation that the parties voluntarily undertook."[71]

Finally, the court also rejected Southwest's argument that, in the alternative, plaintiffs' class allegations should be stricken, concluding that plaintiffs' claims were sufficiently alleged to defeat a Rule 12(b)(6) motion and that Southwest's arguments that individual issues of injury, causation, reliance, and damages will predominate and that the proposed class is facially overbroad are better addressed at the certification stage.[72]

---

[63] *Id.*

[64] 283 F.3d 315 (5th Cir. 2002) (finding no injury in fact where plaintiffs sought to represent a class of individuals who were prescribed, purchased, and ingested a drug that was withdrawn from the market following cases of liver failure, where plaintiffs and the class suffered no physical or emotional injury themselves and plaintiffs did not define their claimed economic injury).

[65] *Earl*, 2020 WL 759385, at *5-6.

[66] *Id.* at *7.

[67] *Id.*

[68] *Id.* at *8.

[69] *Id.* at *9.

[70] *Id.* at *11. Plaintiffs had elected not to pursue the claims for unjust enrichment, negligence, and violations of various state statutes. *Id.* at *10.

[71] *Id.* at *11.

[72] *Id.* at *14. Southwest had also argued that common issues will not predominate because the laws of all 50 states governing plaintiffs' state-law claims vary; however, the court stated that this could no longer be a concern because there are no state-law claims remaining. *Id.*

Thoughts & Takeaways

In determining that plaintiffs had alleged a cognizable economic injury sufficient to establish standing based on one of their two theories of injury, the court drew a distinction between an alleged economic harm that is derived only from potential physical harm and an alleged economic harm that is separate from any risk of physical harm. However, it is not clear how distinct those two theories actually are. Whether plaintiffs frame their claims in terms of seeking a refund for tickets they would not have otherwise bought or in terms of having been overcharged for tickets, both ultimately boil down to a theory that, as a result of defendants' fraudulent scheme that concealed a fatal defect, plaintiffs paid too much for their tickets and should be compensated.

This decision emphasizes that the way plaintiffs characterize their injury can have tremendous significance for the viability of a lawsuit. Had plaintiffs in this case only asserted their first theory, they would not be able to pursue their claims. By including a second theory that framed the injury in a different way, plaintiffs were able to establish standing.

Read the decision here.

Decision in *Dennis v. JPMorgan Chase & Co.* (S.D.N.Y.)

Key Issue

Whether the equitable tolling doctrine allows a named plaintiff added to an action by amendment to revive dismissed class claims after the statute of limitations has run.[73]

Background

Plaintiffs brought a putative class action alleging that a group of banks conspired to manipulate the Bank Bill Swap Rate, an Australian benchmark interest rate similar to LIBOR and used to price certain derivatives.[74] The case was brought in 2016, alleging claims under the Sherman Antitrust Act, the Commodity Exchange Act ("CEA"), RICO, and state law. Over the course of three rounds of preliminary motions, most of those claims were dismissed, chiefly for lack of personal jurisdiction over transactions involving foreign banks transacting with foreign counterparties.[75] Following these dismissals, plaintiffs filed an amended complaint which added a new plaintiff, the Orange County Employees Retirement System ("OCERS"), which they alleged had transacted directly with each of the defendant banks from within the United States. Defendants moved to dismiss.

Decision

Judge Kaplan again dismissed most claims for lack of personal jurisdiction, but found that the claims pled by OCERS did not face this same problem, on the basis that OCERS alleged having entered into transactions with several defendants that were governed by agreements containing appropriate

[73] *Dennis v. JPMorgan Chase & Co.*, —F. Supp. 3d—, No. 16-cv-6496 (LAK), 2020 WL 729789 (S.D.N.Y. Feb. 13, 2020).

[74] *Id.* at *1.

[75] *See Dennis v. JPMorgan Chase & Co.*, 342 F. Supp. 3d. 404 (S.D.N.Y. 2018); *Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122 (S.D.N.Y. 2018).

forum-selection clauses.[76] With respect to a limited number of banks, however, he found that even OCERS's allegations were insufficient because it alleged having transacted with U.S. affiliates of the defendants, not with the defendants themselves.

Although OCERS could proceed with claims against a majority of the defendant banks, Judge Kaplan limited those claims to individual—not class—claims on the basis of the statute of limitations and the Supreme Court's 2018 decision in *China Agritech, Inc. v. Resh*.[77] The decision is one of very few federal decisions construing *China Agritech* in the context of amendments to substitute absent class members as named plaintiffs after the expiration of the limitations period.[78]

Under the Supreme Court's longstanding precedent, *American Pipe & Construction Co. v. Utah*,[79] the filing of a class action claim tolls the statute of limitations for absent class members. Until recently, the decision left open a question as to whether that permitted absent class members to rely on *American Pipe* tolling when commencing subsequent *class actions*, or whether tolling was limited to the absent class members' individual claims only. In *China Agritech*, the Supreme Court held that *American Pipe* tolling does not permit a plaintiff to file a new class action after the statute of limitations has expired (though the plaintiff may still file an individual action within the limitation period).

