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CERTIFICATION

STANDING

The standing of absent class members can be a significant, even dispositive, factor affecting class certification, attorneys Judith Bernstein-Gaeta and Damon Elder say in this BNA Insight. The authors survey case law and discuss how the standing of absent class members may preclude certification of a plaintiff class in federal court.

Absent Class Member Standing: A Potentially Decisive Factor In Resolving Class Certification Challenges in Federal Court

BY JUDITH BERNSTEIN-GAETA AND DAMON ELDER

Beginning with the first year of law school, every attorney knows that a party may not seek relief in federal court without Article III standing. On the other hand, the application of Article III to *absent* parties in a class certification context is less well-understood.

Federal courts almost uniformly agree that the question of whether there is Article III jurisdiction over a class action should be analyzed by reference only to the standing of the putative class representatives[1]: At least one representative with standing must be found in each case.[2] The named plaintiffs therefore must establish that they personally have suffered (or imminently will

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[1] *See, e.g.*, *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) (holding that a class had standing because at least one named plaintiff had standing); *Kendall v. Employees Retirement Plan of Avon Prods.*, 561 F.3d 112, 118 (2d Cir. 2009) (''In a class action, once standing is established for a named plaintiff, standing is established for the entire class.''); *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1215 n.1 (9th Cir. 2008) (''In a class action, standing is satisfied if at least one named plaintiff meets the requirements.''); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000) (''[P]rior to the certification of a class, and technically speaking before undertaking any formal typicality or commonality review, the district court must determine that at least one named class representative has Article III standing to raise each class subclaim.''); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 306-07 (3d Cir. 1998) (''[W]hether an action presents a 'case or controversy' under Article III is determined vis-a-vis the named parties.''); *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir. 1998) (''Once his standing has been established, whether the plaintiff will be able to represent the putative class, including absent class members, depends solely on whether he is able to meet the additional criteria encompassed in Rule 23 . . . .'').

[2] *Kohen*, 571 F.3d at 676 (stating that a class should not be dismissed for lack of standing ''even if the named plaintiff . . . lacks standing, provided that he can be replaced by a class member who has standing'').

 ISSN 1529-0115

suffer) a particularized injury caused by the defendant's alleged conduct.[3] Nevertheless, the standing of absent class members can also be a factor—sometimes, a decisive one—in the analysis as to whether a class should be certified under Federal Rule of Civil Procedure 23 (''Rule 23'').

This article explains three ways by which the standing of absent class members may preclude certification of a plaintiff class in federal court. *First*, where a plaintiff class seeks relief pursuant to a statute with its own jurisdictional ''standing'' requirements, the class should only be certified if *every* class member has such statutory standing. *Second*, Article III imposes requirements of injury and causation[4] before any absent class member can recover, even where similar elements would not exist pursuant to substantive law. The imposition of these requirements may tip the balance against class certification in the predominance analysis under Rule 23(b)(3). *Finally*, a class may not satisfy the ascertainability requirement for class certification, which is an implicit element in the Rule 23 analysis, if the class includes members who lack standing.[5]

Application of Statutory Standing to a Class Action

Although federal courts routinely recognize that a case involving class action allegations gives rise to a justiciable controversy under Article III so long as at least one class representative can demonstrate standing, courts have applied a different approach in the context of statutes that have their own ''statutory standing'' requirements.

Under some statutes, every plaintiff, including absent class members, seeking statutorily-authorized relief must demonstrate not only Article III standing, but also that they have ''statutory standing.'' Specifically, these requirements preclude relief in ''a situation in which, although the plaintiff has been injured and would benefit from a favorable judgment and so has standing in the Article III sense, he is suing under a statute that was not intended to give him a right to sue; he is not within the class intended to be protected by it.''[6]

In the class action context, the United States Supreme Court has held at least three times that absent class members must satisfy the statutory standing requirements of certain federal statutes. In *Zahn v. Int'l Paper Co.*, the Supreme Court held that the amount-in-controversy requirement for subject matter jurisdiction under the version of 28 U.S.C. § 1332(a) that existed prior to 1980 applied to every single member of a class.[7]

