The Need to Establish Absent Class Member Standing in Antitrust Class Actions

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This term, in *Tyson Foods, Inc. v. Bouaphakeo*,[1] the Supreme Court is expected to resolve two related issues concerning the injury required to establish Article III standing that have sharply divided the courts of appeals: (1) can a class containing uninjured members be certified?; and (2) can differences among individual class members be ignored, and a class certified, when plaintiffs use statistical techniques that presume that all class members are identical?

Tyson Foods presents these questions in the context of a wage-and-hour class action brought as a collective action certified under the Fair Labor Standards Act and as a class action pursuant to Federal Rule of Civil Procedure 23(b)(3), but the answers are likely to have important implications for antitrust class actions too. The questions raised by *Tyson Foods* have taken on increasing urgency in class actions over the past several years, particularly in the area of antitrust, where plaintiffs routinely seek to rely on econometric models that cannot or do not establish classwide injury and tend to obscure individual differences among class members. That includes differences between the named plaintiffs and the unnamed individuals, or "absent class members," also participating in the action.

Recurring litigation around these issues in antitrust matters has deepened the circuit split. In fact, in the year leading up to the Supreme Court's decision to grant the petition in *Tyson*, the Supreme Court was asked to address almost identical questions in at least two antitrust cases (*In re Polyurethane Foam* and *In re Urethane Antitrust Litigation*)—one petition has been denied, and the other is still pending.[2]

In our view, the "irreducible constitutional minimum"[3] of Article III standing, coupled with the Supreme Court's repeated directives not to use Rule 23 to enlarge "substantive right[s]," including basic Article III precepts, in violation of the Rules Enabling Act,[4] should lead the Court to conclude that absent class members, like all federal litigants, must have Article III standing. Put differently, the Federal Rules cannot confer standing, or excuse standing, where it is lacking under Article III. Further, class members must demonstrate that standing can be established on a classwide basis at the time the class is certified. Any other result would conflict with the Supreme Court's decisions in such cases as *Wal-Mart Stores, Inc. v. Dukes*[5] and *Comcast Corp. v.*

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[1] Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791 (8th Cir. 2014), *cert. granted*, 135 S. Ct. 2806 (2015).

[2] Carpenter Co. v. Ace Foam Inc., No. 14-0302 (6th Cir. Sept. 29, 2014) (order denying petition to take an interlocutory appeal), *cert. denied*, 135 S. Ct. 1493 (2015); *In re* Urethane Antitrust Litig., 768 F.3d 1245 (10th Cir. 2014), *petition for cert. filed*, Dow Chem. Co. v. Indus. Polymers, Inc., No. 14-1091 (U.S. Mar. 10, 2015).

[3] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[4] 28 U.S.C. § 2072.

[5] 131 S. Ct. 2541 (2011).

Behrend,[6] elevate the class action device to take precedence over the constitutional imperative of a "case or controversy" between the parties, and unduly expand the jurisdiction of the federal courts.

Different Approaches to the Question of Absent Class Member Standing

The "irreducible constitutional minimum of standing"[7] under Article III is essential to maintain the "judiciary's proper role in our system of government" and to ensure that the judicial process is not "used to usurp the powers of the political branches."[8] Beyond its role in preserving the separation of powers, the constitutional standing requirement guarantees that legal questions are resolved in "a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[9] Therefore, to properly invoke the jurisdiction of the federal courts, a litigant must first allege and then eventually prove at trial the three elements essential to Article III standing: (1) an "injury in fact," meaning "an invasion of a legally protected interest which is (a) concrete and particularized [citations omitted], and (b) actual or imminent, not conjectural or hypothetical"; (2) "a causal connection between the injury and the conduct complained of" that is "fairly traceable" to the actions of the defendant; and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable [court] decision."[10]

[C]lass members must demonstrate that standing can be established on a class-wide basis at the time the class is certified.

