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Class Action Defense Strategies In The Eastern District Of Virginia's "Rocket Docket"

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Commentary

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I. Introduction

Colloquially known as the "Rocket Docket," the Eastern District of Virginia ("EDVA") has been the speediest federal court for civil trials since 2008, according to the annual data compiled by the Administrative Office of the United States Courts.[1] In the twelve-month period ending in March 2019, the EDVA (which includes courts in Alexandria, Newport News, Norfolk, and Richmond) handled 2,359 civil cases, averaging 13.4 months from filing to disposition for cases that terminated after reaching trial (rather than before or during pretrial).[2] In comparison, the neighboring District of Maryland and the Western District of Virginia averaged 30.1 and 20.8 months, respectively, for civil cases terminating in or during trial. Nationally, the slowest federal districts averaged 52.8 and 72.9 months from filing to disposition for civil cases that terminated after reaching trial.[3]

Media coverage of the EDVA inevitably highlights the speed at which civil cases go to trial.[4] Less publicized is the fact that the district also remains popular for class action lawsuits, no doubt in part because of the speed with which the district disposes of its cases. Attorneys seeking to file in the EDVA would benefit from paying close attention to where the Fourth Circuit stands on various issues surrounding class certification. This article surveys the current stance of the Fourth Circuit with regard to several questions that are central to strategizing class certification arguments: class representative and class member standing; ascertainability and typicality; the determination of statutory damages; and the application of the U.S. Supreme Court's decision in *Bristol-Myers Squibb* to class action suits.

II. An Overview of Two Standing Issues in Class Actions

Class Representative Standing After *Spokeo*

Class action plaintiffs benefit from federal statutes (such as the Fair Credit Reporting Act, "FCRA")[5] that provide statutory damages as an alternative to actual damages. Statutory damages relieve the plaintiff of the burden of proving any actual damages, which would entail a more fact-intensive and costly inquiry. By avoiding discussion of actual damages, however, plaintiffs may create problems with the threshold question of constitutional standing. As in any other context, courts may only hear cases if the plaintiff can assert a case or controversy such that Article III of the Constitution is satisfied. In the context of a class action claim, the

named plaintiff – if not every member of the putative class – must be able to satisfy standing.[6] The question in class actions when the plaintiff does not intend to demonstrate actual harm becomes: May a plaintiff satisfactorily demonstrate injury-in-fact by claiming only that the defendant violated a statutorily-determined right? For example, if a plaintiff alleges that a consumer reporting agency willfully failed to "follow reasonable procedures to assure maximum possible accuracy of consumer reports" as required under the FCRA, but can demonstrate no actual, real-world harm, has he or she satisfactorily demonstrated injury-in-fact? In *Spokeo, Inc. v. Robins*[7] the U.S. Supreme Court said otherwise: a plaintiff may not rely on a statutorily granted right absent a demonstration of "de facto" real world harm.[8]

Prior to *Spokeo*, courts reasoned that a defendant's violation of a statute such as the FCRA[9] that provided for statutory damages without proof of concrete injury was sufficient to satisfy the injury-in-fact element of standing. In fact, the Ninth Circuit followed precisely that approach in its assessment of the *Spokeo* case, concluding that plaintiff Robins' allegation of a violation of his statutory rights, combined with his personal interest in the handling of his credit information, constituted an injury-in-fact.[10] The Supreme Court, however, held that the Ninth Circuit's analysis was incomplete because it "elided" the injury-in-fact inquiry and failed to address the concreteness of Robins' injury, as opposed to its particularity. Justice Alito's majority opinion instead determined that an assertion of a procedural violation, if "divorced from any concrete harm," would not be a sufficient pleading to satisfy injury-in-fact.[11]

Although the Court did not rule on whether Robins' allegations constituted an injury-in-fact and instead remanded the case to the Ninth Circuit for further consideration (after which the case settled privately), the implications of the case are clear. Plaintiffs may no longer satisfy Article III standing by alleging a statutory violation without also showing some kind of concrete (*i.e.*, "de facto") harm or injury. Instead, courts need to consider "whether the particular procedural violations alleged in [each] case entail a degree of risk sufficient to meet the concreteness requirement."[12]

