

## Protecting the Consumer: Ensuring Uniformity in the Federal Courts When Named Plaintiffs Assert Claims Against Unpurchased Products

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# PROTECTING THE CONSUMER: ENSURING UNIFORMITY IN THE FEDERAL COURTS WHEN NAMED PLAINTIFFS ASSERT CLAIMS AGAINST UNPURCHASED PRODUCTS

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## INTRODUCTION

In 2011, Rosemary Quinn was perusing the aisles of a Walgreens store in New York when she happened upon a line of joint health dietary supplements.<sup>1</sup> The labels of the joint supplements advertised that they contained glucosamine and chondroitin, and that these supplements would “help rebuild cartilage.”<sup>2</sup> After reading and reviewing the representation on the labels, Quinn purchased the products and subsequently took them as directed.<sup>3</sup> The product line of Walgreens’ “Glucosamine Supplements consists of six different products that vary in formulation, strength, and quantity.”<sup>4</sup> Each of the Glucosamine Supplements contains glucosamine hydrochloride and chondroitin sulfate, although each product contains many other ingredients as well.<sup>5</sup>

After consuming the product that she purchased, Quinn realized that her cartilage had not been rebuilt as the label had advertised.<sup>6</sup> Accordingly, Quinn and another plaintiff commenced an action on November 9, 2012, asserting claims under New York and Connecticut consumer protection statutes.<sup>7</sup> The named plaintiffs of the putative class action alleged that Walgreens misrepresented its supplements’ abilities to “rebuild cartilage,” and that the plaintiffs suffered economic injury as a result of this deceptive business practice.<sup>8</sup> In response to the complaint, defendant Walgreens filed a motion to dismiss the claims regarding five of the Glucosamine Supplements because the named plaintiffs had only purchased one of the Walgreens supplements.<sup>9</sup> Walgreens alleged the named plaintiffs did not

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<sup>1</sup> Quinn v. Walgreen Co., 958 F. Supp. 2d 533, 538 (S.D.N.Y. 2013).

<sup>2</sup> *Id.* at 537 (internal quotation marks omitted).

<sup>3</sup> *Id.* at 538.

<sup>4</sup> *Id.* at 537.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 538.

<sup>7</sup> *Id.* at 537, 538.

<sup>8</sup> *Id.* at 537.

<sup>9</sup> *Id.* at 541.

have standing to assert claims against the other products in the product line that the named plaintiffs had not, in fact, purchased.<sup>10</sup>

This scenario—named plaintiffs of a putative consumer protection class action seeking to assert claims relating to products that they did not purchase themselves—has, in recent years, become more frequent within the federal court system.<sup>11</sup> However, in deciding the defendants' motions to dismiss for lack of standing, district courts across the country have been anything but uniform.<sup>12</sup> This Note analyzes the various district court decisions that have addressed this issue and proposes a test for the uniform adjudication of such scenarios.

Before the adoption of state consumer protection statutes in the 1970s and 1980s, there was very limited protection against fraud and abuse in the marketplace.<sup>13</sup> The Federal Trade Commission Act<sup>14</sup> (“FTC Act”), which had prohibited unfair or deceptive acts or practices since 1938, was largely ineffective in policing such behavior.<sup>15</sup> Accordingly, defrauded consumers were often preempted from bringing suit because of small-print disclaimers on the products they purchased.<sup>16</sup> The only remedies consumers had were actions for common law fraud or unjust enrichment, which carry high burdens of proof, including the seller's state of mind at the time of the purchase.<sup>17</sup> Additionally, very few states had provisions reimbursing consumers for attorneys' fees.<sup>18</sup> The lack of reimbursement meant that few attorneys would take these cases and the consumer would, consequently, rarely be made whole.<sup>19</sup>

In recognition of the deficiencies in our legal system for the protection of consumers and the inefficiency of the FTC in protecting against businesses' deceptive practices, a consumer

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<sup>10</sup> *Id.*

<sup>11</sup> See *Brown v. Hain Celestial Grp., Inc.*, 913 F. Supp. 2d 881, 889–91 (N.D. Cal. 2012) (describing numerous cases in which similar scenarios have taken place).

<sup>12</sup> *Id.*

<sup>13</sup> Carolyn L. Carter, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, NATIONAL CONSUMER LAW CENTER INC. 5 (2009).

<sup>14</sup> 15 U.S.C. § 45 (2012).

<sup>15</sup> Carter, *supra* note 13, at 5.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 6.

<sup>19</sup> *Id.*

protection movement emerged, resulting in the passage of consumer protection legislation by every state.<sup>20</sup> Today, the state statutes vary in the extent of the protections they afford the consumer. Specifically, the statutes vary in their substantive prohibitions and the scope of the remedial powers they allot to state enforcement agencies or consumers.<sup>21</sup> The states used the FTC Act and several model statutes to draft legislation that brought consumer justice to the state, local, and individual levels.<sup>22</sup> The statutes empowered state agencies and individual consumers to bring actions to remedy unfair and deceptive practices.<sup>23</sup>

In addition to their basic protections for the individual consumer, unfair and deceptive practices statutes are advantageous because of their beneficial effect on the marketplace.<sup>24</sup> By working to eliminate fraudulent and predatory practices, such statutes disincentivize these behaviors and, consequently, promote fair competition among honest merchants.<sup>25</sup> Although the penalties are primarily civil in nature, these statutes allow for criminal penalties for extreme violations.<sup>26</sup> They allow state enforcement agencies, such as a state's Attorney General, to obtain orders prohibiting a merchant from engaging in certain unfair or deceptive behavior, or impose civil monetary penalties for violations.<sup>27</sup> The statutes are most effective, however, in allowing the individual consumer to seek remedies.<sup>28</sup> Such remedies are usually the return of payments or compensation for loss, an injunction preventing the company from continuing to use the deceptive practice, and, in most states, the reimbursement of attorneys' fees.<sup>29</sup>

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<sup>20</sup> Sheila B. Scheurman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs To Allege Reliance As an Essential Element*, 43 HARV. J. ON LEGIS. 1, 14 (2006). Some states passed more than one statute. Carter, *supra* note 13, at 6.

<sup>21</sup> Carter, *supra* note 13, at 6.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

For years, consumer protection was largely limited to the state court systems. However, with legislation designed to broaden a litigant's access to the federal courts, Congress diverted numerous consumer protection suits to the federal arena.<sup>30</sup>

Following Congress' enactment of the Class Action Fairness Act of 2005<sup>31</sup> ("CAFA"), there has been a dramatic increase in consumer protection class action litigation brought in the federal courts.<sup>32</sup> This surge occurred because CAFA furnishes the federal courts with jurisdiction to hear suits arising from both federal consumer protection statutes, as well as state consumer protection class action claims with diversity of citizenship.<sup>33</sup> In enacting CAFA, Congress sought to remedy some of the abuses of the class action system—namely, forum shopping by plaintiffs in state courts with reputations for hostility toward business defendants and class settlements that benefitted counsel more than the class members themselves.<sup>34</sup> The legislation has prompted the federal courts' adjudication of claims that were traditionally reserved for the state courts.<sup>35</sup>

This new era of federal consumer class actions has been met with certain procedural inconsistencies in how the federal courts have adjudicated these consumer protection claims. One such inconsistency continues to be exacerbated by the recent influx of consumer protection class actions.<sup>36</sup> The issue arises in instances where the named plaintiffs in putative consumer protection class actions seek to assert claims relating to products that they themselves did not purchase. Because the named plaintiffs did not purchase the products over which they assert claims, defendants move to dismiss the claims against the unpurchased products for lack of standing.<sup>37</sup> The question is: Should the standing of a named plaintiff in a putative consumer protection class action to assert claims relating to products he or she did not

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<sup>30</sup> See *infra* Part I.B.

<sup>31</sup> 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2012).

<sup>32</sup> See *infra* Part I.B.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *The Class Action Fairness Act, Five Years Later*, MAYER BROWN (Apr. 12, 2010), <http://www.mayerbrown.com/news/The-Class-Action-Fairness-Act-five-years-later-04-12-2010/>.

<sup>37</sup> See, e.g., *Quinn v. Walgreen Co.*, 958 F. Supp. 2d 533, 541 (S.D.N.Y. 2013).

purchase be addressed at the motion to dismiss stage, or is this a question more appropriately addressed at the Rule 23 class certification stage of litigation?

This Note analyzes the two approaches federal courts have taken when addressing this question. The first approach is to hold that named plaintiffs can never assert claims relating to products that they themselves did not purchase, and therefore, such claims should not survive a defendant's motion to dismiss.<sup>38</sup> The second approach is to hold that the question of whether a named plaintiff may assert a claim relating to unpurchased products is a question better suited for resolution during the Rule 23 class certification stage of the litigation.<sup>39</sup> Accordingly, such an approach denies a defendant's motion to dismiss and reserves decision on the issue of standing until class certification. Looking at the history and rationale underlying consumer protection statutes and the purpose of the class action mechanism itself, this Note concludes that a named plaintiff's standing to assert claims against unpurchased products in a putative consumer protection class action is a question properly addressed at the Rule 23 class certification stage of the litigation.

Part I discusses the history of, and purpose underlying, state consumer protection statutes, followed by an overview of modern standing doctrine and its relation to consumer protection actions and class actions generally.

Part II discusses the conflicting cases involving named plaintiffs who seek to assert claims relating to products they did not purchase that have been decided by district courts across the country, highlighting the two distinct approaches courts have taken to deal with this procedural issue. District courts adopting the first approach have determined that a named plaintiff can never assert claims over products that they did not purchase. The second approach generally holds that whether named plaintiffs have standing to assert claims relating to products they themselves did not purchase is a question that must be addressed at the Rule 23 class certification stage of the litigation. However, the federal courts' application of the second approach is mired with inconsistency and confusion.

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<sup>38</sup> See *infra* Part II.A.

<sup>39</sup> See *infra* Part II.B.

Part III concludes that the most appropriate solution to the procedural issue is an adoption of the second approach. This conclusion is based on the United States' implementation of consumer protection statutes, the history and policy underlying such statutes, and the relationship between modern standing doctrine and the class action mechanism itself. However, due to inconsistency in how courts have applied the second approach, this Part seeks to formulate a response which remedies such inconsistency and creates a uniform test for addressing the issue.

