THE BRIEF

FINANCIAL SERVICES LITIGATION QUARTERLY

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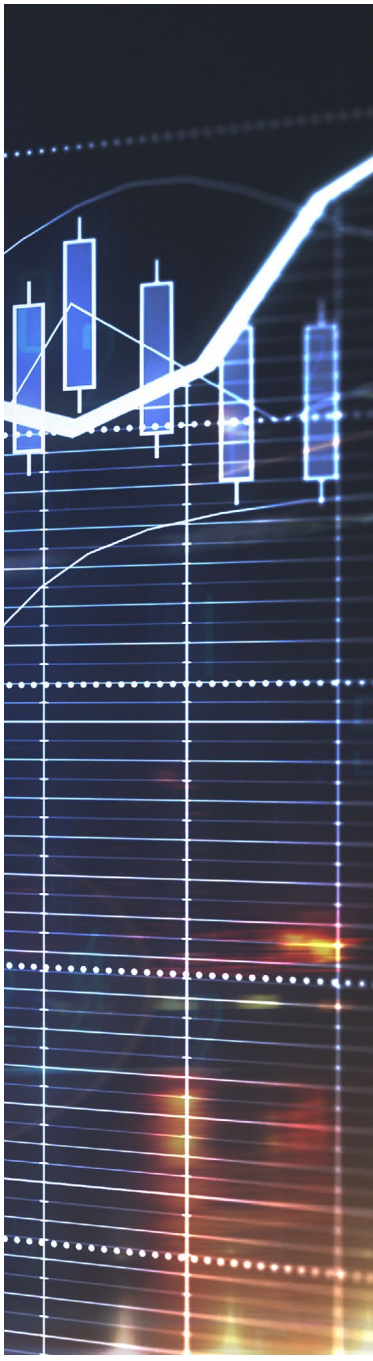


NO CLARITY ON STANDING TO ASSERT STATUTORY CLAIMS

A plaintiff must show a concrete and particularized injury in fact to establish standing to bring a claim in federal court.

Last year, the US Supreme Court provided guidance on the injury in fact requirement in *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190 (2021), in which it largely reiterated the test it first articulated in *Spokeo v. Robins*, 578 U.S. 330 (2016), for standing in cases involving intangible statutory injuries. That test requires courts to determine whether the plaintiff's alleged injury has "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *Ramirez*, 141 S.Ct. at 2204. The *Spokeo* test though "does not require an exact duplicate in American history and tradition." *Id.* That framework has not put the standing issue to rest and has instead created a new question: how close is close enough? And does it suffice for the alleged harms to be closely aligned with an interest traditionally protected by the law, or must the plaintiff's allegations also align with a traditional cause of action?

In the five years after *Spokeo*, lower courts differed widely in how they applied its framework to intangible statutory injuries. The differing views led to different outcomes on nearly indistinguishable facts. In *Salcedo v. Hanna*, 936 F.3d 1162, 1172 (2019), the Eleventh Circuit held that a plaintiff did not have standing to assert a Telephone Consumer Protection Act claim for receipt of an unwanted text message because the alleged injury was not similar enough to the tort of intrusion upon seclusion. The Seventh Circuit reached the opposite conclusion in *Gadelhak v. AT&T Svcs., Inc.*, and held that the plaintiff there had standing to assert a TCPA claim because "[t]he harm posed by unwanted text messages is analogous" to the same "type of intrusive invasion of privacy" as intrusion upon seclusion. 950 F.3d 458, 462 (7th Cir. 2020) (Barrett, J.); see also *Van Patten v. Vertical*

Fitness Group, LLC, 847 F.3d 1037, 1042-43 (9th Cir. 2017) (receipt of unwanted text messages sufficient to establish standing).

The Sixth and Seventh Circuits likewise reached opposite conclusions on whether a debt collector's failure to advise a debtor in a notice that a dispute or request to verify a debt had to be in writing was sufficient to establish standing for violation of the Fair Debt Collection Practices Act. Compare *Macy v. GC Svcs. Ltd. P'Ship*, 897 F.3d 747 (6th Cir. 2018) (violation of in-writing requirement sufficient to establish standing), with *Casillas v. Madison Ave. Assoc., Inc.*, 926 F.3d 329 (7th Cir. 2019) (no standing). Judge Hamilton of the Seventh Circuit summed up the state of affairs after *Spokeo* when he recounted the differing lines of interpretation in a case involving an Illinois privacy law and wrote "I confess that I have not yet been able to extract from these different lines of cases a consistently predictable rule or standard." *Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1250 (2021) (Hamilton, J., concurring).