In *Weinberger v. Salfi*, the Court found that the named plaintiffs had satisfied the jurisdictional requirements of the Social Security Act, which allowed judicial review only after a ''final decision'' by the Secretary of Health, Education, and Welfare, but found that the absent class members (*i.e.*, ''the class'') did not satisfy that requirement because the plaintiffs did not allege that absent class members had received any ''final decision.''[8] And in *Califano v. Yamasaki*, the Court reaffirmed that class action treatment may be appropriate under the Social Security Act only ''[w]here the district court has jurisdiction over the claim of each individual member of the class . . . .''[9]

Adding further complexity, however, some courts have held that absent class members may not need to demonstrate statutory standing where a particular statute's standing requirement is not jurisdictional. For example, the Second Circuit has held that a district court did not abuse its discretion by certifying a class that included members who lacked standing under the Racketeer Influenced and Corrupt Organizations Act (''RICO''), because ''RICO standing is not jurisdictional.''[10] Thus, for some statutes, like the Social Security Act, it is clear that every class member must meet the statutory standing requirements. For others, such as RICO, it is possible that some members need not have statutory standing.

In short, counsel for each party to a class action should investigate carefully whether the class representatives have standing under Article III, as well as under any statute pursuant to which the class seeks relief. If there are no named plaintiffs with standing, the action is likely to be dismissed unless a replacement representative can be found. Further, when plaintiffs seek relief pursuant to a statute with its own jurisdictional prerequisites, counsel for both sides should examine whether there are any arguments that the absent members of the class themselves lack statutory standing. If so, there may be grounds for the dismissal of the plaintiffs' class action allegations or for rejection of class certification.

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[3] *See Wallace v. ConAgra Foods, Inc.*, Slip Op., No. 13-1485, at 7-8 (8th Cir. Apr. 4, 2014) (class representatives lacked standing where they could not show that the specific products they purchased were defective).

[4] Under this inquiry, (1) ''the plaintiff must have suffered an injury in fact''; (2) ''there must be a causal connection between the injury and the conduct complained of''; and (3) ''it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'' *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotations and citations omitted).

[5] *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264-66 (2d Cir. 2006).

[6] *Kohen*, 571 F.3d at 677.

[7] *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973), *superseded by statute*, Pub. L. No. 96-486, 94 Stat. 2369, *as recognized in Skelton v. Gen. Motors Cop.*, 660 F.2d 311, 318 (7th Cir. 1981).

[8] *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975).

[9] *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). In a subsequent decision, the U.S. Court of Appeals for the Second Circuit held that a class pursuing claims under the federal copyright act could not be certified unless every class member's copyright claim satisfied the Act's statutory standing ''jurisdictional prerequisite.'' *In re Literary Works in Elec. Databases Copyright Litig.*, 509 F.3d 116, 125-27 & n.7 (2d Cir. 2007). The U.S. Supreme Court ultimately reversed the Second Circuit's conclusion that the Copyright Act was jurisdictional. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010). In that decision, however, the Supreme Court did not consider whether the Second Circuit correctly decided that a jurisdictional statutory standing requirement precludes class certification if it cannot be satisfied by every class member.

[10] *Denney*, 443 F.3d at 264-66. The *Denney* court explained that ''[a] RICO plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the RICO violation, and only when his or her actual loss becomes clear and definite.'' *Id.* at 266 (internal quotations and brackets omitted).

  CLASS ISSN 1529-0115

Impact of Absent Class Member Standing on Rule 23

In contrast to the determination as to whether a class action gives rise to a justiciable controversy under Article III, courts separately assess the standing of absent class members in determining whether class certification is appropriate pursuant to Rule 23. The requirement that absent class members have standing can affect the class certification analysis in at least two ways.[11]

First, courts have recognized that before any individual absent class member may recover damages after a final judgment for the class, they must prove that they personally have standing to assert the same claims as the class representatives.[12] This principle makes sense in light of the Rules Enabling Act, which mandates that the Federal Rules of Civil Procedure ''shall not abridge, enlarge, or modify any substantive right.''[13] In some cases, this requirement has a significant impact on whether a class may be certified pursuant to Rule 23(b)(3).