Still, because the Supreme Court did not rule directly on whether a plaintiff might have standing based only on a technical statutory violation, lower courts remained free to adopt a relatively broad reading of *Spokeo*. Rather than reading *Spokeo* as restricting the injury-in-fact inquiry to "real" harms, the judges of the EDVA have focused on the two principles Justice Alito put forward as guidance in determining whether the alleged violation constituted a sufficiently tangible injury. As Justice Alito put it, both "history and the judgment of Congress play important roles" in that determination.[13] Thus, a plaintiff may be able to demonstrate injury-in-fact, even for a intangible, technical violation of a statute, if either 1) the statute in question was strengthening or replacing a right found in common law,[14] or 2) Congress, in enacting the statute, intended to protect against the kind of harm the plaintiff alleges.[15]

The EDVA (and many others) originally interpreted these principles liberally to encompass most, if not all, of the statutory violations that came before them. For example, in *Thomas v. FTS USA, LLC*[16] Judge Payne of the Richmond Division concluded that a plaintiff's allegation that an employer failed to provide disclosure and obtain written consent before obtaining a consumer report constituted a substantive, not merely a technical or procedural, violation. Thus, the allegation was a concrete and particularized injury for the purposes of standing.[17] Judge Payne reasoned that certain types of acts may cause harm in and of themselves, so courts must carefully consider the factual context before declining to hear cases alleging only an invasion of statutorily-created rights.[18] Because plaintiff Thomas claimed that he was denied the right to specific information due to him under the FCRA, he had alleged a concrete *informational* injury. Such an injury was sufficient to demonstrate standing because it involved an invasion of the plaintiff's privacy, a common law right.[19] Judge Payne concluded: "*Spokeo* did not change the basic requirements of standing."[20] Other decisions out of the EDVA followed the same interpretation, declining to dismiss for lack of standing when plaintiffs alleged any sort of invasion of their right of privacy, even if that right stemmed from technical statutory provisions in the FCRA.[21]

Recently, two decisions from the Fourth Circuit have further defined the boundaries of Justice Alito's guiding principles. In 2017, the Fourth Circuit decided *Dreher v. Experian Information Solutions, Inc*[22] where the plaintiff asserted various claims under the FCRA, alleging that defendant Experian caused him an informational injury by denying him access to specific information to which he was entitled under the statute.

Dreher alleged that Experian failed to inform him that the holder of one particular credit line (which was fraudulently opened in his name) had changed. Failure to truthfully disclose the sources of credit information was held to be a violation of the FCRA (which "states that a consumer agency 'shall, upon request . . . clearly and accurately disclose to the consumer . . . the sources of the information [in the consumer's file at the time of the request.]'").[23] Judge Thacker's opinion reiterated the major points of *Spokeo* in finding that plaintiff Dreher had failed to demonstrate a concrete injury. While intangible injuries including informational injuries may constitute an injury-in-fact for standing purposes, "a statutory violation *alone* does not create a concrete informational injury sufficient to support standing."[24] Turning to the first of Justice Alito's guiding principles, Judge Thacker found no common law analogue to Dreher's claim.[25] As to the second principle, Judge Thacker found persuasive a case from the D.C. Circuit finding "a plaintiff suffers a concrete informational injury where he is denied access to information required to be disclosed by statute, *and* he suffers, by being denied access to that information, the type of harm *Congress sought to prevent* by requiring disclosure."[26] Because Dreher alleged merely "a statutory violation divorced from any real world effect,"[27] he lacked standing, and the case was remanded with orders to dismiss on jurisdictional grounds.

Following *Dreher*, the landscape in the Fourth Circuit changed with regard to interpretations of *Spokeo*. In *Gathers v. CAB Collection*,[28] for example, Judge Hudson of the Richmond Division quoted Justice Alito's language to the effect that "the violation of a procedural right granted by statute may be sufficient to satisfy concreteness."[29] Yet, Judge Hudson characterized this as a "narrow exception[,] where Congress has codified a common law intangible injury."[30] Given that interpretation, the plaintiff's allegation that the defendant violated a provision of the FDCPA when it failed to list her account as "disputed by consumer" does not represent "actual harm."[31] As in *Dreher*, there was no common law analogue for the right alleged to have been violated. The plaintiff also failed to allege that the harm she suffered was of the type that Congress intended to prevent by enacting the statute.[32] "Therefore, the Court must conclude that Plaintiff's injury is not an intangible harm sufficient to confer standing under either *Spokeo* or *Dreher*."[33] Other cases followed essentially the same approach. The judges of the Rocket Docket seem well aware of the effect *Dreher* has over questions of standing for class action suits. For example, *Clark v. Trans Union LLC.*,[34] which was decided at the district-court level prior to *Dreher*, was appealed post-*Dreher* with a specific focus on *Dreher*'s application.[35]

