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The Decline of Class Actions

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THE DECLINE OF CLASS ACTIONS

ROBERT H. KLONOFF[*]

ABSTRACT

This Article argues that in recent years courts have cut back sharply on plaintiffs' ability to bring class action lawsuits, thereby undermining the compensation, deterrence, and efficiency functions of the class action device. Starting in the mid-1990s, courts began expressing concern about the pressure on defendants to settle after a decision certifying a class. The business community also raised concerns that many multi-state class actions were brought in pro-plaintiff, state-court venues. Federal Rule of Civil Procedure 23(f), adopted in 1998, enabled defendants to obtain interlocutory review of federal district court decisions certifying class actions, and the Class Action Fairness Act (CAFA), adopted in 2005, had the effect of shifting most major class actions to federal court. There is now a large body of federal appellate court case law, and as a result of that case law, several disturbing trends have emerged.

First, many courts now require that plaintiffs prove substantial portions of their cases on the merits at class certification. Second, several of the class certification requirements (class definition, numerosity, commonality, adequacy of representation, Rule 23(b)(2), and Rule 23(b)(3)), are now considerably more difficult to establish. Third, a number of courts have rejected class settlements by rigidly applying the requirements for class certification, even though the settlement eliminates the need for a trial. Fourth, a number of courts have essentially nullified so-called "issues classes" under Rule 23(c)(4) by requiring courts to

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examine whether the case as a whole satisfies the predominance requirement of Rule 23(b)(3). Finally, the Supreme Court has upheld binding arbitration clauses that prohibit resolution of disputes on a classwide basis.

Although some class actions remain viable, such as certain securities fraud, wage and hour, and antitrust class actions, the overall impact of these case law trends has been to curtail substantially the ability of plaintiffs to obtain class treatment. This Article thus concludes by urging courts, rule makers, and Congress to return to a more balanced approach to classwide adjudication.

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INTRODUCTION

The class action device, once considered a "revolutionary" vehicle for achieving mass justice,[1] has fallen into disfavor. Numerous courts have become skeptical about certifying class actions. Some have emphasized the pressures on defendants to settle after class certification is granted, stating that such pressure "is a factor [the court] weigh[s] in [the] certification calculus."[2] These court decisions impact virtually every element of the class certification process. Even requirements that defendants rarely disputed in the past, such as "numerosity"[3] and "commonality,"[4] are now potential impediments to class certification. Moreover, many courts now require that plaintiffs put forward considerably more evidentiary proof at the class certification stage than ever before.[5] In some instances, to obtain class treatment, plaintiffs must now prove major portions of their cases *on the merits*, as opposed to simply showing that they possess evidence *capable* of convincing a jury of classwide liability and damages.[6] As a result of these developments, experienced class action defense counsel can frequently identify a number of promising arguments to defeat certification, even in fairly routine cases.[7]

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1. Owen W. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 25 (1996).

2. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008) (citation and internal quotation marks omitted).

3. *See* FED. R. CIV. P. 23(a)(1) (requiring that the class be "so numerous that joinder of all members is impracticable").

4. *See* FED. R. CIV. P. 23(a)(2) (requiring "questions of law or fact common to the class").

5. *See infra* Part III.A.

6. *See id.*

7. Several law firms tout specialties in class action defense. Among them are: SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, http://www.skadden.com (last visited Sept. 29, 2012); SEYFARTH SHAW LLP, http://www.seyfarth.com/Commercial-Class-Action-Defense (last visited Sept. 29. 2012); SQUIRE SANDERS, http://www.squiresanders.com/class_actions (last visited Sept. 29, 2012); KIRLAND & ELLIS LLP, http://www.kirkland.com/sitecontent.cfm?contentid=218&itemid=673&displaymore=1 (last visited Sept. 29, 2012); SIDLEY AUSTIN LLP, http://www.sidley.com/financialservices/ (last visited Sept. 29, 2012); JONES DAY, http://www.jonesday.com/experiencepractices/servicedetail.aspx?serviceid=166 (last visited Sept. 29, 2012); DLA PIPER, http://www.dlapiper.com/us/services/detail

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Until relatively recently, defendants faced three major roadblocks in challenging class certification:

