United States Supreme Court Class Action Cases to Watch in 2021

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The United States Supreme Court recently granted certiorari in two cases that could have a significant impact on class action practice.

In *TransUnion LLC v. Ramirez*, No. 20-297, the Court could provide additional guidance regarding Article III standing and the Rule 23 requirements for certification in class actions. The Court will consider "whether either Article III or Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered." This case relates to alleged violations of the Fair Credit Reporting Act ("FCRA") arising when, in the process of the plaintiff applying for credit at a car dealership, the dealership received a credit report incorrectly indicating that the plaintiff's name matched two names on the Treasury Department's Office of Foreign Assets Control database (which is a list of persons with whom U.S. businesses may not do business). The plaintiff then asked TransUnion for a copy of his file. The first copy TransUnion sent did not include information regarding the listing on the Treasury Department's database. However, plaintiff later received a separate letter with this information. The plaintiff claims that TransUnion violated FCRA by failing to maintain reasonable procedures to assure accuracy of its consumer reports, by not providing consumers with all information in TransUnion's files upon request, and by not providing consumers with a summary of their rights with each disclosure of their file. Pet. at 9-11.

The class includes persons who never had their credit reports shared with any third party, who were only sent an allegedly incomplete disclosure that they might not have read, and who would not have suffered unique injuries like those of the class representative. The jury awarded more than $60 million to the class in statutory and punitive damages. The Ninth Circuit Court of Appeals held that every class member had an Article III injury-in-fact because TransUnion's credit files allegedly contained inaccurate information that was available to potential creditors and employers, even if not disseminated to these third parties. This was sufficient to demonstrate a "material risk of harm" to concrete interests. The Court of Appeals also held that the mailings sent to the class members were inherently confusing and that concrete injury could be assumed. Pet. at 21-22.

TransUnion argues that the Ninth Circuit's decision is contrary to the holding in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), that a "bare procedural violation" of a statute, without any concrete harm, does not satisfy the injury-in-fact requirement of Article III. Pet. at 18-19. TransUnion asserts that whether any class member suffered injury is mere conjecture. In addition to a lack of standing, TransUnion argues that the class representative could not satisfy the typicality requirement for class certification given the uniqueness of his experiences and injuries. Pet. at 25-26.

In *Goldman Sachs Group, Inc. et al., v. Arkansas Teacher Retirement System, et al.,* No. 20-222, the Court will consider whether a defendant in a securities class action, at the class certification stage, may rebut the presumption of classwide reliance recognized in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), by presenting evidence of the generic nature of the alleged misstatements in asserting that the statements had no impact on the price of the security, even though that evidence is also relevant to the merits element of materiality. The presumption is based on the "fraud on the market" theory, whereby a court may presume that investors relied on a company's material misrepresentation in making purchasing or selling decisions regarding a security. This theory, which creates a "rebuttable presumption" of classwide reliance, is used by plaintiffs to attempt to satisfy the predominance requirement of certification. Pet. at 7-8.

Defendants are The Goldman Sachs Group, Inc. and three former executives. The plaintiffs, Goldman Sachs shareholders, claim that Goldman Sachs made material misrepresentations regarding Goldman Sachs' risks of conflicts of interest. In opposing class certification, and to rebut the *Basic Inc.* presumption of classwide reliance, Goldman Sachs argued that the alleged misrepresentations were generic, aspirational statements that had no price impact. The Second Circuit Court of Appeals refused to consider this evidence at the class certification stage, reasoning that whether statements are too general to have an impact on price does not relate to whether common questions predominate because the issue of materiality is common to all class members. In addition, the Court of Appeals believed this this would be an improper inquiry into the merits. Pet. at 13-14.

Goldman Sachs asserts that the Second Circuit's opinion is contrary to the Supreme Court's securities class action opinion in *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), which established that a defendant is permitted to rebut the *Basic* presumption of reliance at the class certification stage, even if the proffered evidence is also relevant to a substantive element of the claim. Goldman Sachs also argues that the decision cannot be reconciled with the Supreme Court's direction in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) and *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). Specifically, courts at the class certification stage are to conduct a "rigorous analysis" as to whether Rule 23 is satisfied, *Wal-Mart Stores, Inc*. 564 U.S. at 351, "even when that requires inquiry into the merits of the claim." *Comcast Corp.*, 569 U.S. at 35. Pet. at 3, 18-19.

The Court also will decide whether a defendant seeking to rebut this presumption of classwide reliance has the burden of persuasion, or just a burden of production.

It is anticipated that a decision will be issued in these cases by June of this year.