THE BRIEF

FINANCIAL SERVICES LITIGATION QUARTERLY

WINTER 2023

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THE FDCPA'S "LEAST SOPHISTICATED CONSUMER STANDARD" —AN UNCERTAIN FUTURE?

Debt collectors and creditors are often uncertain as to how to communicate with consumers. An individual who enters into an enforceable credit or loan agreement presumably understands the terms of that agreement and so, should be capable of understanding communications about those agreements (such as collection letters).

At the same time, ordinary consumers who have no specialized experience in law or finance may find some of the legal or financial terms in those communications difficult to understand or parse. Not surprisingly, consumers who have fallen behind in their payments or defaulted on loans often argue that statements or representations made in those agreements and communications are deceptive or misleading, and have sought to hold debt collectors and creditors liable under the Fair Debt Collection Practice Act (FDCPA), 15 U.S.C. § 1692, which bars unfair and deceptive methods of debt collection. In these circumstances, what standard ought to be used to determine if a communication to a consumer debtor is actually deceptive under the FDCPA?

In many contexts, legal determinations as to whether a statement or representation is "deceptive" are based on an objective "reasonable person" standard that asks whether an adult of average intelligence and experience would be misled by that statement or representation. *E.g.*, *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1398 (E.D. Cal. 1994) ("[T]he reasonable person standard is well ensconced in the law in a variety of legal contexts in which a claim of deception is brought"; collecting cases). Recognizing that many consumers have little experience with financial terms and credit transactions, however, courts have generally held that debt collectors and creditors regulated under the FDCPA must tailor their communications not to the average "reasonable person," but to the individual least likely to understand his rights and obligations, i.e., the "least-sophisticated consumer."

The "least-sophisticated consumer standard" that is currently the majority rule for FDCPA deception claims has its roots in decisions interpreting § 5 of the FTC Act, which prohibits "unfair or deceptive acts or practices in commerce." 15 U.S.C. § 45(a)(1). For instance, in *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1961), the court stated that "[i]n evaluating the tendency of language to deceive, the Commission should look not to the most sophisticated readers *but rather to the least*." *Id*. at 872 (emphasis added). In surveying cases involving the FTC Act, the court in *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985), explained that in those cases, "consistent with the legal standard in other actions under § 5, the FTC has looked not to the 'reasonable consumer,' but *to a less sophisticated consumer* and whether the debt collection practice has a tendency or capacity to deceive." *Id*. at 1173 (emphasis added).

The rationale generally given for applying the standard developed for § 5 of the FTC Act to the FDCPA is that the FDCPA was enacted to provide consumers with protections *beyond* those given by the FTC Act—which suggests that the standard applicable to the FDCPA should not be more demanding than the "least-sophisticated consumer standard" applicable under § 5 of the FTC Act. *Jeter*, 760 F.2d at 1175. With few exceptions, the Circuit Courts of Appeals today have held that the "least-sophisticated consumer standard," rather than a "reasonable person standard," must be applied in determining whether certain provisions of the FDCPA are violated. *E.g., Almada v. Krieger L. Firm, A.P.C.*, No. 21-55275, 2022 WL 213269, at *1 (9th Cir. Jan. 24, 2022) ("When analyzing a debt collection letter, the court must view the letter 'through the eyes of the least sophisticated debtor.'").[1]

Despite widespread references to the "least sophisticated consumer standard," no court literally applies that standard in practice, since the benchmark for such a standard would be "the single most unsophisticated consumer who exists." *Gammon v. GC Services Ltd. Partnership*, 27 F.3d 1254, 1257 (7th Cir.1994). If such a standard were applied, every collection letter would qualify as deceptive, since the very least sophisticated consumer is one who could not even read the letter. *See Chuway v. Nat'l Action Fin. Servs. Inc.*, 362 F.3d 944, 949 (7th Cir. 2004) ("[L]iterally, the least sophisticated consumer is not merely 'below average,' he is the very last rung on the sophistication ladder ... which means that he cannot even read, for the literacy rate in the United States is not 100 percent.").

In practical terms, then, the "least sophisticated consumer standard" is a fiction, and references to such a standard in fact are to an "*unsophisticated* consumer standard"—one that refers not to the consumer who is entirely unable to read or interpret a collection notice, but to the consumer who is reasonable, but relatively naive or inexperienced with creditors and debt collectors.[2] No matter which label is used, the purpose

[1] *See also Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993) ("We now adopt the least-sophisticated consumer standard for application in cases under § 1692e. ... The basic purpose of the least-sophisticated-consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd."); *Brown v. Card Serv.* Ctr., 464 F.3d 450, 453 (3d Cir. 2006) ("[I]n considering claims under another provision of the FDCPA, ... certain communications from lenders to debtors should be analyzed from the perspective of the 'least sophisticated debtor.'"); *Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 394 (4th Cir. 2014) ("Whether a communication is false, misleading, or deceptive in violation of § 1692e is determined from the vantage of the 'least sophisticated consumer.'"); *Smith v. Transworld Systems, Inc.*, 953 F.2d 1025, 1028 (6th Cir. 1992) (court "must determine whether the 'least sophisticated consumer' would be deceived by a collection agency's letters"); *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1194 (11th Cir. 2010) ("[W]e rejected the 'reasonable consumer' standard in favor of the 'least-sophisticated consumer' standard.").