Before a class may be certified in federal court, plaintiffs must demonstrate that common issues will predominate over individual issues at trial.[14] An issue is ''individual'' where, ''to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member.''[15] On the other hand, an issue is ''common'' when it can be resolved on a classwide basis, such that it will not be necessary to hold ''an evidentiary hearing on each [class member's] claim.''[16]

Claims involving elements of causation and injury are more likely to give rise to individualized issues than claims which do not involve those elements. Thus, it is unsurprising that the parties often dispute at the class certification stage the necessity of proving such elements at trial. Critically, however, even if a plaintiff's substantive claims do *not* require proof of injury and causation on behalf of all class members, Article III ultimately *does* impose similar requirements before each class member can recover in federal court, just as if they had filed suit in their own right.[17]

The consumer fraud laws of California provide a useful illustration of this concept. California state courts have held that under some such laws, certain ''standing requirements are applicable only to the class representatives, and not all absent class members'' at the class certification stage.[18] When plaintiffs rely upon these statutes in federal court, however, the analysis fundamentally changes. By virtue of Article III, every absent class member ultimately will be required to demonstrate a form of causation and injury to establish standing—regardless of the vagaries of California law—virtually guaranteeing that these two issues will factor into the class certification analysis. Indeed, these issues alone may preclude common issues from predominating over individual ones, thus defeating class certification.[19] This result is particularly important in light of the Class Action Fairness Act, which has authorized removal of a broad swath of putative class actions to federal court.

Second, a proposed class that is defined to include absent class members who lack standing may be overbroad, and thus inconsistent with the implicit Rule 23 requirement of ''ascertainability.''[20] This requirement

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[11] The primary difference between the ''class standing'' and Rule 23 class certification requirements is that only the former is jurisdictional. This distinction is illustrated by the court's decision in *R.C. v. Nachman*, 969 F. Supp. 682, 695-96 (M.D. Ala. 1997). In that case, the defendant asked the court to vacate an existing consent decree that it had reached with a plaintiff class, arguing in relevant part that the decree was void because the class included members who lacked standing, depriving the court of jurisdiction. In considering this argument, the court explained that it would vacate the consent decree only if it found that there was ''no arguable basis upon which the court could have rested a finding that it had jurisdiction'' to enter the decree. *Id.* at 692-93. Before deciding this jurisdictional question, the court made clear that ''[a] properly defined class includes only those persons who have standing to bring suit in their own right. A class defined too broadly should not be certified.'' *Id.* at 695. And it recognized that the court would have erred in entering the decree if the class did include individuals who lacked standing, because that would mean that ''the Court implicitly certified an overly-broad class.'' *Id.* at 696. Nonetheless, the court concluded that the decree was ''not void for want of jurisdiction'' even if ''some members of the plaintiff class lacked standing,'' because at least some class members had standing and certifying an overbroad class was not a jurisdictional error. *Id.*

[12] *See*, *e.g.*, *In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. 402, 419-21 (D. Me. 2010) (''The filing of suit as a class action does not relax [the Article III] standing requirement.'').

[13] *See* 28 U.S.C. § 2072(b).

[14] Fed. R. Civ. P. 23(b)(3).

[15] *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005).

[16] *See*, *e.g.*, *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 40 (1st Cir. 2003).

[17] *See*, *e.g.*, *O'Shea v. Epson Am., Inc.*, No. CV 09-8063 PSG (CWx) (C.D. Cal. 2011) (''California law . . . cannot and does not permit unnamed class members to circumvent the requirements of Article III.''); *Webb v. Carter's Inc.*, 272 F.R.D. 489, 503 (C.D. Cal. 2011) (''[U]nnamed class members are not permitted to bring a claim in federal court where they cannot establish Article III standing.'').

[18] *See In re Tobacco II Cases*, 207 P.3d 20, 25 (Cal. 2009) (''We conclude that standing requirements are applicable only to the class representatives, and not all absent class members.'')

[19] *O'Shea*, *id.* (''Based on the foregoing [standing analysis], the Court finds that individualized issues of injury and causation permeate the class claims. In light of such, it concludes that the proposed class is not sufficiently cohesive to warrant adjudication by representation. Plaintiff therefore fails to satisfy Rule 23(b)(3)'s requirement that common issues predominate.'') (quotation omitted); *Webb*, 272 F.R.D. at 503 (similar).