First, for many years following the adoption of the modern federal class action rule (Rule 23) in 1966, most courts believed that the class action device was a salutary tool for the administration of justice.[8] This perception has changed to a significant degree, in part because of judicial experience in applying Rule 23, and in part because of isolated—but highly publicized—instances of abuse in which class attorneys obtained handsome fees while class members received meager recoveries or worthless coupons.[9]

Second, prior to the adoption of Federal Rule of Civil Procedure 23(f) in 1998, defendants typically could not seek immediate appellate review of an order granting class certification.[10] If plaintiffs convinced the district court to certify the class, defendants generally settled prior to trial without the ability to challenge class certification on appeal.[11] Now, under Rule 23(f), defendants can seek discretionary interlocutory review of an order granting or denying class certification.[12] As a result, federal appellate courts (including the U.S. Supreme Court) now play a major role in developing class action jurisprudence.

Third, class counsel with state-law claims often filed their cases in a relatively small number of pro-plaintiff state-court jurisdictions. These cases were handled by elected judges who frequently lacked experience in class actions and were not sympathetic to large, out-of-state defendants. Because of strict limitations on removal in diversity cases, defendants could rarely remove state-law cases to federal court. That situation changed significantly in 2005, when Congress enacted the Class Action Fairness Act (CAFA).[13] The majority of sizable class actions are now brought in federal court in the first instance or immediately removed to federal court.[14]

Rule 23(f) and CAFA have altered the procedural landscape. Defendants can now secure a federal forum much more frequently, and

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.aspx?service=124 (last visited Sept. 29, 2012); GIBSON, DUNN & CRUTCHER LLP, http://www.gibsondunn.com/practices/pages/CCA.aspx (last visited Sept. 29, 2012); and O'MELVENY & MEYERS LLP, http://www.omm.com/classactions/ (last visited Sept. 29, 2012).

8. *See infra* Part I.

9. *See infra* Part II.B.

10. *See infra* Part II.A.

11. *See id.*

12. FED. R. CIV. P. 23(f).

13. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

14. *See infra* Part II.B.

they now have a tool for obtaining immediate appellate review of an order certifying a class. With many more class actions in federal court, and with more class certification decisions being reviewed by appellate courts, federal courts have created new hurdles for plaintiffs seeking class certification. As explained below, these rulings have impacted multiple requirements for class certification.[15] In addition, as discussed below, it is now exceedingly difficult for plaintiffs to secure arbitration on a classwide basis in cases involving signed arbitration agreements.

A critical event leading to Rule 23(f) and CAFA occurred in 1995 when the Seventh Circuit decided *In re Rhone-Poulenc Rorer Inc.*[16] In an opinion authored by Judge Posner, the Seventh Circuit granted mandamus and reversed a decision certifying a class of hemophiliacs who had received transfers of blood contaminated by the HIV virus. The Seventh Circuit found that mandamus was justified in part because the potentially bankrupting classwide verdict put the defendant "under intense pressure to settle."[17] The Supreme Court and several federal circuits quickly followed *Rhone-Poulenc* with important decisions curtailing class actions.[18] These decisions, in turn, created a climate for the adoption of Rule 23(f) and CAFA.

This Article analyzes the key developments that have impacted modern class action law. Part I briefly describes the period from the enactment of modern Rule 23 in 1966 to the mid-1990s. It shows that for much of this period, courts were generally receptive to class actions, even for sprawling mass tort cases such as asbestos suits. Part II describes events leading to

15. To obtain class certification, plaintiffs must satisfy three threshold requirements (a proper class definition, and a representative who is both a member of the class and has a live claim); four requirements under Rule 23(a) (numerosity, commonality, typicality, and adequacy of representation); and a requirement that the putative class satisfy all the elements of one subdivision of Rule 23(b)—(b)(1)(A), (b)(1)(B), (b)(2), or (b)(3). *See* ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL 23–25, 30–133 (West, 4th ed. 2012) [hereinafter KLONOFF, NUTSHELL].

16. 51 F.3d 1293 (7th Cir. 1995).

17. *Id.* at 1298. The court noted that "Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immerse judgment in a class action 'blackmail settlements.'" *Id.* (citing HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)).

