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# Class Certification: Defining or Challenging Class Membership

Evaluating Ascertainability, Overbreadth and Fail-Safe Classes

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Today's faculty features:

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**Class Definitions: Recent Trends  
2010-2011**

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## Identifying the Class – Who Are the Plaintiffs?

*Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006)

“The district court may certify a class of plaintiffs if the putative class satisfies all four requirements of Federal Rule of Civil Procedure 23(a) -- numerosity, commonality, typicality, and adequacy of representation -- and any one of the conditions of Rule 23(b) . . . . The plaintiff must also show . . . that *the class is indeed identifiable as a class* . . . . It is axiomatic that for a class action to be certified a ‘class’ must exist . . . . *[C]lass definitions must be definite enough that the class can be ascertained.*”

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## Three Major Issues

- Ascertainability
- Overbreadth
- “Fail-Safe” Classes

- There is often some conceptual overlap between these categories.

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## Ascertainability

Involves situations where the court would be forced to engage in an individualized analysis of objective evidence to determine who qualifies as a class member. Examples:

- The court must conduct a “mini trial” in order to determine who is in the class.
- Evidentiary and logistical issues make it difficult (or impossible) to accurately identify with objective proof who is in the class.
- The court must conduct an assessment of an individual’s state of mind in order to determine whether he or she belongs in the class.

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## Recent Cases Involving Unascertainable Classes

*Heisler v. Maxtor Corp.*, No. 5:06-cv-06634-JF (PVT), 2010 WL 4788207 (N.D. Cal. Nov. 17, 2010)

Plaintiffs sought to certify a class of “[a]ll end-user persons or entities who purchased in the United States . . . a [Maxtor Hard Drive] sold by Maxtor Corporation or an authorized Maxtor retailer or distributor that have *experienced a failure* and (a) reported *the failure* to Maxtor and/or Seagate (the "Reporting" Class) and (b) who did not report *the failure* to Maxtor and/or Seagate (the "Non-Reporting" Class).”

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## Recent Cases Involving Unascertainable Classes

The court denied the class certification motion, finding that the identity of class members was unascertainable, in light of the vague nature of the term “failure”:

“Plaintiffs' definition fails to explain clearly what constitutes a ‘failure’ of the subject hard drives . . . .

[T]here is a real concern that the term could be interpreted too broadly, encompassing even hard drive problems resulting from operator error . . . . Plaintiffs' proposed class definition [does not] include[] objective limitations that would exclude temporary failures or failures occurring as a result of factors other than manufacturing defects.” *Id.* at \*2-3.

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## Recent Cases Involving Unascertainable Classes

*Mann v. TD Bank, N.A.*, No. 09-1062 (RBK/AMD), 2010 U.S. Dist. LEXIS 112085 (D.N.J. Oct. 20, 2010)

Plaintiffs brought suit under the New Jersey Consumer Fraud Act, alleging that TD Bank failed to adequately disclose to consumers that their prepaid gift cards are subject to a \$2.50 monthly “dormancy fee” beginning one year after a card's date of purchase.

Plaintiffs’ proposed class included “[a]ll New Jersey persons and entities who *purchased or received* [Defendants’] gift cards on which dormancy fees were assessed from 2004 to the present.”

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## Recent Cases Involving Unascertainable Classes

The court rejected class certification, because identifying a large number of class members would require individualized inquiries:

“Plaintiffs’ proposed class is too indeterminate because it would require individual hearings to establish who qualifies as a class member. Although Defendants can produce records identifying purchasers of cards that incurred dormancy fees, *recipients are not required to register their cards . . . .* [T]here is no systematic means for determining who ultimately received those cards or when purchasers gave their cards away. The Court would have to conduct fact-finding hearings to evaluate anecdotal evidence from each putative plaintiff and then determine whether individual plaintiffs could be credibly linked to one of the cards on Defendants’ list at a time when the card incurred a dormancy fee. *This would require just the sort of individualized mini-trials that [courts have consistently rejected] . . . .*” *Id.* at \*39.

