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Advisory | Class Action Litigation

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Class Action Defense Strategies Based on Unnamed Class Member Standing: A Circuit-by-Circuit Analysis

I. Introduction.

Must unnamed class members have standing for a court to certify or enter judgment in a class action? The answer is far from straightforward, as the Supreme Court has not squarely decided the question and circuit courts address this issue in a variety of ways. This GT Advisory analyzes the various approaches to this issue and shows how defendants can use recent cases rejecting class certification where the proposed class included a significant number of uninjured class members.

II. The Varying Approaches to Class Member Standing.

Generally speaking, there are four broad categories into which circuit court cases fall:

- *De minimis* or "some uninjured": the potential presence of more than a small number of class members who lack standing may preclude class certification;
- All-or-nothing: all class members must establish standing at some point in the litigation;
- Standing of named plaintiff only: the standing of unnamed class members is irrelevant once standing of the named plaintiff is shown; and
- No definitive decision: courts expressly state that they have not decided the issue.

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In cases where monetary damages are sought, most courts decline to analyze the standing of unnamed class members in the pre-certification stage, and instead view the inquiry through the lens of Rule 23. Most circuit courts hold that the presence of more than a *de minimis* number of uninjured class members at certification stage defeats certification – particularly if there is no plan for weeding out the uninjured.[1] Cases involving "uninjured class members 'suggest that 5% to 6% constitutes the outer limits of a *de minimis* number.'"[2] There is, however, no "bright line" or definitive number of uninjured class members allowed.

To further complicate matters, some circuit courts treat different types of cases differently. For example, the Ninth Circuit appears to use each of the first three categories, depending on the remedy sought and the stage of the case. In damages cases, the court takes the *de minimis* approach at the class certification stage, but then employs the all-or-nothing test at the end of the case by requiring that all class members establish standing before damages may be awarded. In injunctive relief actions, the Ninth Circuit (like other circuit courts) requires only that the named plaintiff establish standing.

III. The U.S. Supreme Court's Approach to Class Member Standing.

The Supreme Court has set forth three elements of the "irreducible constitutional minimum" for standing:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defs. Of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted). Thus, standing hinges on the alleged injury at issue in any case, class action or not.

Regarding class actions specifically, the Supreme Court has noted that there is a "tension" in its prior decisions on the question of whether the similarity of injuries of the named plaintiff and those of the unnamed class members is "appropriately addressed under the rubric of standing (i.e., under Article III) or adequacy (i.e., under Rule 23)." *Gratz v. Bollinger*, 539 U.S. 244, 263 n. 15 (2003).

The decision in *Blum v. Yaretsky,* 457 U.S. 991, 999 (1982) analyzes the issue under Article III: "It is axiomatic that the judicial power conferred by Art. III may not be exercised unless the plaintiff shows 'that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *Id*. at 999 (citation omitted). In *Blum*, plaintiffs sought to represent Medicaid patients challenging decisions by nursing homes to transfer patients to either higher or lower levels of care. The court found that the named plaintiffs lacked standing to represent those transferred to higher levels of care, explaining that the conditions "are sufficiently different" from those transferred to the lower levels of

[1] The sole exceptions are the Eighth Circuit, which requires that all unnamed class members have standing at certification, and the Second Circuit, which requires that all class members demonstrate Article III standing as a jurisdictional matter, unless the class can be redefined so that all members would have standing.

[2] *In re Rail Freight Fuel Surcharge Antitrust Litigation* - MDL No. 1869, 934 F.3d 619, 625 (2019).

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care with whom the named plaintiff shared an injury. *Id.* at 1001-02. In essence, the court held that the interests of the named plaintiffs and those of the unnamed class members must be aligned because "[t]he complaining party must . . . show that he is within the class of persons who will be concretely affected." *Id.* at 999.

Several years later in *Gratz v. Bollinger*, 539 U.S. 244, 264 (2003), the Supreme Court held that the named plaintiff had standing to represent class members even though there were differences in their interests. The court found that the differences did not "implicate a significantly different set of concerns[.]" 539 U.S. at 265. Hence, *Gratz* appears to have limited – but not overruled – *Blum*.[3]

In *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), the Supreme Court held that the Mexican-American plaintiff alleging that he was passed over for a promotion because of race was not an adequate class representative on behalf of Mexican-American applicants who were not hired by the same employer. *Id.* at 149. In other words, the court found that the interests of the named plaintiff (who was not promoted) differed from those of the class (those who were not hired). In so finding, the Court applied the adequacy requirement of Rule 23, instead of Article III.

Despite the "tension" between *Blum* and *Falcon*, more recent Supreme Court cases seem to suggest that the standing of unnamed class members should be analyzed under Rule 23, as opposed to Article III. Recent cases also suggest that the presence of some uninjured class members may not be fatal to class certification.