18. For example, one year after *Rhone-Poulenc*, the Fifth Circuit overturned a decision certifying a nationwide class action by cigarette smokers, reasoning that "[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citing *Rhone-Poulenc*, 51 F.3d at 1298). In 1996, the Sixth Circuit granted mandamus and overturned the certification of a class of individuals claiming injuries as a result of penile implants manufactured by the defendants. *In re* Am. Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996). In 1997, and again in 1999, the U.S. Supreme Court reversed massive class settlements involving asbestos-related injuries. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

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the adoption of Rule 23(f) in 1998 and the enactment of CAFA in 2005. Part III identifies and critiques the most important changes in the case law that have taken place. These include federal district court and appellate decisions that:

- apply heightened evidentiary standards that require the court to resolve disputed issues bearing on class certification, even if those issues overlap with the merits;
- impose more demanding criteria in evaluating the class definition;
- find Rule 23(a)'s numerosity requirement unsatisfied based on a lack of supporting evidence in circumstances where, as a matter of common sense, the class includes far more than the minimum number necessary to establish numerosity;
- heighten the commonality requirement under Rule 23(a) by requiring not only a common question of law or fact but a question that is central to the outcome of the case;
- reject class certification out of fear that, because plaintiffs have not brought all possible claims, class members may be later barred from bringing those claims as a result of issue or claim preclusion—and therefore the class representatives and counsel are inadequate to represent the putative class;
- reject class certification under Rule 23(b)(2) because monetary claims are included with claims for declaratory and injunctive relief, even though the declaratory and injunctive claims are the most important part of the case;
- reject class certification under Rule 23(b)(3) because individualized issues are involved, without analyzing whether the common issues outweigh the individualized issues;
- reject class settlements by rigidly applying the criteria for class certification, as if the case were being tried as a class action, even though the settlement eliminates the need for a trial;
- reject proposals to try individual issues on a classwide basis under Rule 23(c)(4) on the ground that the cause of action as a whole must satisfy the predominance requirement of Rule 23(b)(3) or because bifurcation purportedly violates the Seventh Amendment; and

- enforce arbitration clauses that prohibit the adjudication of disputes on a classwide basis on the ground that the Federal Arbitration Act (FAA)[19] overrides the enforcement of both state and federal laws.

Not all courts have taken these approaches. Courts are sharply divided on some of these issues. Yet, the emergence of myriad cases that cut back the ability to pursue classwide relief represents a troublesome trend that undermines the compensation, deterrence, and efficiency functions of the class action device.[20]

Part IV assesses the current state of the law in light of the developments discussed in Part III. It notes that some plaintiffs have deliberately chosen to file their cases in federal circuits (such as the Ninth) that are more receptive to class actions. It also identifies some areas, such as securities fraud cases, wage and hour cases, ERISA cases, and antitrust cases, in which class actions continue to flourish. It nonetheless concludes that, although some classes continue to be certified, the jurisprudential trends discussed in this Article are disturbing. Unless these trends are corrected by courts, rule makers, and Congress, the compensation, deterrence, and efficiency functions of the class action device will continue to be compromised.[21]

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19. 9 U.S.C. §§ 1–307 (2006).

20. *See, e.g.*, *Amchem*, at 617–18 ("A class action solves [the] problem" that "small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights" by "aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." (citation and internal quotation marks omitted)); Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."); Butler v. Sears, Roebuck & Co. 702 F.3d 359, 362 (7th Cir. 2012) ("A class action is the more efficient procedure for determining liability and damages in a case such as this involving a defect that may have imposed costs on tens of thousands of consumers, yet not a cost to any one of them large enough to justify the expense of an individual suit."), *vacated and remanded*, No. 12-1067, 2013 U.S. WL 775366 (June 3, 2013); Haley v. Medtronic, Inc., 169 F.R.D. 643, 647 (C.D. Cal. 1996) (noting that class actions "accomplish judicial economy by avoiding multiple suits," and "protect the rights of persons who might not be able to present claims on an individual basis" (citing Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983)); FED. R. CIV. P. 23(b)(3) advisory committee's notes to 1966 amendment (stating that (b)(3) classes will "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.").