The plaintiff in *Dreher*, however, did not assert an invasion of privacy, which was the common law analogue driving several of the cases decided in the EDVA between *Spokeo* and *Dreher*. Dreher did not allege lack of disclosure or failure to obtain consent before running a consumer report. Rather, his claim was based on the allegation that defendant Experian failed to disclose the true holder of credit in a credit report. His claim thus involved a more technical violation of the statute.[36] As Judge Thacker noted, "it would be an end-run around the qualifications for constitutional standing if any nebulous frustration resulting from a statutory violation would suffice as an informational injury."[37] And although Dreher suffered an informational injury by being denied information due to him under the statute, he did not suffer "the type of harm Congress sought to prevent by requiring disclosure."[38] If he had, Judge Thacker may well have found standing. The boundaries of Justice Alito's second *Spokeo* principle were still undetermined.

Recently, however, that second principle has taken shape in the Fourth Circuit. In *Curtis v. Propel Property Tax Funding, LLC*[39] plaintiff Curtis brought a proposed class action alleging various violations of the Truth in Lending Act ("TILA") and the Electronic Funds Transfer Act ("EFTA"). The alleged violations included the forced preauthorization of electronic fund transfers ("EFTs") from his account as a precondition of entering into a Virginia Tax Payment Agreement ("TPA") with the defendant. The district court allowed the suit to proceed, determining that "making the TPA contingent on Curtis agreeing to preauthorized EFTs was *exactly the type of harm that Congress sought to prevent* when it enacted the EFTA."[40] On appeal, Judge Duncan agreed and affirmed, writing that "the harm [Curtis] alleges is not a 'bare procedural violation,' but instead is a substantive violation of the rights conferred by EFTA."[41]

In the Fourth Circuit, *Dreher* and *Curtis* represent the current boundaries of class representative standing for class action lawsuits based on purely statutory violations. Combined with *Spokeo*, these cases significantly

tighten the requirements for satisfying injury-in-fact. Plaintiffs must either demonstrate some kind of common law analogue for the alleged violation or show that the harm suffered was of the type Congress sought to prevent in enacting the statute. Class action plaintiffs thus may encounter increased difficulty demonstrating standing when relying primarily on allegations of statutory violations.

Circuit Split Regarding Class Member Standing

Whether all class members must also be able to demonstrate Article III standing is a separate issue, and one on which the Fourth Circuit has not yet taken a position. In the Second, Ninth, and Eight Circuits, all class members must demonstrate standing in order for a class to be certified.[42] On the other hand, the Seventh Circuit has suggested that "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied."[43]

The Fourth Circuit has not directly addressed or taken a position on this split. In *Beck v. McDonald*[44] the Fourth Circuit stated that "in a class action, we analyze standing based on the allegations of personal injury made by the named plaintiffs."[45] The court repeated this language in both *Dreher* and *Curtis*.[46] However, merely noting that the named plaintiff must have standing says little about whether all members must also demonstrate standing. In 2018, Judge Payne cited the Second Circuit (*Denney*) approvingly in denying class certification for failing to meet the predominance requirement.[47] Under this approach, any putative class will need to be prepared to demonstrate that all of its members have standing prior to certification.

III. Ascertainability and Typicality

To certify a class, plaintiffs must satisfy the listed elements of Fed. R. Civ. P. 23(a) while also showing that members of the proposed class are ascertainable. The Fourth Circuit directly addressed the requirements for ascertainability in *EQT Production Co. v. Adair*,[48] in which five putative classes brought suit against two producers of CBM (a natural gas) in Virginia. The Fourth Circuit vacated the lower court's decision to certify all five classes, noting that there is "an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'"[49] Under this standard, plaintiffs must demonstrate "objective criteria"[50] before a court may certify a class. "If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate."[51]

Though *EQT* clarifies that courts must consider ascertainability as part of their certification inquiry, the district courts are still debating what exactly "objective criteria" means for the purposes of ascertainability. To date, most district courts in the EDVA have found ascertainability to be satisfied as long as plaintiffs provide some kind of objective criteria, without regard for the administrative feasibility of identifying membership in the class.[52] Yet, at least three class certifications have been denied on the basis of administrative infeasibility or when the proposed criteria would result in "mini-trials."[53] Finally, Judge Payne has concluded that while the *EQT* precedent required some discussion of the ascertainability of the proposed class, "the number of steps in the process and the time and effort required have no bearing on whether the individuals are or are not objectively ascertainable."[54] Rather, any "time and effort" burden imposed by the determination of class membership is properly addressed under the superiority element of Fed. R. Civ. P. 23(b)(3).[55] Judge Payne concluded that "where a plaintiff proposes objective criteria capable of identifying those individuals described in the class definition, the ascertainability requirement is satisfied."[56]