[20] *See*, *e.g.*, *Allen v. Holiday Universal*, 249 F.R.D. 166, 171 (E.D. Pa. 2008) (explaining that a class may be overbroad if it includes class members who lack standing, have not been injured, or cannot obtain relief from the defendant for other reasons, such as affirmative defenses). Notably, some courts may ''look beyond the pleadings'' in analyzing whether a class is overbroad, and thus evaluate the parties' evidence to determine whether the plaintiffs might be able to show that every class member has standing or a valid claim. *See, e.g.*, *Edwards v. McCormick*, 196 F.R.D. 487, 491 (S.D. Ohio 2000). As a result, the Seventh Circuit has suggested that determining whether a class is overbroad may be a justification for absent class member discovery. *See Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 679 (7th Cir. 2009) (explaining that the defendant can ''depose a random sample of class members to determine how many . . . were not injured'' in order to show that the class was overbroad). Nevertheless, some courts have accepted the plaintiffs' pleadings as true in evaluating the breadth of a class definition, and therefore may refuse to find that a class is over-

stems from the commonsense principle that ''[i]t is axiomatic that for a class action to be certified, a 'class' must exist.''[21]

Courts repeatedly have found proposed class definitions to be overbroad where they include an excessive number of members who would have lacked constitutional standing if they had sued individually.[22] This restriction has long-standing roots.[23] For example, in a 1970 Fifth Circuit case, the court explained that ''[i]t is elementary that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable.''[24] Affirming the district court's denial of certification, the Fifth Circuit found that the proposed class definition—''residents of [Texas] active in the peace movement''—included individuals who could not have been harmed by the defendant's conduct: ''[t]he activity complained of here, viz. harassment by members of the Houston Police Department under the color of a void city ordinance, could not have a 'chilling effect' on the First Amendment rights of all Texas residents who desire to publicize their particular position on the war in Vietnam outside the City of Houston.''[25] The court held that, as a result, the proposed class was overbroad, and plaintiffs had failed to assist the district court in ''accurately delineating class membership.''[26] Thus, the court affirmed the denial of certification because the class included members who were not harmed by the defendant's conduct.[27]

Despite the long history of this principle, however, courts have not been consistent as to whether the requirement is that *all* or just an undefined but substantial portion of the class must have standing.[28] Indeed, in some cases, courts reject overbroad class definitions without providing any specification as to whether all, or merely most, class members must have standing.[29]

Further, when courts do find that class definitions are overbroad, they will sometimes exercise discretion to modify such definitions rather than denying certifica-

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broad at the certification stage based on evidence submitted by the defendant that contradicts those pleadings. *See*, *e.g.*, *Caroline C. v. Johnson*, 174 F.R.D. 452, 459-62 & n.8-10 (D. Neb. 1996) (excluding certain plaintiffs from a class where it was ''obvious from plaintiffs' complaint'' that their claims were moot, but refusing to consider evidence demonstrating that other plaintiffs' claims were moot at the class certification stage).

[21] *See*, *e.g.*, *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981) (quotation omitted); 17 Charles Alan Wright et al., *Federal Practice and Procedure* § 1760 (3d ed. 2008).

[22] *See*, *e.g.*, *Adashunas v. Negley*, 626 F.2d 600, 603 (7th Cir. 1980) (''In order to state a class action claim upon which relief can be granted, there must be alleged at the minimum (1) a reasonably defined class of plaintiffs, (2) *all of whom have suffered a constitutional or statutory violation* (3) inflicted by the defendants.'' (emphasis added)); *Walker v. Consolidated Freightways, Inc.*, 930 F.2d 376 (4th Cir. 1991) (finding that a class which included all truck drivers covered by a collective bargaining agreement was overbroad because only those drivers who were represented by a particular union had standing). *See also*, *e.g.*, *Sanders v. Apple Inc.*, No. C 08-1713 JF (PVT) (N.D. Cal. Jan. 21, 2009) (finding a consumer fraud class nonascertainable because it included individuals who owned but did not purchase the defendant's product, were not deceived by the defendant's advertisements, or suffered no damages, and who therefore ''would lack standing''); *Kempner v. Town of Greenwich*, 249 F.R.D. 15, 17-18 (D. Conn. 2008) (''[T]he court finds that the proposed class cannot be certified because it contains members who do not have standing under Article III of the Constitution.''); *In re TJX Cos. Retail Sec. Breach Litig.*, 246 F.R.D. 389, 392 & n.2 (D. Mass. 2007) (expressing ''serious doubts whether the class as proposed . . . is properly defined,'' and explaining that ''[i]t is well-established that members of a plaintiff class must all have the legal right to bring suit against the defendant on their own; inclusion of those without such standing renders the class overbroad.''); *Miller v. Univ. of Cincinnati*, 241 F.R.D. 285, 288 (S.D. Ohio 2006) (''A properly defined class includes only members who would have standing to bring suit in their own right.''); *Guillory v. Am. Tobacco Co.*, No. 97 C 8641 (N.D. Ill. Mar. 20 2001) (''[T]he [class] description must not be so broad as to include individuals who are without standing to maintain the action on their own behalf.''); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 490 (S.D. Ill. 1999) (same); *R.C. v. Nachman*, 969 F. Supp. 682, 695 (M.D. Ala. 1997) (''A properly defined class includes only those persons who have standing to bring suit in their own right. A class defined too broadly should not be certified.''); *Pottinger v. City of Miami*, 720 F. Supp. 955, 957 (S.D. Fla. 1989) (''The description of the class is sufficiently definite if any member of the proposed class would have the requisite standing to sue on his own behalf or in his own right.'' (internal quotations omitted)); *Slaughter v. Levine*, 598 F. Supp. 1035, 1041 (D. Minn. 1984) (determining that a class is overbroad because it includes uninjured class members, and explaining that ''[t]he definition of a class cannot be so broad that it includes persons without standing to bring the action on their own behalf. Each class member must have standing to bring the suit in his own right.''), *overruled on other grounds*, *Gardebring v. Jenkins*, 485 U.S. 415 (1988); *McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875, 878 (D.S.D. 1982) (''Each class member must have standing to bring the suit in his own right.''); *Independence Hill Conservancy Dist. v. Sterley*, 666 N.E.2d 978, 982 (Ind. Ct. App. 1996) (''If the definition includes persons without interests or standing in the lawsuit, it is not adequate.'').

