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Old Habits Die Hard: Some Courts Continue to Apply Bad Law When Addressing the Article III Standing of Class Representatives

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Within theological circles, the term "proof-texting" is used in a derogatory fashion to describe an opponent's selective citation of a Bible verse for the purpose of manufacturing the appearance of support for a particular viewpoint without regard for the original context of the cited verse. *See* http://en.wikipedia.org/wiki/Prooftext. Lawyers and judges are equally prone at times to rely upon "proof text" citations of legal precedent taken out of context in an effort to prove a point that the cited authorities do not clearly support. Indeed, such "proof text" citations of legal authority sometimes take on lives of their own, resulting in "well-established" doctrines of law that are divorced from the intent and context of the original opinions from which they purportedly were formed.

One example of this "proof text" process in class action law concerns the relationship between a class representative's Article III "standing" to sue and the requirements of Fed. R. Civ. P. 23. Whether at the motion to dismiss stage or in connection with a motion for class certification, defendants often challenge the "standing" of the named plaintiffs to represent a class or subclass of plaintiffs who may possess claims that share concerns in common with the claims asserted by the named plaintiffs individually, but which vary in some manner from the named plaintiffs' personal claims.

For example, defendants may challenge the standing of investors in one security to also represent purchasers of other securities, Sanders v. Robinson Humphrey/American Exp., Inc., 634 F. Supp. 1048, 1057 (N.D. Ga. 1986), on reconsideration, Fed. Sec. L. Rep. (CCH) P 92880, 1986 WL 10096 (N.D. Ga. 1986) and judgment aff'd in part, rev'd in part on other grounds, 827 F.2d 718, 9 Fed. R. Serv. 3d 276 (11th Cir. 1987); *Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 9 Fed. R. Serv. 3d 276 (11th Cir. 1987)*; the standing of participants in one ERISA benefit plan to also assert claims by participants in a different plan, *see* Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 423-24, 1998 FED App. 0357P (6th Cir. 1998), the standing of individual taxpayers to challenge the constitutionality of a tax charged to both individuals and corporations, though under different sections of the tax code, *see* Davis v. Department of Revenue of Finance and Admin. Cabinet, 2006 WL 29215 (Ky. Ct. App. 2006); or the standing of plaintiffs in a multi-state class action to sue not only on behalf of purchasers from their own state of residence, but on behalf of class members suing under other states' laws, *see* In re Relafen Antitrust Litigation, 221 F.R.D. 260, 268-73 (D. Mass. 2004).

Defendants typically cite a litany of axiomatic principles in support of their challenge to standing, such as the principle that "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.'" Lewis v. Casey, 518 U.S. 343, 357, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). They may also reference the several Supreme Court decisions (or their progeny) that have noted that "[s]tanding cannot be acquired through the back door of a class action." Allee v. Medrano, 416 U.S. 802, 828-29, 94 S. Ct. 2191, 40 L. Ed. 2d 566 (1974) (Burger, C.J., dissenting); O'Shea v. Littleton, 414 U.S. 488, 494, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974); Bailey v. Patterson, 369 U.S. 31, 32-33, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962). *See generally Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*; Blum v. Yaretsky, 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982), *Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 40, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)*>, Warth v. Seldin, 422 U.S. 490, 522, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975), *Sosna v. Iowa, 419 U.S. 393, 95 S. Ct. 553, 42 L. Ed. 2d 532, 19 Fed. R. Serv. 2d 925 (1975)*, and Sierra Club v. Morton, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972) (requiring that the plaintiffs invoking the court's jurisdiction must establish standing for themselves and may not rely on the standing of others to substitute for a lack of their own individual standing).

Two lines of cases have developed regarding the relationship between standing and Rule 23: the "classwide standing" approach and the "individual standing" line of cases. Interestingly, both lines of cases are rooted in the principle espoused by these Supreme Court decisions that the named plaintiffs must have Article III standing to sue on their own behalf. The "individual standing" cases, however, have added a gloss to that principle that limits standing to assert class claims in a manner that the original Supreme Court cases never suggested.