Judge Payne's interpretation of the ascertainability requirement in *Soutter II*, above, followed a remand from the Fourth Circuit in *Soutter I*, denying class certification based on a lack of *typicality*.[57] In *Soutter I*, Judge Shedd found plaintiff Soutter's claims to be typical of other members of the proposed class only on an "unacceptably general level."[58] The court specified that "[w]hile Soutter's claim need not be perfectly identical to the claims of the class she seeks to represent, typicality is lacking where the variation in claims strikes at the heart of the respective causes of action."[59] To determine if a representative meets the typicality requirement, the Fourth Circuit reviewed the plaintiff's prima facie case and the evidence supporting it, then assessed "the extent to which those facts would also prove the claims of the absent class members."[60] Because there was a "substantial gap" between Soutter's proof and the proof of other class members, the typicality element was not met.[61]

However, as Judge Gregory's dissent pointed out, the opinion in *Soutter I* represents a relatively aggressive

approach to assessing the typicality requirement for class certification. Courts in most circuits tend to take a more permissive approach to the typicality inquiry, finding the element to be satisfied as long as there is a general similarity between the claims of the representative and those of other proposed members.[62] The Fourth Circuit's interest in the underlying evidence thus presents a more stringent standard for plaintiffs to meet in the EDVA.

IV. Determination of Statutory Damages

Another open question relates to the determination of the amount of statutory damages plaintiffs are due under various consumer protection statutes. Should the amount be determined by the amount of wrong done by the defendant, as plaintiffs' attorneys tend to argue? Or should the amount be determined based on the harm the plaintiffs actually experienced, as defendants would prefer? Likewise, to what extent do defendants have a due process right to determine actual damages even if the plaintiff abandons actual damages in favor of the much less burdensome statutory damages?

These questions remain unanswered for the time being, at least as far as Fourth Circuit precedent. The Fourth Circuit's decision in *Soutter I*, *supra*, only briefly mentions statutory damages, noting in passing that statutory damages "typically require an individualized inquiry."[63] Judge Shedd's majority opinion cited Judge Wilkinson's concurring opinion in *Stillmock v. Weis Markets, Inc.*,[64] which suggested that "because statutory damages are intended to address harms that are small or difficult to quantify, evidence about particular class members is highly relevant to a jury charged with this task."[65] Under this language, the determination of statutory damages would be somewhat defendant-friendly, requiring an individualized inquiry into each plaintiff's context and circumstances even if actual damages were impossible to identify and/or abandoned. A quick survey of decisions under one particular statutory damages provision, §1681n of the FCRA,[66] suggests that district courts are split on how to weigh the amount of damages within the given statutory range. In *Dreher*, *supra*, the court concluded that statutory damages should be calculated based on the "nature of the particular statutory violation in question,"[67] *i.e.* based on an assessment of the severity of the defendants' acts. While not a class action, in *Fasusi v. Wash. Motorcars, Inc.*[68] Judge Brinkema adopted a magistrate judge's recommendation of an award of $1000, the high end of the statutory range, based on a series of bad acts by the defendant. To date, the district courts thus have not been inclined to read *Soutter I* to require an inquiry into the plaintiff's harm, rather than the defendant's acts, when determining statutory damages within the given range.

V. Applying *Bristol-Myers Squibb* to Class Action Suits

A final consideration for anyone defending a class action in the EDVA involves the consequences of the U.S. Supreme Court's 2016 decision in *Bristol-Myers Squibb Co. v. Superior Court* ("*Bristol-Myers*"),[69] which limited a court's ability to assert specific jurisdiction over a defendant when only minimal or attenuated connections exist between the activities of the defendant in the forum state and the asserted claims.[70] In *Bristol-Myers*, the U.S. Supreme Court rejected the California Supreme Court's application of a "sliding-scale" approach to specific jurisdiction, under which "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim."[71] The California Supreme Court reasoned that because pharmaceutical company Bristol-Myers Squibb had significant, unrelated contacts with the forum state, the plaintiffs needed only to show a minimal connection between the activities of the defendant and the claims being asserted. Although the pharmaceutical company did not develop, market, manufacture, label, package, or work on the regulatory approval of the product alleged to be harmful in California,[72] under the "sliding-scale" approach California courts could still assert specific jurisdiction.[73] The U.S. Supreme Court disagreed, holding that personal jurisdiction requires "an affiliation between the forum and the underlying controversy," and "where there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State."[74]

