

### 10.3.3 Typicality—Rule 23(a)(3)

#### 10.3.3.1 General

Rule 23 requires that the claims or defenses of the representative parties be typical of, or align with, the claims or defenses of the class so that the interests of class members “will be fairly and adequately protected in their absence.”<sup>1</sup> The typicality requirement is met if the named representative’s claims are essentially the same as those of the class at large and if the named representative’s claims arise from the same course of conduct giving rise to the claims of other class members.<sup>2</sup>

Typicality is met even if there are certain factual differences between the named plaintiff’s claims and claims of other class members. Claims do not have to be perfectly coextensive; substantial similarity is sufficient.<sup>3</sup> As long as the class representative’s claim or defense is similar to those

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1 {97} *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997). *See, e.g., In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 599 (3d Cir. 2009).

2 {98} *See Gen. Tel. of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982) (class representative must be part of the class and possess the same interest and suffer the same injury as class members; requirement not satisfied in this case); *Alpern v. UtilCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996); *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983); *Jordan v. Cnty. of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, *Cnty. of Los Angeles v. Jordan*, 459 U.S. 810 (1982); *Lymburner v. U.S. Fin. Funds, Inc.*, 263 F.R.D. 534 (N.D. Cal. 2010) (proposed class representative of borrowers with adjustable rate mortgages (ARM) satisfied typicality requirement in action against mortgage broker for violation of TILA and California law when they were allegedly not adequately informed of possibility of negative amortization; claims were based on loans issued by mortgage broker allegedly without proper disclosures, and mortgage broker’s conduct was typical toward all borrowers). *But see Molina v. Roskam Baking Co.*, 2011 WL 5979087 (W.D. Mich. Nov. 29, 2011) (when defendant certified that it had a permissible purpose before obtaining plaintiff’s consumer report, plaintiff’s claims were not typical of class of persons for whom defendant failed to make the required certification before obtaining reports); *Agostino v. Quest Diagnostics, Inc.*, 2010 WL 5392688 at \*21–22 (D.N.J. Dec. 22, 2010) (finding that plaintiffs had not shown that the proposed class representatives’ claims against three particular debt collection companies were typical of similar ones of absent class members’ against two other companies “simply because all of the debt collectors allegedly acted in similarly improper ways”).

3 {99} *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 598 (3d Cir. 2009); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 314–15 (3d Cir. 1998); *Schulken v. Washington Mut. Bank*, 2012 WL 28099, at \*10 (N.D. Cal. Jan. 5, 2012) (finding plaintiffs’ claims typical as based on the same triggering event—failure to fully respond to income verification letters—that led to automatic HELOC suspensions for all class members, despite factual differences between their circumstances and those of other class members). *But see Soutter v. Equifax Info. Services, L.L.C.*, 498 Fed. Appx. 260, 265–66 (4th Cir. 2012) (in this Fed. R. Civ. P. Rule 23f appeal, applying a constricted view of plaintiff’s legal theories, over a strong dissent, and rejecting district court’s finding that plaintiff’s claim

asserted on behalf of the class, it does not matter that the specific facts bringing the various class members into contact with the defendant differ somewhat.<sup>4</sup> “Typicality entails an inquiry whether the named plaintiff’s individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will perform be based.”<sup>5</sup>

If the representative also has a claim that is completely separate from the class claims, counsel should consider filing it in a separate action. The trial of a hybrid action may confuse a jury.

If the legal and factual arguments that logically would be raised by the named plaintiff appear to cover the legal and factual arguments that the class members generally would present in order to recover, the typicality requirement is satisfied.<sup>6</sup> Moreover, the typicality requirement may be met despite the existence of relatively pronounced factual distinctions between the claims of the named plaintiffs and the claims of the proposed class if there is a strong similarity of legal theories.<sup>7</sup> Accordingly, factual differences will not preclude a finding of typicality if the named plaintiff’s claims (1) arise from the same event, practice, or course of conduct that gives rise to the class members’ claims<sup>8</sup> and (2) are based on the same legal theory as the class claims.<sup>9</sup>

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was typical).

4 {101} “When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is met irrespective of varying fact patterns which underlie individual claims.” *Edmondson v. Simon*, 86 F.R.D. 375, 381 (N.D. Ill. 1980).