The "classwide standing" cases recognize that these Supreme Court decisions were simply stating the basic principle that the party invoking the court's jurisdiction must have Article III standing to assert his own personal claims. The "classwide standing" cases accordingly hold that once a named plaintiff demonstrates standing to pursue his own claims, the "case" or "controversy" standing requirement of Article III to the Constitution is satisfied. Whether that plaintiff can *also* pursue claims on behalf of class members that he could not pursue for himself is not a "standing" issue, but a class certification issue, determined by whether the named plaintiff's claims are typical of the claims asserted by the class and whether the named plaintiff can adequately represent the class members. Thus, to say that "standing cannot be acquired through the back door of a class action" was never intended by the Supreme Court to mean that a class plaintiff cannot

represent a class on claims which he could not pursue on his own behalf. It simply means that a plaintiff without standing to pursue his own claim does not become vested with standing simply by including in his complaint a petition to proceed on behalf of a class of persons who *do* possess such standing. As concisely stated in Warth v. Seldin, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975):

> Of course, Art. III' s requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim. (citations omitted)

The "classwide standing" line of cases is represented by, among others, Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 423, 1998 FED App. 0357P (6th Cir. 1998) ("Once his standing has been established, whether a plaintiff will be able to represent the putative class, including absent class members, depends solely on whether he is able to meet the additional criteria encompassed in Rule 23 of the Federal Rules of Civil Procedure.") and Goodman v. Lukens Steel Co., 777 F.2d 113, 4 Fed. R. Serv. 3d 490 (3d Cir. 1985), judgment aff'd, 482 U.S. 656, 107 S. Ct. 2617, 96 L. Ed. 2d 572 (1987) ("Initially, we observe that contrary to the defendants' contentions, the issue here is one of compliance with the provisions of Rule 23, not one of Article III standing. Each of the named plaintiffs has presented claims of injury to himself and has alleged facts which present a case or controversy under the Constitution.") (citing O'Shea v. Littleton, 414 U.S. 488, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974) ("If none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.")).

In contrast, the "individual standing" cases have added a gloss to these Supreme Court decisions that requires the named plaintiffs to have individual standing not only to pursue their own claims, but also to present *every* claim asserted by the class against *every* defendant. This "individual standing" line has included, for example, Griffin v. Dugger, 823 F.2d 1476, 8 Fed. R. Serv. 3d 782 (11th Cir. 1987) ("Moreover, it is not enough that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to just one of many claims he wishes to assert. Rather, each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim.")[1] and Brown v. Sibley, 650 F.2d 760, 771 (5th Cir. 1981). The analysis of the "individual standing" cases typically follows that of Justice Powell's dissent in U.S. Parole Commission v. Geraghty, 445 U.S. 388, 409-24, 100 S. Ct. 1202, 63 L. Ed. 2d 479, 29 Fed. R. Serv. 2d 20 (1980), with citations to the same cases relied upon by Justice Powell, which was rejected by the majority opinion as improperly constituting a "rigidly formalistic approach to Art. III." *Id.* at 404 n. 11.

Not one of the Supreme Court cases cited by the "individual standing" cases actually says that the named plaintiff must have standing to personally assert every claim against every defendant. The issue in those cases was whether the named plaintiff had individual standing to assert its own claims, not whether a plaintiff with standing to assert its own claims could also assert related claims for the class that it could not have asserted individually.

What is more astounding than the "individual standing" courts' citation of these Supreme Court decisions to generate the appearance of support for their "rigidly formalistic approach to Art. III" is that this line of cases has continued not just since *Geraghty*, but even since the Supreme Court's decisions in Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715, 43 Fed. R. Serv. 3d 691 (1999) and Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689, 37 Fed. R. Serv. 3d 1017 (1997), which explained the proper relationship between standing and the Rule 23 requirements for class certification.

Both *Ortiz* and *Amchem* arose out of efforts to craft class settlements of mass tort asbestos litigation, including efforts to bar claims for future injuries. Most of the publicity regarding these cases, both in legal journals and in the media generally, has focused on the asbestos and settlement issues presented in those cases (and on the huge fees that the plaintiff attorneys sought in connection with the settlements). But both cases also abound with detailed analyses of the constitutional dimensions of Rule 23—including both the timing (pre-certification or post-certification) of when statutory and Article III standing of the class representatives should be addressed and the proper standpoint from which standing for classwide claims must be viewed. These decisions should have nailed the coffin shut on the "individual standing" line of cases, yet such cases have continued unabated, often with little, if any, consideration given to *Amchem* or *Ortiz*.