There was some hope that, in deciding *Ramirez*, the Supreme Court would clarify its views on standing requirements, resulting in greater predictability and uniformity for standing decisions in the lower courts.[1] Clarity and uniformity though remain elusive. Of the four circuit court opinions after *Ramirez* that are discussed below, two drew spirited dissents, and one was withdrawn pending *en banc* review.

The post-*Ramirez* opinions, and in particular the dissents to two of those opinions, suggest that two approaches are emerging for assessing standing for intangible harms. One approach looks to the harm alleged by the plaintiff and considers whether the harm alleged is of a type that could be redressed through a cause of action historically recognized by American courts. The other approach considers whether the plaintiff's allegations fit closely with a cause of action that has been recognized by American courts. The difference is not merely semantic. Courts have reached differing conclusions, depending on which of the two general approaches is applied.

In *Lupia v. Medicredit, Inc.*, 8 F.4th 1184 (2021), the Tenth Circuit considered intangible harm in a case in which the debt collector called the plaintiff (but failed to reach her) the day after she disputed the debt and advised the defendant to stop calling her. Plaintiff alleged in her FDCPA complaint that the call caused her "'intangible harms' that Congress 'made legally cognizable in passing the FDPCA,'" but did not specify any particular injury from the single unanswered call. *Id.* at 1193 (citation omitted). Though not characterized as such in the complaint, the court found that plaintiff's claim was analogous to the tort of intrusion upon seclusion and therefore that she had standing to pursue her claims in federal court. The court did little though to show how the claim was analogous other than to say that the tort "imposes liability for intrusions on a plaintiff's privacy." *Id.* True enough, though intrusion on seclusion also requires the alleged conduct to be offensive to a reasonable person, *see* Restatement (Second) of Torts, at §652B, an important element arguably not met in a case involving a single unanswered telephone call. The Tenth Circuit thus approached standing by looking at whether redress for the type of harm alleged could historically have been had, rather than whether plaintiff's claim aligned closely with a recognized cause of action.

1 See "Supreme Court Clarifies Little About *Spokeo* Standing in *Transunion LLC v. Ramirez*," The Brief, Summer 2021, at 8.

The Eleventh Circuit applied a similar analytical approach in *Hunstein v. Preferred Collection & Mgmt. Svcs., Inc.*, 17 F.4th 1016 (11th Cir. 2021), which involved the transmission of personal information to a debt collector's mailing vendor. Plaintiff claimed that the transmission to the mailing vendor violated Section 1692c(b) of the FDCPA, which (with certain exceptions) prohibits debt collectors from communicating with anyone other than the consumer "in connection with the collection of any debt." The Eleventh Circuit held that the transmission of the plaintiff's information to the mailing vendor was akin to the tort of public disclosure of private facts and found that the plaintiff had standing to pursue his claims in federal court. *Id.* at 1023. As in *Lupia*, the court only loosely lined up plaintiff's claims and the historical cause of action, which drew a dissent from Judge Tjoflat. The majority opinion, he said, gave short shrift to two of the three elements of the tort of public disclosure which resulted in a "sheer misfit" between plaintiff's claim and the tort itself. *Id.* at 1043.[2] The test used by the majority thus amounted to a "distant-relative test," rather than a more rigorous look that Judge Tjoflat believes is required by *Spokeo* and *Ramirez*.

Two circuits have considered whether stress, confusion and emotional distress are enough to show standing for FDCPA claims. The plaintiff in *Ojogwu v. Rodenburg Law Firm*, 26 F.4th 457 (8th Cir. 2022), received a garnishment notice from a debt collector after disputing the debt and advising the debt collector that all communications should go through his attorney. The Plaintiff claimed stress and confusion as a result of receiving the garnishment documents, but the Eighth Circuit held that those alleged injuries "'fall short of cognizable injury as a matter of general tort law.'" *Id.* at 463, quoting *Bucholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 864 (6th Cir. 2020). The Eighth Circuit's decision was based in part on reasoning in a Seventh Circuit opinion, *Pennell v. Global Trust Mgmt, LLC*, 990 F.3d 1041, 1045 (2021), which held that emotional distress with no physical manifestations and no medical diagnosis did not constitute a concrete injury. The Eighth Circuit thus based its holding (at least in part) on the fact that the plaintiff had not met one of the elements of a cause of action for emotional distress.