5 {102} *Baby Neal v. Casey*, 43 F.3d 48 at 57–58 (3d Cir. 1994).

6 *See, e.g., Soutter v. Equifax Info. Services, L.L.C.*, 307 F.R.D. 183, 209 (E.D. Va. 2015).

7 {103} *Baby Neal v. Casey*, 43 F.3d 48 at 57–58 (3d Cir. 1994). *But see Lee v. Pep Boys—Manny Moe & Jack*, 2015 WL 9480475, at \*9 (N.D. Cal. Dec. 23, 2015) (finding plaintiff’s claim atypical in that it was unclear if he had engaged in a covered consumer transaction, as was alleged for class).

8 {104} *See Coleman v. Gen. Motors Acceptance Corp.*, 220 F.R.D. 64, 79 (M.D. Tenn. 2004) (when class representatives alleged that their injuries arose from the same policy that gave rise to the claims of the rest of the class, typicality requirement for nationwide class certification was satisfied with respect to class action brought by African-American consumers against automobile finance company alleging that company charged African-American consumers higher finance charge markup than it charged Caucasian consumers in violation of the Equal Credit Opportunity Act).

9 {105} *See, e.g., Wolin v. Jaguar Land Rover N. Am., L.L.C.*, 617 F.3d 1168, 1175 (9th Cir. 2010) (in a case involving allegedly defective alignment geometry in vehicles causing premature tire wear, holding that “[t]ypicality can be satisfied despite different factual circumstances surrounding the manifestation of the defect”); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552–53 (6th Cir. 2006) (plaintiff’s claim that Ford breached its express warranty by providing vehicles with defectively designed throttle body assemblies was typical even though her vehicle’s throttle body assembly already had stuck while other class members’ vehicle’s throttles had not); *Randolph v. Crown Asset Mgmt., L.L.C.*, 254 F.R.D. 513 (N.D. Ill. 2008) (sixty-dollar business-related expense charged on credit card did not destroy typicality of claims of consumer class representative); *Walco Investments, Inc. v. Thenen*, 168 F.R.D. 315, 326–

For example, in a case alleging that a lender's discretionary pricing policy had a disparate impact on minorities, the fact that the class representatives themselves may have obtained better rates than some similarly situated whites did not make their claims atypical nor deprive them of standing.<sup>10</sup> On the other hand, "plaintiffs' claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim."<sup>11</sup> In this regard, the typicality prerequisite may overlap with the requirement that plaintiff be an adequate class representative; if the plaintiff's claims are not typical, the plaintiff may lack "incentive to press issues important to the other members of the class."<sup>12</sup> For instance, a named plaintiff who is not at risk of having the defendant repeat the alleged wrong in the future lacks typicality for a claim of declaratory relief.<sup>13</sup>

### 10.3.3.2 Standing Issues

#### 10.3.3.2.1 General

In federal court cases, the extent to which the plaintiff's claims are typical is sometimes raised by the defendants as an issue of Article III standing, which is a prerequisite to federal court subject matter jurisdiction.<sup>14</sup> To demonstrate Article III standing, a plaintiff must allege (1) an injury in fact, which includes the invasion of a legally protected interest; (2) fairly traceable to the defendants' actions, (3) that is likely to be redressed by a favorable decision.<sup>15</sup> Article III does not apply in state

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27 (S.D. Fla. 1996) (certifying class in securities cases in which plaintiffs invested in different funds); *Rimmer v. CitiFinancial*, 894 N.E.2d 331 (Ohio 2008).

10 {106} *Ramirez v. Greenpoint Mortg. Funding, Inc.*, 268 F.R.D. 627, 634–35 (N.D. Cal. 2010) (noting that plaintiffs' expert had testified in his deposition that, absent discriminatory practices, they would likely have had an even lower rate).

11 {107} *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466–67 (4th Cir. 2006) (upholding order excluding from the class businesses that purchased Microsoft software in large volume and for negotiated prices).

