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Unnamed Class Member Standing: A Circuit-by-Circuit Analysis

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The U.S. Supreme Court on Unnamed Class Member Standing

The U.S. Supreme Court On Unnamed Class Members Standing

- ***Lujan v. Defs. Of Wildlife*, 504 U.S. 555 (1992)**
  - Injury-in-fact
  - Causal connection
  - Likely favorable decision

- **Rule 23 of the Federal Rules of Civil Procedure**
  - Rule 23(a) requirements – numerosity, commonality, typicality and adequacy
  - Rule 23(b)(3) – predominance factor

The U.S. Supreme Court On Unnamed Class Members Standing (Cont.)

***Blum v. Yaretsky*, 457 U.S. 991 (1982)**

Applying Article III, held that the interests of the named plaintiffs and that 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."

The U.S. Supreme Court On Unnamed Class Members Standing (Cont.)

General Telephone Co. of Southwest v. Falcon,
457 U.S. 147 (1982)

Applying a Rule 23 analysis, class certification was denied where the interests of the named Mexican-American plaintiff (who was promoted) was found to be different from those of the Mexican-American putative class members (who were not hired).

U.S. Supreme Court Cases On Unnamed Class Members Standing (Cont.)

***Gratz v. Bollinger*, 539 U.S. 244 (2003)**

- Recognized that there was a "tension" between *Blum* and *Falcon*
- Here, the court held that the differences did not "implicate a significantly different set of concerns[.]"
- Justice Souter's dissent: *Gratz* appears to have merely limited – but not overruled – *Blum*

U.S. Supreme Court Cases On Unnamed Class Members Standing (Cont.)

Tyson Foods, Inc. v. Bouaphakeo,
136 S.Ct. 1036 (2016)

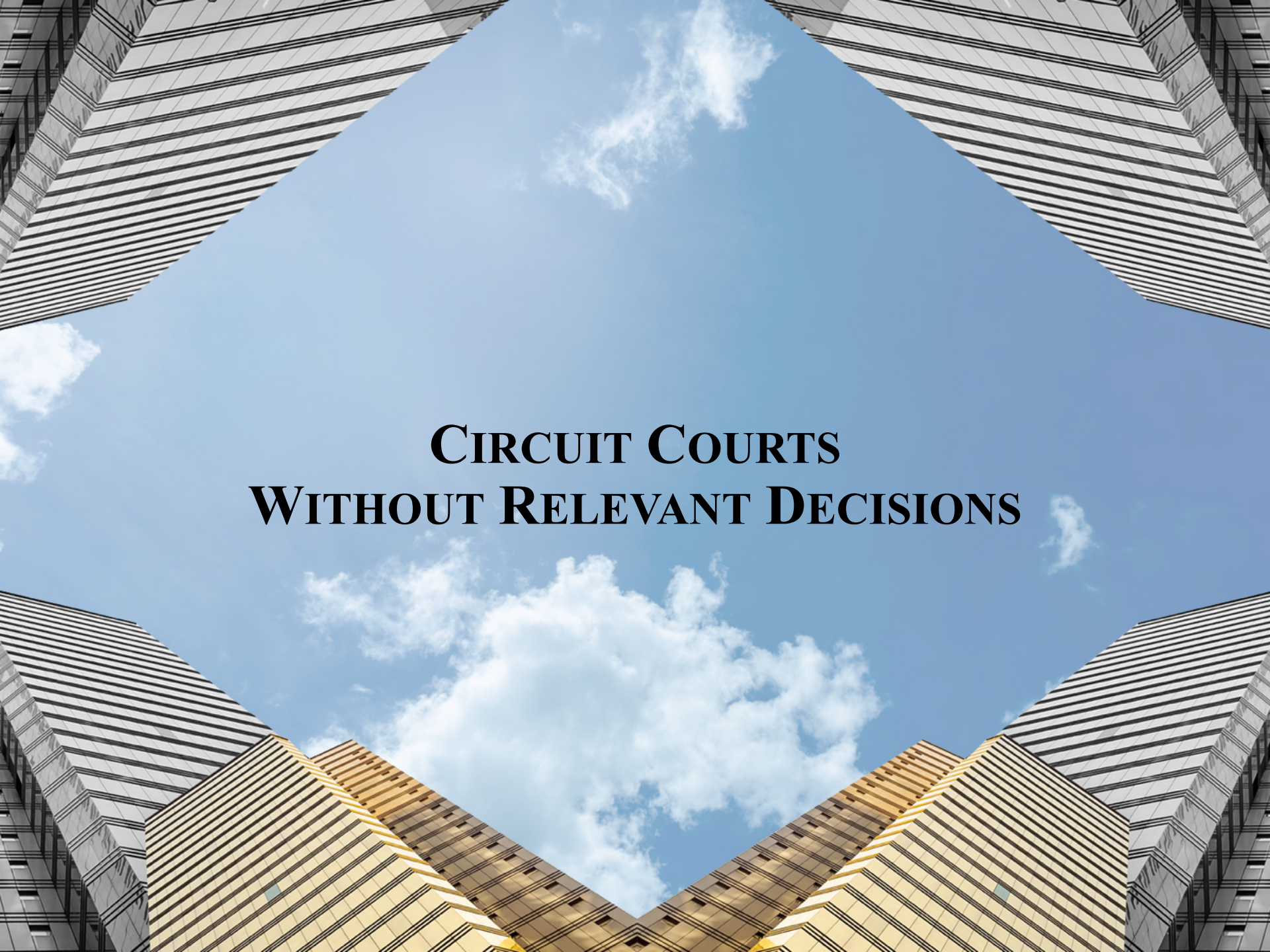
- 212 uninjured class members in class of 3,344.
- Appellant abandoned question of "whether a class may be certified if it contains 'members who were not injured and have no legal right to any damages.'
- In light of abandonment, the court declined to address the matter but affirmed certification anyway.
- Justice Roberts opined in concurring opinion that the damages award would not stand if there is no way to ensure that only injured plaintiffs receive damages.