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## Recent Cases Involving Unascertainable Classes

*Biediger v. Quinnipiac Univ.*, No. 3:09cv621 (SRU), 2010  
U.S. Dist. LEXIS 50044 (D. Conn. May 20, 2010)

Plaintiff brought a putative Title IX class action on behalf of “women who have not and will not enroll at Quinnipiac because of Quinnipiac's allegedly discriminatory athletic programming.”

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## Recent Cases Involving Unascertainable Classes

Determining class membership would require an individualized and subjective assessment of each potential class member's state of mind:

“[The proposed class] is sufficiently amorphous and unwieldy to upset the efficiency that a class action is supposed to achieve . . . . [It] could conceivably be every person who decided, or who will decide, not to attend Quinnipiac. That pool would then have to be narrowed *by determining the members' motivations for their decision not to enroll in the University* . . . . [The court] cannot imagine how the class's membership could be identified objectively and without inordinate time and expense.”

*Id.* at \*13-14.

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## Recent Cases Involving Unascertainable Classes

Determining class membership from objective proof is impossible because of the loss of data.

*Sevidal v. Target Corporation*, 189 Cal. App. 4<sup>th</sup> 905 (2010) – No record of who saw erroneous “MADE IN USA” slug on website

*Solo v. Bausch & Lomb Inc.*, 2009 WL 4287706 (D.S.C. 2009) – The need for mini-trials and the class’s failure to preserve receipts for over-the-counter lens solution makes class membership unascertainable.

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## Recent Cases Involving Unascertainable Classes

*Johnson v. Int'l Paper Co.*, 270 F.R.D. 640, 642-45 (M.D. Ala. 2010) (in toxic tort case, rejecting proposed class definition of all those who experienced contamination of their property and a resulting diminution in property value; determining which property owners actually experienced contamination would “require additional [scientific] evidence, and factual findings by the court before class members could be identified”).

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## Overbreadth

Involves situations where the proposed class definition likely includes large numbers of individuals who have not suffered a legally cognizable injury and thus have no standing to bring suit. Examples:

- Consumer fraud or breach of warranty classes including all owners of a particular product, including those who did not pay to acquire the product.
- Consumer fraud/misrepresentation classes encompassing all purchasers of a product, regardless of whether they ever saw or relied on the defendant's alleged misrepresentations.

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## Recent Cases Involving Overbroad Classes

*O'Shea v. Epson Am., Inc.*, 2011 U.S. Dist. LEXIS 105504 (C.D. Cal. Sept. 19, 2011)

Plaintiff brought suit under the California Unfair Competition Law (UCL) against Epson, alleging that it misrepresented the nature of its printers' ink cartridge requirements by placing a deceptive and false label on printer boxes.

She sought to certify a nation-wide class of persons who “between August 28, 2005 and class certification, purchased, not for resale, an Epson Stylus NX-series printer.”

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## Recent Cases Involving Overbroad Classes

The court refused to certify the proposed class, finding that it would potentially include many individuals who never saw or relied upon the deceptive label in question, and thus lacked standing to sue:

“[There is] evidence showing that individuals who purchased certain models of class printers from certain third-party online sources . . . *were not exposed to the allegedly deceptive representation before they purchased their printers*. . . . [T]he putative class is defined such that it necessarily encompasses individuals whose purported injury cannot fairly be traced to Epson's alleged misrepresentation on the printer box.”

*Id.* at \*34-35.

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## Recent Cases Involving Overbroad Classes

*Vigus v. S. Ill. Riverboat/Casino Cruises, Inc.*, 274 F.R.D. 229 (S.D. Ill. 2011)

Plaintiff filed suit, alleging that Defendant violated the Telephone Consumer Protection Act by calling him with unsolicited pre-recorded advertisements.