In *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016), undisputed evidence demonstrated that at least 212 class members were uninjured in a class consisting of 3,344. *Id.* at 1044, 1052. The defendant, however, had abandoned this question in its petition for certiorari: "whether a class may be certified if it contains 'members who were not injured and have no legal right to any damages.'" 136 S.Ct. at 1049. In light of the abandonment, the court declined to address the matter. *Id.* Nonetheless, the court affirmed class certification – even though, as Justice Roberts in his concurring opinion put it, "it is undisputed that hundreds of class members suffered no injury in this case." *Id.* at 1051.

The Supreme Court also held that whether the damages awarded would be allocated only to those who were injured was "premature." *Id.* at 1046-50. Significantly, in his concurring opinion, Justice Roberts expressed doubt that the damages award could be properly distributed because it was unclear what evidence the jury relied on in arriving at an award that was substantially lower than what the representative evidence suggested. *Id.* at 1052. Justice Roberts concluded that, "if there is no way to ensure that the jury's damages award goes only to injured class members, that award cannot stand." *Id.* at 1053.

Similarly, in *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), a class action securities fraud case, the Supreme Court held that the defendant was entitled to rebut the presumption that the stock price reflected material misrepresentations before the class could be certified. *Id.* at 263-64. The court concluded that, although the rebuttal would result in "individualized questions of reliance[,] . . . there is no reason to think that these questions will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3). That the defendant might attempt to pick off the

[3] As Justice Souter notes in his dissenting opinion, "[t]he Court's holding arguably exposes a weakness in the rule of [*Blum*], that Article III standing may not be satisfied by the unnamed members of a duly certified class. But no party has invited us to reconsider *Blum* and I follow Justice Stevens in approaching the case on the assumption that *Blum* is settled law." *Id.* at 292, n. 1.

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occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." *Id.* at 276. The First Circuit has read *Halliburton* to "contemplate[] that a class with uninjured members could be certified if the presence of a *de minimis* number of uninjured members did not overwhelm the common issues for the class." *In re Nexium Antitrust Litigation*, 777 F.3d 9, 24 (1st Cir. 2015).

IV. The Various Circuit Court Approaches to Class Member Standing.

A. FIRST CIRCUIT

The First Circuit follows the *de minimis* approach to class member standing. For example, the district court in *In re Nexium (Esomeprazole) Antitrust Litig.*, 297 F.R.D. 168 (D. Mass. 2013) certified a class despite evidence that 5.8% of the class members were uninjured. The primary issue involved the propriety of the plaintiffs' methodology for showing common injury and damages, which did not require individualized proof. *Id.* at 183. As the court stated, "in a large class action such as this, management for trial is a dynamic process, one which requires constant reevaluation and adjustment[]" "to insure equality among litigants." *Id.*

On appeal, the First Circuit affirmed certification, holding: "We do not think the need for individual determinations or inquiry for a *de minimis* number of uninjured members at later stages of the litigation defeats class certification." *In re Nexium Antitrust Litigation*, 777 F.3d 9, 21 (2015). The court proposed that any uninjured class member could be winnowed out by mechanisms that would ensure fairness to the defendants. *Id.* at 21. For example, the court indicated that each unnamed class member could submit testimony that, "given the choice, he or she would have purchased the generic[]" product and that "[s]uch testimony, if unrebutted would be sufficient to establish injury in an individual action." *Id.* at 20.

In *United Food & Commer. Workers Unions & Emplrs. Midwest Health Bens. Fund v. Warner Chilcott Ltd. (In re Asacol Antitrust Litig.)*, 907 F.3d 42 (1st Cir. 2018), the First Circuit further defined what type of winnowing mechanism is required.[4] In *Asacol*, evidence indicated that 10% of the unnamed class members were uninjured, but the district court certified the class, concluding *Nexium* authorized the court to use a claims process where class members would submit declarations attesting to injury.

Reversing, the First Circuit held that the district court misread *Nexium*. *Asacol*, 907 F.3d at 49. Emphasizing that *Nexium* involved a situation where the class member testimony was unrebutted, the court in *Asacol* noted that the defendant expressly stated that it intended to refute class member declarations on injury. The court explained that "[t]estimony that is genuinely challenged, certainly on an element of a party's affirmative case, cannot secure a favorable summary judgment ruling disposing of the issue." 907 F.3d at 53. "And the affidavits would be inadmissible hearsay at trial, leaving a fatal gap in the evidence for all but the few class members who testify in person." *Id.*

The court also rejected plaintiff's proposal to have a claims administrator vet class-member declarations: "A 'claims administrator's' review of contested forms completed by consumers concerning an element of their claims would fail to be 'protective of defendants' Seventh Amendment and due process rights.'"

[4] As the D.C. Circuit put it: *Asacol* "sharply limited" *In re Nexium*, by holding that the "affidavit mechanism could not satisfy both conditions where the defendant seeks to contest the question whether individual class members would have shifted from the branded drug to a less expensive generic alternative. That would require individual trials because genuinely contested affidavits do not support summary judgment and are inadmissible." *In re Rail Freight Fuel Surcharge Antitrust Litigation* - MDL No. 1869, 934 F.3d at 625.

