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## Scrutinize Standing

# Beware Jurisdictional Challenges in Class Actions

By Britta Stamps Todd

**P**arties to a class action may be tempted to ignore complicated jurisdictional arguments in their haste to settle a case, and district courts often coast past jurisdictional issues when approving settlements. Objectors, however, have recently found great success raising jurisdictional arguments on appeal. Despite all the possible jurisdictional arguments that defendants can raise in many class actions, they rarely raise these issues. Yet, even if defendants strategically want to settle a case early without fully litigating such issues, they should beware of objectors who can wreak havoc on the settlement process by raising standing, ripeness, or mootness arguments.

Most recently, the Eleventh Circuit re-examined Article III standing to bring a class action alleging a statutory violation and applied the reasoning from *Spokeo* to reverse a district court's approval of a class settlement resolving claims for violations of the Fair and Accurate Credit Transactions Act (FACTA). *Muransky*

*v. Godiva Chocolatier, Inc.*, No. 16-16486 & 16-16783, 2020 WL 6305084 (11th Cir. Oct. 28, 2020) (citing *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016)). After *Spokeo*, a plaintiff can establish an injury in fact by demonstrating that the statutory violation created a “risk of real harm.” *Id.* at \*7 (quoting *Spokeo*, 136 S.Ct. at 1549). Such a risk must be “material,” which the Eleventh Circuit recognized as a “high standard.” *Id.*

But does the violation of a statute, such as printing too many digits of a credit card number on a receipt in violation of FACTA, create a material risk of real harm? This determination boils down to two key questions. First, did the violation itself cause harm, whether tangible or intangible, to the plaintiff? If so, that is sufficient to create standing. If not, courts should ask the second question: did the violation pose a material risk of harm to the plaintiff? If not, the plaintiff does not have standing. *See id.* at \*8.

Summarizing the key holding from *Spokeo*, the Eleventh Circuit concluded that “a ‘bare procedural violation, divorced from any concrete harm’ is not enough to establish an Article III injury.” *Id.* (quoting *Spokeo*, 136 S.Ct. at 1549). “[S]ome statutory violations, by their very nature, will be coextensive with the harm that Congress was trying to prevent.” *Id.* at \*9. As applied to FACTA, the class representative’s “naked assertion” that he “and members of the class continue to be exposed to an elevated risk of identity theft” does not satisfy the concreteness requirement. *Id.* at \*12. Many other allegations of statutory violations would likewise fall under this umbrella. The fact that Congress created a statute to protect against a harm does not automatically equate a violation of that statute to a substantial risk. If no material risk of harm caused by the statutory violation is shown, the class representative lacks standing. District courts are “powerless to approve a proposed class settlement” if “no named plaintiff has standing.” *Id.* at \*13 (quoting *Frank v. Gaos*, 139 S.Ct. 1041, 1046 (2019)).

Turning to the jurisdictional doctrine of mootness, the Ninth Circuit recently held that the class claims in *Brady v. AutoZone Stores, Inc.* were moot after the class representative voluntarily settled his individual claims without reserving a financial stake in the unresolved class claims. 960 F.3d 1172 (9th Cir. 2020). The class representative in *Brady* brought a putative class action against his employer for alleged violations of the state’s meal break laws. *Id.* at 1173. After the district court denied his motion for class certification, the class representative settled his individual claims with the defendant. *Id.* The resulting settlement agreement resolved the class representative’s “claims to costs or attorneys’ fees” and specified that the agreement was “not intended to settle or resolve [plaintiff’s] Class Claims.” *Id.* But the agreement lacked any provision entitling the named plaintiff to any financial reward if the unresolved class claims were ultimately successful. *Id.*

To determine whether the ensuing appeal was moot, the Ninth Circuit looked to *Campion v. Old Republic Prot. Co.*, which provides that “[t]he test for whether an appeal is moot after the putative class representative voluntarily settles his individual claims is whether the class representative retains a personal stake in the case.” 775 F.3d 1144, 1146 (9th Cir. 2014). The class represen-

Objectors seeking to hamstring a class action settlement have recently found traction with jurisdictional arguments.



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tative's personal stake must be both "concrete" and "financial." *Brady*, 960 F.3d at 1173. What exactly is a concrete and financial personal stake? The devil is in the details, and this determination turns on what the precise language of the settlement provides. It is not enough to specify, as the class representative did here, that the settlement did not resolve the class claims. *Id.* at 1174. The settlement agreement must actually specify that the class representative retains a financial stake in the class claims to maintain a live case or controversy. *Id.* And a vague argument that the class representative will be liable for attorneys' fees does not rise to the level of a "concrete" personal stake. *Id.* When crafting a settlement agreement with a class representative, then, defendants should pay careful attention to language about whether the agreement is intended to settle or resolve class claims or merely individual

claims, and whether the class representative retains a concrete or financial personal interest in the case. Without an ongoing, concrete, financial stake in the outcome of the class claims, the voluntary settlement of the class representative's claims renders class claims moot. *Id.* at 1175.

While much ink has been spilled litigating issues of commonality, typicality, predominance, and the like, the true "make or break" issues often lie in jurisdictional arguments. The Ninth and Eleventh Circuits are not alone in handing down recent decisions, striking class action determinations based on jurisdictional issues. So, before defendants rush to settle a case in an attempt to save legal fees, they would be wise to scrutinize any potential jurisdictional issues that an objector could raise at a final approval hearing or on appeal. 