Plaintiff sought to certify a class of “[a]ll persons in the United States who were called, on or after March 1, 2004, on either (1) a residential telephone line or (2) a cellular telephone service, by or on behalf of Defendant using a prerecorded voice to deliver a message promoting Defendant's Casino to pursue a private cause of action under the TCPA, 47 U.S.C. § 227(b)(3).”

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## Recent Cases Involving Overbroad Classes

The court rejected class certification, because many persons had expressly consented to receiving promotional advertisements from the Defendant, and, as such, had no grievance:

“[Plaintiff]’s proposed class includes a substantial number of people who voluntarily gave their telephone numbers to the [Defendant] knowing the [Defendant] would call those numbers to present special commercial offers. They have no grievance with the [Defendant], and . . . their inclusion in the proposed class definition renders it overbroad and the class unfit for certification.” *Id.* at 235.

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## Recent Cases Involving Overbroad Classes

*In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. 402, 419 (D. Me. 2010)

Plaintiffs brought a putative multi-state class action on behalf of purchasers of “light” or “low tar” cigarettes, alleging that Defendants misrepresented the nicotine and tar levels of their products.

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## Recent Cases Involving Overbroad Classes

Many smokers did not believe the Defendant's alleged misrepresentations, and many did not rely on any such misrepresentations when purchasing the products in question. An individual who did not buy light cigarettes as a result of Defendant's misrepresentations did not suffer an Article III injury, and the class was thus overbroad:

“[T]he focus is on ‘the class definition; if the definition is so broad that it sweeps within it persons who could not have been injured by the defendant's conduct, it is too broad.’” *Id.* at 419.

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## Recent Cases Involving Overbroad Classes

*See also:*

*Webb v. Carter's Inc.*, 272 F.R.D. 489, 497-500 (C.D. Cal. 2011) (rejecting class certification where large numbers of individuals within the proposed class suffered no adverse effects from purchasing defendant's product; proposed class definition also failed because it included persons who acquired the product without paying money)

*State ex rel. The Coca-Cola Company v. Nixon*, 249 S.W.3d 855 (Mo. Apr. 15, 2008) – Granting mandamus against class because by sweeping up all purchasers, the class included too many people who actually liked the product and were not defrauded.

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## Fail-Safe Classes – “Heads, I Win; Tails, You Lose.”

Plaintiffs’ proposed class definition incorporates a legal conclusion as to the Defendant’s liability, and thus requires a determination of the merits of Plaintiffs’ claim in order to determine who is in the class.

“[A] class definition is called a ‘fail safe’ class [when] the class definition precludes the possibility of an adverse judgment against class members; the class members either win or are not in the class [and are not bound by an adverse judgment].”

- *Genenbacher v. Centurytel Fiber Co. II, LLC*,  
244 F.R.D. 485, 488 (C.D. Ill. 2007)

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## Recent Cases Involving Fail-Safe Classes

*Randleman v. Fid. Nat'l Title Ins. Co.*, 646 F.3d 347 (6th Cir. 2011)

Plaintiffs brought a putative class action against their insurance company, alleging that they paid a higher rate than they were required to under Ohio law. Specifically, Plaintiffs sought to define the class as all those Ohio residents who “were entitled to receive the ‘reissue’ or ‘refinance’ rate for title insurance [pursuant to state law].”

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## Recent Cases Involving Fail-Safe Classes

The Sixth Circuit affirmed the district court's decertification of this class:

“The class the district court initially certified was flawed in that it only included those *who are ‘entitled to relief.’* This is an improper fail-safe class that shields the putative class members from receiving an adverse judgment. Either the class members win or, by virtue of losing, they are not in the class and, therefore, not bound by the judgment . . . . [T]his is an independent ground for denying class certification . . .” *Id.* at 352.

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## Recent Cases Involving Fail-Safe Classes

*Jones-Turner v. Yellow Enter. Sys., LLC*, No. 3:07CV-218-S, 2011 U.S. Dist. LEXIS 118564 (W.D. Ky. Oct. 11, 2011)

Plaintiffs sought to certify a class, alleging that Defendant had violated the Fair Labor Standards Act (FSLA).