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Asacol, 907 F.3d at 53. Similarly, the court rejected plaintiff's proposal to have an expert calculate aggregate damages. In the court's view, "accepting plaintiffs' proposed procedure for class litigation would also put us on a slippery slope, at risk of an escalating disregard of the difference between representative civil litigation and statistical observations of tendencies and distributions." *Id*. at 55-56. To accept aggregate evidence would mean that a named plaintiff could bring suit "on behalf of a large class of people, forty-nine percent or even ninety-nine percent of whom were not injured, so long as aggregate damages on behalf of 'the class' were reduced proportionately" to account for the uninjured. *Id*. "Such a result would fly in the face of the core principle that class actions are the aggregation of individual claims, and do not create a class entity or re-apportion substantive claims." *Id*.

Adhering to *Asacol*, the Rhode Island District Court in *In re Loestrin 24 FE Antitrust Litig*., 410 F. Supp. 3d 352 (D.R.I. 2019) denied certification where the evidence showed that the class included approximately 6.7% of uninjured individuals and the class "conservatively would include hundreds of thousands of consumers." *Id*. at 402. Unable to present the court with a workable winnowing mechanism, the plaintiffs requested that the court presume injury-in-fact. The court refused, holding that the request "falls flat because *Asacol*, read as a whole, plainly does not contemplate such a presumption." *Id*. at 403.

Similarly, in *In re Intuniv Antitrust Litig*., No. 1:16-cv-12396-ADB, 2019 WL 3947262 (D. Mass. Aug. 21, 2019), the court noted that certifying a class with a "*de minimis*" number of uninjured class members would be appropriate "where those class members may be 'picked off in a manageable, individualized process at or before trial.'" *Id*. at 7. Yet plaintiffs "failed to put forth a reasonable and workable plan to weed out the more than 10,000 uninjured class members in each putative class and Defendants intend[ed] to challenge any attestation that individual class members were injured." *Id*. at 8.

B. SECOND CIRCUIT

The Second Circuit follows the "all or nothing" approach. In *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006), the Second Circuit held that the standing of unnamed class members must be established as a jurisdictional matter under Article III.[5] Absent such a showing, the case must be dismissed, without having to undergo an analysis under Rule 23, because the court would lack jurisdiction.

Denny involved two class members who challenged certification of a class-wide settlement because the named plaintiffs did not adequately represent the interests of all the class members. The Second Circuit held: "We do not require that each member of a class submit evidence of personal standing . . . . At the same time, no 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." 443 F.3d at 263-64.

From 2006 to 2019, *Denny* generally had been followed in district courts in the Second Circuit. As noted in *Tomassini v. FCA US LLC*, 326 F.R.D. 375, 384-85 (N.D.N.Y. 2018), since *Denny*, "the majority of district courts in the Second Circuit have analyzed the standing of absent class members as an Article III question, rather than an issue that can be addressed when reviewing the Rule 23 requirements governing class actions." *Id*. at 384 (citations omitted.) In doing so, "a number of district courts in this circuit have narrowed class definitions to exclude putative class members without standing, rather than outright denying a motion for class certification." *Id*. at 387 (citations omitted.) But where, as in *Tomassini,* redefining the class is impossible or would create additional problems, certification would be denied. *Id*.;

[5] "In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

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see also *Calvo v. City of New York*, 14-CV-7246 (VEC), 2017 WL 4231431, 7 (S.D.N.Y. 2017) ("Because Plaintiffs' proposed class definition(s) include(s) members that lack Article III standing, the Court denies without prejudice Plaintiffs' motion for class certification.")[6]

In 2020, one court took a markedly different turn in *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation,* 2020 WL 2555556 (E.D.N.Y May 5, 2020). In this case, the evidence indicated that 5.7% of the unnamed class members were uninjured. The court rejected the defendant's claim that *Denny* barred certification, instead concluding that "[t]he Supreme Court and Second Circuit . . . have never suggested that a certain percentage or number of uninjured plaintiffs would automatically bar class certification." *Id*. at 11. In holding that the 5.7% of uninjured class members would not bar certification, the court noted that "[a]lthough the concept of *de minimis* is not well defined, one court recently 'suggest[ed] that 5% to 6% constitutes the outer limits of a *de minimis* number of uninjured class members.'" *Id*. at 12.

C. THIRD CIRCUIT

The leading Third Circuit case relating to class member standing is *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353 (3rd Cir. 2015). The Third Circuit held that "before even getting to the point of class certification, . . . class representatives need to present a justiciable claim" as a threshold issue under Article III. *Id*. at 366. For that analysis, the Third Circuit expressly stated that only the standing of the named plaintiffs is required; the standing of unnamed class members is not:

> We now squarely hold that unnamed, putative class members need not establish Article III standing. Instead, the 'cases or controversies' requirement is satisfied so long as a class representative has standing, whether in the context of a settlement or litigation class.

