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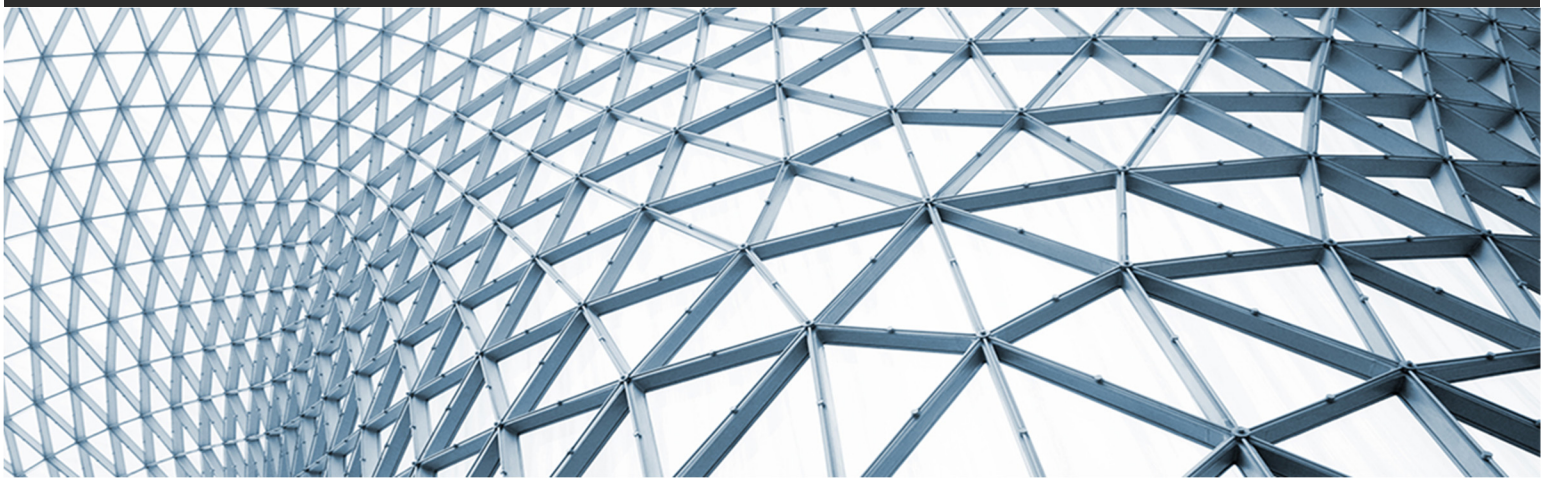
Unnamed Class Member Standing Post-'Restasis': Is 'Denney' Still Viable?



Whether 'Restasis' will be upheld by the Second Circuit remains to be seen. In the meantime, explore some "take-aways" from cases outside of the Second Circuit that should be considered, especially when litigating class actions in the Eastern District of New York.

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In 2006, the Second Circuit held that "no class may be certified that contains members lacking Article III standing … . The class must therefore be defined in such a way that anyone within it would have standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). "To meet the Article III standing requirement, a plaintiff must have suffered an 'injury in fact' that is 'distinct and palpable'; the injury must be fairly traceable to the challenged action; and the injury must be likely redressable by a favorable decision." Id. at 263.

Following *Denny*, the majority of district courts in the Second Circuit "have narrowed class definitions to exclude putative class members without standing, rather than outright denying a motion for class certification." *Tomassini v. FCA US*, 326 F.R.D. 375, 387 (N.D.N.Y. 2018). However, where redefining the class is impossible or would create additional problems, certification should be denied. Id. Moreover, *Tomassini* noted that it is not clear how class members who "did not suffer an inflated-price injury[, when they bought a car] … could provide standing[.]" Id. at 386.

The Eastern District of New York has seemed less inclined to follow *Denney*. In *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 WL 7882100, at *45 (E.D.N.Y. Oct. 15, 2014), the magistrate judge's report and recommendation provided that the existence of "a few" uninjured class members would not preclude certification, provided that they "can legitimately be considered the exceptions to the rule." *Air Cargo* did not cite *Denney*; instead, it relied on the Seventh Circuit's decision in *Kohen v. Pac. Inv. Mgmt. Co. &*

PIMCO Funds, 571 F.3d 672 (7th Cir. 2009). Id. at 45, 47. The magistrate judge did not provide guidelines on how to determine when uninjured class members can "legitimately" be considered "the exceptions to the rule." Nor did the district court judge clarify matters in adopting the report and recommendation. See No. 06-MD-1775, 2015 WL 5093503 (E.D.N.Y. July 10, 2015).

Meanwhile, the majority of the circuit courts have eschewed the Article III jurisdictional approach of *Denney* and viewed the standing of unnamed class members under Rule 23. These courts have held that a de minimis number of uninjured class members would not defeat certification, particularly if there is a mechanism to protect the defendants' rights.