The Seventh Circuit reached a conclusion similar to *Ojogwu* in *Pierre v. Midland Credit Mgmt., Inc.*, No. 19-2993, 2022 BL 114787 (Apr. 1, 2022) and held that "psychological states" induced by a debtor's letter "fall short" of establishing standing. *Pierre* is notable though for a dissent by Judge Hamilton, who took the view opposite of Judge Tjoflat in *Hunstein*. Judge Hamilton wrote that "emotional distress, stress, and harm to reputation" were "all real and foreseeable results of unfair and deceptive debt-collection practices.... Congress has authorized private actions like this case to seek damages for them." *Id.* at *5. He went on to state that Pierre's stress and emotional distress "easily fit[] into this dimension of the common law of torts." *Id.*

2 A majority of the active judges of the Eleventh Circuit voted to re-hear the *Hunstein* appeal *en banc*, so the opinion has been vacated. Oral argument in the *en banc* proceeding was held on February 22, 2022, but no opinion has been issued as of the date of publication of this article.

The results of these cases seem hard to square: one unanswered phone call after debtor disputed debt and directed contacts through an attorney (standing=yes); garnishment notice to debtor after debtor disputed debt and directed contacts through an attorney (standing=no); letter to debtor regarding time-barred debt (standing=no); communication of personal information to a mailing vendor (standing=yes). The results appear to be driven by the court's differing approaches to standing. The dissents discussed above best illustrate the issue. Judge Tjoflat, before finding an injury in fact, would appear to require close alignment between a plaintiff's claim and a historically recognized cause of action. Judge Hamilton's approach takes a broader view and would find standing if a plaintiff's claims align with injuries that historically had redress at common law and that generally are aligned with a harm that motivated Congress to pass the underlying statute.

The split in approaches seems most likely to affect standing in cases implicating intangible privacy-related harms. Consider the single unanswered phone call in *Lupia*. Judge Tjoflat likely would not find an injury in fact because the allegations would not satisfy the elements of the tort of intrusion upon seclusion (offensiveness to a reasonable person being the unmet element). Judge Hamilton's approach though seems likely to result in agreement with the Tenth Circuit's reasoning.

If more circuits adopt Judge Hamilton's view, what does that mean for standing and intangible harms? If all that's required is some allusion to a right to privacy being impacted (no matter how trivial the incursion may seem), then focus on the injury only (and not close alignment with a historical cause of action) will give rise to standing being found more often for cases involving tangible harms. A single unanswered phone call, after all, is not a high bar to clear for showing an intangible harm giving rise to standing. But claims involving other alleged harms, such as emotional distress, will be impacted too. What debtor has not felt at least a tinge of stress or anxiety upon receiving a communication from a debt collector? Judge Tjoflat's school of thought would appear to require a physical manifestation of that harm to find standing (in keeping with his approach of requiring a close fit between the claim and a historical cause of action), but Judge Hamilton likely would not. Unless the Supreme Court issues new guidance in the near future, it seems likely that outcomes in seemingly similar standing scenarios will continue to vary considerably, depending on which analytical approach is used. Financial services companies should expect more battles over a federal court's gatekeeping role for determining standing for intangible harms.

NOTEWORTHY

SEVENTH CIRCUIT AFFIRMS DENIAL OF TCPA CLASS CERTIFICATION ON PREDOMINANCE GROUNDS

Gorss Motels, Inc., brought a putative class action under the Telephone Consumer Protection Act ("TCPA") against Brigadoon Fitness, Inc., seeking class-wide redress for purportedly unsolicited facsimile advertisements. Gorss operated a motel pursuant to a franchise agreement. In that franchise agreement, Gorss agreed, among other things, to purchase equipment from franchisorapproved vendors. Brigadoon was a franchisor-approved fitness equipment vendor. As part of the arrangement, the franchisor periodically provided to Brigadoon contact information, including fax numbers, for its franchisees. The contact information had been collected at various times and under differing circumstances.