U.S. Supreme Court Cases On Unnamed Class Members Standing (Cont.)

***Halliburton Co. v. Erica P. John Fund, Inc.*,**
573 U.S. 258 (2014)

- No reason to think that individualized questions of reliance in securities fraud case would overwhelm common ones and render class certification inappropriate under Rule 23(b)(3).

- "That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate."


CIRCUIT COURTS
WITHOUT RELEVANT DECISIONS

Circuit Courts Without Relevant Decisions

FOURTH CIRCUIT

***Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643 (4th Cir. 2019)**

- Issue "must be left for another day."
- Two 2017 district court cases viewed standing under Article III instead of Rule 23 but no precedential value

Circuit Courts Without Relevant Decisions (Cont.)

FIFTH CIRCUIT

***Flecha v. Medicredit, Inc.*, 946 F.3d 762 (5th Cir. 2020)**

- Not yet decided whether standing must be proved for unnamed class members in addition to the class representative.
- Skirted issue in *Flecha* because other requirements of Rule 23 had not been met, mooting a decision on the adequacy/standing requirement.
- Judge Oldham, concurring - "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."

Circuit Courts Without Relevant Decisions (Cont.)

TENTH CIRCUIT

- No damages cases decided.

- District court in Kansas, in the *Epipen* antitrust litigation decided last year, predicted that, in damages cases, the 10th Circuit would follow the *de minimis* majority approach.


Standing of Named
Plaintiffs Only

Standing Of Named Plaintiffs Only

1. Generally injunctive cases only

   a. No individual notice requirement

   b. Focus on defendants' conduct, not relief to plaintiffs

2. Standing of unnamed class members deemed irrelevant

Standing Of Named Plaintiffs Only (Cont.)

CASES

Ninth Circuit:

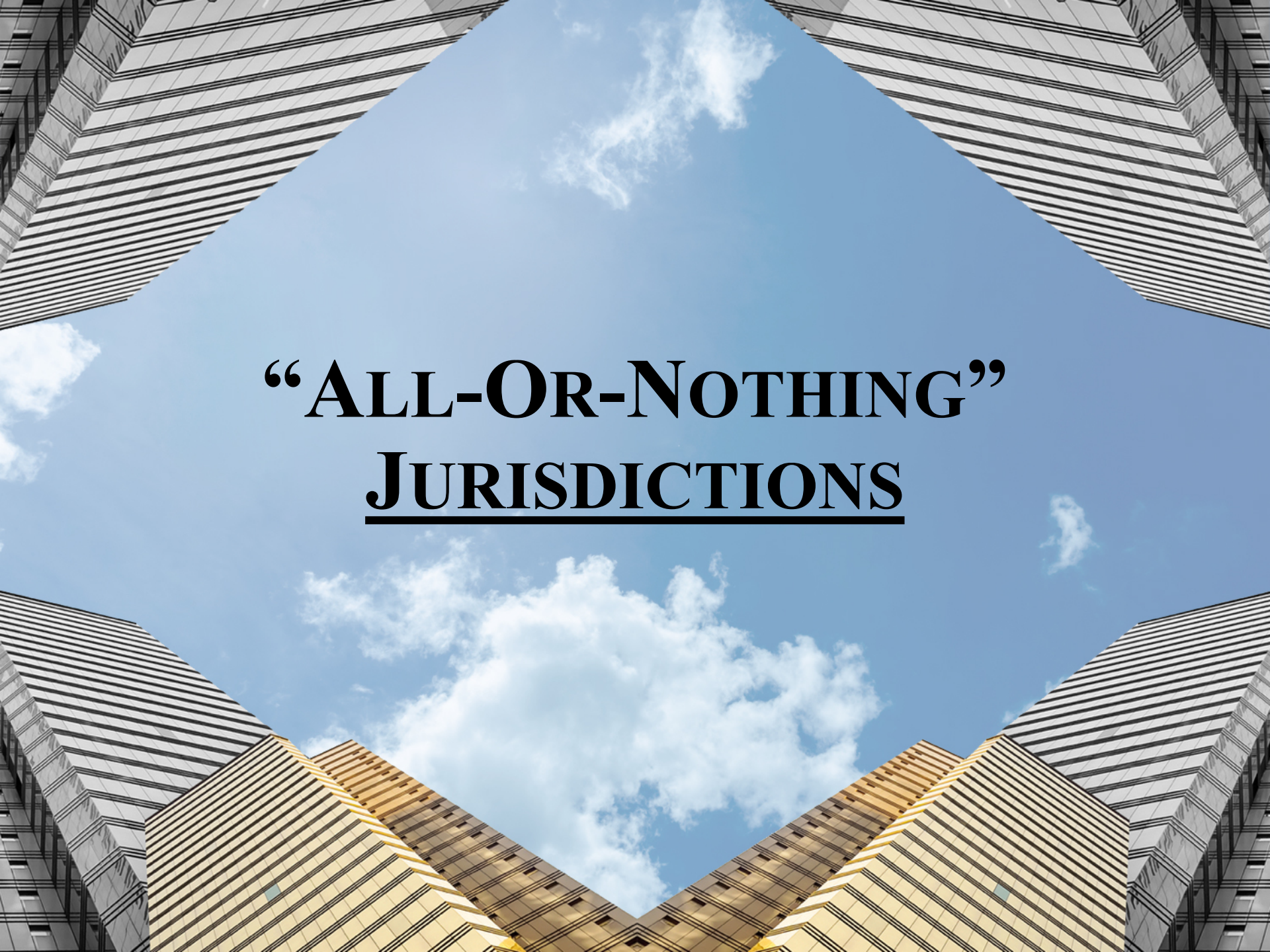
- *Melendres v. Arpaio*, 784 F.3d 1254 (9th Cir. 2015)
- *Bates v. UPS*, 511 F.3d 974 (9th Cir. 2007)
- *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011) (damages case)

Tenth Circuit:

- *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188 (10th Cir. 2010)

D.C. Circuit:

- *J.D. v. Azar*, 925 F.3d 1291 (D.C. Cir. 2019)



"ALL-OR-NOTHING" JURISDICTIONS

"All-Or-Nothing" Jurisdiction

Second Circuit

1. *Denney v. Deutsche Bank AG,* 443 F.3d 253 (2d Cir. 2006)

   Standing of unnamed class members is a threshold jurisdictional matter under Article III.

2. *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation,* 2020 WL 2555556 (E.D.N.Y May 5, 2020)

   Based on *de minimis* approach, allowed class certification even though evidence indicated 5.7% of unnamed class members lacked standing.

3. *B & R Supermarket, Inc. v. Mastercard Int'l, Inc.*, 2020 U.S. Dist. LEXIS 248650 (E.D.N.Y. Jan. 19, 2021)

   Followed *Restasis.*

4. *Robinson v. N.Y.C. Transit Auth.*, 19 Civ. 1404 (S.D.N.Y. Sep. 30, 2020)

   Followed *Denney*.

"All-Or-Nothing" Jurisdiction (Cont.)

Eighth Circuit

1. *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023 (8th Cir. 2010)