The Expansive Approach. In *Tyson Foods*, the plaintiffs alleged that they were not paid overtime under the Fair Labor Standards Act for changing in and out of uniforms and other pre- and post-shift activities. The defendant sought decertification of the class on the ground that the plaintiffs' evidence showed that some class members did not work overtime and were thus not injured. The Eighth Circuit upheld the denial of the decertification motion, relying on pre-*Dukes* authority stating the existence of "claims of differing strengths" did not require decertification, particularly because the defendant "invited error" by requesting that the jury be instructed to "treat plaintiffs with no damages as class members."[11] The court then rejected the defendant's argument that the plaintiffs improperly relied on statistical averages to prove liability where none may have existed. The court found it significant that the defendant had no records documenting the specific amount of time class members spent engaging in certain tasks and found it permissible to use "inference[s]" based on representative testimony to establish classwide liability.[12]

The Eighth Circuit's reasoning in *Tyson Foods*, while contrary to some earlier Eighth Circuit authority, aligns with several other circuits taking an expansive approach to the issue of absent class member standing. The leading case for this approach is *Kohen v. Pacific Investment Management Co.*[13] In *Kohen*, a class action involving futures contracts, the defendants argued that the class definition potentially included persons who would not have lost money on their futures contracts and thus suffered no Article III injury. The Seventh Circuit rejected this argument,

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[6] 133 S. Ct. 1426 (2013).

[7] *Lujan*, 504 U.S. at 560.

[8] DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) (citing Raines v. Byrd, 521 U.S. 811, 818 (1997)); Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013)).

[9] Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

[10] *Lujan*, 504 U.S. at 560–61 (internal quotation marks omitted).

[11] Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791, 797–98 (8th Cir. 2014).

[12] *Id.* at 799.

[13] 571 F.3d 672 (7th Cir. 2009).

explaining that as long as one member of a certified class has a plausible claim to damages, the requirement of Article III standing is satisfied.[14] But the primary authority the court cited for this "one member" standing rule—the Supreme Court's decision in *United States Parole Commission v. Geraghty*[15]—had to do with mootness, not Article III standing in the class action context.

Notwithstanding its flawed premise, *Kohen*'s reasoning spread to other circuits: the Tenth Circuit, for example, followed *Kohen* and subsequently stated in *DG ex rel. Stricklin v. Devaughn* that "Rule 23's certification requirements neither require all class members to suffer harm or threat of immediate harm nor Named Plaintiffs to prove class members have suffered such harm."[16] According to the Tenth Circuit, "That a class possibly or even likely includes persons unharmed by a defendant's conduct should not preclude certification."[17] But like the Seventh Circuit in *Kohen*, the court in *Stricklin* did not elaborate on its conclusion that plaintiffs who have not suffered any injury should be allowed to remain in federal court.

The Third Circuit in *In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions*,[18] and more recently in *Neale v. Volvo Cars of North America LLC*,[19] also adopted the view that absent class members need not establish Article III standing. In *Prudential*, the Third Circuit ruled that Article III standing need not be established on a classwide basis, as the question "whether an action presents a 'case or controversy' under Article III is determined vis-à-vis the named parties."[20] The court further explained that once the class representative has established constitutional standing, a proper party to raise a particular issue is before the court, and there remains no further separate class standing requirement in the constitutional sense.

The court in *Neale* took a somewhat different approach, concluding that '"absentee class members are not required to make a . . . showing [of standing] because once the named parties have demonstrated they are properly before the court, the issue [becomes] one of compliance with the provisions of Rule 23, not one of Article III standing.'"[21] That followed, in *Neale*'s view, from a longstanding history of "treat[ing] individuals falling within a class definition as members of a group rather than as legally distinct persons."[22] *Neale* reasoned that any concerns about compensating uninjured class members could be addressed using Rule 23's requirements (rather than constitutional standing principles), observing that "a properly formulated Rule 23 class should not raise standing issues" because the "interests" and "injuries" of the class should be "tested by the requirements of Rule 23."[23] *Neale* did not explain, though, how this approach would be consistent with the Rules Enabling Act's directive forbidding litigants from using Rule 23 to find standing where none exists.

The Stringent Approach. Not all Circuits prioritize Rule 23 over Article III though. The leading decision for the more stringent approach, *Denney v. Deutsche Bank AG*, involved a challenge to

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[14] *Id.* at 676 (citing U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980)).