The Northern District of Indiana refused to certify a class because common issues did not predominate. Gorss appealed. The Seventh Circuit, in *Gorss Motels, Inc. v. Brigadoon Fitness, Inc.*, 29 F.4th 839 (7th Cir. 2022), affirmed and addressed four issues.

First, prior express invitation or permission is an affirmative defense for which Brigadoon, as the defendant, would bear the burden of proof at trial. That defense would have been the key issue to be resolved at trial, in order for the putative class to recover under the TCPA. However, when considering whether to certify a class, the trial court must ascertain whether the express-permission issue could be resolved at trial with generally applicable, class-wide proof. In other words, "it is the method of determining the answer and not the answer itself that drives the predominance consideration." *Id.* at 845.

In *Gorss*, the fax numbers Brigadoon used were obtained in multiple ways, and Brigadoon provided specific evidence about the various relationships, contracts and personal contacts that it had with the fax recipients, necessitating individualized analysis of prior express permission. Gorss, in contrast, did not carry its burden to show that common issues of law or fact would predominate when resolving the permission question. The Seventh Circuit therefore agreed with the district court that "there is no generalized proof that can be used to resolve the issue of prior permission on a classwide basis across the various methods that Brigadoon used to obtain fax numbers." *Id.*

Second, the Seventh Circuit held that the district court did not err by rejecting the argument that Brigadoon must show with specific evidence that a "significant percentage" of the class was subject to the priorexpress-permission defense. The court held that Gorss'

argument had overread prior cases. In those prior cases, the defendants presented evidence that a significant percentage of the putative class consented to being contacted. The Seventh Circuit explained that such evidence was sufficient—but not necessary—to show that issues of individualized consent predominated over common questions of law or fact. The court noted that "[T]here are many ways to demonstrate that issues of individualized consent predominated over any common questions.". *Id.* at 848.

Third, the Seventh Circuit held that the district court did not misapply the legal standard for "prior express permission" when it analyzed the predominance issue. Rather, the district court applied a definition that was consistent with a narrowed standard that the Seventh Circuit announced later in *Physicians Healthsource, Inc. v. A-S Medication Solutions, LLC*, 950 F.3d 959 (7th Cir. 2020). Specifically, the refinements in *Physicians Heathsource* did not affect the trial court's predominance analysis because Gorss offered no generalized, class-wide method to resolve the permission question under either formulation of the standard. In contrast, Brigadoon's claim of permission was "based on a multitude of contracts, relationships, memberships and personal contacts, evidence sufficient for the district court to conclude that class-wide analysis of the permission issue would not be feasible." *Gorss*, 29 F.4th at 848-49.

Fourth, the district court did not erroneously allow Brigadoon to rely on "transferred" permission from the franchisor. Brigadoon provided evidence that the franchise agreements granted express permission to receive faxed advertisements, not only from the franchisors but also from the franchisors' approved vendors and affiliates. Such express permission is distinguishable from permission given to one entity and then merely transferred to another.

In short, it was not Brigadoon's burden, as a defendant, to prove the merits of its permission defense at the class certification stage. Rather, it was Gorss' burden, as the plaintiff, to demonstrate that the issue of permission could be resolved on a class-wide basis, without having to resort to individualized proof with respect to each member of the class. This marks yet another loss for Gorss, a serial TCPA plaintiff, whose TCPA class actions in the Second and Eleventh Circuits have also failed.

NINTH CIRCUIT ENDORSES "LEAST SOPHISTICATED DEBTOR" STANDARD FOR FDCPA CLAIMS

Five Courts of Appeals, including the Second, Third, Sixth, Ninth and Eleventh Circuits, have adopted the "least sophisticated consumer" standard for determining whether a communication violates the Fair Debt Collection Practices Act ("FDCPA"). A recent decision from the Ninth Circuit suggests how deferential that standard is to plaintiffs and should alert debt collectors to the care they should take in ensuring that their communications comply with the FDCPA.

Almada v. Krieger L. Firm, A.P.C., No. 21-55275, 2022 WL 213269 (9th Cir. Jan. 24, 2022), involved a claim that a collection letter violated the FDCPA's prohibition on requiring that a debtor dispute a debt in writing. The letter at issue stated that:

> **[I]f you dispute this debt or any portion thereof, you must notify this office in writing within thirty (30) days of receipt of this letter.** After notifying this office of a dispute, all debt collection activities will cease until this office obtains verification of the debt and a copy of such verification is mailed to you. If you do not dispute the validity of this debt or any portion thereof within thirty (30) days of receipt of this letter, the debt will be assumed valid.