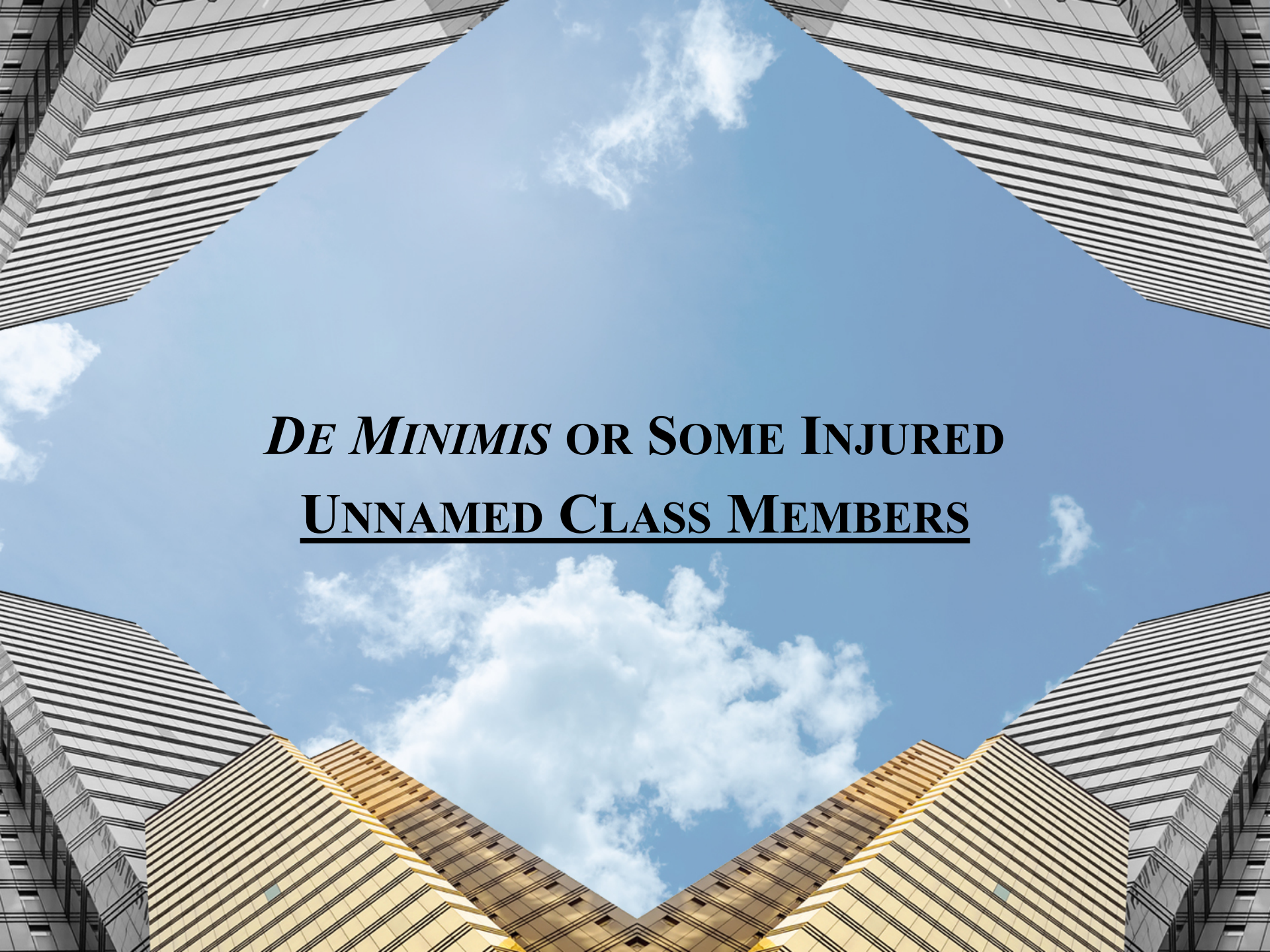
   Relying on *Denney,* held that "a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves."

2. *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773 (8th Cir. 2013)

   Relying on *Avritt*: "[E]ach 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."

3. *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753 (8th Cir. 2020)

   Standing should not be conflated with a failure on the merits and class may be amended prior to judgment to exclude class members with no injury/standing.



De Minimis or Some Injured Unnamed Class Members

De Minimis or Some Injured Unnamed Class Members

- Majority view
- Class certification generally granted:
  - Presence of some uninjured unnamed class members (no specific percentage or number – case-specific)
  - Requires a reasonable and workable mechanism by which to eventually winnow out uninjured class members to protect defendants' rights

De Minimis or Some Injured Unnamed Class Members (Cont.)

FIRST CIRCUIT

- *In re Nexium Antitrust Litigation*, 777 F.3d 9 (2015)

  Any uninjured class member could be winnowed out by mechanisms that would ensure fairness to the defendants.

De Minimis or Some Injured Unnamed Class Members (Cont.)

FIRST CIRCUIT (CONT.)

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)

- 10% of the unnamed class members were uninjured
- What is not acceptable:
  - Affidavits where testimony is rebutted
  - No vetting class-member declarations by class administrator where defendants' Seventh Amendment and due process rights are not protected
  - No expert calculation of aggregate damages (Cf. *Restasis*)

De Minimis or Some Injured Unnamed Class Members (Cont.)

FIRST CIRCUIT (CONT.)

DISTRICT COURT CASES:

- *In re Loestrin 24 FE Antitrust Litig.*, 410 F. Supp. 3d 352 (D.R.I. 2019)

  Certification denied with 6.7% uninjured individuals in a class including hundreds of thousands and no workable winnowing plan; presumption of injury-in-fact denied.