Objectors to the settlements in both *Amchem* and *Ortiz* challenged the class representatives' standing to assert and settle "future claims" for asbestos-related diseases that had not yet accrued. The Supreme Court in *Amchem* concluded that because class certification is "logically antecedent" to issues which "would not exist but for the [class action] certification," class certification should be addressed prior to reaching the standing question. 521 U.S. at 612. The Supreme Court in *Ortiz* reiterated that the class plaintiffs' standing to pursue certain class claims would not be an issue unless the class was first certified; *i.e.*, if the class was not certified, there would be no class claims, so all that mattered would be the individual plaintiffs' standing to assert their own claims. Accordingly, as in *Amchem*, the Court ruled that the class certification decision is "logically antecedent to Article III concerns" and therefore "should be treated first." 527 U.S. at 831 (quoting *Amchem*, 521 U.S. at 612) (internal quotation marks omitted).

When read together with *all* the Supreme Court precedent regarding standing in class actions, it is clear that the Court in *Amchem* and *Ortiz* agrees with the "classwide standing" line of cases. A court may initially address the standing of the named plaintiffs to pursue *their own* claims, for "[p]etitioners 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 and which they purport to represent." Warth v. Seldin, 422 U.S. 490, 502, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) (emphasis added). However, in accordance with *Amchem* and *Ortiz*, "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 v. County of Kane, 308 F.3d 673, 680 (7th Cir. 2002).

As described by the Fifth Circuit in Rivera v. Wyeth-Ayerst Laboratories, 283 F.3d 315 (5th Cir. 2002), the *Ortiz/Amchem* approach to the timing of the classwide standing determination applies whenever class certification creates the standing issue. "The certification of a class changes the standing aspects of a suit, because '[a] properly certified class has a legal status separate from and independent of the interest asserted by the named plaintiff.' " Whitlock v. Johnson, 153 F.3d 380, 384 (7th Cir. 1998) (Once a class is certified, mootness—a standing issue—of the named plaintiff's claim does not moot the claims of the class). "The goal of the standing inquiry [of *Amchem* and *Ortiz*] is therefore appropriately directed toward the class rather than its representative." In re Relafen Antitrust Litigation, 221 F.R.D. 260, 269 (D. Mass. 2004).

The Supreme Court's *Amchem/Ortiz* approach of considering standing for individual claims on an individual basis, and standing for class claims after class certification on a classwide basis, remains consistent with *all* the Supreme Court precedent in the area and with the policies Rule 23 was crafted to promote. This approach acknowledges that unless the class representatives have standing to pursue some claim for themselves, there is no "case" or "controversy" presented as required by Article III of the Warth v. Seldin, 422 U.S. 490, 522, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). However, once the named plaintiffs have presented a "case" or "controversy" of their own, the jurisdiction of the courts is invoked and the focus of the inquiry shifts "from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.'" U.S. Parole Commission v. Geraghty, 445 U.S. 388, 406-07, 100 S. Ct. 1202, 63 L. Ed. 2d 479, 29 Fed. R. Serv. 2d 20 (1980).

Moreover, the vigorous advocacy which the judicially-created requirement of standing is intended to promote normally is assured in the context of a certified class, *see* U.S. Parole Commission v. Geraghty, 445 U.S. 388, 403, 100 S. Ct. 1202, 63 L. Ed. 2d 479, 29 Fed. R. Serv. 2d 20 (1980), because to have approved class certification, the court must have found that the named plaintiffs "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). As the Supreme Court held in Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 755-756, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976), once a class is properly certified in accordance with the requirements of Rule 23, the interests of the class to pursue class claims provides the personal stake required by Article III, even after the named plaintiff's individual claim becomes moot. *See also Sosna v. Iowa, 419 U.S. 393, 402, 95 S. Ct. 553, 42 L. Ed. 2d 532, 19 Fed. R. Serv. 2d 925 (1975)* (Holding that an Article III case or controversy "may exist ... between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.").