Almada v. Kriger L. Firm, A.P.C., 2021 WL 1134388, at *4 (S.D. Cal. Mar. 8, 2021) (bold in original letter).

The plaintiff argued that this letter can reasonably be read as requiring any dispute of the validity of the debt be in writing, contrary to 15 U.S.C. § 1692g(a)(3), which does not require that a dispute as to the validity of a debt be in writing. The district court rejected that argument. It found that the first two sentences (including the bolded text) complied with § 1692g(a)(4), which requires the letter state that "if the consumer notifies the debt collector *in writing* within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt … and a copy of such verification or judgment will be mailed to the consumer by the debt collector" (emphasis added). It further found that the third sentence complied with § 1692g(a)(3) since that sentence informed the plaintiff that he had 30 days to dispute the debt and did not state that the dispute had to be made in writing. The district court held that merely reversing the order of the notices and putting some of the text in bold type did not affect whether the letter complied with the FDCPA and dismissed the claim.

The Ninth Circuit reversed, holding that "the least sophisticated debtor" could not be expected to "analyze whether each sentence, in isolation, accurately conveys the required warnings" in the way the district court did. 2022 WL 213269, at *1. Instead, such a debtor would "examine the letter *as a whole* and would conclude based on the bold text expressly stating that he must dispute the debt in writing that he was required to dispute the debt in writing." *Id.* The Circuit Court thus concluded that bolding some of the text of the § 1692g(a)(4) disclosure—which requires a dispute compelling the debt collector to send a verification of the debt be in writing—and placing it before the § 1692g(a)(3) disclosure—which does not require a dispute of the validity of the debt to be in writing—would lead "the least sophisticated debtor" to conclude that any dispute of the debt had to be in writing.

Importantly, even those courts that have adopted the "the least sophisticated debtor" standard acknowledge that there are limits to the range of possible interpretations, and that because that standard "preserve[s] the concept of reasonableness," it does not extend FDCPA protection "to every bizarre or idiosyncratic interpretation of a collection notice" imaginable. *Rubin v. Montefiore Med. Ctr.*, No. 20-2721-CV, 2021 WL 4538603, at *1 (2d Cir. Oct. 5, 2021). As suggested by *Almada*, however, the range of interpretations that could be considered "reasonable" to the "the least sophisticated debtor" may be extremely broad. Identifying the precise point at which a lack of sophistication might become unreasonable seems likely to remain difficult for those attempting to comply with the FDCPA.

FOURTH AND ELEVENTH CIRCUITS CLARIFY REQUIREMENTS FOR RESPONDING TO QWRS

The Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C.A. § 2605(e)(1)(B), and Regulation X, 12 C.F.R. § 1024.35(a), impose various obligations on loan servicers who receive qualified written requests ("QWRs") from borrowers for information relating to the servicing of their loans. Servicers should know when and how to respond to borrower requests, for while addressing such requests can be costly and time-consuming, failing to respond adequately to a QWR can also be costly. Two recent decisions from the Fourth and Eleventh Circuits help clarify when a request is a QWR and when a response is adequate.

In *Morgan v. Caliber Home Loans, Inc.*, 26 F.4th 643 (4th Cir. 2022), two plaintiffs, Morgan and Johnson, sued on behalf of a putative class of borrowers who had submitted requests for information to the servicer-defendant. Morgan had written to the servicer to ask it to "correct [its] records" as to the amount of debt the servicer had reported to a credit agency. Johnson had asked the servicer to investigate and correct its decision not to finalize a loan modification. *Id.* at 647. The district court granted the servicer's motion to dismiss, concluding that neither letter was a QWR: Morgan's was not specific enough, and Johnson's letter "challenge[d] only [the servicer's] stated denial for the loan modification," which "does not implicate servicing of the loan." *Id.* at 649.

The Fourth Circuit reversed the district court regarding Morgan's letter, holding that it was sufficiently detailed because (i) it included information (including an account number and the ID number of the representative who provided the servicer's record of his debt) that "enable[d] the servicer to identify" the account, and (ii) it stated "reasons for the belief of the borrower, to the extent applicable, that the account is in error" by describing the conflicting balance information he had received from his employer (showing a debt of $16,806) and from the servicer's representative (showing a debt of $30,658.89).

