CORPORATE LITIGATION:

ABSENT CLASS MEMBERS AND ARTICLE III STANDING

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June 10, 2020

A plaintiff's standing to bring a claim is a threshold justiciability inquiry in all actions, including class actions. The Supreme Court has instructed that "[i]n an era of frequent litigation [and] class actions, … courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S.Ct. 1436, 1449 (2011). The interplay of constitutional standing principles and class certification, however, has occasioned a circuit-level conflict. Courts have wrestled extensively but inconclusively with the standing and Rule 23 (and related Seventh Amendment, Rules Enabling Act and due process) questions presented when certification of a proposed class risks allowing uninjured class members to participate in a class action. The Supreme Court has acknowledged the "great importance" of these questions, but to date has declined to answer them. *Tyson Foods v. Bouaphakeo*, 136 S.Ct. 1036, 1050 (2016).

The most recent circuit-level pronouncements, from the Ninth and Eleventh Circuits, frame class member standing as a question of not *if* it must be shown, but *when* it must be shown. The Eleventh Circuit held that "whether absent class members can establish standing may be exceedingly relevant to the class certification analysis," and that district courts must evaluate whether individualized questions about which members have standing predominate over questions susceptible to class-wide proof. The Ninth Circuit held that each member of a certified class must establish Article III standing "at the final judgment stage" of the class action in order to recover money damages. While the Ninth Circuit did not require proof of class member standing at the class certification stage, it cautioned that "district courts and parties should keep in mind that they will need a mechanism for identifying class members who lack standing at the damages phase" when they consider class certification. *Ramirez v. TransUnion*, 951 F.3d 1008 (9th Cir. 2020); *Cordoba v. DIRECTV,* 942 F.3d 1259, 1269–70 (11th Cir. 2019).

Background

There is no such thing as class standing. If an absent class member were to bring an individual suit in federal court, that person would need to allege, and ultimately prove, that she suffered an injury that affected her "in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992). That is because a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). This obligation exists "at the successive stages of the litigation," and must be supported in the manner required by the relevant stage. *Lujan*, 504 U.S. at 561. This precept accords with black letter doctrine that, as a procedural device, a class action enlarges no substantive rights, eliminates no defenses to individual claims, and creates no Article III case or controversy where none would otherwise exist. *Amchem Prods. v. Windsor*, 521 U.S. 591, 613 (1997). Ultimately, any class

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member who claims a right to participate in a settlement or money judgment must demonstrate individual standing to recover. *Tyson Foods*, 136 S.Ct. at 1053 (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not. The Judiciary's role is limited 'to provid[ing] relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm.'").

A threshold question arises: What, if anything, does Article III demand of putative, unnamed class members either at the Rule 12(b) or Rule 23 certification stage? In the class-action context, including cases seeking prospective injunctive relief, Article III requires that only the named plaintiff demonstrate standing to assert the claims (including injury-in-fact) at the motion to dismiss and class certification stages. Individual absent class members do not need to submit evidence of personal standing at the motion to dismiss or class certification stages; in fact, they are not parties who will be bound by the action unless and until a class is certified. In practice, this means that the proposed class representatives do not need to submit individualized proof of the standing of any absent class members. Instead, proposed class representatives must either define the class "in such a way that anyone within it would have standing," *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006), or show through some other means or "common evidence" that "all class members were in fact injured." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252-53 (D.C. Cir. 2013). Those propositions are consistent with the Supreme Court's statement that "a class representative must be part of the same class and possess the same interest and suffer the same injury as the class members." *Amchem*, 521 U.S. at 625–26. They also implicate a key component of class certification: that the class membership be readily ascertainable by reference to objective criteria. Without a manageable way to identify who is part of a class, the efficiencies of a class action are lost to individual mini-trials.

There is broad agreement that permitting uninjured claimants to recover money damages in federal court merely because they are aggregated with injured claimants in a class action violates the Rules Enabling Act, Rule 82 (prohibiting extension of federal court jurisdiction through procedure), and due process. Accordingly, at some point during purported class litigation the district court needs to determine whether each absent class member has standing before it grants any relief to class members.