This Note determines that whether a named plaintiff has standing to assert claims relating to unpurchased products is a question of class standing and is therefore a question for the Rule 23 class certification stage of litigation. However, in certain situations, a named plaintiff's claims against unpurchased products should not survive a defendant's motion to dismiss. Accordingly, this Note proposes a test to determine when the claim should survive. At the motion to dismiss stage of litigation, a named consumer protection class action plaintiff's claims relating to products purchased by unnamed members of the putative class should survive defendant's motion when there is "sufficient similarity" between the unpurchased products and the product plaintiff actually purchased.<sup>40</sup> Such a determination, calling for an analysis into the similarity of claims, is better suited for the Rule 23 class certification stage of litigation than the motion to dismiss stage. Federal district courts should presume sufficient similarity between the products (i) when the product over which standing is sought is of the same product line as that product which was actually purchased by the named plaintiff; (ii) when the products have common ingredients or components and such ingredients or components are the primary or material selling points of the products; and (iii) when the plaintiff does not allege injury based solely on the alleged misrepresentations, but rather on the diminution in value resulting from the product defect that exists in all products, such that if certification is granted, the proposed class would include plaintiffs with personal standing to raise the claims.

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<sup>40</sup> Some courts have used the language "substantially similar." *See, e.g.,* *Donohue v. Apple, Inc.*, 871 F. Supp. 2d 913, 921-922 (N.D. Cal 2012). For the purposes of this Note, the author uses the terminology "sufficiently similar."

Without the adoption of this rule, inconsistent application of modern standing doctrine to consumer protection class actions will continue. Accordingly, a steadfast application of the rule in consumer protection class actions is necessary to preserve the original policy underlying consumer protection statutes, which sought to enable the individual consumer, wronged by unfair and deceitful marketing tactics, to bring an action directly against the offending business.

## I. HISTORY AND BACKGROUND

### A. *The History and Purpose of Consumer Protection Statutes in the United States*

Consumer rights were not a major concern within the United States until the latter part of the twentieth century. The Federal Trade Commission ("FTC") was created in 1914 and was tasked with regulating "[u]nfair methods of competition" among businesses.<sup>41</sup> However, the FTC's mission was limited to protecting against "unfair methods" that were injurious to the "business of a competitor."<sup>42</sup> The FTC, therefore, was largely limited in its ability to protect the general public, and instead was focused primarily on inter-business regulation.<sup>43</sup>

It was not until 1938 that Congress expanded the scope of the FTC's authority to protect consumers from "unfair or deceptive" trade practices under the FTC Act.<sup>44</sup> Congress's intent was for the FTC Act to protect against both "inadvertent or unformed advertising" and "vicious" advertising.<sup>45</sup> Although Congress succeeded in expanding the scope of the FTC's authority, the FTC failed to adequately exercise its enforcement powers to protect consumers.<sup>46</sup> This changed in the 1960s when the American consumer protection movement finally gained momentum.<sup>47</sup>

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<sup>41</sup> 15 U.S.C. § 45 (2012).

<sup>42</sup> Scheuerman, *supra* note 20, at 11.

<sup>43</sup> *Id.*

<sup>44</sup> 15 U.S.C. § 45 ; *see also* Scheuerman, *supra* note 20, at 12 n.68 (discussing the Wheeler-Lea Amendment).

<sup>45</sup> H.R. Rep. No. 75-1613, at 5 (1937).

<sup>46</sup> Scheuerman, *supra* note 20, at 12.

<sup>47</sup> *Id.* at 10-11. The FTC's ineffectiveness inspired a strong movement within state legislatures to enact consumer protection legislation, whereby, beginning in

By the 1970s—due in large part to the FTC’s inability to protect consumers and the passage of model statutes—almost every state had enacted consumer protection legislation.<sup>48</sup> The state legislation was designed to better the public enforcement of consumer protection by employing state attorney generals to handle what was originally the FTC’s responsibility.<sup>49</sup> The final hurdle in establishing consumer rights was adopting private causes of action for damages, which, by 1973, the majority of the states had done.<sup>50</sup>

Today, every state has some form of consumer protection legislation.<sup>51</sup> While the FTC Act prohibits unfair business practices, it only permits the FTC to bring suit.<sup>52</sup> Accordingly, consumers must rely on state consumer protection statutes and other federal consumer protection statutes for any private causes of action.<sup>53</sup> These statutes generally (i) enable private citizens to sue defendants who allegedly engage in unfair practices; (ii) permit plaintiffs to request the injunction of defendants’ harmful practices; (iii) provide plaintiffs with a low bar for causation; and (iv) contain provisions to punish the defendants.<sup>54</sup>

The overall purpose of consumer protection statutes is the regulation of business practices to ensure the proper disclosure of information and enable a more equitably balanced relationship between consumers and businesses.<sup>55</sup> Sometimes referred to as Unfair and Deceptive Acts and Practices (“UDAP”) statutes, they are the main lines of defense protecting consumers from predatory, deceptive, and unscrupulous business practices,<sup>56</sup> and

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the 1960s, three separate model statutes emerged. *Id.* at 14; *see id.* at 18 (analyzing the model statutes).

<sup>48</sup> *Id.* at 18.

<sup>49</sup> *Id.* at 18–19.

<sup>50</sup> *Id.* at 20 n.138.

<sup>51</sup> Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1, 12 (2010); Carter, *supra* note 13, at 5.

<sup>52</sup> 15 U.S.C. § 41 (2012).

<sup>53</sup> Examples of federal consumer protection statutes include the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, and the Truth in Lending Act. *Statutes Enforced or Administered by the Commission*, FED. TRADE COMMISSION, (last visited June 30, 2015), <http://www.ftc.gov/enforcement/statutes>.

<sup>54</sup> Meaghan Millan, Note, *The Justiciability of State Consumer Protection Claims in Federal Courts: A Study of Named Plaintiffs Who Cease Using the Disputed Product yet Seek Injunctive Relief*, 81 FORDHAM L. REV. 3565, 3569 (2013).

<sup>55</sup> 21 C.J.S. *Credit Reporting Agencies* § 34 (2015).

<sup>56</sup> Carter, *supra* note 13, at 5.

“faulty and dangerous goods.”<sup>57</sup> By enacting these statutes, state legislatures sought to remedy any injuries a private citizen suffered because of deceptive marketing.<sup>58</sup>

These statutes provide consumers with a remedy for deceptive trade practices, without the onus of the burden of proof or the numerous defenses that are typically encountered in common law fraud or breach of warranty actions.<sup>59</sup> Specifically, these statutes facilitate a plaintiff's ability to bring suit by providing the plaintiff with a more lenient standard for proving causation.<sup>60</sup>

The statutes are also designed to encourage private enforcement of their provisions. Consumer protection statutes generally seek to eliminate deceptive business practices by (i) compensating the victim for his or her actual loss; (ii) punishing the wrongdoer with awards of treble damages; and (iii) incentivizing attorneys, by means of counsel fee provisions, to take cases involving minor loss to an individual.<sup>61</sup> The most notable feature is the consumer's ability to bring suit directly against a company that is allegedly using deceptive business practices.<sup>62</sup> Additionally, the consumer may also request that the court enjoin the company from further engaging in such deceptive practices.<sup>63</sup> This remedy demonstrates how the statute is designed to affect the wider group of consumers, other than the individual consumer, that purchases or may purchase the product after viewing the deceptive advertisement.<sup>64</sup>

Finally, while the statutes provide for compensatory relief, the injuries caused by the deceptive behavior these statutes seek to prohibit are generally miniscule.<sup>65</sup> However, in addition to being compensatory, consumer protection statutes are generally punitive in nature. Accordingly, consumers will often recover punitive and treble damages should they prevail in their suits.<sup>66</sup>

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<sup>57</sup> BLACK'S LAW DICTIONARY 383 (10th ed. 2014).

<sup>58</sup> Millan, *supra* note 54, at 3569.

<sup>59</sup> *Id.* at 3570.

<sup>60</sup> *See id.* (noting that some state statutes do not require plaintiffs to prove reliance on the deceptive business practice and some states do not require that consumers be misled).

<sup>61</sup> 21 C.J.S. *Credit Reporting Agencies* § 34 n.6 (2015).

<sup>62</sup> Millan, *supra* note 54, at 3570.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Carter, *supra* note 13, at 20.

<sup>66</sup> *Id.* at 20–21.

*B. Class Actions and Consumer Protection Statutes*

Class actions have become a popular means of litigating consumer protection claims.<sup>67</sup> The prevailing plaintiffs in consumer fraud class actions are entitled to recover their costs and reasonable attorneys' fees.<sup>68</sup> Class actions are frequently used to bring both federal and state claims against businesses for alleged unfair practices.<sup>69</sup> Several federal consumer protection statutes specifically provide for class actions;<sup>70</sup> class actions may also be brought under federal statutes that simply address consumer protection.<sup>71</sup> Class actions may also be brought for violations of state consumer protection acts and unfair or deceptive business practice legislation.<sup>72</sup>

Class actions are particularly efficient in the consumer protection context because the unfair and deceptive practices at issue are generally perpetrated against a large number of consumers.<sup>73</sup> Additionally, because the injuries suffered by consumers who seek to invoke the protections of consumer protection statutes are generally small, class actions allow "the claims to be aggregated into a single action against a defendant that has allegedly caused harm."<sup>74</sup> By aggregating small damages, the class action mechanism allows consumers to deal with the economic reality that "each individual loss is likely to be too small to merit the cost of pursuing it" individually.<sup>75</sup> The class action is, therefore, an effective means of remedying small-scale fraud affecting a wide number of people.

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<sup>67</sup> Chris Cole, *The Case of the Rise in Consumer Class-Action Suits, and What It Means*, ADVERTISING AGE (Apr. 23, 2012), <http://adage.com/article/guest-columnists/case-rise-consumer-class-action-suits-means/234232/>.

<sup>68</sup> 2 JOHN F.X. PELOSO ET AL., BUS. & COM. LITIG. FED. CTS. § 19:107 (3d ed. 2014).

<sup>69</sup> *Id.*

<sup>70</sup> *See, e.g.*, Truth in Lending-Act, 15 U.S.C. § 1640(a)(2)(B) (2012) (allowing class actions for civil liability).

<sup>71</sup> *See, e.g.*, Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301–2312 (2012) (regulating warranties on consumer products).

<sup>72</sup> 2 JOHN F.X. PELOSO ET AL., *supra* note 68.

<sup>73</sup> Carter, *supra* note 13, at 19.

<sup>74</sup> *Id.* (internal quotation mark omitted).