The approach adopted in *Amchem* and *Ortiz* also promotes the goal of Rule 23 to "achieve economies of time, effort, and expense." *Amchem*, 521 U.S. at 615-17 (quoting Fed. R. Civ. P. 23 Advisory Committee's Note); *see also Gratz v. Bollinger, 539 U.S. 244, 268, 123 S. Ct. 2411, 156 L. Ed. 2d 257, 177 Ed. Law Rep. 851 (2003)* (Class action "saved the resources of both the courts and the parties" and was permitted even though the class representative's claim was distinguishable from claims of other class members because it involved the "same set of concerns").

The Seventh Circuit fully adopted the *Amchem/Ortiz* approach to class standing in Payton v. County of Kane, 308 F.3d 673, 680 (7th Cir. 2002). The Fifth Circuit initially recognized the significance of *Ortiz* to the timing of the standing determination in James v. City of Dallas, Tex., 254 F.3d 551, 50 Fed. R. Serv. 3d 157 (5th Cir. 2001), but the court failed to recognize the substance of the Supreme Court's ruling as to *why* class certification is "logically antecedent" to a determination of whether classwide standing exists (*i.e.*, because standing to assert the class claims looks to the standing of the class as a whole, not just to the standing of individual class representatives). The Fifth Circuit did, however, seem to recognize this distinction in Rivera v. Wyeth-Ayerst Laboratories, 283 F.3d 315 (5th Cir. 2002), where it accepted the holdings of *Amchem* and *Ortiz*, but distinguished their application to that case because the standing of the named plaintiffs to pursue *their own* claims was at issue.

Nevertheless, some courts that had become well-versed in the old "individual standing" analysis have found their old habits hard to break and have refused to follow the Supreme Court's holdings in Amchem and Ortiz. In Easter v. American West Financial, 381 F.3d 948 (9th Cir. 2004), the Ninth Circuit affirmed the grant of summary judgment due to a lack of standing by the plaintiffs to sue certain defendants with whom they had no personal dealings, although class members did have such dealings. The court disregarded *Ortiz* as involving merely a "very specific situation of a mandatory global settlement class" that "does not require courts to consider class certification before standing." *Id.* at 962. The Ninth Circuit's dismissive attitude toward the constitutional implications of *Ortiz* is logically and legally unsupported. Moreover, the court rejected *Ortiz* in favor of Warth v. Seldin, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975), which as discussed above, addressed whether the named plaintiffs had standing to bring *any* claim on *their own behalf*, not whether plaintiffs with standing to bring their own claims could also assert claims which they do not themselves possess by means of a class action.

Similarly, the district court in Matte v. Sunshine Mobile Homes, Inc., 270 F. Supp. 2d 805 (W.D. La. 2003) danced around *Amchem* and *Ortiz*. The plaintiff in *Matte* filed a complicated class action against all manufacturers of mobile homes alleging a variety of product defects. The plaintiffs clearly had standing to assert claims against the manufacturers of their homes for damages they had suffered; but, of course, they did not have *individual* standing to assert claims against manufacturers of

homes they had not purchased or for harm they had not experienced. The district court dismissed those claims for a lack of individual standing, claiming simply that, unlike the claims *Amchem* and *Ortiz*, "the issue of standing [in *Matte*] would exist regardless of whether the suit were filed by plaintiffs jointly or as a class action." *Id.* at 822. Indeed, *Matte* even relied on the grandfather of the "individual standing" line of cases—Weiner v. Bank of King of Prussia, 358 F. Supp. 684 (E.D. Pa. 1973). *King of Prussia* is a favorite "proof text" of the "individual standing" cases despite the fact that the authorities, such as *Hansberry*, it cites do not support its requirement that the named plaintiffs establish individual standing for every claim as to every defendant.