The circuit scorecard defies neat groupings but broadly speaking the circuits have followed two distinct approaches in evaluating standing for class certification purposes. The Second, Eighth and D.C. Circuits require that in order for a class to be certified, the class must be defined such that anyone within it would have standing to pursue the claim. *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). In the leading *Denney* decision, the court stated that class members need not "submit evidence of personal standing" at the motion to dismiss or certification phases, but that "no class may be certified that contains members lacking Article III standing."

In contrast, the First, Third, Seventh, Ninth and Tenth Circuits have held that absent class members do not need to satisfy the standing requirements of Article III, and that uninjured persons who would lack standing to pursue their claims individually nevertheless can do so—at least before final judgment—merely because their claims are joined in a class action with others who have standing. These courts permit class certification despite the inclusion of uninjured members if it is clear it will be possible to establish a mechanism at the damages stage for winnowing out any uninjured members, i.e. to ensure that only injured parties ultimately participate in any recovery. *See, e.g.*, *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672 (7th Cir. 2009); *Krell v. Prudential Insurance Co. of Am.*, 148 F.3d 283 (3d Cir. 1998). *But see Nexium*, 777 F.3d at 35 (Kayatta, J., dissenting) (criticizing majority's "de minimis" uninjured class members standard; "If 2.4% is okay, why not 5.7%? Or any number under 50%?").

Ramirez arrived amid significant uncertainty about the Ninth Circuit's approach to absent class member standing and class certification. *Compare Torres v. Mercer Canyons*, 835 F.3d 1125, 1137 (9th Cir. 2016) ("fortuitous non-injury to a subset of class members does not necessarily defeat certification of the entire class, particularly as the district court is well situated to winnow out those non-injured members at the damages phase of the litigation, or to refine the class definition"); *and Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011) ("our law keys on the representative party, not all of the class members") *with Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) ("'[N]o class may be certified that contains members lacking Article III standing.'").

Recent Decisions

In *Cordoba*, the Eleventh Circuit provided a thoughtful analysis of the relationship between class certification and the standing of absent class members, and ruled that evaluating whether a significant number of putative class members will need to submit individualized proof of injury in order to recover is an integral part of Rule 23's predominance inquiry. Plaintiff alleged class claims in Georgia federal court under the Telephone Consumer Protection Act against DIRECTV and its telemarketing vendor based on his receipt of phone calls despite requests that he not be contacted. Defendants admitted that they failed to maintain an internal do-not-call list as required by FCC regulations. The district court certified a class defined as "all individuals who received more than one telemarketing call" from defendants during the time they failed to comply with the FCC's do-not-call list regulations (i.e., failed to maintain a list of all those who asked not to receive calls).

The Eleventh Circuit reversed the class certification. It first ruled that the named plaintiff had standing because he received more than one phone call after asking to be placed on the do-not-call list. The court concluded, however, that members of the class who did not ask DIRECTV to stop calling them would lack standing to maintain a claim that the caller failed to institute appropriate internal do-not-call list procedures. The court then turned to what part this lack of standing plays in the class certification analysis. While acknowledging that the Article III standing inquiry at the class certification stage addresses only the named plaintiff, not absent class members, the court emphasized that whether a class definition includes uninjured absent class members is very much a Rule 23 concern. Before any relief can be awarded to class members, the Eleventh Circuit stated, "the district court will have to determine whether each member of the class has standing." In determining how class member standing inquiries affect predominance, the Eleventh Circuit framed two questions for consideration at the class certification stage: (1) how many class members (or what proportion of them) lack standing; and (2) what proof is necessary to determine whether class members have suffered the concrete injury needed to establish standing? The court vacated class certification because absent class member standing was "an individualized issue," and the district court did not consider it in deciding "whether issues common to the class actually predominated over issues that were individualized to each class member." The Eleventh Circuit declined to pre-judge the predominance inquiry: on remand, "[i]f most class members made [do-not-call] requests, or if there is a plausible straightforward method to sort them out at the back end of the case, then the class might appropriately proceed as it is currently defined. If, however, few made these requests, or if it will be extraordinarily difficult to identify those who did, then the class would be overbroad and these individualized determinations might overwhelm issues common to the class."

