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Summary

In July, the federal circuit courts issued significant rulings on Article III standing, preemption, and interpretation of several federal statutes, including the Telephone Consumer Protection Act (TCPA)and the Federal Arbitration Act (FAA). Each will impact plaintiff-side and class action practitioners.

Additionally, the California Supreme Court decided a crucial question on standing to bring representative claims under the California Private Attorneys General Act (PAGA).

Finally, a July Seventh Circuit decision deepens a circuit split on Article III standing that could make its way to the Supreme Court. This split may impact how classes may be defined and how many consumers may be included in actions premised on breach of contract and other similar common law remedies.

State Opinions

Adolph v. Uber Techs., Inc., 532 P.3d 682 (Cal. July 17, 2023)

Background: A former Uber Eats driver filed a putative class action against Uber under PAGA, alleging that Uber misclassified him and other drivers as independent contractors. Uber moved to compel arbitration of his individual claims, and the trial court granted the motion. Thereafter, the plaintiff amended his complaint to remove his individual claims, leaving only representative PAGA claims on behalf of other drivers. Uber then argued that the driver lacked statutory standing to bring those representative claims after the court compelled him to arbitrate his individual claims. The trial court and Court of Appeal disagreed, allowing him to continue to prosecute the case. Uber filed a petitioner for review in the California Supreme Court.

Holding: The California Supreme Court held that an order compelling arbitration of individual claims does not strip the plaintiff of standing to litigate non-individual claims in court. The driver was an "aggrieved employee" under PAGA and therefore continued to have standing to pursue non-individual PAGA claims in court. An interpretation of PAGA that impedes an employee's ability to prosecute their employer's violations committed against other employees would undermine the

statute's purpose of augmenting state enforcement of the California Labor Code.

Impact: In Adolph, the California Supreme Court disagreed with the United States Supreme Court's ruling on this issue in Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022). It had authority to do so because it has the last say on interpretation of California law. This decision is a win for employees and plaintiff-side practitioners: a plaintiff being forced to arbitrate their individual claims is no longer a case-ending event for the employees the plaintiff seeks to represent.

Note, however, that the Court also explained that a plaintiff loses standing to prosecute their non-individual claims in court if the arbitrator determines they are not an "aggrieved employee" (and vice versa). Thus, the arbitrator's ruling will still be dispositive on the issue of the plaintiff's standing.

Federal Opinions

Drazen v. Pinto, 74 F.4th 1336 (11th Cir. July 24, 2023)

Background: The plaintiff brought a TCPA class action against GoDaddy.com, a website-hosting company, for using a prohibited autodialer system to send promotional calls and text messages to former customers. The parties reached a settlement, which the district court approved. An objector appealed, arguing that class members who received only one unwanted text message lacked Article III standing. Relying on prior circuit precedent, the Eleventh Circuit initially reversed, holding that such class members do not have standing. The plaintiff moved for en banc reconsideration, which the Eleventh Circuit granted.

Holding: The en banc Eleventh Circuit held that plaintiffs who received a single unwanted, illegal telemarketing text message suffered a concrete injury sufficient for Article III standing. To reach this conclusion, the court examined whether the harm from receiving such a text message shares a close relationship with a traditional harm recognized at common law. Its analysis found that it did: an unwanted text message is an intrusion into private, personal peace and quiet. This is the same harm underlying intrusion-upon-seclusion claims at common law.

Impact: With its decision in Drazen, the Eleventh Circuit abrogated its prior precedent and joined other circuits in concluding that a single illegal text message is enough for Article III standing. This is a win for victims of these unlawful messages in one of the most populous circuits in the federal system.

Carmona Mendoza v. Domino's Pizza, LLC, 73 F.4th 1135 (9th Cir. July 21, 2023)

Background: Three truck drivers brought a putative class action against their employer, Domino's Pizza, for violation of multiple labor laws. The drivers picked up supplies from a distribution center in California and then delivered them to California franchises. Domino's moved to compel arbitration under the FAA. The district court denied the motion, and the Ninth Circuit affirmed, holding that the drivers' claims were exempted from the FAA because they were a "class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Thereafter, the vacated the decision and remanded for reconsideration in light of Southwest Airlines Co. v. Saxon, 142 S. Ct. 1783 (2022).