In contrast, the Fourth Circuit affirmed the district court's dismissal of Johnson's claim, holding that "correspondence limited to the dispute of contractual issues that do not relate to the servicing of the loan, such as loan modification applications, do not qualify as

QWRs." 26 F.4th at 651. The court cited in support of that holding the Ninth Circuit's decision in *Medrano v. Flagstar Bank, FSB*, 704 F.3d 66, 667 (9th Cir. 2012), which found that a letter concerning a loan modification related to the "terms of the loan and mortgage documents," not servicing, and so could not constitute a QWR. Because the Johnson letter challenged only the denial of the loan modification, it "d[id] not fall within the ambit of 'servicing' so as to trigger RESPA's protections against providing adverse information to credit reporting agencies." 26 F.4th at 651.

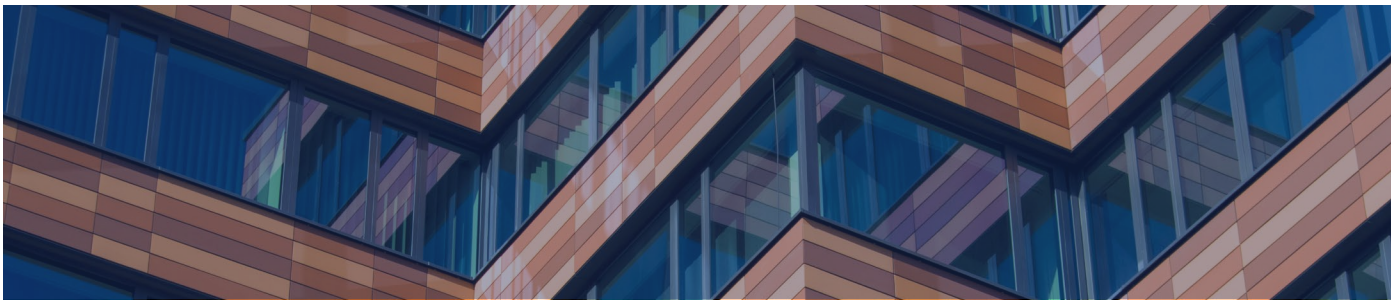
While *Morgan* considered whether a borrower's letter constitutes a QWR, in *Rakestraw v. Nationstar Mortg., LLC*, No. 21-12850, 2022 WL 656104 (11th Cir. Mar. 4, 2022), the Eleventh Circuit addressed what the servicer must do in response to a QWR to comply with RESPA. The borrower there sought, among other things, a "[c]omplete payment history" with a "breakdown of all charges and credits applied" since the loan was originated in 2004. *Id.* at *1. Nationstar provided that information, but five months later, the borrower sent a second QWR asking for "an explanation and detailed breakdown of" all payments made to Bank of America, which had serviced the loan from 2004 to 2013. Nationstar provided that information (which had also been provided in response to the first QWR), but noted that the Bank of America transaction history "was difficult to read and told her to contact Bank of America directly if she wanted a different version." Nationstar also stated that it could not attest to how funds were disbursed from escrow under the loan's prior servicers. Within two months, the borrower sent two more QWRs seeking a "legible" account history and a "code sheet" allowing her to interpret that history. Nationstar responded with copies of its prior responses and a code sheet for its own transaction history, but stated that it could not provide a code sheet for the prior servicers. *Id.* at *2-3.

The borrower then filed a purported class action, alleging that Nationstar violated RESPA by "refus[ing] to provide [a] complete and comprehensible account history[] and the explanation[] of charges and credits" requested in her four QWRs. The district court found Nationstar's responses were adequate and granted it summary judgment. On appeal, the borrower argued that Nationstar violated RESPA because (i) the account histories it provided were "incomprehensible" and (ii) Nationstar failed to perform a reasonable search for information that she requested relating to a prior servicer. *Id.* at *4.