12 {108} *Robinson v. Sheriff of Cook Cnty.*, 167 F.3d 1155, 1157 (7th Cir. 1999), *cited with approval in Muro v. Target Corp.*, 580 F.3d 485 (7th Cir. 2009) (TILA claims). *See also Torres v. Toback, Bernstein & Reiss, L.L.P.*, 2014 WL 988480 (E.D.N.Y. Mar. 14, 2014) (class representative's claims not rendered by mere fact that she and she alone asserted claims on behalf of two separate classes; but noting her adequacy would be problematic but for terms of settlement being simultaneously submitted with motion for conditional class certification) (Mag. J.), *adopted with modification*, 2014 WL 1330957 (E.D.N.Y. Mar. 31, 2014). *But see Phillips v. Asset Acceptance, L.L.C.*, 736 F.3d 1076, 1081 (7th Cir. 2013) (Posner, J.) (noting that representative plaintiff would have an incentive to pursue even claims of class members that did not affect her directly because doing so would render litigation more complex and therefore result in an enhanced incentive award if claims were successful).

13 *See, e.g., Lee v. Pep Boys—Manny Moe & Jack*, 2015 WL 9480475 (N.D. Cal. Dec. 23, 2015).

14 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

15 {109} *Spokeo, Inc. v. Robins, Inc.*, 2016 WL 2842447, at \*5 (May 16, 2016) (citing *Friends of the Earth, Inc. v.*

courts, but some states have their own standing requirements, and these may or may not apply considerations parallel to those used in federal court. This subsection addresses only federal court standing.

It is well established that a named representative herself must have individual standing to raise the legal claims of the class.<sup>16</sup> Importantly, if the named plaintiff has standing, then an action may proceed on behalf of a class without analysis of the standing of each class member because the standing inquiry “keys on the representative party, not all of the class members.”<sup>17</sup> However, surviving an early

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Laidlaw Env'tl Services (TOC), Inc., 528 U.S. 167, 180–81 (2000); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S. Ct. 2130 (1992)). See Neale v. Volvo Cars of N. Am., L.L.C., 794 F.3d 353 (3d Cir. 2015) (noting that injury must be concrete and actual or imminent in case involving allegedly defective sunroofs, some of which may not have yet caused damage to vehicle, but reversing denial of class certification that had been based on lack of standing of some class members). See also Charvat v. Mut. First Fed. Credit Union, 725 F.3d 819 (8th Cir. 2013) (class representative’s allegation that banks did not provide him with the then-required “on machine” notice of a fee satisfied the injury-in-fact requirement and were fairly traceable to banks’ conduct even though he could have walked away when he received notice of the fee during transaction).

16 {110} O’Shea v. Littleton, 414 U.S. 488, 494 (1974) (“[I]f 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.”); McNair v. Synapse Group Inc., 672 F.3d 213 (3d Cir. 2012) (affirming denial of class certification because named plaintiffs had no standing to seek injunctive relief for putative class members); Prado–Steiman *ex rel.* Prado v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000); Searcy v. eFunds Corp., 2010 WL 1337684, at \*4–5, (N.D. Ill. Mar. 31, 2010) (declining to certify one of the classes requested (the Bad Check List class) because substitute class representative did not incur same legal injury as members of putative class she sought to represent); White v. First Am. Registry, 230 F.R.D. 365 (S.D.N.Y. 2005) (standing to pursue class claim—that defendant tenant-screening CRA failed to use reasonable procedures to ensure maximum possible accuracy of its reports—lacking when proposed class representative’s own inaccurate file had been corrected prior to his filing putative class action and he was not seeking damages).

17 {111} Neale v. Volvo Cars of N. Am., L.L.C., 794 F.3d 353 (3d Cir. 2015) (in a case involving allegedly defective sunroofs, some of which may not have yet caused damage to vehicle, vacating denial of class certification that had been based on the lack of standing of some class members); Melendres v. Arpaio, 784 F.3d 1254, 1261 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 799 (2016) (explicitly adopting what court referred to as the “class certification approach” to issue of standing, noting that this “holds that once the named plaintiff demonstrates her individual standing to bring a claim, the standing inquiry is concluded, and the court proceeds to consider whether the Rule 23(a) prerequisites for class certification have been met,” quoting § 2.6 of 1 William B. Rubinstein, *Newberg on Class Actions* (5th ed.)); *In re Nexium Antitrust Litigation*, 777 F.3d 9 (1st Cir. 2015) (named end-payor plaintiffs in multidistrict antitrust litigation involving brand name drug manufacturer’s reverse payments to generic manufacturers to delay launch of their products demonstrated they were overcharged for at least one transaction during the class period, and, thus, they had standing to sue for their injuries and to request that court allow them to represent and secure judgment on behalf of class even if some class members were not injured); McCray v. Fidelity Nat’l Title Ins. Co., 682 F.3d 229, 243 (3d Cir. 2012) (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 306 (3d Cir. 1998) (“[W]hether an action presents a ‘case or controversy’ under Article III is determined vis-a-vis the named parties.”)). *Accord* Gutierrez v. Wells Fargo Bank, NA, 704 F.3d 712, 728 (9th Cir. 2012) (for California Unfair Competition Law class claims, it is sufficient for named plaintiffs to prove their own “actual reliance” on the misleading statements); Gooch v. Life Investors Ins. Co. of Am., 672 F.3d 402, 422 (6th Cir. 2012) (quoting Fallick v. Nationwide Mut. Ins.