21. This Article is not an empirical study, and it does not purport to review all recent orders that certify or refuse to certify classes. Instead, the focus is on published federal decisions (including those on Lexis and Westlaw). Because of the magnitude of the class certification decision and the fact that courts are required by Rule 23(e) to review class settlements, the published opinions provide a fertile source of case law.

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I. FROM 1966 TO ADOPTION OF RULE 23(F) IN 1998

It is useful to provide some historical context.[22] Modern Rule 23, which originated in 1966, was "a bold and well-intentioned attempt to encourage more frequent use of class actions."[23] The prior version, from 1938, contained several classifications—"true," "hybrid," and "spurious" classes—that were difficult to apply and "baffled both courts and commentators."[24] The 1966 version also contained several categories of class suits, but "the new categories [were] described functionally rather than conceptually."[25]

Despite the new rule's encouragement of courts to utilize class actions, courts were reluctant at first to permit the certification of sprawling class actions, especially in the mass torts area. For instance, federal courts refused to permit class certification in litigation involving collapsed skywalks at the Kansas City Hyatt Regency[26] and in litigation involving the Dalkon Shield intrauterine device.[27]

The courts' cautious attitude changed in the mid-1980s. Responding to dockets clogged with mass torts cases, courts became far more receptive to approving major class actions. For instance, significant class actions involving asbestos[28] and Agent Orange[29] received the green light from federal appellate courts, and the Fourth Circuit upheld class treatment in the "Dalkon Shield" intrauterine device litigation.[30]

Perhaps the most notable decision during this period came from the Fifth Circuit, which today is arguably the circuit most reluctant to uphold class actions.[31] In *Jenkins v. Raymark Industries, Inc.*,[32] the court upheld

22. This brief discussion does not include all of the pendulum swings. For a thorough discussion of the 1966–1979 time period, see Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664 (1979); CHARLES A. WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE §§ 1751–1753.1 (2011) (providing overview of the history and purpose of the class action from its roots in English common-law courts to modern Rule 23).

23. Charles A. Wright, *Class Actions*, 47 F.R.D. 169, 170 (1970).

24. *Id.* at 176 (citation and internal quotations omitted).

25. *Id.* at 177.

26. *In re* Fed. Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982).

27. *In re* N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982).

28. *In re* Sch. Asbestos Litig., 789 F.2d 996 (3d Cir. 1986), *cert. denied*, 479 U.S. 852 (1986).

29. *In re* "Agent Orange" Prods. Liab. Litig., 818 F.2d 145 (2d Cir. 1987).

30. *In re* A.H. Robins Co., Inc., 880 F.2d 709 (4th Cir. 1989).

31. *See* Nicole Ochi, *Are Consumer Class and Mass Actions Dead? Complex Litigation Strategies After CAFA & MMTJA*, 41 LOY. L.A. L. REV. 965, 1033 (2008) ("[T]he Fifth Circuit seems to be a particularly hostile venue in which to try to certify a class . . . ."). For example, the Fifth Circuit—alone among the federal circuits—held that plaintiffs in securities fraud class actions were required to prove "loss causation" (in addition to reliance) in order to obtain class certification, an

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class certification in a case in which thousands of class members alleged asbestos-related personal injuries. The court noted that "courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters."[33] In assessing the choice between a class action and individualized adjudications, the court noted that a class action was "clearly superior to the alternative of repeating, hundreds of times over, the litigation of [the same factual issues]."[34] In contrast to later federal appellate decisions, which emphasized that the class action device imposed unfair pressure on defendants to settle,[35] the *Jenkins* court believed that "the defendants enjoy all the advantages, and the plaintiffs incur the disadvantages, of the class action—with one exception: the cases are to be brought to trial."[36] Summarizing its rationale, the court stated that, because of the wave of mass tort cases, "[n]ecessity moves us to change and invent."[37]

Class actions in the 1980s and 1990s (and even into the 2000s) resulted in numerous multi-million dollar and billion dollar settlements.[38] Attorneys' fees for class counsel—mainly from settlements—came under attack as being excessive.[39] Few, if any, class action lawsuits went to trial,[40] and in many of the settlements, the benefits received by the class members were minimal.[41] Class settlements were not limited to mass tort cases. Plaintiff firms brought class actions involving securities fraud, antitrust, consumer protection, and many other areas of law.[42]

During this time, while many plaintiff lawyers amassed great wealth, the class action device began to receive significant unfavorable press.[43]

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approach since overruled unanimously by the Supreme Court. Oscar Private Equity Inv. v. Allegiance Telecomm., Inc., 487 F.3d 261, 269–70 (5th Cir. 2007), *overruled in relevant part by* Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179 (2011).