<sup>75</sup> *Id.*

In 2005, in an attempt to remedy some of the abuses of class action litigation,<sup>76</sup> Congress passed the Class Action Fairness Act (“CAFA”).<sup>77</sup> CAFA altered class action practice in the state and federal courts by changing the rules for federal diversity jurisdiction and removal, restricting the practice of coupon settlements, and changing the procedures for settling class actions in federal courts.<sup>78</sup> Congress reasoned that by expanding federal diversity jurisdiction to encompass interstate class actions, more class actions would be funneled into federal court, where any abuse would be diminished.<sup>79</sup> Congress’s main goal was to reduce forum shopping by plaintiffs in state courts with reputations for hostility to business defendants or reputations for “rubber-stamping coupon settlements under which the class counsel—not the class members—received the lion’s share of the benefit.”<sup>80</sup> Since CAFA’s enactment, class actions have increasingly proceeded in federal court.<sup>81</sup> Therefore, consistent with congressional intent, CAFA has proven to be an invaluable tool, permitting consumers to file class actions in federal court.

### 1. Typical Consumer Protection Class Actions in Federal Court

A typical consumer fraud class action is brought in federal court pursuant to either a federal consumer protection statute that provides for a class action,<sup>82</sup> or a state consumer protection statute where there is minimal diversity among the parties and

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<sup>76</sup> See generally Richard O. Faulk, *Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution*, 37 TORT & INS. L.J. 999 (2002) (discussing the abuses of class action litigation).

<sup>77</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

<sup>78</sup> WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 6:13 (5th ed. 2015). CAFA expanded jurisdiction for diversity class actions by creating jurisdiction for classes with more than 100 class members if (i) at least one class member is diverse from at least one defendant and (ii) more than five million dollars in total is in controversy, exclusive of interest and costs. 28 U.S.C. § 1332 (2012).

<sup>79</sup> RUBENSTEIN, *supra* note 78, § 6:14.

<sup>80</sup> *The Class Action Fairness Act, Five Years Later*, MAYER BROWN (Apr. 12, 2010) <http://www.mayerbrown.com/news/The-Class-Action-Fairness-Act-five-years-later-04-12-2010/>.

<sup>81</sup> *Id.* Class actions that are originally filed in federal courts have nearly tripled; diversity removals from state courts have also increased. *Id.*; see also Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1439, 1723 (2008) (noting the increase was due primarily to increases in consumer class actions filed in, or removed to, federal court).

<sup>82</sup> See *supra* text accompanying notes 70–72.

all of CAFA's preconditions are satisfied.<sup>83</sup> Such class actions typically involve a large number of claimants who allege that certain widespread business or financial practices violate their rights as consumers.<sup>84</sup> The amount of damages that each class member seeks is generally small, usually because (i) consumer fraud statutes that contain aggregate damages limitations limit the amount each individual class plaintiff can recover and (ii) plaintiffs often bring consumer fraud actions to stop defendant's violative conduct, in which case, the recovery of damages is not the primary objective of the suit.<sup>85</sup> Because unfair or deceptive practices generally do not substantially injure individual consumers, given that the injury is usually the purchase price of the product, consumer protection statutes allow claimants to unite in class actions. The effect is that such miniscule individual injury, when multiplied by the thousands of affected consumers, will equate to substantial monetary value and will thereby allow the individual consumer to stymie the practice of the major corporation.<sup>86</sup>

While consumer protection class actions are increasingly more prevalent in federal courts, class action plaintiffs continue to face obstacles in successfully adjudicating these actions. For class actions generally, proper definition of the class is very important. This means that courts will reject overly broad pleadings, requiring that the class be defined specifically.<sup>87</sup> Additionally, a class action must satisfy the prerequisites established by Federal Rule of Civil Procedure 23(a): numerosity,<sup>88</sup> commonality,<sup>89</sup> typicality,<sup>90</sup> and adequacy of

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<sup>83</sup> See *supra* note 78 (discussing CAFA's preconditions).

<sup>84</sup> 2 JOHN F.X. PELOSO ET AL., *supra* note 68.

<sup>85</sup> *Id.*

<sup>86</sup> See generally *id.*

<sup>87</sup> *Id.* Courts have rejected overly broad definitions of the class, such as "every consumer injured by defendant's unfair business practices." *Id.*; see *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 403 (E.D. Pa. 1995) (rejecting as overly broad the definition of a class that would include "all residents and businesses who have received unsolicited facsimile advertisements") (emphasis omitted).

<sup>88</sup> The class must be so numerous that joinder of all members individually would be "impracticable." FED. R. CIV. P. 23(a)(1).

<sup>89</sup> There must be questions of law or fact common to the class. FED. R. CIV. P. 23(a)(2).

<sup>90</sup> The claims or defenses of the class representative must be typical of the claims or defenses of the class. FED. R. CIV. P. 23(a)(3).

representation.<sup>91</sup> The intrinsic nature of the consumer fraud class action ensures that numerosity is not generally an issue for a plaintiff seeking certification of a class.<sup>92</sup> The requirements of commonality and typicality are also not problematic, because in the consumer protection context the defendant's standardized conduct is the basis of the claim.<sup>93</sup> Accordingly, the claims of the class members do not necessarily have to be identical, as long as they were injured by the same conduct of the defendant. Finally, to satisfy adequacy of representation, the claims of the class representative must not conflict with those of the other class members.<sup>94</sup> If these four prerequisites of Rule 23(a) are satisfied, then most consumer fraud plaintiffs will seek class certification under Rule 23(b)(3).<sup>95</sup> For a Rule 23(b)(3) class action to be certified, the named plaintiffs must show that the common issues predominate the individual issues and that the class action mechanism is the superior means of resolving the claims.<sup>96</sup>

For the purposes of this Note, the cases discussed will be decisions addressing a defendant's motion to dismiss. In these cases, named plaintiffs seek to assert consumer protection claims against products that the named plaintiffs did not themselves purchase, but which were purchased by members of the putative class. Accordingly, these cases deal with plaintiffs who bring claims against a defendant alleging violations of consumer protection statutes, with the intent of certifying a class. The defendant's motion to dismiss occurs early in the litigation, before the named plaintiff has an opportunity to move for Rule 23 class certification. Therefore, in the cases that are addressed, the

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<sup>91</sup> The person representing the class must be able to fairly and adequately protect the interests of all members of the class. FED. R. CIV. P. 23(a)(4).

<sup>92</sup> In consumer protection class actions, the alleged injury generally relates to products that have been purchased by large numbers of individuals.

<sup>93</sup> 2 JOHN F.X. PELOSO ET AL., *supra* note 68.

<sup>94</sup> *Id.*

<sup>95</sup> See FED. R. CIV. P. 23(b)(3) ("[T]he court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.")

<sup>96</sup> 2 JOHN F.X. PELOSO ET AL., *supra* note 68.

main obstacle facing the named plaintiffs seeking to establish a class is a Rule 12(b)(1)<sup>97</sup> motion to dismiss for lack of subject-matter jurisdiction. Such a motion asks the court to dismiss the complaint, with the defendant typically arguing that the plaintiff lacks standing to assert claims relating to products or services that he or she did not purchase or use. To understand this argument, it is important to analyze modern standing doctrine and its relation to class actions generally and consumer protection actions in particular.

### C. *Modern Standing Doctrine in the Class Action Context*

In determining whether named plaintiffs have standing to pursue claims arising from putative class members' purchases of products that the named plaintiffs themselves did not purchase, it is necessary to dissect contemporary standing doctrine into several parts. Namely, this Note addresses (i) Article III standing, (ii) statutory standing, and (iii) class standing.

Article III standing is derived from the pages of the United States Constitution. It "identif[ies] those disputes which are appropriately resolved through the judicial process."<sup>98</sup> To establish Article III standing, the Supreme Court has delineated:

First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent," not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely 'speculative,' that the injury will be "redressed by a favorable decision."<sup>99</sup>

The party invoking federal jurisdiction must establish such elements and because the elements are "an indispensable part of the plaintiff's case, each element must be supported . . . with the manner and degree of evidence required at successive stages of the litigation."<sup>100</sup>

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<sup>97</sup> FED. R. CIV. P. 12(b)(1).

<sup>98</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

<sup>99</sup> *Id.* at 560–61 (alteration in original) (citations omitted).

<sup>100</sup> *Id.* at 561.

Article III standing can be satisfied relatively easily in consumer protection class actions because economic injury is generally sufficient as a form of injury-in-fact to satisfy the first element of standing.<sup>101</sup> Take, for example, a consumer who purchases a product based on a corporation's deceptive marketing of that product. If the consumer relies upon some representation made on the product's label, and alleges that the representation turned out to be deceptive, thereby causing the consumer injury, the consumer has established a sufficient economic injury for the purposes of clearing Article III standing's injury bar.

The concept of statutory standing applies to legislatively created causes of action and "it asks whether a statute creating a private right of action authorizes a particular plaintiff to avail herself of that right of action."<sup>102</sup> Essentially, with statutory standing, the question is whether the plaintiff in a particular lawsuit is the person that Congress intended would recover through the creation of the statutory cause of action. Statutory standing is satisfied if the consumer purchased the product that has given rise to the litigation and was injured monetarily as a result.<sup>103</sup>

Class standing is a more elusive concept.<sup>104</sup> This subset of contemporary standing doctrine applies exclusively to the class action mechanism. Accordingly, where Article III and statutory standing are addressed at the motion to dismiss stage of the litigation, class standing is addressed at the Rule 23 class certification stage. The inherent nature of a class action suit, with a plaintiff as a representative of a class, creates standing issues. These issues occur primarily because "[i]n a properly certified class action, the named plaintiffs regularly litigate not only their own claims, but also claims of other class members based on transactions in which the named plaintiffs played no

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<sup>101</sup> See *Clinton v. City of New York*, 524 U.S. 417, 432–33 (1998) (noting that economic injury is sufficient to satisfy the Article III standing requirement of injury-in-fact).

<sup>102</sup> Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 OKLA. L. REV. 89, 91 (2009).

<sup>103</sup> See *id.* at 94–95 (discussing what a plaintiff asserting statutory standing must establish with regard to his or her claim).