[2] *Goswami v. Am. Collections Enter., Inc.*, 377 F.3d 488, 495 (5th Cir. 2004) ("We must evaluate any potential deception in the letter *under an unsophisticated or least sophisticated consumer standard*. That is, in determining whether the defendant's actions are deceptive under the FDCPA, we must assume that the plaintiff-debtor is neither shrewd nor experienced in dealing with creditors.") (emphasis added).

of adopting either the "least sophisticated" or "unsophisticated" consumer standard is "to prevent debt collectors from deceiving naive consumers, but not to hold collectors liable simply because their letters may be deceptive under 'bizarre or idiosyncratic consumer interpretations.'" *Jones v. Dufek*, 830 F.3d 523, 526 (D.C. Cir. 2016).[3]

While an "unsophisticated consumer standard" is at least more readily applied than a standard that literally looks to the person least able to comprehend a collector's communications, it too has its drawbacks. A practical issue is that it offers little guidance either to courts applying the FDCPA or to the entities regulated by the statute as to how, exactly, the standard should be defined. Courts have considerable experience in applying a reasonable person standard, but it is unclear how much less sophisticated a hypothetical "unsophisticated consumer" should be assumed to be than the hypothetical reasonable person. As the Tenth Circuit recently observed in *Tavernaro v. Pioneer Credit Recovery, Inc.*, 43 F.4th 1062 (10th Cir. 2022), the "unsophisticated consumer standard" is wanting because it "leaves us with a vague and nebulous standard that gives little guidance to courts or creditors trying to comply with the law." *Id*. at 1070.

In *Tavernaro*, the Tenth Circuit also suggests there are more fundamental problems with the "unsophisticated consumer standard," such as the legal basis for applying that standard

to the FDCPA in the first place. It found that the rationale courts have generally offered for applying the standard for § 5 of the FTC Act to the FDCPA is not persuasive. *Id*. That is, even if Congress's aim in enacting the FDCPA was to enhance the protections already provided by the FTC Act, there is no need to apply the FTC's "least sophisticated" (or more accurately, "unsophisticated") consumer standard to the FDCPA, since the FDCPA, by its own terms, expressly provides consumer protections—and a private right of action—that the FTC Act does not. *Id*.

The court then held that, absent a persuasive rationale for applying the FTC Act's standard to the FDCPA, courts should apply the traditional "reasonable person" standard for determining whether a debt-collection practice is deceptive or misleading: "Rather than presume Congress intended for the application of a specific standard that is not mentioned in the statute's text"—the least sophisticated consumer standard—"we infer Congress operationalized its intent to protect debtors in other ways and *under traditional standards*." *Id*. at 1070 (emphasis added). Noting that the "reasonable consumer standard" is already applied in other contexts—including the FTC's restrictions on false advertising, 15 U.S.C. § 52, and the Truth-in-Lending Act, 15 U.S.C. §§ 1601 *et seq.*—the court concluded that the "traditional standard" provides a practical, better-defined, and better-justified alternative to the more nebulous "least sophisticated" or "unsophisticated" consumer standard. *Id*. at 1071–72.

Currently, the Tenth Circuit is the lone outlier with respect to the standard for determining whether communications are deceptive or misleading under the FDCPA. However, the Supreme Court has not yet addressed this issue,[4] and there is reason to think that *Tavernaro* may simply be the start of a trend away from the "least sophisticated consumer" standard—which literally cannot even be applied—to a more traditional "reasonable person" standard.

[3] *See also Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 103 (1st Cir. 2014) ("[W]e hold that, for FDCPA purposes, a collection letter is to be viewed from the perspective of the hypothetical unsophisticated consumer."); *Duffy v. Landberg*, 215 F.3d 871, 873 (8th Cir. 2000) ("In evaluating whether a debt collection letter is false, misleading or deceptive, the letter must be viewed through the eyes of the unsophisticated consumer."); *Gammon*, 27 F.3d at 1260 ("Because we have rejected the 'least sophisticated consumer' approach, the plaintiff will have to show that a significant fraction of the letter's addressees were deceived—for if showing a handful of misled debtors were enough, we would as a practical matter be using the 'least sophisticated consumer' doctrine.") (Easterbrook, J., concurring).