Bristol-Myers was a mass tort action, not a class action suit, but its holding has implications for any class action in which plaintiffs attempt to bring suit against a defendant relying on specific, rather than general, jurisdiction. To date the Fourth Circuit has not analyzed the *Bristol-Myers* holding in a class action context. However, district courts within the EDVA have, so far, declined to apply the rationale of *Bristol-Myers* to class

action suits. In *Branch*, *supra*, Judge Payne hinted that an overly defendant-friendly reading of *Bristol-Myers* might be too "strained" to pass muster in his court.[75] In one case Judge Payne cited for this proposition, defendants attempted to argue that the court could not assert personal jurisdiction with regard to "all claims brought in a representative capacity of similarly-situated employees" outside of the forum state.[76] That court, in response, reminded them that "the inquiry for personal jurisdiction lies with the named parties of the suit asserting their various claims against the defendant, not the unnamed proposed class members."[77] Given Judge Payne's tacit approval of the court's response it seems unlikely that an argument against specific jurisdiction based on the *Bristol-Myers* holding would have much success in the EDVA.

In fact, in *Solomon v. American Web Loan*,[78] the defendants attempted to use the rationale of *Bristol-Myers* to dismiss claims brought by non-resident plaintiffs. Judge Morgan found that argument non-persuasive, in part because plaintiffs had raised allegations that the defendants had engaged in significant activities in the state. Judge Morgan also noted Judge Payne's earlier dicta in *Branch*, characterizing it as "raising doubts as to the applicability of [*Bristol-Myers*] to class actions."[79]

In the face of *Branch* and *Solomon*, contrary decisions from other district courts within the Fourth Circuit might not hold much persuasive value. None seem inclined to adapt the holding of *Bristol-Myers* to fit the idiosyncrasies of the class-action context. The Western District of Virginia, indeed, has rejected attempts to apply *Bristol-Myers* to class actions, pointing out that "this Court does not believe *Bristol-Myers Squibb* upended years of class action practice *sub silentio*."[80] Relying on that same language, the Southern District of West Virginia agreed that the differences between mass tort actions and class actions are significant enough that the *Bristol-Myers* holding would not translate.[81] The Eastern District of North Carolina noted that the applicability of *Bristol-Myers* to class actions "remains a subject of debate," but simultaneously found several "compelling reasons to conclude that the Court's holding [in *Bristol-Myers*] does not extend to such class actions."[82] To date, the District Court of Maryland has noted only that the impact of *Bristol-Myers* on "the exercise of personal jurisdiction by a federal court over federal law claims in a class action" remains unclear.[83]

VI. Conclusion

Those defending class actions in the EDVA should endeavor to challenge class standing premised on purely technical, statutory violations, with the caveat that alleged invasions of privacy or the type of harm Congress intended to prevent will likely be sufficient to satisfy a standing inquiry. In addition, the approach taken by the Second, Ninth, and Eighth Circuits with regard to class member standing may prove useful. While Fourth Circuit precedent on ascertainability leans in the direction of requiring only minimal assertions of administrative feasibility, the Circuit is more demanding than many other circuits with regard to the typicality requirement. Finally, while it seems unlikely that the limits on specific jurisdiction heralded by *Bristol-Myers* will have much, if any, effect on class actions, the question still remains technically unresolved in the Fourth Circuit and may be worth assessing as more district and appellate courts weigh in.

Endnotes

1. *See* UNITED STATES COURTS, *Caseload Statistics Data Tables* (last visited June 26, 2019), https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables.

2. Table C-5 at the above link, from which these numbers were pulled, reports the "median time intervals from filing to disposition of civil cases terminated, by district and method of disposition, during the 12-month period ending March 31, 2019."