<sup>104</sup> See *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 768 (1st Cir. 2011) ("The issue looks straightforward and one would expect it to be well settled; neither assumption is entirely true.").

part.”<sup>105</sup> Accordingly, class standing refers to the named plaintiff’s ability to serve as the representative of the members of the putative class. This analysis is wholly independent from the inquiry into the named plaintiff’s standing to bring his individual claims.<sup>106</sup> Because both standing and Rule 23(a) aim to determine whether the proper party is before the court, they appear to be related, but they are very different concepts.<sup>107</sup> When a named plaintiff lacks individual standing, the court must dismiss the complaint, pursuant to Article III standing. However, when a named plaintiff has individual standing, the court should proceed to the Rule 23 criteria to determine if the plaintiff may represent the class.<sup>108</sup>

When a named plaintiff seeks to litigate harms that are not identical to the ones he or she suffered, but which other class members suffered, the situation generates confusion.<sup>109</sup> In addressing such a situation, some courts simply find that the class representative cannot pursue the class members’ claims because he or she did not personally suffer the class members’ injuries, regardless of whether or not the plaintiff has satisfied the individual standing requirement.<sup>110</sup> Such courts effectively confuse Article III and class standing by addressing class standing prematurely, before class certification. Other courts have found that the class representative has standing to pursue his or her own claims, and that any other claims should be analyzed according to class certification, not standing.<sup>111</sup> Such an

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<sup>105</sup> *Id.* at 769.

<sup>106</sup> *See* *Lewis v. Casey*, 518 U.S. 343, 408 n.4 (1996) (Stevens, J., dissenting) (“If named class plaintiffs have standing, the standing of the class members is satisfied by the requirements for class certification.” (citing 1 H. NEWBERG & A. CONTE, *NEWBERG ON CLASS ACTIONS* § 2.01, p. 2–3 (3d ed. 1992))). One court has recently defined class standing, holding:

[I]n a putative class action, 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,” 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.

*NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 162 (2d Cir. 2012) (alteration in original) (citation omitted).

<sup>107</sup> RUBENSTEIN, *supra* note 78, § 2:6, n.0.50.

<sup>108</sup> *See id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

approach allows courts to then analyze the class representative at the class certification stage and thereby determine whether the representative's claims are sufficiently typical or representative of the class members' claims.<sup>112</sup>

The inconsistent approaches federal courts use when applying standing doctrine in the class action context has only been exacerbated by the Supreme Court's lack of direction. The Court has held that a plaintiff does not have Article III standing unless there is a showing that "he personally has suffered some actual or threatened injury as a result of some putatively illegal conduct of the defendant . . . [i]t is not enough that the conduct of which the plaintiff complains will injure *someone*."<sup>113</sup> Additionally, the Court has explicitly noted, "Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject."<sup>114</sup> The Court has acknowledged that there is "tension" in prior 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' Rule 23."<sup>115</sup> Accordingly, the Court's inability to address the issue of "standing versus adequacy" has resulted in inconsistent court decisions.<sup>116</sup>

Several circuits have held that the class action mechanism should be liberally interpreted and administered.<sup>117</sup> These courts have rejected the strict application of standing doctrine, which

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<sup>112</sup> *Id.*

<sup>113</sup> *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) (quoting *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979)).

<sup>114</sup> *Blum*, 457 U.S. at 999.

<sup>115</sup> *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 160 (2d Cir. 2012) (alteration in original) (quoting *Gratz v. Bollinger*, 539 U.S. 244, 263 & n.15 (2003)).

<sup>116</sup> *See Gratz*, 539 U.S. at 263.

<sup>117</sup> *See, e.g., Payton v. Cnty. of Kane*, 308 F.3d 673, 680–81 (7th Cir. 2002) (finding the named plaintiffs, who were only injured by two counties themselves, were entitled to maintain the class action claims against seventeen other counties that had implemented the same state statute in the same way); *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 424 (6th Cir. 1998) (holding the named plaintiff, who only participated in one ERISA plan, could represent a class against all of the defendant's ERISA plans when the essence of the complaint was a practice present in all of the plans).

provides that “no defendant may be sued unless a named plaintiff has a . . . claim against that defendant.”<sup>118</sup> Instead, these courts reason that even defendants against whom no named plaintiff has a claim should be included in a class action if the claims against them are “essentially of the same character as the claim against a properly named defendant.”<sup>119</sup> Such courts believe this issue should be dealt with during the Rule 23 stage of the litigation.<sup>120</sup>

Accordingly, when a named plaintiff brings a consumer protection claim intending to certify a class, at the motion to dismiss stage, all that matters is whether or not the plaintiff can satisfy Article III and statutory standing requirements. This holds true because class standing is not implicated until the actual class certification stage of the litigation, which occurs later. If the named plaintiff adequately alleges individualized injury, then any claims relating to products the plaintiff has not purchased should be analyzed under the Rule 23 class certification prerequisites. Although the case law is far from clear, it is apparent that weighing the similarity of a named plaintiff’s claim with that of a class member is an action that invokes the same analysis required by Rule 23(a).

## II. THE CONFLICTING DECISIONS OF THE FEDERAL COURTS

Recently, district courts across the country have addressed the procedural issue of whether named plaintiffs in a putative consumer protection class action could survive a motion to dismiss. These same courts also addressed whether such plaintiffs have standing to pursue claims arising from the putative class members’ purchases of products that the named plaintiffs had not purchased themselves. This Part discusses the conflicting decisions of the courts. In particular, district courts have formulated two different tests with contradictory answers to this question. Under the first approach, the named plaintiff does not have standing, so any claims relating to the unpurchased products must be dismissed.<sup>121</sup> Alternatively, courts adopting the

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<sup>118</sup> *Plumbers’ Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 770 (1st Cir. 2011).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *See, e.g.*, *Padilla v. Costco Wholesale Corp.*, No. 11 C 7686, 2013 WL 195769, at \*3 (N.D. Ill. Jan. 16, 2013); *Pearson v. Target Corp.*, No. 11 CV 7972, 2012 WL

second approach have denied a defendant's motion to dismiss and held that whether or not a named plaintiff can assert claims related to unpurchased products is a question addressed at the Rule 23 class certification stage of the litigation. However, courts adopting this second approach have complicated the issue by adopting inconsistent tests within their opinions. Some have held that the named plaintiff can have standing over the unnamed class members' products only so long as the products and alleged misrepresentations are "substantially similar."<sup>122</sup> Other courts have held that the question is one for a Rule 23 class certification analysis but do not inquire as to whether the products or misrepresentations are "sufficiently similar."<sup>123</sup>

The effect of this disagreement among the districts is that in a putative class action, in certain instances, a plaintiff in one state will have standing over products he or she did not purchase, whereas the same plaintiff in a different state will not. Such inconsistencies in the federal courts are detrimental to consumers who look to the judicial system to remedy injuries they have suffered due to unfair business practices and are, thereby, at odds with the policies underlying consumer protection laws. Additionally, such inconsistency was the problem that the Class Action Fairness Act ("CAFA") originally sought to remedy—forum shopping resulting from different jurisdictions having more favorable laws.<sup>124</sup> Accordingly, a uniform approach must be implemented so that this inconsistency within the district courts is not exploited.

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7761986, at \*1 (N.D. Ill. Nov. 9, 2012); *Granfield v. NVIDIA Corp.*, No. C 11-05403 JW, 2012 WL 2847575, at \*6 (N.D. Cal. July 11, 2012); *Larsen v. Trader Joe's Co.*, No. C 11-05188 SI, 2012 WL 5458396, at \*4-5 (N.D. Cal. June 14, 2012); *Carrea v. Dreyer's Grand Ice Cream, Inc.*, No. C 10-01044 JSW, 2011 WL 159380, at \*3 (N.D. Cal. Jan. 10, 2011), *aff'd*, 475 F. App'x 113 (9th Cir. 2012).

<sup>122</sup> See generally *Donohue v. Apple, Inc.*, 871 F. Supp. 2d 913, 921-22 (N.D. Cal. 2012) (collecting cases); *Brown v. Hain Celestial Grp., Inc.*, 913 F. Supp. 2d 881, 889-91 (N.D. Cal. 2012) (same).

<sup>123</sup> See generally *In re Frito-Lay N. Am., Inc. All Natural Litigation*, No. 12-MD-2413 (RRM), 2013 WL 4647512, at \*13 (E.D.N.Y. Aug. 29, 2013).

<sup>124</sup> See *supra* note 80 and accompanying text.

A. *A Named Plaintiff Does Not Have Standing*

In addressing this issue, the Northern District of Illinois has emphatically announced that a plaintiff does not have standing to assert claims relating to products purchased by unnamed putative class members and, accordingly, a defendant's motion to dismiss must be granted.

In *Padilla v. Costco Wholesale Corp.*,<sup>125</sup> plaintiff Ray Padilla brought suit alleging violation of the Illinois Consumer Fraud Act ("ICFA").<sup>126</sup> Padilla alleged that Costco Wholesale, Inc. ("Costco") marketed and sold the Kirkland Signature Extra Strength Glucosamine HCL line of joint-health dietary supplements ("Kirkland Products") in stores and online.<sup>127</sup> The Kirkland Products named in Padilla's complaint included two products with differing ingredients.<sup>128</sup> Both products represented that if consumers took the supplements, they would experience optimum mobility while, at the same time, building cartilage and protecting their joints.<sup>129</sup> Padilla alleged that in March 2011, he purchased one of the Kirkland Products from Costco, relying on the advertisement from the product's label, and that his joint health was not improved as a result.<sup>130</sup>

The court held Padilla failed to state an ICFA claim as to the other Kirkland Product because he had not purchased it and, accordingly, did not have standing.<sup>131</sup> The court looked to the ICFA's definition of "consumer,"<sup>132</sup> and found that because Padilla had not purchased the product, he "ha[d] not sustained any actual damage"<sup>133</sup> and did not fit within the definition.<sup>134</sup> The court rejected Padilla's argument that "whether he is 'entitled to represent purchasers of Glucosamine Chondroitin does not turn on [his] standing to sue . . . but rather, on whether,

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<sup>125</sup> 2012 WL 2397012.

<sup>126</sup> *Id.* at \*1.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at \*3.

<sup>129</sup> *Id.* at \*1.

<sup>130</sup> *Id.* at \*1–2.

<sup>131</sup> *Id.* at \*2–3.

<sup>132</sup> See 815 ILL. COMP. STAT. 505/1(e) (2007) ("[A]ny person *who purchases or contracts for the purchase* of merchandise not for resale in the ordinary course of his trade or business but for his use or that of a member of his household.") (emphasis added).

<sup>133</sup> *Padilla*, 2012 WL 2397012, at \*2.