motion to dismiss is not a guarantee that the issue will not be raised again. The standard applicable to the three elements of standing “is not constant but becomes gradually stricter as the parties proceed through ‘the successive stages of the litigation.’ ”<sup>18</sup>

#### 10.3.3.2.2 *Standing of the named plaintiff*

Recently, the Supreme Court addressed the issue of the standing of the named plaintiff in the context of alleged federal statutory violations. The Court’s focus was on the first of the three prerequisites for standing, injury in fact, discussed in the previous subsection. In *Spokeo, Inc. v. Robins*,<sup>19</sup> the Supreme Court held that the Ninth Circuit Court of Appeals had “elided” the particularity requirement<sup>20</sup> of injury in fact with the concreteness requirement for injury in fact.<sup>21</sup> The Court found that the Court of Appeals had therefore failed to determine whether a website operator’s alleged violations of the FCRA’s procedural requirements caused concrete injury. While the FCRA thus provides the setting for the Court’s decision, the focus of this subsection is on the principles enunciated in *Spokeo* that are generally applicable to all alleged federal statutory violations. Other treatises in this series consider in greater depth the implications of *Spokeo* for the particular statutory scheme discussed in the relevant treatise, such as *Fair Debt Collection*, *Fair Credit Reporting* and *Truth in Lending*.

While noting that a bare procedural violation of the FCRA is not alone enough to establish a concrete injury, the Court in *Spokeo* did not reverse the holding of the Ninth Circuit that Robins had

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Co., 162 F.3d 410, 423 (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.”); *Shahriar v. Smith & Wollensky Rest. Group, Inc.*, 659 F.3d 234, 253 (2d Cir. 2011) (evaluating named plaintiffs’ adequacy under Rule 23(a)(4); “ ‘only one of the named Plaintiffs is required to establish standing in order to seek relief on behalf of the entire class’ ” (citation omitted)); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011) (rejecting defendant’s contention that class lacked Article III standing); *Amador v. Andrews*, 655 F.3d 89, 99 (2d Cir. 2011) (citing *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 118 (2d Cir. 2009)). See also *Lewis v. Casey*, 518 U.S. 343, 395, 116 S. Ct. 2174 (1996) (Souter, J., concurring) (class certification “does not require a demonstration that some or all of the unnamed class could themselves satisfy the standing requirements for named plaintiffs”); *Kohen v. Pac. Inv. Mgmt. Co., L.L.C.*, 571 F.3d 672, 679–680 (7th Cir. 2009), *reh’g and reh’g en banc denied*, (2009) (noting that, at class certification stage, identities of many class members and facts bearing on their claims may be unknown). The relationship of absent class members’ standing to class definitions is discussed in § 4.1, *supra*.

18 *In re Deepwater Horizon Appeals*, 739 F.3d 790 (5th Cir. 2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

19 \_\_\_ U.S. \_\_\_, 2016 WL 2842447 (May 16, 2016).

20 For an injury to be “particularized,” it “must affect the plaintiff in a personal and individual way.” *Id.* at \*6. The Supreme Court found this part of the standing test was easily satisfied in the case before it.

21 *Id.* at \*1.