- *In re Intuniv Antitrust Litig.*, No. 1:16-cv-12396-ADB, 2019 WL 3947262 (D. Mass. Aug. 21, 2019)

  Certification denied where no workable plan to weed out more than 10,000 uninjured class members was presented.

- *Rapuano v. Trs. Of Dartmouth Coll.*, 2020 DNH 13 (D.N.H. 2020)

  Law is "clear" that *de miminis* number of uninjured plaintiffs will not defeat certification.

De Minimis or Some Injured Unnamed Class Members (Cont.)

THIRD CIRCUIT

Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353 (3rd Cir. 2015)

- Article III requires only standing of named plaintiff
- Standing of unnamed class members analyzed under Rule 23
- "[W]e do not expect a plaintiff to be 'able to identify all class members at class certification[]'" in damages cases. (citing *Kohen*)

De Minimis or Some Injured Unnamed Class Members (Cont.)

SIXTH CIRCUIT

1. *In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litig.*, 678 F.3d 409, (6th Cir. 2012)

   Certification affirmed "[e]ven if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate.'"

2. *Cf. In re Carpenter Co.*, 2014 WL 12809636 (6th Cir. 2014)

   Took "all-or-nothing" approach, holding that "whether standing is established is dependent upon whether the definition of the class is sufficiently narrow to exclude uninjured parties."

3. *Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452 (6th Cir. 2020)

   Echoed *Vogt* (8th Cir.).

De Minimis or Some Injured Unnamed Class Members (Cont.)

SEVENTH CIRCUIT

1. *Kohen v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds*, 571 F.3d 672 (7th Cir. 2009)
   - The "inevitable" presence of uninjured class members "does not preclude class certification."
   - 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."
2. *Messner v. Northshore University Heathsystem*, 669 F.3d 802 (7th Cir. 2012)
   - "There is no precise measure for [the term] 'a great many.'"
   - "Such determinations are a matter of degree and will turn on the facts as they appear from case to case."
3. *Bell v. PNC Bank, Nat. Ass'n*, 800 F.3d 360 (7th Cir. 2015)

   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.

De Minimis or Some Injured Unnamed Class Members (Cont.)

ELEVENTH CIRCUIT

- *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259 (11th Cir. 2019)

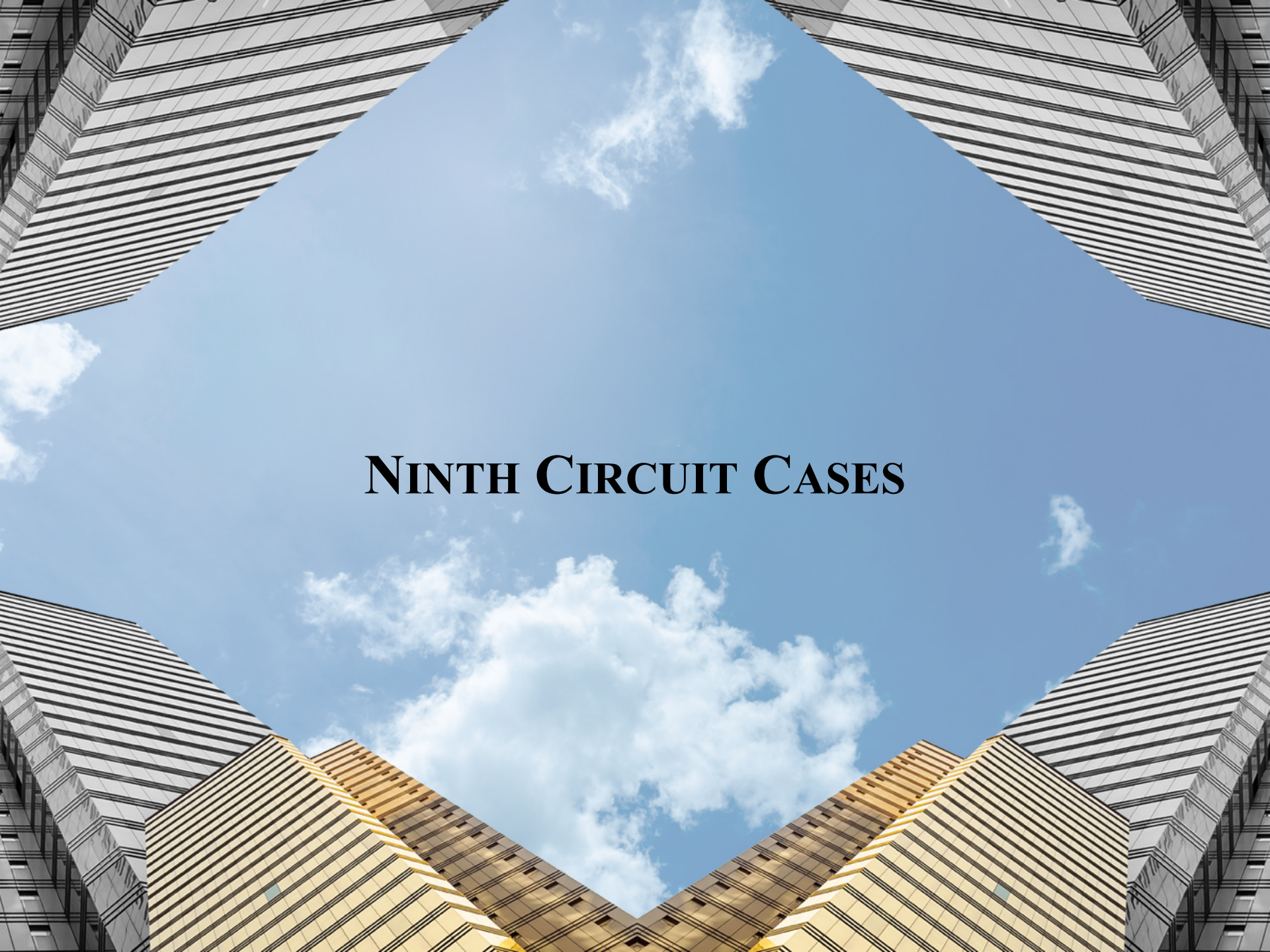
  "A plaintiff need not prove that every member of the proposed class has Article III standing prior to certification, and in some cases a court might reasonably certify a class that includes some putative members who might not have satisfied the requirements of *Lujan* and decide to deal with the problem later on in the proceeding, but before it awarded any relief."