<sup>134</sup> *Id.* at \*3.

under Rule 23(a), his claims are common and typical of purchasers of all of Costco's Products.'<sup>135</sup> In determining whether Padilla could assert claims against the products he did not purchase, the court relied upon the fact that the two products at issue had different product formulations and different labels.<sup>136</sup> The court noted Padilla could not use "the class-action device to 'predicate standing on injury which he does not share' with respect to" the product not purchased.<sup>137</sup> The court reasoned that a named plaintiff cannot "piggy-back on the injuries of the unnamed class members," to acquire standing "through the back door of a class action."<sup>138</sup> Accordingly, the court granted defendant's motion to dismiss as to the product Padilla did not purchase.<sup>139</sup>

The Northern District of Illinois has adopted a strict interpretation of the standing doctrine and its relation to consumer protection class actions.<sup>140</sup> The court's refusal to allow the named plaintiff to assert claims against any product other than that which directly harmed the individual plaintiff demonstrates the court's constrictive application of the standing doctrine. The increase in consumer protection class action litigation in federal court has ensured that this issue is increasingly present; the Northern District of Illinois is already considering another case with identical facts.<sup>141</sup>

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* (quoting *Payton v. Cnty. of Kane*, 308 F.3d 673, 682 (7th Cir. 2002)).

<sup>139</sup> *Id.*

<sup>140</sup> *See Pearson v. Target Corp.*, 2012 WL 7761986, at \*1 (N.D. Ill. Nov. 9, 2012) (finding that the plaintiff lacked standing to assert claims against products he did not purchase by holding that the plaintiff "[was] mixing up the concept [of] standing with Rule 23 class representation" and asking, "[H]ow could [the plaintiff] possibly have been injured by representations made on a product he did not buy?").

<sup>141</sup> *See Second Amended Class Action Complaint, Guilin v. Walgreens Co.*, No. 11-CV-07763 (N.D. Ill. Apr. 19, 2012), 2012 WL 6045111. The standing issue has been briefed and the parties are waiting for the ruling of the court. Additionally, another district has agreed with the Northern District of Illinois, holding that a named plaintiff did not have standing to assert claims relating to products that were not purchased by the plaintiff. *See, e.g., Granfield v. NVIDIA Corp.*, No. C 11-05403 JW, 2012 WL 2847575, at \*6 (N.D. Cal. July 11, 2012) ("[W]hen a plaintiff asserts claims based both on products that she purchased and products that she did not purchase, claims relating to products not purchased must be dismissed for lack of standing.").

B. *The Question Is Better Suited for a Rule 23 Class Certification Analysis*

Whereas some district courts have held a plaintiff cannot have standing to assert claims relating to products that he or she did not purchase, other district courts have held that such a determination must be made at the Rule 23 class certification stage of the litigation.<sup>142</sup> However, in adopting this approach to the procedural issue, district courts have not been uniform and the inconsistent decisions have created a confusing legal landscape. Namely, there are two applications of the second approach. The first application finds that the named plaintiff can have standing over the unnamed class members' products and survive a defendant's motion to dismiss so long as the products and alleged misrepresentations are "sufficiently similar."<sup>143</sup> The second application of the second approach agrees that the question is one for a Rule 23 class certification analysis, but does not inquire as to whether the products or misrepresentations are "sufficiently similar."<sup>144</sup>

The vast "majority of the courts that have carefully analyzed th[is] question hold that a plaintiff may have standing to assert claims for unnamed class members based on products he or she did not purchase so long as the products and alleged misrepresentations are substantially similar."<sup>145</sup> The district courts employing this test look at the products that the named plaintiff is seeking to assert claims against and the alleged misrepresentations they contain, and compare them to the product and misrepresentation that the named plaintiff actually purchased and relied upon.<sup>146</sup>

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<sup>142</sup> *Brown v. Hain Celestial Grp., Inc.*, 913 F. Supp. 2d 881, 891 (N.D. Cal. 2012).

<sup>143</sup> See *infra* note 145 and accompanying text.

<sup>144</sup> See *infra* note 159 and accompanying text.

<sup>145</sup> *Brown*, 913 F. Supp. 2d at 890.

<sup>146</sup> See *id.* at 891–92 (holding that the plaintiffs had standing to bring claims against unpurchased products because, although the products within the brand were dissimilar, the alleged misrepresentations were uniform, and standing is determined by considering "whether there are substantial similarities in the accused products and whether there are similar misrepresentations across product lines such that Plaintiffs' injury is sufficiently similar to that suffered by class members who purchased other accused products"); *Astiana v. Dreyer's Grand Ice Cream, Inc.*, Nos. C-11-2910 EMC, C-11 3164 EMC, 2012 WL 2990766, at \*11 (N.D. Cal. July 20, 2012) (holding "the critical inquiry seems to be whether there is sufficient similarity between the products purchased and not purchased," and finding sufficient

In the courts' comparison, "where product composition is less important, the cases turn on whether the alleged misrepresentations are sufficiently similar across product lines."<sup>147</sup> For example, in *Koh v. S.C. Johnson & Son, Inc.*,<sup>148</sup> the court denied defendant's motion to dismiss for lack of standing.<sup>149</sup> There, plaintiff was allowed to assert claims relating to a label suggesting an unpurchased Shout brand stain remover was environmentally friendly.<sup>150</sup> The court found that the purchased product, Windex brand glass cleaner, was produced by the same company and bore a label that was identical to the unpurchased product.<sup>151</sup> The court noted that "there is no brightline rule that different product lines cannot be covered by a single class," and highlighted that the plaintiff was allegedly directly injured by defendants.<sup>152</sup> Therefore, the court allowed plaintiff's claims and deferred ruling on the standing question until class certification.<sup>153</sup>

Conversely, "[w]here the alleged misrepresentations or accused products are dissimilar, courts tend to dismiss claims to the extent they are based on products not purchased."<sup>154</sup> For example, in *Larsen v. Trader Joe's Co.*,<sup>155</sup> the court found that the plaintiffs lacked standing over the unpurchased products because they challenged a wide range of Trader Joe's products, including cookies and ricotta cheese, which bore insufficient similarity.<sup>156</sup>

Accordingly, the district courts adopting the first application of the second approach have allowed the named plaintiff to assert claims relating to unpurchased products where the products were "substantially similar" to those actually purchased by the named plaintiff.<sup>157</sup> In doing so, although they failed to expressly note it,

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similarity where different ice creams used the same labels for all of the products and plaintiffs challenged this mislabeling practice across different product flavors).

<sup>147</sup> *Brown*, 913 F. Supp. 2d at 890.

<sup>148</sup> No. C-09-00927 RMW, 2010 WL 94265, at \*1 (N.D. Cal. Jan. 6, 2010).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at \*3.

<sup>151</sup> *Id.* at \*1, \*3.

<sup>152</sup> *Id.* at \*3.

<sup>153</sup> *See id.* ("[T]he court will defer ruling on the issue until the class certification stage and denies defendant's motion to dismiss in its entirety.")

<sup>154</sup> *Brown v. Hain Celestial Grp., Inc.*, 913 F. Supp. 2d 881, 891 (N.D. Cal. 2012).

<sup>155</sup> 2012 WL 5458396 (N.D. Cal. June 14, 2012).

<sup>156</sup> *Id.* at \*1, \*4-5 (N.D. Cal. June 14, 2012); *see also* *Stephens v. Neutrogena*, No. C 12-0426 PJH, 2012 WL 8527784, at \*1 (N.D. Cal. July 27, 2012).

<sup>157</sup> *Brown*, 913 F. Supp. 2d at 890.

these courts were conducting a Rule 23 analysis at the motion to dismiss stage. The courts were addressing whether there was class standing by analyzing whether the named plaintiff's claims were adequate, common, and typical of the claims of the putative class members.<sup>158</sup> While these courts generally failed to classify the issue as one of class standing, which is properly determined at the Rule 23 stage, the use of the "sufficiently similar" language shows that the inquiry was one in the same.

Alternatively, the courts that have adopted the second application of the second approach to this procedural issue have explicitly noted that the determination is one meant for the Rule 23 class certification stage. Rather than examining whether there are "sufficient[] similar[ities]" to survive a motion to dismiss, these courts hold that the motion to dismiss must be denied, because whether the named plaintiff can assert claims related to the product purchased by unnamed class members is always a question for a Rule 23 class certification analysis.<sup>159</sup>

The Eastern District of New York adopted this approach in *In re Frito-Lay North America, Inc. All Natural Litigation*.<sup>160</sup> There, plaintiffs brought a putative class action grounded in various federal and state-law claims, alleging defendants Frito-Lay North America, Inc., and PepsiCo, Inc., deceptively labeled their products.<sup>161</sup> Specifically, plaintiffs alleged defendants marketed various products as "All Natural" when, in fact, the products contained unnatural, genetically-modified organisms.<sup>162</sup> Plaintiffs alleged they paid a premium price for the products as compared to similar products not bearing an "All Natural" label.<sup>163</sup> Accordingly, plaintiffs asserted that they relied on the defendants' misleading and deceptive misrepresentations as to the "All Natural" quality of their products and that they would not have bought the products absent such representations.<sup>164</sup>

Defendants moved to dismiss the complaint, alleging plaintiffs did not have standing to bring claims related to the "All Natural" labeling of eight products that none of the named

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<sup>158</sup> See *supra* text accompanying notes 104–08.

<sup>159</sup> See, e.g., *In re Frito-Lay N. Am., Inc. All Natural Litigation*, No. 12-MD-2413 (RRM), 2013 WL 4647512, at \*13 (E.D.N.Y. Aug. 29, 2013).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at \*1.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

plaintiffs had purchased.<sup>165</sup> In response, the plaintiffs argued that the question was not one of Article III standing, but instead a question of “class standing,” and therefore should be considered on a motion for class certification pursuant to Rule 23 rather than on a motion to dismiss.<sup>166</sup>

The Eastern District agreed, holding it was a question of class standing and should therefore be addressed at the class certification stage of the litigation.<sup>167</sup> The court noted that because the plaintiffs did purchase certain products, and were directly injured accordingly, the plaintiffs clearly had alleged sufficient facts to show that, individually, they had Article III standing.<sup>168</sup> The court reasoned the real question was “whether plaintiffs [could] represent putative class members who suffered a similar injury arising out of the class members’ purchases of products that the plaintiffs did not purchase.”<sup>169</sup> The court found it “remains undisputed that plaintiffs lack Article III standing to assert claims arising out of products that they themselves did not purchase.”<sup>170</sup> Therefore, the court noted that had plaintiffs not purchased a product and been injured, they would not have had Article III standing.<sup>171</sup> However, the court found that “once there is at least one named plaintiff for every named defendant ‘who can assert a claim directly against that defendant, . . . [Article III] standing is satisfied and only then will the inquiry shift to a class action analysis.’”<sup>172</sup> In this case, because there was only one defendant, and the named plaintiff could, himself, assert a

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<sup>165</sup> *Id.* at \*10.

