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SECOND CIRCUIT REVIEW

Expert Analysis

Court Clarifies Certification Analysis For Out-of-State Class Members

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When it comes to class action certification, named plaintiffs suing on behalf of out-of-state class members face numerous challenges. But after last month's Second Circuit decision, by Judges John M. Walker Jr., Gerard Lynch and Denny Chin, in *Langan* v. *Johnson & Johnson*, No. 17-1605, 2018 WL 3542624 (2d Cir. 2018), having standing to sue on behalf of unnamed class members with out-of-state claims is no longer one of them.

For several years now, district courts in the Second Circuit have split on whether named plaintiffs must establish Article III standing for out-of-state claims asserted by nonparty class members from different states. To clear up the confusion, the Second Circuit has now "made explicit" what it had implied in prior cases: for purposes of class action certification, named plaintiffs only need standing for their *own* claims.

An Attempt to Resolve The Debate

There has been considerable disagreement about whether Article III impacts plaintiffs seeking class certification for claims brought on behalf of out-of-state, nonparty class members. *In re Foodservices Inc. Pricing Litigation*, 729 F.3d 108 (2d Cir. 2013). The Second Circuit previously attempted to clarify, albeit implicitly, that Federal Rule of Civil Procedure Rule 23(b)(3)'s predominance test—i.e., whether questions of law or fact are common among class members and predominate over any individual issue—is the proper analysis for these certification issues, not Article III standing.

In *Foodservices*, the Second Circuit granted an interlocutory appeal challenging a nationwide class certification of claims under the Racketeer Influenced and Corrupt Organization Act (RICO) and, as relevant here, breach of contract. After concluding that the district court properly certified the class under RICO, the Second Circuit turned to the

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breach of contract claims, which "implicate[d] the laws of many jurisdictions." *Id.* at 112.

The court first explained that "putative class actions involving the laws of multiple states are often not properly certified *pursuant to Rule 23(b)(3)*," because of the variations of legal issues related to those laws. *Id.* at 126 (emphasis added). The court nevertheless observed that these concerns are lessened when state laws do not materially vary. As such, the court explained, the proper inquiry for class certification is whether the laws of multiple jurisdictions differ materially, not whether those laws are merely implicated. Finding that the multistate claims' commonalities predominated, the Second Circuit affirmed the district court's grant of class certification. Notably, the court never addressed whether the named plaintiffs had standing to bring claims on behalf of out-of-state, nonparty class members.

District Courts Split

If the Second Circuit believed it had clarified in *Foodservices* that Article III standing has no bearing on plaintiffs seeking class certification for nonparty class members' out-of-state claims, that clarification was lost on the district courts. In the years that followed, several district courts came to the opposite conclusion.

Consider, for example, *Richards* v. *Direct Energy Services*, 120 F. Supp. 3d 148 (D. Conn. 2015). There, the district court dismissed plaintiff's claims for injuries suffered by potential class members in Massachusetts. Because plaintiff had only alleged personal injuries in Connecticut and not in Massachusetts, the court reasoned that plaintiff's claims turned on whether some unnamed parties in Massachusetts suffered harm. Plaintiff accordingly lacked standing to bring his Massachusetts claims, and his intent to seek class certification did not relieve his burden to establish it. The district court in *In re HSBC Bank, USA, N.A., Debit Card Overdraft Fee Litigation*, 1 F. Supp. 3d 34 (E.D.N.Y. 2014) similarly explained that "Article III standing is generally a prerequisite to class certification." *Id.* at 49. It, in turn, also concluded that plaintiffs, in bringing a consolidated putative class action, lacked standing to bring claims under state laws to which they were not personally subjected.

These conclusions starkly contrasted with other district court decisions issued prior to *Foodservices*. The court in *In re Bayer Corp. Combination Aspirin Products Marketing and Sales Practices Litigation*, 701 F. Supp. 2d 356 (E.D.N.Y. 2010), for example, explained that the issue of standing should not "be conflated with Rule 23 class action requirements." *Id.* at 376. It thus rejected any standing issues related to nonparty class members' out-of-state claims. As the court put it, whether named plaintiffs had standing to bring suit in each state was "immaterial" because plaintiffs did not *personally* bring those nonparties' claims in a multistate class action. Likewise, the court in *In re Grand Theft Auto Video Game Consumer Litigation (No. II)*, 2006 WL 3039993 (S.D.N.Y. Oct. 25, 2006), found that it was better to "treat class certification as logically antecedent to standing where class certification is the source of potential standing problems." *Id.* at *2.

The 'Langan' Opinion

With the district courts split on standing, the Second Circuit in *Langan* provided much-needed clarification. *Langan* concerned a class action lawsuit against Johnson & Johnson for deceptively labeling its baby bath and wash products as "natural." Seeking damages on behalf of herself and "all others similarly situated," plaintiff

alleged that defendant violated the Connecticut Unfair Trade Practice Act, as well as the consumer protection laws of 20 other states. The case reached the Second Circuit after defendant appealed the district court's order certifying plaintiff's class. On appeal, defendant argued that: (i) plaintiff lacked standing to bring a class action on behalf of out-of-state consumers, and (ii) the district court erroneously concluded that the state laws at issue were sufficiently similar to support certification.

The only real standing-related dispute was whether plaintiff had "standing to bring a class action on behalf of unnamed, yet-to-be-identified class members from other states under those states' consumer protection laws." *Langan*, 2018 WL 3542624, at *3. Accordingly, the court took the opportunity to "make explicit what [it] previously assumed in" *Foodservices*: if a named plaintiff has standing to bring its claims against a named defendant, any issue about whether plaintiff's *class* could include unnamed members' out-of-state claims is a question for Rule 23(b)(3) predominance, not Article III standing. *Id.*

To reach this conclusion, the Second Circuit emphasized that class actions are an exception to the general rule that one person cannot litigate injuries on behalf of another. Indeed, by their very nature, class actions permit named plaintiffs to bring claims on behalf of other class members even if they had not personally suffered the class members' specific injuries. The court reasoned that it would make little sense to dismiss out-of-state claims belonging to unnamed class members on standing grounds if no equivalent standing requirement existed for named plaintiffs to bring claims on behalf of class members in the first place. Thus, if any doubt remained about the relevance of Article III standing to this inquiry, the Second Circuit soundly put the notion to bed.

Plaintiffs must nevertheless be prepared to satisfy the other significant class certification requirements if their class-wide claims extend across multiple states.

Where Things Stand

Langan aligns the Second Circuit with the Supreme Court's "preference for dealing with modest variations between class members' claims as substantive questions, not jurisdictional." *Id.* at *5. In so ruling, the court unequivocally removed an additional—and potentially unnecessary—barrier to class certification.

Nevertheless, *Langan* did not create an unbridled path for plaintiffs to freely bring claims on behalf of out-of-state class members. In fact, the *Langan* court vacated the grant of class certification because the district court's Rule 23(b)(3) predominance analysis lacked rigor. As such, although no longer required to make a now-unnecessary showing of standing, plaintiffs must nevertheless be prepared to satisfy the other significant class certification requirements in circumstances where their class-wide claims extend across multiple states.