Specifically, Plaintiffs' defined the class as encompassing those individuals who "were not paid for all time worked and/or were not paid overtime wages . . . were not granted meal breaks [in accordance with state law] . . . [and] were subjected to automatic pay deductions."

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## Recent Cases involving “Fail-Safe” Classes

The court denied certification, finding Plaintiffs’ proposed definition to be of the classic “fail-safe” variety:

“This proposed class is an improper “fail-safe” class . . . in that the class definition shields the putative class members from receiving an adverse judgment . . . . Thus, in order to ascertain who is a member of the class, *the merits of each individual employee’s claims would need to be reached*, thus defeating the suggestion that class treatment would be appropriate.” *Id.* at \*9.

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## Recent Cases Involving Fail-Safe Classes

*Schilling v. Kenton County*, No. 10-143-DLB, 2011 U.S. Dist. LEXIS 8050 (E.D. Ky. Jan. 27, 2011)

Plaintiff inmates brought a putative class action under 42 U.S.C. § 1983 on behalf of incarcerated individuals who were “subjected to intentional physical and mental abuse by Defendants in violation of the Eighth Amendment ... and the Fourteenth Amendment” and were denied “appropriate and necessary” medical care as a “result of Defendants' neglect and deliberate indifference.”

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## Recent Cases Involving Fail-Safe Classes

The court found that this was inescapably an improper fail-safe definition:

“This proposed definition improperly requires the Court to make a legal determination that certain inmates . . . were deprived of constitutionally adequate medical care or subjected to physical and mental abuse in violation of their constitutional rights . . . . Whether Plaintiffs seek to certify a mass tort class action or a police misconduct class action, the proposed class definition must be sufficiently definite to ascertain class membership and *must not depend on a merits-based adjudication to determine inclusion.*”

*Id.* at \*19, 22.

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## Recent Cases Involving Fail-Safe Classes

*See also:*

*Boucher v. First Am. Title Ins. Co.*, No. C10-199RAJ, 2011 U.S. Dist. LEXIS 49162, at \*15-16 (W.D. Wash. May 2, 2011) (rejecting proposed class definition which defined class members as those individuals who “did not receive [a] fully and correctly discounted price”, since “the definition conditions a customer's class membership on a finding that [Defendant] is liable to him or her”).

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## Recap

> The class definition . . .

- Must be **precise**
- Must define a class that is **objectively identifiable** at the **outset**
- Must **not involve mini-trials** to determine membership
- Must **not require resolution of merits issues**
- Must not sweep in large numbers of **people with no claim**

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## Recap

- > Beware of class definitions that . . .
  - Cite statutes
  - Use values words (*e.g.*, improper, wrongful)
  - Use legal conclusions (*e.g.*, fraudulently)
  - Use the word “all” (*e.g.*, “all purchasers”)
  - Depend on class members’ subjective feelings
  - Would require mini-trials
  - Require documents that are likely lost or discarded

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# Class Definitions: Recent Trends

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"What matters to class certification is not the raising of common 'questions' ... but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation."

*Wal-Mart Stores, Inc. v. Dukes*, 141 S.Ct. 2541, 2551 (June 20, 2011); *Ellis v. Costco Wholesale Corp.*, \_\_F.3d\_\_, 2011 WL 4336668 (9th Cir. 2011), \*7 (quoting *Wal-Mart*)

# A Class Must Satisfy Rule 23(a)

Plaintiffs can satisfy the rigorous analysis of the Rule 23(a) factors by presenting evidence that (1) the nationwide class is sufficiently numerous; (2) there are key questions of law or fact, common to the class, that are susceptible to common resolution; (3) the claims of the representative parties are typical of the cross claims; and (4) Plaintiffs and their counsel will fairly and adequately protect the interests of the class.