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adequately alleged standing. Rather, it vacated and remanded so that the Ninth Circuit could consider in the first instance a question that it had not addressed: Did the allegations of procedural violations show a material risk of “concrete” injury? More particularly, what “types of false information” can work concrete harm?<sup>22</sup> And could such harm flow from the alleged violations, such as the requirement that CRAs post toll-free numbers to allow consumers to request consumer reports?<sup>23</sup>

The majority opinion provided guidance regarding when harm is concrete, a term of art, but broke no new ground. Concrete means “real,” not “abstract,” but “it is not [] necessarily synonymous with ‘tangible.’”<sup>24</sup> Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete.<sup>25</sup>

In discussing which intangible injuries can be concrete, the Court noted: “Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.”<sup>26</sup> An example mentioned by the court is slander, which is actionable because it is inherently damaging without showing actual damage to reputation, which is an intangible interest. Similarly, the court also observed that “Many traditional remedies for private-rights causes of action—such as for trespass, infringement of intellectual property, and unjust enrichment—are not contingent on a plaintiff’s allegation of damages beyond the violation of his private legal right.”<sup>27</sup> There is no requirement that the plaintiff have suffered a loss of money, personal injury, or actual damages as a result of these types of violations. The harm can be actionable even if it is “difficult to prove or measure.”<sup>28</sup>

Apart from intangible harms that have “a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts,” *Spokeo* recognized that Congress “may ‘elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that

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22 *Id.* at \*8 n.8. The Court gave zip codes as an example of inaccurate information that would be extremely unlikely to cause harm, without more, but in fact an inaccurate zip code can lead to higher insurance rates or to a family being excluded from a certain school district.

23 The four alleged violations were Spokeo’s failure to “follow reasonable procedures to assure maximum possible accuracy of” consumer reports, § 1681e(b); failure to notify providers and users of consumer information of their responsibilities under the FCRA, § 1681e(d); failure to limit the circumstances in which such agencies provide consumer reports “for employment purposes,” § 1681b(b)(1); and failure to post toll-free numbers for consumers to request reports, § 1681j(a).

24 *Id.* at \*7.

25 *Id.*

26 *Id.*

27 *Id.* at \*11.

28 *Id.* at \*8.

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were previously inadequate in law.”<sup>29</sup> “Congress is well positioned to identify intangible harms that meet minimum Article III requirements, [and] its judgment is also instructive and important.”<sup>30</sup>

The Court observed that Congress identified such intangible harms in enacting the FCRA: “Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk.”<sup>31</sup> Although “Article III standing requires a concrete injury even in the context of a statutory violation,” “the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified.” The court gave as examples the right to information that Congress had decided should be made public.<sup>32</sup>

Violations of statutory rights that cause such monetary harm or emotional distress will easily meet the test for “concreteness.” In the wake of *Spokeo*, it is to be expected that the major battleground will be over which procedural rights has Congress elevated to a level where, like common law slander or trespass, the violation itself constitutes injury in fact, without “any *additional* harm beyond the one Congress has identified.”

#### ***10.3.3.2.3 Standing to assert different claims***

Defendants sometimes contend that the named plaintiff lacks standing to assert claims of absent class members that are similar to but differ in some way from the plaintiff’s. For example, a holder of mortgage-backed certificates brought a putative class action against the underwriter, issuer, and others, alleging that the registration statement for the certificates contained false or misleading information. There was no question that the named plaintiff had individual standing that was sufficient to support a class action; the issue was which claims were permissible in the action.

The Second Circuit held, in *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Company*, that the plaintiff had standing to assert Securities Act class claims on behalf of purchasers of certificates that were backed by mortgages from the same lenders that originated the mortgages

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<sup>29</sup> *Spokeo, Inc. v. Robins*, \_\_\_ U.S. \_\_\_, 2016 WL 2842447, at \*7 (May 16, 2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at \*8.

<sup>32</sup> *Id.* (emphasis in the original) (citing to *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20–25, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998) (confirming that a group of voters’ “inability to obtain information” that Congress had decided to make public is a sufficient injury in fact to satisfy Article III); *Public Citizen v. Dep’t of Justice*, 491 U.S. 440, 449, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989) (holding that two advocacy organizations’ failure to obtain information subject to disclosure under the Federal Advisory Committee Act “constitutes a sufficiently distinct injury to provide standing to sue”)).