The Eleventh Circuit rejected those arguments and affirmed. The Court rejected the claim that Nationstar's responses were "incomprehensible," holding that Nationstar satisfied its obligation by providing the borrower with its code sheet and stating that a borrower must allege more than that he was "unsatisfied" or "confused by" a response to state a claim for a RESPA violation. *Id.* at *6 (citing *Bates v. JPMorgan Chase Bank, NA*, 768 F.3d 1126, 1135 (11th Cir. 2014)). The Court also rejected the borrower's contention that Nationstar did not conduct a "reasonable search" for information from prior servicers and found no authority suggesting that a servicer must search "beyond its own records" or that "the word 'unavailable' really means 'unobtainable.'" *Id.*

FOURTH CIRCUIT CLARIFIES CLASS NOTICE REQUIREMENTS

In any class-action settlement, absent class members must be provided with "direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). While courts have generally held that an adequate notice must "fairly apprise" absent class members of the terms of the proposed settlement and their options regarding the settlement, e.g., *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005), and describe the settlement in sufficient detail to "alert" potential objectors of the settlement, e.g., *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934,



946 (9th Cir. 2015), the level of detail required in the notice in a particular case may be contested.

In *McAdams v. Robinson*, 26 F.4th 149 (4th Cir. 2022), the Fourth Circuit addressed what, precisely, the notice must provide. The case arose from an objection to a class-action settlement that was approved in *Robinson v. Nationstar Mortg. LLC*, 2020 WL 8256177 (D. Md. Dec. 11, 2020). The proposed email and mail notices informed class members that there was a $3,000,000 settlement fund, explained how to file a claim and presented the option to opt-out. Those forms of notice also included a reference to a website containing a "longform" notice explaining the settlement in greater detail. The objector claimed that those notices were inadequate because they did not (i) include the attorneys' fees to be deducted from the settlement fund, (ii) provide an estimate of individual class members' recovery or (iii) explain the point-based system used to determine how much each person who submitted a valid claim would receive. The magistrate judge approved the settlement over those objections, and the objector appealed.

The Fourth Circuit rejected the objections and affirmed the approval of the settlement. It first noted that, because the longform notice disclosed that class counsel intended to request up to $1.3 million for attorney's fees and costs to be deducted from the $3 million settlement fund, the class had been given adequate notice of those fees and costs. 26 F.4th at 158. The Court further found that while the longform notice did not explain the settlement's points system, its statement that "[e]ach Settlement Class Member who files a valid claim will receive a proportionate share of the Settlement Fund remaining after [ ] deductions are made" was sufficient to satisfy Rule 23. *Id.* at 158 n.7. Finally, the Court held that the notice was not inadequate because it did not provide an estimate of class members' recovery because "it would be difficult, if not impossible, for parties to reliably predict the number of valid claims when drafting notices." *Id.* at 158.

The Court stated that there was no "compelling argument" for requiring the parties to provide an estimated recovery, when nothing in the record showed that there was "a reliable method of estimating the percentage of class members who would file claims, let alone the average number of points they would claim," and when the parties could not know when drafting the notices what amount of attorneys' fees and costs would be awarded. *Id.* at 158-59. It then held that "[w]ithout some evidence proving an average recovery calculation would be reliable, we think it inappropriate to impose such a requirement." *Id.* at 159. In so holding, the Court aligned itself with the Fifth and Ninth Circuits, which have also held that a notice for class action settlement need not provide an estimated recovery if the estimate is considered unreliable. *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 224 (5th Cir. 1981); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993).

NINTH CIRCUIT DENIES CERTIFICATION FOR FAILURE TO SHOW CLASS-WIDE INJURY

A plaintiff seeking to certify a class under Rule 23(b)(3) must establish, among other things, that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Courts have, however, often found that, while common issues must predominate, a class can be certified if individual determinations are limited to the calculation of damages. E.g., *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 987–88 (9th Cir. 2015) ("[W]e have … reaffirmed that damage calculations alone cannot defeat class certification."); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015) ("It is a 'black letter rule … that individual

damage calculations generally do not defeat a finding that common issues predominate.'") (quoting Newberg on Class Actions § 4:54 (5th ed.)). Plaintiffs thus commonly argue that individual differences between class members identified by defendants are at most relevant to the calculation of damages and so cannot bar certification. The Ninth Circuit's recent decision in *Lara v. First Nat'l Ins. of Am.*, 25 F.4th 1134 (9th Cir. 2022), highlights the limits of that argument.

