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SUPREME COURT

STANDING

A footnote in the U.S. Supreme Court ruling in Spokeo v. Robins has reignited the debate over whether a named plaintiff in a class action can serve as a ''Trojan horse'' for thousands of uninjured individuals to establish standing, attorney Mark A. Perry says. The author says certifying a class that includes uninjured persons would unnecessarily thrust courts into a role with multiple infirmities: It's forbidden by Article III, prohibited by Congress, contrary to the purpose of Federal Rule of Civil Procedure 23 and prejudicial to the defendant—all ''just to delay the standing determination until after a verdict.''

Spokeo and Absent Class Member Standing

By Mark A. Perry

In its recent decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the U.S. Supreme Court reignited, in a footnote, a question that has divided courts and scholars: Whether the named plaintiff in a class action can serve as a Trojan horse for thousands of uninjured others to pass through the Article III gate. *Id.* at 1547 n.6.

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The answer is no; Rule 23 does not trump the Constitution.

This conclusion is confirmed by the Rules Enabling Act, the purpose of Rule 23, and basic considerations of fairness.

The defendant in *Spokeo* operated a ''people search engine'' that compiled and aggregated information about individuals, and made the plaintiff's life sound better than it really was. In particular, Spokeo posted information online indicating that Thomas Robins was working, wealthy, and married with children; in fact, Robins was unemployed, relatively impoverished, and single. Robins filed a class action lawsuit, alleging that Spokeo had disregarded various procedural requirements in the Fair Credit Reporting Act in the course of gathering and reporting information about him and other class members. *See* 136 S. Ct. at 1545–46. The case eventually found its way to the Supreme Court.

The Supreme Court emphasized that injuries must be particularized *and* concrete to satisfy Article III, and ultimately remanded the case to the Ninth Circuit for a concreteness analysis. *See* 136 S. Ct. at 1548–50. In doing so, the Court raised more questions than it answered about what types of harms are injuries ''in fact.'' Much has already been said about that aspect of the

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Court's holding, and implementation of the Delphic mandate will undoubtedly engender more discussion. The focus here, however, is narrower.

Since *Spokeo* came to the Supreme Court at the pleadings stage, the putative class had not been certified. *See* 136 S. Ct. at 1547. In addressing the plaintiff's individual claim, however, the *Spokeo* Court reiterated in a footnote an oft-repeated observation: ''That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.'' *Id.* at 1547 n.6 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976)). But the Court offered no views on the converse—that is, whether *un*named plaintiffs in a class action must demonstrate standing before the class may be certified, or whether they may instead point to the ''injury [that] has been suffered'' by the named ''member[] of the class to which they belong.'' This very question had been raised in another case decided the same Term as *Spokeo*, but the Court declined to answer it for procedural reasons. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1049 (2016).

Spokeo's silence should not be mistaken for approval. The Court has been vigilant in limiting federal courts' reach to disputes that lie within Article III's grant of the ''judicial Power,'' insisting that persons seeking to maintain or participate in federal-court litigation first possess Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Allowing uninjured class members a free pass through the Article III barrier would expand the judicial power beyond its constitutional limits, enlarge class members' substantive rights in violation of the Rules Enabling Act, conflict with the purpose of Rule 23, and distort the litigation process in a way that is unfair to defendants.

Start with ''the judicial Power.'' U.S. Const. art. III, § 2. Article III limits that power to ''[c]ases'' and ''[c]ontroversies,'' and courts identify those by looking for ''the irreducible constitutional minimum'' of standing: injury in fact, causation, and redressability. *Lujan*, 504 U.S. at 560–61. It follows from the Supreme Court's dual admonitions that ''[t]hose who do not possess Art. III standing may not litigate as suitors in the courts of the United States,'' *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475–76 (1982), and that Rule 23 ''must be interpreted in keeping with Article III constraints,'' *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997)), that courts must ensure that every potential party in the suit satisfies Article III's strictures. Although unnamed persons are not ''parties'' before certification for purposes of preclusion, *see Smith v. Bayer Corp.*, 564 U.S. 299 (2011), after certification they are generally entitled to all the rights—and subject to all the substantive obligations—of named litigants. *See* Theane Evangelis & Bradley J. Hamburger, *Article III Standing and Absent Class Members*, 64 Emory L.J. 383, 393–94 (2014). The attorney-client privilege, for example, generally attaches upon certification. *See, e.g.*, Manual for Complex Litigation § 21.33 (4th ed. 2004).