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backing plaintiff's certificates, even though some of the certificates were from different offerings or from different tranches than the ones the plaintiff had purchased.<sup>33</sup> In reaching this conclusion, the court noted that "the Supreme Court has acknowledged [that] there is some 'tension' in its case law as to whether 'variation' between (1) a named plaintiff's claims and (2) the claims of putative class members 'is a matter of Article III standing . . . or whether it goes to the propriety of class certification pursuant to [Fed. R. Civ. P. 23(a)].'"<sup>34</sup>

The Court of Appeals distilled the relevant case law down to the following broad standard for a class representative to have standing to raise a set of claims:<sup>35</sup>

a plaintiff has class standing if he plausibly alleges (1) that he "personally has suffered some actual . . . injury as a result of the putatively illegal conduct of the defendant," *Blum*, 457 U.S. at 999, 102 S. Ct. 2777 (quotation marks omitted), and (2) that such conduct implicates "the same set of concerns" as the conduct alleged to have caused injury to other members of the putative class by the same defendants, *Gratz*, 539 U.S. at 267, 123 S. Ct. 2411.

A plaintiff who makes such plausible allegations should also pass the typicality test. Thus, one of the important implications of the holding in *NECA-IBEW Health & Welfare Fund* is that a single plaintiff will not lack standing or typicality to bring a multistate class action so long as the "same set of concerns" is raised by the claims under the various state laws.

#### ***10.3.3.2.4 Standing to sue multiple defendants***

When there are multiple defendants, a proposed class representative who has no claim against one or some of the defendants generally lacks standing to sue such defendants as a representative of

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33 {112} *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 163 (2d Cir. 2012) (also holding, however, that plaintiff lacked standing to assert Securities Act class claims on behalf of purchasers of certificates that were backed by mortgages from *different* lenders than those that originated mortgages backing plaintiff's certificates because "differences in the identity of the originators backing the Certificates matters for the purposes of assessing whether those claims raise the same set of concerns" as plaintiff's claims).

34 {113} *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 160 (2d Cir. 2012) (reviewing precedent).

35 {114} *Id.* at 162. *See also id.* at 159 n.10; *In re Deepwater Horizon Appeals*, 739 F.3d 790 (5th Cir. 2014) (analyzing circuits that focus solely on Article III standing of class representatives and those that require class to be defined in such a way that anyone in it would have standing); *Bzdawka v. Milwaukee Cnty.*, 238 F.R.D. 469, 472 (E.D. Wis. 2006); *Simpson v. Fireman's Fund Ins. Co.*, 231 F.R.D. 391, 396 (N.D. Cal. 2005) ("In a class action, the question of whether plaintiff may be allowed to present claims on behalf of others does not depend on the standing of absent class members, but on the assessment of the typicality and adequacy of representation of the named plaintiff.").

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unnamed class members who do have such claims and they will be dismissed for lack of jurisdiction at the pleading stage.<sup>36</sup> A limited exception has been suggested in cases in which “all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious.”<sup>37</sup> For example, when the additional defendants are wholly owned affiliates of a defendant that allegedly injured the representative herself, and the issues raised are “substantially the same,” typicality and adequacy have nevertheless been found as to such defendants, and class representation permitted.<sup>38</sup>

### 10.3.3.3 Unique Defenses

Some courts have held that the existence of a unique defense peculiar to the named plaintiff or a small portion of the class precludes a finding of typicality.<sup>39</sup> The concern about a unique defense affecting typicality overlaps with the issue of the class representative’s adequacy because a class representative may be vulnerable to a motion for summary judgment predicated on the defense and also “might devote time and effort to the defense at the expense of issues that are common and controlling for the class.”<sup>40</sup> However, only defenses that “threaten to become the focus of the litigation”<sup>41</sup> or that would affect the presentation of evidence to the trier of fact should be considered in

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36 {115} *See, e.g.*, *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 163 (2d Cir. 2012) (plaintiff lacked standing to assert Securities Act class claims on behalf of purchasers of certificates that were backed by mortgages from *different* lenders than those that originated mortgages backing plaintiff’s certificates because “differences in the identity of the originators backing the Certificates matters for the purposes of assessing whether those claims raise the same set of concerns” as plaintiff’s claims); *Cassese v. Washington Mut., Inc.*, 262 F.R.D. 179, 184 (E.D.N.Y. 2009); *Forsythe v. Sun Life Fin., Inc.*, 417 F. Supp. 2d 100, 119 n.19 (D. Mass. 2006).

37 {116} *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 466 (9th Cir. 1973). *See also* *Moore v. Comfed Sav. Bank*, 908 F.2d 834, 838 (11th Cir. 1990) (permitting joinder of defendant banks that had no dealings with class representatives).