In 2020, the Eastern District of New York followed the majority view by granting class certification where plaintiffs' expert conceded that at least 5.7% of the putative class was uninjured. *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation*, 2020 WL 2555556 at *9 (E.D.N.Y May 5, 2020). The court expressly rejected the defendant's argument that because *Denney* requires Article III standing, "the Second Circuit does not permit certification of a class containing uninjured members." 2020 WL 2555556, n. 12. The court held that the class members had Article III standing, simply by purchasing Restasis—"whether or not they paid an overcharge." Id. In support, the court cited *Dubuisson v. Stonebridge Life Ins. Co.*, 887 F.3d 567 (2d Cir. 2018), which held that an Article III analysis requires a court to accept as true a plaintiff's allegations. Id. at 574-75. However, unlike *Restasis*, *Dubuisson* did not involve a concession from plaintiffs that a percentage of the putative class was not injured. The concession in *Restasis* is similar to the undisputed presence of class members in *Tomassini* who "did not suffer an inflated-price injury." Accordingly, it is unclear how either group could have Article III standing. Under *Denney*, the *Restasis* court should have narrowed the class definition to include only those with Article III standing or, alternatively, denied certification if narrowing the class proved intractable. In doing neither, *Restasis* joins the majority of circuits in analyzing class members' standing through the lens of Rule 23 under a de minimis approach.

As the court in *Restasis* recognized, "the concept of de minimis is not well defined[.]" 2020 WL 2555556 at 12. In the Seventh Circuit's view, certification should be denied "if it is apparent that it contains a great many persons who have suffered no injury." *Kohen*, 571 F.3d at 677. Simultaneously, "[t]here is no precise measure for 'a great many.' Such determinations are a matter of degree, and will turn on the facts as they appear from case to case." *Messner v. Northshore University Heathsystem*, 669 F.3d 802, 825 (7th Cir. 2012). Nonetheless, "the 'few reported decisions' involving uninjured class members 'suggest that 5% to 6% constitutes the outer limits of a *de minimis* number.'" *In re Rail Freight Fuel Surcharge Antitrust Litigation* – MDL No. 1869, 934 F.3d 619, 625 (2019).

Although the existence of some uninjured class members may not bar certification under *Restasis*, "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J. concurring). Accordingly, in addition to falling within the outer limits of de minimis, plaintiffs must present a mechanism which ensures that the defendants are not charged with damages or deprived of their due process rights.

In this regard, the *Restasis* court approved the plaintiff's aggregate damages model because it "is relatively straightforward as aggregate class-wide damages equal the difference between the costs paid by class members for [brand Restasis] in the actual world versus the costs class members would have paid for [generic Restasis] in the 'but-for' world." 2020 WL 2555556 at 26. The court noted that "the Second Circuit has accepted the use of aggregate classwide damages so long as they 'roughly reflect' the harm caused to plaintiffs[,]" id., and approved the "use of averages in this context (as) a reasonable way to measure overcharges." Id. at 27. The court further held that where "plaintiffs cannot prove their damages with

precision, '[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.'" Id.

Still, not all aggregate damages models are acceptable. For example, in *United Food & Commer. Workers Unions & Emplrs. Midwest Health Bens. Fund v. Warner Chilcott Ltd. (In re Asacol Antitrust Litig.)*, 907 F.3d 42 (1st Cir. 2018), the plaintiffs explained:

Warner would only be found liable and forced to pay damages if the jury found that Warner's actions unlawfully raised the price paid by consumers by a specified amount, and if the jury also determined the percentage of sales for which that price surcharge would not have been paid but for the illegal conduct. The total aggregate damages award would therefore in theory net out all purchases by brand loyal consumers as a group. The fact that some of that money might then be paid to uninjured people should be of no concern to Warner[.]

Id. at 55. The court found that the proposed model "put[s] us on a slippery slope … because there would be no logical reason to prevent a named plaintiff from bringing suit on behalf of a large class of people, … [up to] ninety-nine percent of whom were not injured, so long as aggregate damages on behalf of 'the class' were reduced proportionately." Id. at 55-56.

In contrast, the *Restasis* model ensures that no uninjured plaintiff would be awarded damages:

By removing a percentage of prescriptions from the total damages calculation, EPPs' model is not dependent on any individual class member's actions in the but-for world. If, in the claims administration process, defendant successfully challenges a class member's representation in his or her affidavit that he or she would have purchased generic Restasis, defendant would have identified someone who falls within the percentage of uninjured plaintiffs whose prescriptions were removed from the damages award. While that class member would not recover, the aggregate damages amount would not be affected.

2020 WL 2555556 at *27.

Whether *Restasis* will be upheld by the Second Circuit remains to be seen. Meanwhile, the following "take-aways" from cases outside of the Second Circuit should be considered, especially when litigating class actions in the Eastern District of New York:

• Certification has been denied in cases involving 6.7%, 8%, 10%, 12.7% and 44% of uninjured class members. See *Restasis*, 2020 WL 2555556 at *12. Even lower percentages must be evaluated with case-specific raw numbers to determine whether the number of uninjured members is indeed de minimis. Id.

• Damages models must ensure that (1) uninjured class members are not awarded damages, and (2) defendants' due process rights are protected.

• If post-certification discovery reveals that the number or percentage of uninjured class members is greater than initially indicated, defendants should seek to de-certify or re-define the class.

• The de minimis approach applies to damages cases. In injunctive relief cases, the Third, Ninth, Tenth, and D.C. Circuits have required only the standing of one named plaintiff because such cases focus on the defendants' conduct, not on monetary relief and the attendant notice requirements. Therefore, the standing of unnamed class members is deemed irrelevant.

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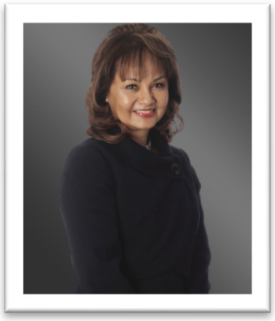

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