Article III and Class Certification

BY BRIAN BLAKLEY, ESQ.

When seeking or opposing class certification, most of us begin and end our analysis under the Rule 23 framework. This is hardly surprising; after all, Rule 23 governs the certification process. The problem, however, is that focusing on Rule 23 can sometimes blind attorneys to critical constitutional doctrines often at play during certification proceedings. These include, but are certainly not limited to, Article III's justiciability doctrines. In fact, Article III's class-specific nuances can shape the scope of the class and even prevent certification altogether. Likewise, in some jurisdictions, the juridical link doctrine relaxes Article III's requirements and can dramatically expand the number of defendants that a single class representative has standing to sue. Counsel for both sides should at least consider the following and related Article III issues when wrestling with class certification:

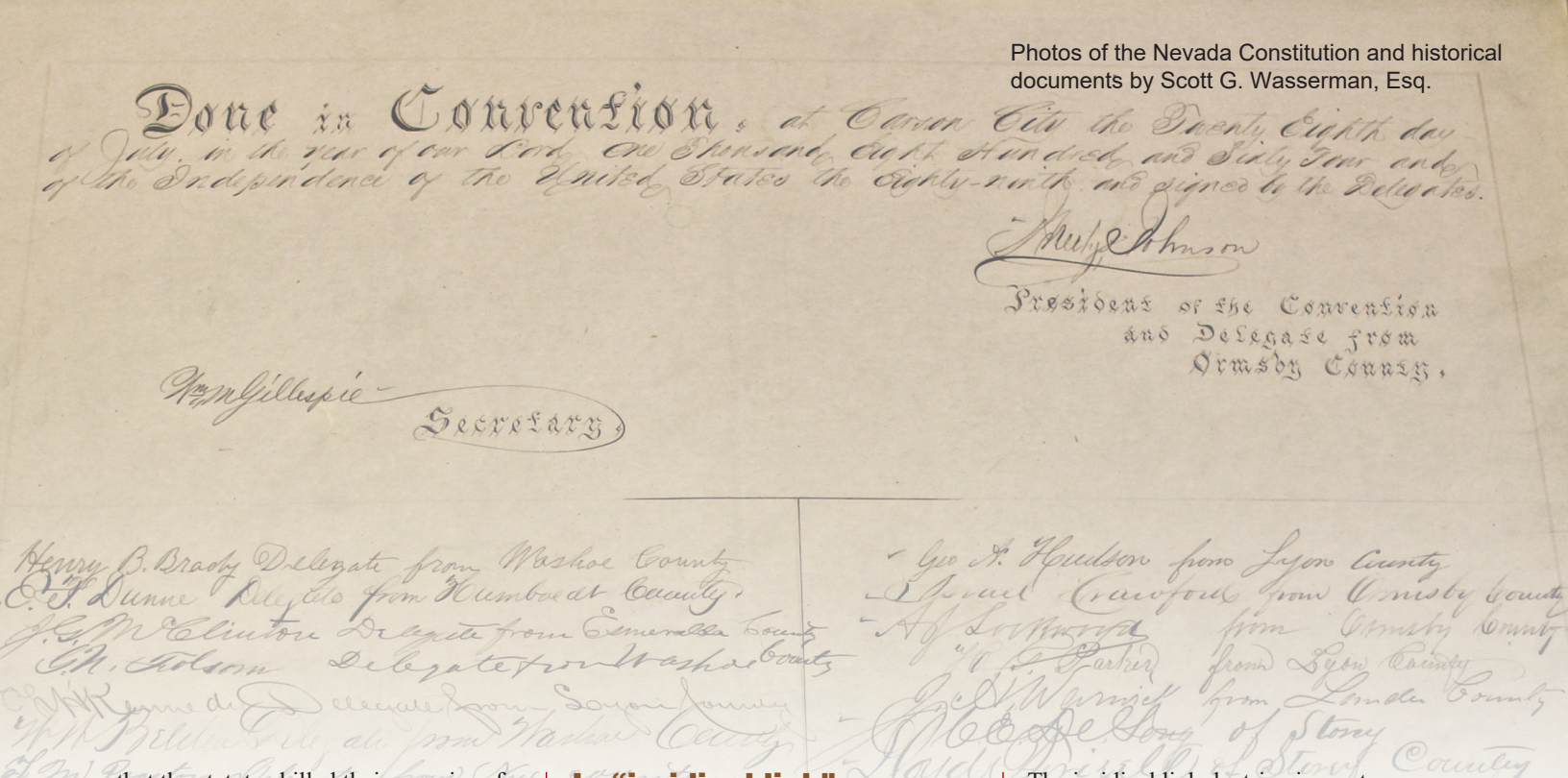
Where a class is defined to include members who lack standing, an Article III challenge could prevent certification.

At some point, we likely learned that Article III standing requires every plaintiff to show (1) an injury in fact that is, (2) fairly traceable to the challenged action, and (3) is likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 590 (1992). This "irreducible constitutional minimum" applies to class actions just as it applies to any other action. *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010).

Of course, courts "do not require that each member of a class submit evidence of personal standing." *Id.* Instead, many federal courts—including the Ninth Circuit—look to the class definition, holding that a proposed class should not be certified if it is defined to include members who lack standing.[1] In these courts, "a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves." *Avritt*, 615 F.3d at 1034.[2] Echoing this rule, Chief Justice Roberts recently explained that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods, Inc. v. Bouaphakeo*, ___ U.S. ___, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring).