[15] *See Geraghty*, 445 U.S. at 404–05.

[16] 594 F.3d 1188, 1198 (10th Cir. 2010).

[17] *Id.* at 1201 (citing *Kohen*, 571 F.3d at 677).

[18] 148 F.3d 283 (3d Cir. 1998).

[19] 794 F.3d 353 (3d Cir. 2015).

[20] 148 F.3d at 306 (citation omitted).

[21] 794 F.3d at 361 (quoting *Prudential*, 148 F.3d at 307).

[22] *Id.* at 364 (citing Sosna v. Iowa, 419 U.S. 393, 399 (1975)).

[23] *Id.* at 368.

the certification of a settlement class relating to claims of improper and fraudulent tax counseling.[24] The objecting class members asserted that the settlement class had been improperly certified because it contained members for whom tax penalties had not yet been assessed and therefore lacked Article III standing. The Second Circuit held that although absent class members need not "submit evidence of personal standing," "[t]he class must . . . be defined in such a way that anyone within it would have standing" under Article III.[25]

The Eighth Circuit in *Avritt v. Reliastar Life Insurance Co.* subsequently adopted, without much analysis, the Second Circuit's views, stating that "a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves."[26] Likewise, the Ninth Circuit also followed *Denney* in *Mazza v. American Honda Motor Co.*, holding that "[n]o class may be certified that contains members lacking Article III standing,"[27] though in previous decisions, the Ninth Circuit had suggested that only named plaintiffs must have Article III standing.[28]

Although these broad questions of class member standing arise in all kinds of class actions, they are particularly salient in high-stakes antitrust matters with hundreds or thousands of plaintiffs and where liability is often measured in multiples of millions.

Absent Class Member Standing in the Antitrust Context

Although these broad questions of class member standing arise in all kinds of class actions, they are particularly salient in high-stakes antitrust matters with hundreds or thousands of plaintiffs and where liability is often measured in multiples of millions. The leading decisions on absent class member standing that illustrate the circuit split in the antitrust context are the D.C. Circuit's opinion in *In re Rail Freight Fuel Surcharge Antitrust Litigation*[29] and the First Circuit's opinion in *In re Nexium Antitrust Litigation*.[30] Although the cases diverge on whether absent class member standing must be proved on a classwide basis (and the point in the litigation during which the issue of standing should be considered), their analytical approaches—examining the issue of Article III standing through the lens of predominance—are similar.

Rule 23(b)(3)'s predominance requirement is concerned with the question whether elements of the plaintiffs' claims are "susceptible of measurement across the entire class."[31] Two critical elements in antitrust class actions that rightly receive a disproportionate amount of attention in the predominance analysis are the requirements of (1) antitrust impact and (2) resulting damages. Both elements are tied to the concept of Article III standing insofar as they require a plaintiff to show a direct connection to the alleged wrongdoing and require her to show that she was injured in some non-speculative, ascertainable way, often by demonstrating damages.

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[24] 443 F.3d 253, 259 (2d Cir. 2006).

[25] *Id.* at 263–64.

[26] 615 F.3d 1023, 1034 (8th Cir. 2010). The Eighth Circuit appeared to take a different approach in *Tyson Foods*, however.

[27] 666 F.3d 581, 594 (9th Cir. 2012).

[28] Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1021 (9th Cir. 2011), *abrogated on other grounds by* Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (claiming that, with respect to "standing under Article III," Ninth Circuit "law keys on the representative party, not all of the class members, and has done so for many years"); *see also* Bates v. United Parcel Serv., Inc., 511 F.3d 974, 985 (9th Cir. 2007) (en banc) ("[W]e consider only whether at least one named plaintiff satisfies the standing requirements . . ."). As one district court put it, while "[i]n the wake of *Mazza*, many courts have acknowledged and ostensibly followed its directive that absent class members must have Article III standing," others have "recognized the apparent *Stearns-Mazza* split—and sided with the reasoning of *Stearns*," or else have seen the conflict and "taken no position." Waller v. Hewlett-Packard Co., 295 F.R.D. 472, 478 (S.D. Cal. 2013).