The constitutional problem parallels a statutory one: the Rules Enabling Act, which authorizes the judicial creation of procedural rules, forbids rules (or interpretations of rules) that ''abridge, enlarge or modify any substantive right.'' 28 U.S.C. § 2072(b). The class action is a procedural device to aggregate *existing* individual claims, and nothing more—under the Rules Enabling Act, it cannot be a font of new substantive rights. Litigants who lack Article III standing have no right to be in federal court at all, and certainly no right to a full trial and merits adjudication. It would therefore ''enlarge . . . substantive right[s]'' to allow a person who lacks Article III standing—and who, by definition, could not sue in his or her own name—to participate as a party in federal-court litigation. Indeed, the rules themselves disclaim any attempt to do so: Rule 82 makes clear that the federal rules ''do not extend or limit the jurisdiction of the district courts.'' Fed. R. Civ. P. 82. Yet interpreting Rule 23 to invite into federal court individuals who lack standing to sue would do precisely that.

Certifying a class comprised of (or even containing) uninjured individuals would also thwart the purpose of Rule 23. That rule, like all federal rules of civil procedure, ''should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.'' Fed. R. Civ. P. 1. Even courts that have rejected the constitutional argument that unnamed class members must possess Article III standing recognize that such members *should* have standing in a well-constructed class. *See, e.g.*, *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 368 (3d Cir. 2015); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677–78 (7th Cir. 2009). Sooner or later, if a class successfully demonstrates liability at trial, a court must verify the standing of each member before doling out damages because ''Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.'' *Tyson*, 136 S. Ct. at 1053 (Roberts, C.J., concurring); *see also Lewis v. Casey*, 518 U.S. 343, 349 (1996). Requiring a court to conduct a series of mini-trials to determine whether each member has been injured would defeat the simplifying purpose of consolidating claims in the first place; in contrast, classes defined to ensure that every member has standing allow the court to focus its resources elsewhere. And early resolution of the standing question better aligns with the Advisory Committee's decision to do away with ''conditional'' certification. *See* Fed. R. Civ. P. 23(c)(1), advisory committee's note to 2003 amendment. In short, judicial procrastination of the standing determination is an ill fit with Rule 23's streamlined vision of efficient claim resolution.

Finally, including uninjured plaintiffs in the initial class would work a distorting effect on the litigation process that is unfair to defendants. Granting or denying class certification is not a mere perfunctory procedural blip on the way to the merits; it ''is often the defining moment in class actions'' and ''may have a decisive effect on [the] litigation.'' *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162, 167 (3d Cir. 2001). Artificially inflating a class with members who lack standing to sue forces a defendant to factor in ''potentially ruinous liability'' to individuals who were never injured. Fed. R. Civ. P. 23(f), advisory committee's note to 1998 amendment; *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting); *Kohen*, 571 F.3d at 677–78 (noting ''the *in terrorem* character of a class action''). Limiting certification to class members

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who actually have an (at-least-colorably-alleged) entitlement to relief allows both parties to engage in settlement negotiations with more accurate information and prevents class action lawyers from extorting defendants with an outsized class.

The upshot is that certifying a class including uninjured persons—that is, individuals who in their own right have no justiciable claim—would unnecessarily thrust courts into a role that Article III forbids, proceeding on a basis that Congress has prohibited, contrary to the purpose of Rule 23 itself, to the prejudice of the defendant—all just to delay the standing determination until after a verdict.

At minimum, courts should require plaintiffs to demonstrate that standing can be proven by common evidence before certifying a class. *See* Evangelis & Hamburger, *supra*, at 396–98 (arguing in favor of this approach).

Even better, courts can avoid these adverse effects by ascertaining at the outset of litigation, and certainly no later than the certification stage, that all unnamed persons on whose behalf the suit is ostensibly brought have Article III standing to sue. The Constitution demands no less.