38 {117} *Alves v. Harvard Pilgrim Health Care Inc.*, 204 F. Supp. 2d 198, 205 (D. Mass. 2002).

39 {118} *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 728 (7th Cir. 2011) (remanding to district court to determine typicality and adequacy when potentially unique defense was available against named plaintiff, but cautioning defendants against “conjuring up . . . insubstantial defenses” to defeat class certification); *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 598 (3d Cir. 2009); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176 (2d Cir. 1990); *Agostino v. Quest Diagnostics Inc.*, 256 F.R.D. 437 (D.N.J. 2009). *But see* *Randolph v. Crown Asset Mgmt., L.L.C.*, 254 F.R.D. 513 (N.D. Ill. 2008) (“the existence of a unique defense does not preclude a finding of typicality,” citing *Wagner v. Nutrasweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996)).

40 {119} *Beck v. Maximus, Inc.*, 457 F.3d 291, 297 (3d Cir. 2006). *Accord* *Fireside Bank v. Superior Court*, 155 P.3d 268 (Cal. 2007) (rejecting defendant’s assertion that unique defenses posed a significant risk of diverting class representative’s attention from class issues).

41 {120} *Hannon v. Dataproducts*, 976 F.2d 497, 508 (9th Cir. 1992). *Accord In re Milk Prods. Antitrust Litig.*, 195 F.3d 430, 437 (8th Cir. 1999) (a class representative is “not adequate or typical if it is subject to a unique defense that threatens to play a major role in the litigation”); *Ellsworth v. U.S. Bank, N.A.*, 2014 WL 2734953, at \*17 (N.D. Cal. June 13, 2014) (attempted refund of illegal charges and alleged

this regard.<sup>42</sup> Moreover, the asserted defense must not be merely speculative<sup>43</sup> and must have some merit.<sup>44</sup>

### 10.3.3.4 Typicality and the Relief Sought by Plaintiff

It is not essential that the relief sought by the named plaintiff be precisely coextensive with the relief to which the class members may be entitled.<sup>45</sup> Differences in the relief sought on behalf of the named plaintiff and the class members do not defeat a class action if the factual and legal grounds for seeking relief are the same.<sup>46</sup> For example, in an action litigated under the Fair Debt Collection

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failure to mitigate did not defeat typicality); *Ge Dandong v. Pinnacle Performance, Ltd.*, 2013 WL 5658790, at \*7 (S.D.N.Y. Oct. 17, 2013) (holding, in this action alleging fraud on investors related to a series of credit-linked notes, that unique defenses did not defeat typicality requirement because they did not threaten to become focus of litigation).

42 {121} *Beck v. Maximus, Inc.*, 457 F.3d 291, 300 (3d Cir. 2006) (“will play a significant role at trial”); *In re Farmers Ins. Co., FCRA Litig.*, 2006 WL 1042450, at \*6 (W.D. Okla. Apr. 13, 2006).

43 *See, e.g., Allbaugh v. California Field Ironworkers Pension Trust*, 2014 WL 3814026, at \*6 (D. Nev. Aug. 4, 2014).

44 {122} *Johnson v. Steven Sims Subaru & Subaru Leasing*, 1993 WL 761231 (N.D. Ill. June 9, 1993). *See, e.g., Ramirez v. Greenpoint Mortg. Funding, Inc.*, 268 F.R.D. 627, 638–39 (N.D. Cal. 2010) (finding class representatives’ claims typical despite false statements on their loan applications, as the defense of unclean hands would not apply to their ECOA claims; also noting that there was ample evidence that plaintiffs were unaware of the misstatements). *See also Beck v. Maximus, Inc.*, 457 F.3d 291, 300 (3d Cir. 2006) (citing with approval *Hardy v. City Optical Inc.*, 39 F.3d 765, 770 (7th Cir. 1994)); *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231 (N.D. Cal. 2014) (deposition testimony by proposed class representative that she did not think she was “harmed from purchasing and consuming” the smoothie kit that falsely claimed to be “All Natural” did not render her atypical or inadequate). *Cf. In re Farmers Ins. Co., FCRA Litig.*, 2006 WL 1042450, at \*6 (W.D. Okla. Apr. 13, 2006).

45 This issue may arise in the context of adequacy, wherein it also is not a bar to certification. *See* § 10.3.4.3, *infra*.