[4] *Sheriff v. Gillie*, 578 U.S. 317, 327 n.6 (2016) (it has yet to decide "whether a potentially false or misleading statement should be viewed from the perspective of the least sophisticated consumer … or the average consumer who has defaulted on a debt") (cleaned up).

NOTEWORTHY

NINTH CIRCUIT ARTICULATES STANDARD FOR EXCESSIVE STATUTORY DAMAGES

The Ninth Circuit recently joined the Eighth Circuit in holding that the Due Process clause may in some circumstances limit aggregated statutory damages.

The plaintiff in *Wakefield v. Visalus*, No. 21-35201, 2022 WL 11530386 (9th Cir. Oct. 20, 2022) claimed that the defendant, a weight-loss products marketing company, violated the Telephone Consumer Protection Act (TCPA) by placing calls to his cell phone using a pre-recorded voice without his consent. Following class certification and a three-day trial, a jury found that the defendant placed 1,850,440 calls in violation of the TCPA. The minimum statutory penalty for a TCPA violation is $500 per call, so the jury awarded the plaintiff and class $925,220,000 in statutory damages. Defendant appealed the verdict on several grounds, including that the aggregated statutory damages award was unconstitutionally excessive.

The US Supreme Court held in *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996), that a grossly excessive punitive damages award that was disproportionate to actual damages violated the Due Process clause. In the 25 years since *BMW* recognized limits on *punitive* damages under the Due Process clause, similar limits have not emerged with respect to aggregated *statutory* damages, even though, as in *Wakefield* and many other cases, the awards often present an existential threat to a defendant. In *Wakefield*, the Ninth Circuit held that the aggregated statutory damages awarded by the trial court were unconstitutionally excessive and remanded the case for further consideration in light of its ruling.

The Ninth Circuit based its conclusion in part on a century-old case, *St. Louis I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919), in which the Supreme Court held that statutory damages violate the Due Process clause when they are "so severe and oppressive as to be wholly disproportioned to the offense, and obviously unreasonable." *Id.* at 66-67. The statutory damages there, for violation of a state statute prescribing rail passenger rates, were $50-300, for an overcharge in that case of 66 cents. The Supreme Court held that the statutory damages were not unconstitutionally excessive on an individual basis, in light of the fact that the damages were not "wholly" disproportionate to actual damages or "obviously" unreasonable in light of the statute's purpose of securing uniform adherence to established rates and the "numberless opportunities for committing the offense." *Id*. at 67. The takeaway for the Ninth Circuit though was that, "*Williams* suggests a general reasonableness and proportionality limit on damages awarded pursuant to statutes, taking into account statutory goals." *Wakefield*, 2022 WL 11530386 at *9. An aggregated statutory damages award thus could "like a per-violation award, be wholly disproportioned to the prohibited conduct (and its public importance) and greatly exceed any reasonable deterrence value." *Id*. And "the goals of a statute in imposing a per-violation award may become unduly punitive when aggregated." *Id*. at *10.

The Ninth Circuit then considered a class action case involving liquidated damages and adopted a similar test for determining whether aggregated statutory damages were unconstitutionally excessive. To make that determination, a court should evaluate:

1. The amount of award to each plaintiff;
2. the total award;
3. the nature and persistence of the violations;
4. the extent of the defendant's culpability;
5. damage awards in similar cases;
6. the substantive or technical nature of the violations; and
7. the circumstances of each case.

Id. at 11 (quoting *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1309 (9th Cir. 1990)). Note that the court explicitly declined to apply a ratio test, as in *BMW*, to make this determination. *Id*. at 10.

The *Wakefield* holding is in accord with *Golan v. FreeEats.com*, 930 F.3d 950 (2019), in which the Eighth Circuit affirmed a district court decision reducing an aggregated statutory damages award in a TCPA case from $1.6 billion to $32 million. *Wakefield* and *Golan* are significant for class action defendants facing potentially ruinous liability for statutory damages. If their principles are adopted widely, the reduction of the in terrorem effect of aggregated statutory damages could be quite profound, decreasing the number of "bet the company" cases significantly.

ELEVENTH CIRCUIT ADOPTS STRINGENT TEST TO ESTABLISH STANDING TO RECOVER FOR INTANGIBLE HARMS

In the Spring 2022 issue of The Brief, we wrote about federal courts' continuing struggle to determine whether plaintiffs have Article III standing to assert statutory claims for intangible harms. *See* "No Clarity on Standing to Assert Statutory Claims," The Brief, Spring 2022, at 3-6. We discussed four circuit court opinions illustrating the differing approaches being taken by appellate courts in light of the Supreme Court's decision in *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190 (2021). We noted that in one of the appeals, *Hunstein v. Preferred Collection & Mgmt. Svcs., Inc.*, 17 F.4th 1016 (11th Cir. 2021), a majority of the circuit panel had voted to rehear the case en banc. The court has now issued its en banc decision and, by a vote of 8-4, reversed the decision of the three-judge panel. 48 F.4th 1236 (2022) (en banc).