De Minimis or Some Injured Unnamed Class Members (Cont.)

D.C. CIRCUIT

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

- Affirmed decertification of class
  - 5% to 6% constitutes the outer limits of a *de minimis* number
  - 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', all of whom would need individualized adjudications of causation and injury is not.
  - No workable winnowing plan "to reduce this number and segregate the uninjured from the truly injured."
- "[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."


NINTH CIRCUIT CASES

Ninth Circuit Cases

1. *Torres v. Mercer*, 835 F.3d 1125 (9th Cir. 2016)

   "[E]ven a well-defined class may inevitably contain some individuals who have suffered no harm as a result of a defendant's unlawful conduct."

2. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012)

   "No class may be certified that contains members lacking Article III standing."

3. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011)

   "[W]e consider only whether at least one named plaintiff satisfies the standing requirements."

4. *In re Lidoderm Antitrust Litig.*, 2017 WL 679367 (N.D. Cal. Feb. 21, 2017)

   The presence of a *de minimis* number or percentage of uninjured class members in class did not preclude class certification because "various methodologies" can be employed at the damages allocation phase to ensure that the uninjured are not allocated any damages.


RAMIREZ v. TRANSUNION, LLC

Ramirez v. TransUnion, LLC
951 F.3D 1008 (9TH CIR. 2020)

Issue Not on Appeal

"[E]very 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."

Ramirez v. TransUnion LLC, (Cont.)

Case Description

The named plaintiff claimed that an inaccurate credit report hindered his effort to secure credit, caused him embarrassment in front of family, and led him to cancel a vacation. Yet he sought to represent a class of thousands of individuals, the vast majority of whom (>75%) never had a credit report disseminated to any third party, let alone suffered a denial of credit or other injury anything like the class "representative." The trial court nonetheless let the class proceed on the theory that the absent class members all suffered Article III injury and that the vast differences between the experiences of the named plaintiff and the class he purported to represent were immaterial . . . Having heard only about the named plaintiffs entirely atypical injuries, the jury awarded the entire class statutory damages near the statutory maximum and then awarded classwide punitive damages that dwarfed the statutory damages.

Ramirez v. TransUnion LLC (Cont.)

Question on Appeal

"Whether either Article III or Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered."

Ramirez v. TransUnion LLC (Cont.)

Observations

- Question deals with certification, not distribution of damages.
- "Vast majority" – case-specific based on description of case for Supreme Court.
  - Does not address presence of a *de minimis* or only a few uninjured unnamed class members.
  - Does not address what *de minimis* means
- Does not directly address "all-or-nothing" standard or "named plaintiff's standing only" approach in *Sterns*.
- Still leaves room for further litigation.