[29] 725 F.3d 244 (D.C. Cir. 2013).

[30] 777 F.3d 9 (1st Cir. 2015).

[31] *Comcast*, 133 S. Ct. at 1433.

These two elements were front and center in the Supreme Court's decision two terms ago, in *Comcast Corp. v. Behrend*, which reversed the grant of class certification to a class of antitrust plaintiffs alleging violations of the Sherman Act. Central to the Court's holding was the fact that the expert model proposed to measure antitrust damages could not adequately estimate the damages attributable to the plaintiffs' particular theory of injury and, by implication, provided a misleading picture as to which class members were injured by the allegedly anticompetitive conduct and which ones were not. Without a means of establishing that damages were capable of relatively accurate measurement on a classwide basis, the Court said "[q]uestions of individual damage calculations" would "inevitably overwhelm questions common to the class."[32]

Rail Freight*: Toward a More "Rigorous Analysis" of Models of Injury.* In *Rail Freight*, a group of shipping companies brought suit against the four major freight railroads alleging that they were engaged in a price-fixing conspiracy with respect to the rates they set for certain fuel surcharges. The district court granted class certification, largely based on its belief that the plaintiffs' damages model, which "sought to quantify, in percentage terms, the overcharge due to conspiratorial conduct" at various times during the class period, was "plausible" and "workable."[33] The D.C. Circuit reversed. It first observed that "[m]eeting the predominance requirement demands more than common evidence the defendants colluded to raise fuel surcharge rates." Rather, "The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy." In so holding, the court described the level of specificity the plaintiffs had to approach to meet their burden: while they need not "be prepared at the certification stage to demonstrate through common evidence the precise amount of damages incurred by each class member," the court did "expect the common evidence to show all class members suffered some injury" under Article III.[34]

The court's scrutiny of the plaintiffs' damages model played a significant role in the analysis: after taking a hard look at the model, the court agreed it was "defective" because it "purport[ed] to quantify the injury in fact to all class members attributable to the defendants' collusive conduct," but it in fact "detect[ed] injury where none could exist."[35] False positives, the court observed, were of particular importance in *Comcast*, and detecting such false positives or other modeling errors was "now indisputably the role of the district court . . . *before* granting certification."[36] The D.C. Circuit summed up its analysis by observing that "[c]ommon questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact."[37]

The Eighth Circuit took a similar approach in *In re Wholesale Grocery Products Antitrust Litigation*.[38] The district court had denied certification to a class alleging various non-competition claims on the basis that the plaintiffs could not "articulate a method for showing with the same evidence that [certain] fees were inflated for all putative class members," and therefore could not show that the plaintiffs had "suffered injury from the wholesalers' alleged antitrust violation."[39] The

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[32] *Id.*

[33] *Rail Freight*, 725 F.3d at 250.

[34] *Id.* at 252.

[35] *Id.*

[36] *Id.* at 253 (emphasis added).

[37] *Id.* at 252–53.

[38] 752 F.3d 728 (8th Cir. 2014).

[39] *Id.* at 732 (internal quotation marks and internal emphasis omitted).

Eighth Circuit affirmed, holding that the district court did not abuse its discretion in refusing to certify the class in the absence of any evidence of classwide injury and damages.[40]

The Third Circuit, following *Comcast*, also adopted a more rigorous analysis of the plaintiffs' damages model in *In re Blood Reagents Antitrust Litigation*, although its reasoning is in some tension with the Third Circuit's treatment of the issue in *Prudential* and *Neale*. In *Blood Reagents*, a price-fixing case, the district court rejected the defendants' challenges to the plaintiffs' antitrust impact and damages models, noting that the models were "irrelevant to class certification" and were better analyzed at the merits stage.[41] The Third Circuit vacated the district court's order granting class certification, noting that the district court's observation that the model "*could* evolve" into classwide proof of antitrust injury—but had not yet crossed that threshold at the class certification stage—"did not survive *Comcast*."[42]

Nexium*: Kicking the Can Down the Road.* Not all courts have interpreted *Comcast* to require heightened scrutiny of antitrust impact and damages models—and consequently, Article III standing—at the class certification stage. The First Circuit's decision in *In re Nexium Antitrust Litigation*, a case involving alleged non-compete agreements, illustrates this approach. The district court granted class certification in *Nexium* despite the "possibility or indeed inevitability" that some class members were not injured by the defendants' conduct.[43] That holding rested on the court's belief that the plaintiffs had shown "that all class members [had] been exposed to purchasing or paying for [Nexium] at a supracompetitive price."[44] In the district court's view, no further showing was necessary.