Plaintiff alleged that a debt collector's transmission of personal information to a mailing vendor violated Section 1692(c) of the Fair Debt Collection Practices Act, which (with certain exceptions) prohibits debt collectors from communicating with anyone other than the debtor "in connection with the collection of any debt." A three-judge panel of the Eleventh Circuit held that plaintiff had standing because the harm alleged by plaintiff had a "close relationship" to "invasion-of-privacy torts," and, in particular, the tort of "public disclosure of private facts." 17 F.4th at 1023. Senior Judge Tjoflat dissented on the grounds that there was a "sheer misfit" between plaintiff's claim and the public disclosure of private facts claim, because plaintiff had not established two of the three elements of the tort. *Id*. at 1043.

The majority and dissenting opinions in the *Hunstein* en banc decision cover little new ground in the standing debate. The majority opinion held that plaintiff had not established the publicity element of his claim and so lacked a close relationship with a traditional common law tort that would be sufficient to confer standing. *Hunstein*, 48 F.4th at 1245. The dissent found that plaintiff had "alleged a harm that is similar in kind—even if not in precise degree—to the common-law tort of public disclosure of private facts," and so would have held that plaintiff had standing. *Id*. 1268.

A question posed by the *Hunstein* dissent highlights why lucidity continues to elude this area of the law: "how close is 'close enough'" to a common law analog to show standing? *Id*. at 1258. And, close enough to what part of the common law analog: the whole tort itself, or just the harm for which the tort provides a mechanism for recovery? The uncertainty stems from the Supreme Court's holdings in *Spokeo v. Robbins*, 578 U.S. 330 (2016), and *TransUnion*. The Court held in *Spokeo* that the relevant test is "whether plaintiffs have identified a close historical or common-law analogue for their asserted injury." 578 U.S. at 341. In *TransUnion*, the inquiry was framed as to whether a plaintiff's alleged injury has "a close relationship to harms traditionally recognized as providing a basis for recovery in American Courts." 141 S.Ct. at 2204. But do the references in those cases to an "injury" and "harms" mean that the relevant comparator is the harm sought to be addressed (e.g., a general invasion of privacy), or is it a cause of action and all of its elements?

TransUnion also says that the test "does not require an exact duplicate in American history and tradition." *Id*. But, again, how is a court to tell if a claim is close enough? Consider the *Hunstein* en banc ruling: the fact that plaintiff's claim did not meet one element of a common law claim meant no standing. Thus, despite what the Supreme Court said in *TransUnion* about not needing an "exact duplicate" to establish standing, one reading of the *Hunstein* majority opinion seems to require exactly that. Or, it could be that the absence of arguably the most essential element of the common law claim resulted in the fit not being close enough. After all, plaintiff's purported common law analog was public disclosure of private facts, but there was no publicity according to the majority, and so the fit was not close enough. But if it is the fact that the core of the common law claim was missing, how are courts to determine what is the core of the claim (and, thus, must be established to show standing), and what elements are non-core and, thus, perhaps are not required to show standing?

What is clear is that in the Eleventh Circuit, the claim of a plaintiff alleging an intangible injury must fit very closely with all elements of a common law cause of action (not just a harm) for that plaintiff to have standing. But more battles on this issue are sure to follow in other circuits.

NINTH CIRCUIT CONFIRMS THAT TCPA'S AUTO-DIALER DEFINITION PERTAINS ONLY TO GENERATION OF TELEPHONE NUMBERS

The Telephone Consumer Protection Act (TCPA) makes it unlawful to place a call without the recipient's consent using an "automatic telephone dialing system" (ATDS), which is defined as equipment with the capacity "(A) to store or produce telephone numbers to be called, *using a random or sequential number generator*; and (B) to dial such numbers." 47 U.S.C. §227(a)(1) (emphasis added). But does the phrase italicized in the last sentence refer to the generation of telephone numbers, or, as many plaintiffs have argued recently, does it apply to a dialing system which uses a random or sequential number generator somewhere in its process to determine the order in which telephone numbers are called?

The plaintiff in *Borden v. eFinancial, LLC*, 2022 WL 16955661 (9th Cir. Nov. 16, 2022), alleged that, after completing an online form to receive a life insurance quote, he began to receive text messages from the insurer at the telephone number that he provided on the form. Plaintiff claimed that the texts were sent in violation of the TCPA because they were sent without his consent using a sequential number generator that "pick[ed] the telephone numbers to be dialed from Defendant's stored list (database)." *Id*. at *2.

