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Town Of Chester: An Answer On Class-Member Standing?

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May a class be certified under Federal Rule of Civil Procedure 23 if some of its members lack Article III standing? This is one of the most hotly debated questions in contemporary class-action practice. And the U.S. Supreme Court may have just telegraphed the answer — in a case that, on its face, had nothing to do with Rule 23 or class actions. The unanimous decision in Town of Chester v. Laroe Estates Inc.[1] strongly suggests that, before a damages class is certified under Rule 23(b)(3), the named plaintiff must demonstrate not only his or her own Article III standing, but that of all absent class members as well.

Twenty years ago, the Supreme Court stated that "Rule 23's requirements must be interpreted in keeping with Article III's constraints."[2] This cryptic pronouncement has engendered much confusion. Must all members of a class possess an injury-in-fact sufficient to establish Article III standing — or is it enough that the named plaintiff does? And if absent class members must satisfy Article III, need their standing be shown before the district court certifies a class, or can that demonstration be put off to some later time (e.g., during the claims process, after liability is adjudicated)? Perhaps surprisingly for such fundamental questions of justiciability, the lower courts are deeply divided.

The view that all class members must possess Article III standing rests on two well-settled premises. First, Article III standing is an "irreducible constitutional minimum" that any individual litigant must satisfy before he or she may seek relief from a federal court.[3] And second, aggregation of claims pursuant to Rule 23 — a mere rule of procedure — does not change the substantive law governing those claims. Indeed, the Rules Enabling Act expressly provides that aggregation cannot vest class members with greater rights than they would possess if they sued separately.[4] Putting these principles together, it would seem that, in order to recover as members of a class, claimants must satisfy the same Article III standing requirement that they would have to satisfy to recover in an individual action. Courts that have expressed this view of the law include the Second,[5] Eighth[6] and D.C. Circuits.[7]

Others take the opposite position. In their view, only the named plaintiff in a class action must possess Article III standing. As long as the court finds that Rule 23's criteria for class certification are met, it may reach out and decide the claims of absent class members, even if some of them would lack have Article III standing to sue on their own. This view can be traced to a three-Justice concurrence in Lewis v. Casey (1996), which stated that "the standing issue focuses on whether the [named] plaintiff is properly before the court, not whether … absent class members are properly before the court."[8] The First,[9]

Third,[10] Seventh[11] and Tenth Circuits[12] have all espoused this more permissive view.

Finally, exemplifying the confusion on this issue, the Ninth Circuit has taken both sides of the debate. For example, in 2012, it stated that "no class may be certified that contains members lacking in Article III standing."[13] But the year before that, it said the opposite, explaining that "our law [of standing] keys on the representative party, not all of the class members, and has done so for many years."[14]

The Supreme Court was poised to resolve this confusion last term in Tyson Foods Inc. v. Bouaphakeo:[15] one of the questions presented in Tyson's petition for certiorari was "[w]hether a class action may be certified or maintained … when the class contains … members who were not injured."[16] The court ultimately declined to decide that question, however, because Tyson "abandon[ed]" it after certiorari was granted.[17] Even so, the court recognized that "the question … is one of great importance."[18] And, in a concurrence, Chief Justice Roberts and Justice Alito made their views clear, explaining that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."[19]

There things stood until this week, when the Supreme Court decided Town of Chester. It was not a class action, and the court's opinion said nothing about Rule 23 — at least, not expressly. But its holding may well foreshadow how the court would answer the question left open in Tyson Foods.

Town of Chester originated as a lawsuit by a real estate developer named Sherman against a New York municipality. Several years into the litigation, Laroe Estates, a development company that had a contractual relationship with Sherman, moved to intervene of right pursuant to Rule 24(a)(2). The district court denied Laroe's motion to intervene for lack of Article III standing. The Second Circuit reversed, holding that an intervenor such as Laroe need not "meet the requirements of Article III," because Constitution's case-or-controversy requirement is satisfied as long as the original plaintiff has standing.[20]

The Supreme Court disagreed. "Standing is not dispensed in gross," the court noted.[21] "For all relief sought" in an action, "there must be a litigant" before the court "with [Article III] standing" to seek that relief, "whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right."[22] The "ineluctabl[e]" conclusion, therefore, was that "an intervenor of right must demonstrate Article III standing" where he or she "seeks additional relief beyond that which the plaintiff requests" for himself or herself.[23] This is so not only where the intervenor seeks an entirely different form of relief than the original plaintiff (such as money damages versus injunctive relief), but also where "both the plaintiff and the intervenor seek separate money judgments in their own names."[24]

On the other hand, if the intervenor seeks no additional or different relief — e.g., if he or she wishes to help persuade the court to grant a money judgment to the original plaintiff — the intervenor need not "demonstrate Article III standing."[25] As the United States noted in its amicus brief, such an intervenor is essentially just an amicus curiae by another name, and it is universally acknowledged that amici need not possess standing to participate in a case.[26]

Because the record was not clear, the Supreme Court remanded the case for for the lower courts to determine "whether Laroe [was] seeking [additional] damages for itself," in which case a showing of Article III standing was required, or whether it was "simply seeking the same damages sought by Sherman," in which case such a showing was unnecessary.[27]