Id. at 362. In so holding, the court expressly rejected the all-or-nothing approach espoused by the Second and Eighth Circuits: "We decline Volvo's invitation to impose a requirement that all class members possess standing." *Id*. at 365-66. Instead, the court held that the standing of unnamed class members must be analyzed under Rule 23, relying on *In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions,* 148 F.3d 283, 307 (3d Cir. 1998) (holding that unnamed class members are not required to show Article III standing because their standing relates to "one of compliance with the provisions of Rule 23, not one of Article III standing").

With respect to damages cases, the court stated that "we do not expect a plaintiff to be 'able to identify all class members at class certification.'" *Id*. at 367. The Third Circuit relied upon *Kohen v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds*, 571 F.3d 672 (7th Cir. 2009), in which the Seventh Circuit held that it is inevitable that "a class will often include persons who have not been injured by the defendant's conduct." *Id*. And, like the Seventh Circuit, the Third Circuit did not expressly define what percentage or number of class members must establish standing at class certification. Nor, conversely, did the court specifically state that only a *de minimis* percentage or number of uninjured class members can be included.[7] In any event, *Neale* allows class certification in the presence of at least some uninjured class members.

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[6] *Cf.* *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 WL 7882100, 45 (E.D.N.Y. Oct. 15, 2014) (holding that "a few" uninjured putative class members would not be fatal to certification, provided that they "can legitimately be considered the exceptions to the rule.")

[7] This is consistent with the Seventh Circuit's holding in *Messner v. Northshore University Heathsystem*, 669 F.3d 802, 825 (7th Cir. 2012) (discussed in more detail below) that while *Kohen* allows class

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Martinez-Santiago v. Public Storage, 331 F.R.D. 94 (D.N.J. 2019) is instructive on how the issue of unnamed class member standing is analyzed under Rule 23. There, the district court initially certified a class seeking statutory damages for alleged violations of New Jersey's Truth-in-Consumer Contract, Warranty, and Notice Act. *Id.* at 96. Following certification, the New Jersey Supreme Court interpreted this statute in a way that essentially stripped many class members of the requisite injury-in-fact. The defendant sought to decertify the class after evidence revealed that, in light the New Jersey Supreme Court's decision, only 29 individuals out of the certified class of 160,000 (or .02%) were injured, meaning that 99.98% were uninjured – well above any definition of *de minimis*. *Id.* at 98-99. The court decertified the class for failing to satisfy the predominance, numerosity and typicality requirements of Rule 23. *Id.* at 103-04.[8]

D. FOURTH CIRCUIT

The Fourth Circuit has not yet decided which approach it will apply to class member standing. In *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643 (2019), the Fourth Circuit declined to opine on the issue, holding that "there is . . . no untold number of class members who lack standing . . . and we need not expound on what it would mean if there were." *Id.* at 652. The court further held:

> The question of how best to handle uninjured class members has led to well-reasoned opinions from our sister circuits. Were we empowered to issue advisory opinions, we might have something useful to contribute to the discussion. A litigated case is not a symposium, however, and whatever views we may have on these issues must be left for another day. . . Anyone looking for some grand pronouncement of law in this case has simply picked the wrong horse.

Id. at 659.

E. FIFTH CIRCUIT

Similarly, in a case where "[c]ountless unnamed class members lack standing[,]" the Fifth Circuit stated that "[o]ur court has not yet decided whether standing must be proven for unnamed class members, in addition to the class representative." *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768 (5th Cir. 2020). The court did not reach that issue because the other requirements of Rule 23 had not been met, thereby rendering a decision on the standing issue moot. *Id.* at 768-69.

Notably, in his concurring opinion, Judge Oldham agreed with the reversal of certification but differed on the basis for reversal. Citing the unnamed members' lack of standing, Judge Oldham apparently subscribes to the all-or-nothing approach: "A plaintiff must show standing at each "successive stage[] of the litigation. Nothing in Rule 23 could exempt the class certification stage from this requirement." *Id.* at 770.

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certification as long as not "a great many persons" were uninjured, the definition of "great many persons" is case- and fact-dependent.

[8] Notably, the court held that "[w]hile there is '[n]o minimum number of plaintiffs is required to maintain a suit as a class action,' the Third Circuit has held 'generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) (*i.e.*, numerosity) has been met.'" Quoting *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001). This seems to require a showing that the standing of at least 40 unnamed plaintiffs can be demonstrated to satisfy the numerosity requirement of Rule 23.

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F. SIXTH CIRCUIT

The Sixth Circuit's approach to class member standing is unclear. In *In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litig.*, 678 F.3d 409, 420 (6th Cir. 2012), Whirlpool argued against class certification where its own data showed that the "rate of consumer complaints about the mold problem was far less than the [35% of consumers] plaintiffs alleged." *Id.* at 415. But the Sixth Circuit affirmed certification, holding that "[e]ven if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate.'"[9] The court, however, did not discuss any specific number or percentage of uninjured class members or any other requirements (such as a winnowing plan) that would be required.