Plaintiff's argument was based in part on a footnote in *Facebook, Inc. v. Duguid*, 141 S.Ct. 1163 (2021). The US Supreme Court there resolved a circuit split over whether the phrase "using a random or sequential number generator" modified both verbs that preceded it ("store" and "produce") or only the one closest to it ("produce"). In holding that the phrase modified both verbs (i.e., that to be an ATDS, a system had to use a random or sequential number generator to store or produce telephone numbers), the Court said in a footnote that "an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list." *Id*. at 1172 n.7. The plaintiff in *Borden* seized on this language to argue that "an autodialer must merely generate some random or sequential number during its dialing process (for example, to figure out the order to call a list of phone numbers), and is not limited to generating telephone numbers." *Borden*, 2022 WL 16955661 at *2.

The Ninth Circuit rejected plaintiff's argument and affirmed the district court's order dismissing the case. Plaintiff's gloss on footnote 7, the court said, "is an acontextual reading of a snippet divorced from the context of the footnote and the entire opinion." *Id*. at *5. The numbers referred to in the footnote were themselves randomly or sequentially generated telephone numbers. *Id*. And "[n]othing in the opinion suggests that the Court intended to define an autodialer to include the generation of any random or sequential number." *Id*. The structure of the statute further suggests that the phrase "number generator" refers to telephone numbers, because the TCPA uses both "telephone number" and "number" interchangeably throughout the statute to mean telephone number. *Id*. at *3. The text and context of the statute, thus, make clear that to qualify as an ATDS, a system must generate and dial random or sequential telephone numbers, not just any number. *Id*. at 4.

Facebook significantly limited the universe of dialing systems that qualified as an ATDS, and, thus, severely curtailed the viability of TCPA claims based on alleged use of an ATDS. Plaintiffs since *Facebook* have sought to salvage ATDS claims by arguing that the use of a random or sequential number generator somewhere in the dialing process was enough for a system to qualify as an ATDS. *Borden* is the clearest rejection yet of this theory. If the holding is followed by other courts, TCPA claims based on alleged use of an ATDS will be viable for only a small universe of dialing systems.

ELEVENTH CIRCUIT: EMOTIONAL DISTRESS AND WASTED TIME ARE SUFFICIENT FOR ARTICLE III STANDING FOR FDCPA CLAIMS

As part of the ongoing efforts by federal courts to establish clear standards for Article III standing for statutory violations, the Eleventh Circuit in *Toste v. Beach Club at Fontainebleau Park Condo. Ass'n, Inc.*, No. 21-14348, 2022 WL 4091738 (11th Cir. 2022), reversed the dismissal of a plaintiff's Fair Debt Collection Practices Act (FDCPA) claim for lack of standing, holding that his allegations that he suffered emotional distress resulting in loss of sleep and wasted time responding to debt-collection efforts were sufficient to show standing.

Toste arose when the plaintiff's condominium association referred his past-due fees to its debt collector, who filed a lien on his condominium and threatened to foreclose if he did not pay the $10,000 he owed in fees, interest, attorney's fees and costs. The plaintiff retained an attorney to advise him on how to respond to the collection letter. After the attorney discovered that the collection letters misstated the amount owed by including interest charges, late fees and finance charges that are barred by Florida law, the plaintiff had his attorney file an FDCPA action. The condominium association eventually settled, and the debt collector moved to dismiss for lack of subject-matter jurisdiction. The district court held that the plaintiff had not alleged any concrete injury, and dismissed the case.

On appeal, plaintiff argued that his alleged injuries—that he wasted significant time responding to and contesting the defendant's collection efforts; suffered confusion over the amount he owed, which then required him to seek legal assistance; and experienced emotional distress manifesting in "loss of sleep, extreme stress, frustration, anger, agitation, and anxiety"—were sufficient for standing.

The Eleventh Circuit reversed. It held that sleep loss, combined with the significant loss of time caused by trying to correct inaccuracies in credit reports, were substantial enough to constitute concrete injuries for purposes of Article III standing. *Id*. at *4. It further held that, while a plaintiff cannot base standing on the time and expense of his own lawsuit, the time and expense the plaintiff alleged he spent in defending against the debt collector's actions is "separable" from the cost of the plaintiff's lawsuit, and so may confer standing. *Id.*

Since the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), the federal courts have struggled to develop a consistent standard for determining whether plaintiffs have alleged the "concrete and particularized" injuries required for standing. The holding in *Toste* that emotional distress, wasted time and confusion are sufficient for standing does little to clarify that standard, conflicting as it does with holdings in other Circuits. *See, e.g., Pierre v. Midland Credit Mgmt., Inc.*, 29 F.4th 934, 939 (7th Cir. 2022) (holding that "psychological states," including "emotional distress" and "confusion," are "insufficient to confer standing"); *Perez v. McCreary*, 45 F.4th 816, 825 (5th Cir. 2022) (allegation that plaintiff lost time responding to collection letter did not create standing for FDCPA claim). As those conflicts suggest, the struggle to develop a consistent approach to standing is likely to continue for the foreseeable future.