In *Lara*, the Ninth Circuit affirmed a district court's denial of class certification for breach of contract claims for lack of predominance. The plaintiffs sought to represent a class of insureds who made claims on their cars that were determined to be total losses and alleged that the method used by the insurer to determine payments for those losses breached the class members' insurance contracts, which contracts entitled them to the "actual cash value" of their pre-accident cars. The method the insurer used was based on a database of values for particular makes, models, conditions and ages of cars from dealers around the country, which are then adjusted up or down, according to the pre-accident condition of the totaled car. *Id.* at 1136-37. The district court denied the plaintiffs' motion for class certification, finding that the predominance and superiority requirements of Rule 23(b) were not satisfied. The district court reasoned that proving liability to the class would have required proof that each class member's insurance claim was adjusted by an "inappropriate" value, and that such a determination could not be made based on evidence that applied to all members of the class. The district court noted that if individual determinations were needed only to calculate the damages awardable to class members, that would not bar class certification. However, since individual determinations were necessary to establish liability, the class could not be certified.

The Ninth Circuit agreed that certification would be improper because proof of class members' injuries—required for the breach of contract claim—would require individualized determinations. *Id.* at 1139. The Court found that, under the insurance contracts, class members were entitled to the "actual cash value" of the pre-accident car, and that determining whether any given class member was injured would require the district court "to look into the actual value of the [totaled] car, to see if there was an injury." The Court specifically rejected the plaintiffs' argument that those individual determinations cannot bar certification because they concern only the amount of damages. The Ninth Circuit rejected that argument, stating: "that's not right…: if there's no injury, then the breach of contract… must fail. That's not a damages issue; that's a merits issue." *Id.*

Because *Lara* did not articulate any principle by which to distinguish individual determinations that are relevant only to the calculation of damages—which would not usually bar class certification in the Ninth Circuit—from those needed to establish liability, its value for defendants in other cases may be limited.

FIFTH CIRCUIT BARS CLASS CERTIFICATION WHEN PROPOSED CLASS INCLUDES MEMBERS WHO BENEFITED FROM THE COMPLAINED-OF CONDUCT

The Circuit Courts are divided on whether a federal court may certify a class before it has been shown that all class members have been injured by the defendant's conduct. Compare, e.g., *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 306-07 (3d Cir. 1998); *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 676-78 (7th Cir. 2009) (holding a class may be certified even if absent class members have not been injured), with *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) (plaintiff cannot represent a class containing individuals who were not injured).

The analyses in those cases have focused on whether uninjured absent class members have Article III standing. E.g., *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) (a class must be defined in such a way that absent class members are all injured so that "anyone within it would have standing").[1] However, given the Supreme Court's reluctance to resolve whether Article III standing for absent class members is required for class certification, see *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 n.4 (2021), the issue remains to mature at the Circuit Court level.

In *Prudhomme v. Gov't Emps. Ins. Co.*, No. 21-30157, 2022 WL 510171 (5th Cir. Feb. 21, 2022), the Fifth Circuit addressed a different argument sometimes made when a proposed class includes members who were not all injured by the conduct of the defendant. In that case, the plaintiff sought to represent a class of insured parties and alleged that the insurer's methods for valuing total-loss automobile claims were unfair. (The main valuation method at issue was the same one at issue in *Lara v. First Nat'l Ins. of Am.*, 25 F.4th 1134 (9th Cir. 2022), discussed above.) The Western District of Louisiana denied class certification. It found that, because the defendant used different methods to value the claims of different class members, there were no common questions that, when answered, would determine the defendant's liability to the class. The district court also found that because one-fifth of the class benefited from the defendant's valuation method, the named plaintiffs had a conflict of interest with those members of the putative class. The court went on to hold that the conflict rendered the plaintiffs inadequate representatives.

The Fifth Circuit affirmed on adequacy grounds and did not address the district court's holding regarding commonality and predominance. It noted that Rule 23(a)(4) requires that "representative parties [in a class-action] will fairly and adequately protect the interests of the class," and that in order to be an adequate representative, a plaintiff must "'possess the same interest and suffer the same injury' as the class members" so as to reduce the "risk of 'conflicts of interest between the named plaintiffs and the class they seek to represent." 2022 WL 510171, at *1 (quoting *Amchem Prods., Inc. v. Windsor*, 521 US 591, 625–26 (1997), and *Slade v. Progressive*, 856 F.3d 408, 412 (5th Cir. 2017)).

[1] See also our discussion of the circuit split on this question in The Brief from September 2021.

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