3. D.D.C. and W.D.N.Y., respectively.

4. *See, e.g.*, Russell Berman, *Why Paul Manafort's Trial Is Going So Fast*, THE ATLANTIC (Aug. 9, 2018), https://www.theatlantic.com/politics/archive/2018/08/why-paul-manaforts-trial-is-going-so-fast/567137/; Jerry Markon, *A Double Dose of Molasses in the Rocket Docket*, WASH. POST Oct. 3, 2004, http://www.washingtonpost.com/wp-dyn/articles/A3007-2004Oct2.html; Carl Tobias, *The 'Rocket Docket' Is Down a Judge. It's Time to Fill the Vacancy*, WASH. POST Oct. 6, 2017, https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2017/10/06/the-rocket-docket-is-down-a-judge-its-time-to-fill-the-vacancy/.

5. 15 U.S.C. § 1681, *et seq.*

6. Whether other members of the class must also satisfy standing is currently subject to a circuit split and will be discussed *infra* Part II.B.

7. 136 S. Ct. 1540 (2016).

8. *See id.* at 1548 (citing various dictionaries) ("When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term – 'real,' and not 'abstract.'").

9. *See, e.g.*, the Fair Debt Collection Practices Act ("FDCPA"), the Telephone Consumer Protection Act, the Stored Communications Act, etc. Many cases discussed in this article arise under the FCRA, but the underlying principles of standing carry over to other statutes that provide statutory damages as an alternate to actual damages.

10. *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413 (9th Cir. 2014).

11. *See Spokeo*, 136 S.Ct. at 1549 ("Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation.").

12. *Spokeo*, 136 S.Ct. at 1550.

13. *Id.* at 1548.

14. *See id.* at 1549 ("Just as the common law permitted suit [in certain tort cases when harm was difficult to measure], the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact.").

15. *See id.* at 1549 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992)) ("Congress may elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.").

16. 193 F. Supp. 3d 623 (E.D. Va. 2016).

17. *Id.* at 632.

18. *Id.* at 631.

19. *Id.* at 636 n. 7. Judge Payne clarified that while Thomas was denied employment based on his consumer report, he and other plaintiffs in the class "need not show that their failure to obtain employment was directly traceable to Defendants' failure to comply with the FCRA, because the other concrete and particularized injuries discussed herein are sufficient to confer standing." *Id.* at 638 n. 9.

20. *Id.* at 631.

21. *See, e.g.*, *Witt v. Corelogic Saferent, LLC*, No. 3:15-cv-386, 2016 U.S. Dist. LEXIS 110662, 2016 WL 4424955 (E.D. Va. Aug. 18, 2016) [Richmond] (declining to dismiss for lack of standing when plaintiffs alleged the sale of personal information in background checks); *Burke v. Fed. Nat'l Mortgage Ass'n*, No. 3:16cv153-HEH, 2016 U.S. Dist. LEXIS 105103, 2016 WL 4249496 (E.D. Va. Aug. 9, 2016) [Richmond]; *Green v. Rentgrow, Inc.*, No. 2:16cv421, 2016 U.S. Dist. LEXIS 166229, 2016 WL 7018564 (E.D. Va. Nov. 10, 2016) [Norfolk]; *Biber v. Pioneer Credit Recovery, Inc.*, 229 F. Supp. 3d 457 (E.D. Va. 2017) [Alexandria] (FDCPA claim alleging misleading letters sent by debt collector were not merely procedural violations because a debt collector's failure to provide accurate information infringes on a Congressionally mandated right and detrimentally affects debtor's decisions).

22. 856 F.3d 337 (4th Cir. 2017). The court had previously stayed the case (which was decided in the district court in 2014) to be considered once the Supreme Court handed down *Spokeo*. *Dreher v. Experian Info Solutions*, 71 F. Supp. 3d 572 (E.D. Va. 2014).

23. *Dreher*, 856 F.3d at 344-45 (alterations in original) (citing 15 U.S.C. § 1681(g)(a)(2)).

24. *Dreher*, 856 F.3d at 345 (emphasis in original).

25. *See id.* at 345 ("Dreher does not propose a common law analogue for his alleged FCRA injury, and we find no traditional right of action that is comparable.").

26. *Id.* at 345 (emphasis in original) (citing Friends of Animals v. Jewell, 828 F.3d 989, 992 (D.C. Cir. 2016)).

27. *Id.* at 346.

28. No. 3:17cv261, 2017 U.S. Dist. LEXIS 96908, 2017 WL 2703686 (E. D. Va. June 22, 2017).

29. *Id.* at *3 (citing *Spokeo*, 136 S. Ct. at 1549).

30. *Id.*

31. Id. at *3.

32. *Id.* at *4.