Two years later in, *In re Carpenter Co.*, 2014 WL 12809636 (6th Cir. 2014), the Sixth Circuit took a different approach, stating that standing should be on an all-or-nothing basis, citing *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773 (8th Cir. 2013), *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012) and *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006). According to the court, "whether standing is established is dependent upon whether the definition of the class is sufficiently narrow to exclude uninjured parties." *Id.* at 2.

G. SEVENTH CIRCUIT

The Seventh Circuit adopted slightly different elements to the *de minimis* approach in *Kohen v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds*, 571 F.3d 672 (7th Cir. 2009). *Kohen* involved class members who sought to decertify the class because the named plaintiffs lacked standing to represent their interests. The court held that standing is satisfied once "one member of a certified class has a plausible claim to have suffered damages." *Id.* at 676 (citation omitted). The *Kohen* court also held that the "inevitable" presence of uninjured class members "does not preclude class certification." *Id.* at 677. Nonetheless, it held that class certification should be denied "if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant . . . [f]or by aggregating a large number of claims, a class action can impose a huge contingent liability on a defendant." *Id.* at 677-78. *Kohen* did not define the term "a great many persons" with any specificity.

Three years later, in *Messner v. Northshore University Heathsystem*, 669 F.3d 802, 825 (7th Cir. 2012), the Seventh Circuit reiterated that it was not providing a precise measure: "There is no precise measure for 'a great many.' Such determinations are a matter of degree and will turn on the facts as they appear from case to case." *Id.* at 825. In *Messner*, the court vacated the district court's denial of certification, ruling that the defendant had failed to demonstrate that the proposed class was overbroad, based on a showing that 2.4% of the putative class was uninjured. The court held: "While this may prove, depending on the ultimate size of the class at issue here, to be a significant number of additional plaintiffs, a 2.4 percent decrease in the size of the class is certainly not significant enough to justify denial of certification." *Id.* at 826.

The Seventh Circuit further expounded on the interplay between uninjured class members and overbreadth in *Bell v. PNC Bank, Nat. Ass'n*, 800 F.3d 360 (7th Cir. 2015):

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[9] On appeal, the United States Supreme Court vacated the judgment on grounds unrelated to the unnamed class members' standing and remanded the case to the Sixth Circuit "for further consideration in light of" *Comcast. Whirlpool Corp. v. Glazer*, 569 U.S. 901 (2013). *Comcast* does not involve standing; rather, it deals with damages models and how they must be consistent with the theories of liability. 569 U.S. 27, 34-35 (2013).

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> If very few members of the class were harmed, that is an argument not for refusing to certify the class but for certifying it and then entering a judgment that would largely exonerate the defendant. (Internal citations omitted). If, however, a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification. (Citation omitted.) The important distinction then is between class members who were not harmed and those who could not have been harmed. (Citation omitted.)

Id. at 380. The court held that those not harmed did not preclude certification [but could face summary judgment] and those "who could have been harmed . . . but were, in fact, not harmed, can be excluded during a later determination on the merits." *Id*. With these parameters, the court affirmed class certification.

H. EIGHTH CIRCUIT

The Eighth Circuit requires standing for all class members but, unlike the Second Circuit in *Denny*, the analysis is done through the prism of Rule 23 instead of Article III.

In *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023 (8th Cir. 2010), the Eighth Circuit affirmed the denial of class certification based upon violations of California's Unfair Competition Law (UCL), holding that each class member must have standing:

> Although federal courts "do not require that each member of a class submit evidence of personal standing," a class cannot be certified if it contains members who lack standing. *Denney v. Deutsche Bank AG,* 443 F.3d 253, 263–64 (2d Cir. 2006). A class "must therefore be defined in such a way that anyone within it would have standing." *Id*. at 264. Or, to put it another way, a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves.

Id.

Relying on *Avritt*'s all-or-nothing approach, the Eighth Circuit in *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773 (8th Cir. 2013),reversed class certification because "[i]n 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." *Id*. at 778. In conducting a predominance analysis under Rule 23, the court found that, under the facts of the case, the individual inquiries for each class member regarding injury-in-fact do not predominate and would "overwhelm questions common to the class." *Id*. at 779, citing *Comcast Corp*., 133 S.Ct. at 1433.[10]

I. NINTH CIRCUIT

The Ninth Circuit decisions on class member standing are all over the map. For example, in *Torres v. Mercer*, 835 F.3d 1125, 1137 (9th Cir. 2016), the Ninth Circuit faced the argument that "a class cannot be certified if it contains both injured and non-injured parties." 835 F.3d at 1136. The court disagreed, holding that "even a well-defined class may inevitably contain some individuals who have suffered no harm as a result of a defendant's unlawful conduct." *Id*.

[10] In *Neale*, the Third Circuit observed that because *Avritt* relied on *Denny* (an Article III analysis) but *Halvorson* used Rule 23's "predominance" element while simultaneously relying on *Avritt*, it was "not clear . . . whether the Eighth Circuit's standing analysis rests on Article III or Rule 23." 794 F.3d at 366.