# *Commonality is Essential to Class Certification*

# Resolution of Plaintiffs' Claims Must Depend on Answers to Common Questions

Plaintiffs must meet the commonality standard as set forth in *Dukes* by setting forth "common contention" that "is capable of classwide resolution," *Id.* at 2551.

# Examine the Supreme Court's Opinion in *Dukes*

- In *Dukes*, the Court decertified a Rule 23(b)(2) class consisting of a 1.5 million current and former employees of Wal-Mart, on two grounds. First, the Court held that a Rule 23(a) prerequisite — the requirement that a common question of law or fact unite the class — was not satisfied.

- Second, it held that an injunction class under Rule 23(b)(2) was not appropriate when accompanied by class claims for individualized money damages that are more than merely "incidental" to the injunctive relief.

Summarizing the commonality requirement for a five-Justice majority, Justice Scalia said that:

Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury," (citation omitted). This does not mean merely that they have all suffered a violation of the same provision of law. . . . Their claims must depend upon a common contention . . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. *Id.* at 2551.

What does *Dukes*, an employment discrimination class action have to do with a consumer fraud class action, for example?

In *Jermyn v. Best-Buy Stores, LP*, 2011 Lexis 10449 (SDNY 2011), the District Court answered: Little or nothing.

“It fails for two reasons. First, these additional requirements are designed for and unique to the context of employment discrimination. They are necessary because the employer's motivation is crucial to establishing liability, and therefore to the common liability necessary to glue the plaintiff class together. In the deceptive business practice context, by contrast, the "why" is less relevant, if it is relevant at all.”

An entire course of fraudulent Conduct – readily satisfies the commonality requirement.

*Blackie v. Barrack*, 524 F.2d 891 (9<sup>th</sup> Cir. 1975); *Armstrong v. Davis*, 275 F.3d 849,868 (9<sup>th</sup> Cir. 2001); *Hanlon v. Chrysler Corp.*, 150 F. 3d 1011 (9<sup>th</sup> Cir. 1998); *Johnson v. General Mills, Inc.*, \_\_\_F.3d.\_\_\_, 2011 WL 4056208 (CDCA 9/12/2011) (finding commonality and predominance satisfied where common false advertising scheme alleged, even though class members may have had different reasons for purchasing the product.)

# Ascertainability

State of mind does not likely apply in consumer fraud cases, for example, where courts do NOT need to evaluate state of mind.

The test for most consumer causes of action for fraud is whether a "reasonable" consumer would conclude that the misrepresentation was material such that it was deceptive. Determining whether each class member actually felt deceived is not necessary. See *Williams v. Gerber Products Co.*, 523 F.3d 934, 938 (9th Cir. 2008) (discussing CA UCL). Because the focus of the UCL is on a defendant's conduct, rather than a plaintiff's damages, "relief under the UCL is available without individualized proof of deception, reliance and injury." *Stearns v. Ticketmaster Corp.*, — F.3d. —, 2011 U.S. App. LEXIS 17454, 2011 WL 3659354, at \*4 (9th Cir. Aug. 22, 2011). The same is true for many state consumer fraud laws.

Plaintiffs MUST Show that Common Issues  
will Predominate.

All class members were subjected to the  
same misconduct.

If the common misrepresentations and omissions are material, then the Plaintiff and the class are entitled to a class wide presumption of reliance.

See *Ewert v. eBay, Inc.*, 2010 WL 4269259, at 8\* (NDCA 10/25/2010)(Citing *Tobacco II*, 46 Cal. 4<sup>th</sup> at 327); *Chavez v. Blue Sky Nat. Bev. Co.*, 268 F.R.D. 365, 378-79 (NDCA 2010) “[R]eliance on the alleged misrepresentations may be inferred to the entire class if the named plaintiff can show that material misrepresentations were made to the class members” regardless of whether, unsurprisingly, class members had different reasons for purchasing the product; certifying common-law and statutory fraud claims.