<sup>166</sup> *Id.* at \*10–11.

<sup>167</sup> *Id.* at \*12–13. The court did, however, note that “[e]ven if the inquiry here is one of Article III standing, there are cases conferring Article III standing to pursue claims on behalf of purchasers of products the named plaintiffs did not purchase so long as the products are ‘sufficiently similar’ to those the plaintiffs did purchase.” *Id.* at \*12. However, the court noted that even these cases seem to suggest the question is truly one of class standing. *Id.*

<sup>168</sup> *Id.* at \*11.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* (alteration in original) (quoting *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 241 (2d Cir. 2007)).

claim against that defendant based on that plaintiff's purchase, Article III standing was satisfied, and the inquiry became one of class standing.<sup>173</sup>

Therefore, in *In re Frito-Lay North America, Inc. All Natural Litigation*,<sup>174</sup> the Eastern District held that because the named plaintiffs satisfied Article III standing at the motion to dismiss stage, they could pursue claims on behalf of putative class members against products the named plaintiffs did not purchase. There, what was being questioned was whether the plaintiffs' injuries were sufficiently similar to those of the class members; a question that really concerned the named plaintiffs' ability to adequately represent the interests of the class. Such an inquiry is the objective of a Rule 23 class certification motion.<sup>175</sup>

Most recently, in *Jovel v. I-Health, Inc.*,<sup>176</sup> the Eastern District once again determined this issue is better addressed at the class certification stage of litigation. There, however, the court seemed to combine the class standing classification of *In re Frito Lay North America, Inc. All Natural Litigation* and the "sufficiently similar" language of the previous district court decisions adopting the second approach.<sup>177</sup> There, defendant i-Health manufactured, sold, and distributed BrainStrong

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<sup>173</sup> *Id.* at \*13. The court relied heavily on the Second Circuit's decision in *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.* *Id.* at \*10. In *NECA-IBEW Health & Welfare Fund*, the court reasoned that once the plaintiff had established Article III and statutory standing, the inquiry shifted "from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.'" 693 F.3d 145, 159 (2d Cir. 2012) (quoting *Sosna v. Iowa*, 419 U.S. 393, 403 (1975) and FED. R. CIV. P. 23(a)(4)).

<sup>174</sup> 2013 WL 4647512.

<sup>175</sup> Outside of New York, several California district courts have likewise found that a plaintiff's ability to assert claims relating to products that were not purchased by the plaintiff is a question better suited for class certification. *See, e.g.,* *Cardenas v. NBTY, Inc.*, 870 F. Supp. 2d 984, 992 (E.D. Cal. 2012) (holding "whether Plaintiff may be allowed to present claims on behalf of purchasers of the remaining" products was a decision which would be analyzed solely under Rule 23); *Dorfman v. Nutramax Labs., Inc.*, No. 13cv0873 WQH (RBB), 2013 U.S. Dist. LEXIS 136949, at \*22 (S.D. Cal. Sept. 23, 2013) (holding that any differences in the product purchased by the plaintiff and those purchased by the putative class members is an issue "best addressed at the class certification stage rather than the motion to dismiss stage"); *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 530 (C.D. Cal. 2011) ("[W]hether a class representative 'may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation.'").

<sup>176</sup> 12-CV-5614 (JG), 2013 U.S. Dist. LEXIS 139661 (E.D.N.Y. Sept. 27, 2013).

<sup>177</sup> *Id.* at \*28–31.

products—a line of four dietary supplements—throughout the United States.<sup>178</sup> The products were advertised to “support[] brain health and function in children and adults.”<sup>179</sup> After purchasing one of the products and using it as advertised, plaintiff alleged that her child’s brain health was not supported as represented.<sup>180</sup> Accordingly, because of i-Health’s deceptive representations, the plaintiff brought a putative class action alleging violations of state consumer protection laws, asserting claims against three of the four BrainStrong products.<sup>181</sup> i-Health moved to dismiss the complaint, arguing that plaintiff did not have standing to bring claims relating to the two BrainStrong products that she did not purchase.<sup>182</sup>

The court held that “there [we]re sufficient similarities among i-Health’s products that any concerns regarding the differences c[ould] be addressed at the class certification stage.”<sup>183</sup> The court noted that the products had similarities in packaging and labeling, and that any differences in the advertisements were immaterial.<sup>184</sup> The court also focused on the fact that all of the products had the same core active ingredient.<sup>185</sup> In doing so, the court seemed to formulate a hybrid application of the class standing classification and the “sufficiently similar” language. The court concluded that because the products were sufficiently similar, any differences between them should be sorted out at the class certification stage.<sup>186</sup>

Accordingly, there is a disparity in how district courts have dealt with a named plaintiff seeking to assert claims relating to products purchased by putative class members. The first, the minority approach, is to grant defendant’s motion to dismiss claims relating to unpurchased products. The second, the majority approach, is to allow the claims to continue because such a determination is meant to be determined during the Rule 23 class certification stage of litigation. However, within the majority approach exist two different, confusing applications for

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<sup>178</sup> *Id.* at \*3.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at \*1–2.

<sup>182</sup> *Id.* at \*27.

<sup>183</sup> *Id.* at \*30.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at \*31.

<sup>186</sup> *Id.* at \*30.

determining when claims relating to unpurchased products will survive defendant's motion to dismiss. The first application allows the plaintiff's claims to survive defendant's motion to dismiss if the purchased products and unpurchased products and their accompanying misrepresentations are "sufficiently similar."<sup>187</sup> Whereas the second application provides that the claims must survive because the determination is always one of class standing, not suited for a motion to dismiss, but rather, a Rule 23 class certification analysis. Finally, at least two courts have used what appears to be a mixture of the two applications, using both the class standing classification and the "sufficiently similar" language, and holding that where the products are sufficiently similar, the claims will survive the motion to dismiss stage and proceed to a Rule 23 class certification analysis.<sup>188</sup>

### III. FINDING A SOLUTION

This Note proposes a test for determining when, in a putative consumer protection class action in federal court, a named plaintiff's claims relating to products he did not himself purchase, but which were purchased by unnamed members of the putative class, will survive defendant's motion to dismiss. By analyzing the ways that district courts have addressed this procedural issue, this Note determines which solution best comports with contemporary standing doctrine, the rationale underlying consumer protection statutes, and public policy, generally.

As federal courts continue to maintain different approaches, the split of authority among district courts is only widening. Because CAFA has enabled consumers to bring their putative class actions in the federal courts, this issue is presenting itself more frequently. In fact, there are numerous cases awaiting decision right now that will address it.<sup>189</sup> For these reasons, the

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<sup>187</sup> See *supra* note 145 and accompanying text.

<sup>188</sup> See *Quinn v. Walgreen Co.*, 958 F. Supp. 2d 533, 542 (S.D.N.Y. 2013) (finding that because "there are substantial similarities between all of defendants' [products], and the alleged misrepresentations on the labels of the [products] are nearly identical . . . the appropriate time to consider whether plaintiffs can bring claims on behalf of purchasers of all of the various [products] is at the class certification stage, not on a motion to dismiss").

<sup>189</sup> See, e.g., Class Action Complaint and Demand for Jury Trial, *Dimuro v. Estee Lauder, Inc.*, No. 3:12-CV-01789 (D. Conn. Dec. 20, 2012), 2012 WL 6633707; Reply Memorandum of Law in Support of Defendants' Motion to Dismiss, *In Re*

issue is ripe for review. This Note proposes that, unquestionably, the second approach is the correct judicial response. However, this Note submits that the more appropriate way to address the issue is to adopt a multi-faceted test, like that adopted by the Eastern District of New York in *Jovel v. I-Health, Inc.*,<sup>190</sup> rather than simply automatically deferring to the Rule 23 stage of litigation.

Because of the inconsistent judgments, American consumers are at a severe disadvantage. The same claims brought by identical plaintiffs are being adjudicated differently in courts across the country. Worst of all, the inconsistent judgments are not based on differences inherent in those courts' applications of certain states' different substantive laws. These inconsistent rulings are based on district courts' interpretations of contemporary standing doctrine. Accordingly, a change is necessary so that plaintiffs who bring identical claims will not be subjected to different outcomes simply because of the district in which they initiate their suit.

In determining which solution to this procedural issue best comports with contemporary standing doctrine, the purpose of consumer protection statutes, and public policy, it is important to immediately note that the first approach—granting the defendant's motion to dismiss and denying the plaintiff's claims relating to unpurchased products—is the least appropriate. In a putative consumer class action, once the named plaintiff has plausibly alleged personal injury, thereby satisfying Article III and statutory standing, determining whether the named plaintiff's claims are representative of the unnamed putative class members' claims is a question of class standing. Accordingly, because class standing is an issue addressed in a Rule 23 class certification analysis, the plaintiff's claims should survive a defendant's motion to dismiss. However, because the second approach is mired with inconsistent and confusing district court decisions, it is necessary to employ a test for better determining when a named plaintiff's claims relating to unpurchased products will survive a defendant's motion to dismiss.

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L'Oreal Wrinkle Cream Marketing Practices Litigation, No. 2:12-CV-3571 (D.N.J. July 8, 2013), 2013 WL 3941892; Second Amended Class Action Complaint, *Guilin v. Walgreens Co.*, No. 11-CV-07763 (N.D. Ill. Apr. 19, 2012), 2012 WL 6045111.

<sup>190</sup> 2013 U.S. Dist. LEXIS 139661 (E.D.N.Y. Sept. 27, 2013).

This Note proposes such a test, which builds off the analysis in *Jovel v. I-Health, Inc.*<sup>191</sup> to remedy the current inconsistencies in the second approach. The proposed test, like *Jovel*, allows the putative consumer protection class action to survive a defendant's motion to dismiss where the named plaintiff's claims relating to products purchased by the putative class members but not purchased by the plaintiff himself are "sufficiently similar" to those products actually purchased by the named plaintiff. However, in addition to adopting this *Jovel* test, the proposed test adds another component. To promote consistency and enhance knowledge of the law, the test identifies certain situations that have arisen frequently in the cases addressing this issue, and presumes the existence of sufficient similarity between the products in such situations.