Holding: Upon reconsideration, the Ninth Circuit again held that the drivers were "a class of workers engaged in foreign or interstate commerce," and thus exempt from the FAA. These truck drivers transported the supplies on the last leg of an inherently interstate trip from suppliers outside California to California franchisees. Further, the pause in the journey of the goods at the warehouse

alone did not remove them from “the stream of interstate commerce.” The supplies “were inevitably destined from the outset of the interstate journey for Domino’s franchisees,” so the brief pause at a distribution center made no difference.

Impact: Carmona confirms the Ninth Circuit’s broad interpretation of the FAA’s interstate-commerce exception. Under the court’s rationale, many logistics and transportation workers may be exempt. The key for practitioners is to look not at whether the drivers cross state lines, but rather whether the drivers are part of an interstate supply chain.

Jones v. Google LLC, 73 F.4th 636 (9th Cir. July 13, 2023)

Background: Plaintiffs filed a class action suit against Google for its targeted advertising technology on YouTube, which operates partly by relying on “persistent identifiers”—information that can be used to recognize a user over time and across different websites or online services. FTC regulations under COPPA prohibit the collection of children’s persistent identifiers without parental consent. The plaintiffs alleged that Google surreptitiously used persistent identifiers to collect data and track the online behavior of children who use YouTube. The plaintiffs asserted only state-law causes of action, but they also alleged that Google’s conduct violated COPPA.

The district court dismissed the case, ruling that the plaintiffs’ causes of action were preempted by COPPA.

Holding: The Ninth Circuit reversed, holding that COPPA’s preemption clause does not bar state-law causes of action that are parallel to or prohibit the same conduct forbidden by COPPA. COPPA preempts laws that are “inconsistent” with COPPA; parallel laws and laws that forbid the same conduct as COPPA are not “inconsistent.” The panel decided the issue back in December, but in this amended opinion, the full Ninth Circuit denied rehearing. Barring Supreme Court intervention, this is now settled law in the Ninth Circuit.

Impact: For practitioners who litigate on behalf of minors, this opinion is a big win. It defeats the argument, which defense counsel have been making for years, that COPPA is a hindrance to state-law claims premised on conduct touched on by the federal statute. Most notably, this includes state consumer-protection laws that prohibit unfair and deceptive practices.

Dinerstein v. Google, LLC, 73 F.4th 502 (7th Cir. July 11, 2023)

Background: The University of Chicago and its hospital worked with Google to implement an AI-based technology that uses anonymized electronic health records to create predictive health models. A former patient filed a class action alleging violation of HIPAA, consumer-protection law, breach of contract, unjust enrichment, tortious interference with contract, and intrusion upon seclusion. He had several theories of Article III standing, including the argument that a breach of contract is sufficient to establish standing in federal court irrespective of whether the plaintiff suffered other harms.
The district court dismissed the consumer-fraud claim for lack of standing and the other claims for failure to state a claim.

Holding: The Seventh Circuit affirmed but altered the district court’s order to reflect a jurisdictional dismissal instead of a merits dismissal. The appeals court rejected all the plaintiffs’ standing theories. Most notably, the court held that a breach of contract alone is not enough to satisfy Article III.

Impact: The Seventh Circuit's holding in Dinerstein deepens a circuit split on whether breach of contract is sufficient to confer standing. The First, Fifth, and Eighth circuits hold that a breach alone is sufficient (although the decisions of the First and Eighth circuits on the issue came before TransUnion), while the Ninth and now the Seventh circuits hold that it is insufficient without a further showing of harm.

This is an interesting issue: while the Supreme Court's decision in TransUnion held that a purely legal violation is not sufficient to create standing, the decision also focused on whether the type of harm in a case was sufficient for standing in American history and common law. As the Seventh Circuit acknowledged, suits for breach of contract seeking only nominal damages or specific performance have been actionable since ancient times.

This issue is ripe for Supreme Court resolution, and we may see the Court presented with such a case in the next few years. The decision also raises the bar for standing in the Seventh Circuit. This issue may effect how broadly practitioners may be able to define classes in class actions premised on breach of contract or similar common law theories that authorize nominal damages. For example, in a class action based on systemic breach of contract (or based on a state consumer-protection statute that depends on breach of contract as a predicate to satisfy the "unfair" or "unlawful" prongs), some class members might have suffered de minimis actual damages. They could still be class members and part of a settlement class in the First, Fifth, and Eighth circuits. But in the Seventh and Ninth circuits, these class members may lack standing and thus can't be included.