EIGHTH CIRCUIT: TCPA BAR ON UNSOLICITED ADVERTISEMENTS APPLIES ONLY TO COMMUNICATIONS WITH "COMMERCIAL COMPONENTS"

Since the DC Circuit's decision in *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), federal courts have limited the scope of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA), in significant ways. In doing so, courts have had to contend with decades of FCC interpretations that would otherwise demand deference under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *BPP v. CaremarkPCS Health, L.L.C.*, 53 F.4th 1109 (8th Cir. 2022), is another such case. There, the Eighth Circuit joined the Sixth Circuit in finding that, while § 227(b)(1)(C) of the TCPA bans faxes that "advertis[e] the commercial availability or quality of any property, goods, or services," it does not ban faxes that simply contain information about commercial goods or services. The Court further limited the extent to which courts had to defer to the FCC's interpretation of the TCPA, holding that the term "advertisement" was unambiguous and so *Chevron* deference was not required.

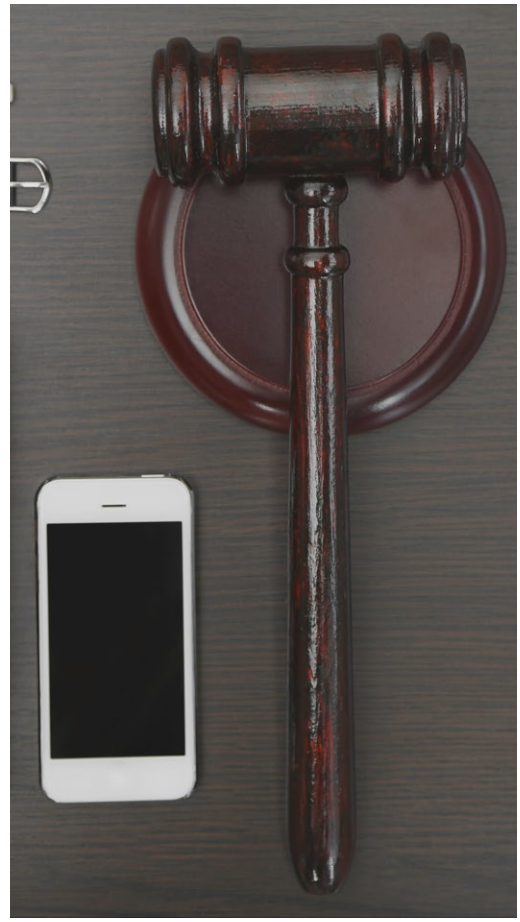
The case arose when defendant Caremark had its vendor fax more than 55,000 health-care providers (including the plaintiff) options for limiting the provision of opioids to adolescents. The fax explained the purpose of the limits and available exceptions for certain categories of patients. The plaintiff sued Caremark and its vendor, alleging that the fax was an "unsolicited advertisement" that violated § 227(b)(1)(C). The district court applied the definition of "advertisement" used by the Sixth Circuit in *Sandusky Wellness Ctr., LLC v. Medco Health Solutions, Inc.*, 788 F.3d 218, 222 (6th Cir. 2015), i.e., "any material that promotes the sale (typically to the public) of any property, goods, or services available to be bought or sold so some entity can profit." Concluding that the faxes did not promote the sale of Caremark's products, the district court granted Caremark summary judgment. 53 F.4th at 1111-12.

On appeal, the plaintiff argued that the fax constituted an "unsolicited advertisement" under the TCPA because, by informing providers of Caremark's new opioid program, the fax "gave public notice of" a commercial good or service. The Court rejected that argument, holding that the TCPA did not ban all faxes that contain information about commercial goods or services, but only those that "advertis[e] the commercial availability or quality of any property, goods, or services." *Id*. at 1112-12 (quoting 47 U.S.C. § 227(a)(5); emphasis added). The Court thus held, in accordance with *Sandusky*, that the fax itself must have "a commercial component or nexus" to be subject to the TCPA's ban on unsolicited advertisements. *Id*. The Court further held that because the term "unsolicited advertisement" is not ambiguous, it was not required to defer to the FCC's interpretation of that term in its regulations concerning the Junk Fax Prevention Act of 2005. *Id*. at 1113.

NINTH CIRCUIT: TCPA CAN APPLY TO "DUAL-USE" BUSINESS CELL PHONES

Section 227(c)(3)(F) of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA) bars anyone from making telephone solicitations to residential telephone subscribers who have registered with the national do-not-call registry, but does not actually define what qualifies as a "residential" telephone. In *Chennette v. Porch.com, Inc.*, 50 F.4th 1217 (9th Cir. 2022), the Ninth Circuit addressed whether cell phones used in home-based businesses qualify as residential phones for purposes of § 227(c)(3)(F). It held, 2-1, that there is a rebuttable presumption that a phone used for both personal and business purposes is a "residential" phone and established a multi-factor test for determining when that presumption has been rebutted.