Still, counsel should be aware that, in at least a few courts, unnamed class members need not satisfy Article III, "as long as a class representative has standing." *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 362 (3d Cir. 2015). Moreover, the Supreme Court has not decided "what Article III requires of putative, unnamed class members during a Rule 23 motion for class certification." *Id.* at 359-60.[3]

Assuming that the case is in a jurisdiction requiring class members to satisfy Article III, a defendant could prevent or unwind certification where the class definition includes members who have not suffered an "injury in fact." In *Phelps v. Powers*, for example, the Westboro Baptist Church sought to certify a class of its members while challenging a flag-abuse statute. 295 F.R.D. 349, 353-54 (S.D. Iowa 2013). The court found that the proposed class lacked standing, because at least some of Westboro's members had neither participated in any flag demonstrations nor alleged


Photos of the Nevada Constitution and historical documents by Scott G. Wasserman, Esq.

that the statute chilled their exercise of First Amendment rights. *Id.* Therefore, because these particular members lacked an "injury in fact," the court refused to certify the class.

A similar challenge could be used in other contexts. For example, where a products-liability or false-advertising class is defined to include "all product purchasers," it may lack Article III standing because many such purchasers may not have experienced the alleged defect or relied on the alleged misrepresentation.[4]

Faced with such a standing challenge, the seemingly-obvious solution is to redefine the class to include only injured persons—that is, only those persons who bought a defective product or relied on a misrepresentation. The problem, however, is that such injury-based classes are often rejected for lack of definiteness or ascertainability. Newberg on Class Actions § 3:6 (5th ed.) (citing *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015)). This is because, in many cases, an injury-based definition would require courts to make factual determinations for each prospective class member in order to determine who qualifies for membership. *Id.* For these and other reasons, such "administratively-infeasible," injury-based definitions are often rejected. *Id.* This is something counsel should consider when a class must be redefined to satisfy Article III.

In "juridical link" jurisdictions, named plaintiffs can maintain claims against defendants who caused them no injury.

Counsel should also be aware that, in multi-defendant actions, some courts have used the "juridical link" doctrine to soften Article III's requirements.

Generally, "class representatives do not have standing to sue defendants who have not injured them, even if those defendants have allegedly injured other class members." Newberg on Class Actions § 2:5 (5th ed.). However, some jurisdictions treat the juridical link doctrine as an exception. *Id.* (collecting cases). Under this doctrine, named plaintiffs can maintain claims against defendants who caused them no injury as long as:

1. Those defendants allegedly caused similar injuries to unnamed class members, and
2. It would be expeditious to resolve the entire dispute in one lawsuit. *Id.*

> Many courts refuse to treat the juridical link doctrine as an exception to Article III, and many treat it as part of the Rule 23 analysis.

The juridical link doctrine is most frequently applied when either a contractual obligation or statute requires all of the defendants to take common action. *Id.*

Consider the following example: Northern Power Company provides electricity to the northern areas of a state and charges hidden, possibly-unlawful fees. The nine other power companies in the state, including some of Northern's subsidiaries, charge similar hidden fees. So, Mr. Smith, a Northern customer, decides to fight back and files a class action, on behalf of himself and all similarly situated parties, against all 10 power companies.

Applying the general rule, Mr. Smith lacks standing to assert claims against any company other than Northern, because he was not injured by any of them. But, in a juridical link jurisdiction, Mr. Smith might survive an Article III challenge—particularly if the power companies entered into relevant agreements or share common ownership.

Nonetheless, it bears emphasizing that many courts refuse to treat the

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juridical link doctrine as an exception to Article III, and many treat it as part of the Rule 23 analysis. Newberg on Class Actions § 2:5 (5th ed.). For example, in the only local case discussing the issue, Nevada's U.S. District Court declined to "import [the] juridical link doctrine into an Article III analysis." *Henry v. Circus Circus Casinos, Inc.*, 223 F.R.D. 541, 544 n.2 (D. Nev. 2004). Still, because this is a largely unresolved Article III issue, counsel for both sides should at least consider it at the early stages of a class action.

To conclude, Article III is often overlooked, but it can play a critical role in shaping the class and the number of possible defendants. And while many of its nuances exceed the scope of this article, the important point is this: When bringing or defending a federal class action, counsel should look beyond Rule 23 and carefully consider how Article III will apply. NL

1. For example, in the Second, Eighth and Ninth Circuits "no class may be certified that contains members lacking Article III standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *accord Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012); *see also* Wright & Miller, 7AA Fed. Prac. & Proc. Civ. § 1785.1 (3d ed.) (explaining Article III requirements in class action cases). The D.C. Circuit appears to have adopted the same rule, though less decisively. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) (not mentioning Article III but holding, under Rule 23's predominance prong, that plaintiffs must "show that they can prove, through common evidence, that *all* class members were in fact injured by the alleged conspiracy").
2. While many courts will address class-member standing before certification, others wait until the class is certified. *Compare Payton v. Cty. of Kane*, 308 F.3d 673, 680 (7th Cir. 2002) (standing should be addressed post-certification) *with Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 64 (2d Cir. 2012) (discussing and rejecting *Payton*'s post-certification approach). But even these courts recognize that "once a class is properly certified, statutory and Article III standing requirements must be assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs." *Payton*, 308 F.3d at 680.
3. Last term, in *Tyson Foods*, the Supreme Court granted a petition for certiorari on this issue, but it declined to resolve it because the petitioner changed arguments. *See* 136 S. Ct. at 1049.
4 *See, e.g., Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 317 (5th Cir. 2002) (finding a lack of standing in a products liability action where putative class members failed to allege that the drug caused them physical or emotional injury).

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