The First Circuit affirmed, noting, in essence, that uninjured class members could be filtered out later during the individual claims process. At the class certification stage, however, the First Circuit stated that courts simply must be "satisfied that, *prior to judgment*, it will be possible to establish a mechanism for distinguishing the injured from the uninjured class members."[45] Although acknowledging that "a proper mechanism for exclusion of brand-loyalist consumers has not yet been proposed," the court credited the fact that the "plaintiffs' expert made no concession that such a mechanism could not be developed, nor did defendants' expert say that it could not be developed."[46]

The Tenth Circuit, in *In re Urethane Antitrust Litigation*, also took the view that *Comcast* requires proof that the plaintiffs "could" establish Article III injury on a classwide basis, but does not demand that the plaintiffs actually produce that proof at the class certification stage. As the Tenth Circuit put it, *Comcast* "did not rest on the ability to measure damages on a class-wide basis" but rather on the "majority's conclusion that without a way to measure" such damages, individualized questions would "inevitably overwhelm questions common to the class."[47] Because the plaintiffs in *Urethane* had provided "a way to measure" damages on a classwide basis, the Tenth Circuit concluded the district court had not abused its discretion in certifying the class. Importantly, it

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[40] *Id.* at 736.

[41] 783 F.3d 183, 186 (3d Cir. 2015).

[42] *Id.* (emphasis added).

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

[44] *Id.* at 17.

[45] *Id.* at 19 (emphasis added).

[46] *Id.* at 20.

[47] *In re* Urethane Antitrust Litig., 768 F.3d 1245, 1257–58 (10th Cir. 2014).

reached this result even though it agreed, for the sake of argument, that the plaintiffs' damages model had failed "to distinguish between the impact and damages attributable to the liability theory pursued at trial and another liability theory" that had not been.[48]

Whether Absent Class Member Standing—and the Models Used to Prove It—Should Be Decided at the Class Certification Stage

Postponing the analysis of difficult questions of Article III injury as *Nexium* and other cases do by analyzing whether a damages model "could" theoretically establish injury for at least some class members at some point in the future is problematic because it invites the use of sampling and averaging to disguise individualized issues that should preclude certification. The Supreme Court addressed this concern many years ago in *Illinois Brick Co. v. Illinois*,[49] in which it rejected the use of abstract economic theory to permit indirect purchasers of a product to establish impact at the end of a chain of distribution. In rejecting the use of such theories, it urged courts to closely examine the "serious problem" of measuring complex and uncertain market variables, and to address issues of standing and antitrust impact "in the real economic world" rather than in the world of academia and economic theory.[50]

Such "shortcuts" to achieving class certification are highly problematic: they mask the existence of individualized injuries and defeat the right of defendants to challenge the allegations of individual plaintiffs, forcing them to challenge the bases for an expert's economic model instead.

Nevertheless, courts have continued to endorse the use of aggregate damages models that oversimplify market realities and the variety of injuries those realities can produce. In *In re Scrap Metal Antitrust Litigation*,[51] for example, the Sixth Circuit held that "[d]amages in an antitrust class action may be determined on a classwide, or aggregate, basis" and approved the use of damages models that assumed (unrealistically) that each plaintiff had incurred an identical "undercharge."[52] The Tenth Circuit said as much in *Urethane*, where it held that a class action defendant has "no interest in the method of distributing the aggregate damages award among the class members"[53] and thus could not challenge a jury's award to purchasers of polyurethane in an alleged price-fixing conspiracy on the basis that the model considered by the jury may have awarded damages to members with greater bargaining power who suffered no injury.