In actuality, there was no genuine factual distinction between the claims in *Matte* and those in *Amchem* and *Ortiz*. The named plaintiffs in *Amchem* and *Ortiz* were alleged not to have standing to assert future, unaccrued claims, whether individually or as a class. Thus, the court in *Matte* misunderstood the holding and import of *Amchem* and *Ortiz*. Of course, class certification does not create for a named plaintiff the right to sue *for himself* that he does not already have, but that was not the standing issue presented. Rather, the issue was whether the named plaintiff could—in addition to the claims which he had standing to assert for himself—also prosecute claims on behalf of others which were similar to those asserted by the plaintiff, but which would involve different types of harm or different sets of defendants. That is precisely the type of Article III justiciability challenge addressed in *Amchem* and *Ortiz*. Given the breadth and complexity of the proposed class in *Matte*, the court could easily have reached the same result (denial of class certification) under the proper approach confirmed in *Amchem* and *Ortiz*, but the court instead fell back on the "proof texts" that had become familiar in Fifth Circuit law (prior to *James* and *Rivera*).

Although some courts continue to misplace reliance on "proof text" citations that have been overruled by *Amchem* and *Ortiz*[2], and to promote the "rigidly formalistic approach to Art. III" rejected by *Geraghty*, the better reasoned cases and clear trend led by the Fifth and Seventh Circuits is to recognize that, where the standing is questioned of a named plaintiff to represent a class involving claims that the named plaintiff could not personally assert, class certification must be addressed first, and then standing must be determined as to the class as a whole. *See also, e.g.*, Ford v. NYLCare Health Plans of the Gulf Coast, Inc., 301 F.3d 329 (5th Cir. 2002) (Must determine standing of the named plaintiff on his own claims first, then standing of the class as to classwide claims); In re Relafen Antitrust Litigation, 221 F.R.D. 260 (D. Mass. 2004); Clark v. McDonald's Corp., 213 F.R.D. 198 (D.N.J. 2003); In re Buspirone Patent Litigation, 185 F. Supp. 2d 363 (S.D. N.Y. 2002).

The analysis of these post-*Amchem/Ortiz* cases properly reflects Supreme Court precedent and the letter and spirit of both Rule 23 and Article III of the Constitution.

ENDNOTES

1. This quotation from *Griffin* contains a significant ambiguity regarding what is meant by the phrase, "the injury that gives rise to that claim." The "classwide standing" cases might argue that claims that arise out of the same common course of conduct satisfy this standard even if asserted against different defendants or if the causes of action vary in some minor fashion, while the "individual standing" cases often require that the claims not only arise out of the same course of conduct, but that they share every element of the claims and that they be asserted against the same defendants. As a result of this sort of ambiguous language, there is little consistency among the Eleventh Circuit cases on this issue. *Compare* Sanders v. Robinson Humphrey/American Exp., Inc., 634 F. Supp. 1048, 1057 (N.D. Ga. 1986), on reconsideration, Fed. Sec. L. Rep. (CCH) P 92880, 1986 WL 10096 (N.D. Ga. 1986) and judgment aff'd in part, rev'd in part on other grounds, 827 F.2d 718, 9 Fed. R. Serv. 3d 276 (11th Cir. 1987), *Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 9 Fed. R. Serv. 3d 276 (11th Cir. 1987)* (plaintiff who purchased one type of security had standing to represent class members who had purchased other securities where defendants "engaged in a uniformly fraudulent course of conduct, disseminated virtually identical false prospectuses, false financial statements and other financial information, and failed to disclose material information regarding operations of [the Company] to purchasers during the class period") and Klay v. Humana, Inc., 382 F.3d 1241, 1250, 59 Fed. R. Serv. 3d 707 (11th Cir. 2004), cert. denied, 543 U.S. 1081, 125 S. Ct. 877, 160 L. Ed. 2d 825 (2005) ("For a district court to certify a class action, the named plaintiffs must have standing, and the putative class must meet each of the requirements specified in Federal Rule of Civil Procedure 23(a), as well as at least one of the requirements set forth in Rule 23(b)."") with *Griffin, supra*, and Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1280, 47 Fed. R. Serv. 3d 953 (11th Cir. 2000) ("It is not enough that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to one of many claims he wishes to assert. Rather, 'each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim.'" (quoting Griffin, 823 F.2d at 1483)).

2. *See* Parks v. Dick's Sporting Goods, Inc., 2006 WL 1704477 (W.D. N.Y. 2006); In re Eaton Vance Corp. Securities Litigation, 220 F.R.D. 162 (D. Mass. 2004); Mull v. Alliance Mortg. Banking Corp., 219 F. Supp. 2d 895 (W.D. Tenn. 2002).