A. *The First Approach Does Not Comport with Contemporary Standing Doctrine or the Policy Underlying Consumer Protection Statutes*

There are several reasons why the first approach—granting defendant's motion to dismiss and denying plaintiff's claims against unpurchased products—is the incorrect approach to this issue. The primary reason is the underlying purpose of contemporary standing doctrine: ensuring that a real case or controversy exists.<sup>192</sup> In these cases, a real case or controversy absolutely exists. A plaintiff is seeking to certify a class, the members of which have all been harmed after purchasing products with misrepresentations. The only issue here is that the named plaintiff does not technically have an identical claim as the other putative class members because the named plaintiff purchased an immaterially different product. Even if the misrepresentations are identical and the products are similar, the issue arises only because the products are not the same. Accordingly, if there were a named plaintiff for each separate product, there would be no issue at all. But, simply because one named plaintiff asserts claims related to products purchased by unnamed class members, district courts adopting this approach hold the claims related to unpurchased products must be dismissed. By essentially preventing the action from proceeding

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<sup>191</sup> *Id.*

<sup>192</sup> RUBENSTEIN, *supra* note 78, § 2:6.

for no reason other than the name that appears on the complaint, these courts undermine the purpose of standing doctrine, which is to ensure that plaintiffs who have personally suffered injury are provided a mode of redress.

This approach is also incorrect because it confuses Article III standing with class standing. As previously discussed, once the named plaintiff has plausibly alleged personal injury, thereby satisfying Article III and statutory standing, determining whether the named plaintiff's claims are representative of the unnamed putative class members' claims is a question of class standing. Rule 23 is specifically designed to address any concerns about the relationship between a class representative and members of the class.<sup>193</sup> Therefore, if a plaintiff has satisfied her individual standing requirement so as to establish a real case or controversy, then Rule 23 will address any concerns that arise due to the nature of the class action mechanism.<sup>194</sup>

Additionally, because standing decisions invoke constitutional concerns, courts addressing this issue should choose the less complex class certification analysis over that of contemporary standing doctrine.<sup>195</sup> Class certification "focuses a court on pragmatic factors in a familiar and accessible manner" and allows the court to adjudicate the issue in a "nonconstitutional manner."<sup>196</sup> This will only simplify the proceedings by eliminating any unnecessary constitutional litigation.

Aside from contemporary standing concerns, this first approach also does not comport with the rationale underlying consumer fraud statutes. As previously discussed, the goal of consumer protection statutes is to better enable consumers to bring causes of action for alleged unfair practices.<sup>197</sup> The statutes were designed to lessen the burden on the individual consumer and place the onus on the major corporation. If the objective is

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *See id.* (noting standing decisions are "abstract and often politicized"); *see also* *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909) ("Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons.").

<sup>196</sup> RUBENSTEIN, *supra* note 78, § 2:6.

<sup>197</sup> *See supra* text accompanying notes 55–58.

for the consumer to have redress, making it difficult for a plaintiff to bring a class action defeats the purpose of these statutes.

*B. The District Courts' Inconsistent and Confusing Applications of the Second Approach Must Be Reconciled*

The second approach complies with contemporary standing doctrine and the policy underlying consumer protection statutes; however, the inconsistent and confusing decisions of the district courts need to be consolidated for uniform application and consistent results.

The first application of the second approach provides that where the named plaintiff's claims relate to unpurchased products that are "sufficiently similar" or have misrepresentations that are "sufficiently similar" to the product that the plaintiff actually purchased, the plaintiff has standing, and such claims will survive defendant's motion to dismiss.<sup>198</sup> While this approach correctly holds that the named plaintiff's claims should proceed past the defendant's motion to dismiss, it fails to conclude that such a standing determination is the purview of a Rule 23 class certification analysis.<sup>199</sup> Instead, the court simply finds that where the products and misrepresentations are sufficiently similar the plaintiff has standing, and the claims may proceed to the next stage of the litigation. In doing so, the court is addressing, at the motion to dismiss stage of the litigation, that which is supposed to be reserved for the Rule 23 class certification analysis: whether the named plaintiff has adequately established class standing.

The second application of the second approach provides that, where a plaintiff plausibly alleges individual injury, any determination of whether his or her claims against the products of the putative class members will survive defendant's motion to dismiss must be analyzed at the Rule 23 class certification stage of litigation. This means that whether the two claims are similar enough would automatically be determined by the Rule 23 analysis. However, such a rule would consequently undermine the efficacy of defendant's motion to dismiss. All that a plaintiff would have to allege was an intention to certify a class, and the

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<sup>198</sup> See *supra* text accompanying notes 145–53.

<sup>199</sup> See *supra* text accompanying notes 87–96.

complaint could proceed past the motion to dismiss stage of the litigation. A plaintiff who adequately alleges individual standing should not go unchecked in what additional claims he or she can allege.<sup>200</sup> This concern was recently remedied by the use of a mixed approach.<sup>201</sup>

The district courts' inconsistent and confusing applications of the second approach were simplified through the creation of a mixed approach. In *Jovel v I-Health, Inc.*,<sup>202</sup> the Eastern District found the plaintiff's standing to assert claims against unpurchased products was a determination for a Rule 23 class certification analysis.<sup>203</sup> However, the court also incorporated the "sufficiently similar" language into its analysis.<sup>204</sup> In doing so, the court formulated a hybrid application of the inconsistent decisions of the second approach, and one, which this Note advocates, that is the most appropriate method for dealing with this issue. Such a test declares that the standing inquiry is one better suited for the class certification analysis, while also ensuring a plaintiff may not assert claims against products that have nothing to do with his alleged injury.

C. *The Proposed Test Will Comport with Contemporary Standing Doctrine and Effectuate the Policy of Consumer Protection Statutes, While Also Protecting Against Overly Broad Suits*

This Note's proposed hybrid approach will better achieve the objectives of contemporary standing and consumer protection doctrines, while also ensuring that overly broad claims will not survive a defendant's motion to dismiss. The proposed test adopts the rule set out in *Jovel*. Accordingly, the test permits the named plaintiff's claims relating to unpurchased products and

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<sup>200</sup> For example, the plaintiff should not be able to assert a class member's claim for misrepresentation in relation to cleaning products when he has only personally been injured by alleged misrepresentations on a dietary supplement. Although the plaintiff has personally suffered an injury, the injury cannot be said to be representative of the injury felt by the unnamed putative class member. If allowed, this would circumvent the efficacy of defendant's motion to dismiss, allowing the plaintiff to serve as representative for claims that bear no relation to his or her own.

<sup>201</sup> See *Jovel v. I-Health, Inc.*, 12-CV-5614 (JG), 2013 U.S. Dist. LEXIS 139661, at \*30–31 (E.D.N.Y. Sept. 27, 2013) (demonstrating the mixed approach).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at \*30.

<sup>204</sup> *Id.*

allows the suit to proceed past the motion to dismiss stage of the litigation, but only where the unpurchased products are “sufficiently similar” to the products that the named plaintiff actually did purchase. However, in addition to the *Jovel* rule, the test highlights three situations where the named plaintiff’s claims are presumed to be sufficiently similar to those of the unnamed members of the putative class, so that such claims will survive a defendant’s motion to dismiss. The three situations are: (i) when the product over which standing is sought is of the same product line as that product which was actually purchased by the named plaintiff; (ii) when the products have common ingredients or components and such ingredients or components are the primary or material selling points of the products; and (iii) when the plaintiff does not allege injury based solely on the alleged misrepresentations but rather on the diminution in value resulting from the product defect that exists in all products, such that if certification is granted, the proposed class would include plaintiffs with personal standing to raise the claims.

The test adopts the second approach’s determination that the standing of the named plaintiff to assert claims over products he or she did not purchase is a matter properly addressed at the Rule 23 class certification stage of the litigation. This test also comports with contemporary standing doctrine, because the issue being decided is whether or not the named plaintiff has class standing as opposed to Article III standing, which is the purpose of a Rule 23 class certification analysis.<sup>205</sup>

However, to protect defendants from frivolous or overly broad suits, the plaintiff’s claims will only survive defendant’s motion to dismiss in certain limited circumstances. A named plaintiff’s claims against products he or she did not actually purchase will only survive the defendant’s motion to dismiss when the unpurchased products are “sufficiently similar” to the product actually purchased by the named plaintiff. The rationale underlying this approach is that, although an analysis of the similarity of the claims is better suited for a Rule 23 class certification, a named plaintiff should not survive a defendant’s motion to dismiss when he or she asserts claims against unpurchased products that have no cognizable similarity or nexus with the product that injured the named plaintiff.

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<sup>205</sup> See *supra* text accompanying notes 88–92.

Allowing this would cause undue hardship to defendants because a named plaintiff could assert claims against every product in the defendant's inventory, and then survive the defendant's motion to dismiss simply because, in a class action, the question is better dealt with at the Rule 23 stage. To protect against such an occurrence, the proposed test identifies three situations that have arisen frequently in the cases addressing this issue, where courts have allowed the claims to survive defendants' motions to dismiss. The test presumes that in these specific enumerated situations the named plaintiff's claims are sufficiently similar to those of the unnamed putative class members.

The first situation is where the unpurchased product is of the same product line as the product that was actually purchased by the named plaintiff. As an example, assume that a plaintiff was injured when he bought a dietary supplement, which advertised and represented its ability to improve eyesight. If the plaintiff sues alleging that his sight was not improved, the plaintiff should be able to assert claims on behalf of the unnamed putative class members against a product in the same product line that he did not purchase, but which is sold by the same defendant and similarly advertised and represented to improve eyesight. Here, the unpurchased product would simply be a dietary supplement with minor variations to the product that the named plaintiff actually purchased. Because the injury will be identical regardless of which product was purchased, the named plaintiff's claims should survive to the class certification stage of the litigation. That said, the converse is also true; plaintiff should not be able to assert claims relating to defendant's misrepresentations concerning a weight loss dietary supplement that he never purchased. This is somewhat obvious, and ensures that only in cases where the products are actually similar, will the claims against unpurchased products survive defendant's motion to dismiss and proceed to the Rule 23 analysis. This scenario works to protect the defendant against overly broad suits, so the defendant will not be forced to incur litigation costs resulting from the suit automatically proceeding to the Rule 23 analysis.

The second part of the test further limits the circumstances where a named plaintiff would be able to assert claims related to unpurchased products. The requirement that the products have components or ingredients that are common and are the selling

point of the product line bolsters the “sufficiently similar” requisite. Returning to the hypothetical, assume that the dietary supplement, which was advertised for its ability to improve eyesight, had as its active ingredient beta-carotene. Assume also that the plaintiff seeks to assert claims relating to another product which is part of a different product line than the product plaintiff purchased. The product in the other product line is similarly advertised as improving eyesight, but it contains triple the amount of beta-carotene as the product that the plaintiff purchased. It also has additional ingredients such as Vitamin C. Can the plaintiff assert claims against this product, which was purchased by unnamed members of the putative class?