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The Ninth Circuit took a different approach in *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), holding that "[n]o class may be certified that contains members lacking Article III standing." *Id.* at 594. Compare this language to the Ninth Circuit's standing analysis in *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011): "In a class action, standing is satisfied if at least one named plaintiff meets the requirements. . . . Thus, we consider only whether at least one named plaintiff satisfies the standing requirements."

Some district courts have adopted the *de minimis* approach. For example, the court in *In re Lidoderm Antitrust Litig.*, 2017 WL 679367 (N.D. Cal. Feb. 21, 2017), held that the presence of a *de minimis* number or percentage of uninjured class members in class did not preclude class certification. *Id.* at 12. This case involved two different classes. The first class consisted of "52 at a minimum" (*id.* at 14), and the defendant challenged the injury-in-fact of three of the putative class members (6%). The court held that the inclusion of those three had only "a *de minimis* impact" and did not preclude certification. *Id.* at 12. As to the second class, the evidence showed that 6.1% to 7.2% of the class may have been uninjured. *Id.* at 20. Yet, the court granted certification, holding that such evidence "does not show over-inclusiveness or predominance of individualized uninjured" and that, at most, it represents a *de minimis* portion of the class. *Id.* The court further held that "various methodologies can be employed at the damages allocation phase to ensure that uninjured brand loyalists are not allocated any damages." *Id.* at 20.

The Ninth Circuit recently brought some clarity to these issues, holding that all putative class members must demonstrate standing, at least before damages are awarded. In *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020), the court expressly ruled that "every member of a class certified under Rule 23 must satisfy the basic requirements of Article III standing at the final stage of a money damages suit when class members are to be awarded individual monetary damages." *Id.* at 1037. The Ninth Circuit explained that this approach is consistent with Supreme Court precedent. As stated by Justice Roberts in his concurring opinion in *Tyson Foods*: "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.'" 136 S.Ct. at 1053 (Roberts, C.J., concurring) (quoting *Lewis v. Casey,* 518 U.S. 343, 349, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)).

In *Melendres v. Arpaio*, 784 F.3d 1254, 1262 (9th Cir. 2015) – an injunctive relief case – the Ninth Circuit held that the named plaintiffs would be deemed "adequate representatives" of the putative class if they "do not 'implicate a significantly different set of concerns' than the unnamed plaintiffs' claims." 784 F.3d at 1263. Accordingly, only the named plaintiff's standing is required throughout the litigation. *See also Bates v. UPS*, 511 F.3d 974, 985 (9th Cir. 2007) ("Here, only liability and equitable relief were at issue in the district court, not damages. Thus, we consider only whether at least one named plaintiff satisfies the standing requirements for injunctive relief.")

J. TENTH CIRCUIT

In *DG v. Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010), the Tenth Circuit held that only the named plaintiffs need to demonstrate standing in an injunction action. The court, however, explained that if classwide discovery reveals that "the class, in fact, does not meet the requirements of Rule 23(a) or that more of Named Plaintiffs' requested remedies or none at all meet Rule 23(b)(2)'s requirements[,]" the district court has discretion "under Rule 23(c)(1)(C) to amend its certification order to reflect its findings or decertify the class altogether prior to final judgment." *Id.* at 1201.

In *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation*, 2020 WL 1180550 (D. Kan. Mar. 10, 2020), the district court underscored the line between the standing

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requirements in a damages case versus those seeking injunctive relief. The court held that the Tenth Circuit's decision in *Devaughn* is inapplicable to a damages case because the remedy sought in *Devaughn* was injunctive relief. The court further held that the "Tenth Circuit never has discussed whether Rule 23 permits certification of a class with uninjured class members in the context of a class seeking money damages under Rule 23(b)(3)." *Id.* at 29. In that regard, the court predicted that the Tenth Circuit would follow the Seventh Circuit's decisions in *Kohen* and *Messner*:

> [O]ur court has followed Seventh Circuit precedent when analyzing whether the presence of uninjured class members defeats certification. That is, as the Seventh Circuit has held, 'a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant….' *Kohen*, 571 F.3d at 677–78 (citations omitted). *Kohen* determined that this issue is best averted by focusing on the class definition. *Id.* at 677. '[I]f the definition is so broad that it sweeps within it persons who could not have been injured by the defendant's conduct, it is too broad.'" The Seventh Circuit repeated this observation in *Messner* and distinguished it from a proposed class consisting "largely (or entirely, for that matter) of members who are ultimately shown to have suffered no harm, [as] that may not mean that the class was improperly certified but only that the class failed to meet its burden of proof on the merits."

Id. at 31. The court recognized that neither *Kohen* nor *Messner* defines what "too many" means and that it is "a matter of degree," turning on the facts of each individual case. *Id.* At the same time, the court held that the question that must be answered when faced with a motion for certification in a damages case is whether certification would be precluded "because the putative class definitions 'contain[ ] a great many persons who have suffered no injury at the hands of the defendant[.]'" *Id.* at 32 (citing *Messner,* 669 F. 3d at 825).