The case arose from plaintiffs' allegation that the defendants sent texts to their cell phones for the purpose of soliciting sales. Those plaintiffs had registered their numbers on the national do-not-call registry, and so alleged violations of § 227(c)(3)(F). The district court dismissed those claims for lack of statutory standing, holding that the texts to the plaintiffs—who were all contractors working from their home-based businesses—fell outside the "zone of interests" protected by the TCPA.



The Ninth Circuit reversed, rejecting the defendants' claim that the fact that the plaintiffs used their phones for both personal calls and for calls relating to their home-based businesses means the plaintiffs are not residential subscribers for purposes of § 227(c). In doing so, it sided with the majority of district courts, which have held that a phone used for business purposes may qualify as a residential phone, "depending upon the facts and circumstances." *Id*. at 1224.

The Court noted that its conclusion was consistent with the FCC's 2003 Order stating that it "will presume wireless subscribers who ask to be put on the national do-not-call list

to be 'residential subscribers.'" *Id*. at 1223-24 (quoting 2003 Order). It further held that the FCC did not articulate its own test for deciding if that presumption was rebutted in any particular case, and so it was free to devise its own test, on which it would consider "(1) how plaintiffs hold their phone numbers out to the public; (2) whether plaintiffs' phones are registered with the telephone company as residential or business lines; (3) how much plaintiffs use their phones for business or employment; (4) who pays for the phone bills; and (5) other factors bearing on how a reasonable observer would view the phone line." *Id*. at 1225.

The dissent argued that the majority had overstepped its authority by crafting its own test because the FCC's 2003 Order, in fact, did establish a test for when a cell phone qualifies as a residential phone, under which § 227(c)(3)(F) would apply only if the cell phone is used within the residence. *Id*. at 1237 ("[T]he location of the phone, rather than the purpose for which it was used, is critical for determining whether it merited protection.") (emphasis in original). The dissent argued that that interpretation was reasonable, and so the Court was required under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to apply the FCC's test.

The majority rejected the dissent's claim that the FCC had spoken on the issue of when a cell phone qualifies as a residential phone for purposes of § 227(c)(3)(F), thus freeing itself to create its own test. *Chennette* thus represents yet another instance in which a court has applied its own interpretation of the text of the TCPA, rather than deferring to the FCC's interpretation of that text. (*See also BPP v. CaremarkPCS Health, L.L.C.*, 53 F.4th 1109 (8th Cir. 2022), summarized in this issue.)

Courts' seemingly growing skepticism regarding *Chevron* deference could portend consideration of *Chevron* by the Supreme Court in the near future. Though the issue arises in a variety of contexts, issues related to the TCPA could well provide the fact pattern against which the high court could reconsider *Chevron*.

SIXTH CIRCUIT: TRACEABILITY REQUIREMENT FOR ARTICLE III STANDING DOES NOT REQUIRE PROOF THAT THE DEFENDANT CAUSED PLAINTIFF'S INJURY

Article III standing requires that the plaintiff's injury be "fairly traceable" to the defendant's complained-of conduct. While traceability is generally related to causation, the recent decision in *Hammoud v. Equifax Info. Servs., LLC*, 52 F.4th 669 (6th Cir. 2022), shows how the two may be distinguished, particularly in contexts in which the evidence submitted is not sufficient to show that the defendant's alleged misconduct was the cause-in-fact of the injury.

Hammoud arose when Experian, relying on information provided by LexisNexis, mistakenly included on the plaintiff's credit report a bankruptcy that had actually been filed for the plaintiff's father. Experian included that erroneous information in the plaintiff's credit report for nine years. After the plaintiff learned he was not eligible for a loan because his potential lender had received a credit report with the erroneous bankruptcy information, he sued Experian and another credit agency (Equifax), both of whom had shared credit information with the lender, for violations of § 1681e(b) of the Fair Credit Reporting Act (FCRA) by failing to "follow reasonable procedures to assure maximum possible accuracy." After the plaintiff and Equifax settled, Experian moved for summary judgment, arguing that the plaintiff could not prove that his injury was traceable to Experian (and so lacked standing) or that its methods were unreasonable. The district court granted Experian's motion, finding that while the plaintiff had standing, he could not prevail on the merits. *Id*. at 673-74.