The second part of our test is designed to address situations where products are not part of the same product line,<sup>206</sup> but are sold for the same underlying purpose and differ in nonmaterial or insubstantial ways. Accordingly, in the hypothetical, the plaintiff should be able to assert claims against the second product because, although it is technically different than the product plaintiff actually purchased, it was purchased by the unnamed class members for the same reason: improving eyesight. Additionally, both products’ active ingredient is beta-carotene. Whether the products are too different from each other for class action purposes, simply because of the added Vitamin C, is a determination that should be addressed at the Rule 23 class certification stage. Even though the strengths of the products are different and the ingredients are not identical, the products were bought for the same purpose and advertised to do the same thing. Therefore, such claims should survive defendants’ motions to dismiss. This situation captures instances where the named plaintiff and the class members purchase different products but the differences relate to minor, incidental variations in the composition of the products.<sup>207</sup>

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<sup>206</sup> See *Product Line Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/product%20line> (last visited Mar. 6, 2014) (defining product line as “a group of closely related commodities made by the same process and for the same purpose and differing only in style, model, or size”).

<sup>207</sup> The proposed test uses the “ingredient or component” language to capture situations where the products are not dietary supplements or other things designed for human consumption, that is, the 3-D feature of a new Samsung 3-D television model.

The final instance where courts should presume products are “sufficiently similar” and allow claims to proceed to class certification is where the named plaintiff does not allege injury based solely on alleged misrepresentations, but rather, on the diminution in value resulting from the product defect that exists in all of the products. This situation focuses on the actual injury incurred and, thereby, allows the plaintiff to assert claims against unpurchased products when his actual injury is the same as the injury that the unnamed class members will allege. This ensures that if certification is granted, the proposed class will include plaintiffs with personal standing to raise the claims.<sup>208</sup> This component of the test derives from the analysis in *Donohue v. Apple, Inc.*<sup>209</sup> There, a consumer brought a putative class action alleging that a defect in his iPhone’s signal meter violated state consumer protection laws.<sup>210</sup> The plaintiff asserted claims against Apple, Inc. because of his iPhone, but also sought to assert claims on behalf of purchasers of other iPhone models.<sup>211</sup> The court found that the plaintiff had standing to assert such claims because the plaintiff did not allege injury based solely on Apple’s alleged misrepresentations, but on the diminution in value caused by the defect itself, which “Apple ha[d] already admitted existed in every iPhone model at issue in th[e] case.”<sup>212</sup> Accordingly, the court focused on the fact that the injury was identical across the different iPhone models and all the members of the class would allege the same injury.

To understand this, let us again return to our hypothetical. Plaintiff’s injury is that he purchased the particular dietary supplement, which did not perform as promised. However, looking at the injury in a broader scope, the injury is also that plaintiff bought a specific dietary product from defendant, which, because it did not perform as promised, is worthless. The class members similarly suffered an injury when they purchased a different particular dietary product, which did not perform as promised. Aside from the specific injury of purchasing the product, which failed to perform as advertised, the class members were likewise generally injured because the dietary

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<sup>208</sup> See *Donohue v. Apple, Inc.*, 871 F. Supp. 2d 913, 922 (N.D. Cal. 2012).

<sup>209</sup> *Id.* at 913.

<sup>210</sup> *Id.* at 916–18.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 922.

product that they purchased became worthless when it did not perform as promised. Accordingly, because the diminution in value resulting from the product defect caused the same type of injury in relation to all plaintiffs, regardless of which product was purchased, the claims are sufficiently similar to survive the motion to dismiss. This situation is designed to cover instances where, unlike the first and second situations, the products are not of the same product line and do not necessarily share common ingredients or components.

This Note's proposed test promotes the underlying rationale of consumer protection statutes by better enabling consumers to seek a remedy for their alleged injuries.<sup>213</sup> Because consumer protection statutes are designed to place the burden on the corporation that allegedly utilizes unfair or deceptive practices, allowing the suit to proceed to the Rule 23 analysis is consistent with this approach.<sup>214</sup> The rationale behind consumer protection statutes is to create a mode of redress for the individual consumer by allowing that individual to sue the corporation directly, rather than having to rely on a state or federal enforcement agency.<sup>215</sup> The idea was that this would place consumers—average citizens engaging in business transactions—on the same playing field as massive corporations, where the consumer would no longer be inherently disadvantaged when bargaining with corporations or industries. Allowing the plaintiff to assert claims relating to unpurchased products enables the plaintiff to address more than one unfair or deceptive practice in the suit. The corporation engaging in such practices is, therefore, more likely to be held accountable, and the individual will be better able to redress every alleged injury.

#### *D. The Proposed Test Advances Public Policy Objectives*

The proposed test has the added benefit of comports with two public policy objectives. Namely, the test will promote efficiency and uniformity within the federal court system.

The proposed test promotes efficiency, one of the principal tenets of the federal system. "A federal judicial system that is inefficient . . . endangers the basic principles of our national

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<sup>213</sup> See *supra* Part I.A.

<sup>214</sup> See *supra* text accompanying notes 59–60.

<sup>215</sup> See *supra* text accompanying notes 61–64.

justice resource: quality resolution of our country's most fundamental, important, and complex legal concerns within the context of the well-balanced governmental fabric of federalism.<sup>216</sup> Because the alleged unfair or deceptive practices of corporations usually relate to a consumer's purchase of a single product, the damages relating to that individual injury will not be great. Accordingly, consumer protection class actions allow plaintiffs to accumulate their alleged injuries into a single action with the potential for sizeable damages. It is in the best interest of the federal system to promote this type of action because the class action mechanism effectively consolidates individual actions.<sup>217</sup> The alternative would be multiple suits alleging injury due to the exact same misrepresentation simply found on different products.

The other, more significant, policy implication of the proposed test would be the promotion of uniformity within the federal courts. The importance of uniformity is a fundamental principle enshrined in the Constitution itself<sup>218</sup> and favored in the federal courts.<sup>219</sup> A federal system demands both uniformity in the interpretation of the substantive law and uniformity in procedure.<sup>220</sup> The principal argument for uniformity is that "citizens of different jurisdictions should not be subjected to different interpretations of the same law."<sup>221</sup> However, there are numerous other interests that are also served by uniformity. Uniformity ensures the predictability of the law, thereby enabling "a legal regime to achieve its instrumental purposes."<sup>222</sup> Without the uniform application of the law, "it is impossible for law to influence primary behavior effectively when individuals are subjected to inconsistent and conflicting signals about the

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<sup>216</sup> Judge Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, 14 MISS. C. L. REV. 211, 213 (1994).

<sup>217</sup> See *supra* text accompanying notes 73–74.

<sup>218</sup> See U.S. CONST. art. I, § 8, cl. 1 ("[A]ll Duties, Imposts and Excises shall be uniform throughout the United States.").

<sup>219</sup> See Sara Fawk, Note, *Immigration Law—Eligibility for Section 212(c) Relief from Deportation: Is It the Ground or the Offense, the Dancer or the Dance?*, 32 W. NEW ENG. L. REV. 417, 459 (2010) ("The federal courts favor uniformity and consistency to support the structure and function of the court system.").

<sup>220</sup> Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 378 (2011).

<sup>221</sup> *Id.* at 378 n.383.

<sup>222</sup> Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 850 (1994).

law's meaning."<sup>223</sup> However, most importantly, "[n]ational uniformity of federal law ensures that courts treat similarly situated litigants equally—a result often considered a hallmark of fairness in a regime committed to the rule of law."<sup>224</sup> Without such uniformity, a plaintiff may be able to bring suit in one state, but fail in another. While there exist many other justifications for uniformity in the federal court system,<sup>225</sup> this inconsistency serves as an "impetus to forum shop,"<sup>226</sup> and is therefore strongly disfavored in our judicial system.<sup>227</sup>

Currently, district courts across the country address this procedural issue differently. If a suit is brought in Illinois, the named plaintiff will be deemed to have no standing to assert claims relating to unpurchased products. Within California, how this issue will be adjudicated depends on where you file suit, as the state's district courts are split on the issue.<sup>228</sup> In New York, as long as a plaintiff establishes Article III standing, the class standing question is not decided at the motion to dismiss stage, as it is properly addressed at a later stage of the litigation.<sup>229</sup> However, district courts within New York apply different tests, with one court employing the "sufficiently similar" language. Accordingly, district courts across the country are anything but uniform. The approach this Note proposes would promote a uniform response to these cases, and ensure that district courts will no longer differ. Instead, in a putative consumer protection class action, the named plaintiff's ability to assert claims relating to unpurchased products would be a question of class standing and, as long as the products are "sufficiently similar," would be an issue meant to be resolved at the Rule 23 class certification stage of the litigation.

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<sup>223</sup> *Id.* (quoting Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991, 995 (1987)).

<sup>224</sup> *Id.* at 852.

<sup>225</sup> *See id.* at 850–55 (discussing extensively the interests served through the promotion of uniformity).

<sup>226</sup> Fawk, *supra* note 219, at 459–60.

<sup>227</sup> *See Note, Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1681 (1990) (discussing the judicial and legislative branches' opposition to "the evil of forum shopping") (internal quotation marks omitted).

<sup>228</sup> *See Brown v. Hain Celestial Grp., Inc.*, 913 F. Supp. 2d 881, 889–91 (N.D. Cal. 2012) (collecting cases).

<sup>229</sup> *See In re Frito-Lay N. Am., Inc. All Natural Litigation*, No. 12-MD-2413 (RRM), 2013 WL 4647512, at \*11–12 (E.D.N.Y. Aug. 29, 2013).

## CONCLUSION

Consumer class actions will only become increasingly more relevant in today's society, as these actions are the most convenient and efficient sources of relief for individual consumers who are wronged by large corporations. This Note concludes that a named consumer protection class action plaintiff's claims relating to products purchased by unnamed members of the putative class should survive the defendant's motion to dismiss when there is "sufficient similarity" between the unpurchased products and the product plaintiff actually purchased, because such a determination is better suited for the Rule 23 class certification stage of the litigation. To promote consistency and enhance knowledge of the law, this Note's proposed test identifies certain situations that have arisen frequently in the cases addressing this issue, and presumes there exists sufficient similarity between the products in such situations. Adoption of the proposed test will better enable a uniform application of standing doctrine, help reconcile the inconsistent decisions of district courts across the country, and ensure that courts comport with contemporary standing doctrine, the rationale underlying consumer protection statutes, and public policy concerns.