Green-Cooper v. Brinker International, Inc., 73 F.4th 883 (11th Cir. July 11, 2023)

Background: Consumers sued Brinker International, Inc., the owner of Chili's restaurants, after a cyberattack exposed customers' credit and debit card data. Hackers posted all the stolen information (associated with 4.5 million Chili's customers) on Joker's Stash, a darknet platform for buying and selling stolen credit card data. The district court certified two classes (a nationwide class and a California class) of consumers who (1) had their data accessed by cybercriminals and (2) incurred reasonable expenses or time spent to mitigate the consequences of the breach. The Eleventh Circuit granted Brinker's Rule 23(f) petition to review the class-certification decision.

Holding: The Eleventh Circuit affirmed in part, vacated in part, and remanded. The opinion contained four principal conclusions.

First, the fact that hackers took credit card data and corresponding personal information from the Chili's restaurant systems and affirmatively posted that information for sale on Joker's Stash was a concrete in jury sufficient to establish Article III standing for the named plaintiffs and class members.

Second, two of the named plaintiffs failed to establish the causation requirement for Article III standing because they dined at Chili's outside the date range in which hackers had access to customers' card information. Where the facts developed in discovery firmly contradict allegations in the complaint, the district court cannot rely on the complaint's factual allegations at class certification.

Third, remand was necessary to give the district court a chance to clarity its predominance finding. The class definitions included consumers whose data was "accessed by cybercriminals," but the district court's predominance analysis focused only on consumers who experienced fraudulent

charges or whose information was posted on Joker's Stash. Thus, the district court needed to either modify the class definitions or conduct a broader predominance analysis.

Fourth, the district court did not abuse its discretion in finding that damages could be proven on a class-wide basis using the methodology proposed by the plaintiffs' expert.

Impact: Green-Cooper contains several important rulings of practical importance for class action practitioners. First and foremost, the decision confirmed that the Supreme Court's decision in TransUniondid not alter the Eleventh Circuit's preexisting test for Article III standing in data breach cases. That test holds that a plaintiff whose personal information is subject to a data breach can establish a concrete injury for purposes of Article III standing if, as a result of the breach, they experience "misuse" of their data in some way. Further, such "misuse" includes posting information on the dark web, even if a hacker doesn't use it. This is a middle ground among the divided circuits on what is required to establish standing in data breach cases. Some circuits hold that the threat of misuse of personal data is an injury sufficient to confer standing, others hold that actual misuse must occur and pecuniary harm must result, and still others (such as the Eleventh Circuit) hold that actual misuse is sufficient without a need to show financial harm.

Second, at least in the Eleventh Circuit, plaintiffs can't rely solely on allegations in their complaint to establish standing at the class-certification stage.

Finally, Green-Cooper is a strong reminder that plaintiffs should carefully define their proposed classes with as little ambiguity as possible, and they should urge district courts to stick closely to those definitions in their class-certification analyses.

Hall v. Smosh Dot Com, Inc., 72 F.4th 983 (9th Cir. June 30, 2023)

Background: The plaintiff alleged that defendants sent text messages to a cell number that she placed on the National Do Not Call Registry. She gave the number to her thirteen-year-old son, who received tel emarketing solicitations via text message. The district court dismissed the case, ruling that the plaintiff lacked Article III standing because she failed to allege that she was the "actual user" of the phone or the "actual recipient" of the text messages.

Holding: The Ninth Circuit reversed, holding that the owner and subscriber of a phone number listed on the National Do Not Call Registry has suffered a concrete injury in fact sufficient to confer Article III standing when unsolicited telemarketing calls or texts are placed to that number—even if the communications are intended for or solicited by another individual, and even if someone else is using the phone at the time the messages are transmitted. The court also noted that, because "standing is not exclusive," both the owner/subscriber of a number and the person using the number at the time the unlawful calls or texts were placed may have standing to bring a TCPA claim.

Impact: Experienced TCPA lawyers are no doubt familiar with the defense that a subscriber or owner of a number must be the actual recipient of an allegedly unlawful call to have standing to sue. The Ninth Circuit expressly rejected that argument in Hall. This ruling may make it easier to certify TCPA classes in which a defendant claims the plaintiff can't prove that the owner or subscriber of a number received the call(s) at issue.

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