# Materiality

- Materiality is determined on an objective standard that does not vary by class member. See *U.S. v. Watkins*, 278 F.3d 961, 967-968 (9<sup>th</sup> Cir. 2002) (“[t]he requirement of materiality functions to cabin potentially unlimited liability by imposing a more objective standard”); *Brazil v. Dell, Inc.*, 2010 WL 5387831, \*5 (ND CA 12/21/2010).

- Materiality need not be shown as part of class certification – but rather, it demonstrates “a common question of fact suitable for class treatment.” *Mass Mutual Life Ins. Co. v. Superior Ct.*, 97 Cal Spp. 4<sup>th</sup> 1282, 1294 (2001) (the information disclosed by Mass Mutual to prospective purchasers was widely disseminated; the court concluded that the ultimate question of whether the information was material was a common question of fact suitable for classwide treatment.)

# Remedies Need Not be Identical in order to Certify a Class

- Courts routinely find Rule 23(b)(3)'s predominance requirement satisfied despite the need for individualized damage determinations when the fact of injury is common.

The fact that “mini-trials” as to damages may be appropriate does NOT defeat class certification.

- To the extent he's identifying a problem regarding individualized issues, even after *Dukes*, courts have determined that liability questions that go to the defendant's conduct can be determined on a class-wide basis, leaving questions related to damages to be determined separately.
- That there may be thousands of individual questions related to the remedy does not mean that individual issues predominate such that it would be better to try all the cases individually.
- Significantly, "In deciding whether class certification will achieve substantial efficiencies, the proper comparison is not between class litigation and no litigation at all, but between class litigation and actions conducted separately by individual class members." *United States v. City of New York ("Vulcan Society")*, 2011 U.S. Dist. LEXIS 73660, at \*84 (E.D.N.Y. July 8, 2011).

## Defeating defendant's claim that the class is “overbroad”:

- A class is ascertainable for purposes of class certification “if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description.” *Bartold v. Glendale Federal Bank*, 81 Cal.App.4th 816 at p. 828 (2000)

# Lesson on Over Breadth

- Plaintiffs in consumer action must be sure to limit the class to those who could have been exposed to the misrepresentation at issue.
- The Court in *Chavez v. Blue Sky* distinguished *Sevidal v. Target* on exactly this basis: "Because the evidence in [*Sevidal v. Target*] conclusively demonstrated that members of the purported class were not actually exposed to the allegedly false advertising, the court determined that the proposed class was overbroad because, based on the evidence presented, a substantial portion of the class would have no right to recover on the asserted legal claims." *Chavez v. Blue Sky Natural Bev. Co.*, 2011 U.S. Dist. LEXIS 109738, at \*29 (N.D. Cal. Sept. 27, 2011).
- Also note, though "standing in a class action is assessed solely with respect to class representatives, not unnamed members of the class," *In re General Motors Corp. Dex-Cool Prod. Liab. Litig.*, 241 F.R.D. 305, 310 (S.D. Ill. 2007); see also *Tobacco II* (2009) 46 Cal. 4th 298, 319 (referencing Rule 23), class members must at least be capable of standing.

# The Fail-Safe Class Definition

- Plaintiffs would not disagree: this is not the best way to define a class.
- Instead of defining the class as “all prisoners who received inadequate care due to deliberate indifference of prison officials” – then define it as:
- “prisoners complaining of X condition at X facilities during X time.” OR the class could be more broadly defined as “prisoners seeking medical care at X facilities during X time” and the parties could offer possible subclasses.

Even if not all issues will be common to all class members, certain common issues may be certified under Rule 23(c)(4). See *Vulcan Society*, 2011 U.S. Dist. LEXIS 73660 (E.D.N.Y. July 8, 2011).

# Rule 23(b)(2) Class

Rule 23(b)(2) class can be maintainable for Injunctive Relief and May be Properly Certifiable if “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive relief with respect tot eh Class as a whole.” See *Aho v. Americredit Fin. Serv.*, 2011 U.S. Dist Ct. LEXIS 80426, at \*18-21 (SDCA 7/25/2011)