While *China Agritech* thus resolved the question of whether absent class members can commence *new* "follow on" class actions outside of the limitations period (they cannot), it created a new question: What of absent class members who seek to join *existing* class actions, to assert class claims, outside of the limitations period?

In *Dennis* the court held that the reasoning of *China Agritech* required the same result: OCERS's individual CEA claims could be maintained because the pending class action had tolled the statute of limitations, but OCERS could not bring class CEA claims now that the statute's two-year statute of limitations had expired.[80]

Three features of *China Agritech*'s analysis drove this decision. First, the court pointed out that under *China Agritech*, a plaintiff needed to be "diligent in pursuit of their claims" in order to benefit from *American Pipe* tolling.[81] Because OCERS had joined the case so late and "offered no persuasive excuse for [its] failure to join" earlier, it had failed to demonstrate the required diligence.[82]

Second, the court noted the Supreme Court's concern that tolling the statute of limitations for class claims could indefinitely extend the life of a class action lawsuit.[83] So long as plaintiffs could find new potential class representatives, they could file new class actions as soon as a previous claim or action was dismissed, no matter how long ago the statute of limitations had expired. Allowing plaintiffs to add new representatives through amendment rather than a new filing posed essentially the same risk of indefinite and piecemeal litigation, and Judge

---

[76] *Dennis*, 2020 WL 729789.

[77] 138 S. Ct. 1800, 1804 (2018).

[78] In 2019, in a parallel case, Judge Hellerstein held in *Fund Liquidation Holdings LLC v. Citibank, N.A.*, 399 F. Supp. 3d 94, 105 (S.D.N.Y. 2019), that a member of a putative class could not join a dismissed class action by amendment after the limitations period had expired.

[79] 414 U.S. 538 (1974).

[80] *Dennis*, 2020 WL 729789, at *4. The court allowed OCERS's state-law claims to continue on a class basis because OCERS had alleged fraudulent concealment, which could toll the statute of limitations long enough to keep those claims timely. The court held that OCERS would have the "opportunity to prove fraudulent concealment at trial." *Id.* (citation omitted).

[81] *Id.* at *5.

[82] *Id.*

[83] *Id.* at *6.

Kaplan was not satisfied that the court's power to deny leave to amend the complaint was a sufficient safety valve to protect against this possibility.[84]

Finally, the court was concerned that allowing class claims to be tolled for plaintiffs added by amendment but not those who file successive actions would be doctrinally incoherent.[85] *American Pipe* tolling had originally been articulated for the benefit of intervenors, not class action plaintiffs. But the Supreme Court has held that *American Pipe* should be read broadly, to cover class action plaintiffs as well.[86] It would be inconsistent, Judge Kaplan reasoned, "to say that the tolling rule applies regardless of how a plaintiff seeks to join a lawsuit" but that "*China Agritech*'s limitation on that rule applies only when a plaintiff initiates a new action," and not when a plaintiff joins an existing suit by way of amendment.[87]

How limitations periods apply to absent class members joining existing class actions is also complicated by the Federal Rules of Civil Procedure governing the "relation back" of amendments and to intervention. Plaintiffs are likely to argue, as they did in *Dennis*, that amendments to substitute absent class members are not "new" class actions, but rather amendments that should relate back to the filing of the original complaint under Federal Rule 15(c), and thus that they need not rely on *American Pipe* tolling at all. Rule 15(c) by its terms addresses amendments to change "the party or the naming of the party *against whom a claim is asserted*."[88] The Advisory Committee Notes to the 1966 amendments, however, state that "the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs."[89] But the Rule also requires that there have been a "mistake concerning the proper party's identity."[90] In *Dennis*, the Plaintiffs asserted that OCERS had made a mistake in believing that a prior complaint established personal jurisdiction over the defendants. Judge Kaplan rejected that argument, noting that it "seriously misperceives the meaning of 'mistake concerning the proper party's identity,'" and holding that "[t]his is not a mistake in party identity. It is a miscalculation for which Rule 15 provides no remedy."[91]

Thoughts & Takeaways

The decision in *Dennis* builds on a body of district court case law construing *China Agritech* as a limitation on the ability of class action plaintiffs to modify or add to the list of named plaintiffs after the limitations period expires. This is an important limitation for class action defendants, and puts increasing pressure on the plaintiffs to "get it right" when putting forth representative plaintiffs at the commencement of a class action. While *China Agritech* will not forestall the ability of individual plaintiffs to later "opt out" and rely on *American Pipe* tolling to file individual claims, as interpreted in *Dennis* it does significantly limit the flexibility of class action plaintiffs.