In *Ramirez*, the named plaintiff alleged in California federal court that he had difficulty obtaining an auto loan because his name appeared on a credit report as a potential match to information listed on the Treasury Department's Office of Foreign Asset Control (OFAC) Database. Defendant had inaccurately added OFAC alerts to the front page of the credit report of plaintiff and several thousand other consumers, inaccurately labeling putative class members as national security threats. Plaintiff alleged, among other claims, that defendant violated the Fair Credit Reporting Act by failing to maintain "reasonable procedures to assure maximum possible accuracy" of consumer reports. Plaintiff did not seek to represent a class of individuals who experienced similar problems because of the mislabeling. Instead, he sought to represent a much broader nationwide

damages class of every individual who received a letter from defendant informing them that they were potential OFAC matches (even though, for more than 75% of those individuals, the information was not disseminated to any third party). Even though it appeared that most absent class members had not suffered a concrete injury, the district court refused to decertify the class containing a majority of uninjured class members through trial and a plaintiff verdict. As the dissent by Judge McKeown observed, "the hallmark of the trial was the absence of evidence about absent class members, or any evidence that they were in the same boat as Ramirez."

A Ninth Circuit panel affirmed class certification and the verdict's statutory damages award, holding that "[e]ach member of a class certified under Rule 23 must satisfy the bare minimum of Article III standing at the final judgment stage of a class action in order to recover monetary damages in federal court." "To hold otherwise," the court reasoned, "would directly contravene the Rules Enabling Act, because it would transform the class action—a mere procedural device—into a vehicle for individuals to obtain money judgments in federal court even though they could not show sufficient injury to recover those judgments individually." The court reaffirmed, however, that only the named plaintiff needs to allege standing at the motion to dismiss and class certification stages. Although a less prominent part of the decision than in *Cordoba*, the Ninth Circuit in a footnote also cautioned that at the class certification stage "district courts and parties should keep in mind that they will need a mechanism for identifying class members who lack standing at the damages phase." 951 F.3d at 1023 n.6.

Having concluded that each class member must have standing to recover damages, the majority ruled that every class member had standing on all the claims in the case. Even though the inaccurate reports prepared about thousands of members of the putative class were not disseminated to third parties, these members had standing to pursue FCRA claims because there existed a "material risk of harm to the concrete interests of all class members," which "caus[ed] the uncertainty and stress that Congress aimed to prevent in enacting the FCRA." The court did not require individualized class member proof of "uncertainty and stress" to support the verdict, concluding that being inaccurately labeled as a national security threat was "inherently shocking and confusing." In dissent, Judge McKeown stated that while the majority declared that each member of a certified class must demonstrate Article III standing at the final judgment stage in order to recover damages, "[t]his principle … does not square with what happened at the trial, which opened with class counsel telling jurors that they would learn 'the story of Mr. Ramirez.'" But that was all jurors heard, "leaving them to assume that the absent class members suffered the same injury." Defendants intend to petition for writ of certiorari in the Supreme Court.

Conclusion

Article III bars any person—whether named plaintiff or absent class member—from recovering damages in federal court without a cognizable injury. Rule 23, the Rules Enabling Act, and due process require that a defendant have the opportunity to challenge each putative class member's claim of Article III injury; class certification should not be granted if that inquiry will necessitate individualized inquiries into each member's circumstances. Even if only the named plaintiff needs to demonstrate Article III standing at the motion to dismiss and class certification stages, *Cordoba* and *Ramirez* are important reminders that a class should not be certified unless plaintiff establishes by a preponderance of the evidence that the process of distinguishing the injured claimants from the uninjured claimants will not entail highly individualized factual inquiries inconsistent with a finding of predominance.