Such "shortcuts" to achieving class certification are highly problematic: they mask the existence of individualized injuries and defeat the right of defendants to challenge the allegations of individual plaintiffs, forcing them to challenge the bases for an expert's economic model instead. These shortcuts, which assume a "fictional class" of individuals, also harm absent class members who would have standing to the extent they systematically underestimate the value of their claims.[54]

In essence, the approach taken by courts like *Nexium* and *Urethane* hinges on those courts' belief that there is no need to burden plaintiffs with the requirement of offering some method of establishing accurate classwide injury during the class certification phase as long as the court is

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[48] *Id.* at 1257.

[49] 431 U.S. 720 (1977).

[50] *Id.* at 742 (internal quotation marks omitted).

[51] 527 F.3d 517 (6th Cir. 2008).

[52] *Id.* at 534 (internal quotation marks omitted).

[53] 768 F.3d at 1269.

[54] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 629 (1997) ("Rule 23 . . . must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view . . . ."); *see also id.* at 620 (noting that the Rules are "designed to protect absentees by blocking unwarranted or overbroad class definitions").

assured that such a method may exist and that uninjured class members can be dealt with at a later time. But neither Article III nor Rule 23 permits this. The Federal Rules have eliminated courts' ability to engage in "conditional" certification—i.e., certifying a class while reserving the right to decertify it later if it turns out that Rule 23's requirements are not met.[55] And Article III has never permitted such a wait-and-see approach in the context of individual actions. Individual plaintiffs must establish their Article III injury-in-fact at the time the operative complaint is filed and must maintain standing at all stages of the litigation. Absent class members get more lead time insofar as they do not become parties to the action (for at least some purposes) until class certification is granted, but there is no reason the same justification for determining standing as early as possible should not apply to them.

[F]or constitutional, jurisprudential, and policy reasons, it is important to get the standing question right, and it is important to get it right at the earliest possible time in the litigation.

Adhering to those principles is necessary not only to ensure that the class action device does not destroy bedrock constitutional principles, including Article III's case or controversy requirement, but also to take into account the dispositive role that the class certification stage often plays in today's litigation. Not all defendants have the resources to litigate their cases through trial or on appeal. As Justice Ginsberg recognized in *Shady Grove*, a decision granting class certification will often "place[] pressure on the defendant to settle even unmeritorious claims."[56] Thus, for constitutional, jurisprudential, and policy reasons, it is important to get the standing question right, and it is important to get it right at the earliest possible time in the litigation. That may involve an in-depth examination of the class definition or it may require plaintiffs to provide "some evidence" at class certification, showing how each element of standing can be proved on a classwide basis, even if the actual proof is reserved for trial.[57] *Dukes* requires plaintiffs to "affirmatively demonstrate [their] compliance" with Rule 23's elements, including demonstrating that they "have suffered the same injury,"[58] and there is no reason that directive should not also require plaintiffs to demonstrate that Article III standing can be established on a classwide basis. In the context of antitrust class actions specifically and their dependence on expert models of economic injury, courts should apply the kind of heightened scrutiny that the D.C. Circuit applied in *Rail Freight*—"common evidence to show all class members suffered *some* injury,"[59] that appropriately accounts, at the class certification stage, for those class members that may have suffered no injury at all.

Conclusion

It is difficult to overstate the importance of the coming resolution of the circuit split in *Tyson Foods* on the question whether absent class members must provide some evidence of Article III injury at the class certification stage. Correct resolution of this issue would ensure that litigants in Rule 23 class actions continue to be governed by constitutional principles, just as individual litigants are. It would further guarantee that the class action remains a productive means of resolving meritorious claims, rather than becoming a tool to bludgeon defendants into settlements with individuals who were never harmed. ●

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[55] Fed. R. Civ. P. 23(c)(1) advisory committee's note (2003).

[56] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 445 n.3 (2010).

[57] Such a rule would be consistent with the trial plan requirement under Rule 23(c) recognized in both the Third and Ninth Circuits. *See, e.g.*, Wachtel *ex rel.* Jesse v. Guardian Life Ins. Co. of Am., 453 F.3d 179, 186 (3d Cir. 2006); Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1190 (9th Cir. 2001).

[58] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (internal quotation marks omitted).

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