The Sixth Circuit affirmed. It agreed that the plaintiff had adequately demonstrated standing. It held that while there was no question that the plaintiff satisfied the injury and redressability requirements, "[t]he more difficult question" was whether the evidence submitted by the plaintiff was sufficient to satisfy the traceability requirement for standing. That evidence did not show that Experian (rather than Equifax) had provided the inaccurate information to the lender, or even that the lender asked for more than just the plaintiff's credit score from Experian. That evidence could not, therefore, establish that Experian (rather than Equifax) had caused the plaintiff's injury. *Id*. at 674. Nonetheless, the Court held that the fact that Experian had the inaccurate information and might have caused the plaintiff's injury was sufficient to withstand a challenge to standing on summary judgment. *Id*. The concurring opinion further distinguished traceability from causation, stating that "[t]he standard for establishing traceability for standing purposes is less demanding than the standard for proving tort causation." *Id*. at 677 (quoting *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 866 (6th Cir. 2020)). It concluded that the "less demanding standard" for standing requires a plaintiff to show only a "substantial likelihood"—i.e., "something less than a 50% chance but more than an insignificant chance"—"that the defendant caused his injury." *Id*. at 678.

While the Court found the plaintiff had standing, it ultimately affirmed the denial of plaintiff's motion on the merits, joining the Seventh Circuit in holding that it was, as a matter of law, reasonable for Experian to rely on information gathered by LexisNexis from bankruptcy dockets. *See Childress v. Experian Info. Sols., Inc.*, 790 F.3d 745, 747 (7th Cir. 2015).

ELEVENTH CIRCUIT: PLAINTIFF'S ABILITY TO REPRESENT CLASS MEMBERS WITH CLAIMS UNDER DIFFERENT STATES' LAWS DOES NOT AFFECT ARTICLE III STANDING

The Supreme Court has observed that there is a "tension" in its jurisprudence as to whether the difference between the claims of a named plaintiff and those of absent class members "is a matter of Article III standing at all or whether it goes to the propriety of class certification pursuant to Federal Rule of Civil Procedure 23(a)." *Gratz v. Bollinger,* 539 U.S. 244, 263 & n.15 (2003). The Eleventh Circuit's recent decision in *In re Zantac (Ranitidine) Prod. Liab. Litigation*, No. 21-10335, 2022 WL 16729170 (11th Cir. 2022), indicates that, at least with respect to differences between the law underlying the claims of a named plaintiff and those class members he seeks to represent, there is a solid consensus among the Courts of Appeals that have addressed the issue that those differences go only to whether certification is proper under Rule 23, and are not of constitutional significance.

In *Zantac*, three named plaintiffs alleged, among other things, that 22 drug manufacturers violated several states' laws by charging them for an allegedly worthless drug in those states. Those defendants moved to dismiss for lack of Article III standing the claims made on behalf of putative class members that arose under the laws of states other than those in which the named plaintiffs resided or purchased the drug. The district court agreed and dismissed the claims on behalf of those other putative class members. *Id*. at *2. One of the named plaintiffs appealed.

On appeal, the Eleventh Circuit first held that the plaintiff had Article III standing to assert its own claims against only 14 of the 22 defendants, since it could trace its alleged injuries to only the 14 defendants to whom it had made payments for the drug in question. The Court also held the plaintiff lacked standing to assert any claims on behalf of absent class members against the remaining eight defendants, stating that a plaintiff "cannot haul into court parties that did not allegedly cause harm, even on behalf of unnamed class members." *Id*. at *3.

The Court then reversed the district court's decision that the plaintiff lacked standing to assert claims (against the 14 manufacturers) on behalf of absent class members whose claims arose under the laws of states in which the plaintiff didn't reside or purchase the drug. The Court stated that in general, as long as the plaintiff itself has standing for its claims, and is part of the class and has "the same interest and suffer[ed] the same injury as the class members," it has standing to bring claims on behalf of those other class members. The Court held that, for purposes of standing, it was sufficient that the plaintiff made representations about the similarity between its claims and those of other class members, even if those claims were based on the law of different jurisdictions. *Id*. at *4.

Aligning itself with decisions from the First, Second, Fourth and Seventh Circuits, the Court explained that whether the plaintiff itself has causes of action under the laws of jurisdictions in which other class members resided or purchased the drug "is not a standing question at all," but rather a question regarding the requirements of Rule 23. *Id*. at *5-6. *See, e.g.*, *In re Asacol Antitrust Litig.*, 907 F.3d 42, 49 (1st Cir. 2018) (named plaintiff has standing if, "assuming a proper class is certified, success on the claim under one state's law will more or less dictate success under another state's law"); *Langan v. Johnson & Johnson Consumer Companies, Inc.*, 897 F.3d 88, 93 (2d Cir. 2018) ("[A]s long as the named plaintiffs have standing to sue the named defendants, any concern about whether it is proper for a class to include out-of-state, nonparty class members with claims subject to different state laws is a question of predominance under Rule 23(b)(3)."). *Zantac* thus indicates there is a strong consensus that while choice-of-law issues may pose problems for class certification, they will not affect Article III standing.

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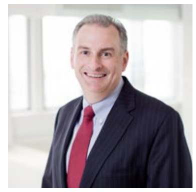

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