33. *Id.*

34. No. 3:15cv391, 2017 U.S. Dist. LEXIS 29738, 2017 WL 814252 (E.D. Va. Mar. 1, 2017).

35. *See* Appellant's Brief at *2, *Clark v. Trans Union, LLC*, 2017 WL 6462675 (4th Cir. 2017) (No. 17-2208).

36. Under the facts of the case, Experian allowed an intermediary to service customer accounts following the dissolution of the original account holder. The intermediary used the same name as the defunct servicer in part to avoid confusion on the part of the debtors.

37. *Dreher*, 856 F.3d at 346.

38. *Dreher*, 856 F.3d at 345 (citation omitted, emphasis in original).

39. 915 F.3d 234 (4th Cir. 2019).

40. *Id.* at 239 (emphasis added) (citing Curtis v. Propel Prop. Tax Funding, LLC., 265 F. Supp. 3d 647, 652 (E.D. Va. 2017)).

41. *Curtis*, 915 F.3d at 241, citing *Spokeo*, 136 S. Ct. at 1549.

42. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing. . . . The class must therefore be defined in such a way that anyone within it would have standing."); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2011) (same, citing *Denney*); *Halvorsen v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) ("In order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision.").

43. *Kohen v. Pacific Inv. Mgmt. Co., LLC*, 571 F.3d 672, 676 (7th Cir. 2009).

44. 848 F.3d 262 (4th Cir. 2017).

45. *Id.* at 269.

46. *See Dreher*, 856 F.3d at 343; *Curtis*, 915 F.3d at 240 ("In a class action case, we look to the standing of the named plaintiff.").

47. *Branch v. Gov't Emps. Ins. Co.*, 323 F.R.D. 539, 552 (E.D. Va. 2018). Judge Payne also reads *Kohen*, *supra*, to reach the same conclusion as the majority rule.

48. 764 F.3d 347 (4th Cir. 2014).

49. *Id.* at 358 (citing *Hammond v. Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972)).

50. *Id.*

51. *Id.*, citing *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-94 (3d Cir. 2012).

52. *See, e.g.*, *Bell v. Westrock CP, LLC*, No. 3:17-cv-829, 2019 U.S. Dist. LEXIS 71209 *15 (E.D. Va. Apr. 26, 2019) (concluding that specification that class members included all property owners within a half mile radius from a given point was a "clear boundary" separating class members from non-members and would not require a "multi-step process," thereby satisfying the ascertainability inquiry); *Branch*, 323 F.R.D. at, 546 (background reports easily filterable by relevant criteria sufficient to ascertain class); *Thomas*, 312 F.R.D. at 416 (records that allow class members to be identified "without difficulty" sufficient to satisfy ascertainability); *Manuel v. Wells Fargo Bank, N.A.*, No. 3:14CV238, 2015 U.S. Dist. LEXIS 109780 *22 (E.D. Va. Aug. 9, 2015) (finding criteria for searching "detailed employment and application records" sufficient to satisfy ascertainability); *Droste v.*

Vert Capital Corp., No. 3-14-cv-467, 2015 U.S. Dist. LEXIS 43849 *11 (E.D. Va. Apr. 2, 2015) (acknowledging ascertainability of class members who were previous employees through existing business records); *Milbourne v. JRK Residential Am., LLC*, No. 3:12cv861, 2014 U.S. Dist. LEXIS 155288 *11 (E.D. Va. Oct. 31, 2014) (class members readily ascertainable when an employment records search provided a full list of potential members, relevant dates and related documents).

53. *See Henderson v. Trans Union LLC*, No. 3:14-cv-00679-JAG, 2016 U.S. Dist. LEXIS 59198 *17 (E.D. Va., May 3, 2016) (limiting potential class members to avoid "mini-trials" that would defeat the ascertainability requirement); *Plotnick v. Computer Scis. Corp. Deferred Comp. Plan*, 182 F. Supp. 3d 573, 586 (E.D. Va. 2016) (focusing on whether class membership is "administratively feasible" and declining to certify a class when the identification of those harmed by a deferred compensation plan amendment "can change on a daily basis" and "there is no feasible means of predicting how participant accounts will perform in the future."); *Dykes v. Portfolio Recovery Assocs., LLC*, 1:15cv110 (JCC/MSN), 2016 U.S. Dist. LEXIS 10308 *15 (E.D. Va. Jan. 28, 2016) (finding "fatal deficiencies with respect to ascertainability" when the procedure described for identifying members of proposed class would involve "a detailed review and analysis of the individual context of each of the 3,330 recipients' accounts" that would be too closely akin to "mini-trials").