Town of Chester appears to have flown under the radar of the class-action bar. But the court's view of

the interplay between Article III and Rule 24 foreshadows its likely resolution of the analogous debate involving Rule 23. Although Town of Chester did not mention Rule 23 explicitly, it explained that the same rule applies regardless of the particular procedural method by which "[a] litigant joins the lawsuit":[28] Any person seeking relief greater than or different from what the original plaintiff seeks for himself — including a separate monetary award — must demonstrate Article III standing to seek that relief. The Constitution requires no less. How could this principle not apply in damages class actions under Rule 23(b)(3), where, as the Supreme Court has noted, "each class member [claims] entitle[ment] to an individualized award of monetary damages"?[29]

Town of Chester also suggests that, in damages class actions, the requisite showing that all class members have Article III standing must be made prior to certification. In that case, the court held that a would-be intervenor seeking separate relief "must establish its own Article III standing in order to intervene"[30] — not at some later time, such as when judgment is entered or when the proceeds of the suit are distributed. The certification of a class is the Rule 23 equivalent of the grant of permission to intervene: it is the judicial act that officially "bring[s] the claims of the unnamed class members before the court"[31] and bestows on those individuals "a legal status separate from" that of the named plaintiff.[32] If the Constitution requires third parties seeking different or additional relief to demonstrate Article III standing before Rule 24 intervention, it stands to reason that the same showing is also required before Rule 23 certification.

Conversely, Town of Chester suggests a different rule for class actions brought pursuant to Rule 23(b)(2). Such actions do not seek individualized awards of damages, but rather, "injunctive relief or corresponding declaratory relief … respecting the class as a whole" — for example, a unitary injunction ordering the defendant to stop a discriminatory practice or cease a misleading ad campaign. In a (b)(2) action, in other words, absent class members seek the very same relief that the named plaintiff seeks — nothing more and nothing less. As such, under Town of Chester, a separate demonstration of Article III standing for absent class members may not be necessary. (Of course, the named plaintiff must have standing to seek all of the requested injunctive or declaratory relief, and the requirements of Rule 23 must be met.)

Notably, Lewis v. Casey — the source of the concurrence that gave rise to the loose view of absent-class-member standing — was itself a (b)(2) class action. There, the plaintiff class sought a unitary injunction requiring Arizona to "implement a plan to ensure [its] prisoners meaningful access to the courts."[33] There was apparently no request for damages, and none were awarded. In Lewis, therefore, the concurrence was likely correct to conclude that absent class members' standing was beside the point as long as at least one named plaintiff had standing to seek the requested injunction and Rule 23's requirements were satisfied. As Town of Chester strongly suggests, however, a more stringent approach to standing is required in damages class actions — and courts that have extended the approach of the Lewis concurrence to damages class actions have done so in error.

Town of Chester may not be the last word in the debate over absent-class-member standing. But it is hard to see how the same Supreme Court that decided Town of Chester unanimously could turn around and hold that a damages class may be certified even if some of its members cannot satisfy Article III's "irreducible constitutional minimum." After all, that court is largely the same one which, six years ago, warned that "[i]n [this] era of frequent litigation[] [and] class actions, … courts must be more careful to insist on the formal rules of standing, not *less* so."[34]

The Supreme Court should take this question up again at the first opportunity and resolve it once and for all. Until it does so, however, class action defendants would be wise to argue that Town of Chester

abrogated lower-court precedents that dispense with the duty to demonstrate classwide standing prior to the certification of a damages class.

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[1] 2017 U.S. LEXIS 3555 (June 5, 2017).

[2] Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 612-13 (1997).

[3] Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 102-03 (1998).

[4] Rules Enabling Act, 28 U.S.C. § 2702(b); see also Fed. R. Civ. P. 82 (noting that the Federal Rules of Civil Procedure "do not extend" the "jurisdiction of the district courts").

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

[6] Avritt v. Reliastar Life Insurance Co., 615 F.3d 1023, 1034 (8th Cir. 2010).

[7] In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252 (D.C. Cir. 2013).

[8] 518 U.S. 343, 395-96 (Souter, J., joined by Ginsburg and Breyer, JJ.).

[9] In re Nexium Antitrust Litig., 777 F.3d 9, 25 (1st Cir. 2015).

[10] Krell v. Prudential Insurance Co. of Am., 148 F.3d 283, 306-07 (3d Cir. 1998).

[11] Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 676-77 (7th Cir. 2009).

[12] DG ex rel. Stricklin v. Devaughn, 594 F.3d 1188, 1198 (10th Cir. 2010).

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

[14] Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1021 (9th Cir. 2011).

[15] 136 S. Ct. 1036 (2016).

[16] Tyson Foods, Inc. v. Bouaphakeo, No. 14-1146, Pet. at i (Mar. 19, 2015).

[17] 136 S. Ct. at 1049.

[18] Id. at 1050.

[19] Id. at 1053 (Roberts. J., concurring) (emphasis added).

[20] 2017 U.S. LEXIS 3555, at *8.

[21] Id. at *9.

[22] Id. at *10-11.

[23] Id.

[24] Id at *11.

[25] Id.

[26] Br. of United States as Amicus Curiae, No. 16-605, at 15 (March 3, 2017).

[27] 2017 U.S. LEXIS 3555, at *13-14.

[28] Id. at *10.

[29] Wal-Mart Stores Inc. v. Dukes, 564 U.S. 338, 361 (2011).

[30] 2017 U.S. LEXIS 3555, at *4, *14.

[31] Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030 (5th Cir. 1981).

[32] Sosna v. Iowa, 419 U.S. 393, 399 (1975).

[33] Casey v. Lewis, 43 F.3d 1261, 1265 (9th Cir. 1994), rev'd, 518 U.S. 343.

[34] Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 146 (2011) (emphasis added).