46 {123} *Wolin v. Jaguar Land Rover N. Am., L.L.C.*, 617 F.3d 1168, 1175 (9th Cir. 2010) (in a case involving allegedly defective alignment geometry in the vehicles, causing premature tire wear, holding that the fact that the two named plaintiffs “already received discounts and some free services also does not defeat typicality”); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975) (former employee, not entitled to reinstatement, was adequate representative of class of past and present employees alleging discriminatory employment practices and seeking reinstatement and other relief); *Taylor v. United Technologies Corp.*, 2008 WL 2333120, at \*4 (D. Conn. June 3, 2008); *Grant v. Sullivan*, 131 F.R.D. 436, 448 (M.D. Pa. 1990), *rev’d other grounds*, 989 F.2d 1332 (3d Cir. 1993).

In *McDermott v. Hollander*, 60 F.R.D. 643 (E.D. La. 1973), the court held that a plaintiff who sought rescission of a transaction under the Truth in Lending Act could represent a class of persons on whose behalf the only remedy sought was damages:

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The assertion that the plaintiffs in demanding rescission of the transaction do not have a “claim that is typical” merely concerns the remedy that will be afforded, not the question whether there is a right to relief and whether the claim itself is typical. If the validity of the claim is established, different relief may be afforded various members of the class or . . . the entire question of relief may be reserved for individual actions, and class action status allowed only for the determination of

Practices Act, the named plaintiff is not atypical simply because her claim is for statutory damages, while some class members may be entitled to actual damages.<sup>47</sup> If, however, the class representative has already received the relief sought for the class, he or she may be seen as atypical.<sup>48</sup>

### 10.3.3.5 Options When Typicality Is Problematic

Finally, if typicality problems exist, several options are open to the class attorney. One is to establish subclasses, each with a class representative, in which the class representative's claims and defenses are typical of the subclass that the individual is representing.<sup>49</sup> Another is to add or substitute a different class member as class representative.<sup>50</sup> A third possibility is to modify the proposed class definition to eliminate the portion of the class whose claims differ from those of the representative.<sup>51</sup>

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rights. *The plaintiffs' claim is typical; it is not necessary that the relief be universal.* (emphasis added)

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47 {100} Keele v. Wexler, 149 F.3d 589, 593–594 (7th Cir. 1998); Magee v. Portfolio Recovery Associates, L.L.C., 2015 WL 535859 (N.D. Ill. Feb. 5, 2015); Herrera v. LCS Fin. Services Corp., 274 F.R.D. 666, 679 (N.D. Cal. 2011); Mund v. EMCC, Inc., 259 F.R.D. 180 (D. Minn. 2009); Wyatt v. Creditcare, Inc., 2005 WL 2780684, at \*4 (N.D. Cal. Oct. 25, 2005); Irwin v. Mascott, 96 F. Supp. 2d 968, 977 (N.D. Cal. 1999).

48 Manson v. GMAC Mortg., L.L.C., 283 F.R.D. 30 (D. Mass. 2012) (finding class representatives atypical because they were already aware of the rights they sought for the class—notice that homeowners may have a latent interest in their properties taken by foreclosure without proper assignment—but ignoring certain other relief sought for class which had not been obtained by representatives, including cancellation of indebtedness and corrective credit reporting).

49 {124} See Phillips v. Asset Acceptance, L.L.C., 736 F.3d 1076, 1081 (7th Cir. 2013) (reversing denial of certification because district court could have created a subclass of those class members whose claims the class representative did not have a direct incentive to pursue “and directed class counsel to designate a representative for it”); Erin M. Brady & Michael P. Malakoff, The Impact Fund, *Taming the Uncommon Issues: What Role Should Subclasses Play in Rule 23(b)(3) Certification?* (Practice L. Inst. 1998); § 10.3.4.9, *infra*.

Note, however, that the proposed representative of a subclass must be a member of it. Agostino v. Quest Diagnostics Inc., 256 F.R.D. 437 (D.N.J. 2009), *later op. at* 2010 WL 5392688 (D.N.J. Dec. 22, 2010) (same).

50 {125} See § 10.3.4.8, *infra*.

51 See, e.g., Schulken v. Washington Mut. Bank, 2012 WL 28099, at \*12 (N.D. Cal. Jan. 5, 2012).

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