32. 782 F.2d 468 (5th Cir. 1986) (review granted under 28 U.S.C. § 1292(b)).

33. *Id.* at 473 (citation omitted).

34. *Id.*

35. *See infra* Part II.A.

36. *Raymark*, 782 F.2d at 473.

37. *Id.*

38. *See, e.g.*, S. REP. NO. 109-14, at 14–20 (2005) (discussing numerous settlements in which most of the recovery went to class counsel).

39. *Id.*

40. *See* Robert H. Klonoff, Edward K.M. Bilich & Suzette M. Malveaux, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS 356 (West, 3d ed. 2012) [hereinafter KLONOFF ET AL., CASEBOOK].

41. S. REP. NO. 109-14, at 14–20.

42. *Id.*

43. *See, e.g.*, Richard B. Schmitt, *Leaky System: Suits Over Plastic Pipe Finally Bring Relief, Especially for Lawyers*, WALL ST. J., Nov. 20, 1995, at A1; Michelle Singletary, *Coupon Settlements*

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Because of the high stakes, defendants often felt compelled to settle large class actions rather than risk a potentially bankrupting judgment.[44] And, in most of these cases, defendants settled without having had an opportunity for immediate appellate review of the decision granting class certification.

In 1995, the *Rhone-Poulenc* court was persuaded to invoke mandamus to review a class certification order.[45] At the time the Seventh Circuit rendered its decision, interlocutory review under Rule 23(f) did not exist, and few other options were available.[46] Other than the stringent review criteria provided by 28 U.S.C. § 1292(b),[47] the only immediate appellate remedy for most defendants facing a grant of class certification was the extraordinary writ of mandamus.[48]

Most appellate courts were unwilling to invoke mandamus.[49] In 1996, in *Castano v. American Tobacco Co.*,[50] the Fifth Circuit exercised its jurisdiction to review the district court's certification order, but it did so only because the district court certified the issue for appeal under 28

Fall Short, WASH. POST, Sept. 12, 1999, at H1. These and numerous other articles are cited in CAFA's legislative history. *See* S. REP. NO. 109-14, at 19 n.76, 20 n.79.

44. *See* S. REP. NO. 109-14, at 20–22 (section entitled "Judicial blackmail forces settlement of frivolous cases").

45. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995); *see also In re* Am. Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996) (granting mandamus and reversing class certification in penile implant case); Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997) (granting mandamus and reversing class certification in race discrimination case).

46. In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the Supreme Court rejected plaintiffs' argument that the denial of class certification should be immediately appealable as a "collateral order" (and thus subject to an exception to finality under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)). *Coopers & Lybrand*, 437 U.S. at 469. The Court in *Coopers & Lybrand* also rejected the "death knell" argument, *i.e.*, that a denial of class certification was a final judgment because, as a practical matter, the case would not be pursued absent a class action. *Id.* at 474–76. For a discussion of the various options for immediate appellate review prior to Rule 23(f), *see* KLONOFF ET AL., CASEBOOK, *supra* note 40, at 690–95.

47. Under 28 U.S.C. § 1292(b) (2006), if a district court certifies in writing that an "order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," the court of appeals has discretion to grant immediate review.

48. The power to issue a writ of mandamus stems from the All Writs Act, 28 U.S.C. § 1651 (2006). This power is exceedingly narrow: "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." Will v. United States, 389 U.S. 90, 95 (1967) (citation omitted).

