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BLOG

SCOTUS May Weigh in—Class Members and Article III Standing

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Key Takeaways:

- The Eleventh Circuit's decision in *Drazen v. Pinto* deepens the divide among circuit courts regarding treatment of uninjured class members in class actions.
- If the Supreme Court considers and affirms *Drazen's* holding that class settlements must be limited to class members with standing, fewer class actions may be filed, it could be harder to obtain class certification, and class actions may be less likely to settle early.

On August 19, 2022, we wrote about the Eleventh Circuit's decision in *Drazen v. Pinto*, which held that a class action settlement agreement may receive final approval only if every class member has standing to recover individual damages. 41 F.4th 1354 (11th Cir. 2022). The case is significant not only because it establishes the standing requirement for absent class members at the settlement stage, but also because it serves as bait for SCOTUS to take up the issue.

Indeed, the *Drazen* decision joins a host of split decisions from other circuits that have grappled with the issue of uninjured class members and whether that issue is a matter to be addressed at class certification or, later, at the damages phase. *Compare Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (finding that a class that potentially includes more than a *de minimis* number of uninjured class members is not precluded from being certified); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624–25 (D.C. Cir. 2019) (endorsing a *de minimis* rule to meet predominance at the class certification stage); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 58 (1st Cir. 2018) (holding that not every class member is required to demonstrate standing when a class is certified); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (finding that damages class may be certified where not "a great many" members of the class are uninjured); *with Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing."); *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 779 (8th Cir. 2013) ("a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves."); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) ("[W]here fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance."); *In re*

Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008) (where "every class member" cannot prove at least individual injury through common proof, Rule 23(b)(3)'s predominance requirement is not met).

These split decisions beg the question whether now is the time for SCOTUS to weigh in on this meaningful issue. Defendants in *Olean* recently filed a petition for writ of certiorari. Plaintiffs in *Drazen* have filed for rehearing en banc, but assuming the en banc court affirms the decision, an appeal to the Supreme Court might follow.

If *Drazen* is appealed to the Supreme Court, and if the Supreme Court grants certiorari and affirms, attorneys representing plaintiffs bringing class action lawsuits may very likely face a new reality. There will no longer be an incentive to draft class definitions broadly, without concern for whether any members of the class were injured and thus lack Article III standing. Instead, attorneys would be forced to engage in that investigative and economic legwork upfront if the goal is to obtain a settlement that a court could approve. Moreover, should SCOTUS consider the decision in *Drazen*, the Court might in tandem with, or in a separate examination of the *Olean* case, be inclined to resolve the circuit split with a decision stating every class member must have standing, and thus must prove injury, at the class certification stage. This might particularly be the case if, under *Drazen*, plaintiffs are already incentivized to make those economic determinations on the front end. Such a decision from SCOTUS could result in fewer class actions being filed, greater difficulty in obtaining class certification, and fewer instances of class actions settling early in the life of a case.

Drazen and *Olean* present the Supreme Court an opportunity to resolve this long-standing circuit split, but only time will tell whether SCOTUS will weigh in.
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Jared R. Kessler

Drew Washington

Reid Smith

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