There are a number of questions that remain outstanding, however. First, what happens when a class representative becomes unavailable or inadequate due to intervening circumstances outside of the plaintiffs' control? For example, what happens when a named class representative dies?

---

[84] *Id.*

[85] *Id.*

[86] *Id.* (citing *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983)).

[87] *Id.*

[88] Fed. R. Civ. P. 15(c)(1)(C) (emphasis added).

[89] Fed. R. Civ. P. 15(c) advisory committee's note to 1966 amendment.

[90] Fed. R. Civ. P. 15(c)(1)(C)(ii).

[91] *Dennis*, 2020 WL 729789, at *3 (citing Fed. R. Civ. P. 15(c)(3)(B)).

It would seem to be a harsh rule to hold that class members who relied on the existence of a class action would be precluded from amending the complaint to join that action when the named class representative becomes unable to serve.[92]

Second, the lack of tolling for class claims puts pressure on the law concerning amendment and intervention. That law is confused by the fact that Rule 15(c) does not refer to amendments to plaintiffs' identities, and yet the advisory committee appears to suggest that amendments to add plaintiffs can be treated similarly to amendments adding defendants. In reality, the addition of an absent class member as a named representative appears to fit better within the rubric of Federal Rule of Civil Procedure 24, concerning intervention, although that Rule does not provide for "relation back" for limitations purposes.

Finally, Judge Kaplan noted that several district courts have held that *China Agritech* bars successive class actions only when class certification has already been denied. OCERS was added to the complaint before class certification, but since plaintiffs did not raise this distinction between the present case and *China Agritech*, the *Dennis* court did not discuss "whether this temporal difference matters."[93] Decisions in future cases may need to consider this question. Given the significance of the issue, we expect that the application of *China Agritech* in these circumstances will ultimately be the subject of appellate practice.

Read the decision here.

[92] Even if the estate of the decedent were substituted under Rule 25, an estate may be subject to unique defenses that may be an obstacle to class certification. *See, e.g., Swan v. Stoneman*, 635 F.2d 97, 102 n.6 (2d Cir. 1980) (holding that class action generally cannot be maintained where death of named plaintiff would moot named plaintiff's claims).

[93] *Id*. at *5 n.36.

AUTHORS

Jessica Roll
+1 212 225 2574
jroll@cgsh.com

William Baldwin
+1 212 225 2078
wbaldwin@cgsh.com

Michael Cinnamon
+1 212 225 2169
mcinnamon@cgsh.com

EDITOR

Lina Bensman
+1 212 225 2069
lbensman@cgsh.com

PARTNERS, COUNSEL AND SENIOR ATTORNEYS – CLASS & COLLECTIVE ACTION GROUP

Matthew I. Bachrack
+1 202 974 1662
mbachrack@cgsh.com

Nowell D. Bamberger
+1 202 974 1752
nbamberger@cgsh.com

Jonathan I. Blackman
+1 212 225 2490
jblackman@cgsh.com

Jeremy J. Calsyn
+1 202 974 1522
jcalsyn@cgsh.com

George S. Cary
+1 202 974 1920
gcary@cgsh.com

Alexis Collins
+1 202 974 1519
alcollins@cgsh.com

Roger A. Cooper
+1 212 225 2283
racooper@cgsh.com

Jared Gerber
+1 212 225 2507
jgerber@cgsh.com

Steven J. Kaiser
+1 202 974 1554
skaiser@cgsh.com

Mitchell A. Lowenthal
+1 212 225 2760
mlowenthal@cgsh.com

Abena Mainoo
+1 212 225 2785
amainoo@cgsh.com

Larry Malm
+1 202 974 1959
lmalm@cgsh.com

Thomas J. Moloney
+1 212 225 2460
tmoloney@cgsh.com

Mark W. Nelson
+1 202 974 1622
mnelson@cgsh.com

Breon S. Peace
+1 212 225 2059
bpeace@cgsh.com

Lisa M. Schweitzer
+1 212 225 2629
lschweitzer@cgsh.com

Matthew D. Slater
+1 202 974 1930
mslater@cgsh.com

Larry C. Work-Dembowski
+1 202 974 1588
lwork-dembowski@cgsh.com

Rishi N. Zutshi
+1 212 225 2085
rzutshi@cgsh.com

© 2020 Cleary Gottlieb Steen & Hamilton LLP
Under the rules of certain jurisdictions, this may constitute Attorney Advertising.

20.0409.05_041020