49. *See, e.g.*, Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1557–62 (2000) (discussing *Rhone-Poulenc* and noting that while "[s]ome increased use of the writ of mandamus ha[d] occurred, it [was] hardly clear that it ha[d] been used in enough instances to constitute a trend"); Baxter Healthcare Corp. v. U.S. Dist. Court for Cent. Dist. of Cal., 121 F.3d 714 (9th Cir. 1997) (unreported) (post *Rhone-Poulenc* decision denying petition for mandamus seeking to overturn order certifying class).

50. 84 F.3d 734 (5th Cir. 1996).

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U.S.C. § 1292(b),[51] something most other district courts were unwilling to do.[52] Thus, despite isolated federal appellate court decisions, a rulemaking solution was needed to provide interlocutory appellate review.

II. REFORMS IN APPELLATE REVIEW AND FEDERAL JURISDICTION

A. Federal Rule of Civil Procedure 23(f)

The Advisory Committee on Civil Rules began looking at possible amendments to Rule 23 in 1991 and recognized a need for an interlocutory appellate remedy. It was not until 1995, however, with the decision in *Rhone-Poulenc*, that the Committee focused extensively on such an amendment to Rule 23.[53] Although there was much support for the addition, there was strong opposition as well, especially from plaintiffs' attorneys, who worried that such a rule lacked clear guidelines and would result in increased costs and unnecessary delay.[54] The Committee concluded that both plaintiffs and defendants needed interlocutory review. For plaintiffs, securing review of a denial of class certification (absent an interlocutory appeal) meant taking an individual plaintiff's case to trial and obtaining a final judgment, thereby incurring expensive discovery, often with only a slight hope of ultimately overturning the denial of certification on appeal.[55] For defendants, securing a final judgment meant risking a potentially bankrupting verdict at trial, with no guarantee of ultimately prevailing on class certification.[56] Indeed, the very fact that a trial had already occurred would, as a practical matter, pose great obstacles for defendants in arguing that the case could not feasibly be tried on a classwide basis. Defendants no doubt feared that appellate courts, faced with a trial verdict and years of litigation, would do everything possible to uphold the verdict. And even if counsel for defendants predicted favorable odds for ultimate reversal, the potentially significant impact of a large verdict on a company's stock during the appeals process made corporate officials reluctant to commit to a protracted battle. Settlements, even for many millions (or billions) of dollars, appeared the lesser of evils.

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51. *See supra* note 47.

52. Granting 1292(b) review essentially requires the district court to concede the serious possibility of error in its ruling by finding, *inter alia*, "a controlling question of law as to which there is a substantial ground for difference of opinion." 28 U.S.C. § 1292(b).

53. *See* Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), A Good Rulemaking*, 69 TENN. L. REV. 97, 102 (2001).

54. *See id.* at 104–05.

55. *See* FED. R. CIV. P. 23(f) advisory committee's note.

56. *Id.*

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With these competing interests in mind, the drafters crafted Rule 23(f) in neutral language:

> A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification if application is made to it within ten [now 14] days after the entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.[57]

Under Rule 23(f), either plaintiff (upon denial of certification) or defendant (upon the grant of certification) can ask the appellate court to grant interlocutory review. The rule gives the appellate court "unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for *certiorari*."[58] Permission of the district court is not required. Rule 23(f) has enabled not only federal circuit courts, but also the Supreme Court (when reviewing a Rule 23(f) circuit court decision) to hear interlocutory appeals.[59]

Following the adoption of Rule 23(f), appellate courts wrestled with the criteria for granting review. A few variations evolved.[60] For instance, in *Blair v. Equifax Check Services, Inc.*,[61] the Seventh Circuit construed Rule 23(f) to authorize review: (1) where the "denial of the class status sounds the death knell of the litigation, because the representative plaintiff's claim is too small to justify the expense of the litigation"; (2) where the grant of class certification sounds the "death knell" for defendants because an order certifying a class "can put considerable pressure on the defendant to settle"; and (3) where an interlocutory appeal "may facilitate the development of the law" of class actions.[62] Some circuits have limited the third *Blair* category to "issues that are both important to the particular litigation and likely to escape effective review