To date, there is no Tenth Circuit case that confirms the district court's prediction in *In re EpiPen*.

K. ELEVENTH CIRCUIT

According to *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1264 (11th Cir. 2019), "the fact that many, perhaps most, members of the class may lack standing is extremely important to the class certification decision." This is true because, although a claim is justiciable (i.e., the named plaintiff has established Article III standing), the problem is that "many claims of the absent class members may not be" when analyzed under Rule 23. *Id.* at 1273.

In *Cordoba*, the Eleventh Circuit decertified the class and remanded the case after finding that the district court failed to properly assess whether the putative class members sustained any injury traceable to the defendants' conduct and whether individualized proof would overwhelm the common issues. As the court stated: "Among the factors that we have directed district courts to consider before certifying a class are 'how the class will prove causation and injury and whether those elements will be subject to class-wide proof,' since '[t]he issue of liability . . . includes not only the question of violation, but also the question of fact of injury.'" *Id.* (citations omitted.) Accordingly, the court limited its holding:

> [We] only hold that . . . the district court must consider under Rule 23(b)(3) before certification whether the individualized issue of standing will predominate over the common issues in the case, when it appears that a large portion of the class does not have standing . . . and making that determination for these members of the class will require individualized inquiries. . . A plaintiff need not prove that every member of the proposed class has Article III standing prior to certification, and in some cases a court might reasonably certify a class that includes some

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> putative members who might not have satisfied the requirements of *Lujan* and decide to deal with the problem later on in the proceeding, but before it awarded any relief.

Id. at 1277. In arriving at its decision, the Eleventh Circuit cited with approval the Seventh Circuit's decision in *Kohen*. *Id.* at 1276. The court stated that "there is a meaningful difference between a class with a few members who might not have suffered an injury traceable to the defendants and a class with potentially many more, even a majority, who do not have Article III standing" (*id.* at 1277) – without defining the terms "few" or "many more." Further relying on *Kohen*, the court held that "if a class is 'overbroad' . . . there is a 'compelling reason' to redefine it more narrowly." *Id.* at 1276.

L. D.C. CIRCUIT

In *In re Rail Freight Fuel Surcharge Antitrust Litig.* - MDL No. 1869, 406 U.S. App. D.C. 371, 379, 725 F.3d 244, 252 (2013), the court held that, at the certification stage, "[t]he plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured" by the alleged wrongful conduct of the defendant. That showing, however, need not establish through "common evidence the precise amount of damages incurred by each class member." *Id.*

On remand, the district court interpreted the D.C. Circuit's opinion to mean only that the plaintiffs have the *capability* (i.e., "can prove") to show of injury through common evidence – "not that the common evidence already has shown such injury." *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 292 F. Supp. 3d 14, 133 (2017). Accordingly, the district court concluded "that all that is required to satisfy Rule 23(b)(3)'s predominance requirement for purposes of certification of the class is to show by a preponderance of the evidence that injury to 'all or virtually all' putative class members can be proved through common evidence and that plaintiffs have a reliable way to ensure that all class members suffered some injury by the time the Court awards damages." *Id.* at 135.[11] Under that standard, the court denied certification. The evidence demonstrated that 12.7% of the putative class (or 2,037 persons) was uninjured, which the court deemed to be "beyond the outer limits of what can be considered *de minimis* for purposes of establishing predominance." *Id.* at 138.

On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the denial of class certification. *In re Rail Freight Fuel Surcharge Antitrust Litigation* - MDL No. 1869, 934 F.3d 619 (2019). As the court explained:

> As the [lower] court explained, the 'few reported decisions' involving uninjured class members 'suggest that 5% to 6% constitutes the outer limits of a *de minimis* number.' *Rail Freight II,* 292 F. Supp. 3d at 137. The 12.7 percent figure in this case is more than twice that approximate upper bound reflected in analogous caselaw. Moreover, the district court considered raw numbers as well as percentages: six percent of a 'class totaling only fifty-five' members might be *de minimis,* but 12.7 percent of this class yields '2,037 uninjured class members' (according to the common proof), all of whom would need individualized adjudications of causation and injury. *Id.* at 137-38. Finally, the district court stressed that the plaintiffs have proposed no 'further way' – short of full-blown, individual trials – 'to reduce this number and segregate the uninjured from the truly injured.' *Id.* at 138. None of this was an abuse of discretion.

Id. at 625.

[11] The court noted that it viewed the "'all or virtually all' and the 'de minimis' standards as two sides of the same coin." *Id.*

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The court also rejected plaintiff's alternative definition of *de minimis* by arguing that the 2,037 persons were *de minimis* because they constituted less than one percent of the railroad's revenue from the alleged conspiracy: "[R]evenue is irrelevant to predominance, which looks to whether elements such as causation and injury may be proved through common evidence, not how much the defendants benefited from any wrongdoing." *Id*. at 626.