UNNAMED CLASS MEMBER STANDING: A SUMMARY

NO DECISION	**Fourth Circuit** *Krakauer* – issue "must be left for another day"	**Fifth Circuit** *Flecha* - "Our court has not yet decided whether standing must be proven for unnamed class members, in addition to the class representative."	**Tenth Circuit** *In re EpiPen* – district court predicts Circuit Court will follow de minimis approach for damages cases				
NAMED PLAINTIFF'S STANDING ONLY (INJUNCTIONS)	**Ninth Circuit** *Melendres* *Bates* *Stearns* (a damages case)	**Tenth Circuit** *Devaughn*	**D.C. Circuit** *Azar*				
ALL-OR-NOTHING	**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))	**Eighth Circuit** *Avritt and Halvorsen* - all class members must show standing as part of Rule 23 analysis *Vogt* -- standing not to be conflated with lack of merit.	**Ninth Circuit** *Mazza* – no class may contain members without Art. III standing *Ramirez* - all members must show standing before award but not at certification stage				
DE MINIMIS OR "SOME INJURED"	**First Circuit** *Asacol* – 10% uninjured; certification reversed and remanded, requiring plan to protect defendants' rights • 5.8% uninjured – certification affirmed but with proposed plan (Nexium) • District court cases with 6.7% (of "hundreds of thousands") and 8% (25,000+) uninjured with no workable plan – certification denied	**Third Circuit** *Neale* – "do not expect a plaintiff to be 'able to identify all class members at class certification'"	**Sixth Circuit** *Whirlpool* - "some class members" would not defeat certification *Cf. In re Carpenter Co.* – "all-or-nothing" *Hicks* – standing not to be conflated with lack of merit.	**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	**Ninth Circuit** *Torres* – well-defined class may contain some uninjured members *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 *Cf. Ramirez* - <75% uninjured in certified class	**Eleventh Circuit** *Cordoba* – follows Seventh Circuit	**D.C. Circuit** *In re Rail Freight* – certification denied with 12.7% (2037 persons) uninjured without separation plan

New York Law Journal

Unnamed Class Member Standing Post-'Restasis': Is 'Denney' Still Viable?

Whether 'Restasis' will be upheld by the Second Circuit remains to be seen. In the meantime, explore some "take-aways" from cases outside of the Second Circuit that should be considered, especially when litigating class actions in the Eastern District of New York.

By **Marissa Banez** | December 21, 2020

In 2006, the Second Circuit held that "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." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). "To meet the Article III standing requirement, a plaintiff must have suffered an 'injury in fact' that is 'distinct and palpable'; the injury must be fairly traceable to the challenged action; and the injury must be likely redressable by a favorable decision." Id. at 263.

Following *Denny*, the majority of district courts in the Second Circuit "have narrowed class definitions to exclude putative class members without standing, rather than outright denying a motion for class certification." *Tomassini v. FCA US*, 326 F.R.D. 375, 387 (N.D.N.Y. 2018). However, where redefining the class is impossible or would create additional problems, certification should be denied. Id. Moreover, *Tomassini* noted that it is not clear how class members who "did not suffer an inflated-price injury[, when they bought a car] … could provide standing[.]" Id. at 386.

The Eastern District of New York has seemed less inclined to follow *Denney*. In *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 WL 7882100, at *45 (E.D.N.Y. Oct. 15, 2014), the magistrate judge's report and recommendation provided that the existence of "a few" uninjured class members would not preclude certification, provided that they "can legitimately be considered the exceptions to the rule." *Air Cargo* did not cite *Denney*; instead, it relied on the Seventh Circuit's decision in *Kohen v. Pac. Inv. Mgmt. Co. & PIMCO Funds*, 571 F.3d 672 (7th Cir. 2009). Id. at 45, 47. The magistrate judge did not provide guidelines on how to determine when uninjured class members can "legitimately" be considered "the exceptions to the rule." Nor did the district court judge clarify matters in adopting the report and recommendation. See No. 06-MD-1775, 2015 WL 5093503 (E.D.N.Y. July 10, 2015).

Meanwhile, the majority of the circuit courts have eschewed the Article III jurisdictional approach of *Denney* and viewed the standing of unnamed class members under Rule 23. These courts have held that a de minimis number of uninjured class members would not defeat certification, particularly if there is a mechanism to protect the defendants' rights.

In 2020, the Eastern District of New York followed the majority view by granting class certification where plaintiffs' expert conceded that at least 5.7% of the putative class was uninjured. *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation*, 2020 WL 2555556 at *9 (E.D.N.Y May 5, 2020). The court expressly rejected the defendant's argument that because *Denney* requires Article III standing, "the Second Circuit does not permit certification of a class containing uninjured members." 2020 WL 2555556, n. 12. The court held that the class members had Article III standing, simply by purchasing Restasis—"whether or not they paid an overcharge." Id. In support, the court cited *Dubuisson v. Stonebridge Life Ins. Co.*, 887 F.3d 567 (2d Cir. 2018), which held that an Article III analysis requires a court to accept as true a plaintiff's allegations. Id. at 574-75. However, unlike *Restasis*, *Dubuisson* did not involve a concession from plaintiffs that a percentage of the putative class was not injured. The concession in *Restasis* is similar to the undisputed presence of class members in *Tomassini* who "did not suffer an inflated-price injury." Accordingly, it is unclear how either group could have Article III standing. Under *Denney*, the *Restasis* court should have narrowed the class definition to include only those with Article III standing or, alternatively, denied certification if narrowing the class proved intractable. In doing neither, *Restasis* joins the majority of circuits in analyzing class members' standing through the lens of Rule 23 under a de minimis approach.