57. FED. R. CIV. P. 23(f).

58. FED. R. CIV. P. 23(f) advisory committee's note (emphasis added).

59. For instance, in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Supreme Court granted *certiorari* from an en banc decision that stemmed originally from the granting of Rule 23(f) review by a Ninth Circuit panel. *See* Dukes v. Wal-Mart, Inc., 474 F.3d 1214, 1223 (9th Cir. 2007), *aff'd*, 603 F.3d 571 (9th Cir. 2010) (en banc), *rev'd* 131 S. Ct. 2541 (2011). The case of *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011), also reached the Supreme Court on *certiorari* after the Fifth Circuit granted 23(f) review and rendered its decision. *See* Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., 597 F.3d 330, 334 (5th Cir. 2010), *rev'd*, 131 S. Ct. 2179 (2011). Other examples involving Rule 23(f) include *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

60. *See* CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1802.1 (3d ed. 2011) (discussing courts' various approaches to Rule 23(f)).

61. 181 F.3d 832 (7th Cir. 1999).

62. *Id.* at 834–35.

after the conclusion of the trial."[63] Several circuits have added a fourth situation in which interlocutory review would be justified, *i.e.*, when the decision of the district court is "manifestly erroneous."[64] In those circuits, a "manifestly erroneous" ruling will justify Rule 23(f) review without the need to satisfy any other criterion.[65] While these formulations differ somewhat, all are neutral in the sense that, on their face, they do not favor either plaintiffs or defendants. Either side is permitted to seek review of a class certification ruling (granting or denying certification) if one or more of the criteria are satisfied.

In fact, however, in terms of sheer numbers, Rule 23(f) has served primarily as a device to protect defendants. Appendix A reflects all Rule 23(f) appeals accepted from November 30, 1998 through May 31, 2012.[66] Out of the 209 Rule 23(f) appeals accepted, 144 (or about 69 percent) were appeals by defendants after the grant of class certification, whereas only 65 (31 percent) were appeals by plaintiffs after the denial of class certification. Of the 144 appeals by defendants, defendants were successful in 101 cases (a 70 percent reversal rate).[67] Of the 65 appeals by plaintiffs, plaintiffs prevailed in only 26 cases (or 30 percent of the time). Thus, even when plaintiffs convinced the appellate court to grant review, they lost in the majority of cases. In short, with respect to appellate court review pursuant to Rule 23(f), defendants have benefited more from Rule 23(f) than have plaintiffs. As Part III reveals, federal appellate courts have rendered decisions that impose new hurdles that make certification even more challenging for plaintiffs.

In a number of the cases granting review at the request of defendants, the reviewing courts cited the pressure to settle as a reason for granting review.[68] This reason for granting interlocutory review is troublesome. In

63. Chamberlan v. Ford Motor Co., 402 F.3d 952, 959 (9th Cir. 2005) (citing Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 294 (1st Cir. 2000)); *see also In re* Sumitomo Copper Litig., 262 F.3d 134, 139–40 (2d Cir. 2001).

64. *See, e.g.*, Prado-Steinman *ex rel.* Prodo v. Bush, 221 F.3d 1266, 1274–75 (11th Cir. 2000); *In re* Lorazepam & Chlorazepate Antitrust Litig., 289 F.3d 98, 105 (D.C. Cir. 2002); Newton v. Merrill Lynch, Pierce, Fenner & Smith, 259 F.3d 154, 163–65 (3d Cir. 2001); Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 145 (4th Cir. 2001).

65. *See, e.g.*, *Chamberlan*, 402 F.3d at 959.

66. The analysis includes only cases found on LEXIS or Westlaw.

67. It should be noted that because courts do not always cite Rule 23(f), it is difficult to be sure that every single case has been located.