In *J.D. v. Azar*, 925 F.3d 1291, 1324 (D.C. Cir. 2019), the D.C. Circuit held that, in an injunctive relief case, the standing of unnamed class members is not required:

> any suggestion that absent class members (unlike joined plaintiffs) must themselves demonstrate standing is belied by the accepted understanding that only one of the class *representatives* needs standing. *Cf. Frank v. Gaos,* 139 S. Ct. 1041, 1046, 203 L. Ed. 2d 404 (2019) (per curiam) (observing that "federal courts lack jurisdiction if *no* named plaintiff has standing" and remanding for a determination whether '*any* named plaintiff' has standing (emphasis added)). If even a *class representative*'s individual standing is immaterial as long as one representative has standing, an *absent class member*'s individual standing must also be immaterial in that instance.

The plaintiffs in that case sought certification of unaccompanied alien minors challenging a governmental policy that barred them from obtaining a pre-viability abortion while in federal custody. The proposed class would have included members who were "uninjured" because they would not have undergone an abortion regardless of the policy. The D.C. Circuit sustained class certification, holding that "the inclusion in the class of unaccompanied minors who desire to carry their pregnancies to term no more gives rise to an Article III concern than it poses a problem under Rule 23(a)." *Id*. at 1325.

V. Takeaways and Practical Considerations.

A. A majority of the circuits apply the *de minimis* approach under the rubric of Rule 23, allowing an "outer limit" of only about 5-6% of uninjured class members at certification stage. Courts have denied certification in cases involving 6.7%, 8%, 10%, 12.7% and 44% of uninjured class members – especially in the absence of a plan to winnow out the uninjured while protecting defendants' rights. The percentages, however, must be evaluated in conjunction with case-specific numbers to determine whether, under the facts and circumstances of the case, the uninjured members are indeed *de minimis*.

B. The Second and Eighth Circuits continue to employ an all-or-nothing approach, requiring that all class members demonstrate standing or defining the class narrowly so that all members would have standing.

C. Regardless of what is required at certification stage, the Ninth Circuit now requires that all class members have standing before the award of any damages. This is consistent with Article III, which prevents federal courts from awarding damages to uninjured persons and, therefore, is more likely to be applied outside of the Ninth Circuit.

D. Because injunctive relief cases focus on the defendants' conduct and not on the recovery of monetary relief by the class members (and the attendant notice requirements), the Third, Ninth, Tenth, and D.C. Circuits require the standing of the named plaintiff only, not that of the unnamed class members.

E. The Fourth and Fifth Circuits, as well as the Tenth Circuit with regard to damages cases, have not yet definitively decided whether, when, or how unnamed class members must establish standing.

F. As more and more circuits limit classes to those who can establish standing, defendants facing class litigation should consider evaluating ways to show that class members do not have standing.

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UNNAMED CLASS MEMBER STANDING: A SUMMARY

***DE MINIMIS* OR "SOME INJURED" STANDARD**	**ALL-OR-NOTHING TEST**	**NAMED PLAINTIFF'S STANDING ONLY (INJUNCTIONS)**	**NO DECISION**
First Circuit: *Asacol* – 10% uninjured; certification reversed and remanded, requiring plan to protect defendants' rights • 5.8% uninjured – certification affirmed but with proposed plan • Cases with 6.7% (of "hundreds of thousands") and 8% (25,000+) uninjured with no workable plan – certification denied	**Second Circuit:** *Denny* – Define class so all members have standing under Article III analysis (But *see In re Restasis* (certification granted with 5.7% uninjured))	**Third Circuit:** *Neale*	**Fourth Circuit:** *Krakauer* – issue "must be left for another day"
Third Circuit: *Neale* – "do not expect a plaintiff to be 'able to identify all class members at class certification'"	**Eighth Circuit:** *Avritt* and *Halvorsen* - all class members must show standing as part of Rule 23 analysis	**Ninth Circuit:** *Melendres, Bates*	**Fifth Circuit:** *Flecha* - "Our court has not yet decided whether standing must be proven for unnamed class members, in addition to the class representative."
Sixth Circuit: *Whirlpool* - "some class members" would not defeat certification	**Ninth Circuit:** *Ramirez* - all members must show standing before award but not at certification stage	**Tenth Circuit:** *Devaughn*	**Tenth Circuit:** *In re EpiPen* – district court predicts Circuit Court will follow Seventh Circuit for damages cases
Seventh Circuit: *Kohen* - No cert if "a great many persons" are uninjured • "No precise measure" for "a great many;" case-specific • 2.4% uninjured not sufficient to defeat certification		**D.C. Circuit:** *Azar*	
Ninth Circuit: *In re Lidoderm* (district court) - .06% (3 persons out of 52) to 7.2% uninjured deemed *de minimis* and various plans can insure that they would not get damages			
Eleventh Circuit: *Cordoba* – follows Seventh Circuit			
D.C. Circuit: *In re Rail Freight* – certification denied with 12.7% (2037 persons) uninjured without separation plan			

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