54. *Soutter v. Equifax Info. Servs., LLC* ("*Soutter II*"), 307 F.R.D. 183, 197 (E.D. Va. 2015).

55. FED. R. CIV. P. 23(a)(3) ("[T]he claims or defenses of the class representative are typical of the claims or defenses of the class.").

56. *Soutter II*, 307 F.R.D. at 199.

57. *Soutter v. Equifax Info. Servs., LLC* ("*Soutter I*"), 498 Fed. App'x 260 (4th Cir. 2012).

58. *Id.* at 265.

59. *Id.* (citation omitted).

60. *Id.* (citation omitted).

61. *Id.* at 266 (citation omitted).

62. *See, e.g.*, *Postawko v. Missouri Dep't of Corr.*, 910 F.3d 1030, 1039 (8th Cir. 2018) ("Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory."); *In re Schering Plough Corp. ERISA Litigation*, 589 F.3d 585, 599 (3d Cir. 2009) ("the claims of the class representative must be generally the same as those of the class in terms of both (a) the legal theory advanced and (b) the factual circumstances underlying that theory."); *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) ("representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical.").

63. Soutter v. Equifax Info. Servs., LLC, 498 F. App'x. 260, 265 (4th Cir. 2012).

64. 385 F. App'x 267 (4th Cir. 2010).

65. *Id.* at 277 (Wilkinson, J., concurring).

66. *See* 15 U.S.C. § 1681n(a)(1)(A) ("Any person who willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable in that consumer in an amount equal to . . . any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1000.").

67. Dreher v. Experian Info. Sols., Inc., Case No. 3:11-cv-00624-JAG, 2014 U.S. Dist. LEXIS 85951 (E.D. Va. June 19, 2014), at *5.

68. Civil Action No. 1:17cv0812 (LMB/JFA), 2018 U.S. Dist. LEXIS 174060 (E.D. Va. Aug. 31, 2018), at *17.

69. 137 S. Ct. 1773 (2016).

70. *See id.* at 1784 (Sotomayor, J., dissenting) (characterizing the majority's opinion as a "contraction of specific jurisdiction" in holding "that a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court by a group of injured people unless all of those people were injured in the forum State").

71. *BMS*, 137 S. Ct. at 1778, citing 377 P.3d 874, 889 (Cal. 2016).

72. *BMS*, 137 S. Ct. at 1778.

73. *See id.* at 1779, citing 377 P.3d at 889 ("Applying this test, the majority concluded that Bristol-Myer Squibb's extensive contacts with California permitted the exercise of specific jurisdiction based on a less direct connection between Bristol-Myers Squibb's forum activities and plaintiff's claims than might otherwise be required.").

74. *Id.* at 1781 (citation omitted).

75. *Branch*, 323 F.R.D. 539, 553 n. 10 (E.D. Va. 2018) (citations omitted) ("It is not necessary to consider [defendant]'s rather unique argument about personal jurisdiction, which is based on a rather strained reading of [Bristol-Myers Squibb] that has been soundly rejected by other courts.").

76. *Day v. Air Methods Corp.*, Civil Action No. 5: 17-183-DCR, 2017 U.S. Dist. LEXIS 174693, at*5-*6 (E.D. Ky. Oct. 23, 2017).

77. *Id.* at *6.

78. Civil Action No. 4:17cv145, 2019 U.S. Dist. LEXIS 48420 (E.D. Va. Mar. 22, 2019), at *55.

79. *Id.* at *56.

80. Morgan v. U.S. Xpress, Inc., CASE NO. 3:17-cv-00085, 2018 U.S. Dist. LEXIS 125001 (W.D. Va. July 25, 2018), at *9.

81. Ross v. Huron Law Group W. Va., PLLC, CIVIL ACTION No. 3:18-0036, 2019 U.S. Dist. LEXIS 24023 (S.D. W. Va. Feb. 14, 2019), at *8.

82. Hicks v. Houston Baptist Univ., NO. 5:17-CV-629-FL, 2019 U.S. Dist. LEXIS 664 (E.D.N.C. Jan. 3, 2019), at *16.

83. Weisheit v. Rosenberg & Assocs., LLC., CIVIL NO. JKB-17-0823, 2018 U.S. Dist. LEXIS 69303 (D. Md. Apr. 25, 2018), at *15. ■

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