[23] *See DeBremaecker v. Short*, 433 F.2d 733 (5th Cir. 1970).

[24] *Id.* at 734.

[25] *Id.*

[26] *Id.*

[27] *Id.* Two years later, the plaintiffs in another Fifth Circuit case alleged that the defendant union lodge's enforcement of a provision of its constitution violated federal law and sought certification of a class of all members of the lodge. *Nix v. Fulton Lodge No. 2 of the Int'l Ass'n of Machinists & Aerospace Workers*, 452 F.2d 794, 796-97 (5th Cir. 1972). The district court narrowed the class ''from all members of the Grand Lodge to only those members against whom the provision was being in[]voked.'' *Id.* at 797. The Fifth Circuit affirmed, concluding that only with respect to those members ''would the judicial resolution be limited to 'concrete legal issues, presented in actual cases, not abstractions.'' *Id.*

[28] *Compare*, *e.g.*, *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) (''[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'' (emphasis added)), *with Adashunas v. Negley*, 626 F.2d 600, 603 (7th Cir. 1980) (''In order to state a class action claim upon which relief can be granted, there must be alleged at the minimum (1) a reasonably defined class of plaintiffs, (2) *all of whom have suffered a constitutional or statutory violation* (3) inflicted by the defendants.'' (emphasis added)).

[29] *See*, *e.g.*, *In re Monumental Life Ins. Co.*, 365 F.3d 408, 413-14 (5th Cir. 2004) (finding that a class definition was overbroad because it not only included individuals who were ''forced into substandard rates or substandard plans'' for the actionable reasons alleged by the plaintiffs, but also for other reasons); *Walker v. Consolidated Freightways, Inc.*, 930 F.2d 376, 382 (4th Cir. 1991) (finding that a class that included all truck drivers covered by a collective bargaining agreement was overbroad because only those drivers who were represented by a particular union had standing).

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tion, assuming that an alternative definition can be formulated that meets all of the requirements of Rule 23.[30] Thus, a minority of courts have limited the rule's application at the initial certification stage because of the possibility that a class could be redefined to exclude class members without standing later in the litigation.[31]

Finally, despite the plethora of federal decisions holding that class member standing may affect the Rule 23 analysis—whether under the predominance or ascertainability rubrics—a small number of courts have concluded otherwise.[32] These decisions are inconsistent with the weight of authority and, in at least some instances, have been implicitly or explicitly overruled. For example, in 2011, the Central District of California refused to consider a defendant's argument that absent class members lacked standing in connection with class certification.[33] The court reasoned in part that there was no Ninth Circuit precedent giving rise to a requirement that absent class members have standing.[34] The following year, however, the U.S. Court of Appeals for the Ninth Circuit ruled that ''[n]o class may be certified that contains members lacking Article III standing.''[35]

In light of these principles, when a putative class action is filed in or removed to federal court, plaintiffs' counsel should be cognizant of the fact that they will not be able to avoid individual issues related to injury and causation simply by suing under a statute that does not explicitly contain such requirements. Further, plaintiffs' counsel should take care to limit any class definition in federal court to individuals who would have standing to bring a similar action themselves. Otherwise, defense counsel will have a strong argument that class certification should be denied because individual issues predominate over common ones and the proposed class is overbroad.