As the court in *Restasis* recognized, "the concept of de minimis is not well defined[.]" 2020 WL 2555556 at 12. In the Seventh Circuit's view, certification should be denied "if it is apparent that it contains a great many persons who have suffered no injury." *Kohen*, 571 F.3d at 677. Simultaneously, "[t]here 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." *Messner v. Northshore University Heathsystem*, 669 F.3d 802, 825 (7th Cir. 2012). Nonetheless, "the 'few reported decisions' involving uninjured class members 'suggest that 5% to 6% constitutes the outer limits of a *de minimis* number.'" *In re Rail Freight Fuel Surcharge Antitrust Litigation* – MDL No. 1869, 934 F.3d 619, 625 (2019).

Although the existence of some uninjured class members may not bar certification under *Restasis*, "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J. concurring). Accordingly, in addition to falling within the outer limits of de minimis, plaintiffs must present a mechanism which ensures that the defendants are not charged with damages or deprived of their due process rights.

In this regard, the *Restasis* court approved the plaintiff's aggregate damages model because it "is relatively straightforward as aggregate class-wide damages equal the difference between the costs paid by class members for [brand Restasis] in the actual world versus the costs class members would have paid for [generic Restasis] in the 'but-for' world." 2020 WL 2555556 at 26. The court noted that "the Second Circuit has accepted the use of aggregate classwide damages so long as they 'roughly reflect' the harm caused to plaintiffs[,]" id., and approved the "use of averages in this context (as) a reasonable way to measure

overcharges." Id. at 27. The court further held that where "plaintiffs cannot prove their damages with precision, '[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.'" Id.

Still, not all aggregate damages models are acceptable. For example, 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 plaintiffs explained:

> Warner would only be found liable and forced to pay damages if the jury found that Warner's actions unlawfully raised the price paid by consumers by a specified amount, and if the jury also determined the percentage of sales for which that price surcharge would not have been paid but for the illegal conduct. The total aggregate damages award would therefore in theory net out all purchases by brand loyal consumers as a group. The fact that some of that money might then be paid to uninjured people should be of no concern to Warner[.]

Id. at 55. The court found that the proposed model "put[s] us on a slippery slope … because there would be no logical reason to prevent a named plaintiff from bringing suit on behalf of a large class of people, … [up to] ninety-nine percent of whom were not injured, so long as aggregate damages on behalf of 'the class' were reduced proportionately." Id. at 55-56.

In contrast, the *Restasis* model ensures that no uninjured plaintiff would be awarded damages:

> By removing a percentage of prescriptions from the total damages calculation, EPPs' model is not dependent on any individual class member's actions in the but-for world. If, in the claims administration process, defendant successfully challenges a class member's representation in his or her affidavit that he or she would have purchased generic Restasis, defendant would have identified someone who falls within the percentage of uninjured plaintiffs whose prescriptions were removed from the damages award. While that class member would not recover, the aggregate damages amount would not be affected.

2020 WL 2555556 at *27.

Whether *Restasis* will be upheld by the Second Circuit remains to be seen. Meanwhile, the following "take-aways" from cases outside of the Second Circuit should be considered, especially when litigating class actions in the Eastern District of New York:

- Certification has been denied in cases involving 6.7%, 8%, 10%, 12.7% and 44% of uninjured class members. See *Restasis*, 2020 WL 2555556 at *12. Even lower percentages must be evaluated with case-specific raw numbers to determine whether the number of uninjured members is indeed de minimis. Id.

- Damages models must ensure that (1) uninjured class members are not awarded damages, and (2) defendants' due process rights are protected.

- If post-certification discovery reveals that the number or percentage of uninjured class members is greater than initially indicated, defendants should seek to de-certify or re-define the class.

- The de minimis approach applies to damages cases. In injunctive relief cases, the Third, Ninth, Tenth, and D.C. Circuits have required only the standing of one named plaintiff because such cases focus on the defendants' conduct, not on monetary relief and the attendant notice requirements. Therefore, the standing of unnamed class members is deemed irrelevant.

Marissa Banez *is of counsel with the firm of Greenberg Traurig.*