Conclusion

Federal courts typically find that they have Article III jurisdiction over a putative class action so long as at least one class representative can demonstrate Article III standing. On the other hand, where a plaintiff seeks to certify a class asserting claims under a statute with its own jurisdictional standing requirement, courts have held that the standing requirement is not satisfied for the class as a whole unless it is satisfied for *every* class member. Further, where a plaintiff seeks to certify a class that includes members without Article III standing, the existence of those absent class members may tip the balance against class certification, either because they create individual issues that predominate over common ones, or because they render the class non-ascertainable.

Some scholars advise that ''the standing issue focuses on whether the named plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court.''[36] Nevertheless, for the reasons discussed above, the reality is that in many cases the standing of absent class members can be a significant—or even dispositive—factor affecting class certification, which should not be overlooked.

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[30] *See*, *e.g.*, *Kornberg v. Carnival Cruise Lines*, 741 F.2d 1332, 1337 (11th Cir. 1984) (''The district court's examination . . . may indicate that the class is presently too broadly defined. Some of the passengers may not have been affected by the toilet breakdowns. This, however, simply requires that the class be limited.''); *Slaughter v. Levine*, 598 F. Supp. 1035, 1041 (D. Minn. 1984) (narrowing a class definition from all individuals who received certain government benefits in an allegedly improper manner, to only those who were injured by having received their benefits in such a manner), *overruled on other grounds*, *Gardebring v. Jenkins*, 485 U.S. 415 (1988); *Thomas v. Clarke*, 54 F.R.D. 245, 249 (D. Minn. 1971) (narrowing a class definition from individuals whose properties had been seized or were under threat of seizure by the defendant, to only individuals whose properties had been seized, in order to ensure that every member of the class would have standing).

[31] *See State v. Starcher*, 474 S.E.2d 186, 193 (W.Va. 1996) (''[I]t is not a proper objection to certification that the class as defined may include some members who do not have claims. This is because certification is conditional and may be altered, expanded, subdivided, or vacated as the case progresses toward resolution on the merits.'' (internal citations and quotations omitted)); *Zapka v. Coca-Cola Co.*, No. 99 CV 8238 (N.D. Ill. Oct. 27, 2000) (''A class may be certified although the initial definition includes members who have not been injured . . . however, the exact membership of the class must be ascertainable at some point of the case.'').

[32] *See Friedman v. 24 Hour Fitness USA, Inc.*, No. CV 06-6282 AHM (CTx), at *4 (C.D. Cal. Aug. 25, 2009) (''There is no requirement that a class be defined to include only those with meritorious claims. Class certification does not depend on the ability of the named plaintiffs or class members to win on the merits.''); *Stewart v. Assocs. Consumer Discount Co.*, 183 F.R.D. 189, 198 (E.D. Pa. 1998) (''A class may be certified even though the initial definition includes members who have not been injured or do not wish to pursue claims against the defendant.'') (citing *Joseph v. Gen. Motors Corp.*, 109 F.R.D. 635, 639 (D. Colo. 1986); *Elliott v. ITT Corp.*, 150 F.R.D. 569, 575 (N.D. Ill. 1992) (same). Others have held that the requirement does not apply to actions for injunctive or declaratory relief. *See*, *e.g.*, *Coleman v. Gen. Motors Acceptance Corp.*, 220 F.R.D. 64, 88-90 (M.D. Tenn. 2004) (''How narrowly or broadly a class may be defined depends largely on the relief sought. A class seeking declaratory and injunctive relief can be much more broadly defined than classes seeking damages.'' (internal citation omitted)); *see also supra* I.D. And, at least one court has held that the bifurcation of a case into liability and remedial phases obviated this rule. *United States v. City of New York*, 258 F.R.D. 47, 57-58 (E.D.N.Y. 2009).

[33] *See Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 536-37 (C.D. Cal. 2011) (refusing to consider absent class member standing in connection with class certification).

[34] *Id.* at 531-33.

[35] *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594-95 (9th Cir. 2012).

[36] 1 Newberg on Class Actions § 2:3 (5th ed.).