68. *See, e.g.*, *In re* New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 8, 26 (1st Cir. 2008); McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 231 (2d Cir. 2008); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 162 (3d Cir. 2001); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008); Regents of Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc., 482 F.3d 372, 379 (5th Cir. 2007); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 675

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every case in which a class is certified, a defendant can argue as a ground for appeal that it faces intense pressure to settle. Pressure to settle (or to plead guilty in criminal cases) is a reality in our judicial system—in traditional, bipolar civil litigation, agency enforcement actions, or criminal prosecutions. The law does not, for example, provide for immediate appellate review of a decision upholding the sufficiency of an indictment merely because a trial court's refusal to dismiss that indictment puts pressure on the defendant to enter a guilty plea. But even if it were possible to separate out cases in which a defendant is not under pressure to settle,[69] the appellate courts, in the context of Rule 23(f), are in no position to engage in the case-specific factfinding necessary to gauge the true pressure on the defendant. Likewise, at least in cases involving relatively small individual claims, plaintiffs can argue that denial of class certification will effectively end the case. Thus, the fact that a plaintiff will not pursue a case absent class certification should not be a reason for plaintiff to secure immediate review of a decision denying certification.[70] Even if it were possible to isolate which class action suits truly involved claims that were so small that the denial of certification was in fact the death knell, "[t]he formulation of an appealability rule that turns on the amount of the plaintiff's claim is plainly a legislative, not a judicial, function."[71] Review under Rule 23(f) should be limited to cases in which such review is necessary to resolve conflicts among the courts or to address an issue of exceptional importance. The test should not turn on whether the certification ruling is the "death knell" for either the plaintiff or the defendant.[72]

(7th Cir. 2001); Isaacs v. Sprint Corp., 261 F.3d 679, 681 (7th Cir. 2001); West v. Prudential Secs., Inc., 282 F.3d 935, 937 (7th Cir. 2002); *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1016 (7th Cir. 2002); Creative Montessori Learning Ctrs. v. Ashford Gear LLC, 662 F.3d 913, 915 (7th Cir. 2011); CE Design Ltd. v. King Architectural Metals, Inc., 637 F.3d 721, 723 (7th Cir. 2011); Elizabeth M. v. Monetenez, 458 F.3d 779, 784 (8th Cir. 2006).

69. *Cf.* McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 491 (7th Cir. 2012) ("Merrill Lynch is in no danger of being destroyed by a binding class-wide determination that it has committed disparate impact discrimination against 700 brokers."), *cert. denied*, 133 S. Ct. 338 (2012); *Chamberlan*, 402 F.3d at 960–61 (denying defendant's request for Rule 23(f) review in part because of defendant's failure to submit evidence that certification would coerce a settlement).

70. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) (holding that "death knell" of plaintiffs' case absent appellate review did not create a final judgment).

71. *Id.* at 472.

72. According to the Advisory Committee notes, pressure on defendant to settle (or the death knell for plaintiff) is the reason for an interlocutory appellate rule, but is not the criterion upon which review should be granted. Virtually every grant of class certification puts pressure on defendants to settle; and plaintiffs will rarely go forward with an individual case, when class certification is denied. Thus, it is not appropriate for a court to grant review *because* of pressure to settle or death knell. Rather, review should depend on whether there is an issue that justifies immediate review. The

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B. The Class Action Fairness Act

Federal Rule 23(f) had one serious limitation: it only operated for class actions in federal court. If the case was brought in state court and was not successfully removed, Rule 23(f) did not apply. Even if, in addition to the state case, there was overlapping litigation in federal court involving the same or a similar class, the federal court could rarely control what the state court did. The reason is that federal courts have only limited authority to enjoin class actions in state court.[73] Yet, many of the most egregious examples of class action abuse had occurred in the state courts, often by elected judges who favored class members over large, out-of-state corporations.[74]

The concerns about abuses in state court were not without foundation. During the hearings on CAFA, members of Congress heard about myriad instances of alleged abuse by state-court judges and plaintiffs' counsel.[75] These included many examples in which class members recovered only small sums of money or undesirable coupons, rebates, or vouchers.[76] In one well-publicized example, the *Bank of Boston* settlement, class

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Advisory Committee notes support this interpretation. After noting that a grant of certification can pressure the defendant to settle and that the denial of certification can be the death knell of the case, the Notes state, "These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review *in cases that show appeal-worthy certification issues* . . . . Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation." FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendments (emphasis added). Thus, the appellate court's decision whether to grant review should depend on whether there are "appeal-worthy" issues.

73. *See, e.g.*, Smith v. Bayer Corp., 131 S. Ct. 2368 (2011) (holding that the district court, after refusing to certify class action in federal court, lacked authority under the Anti-Injunction Act's "relitigation exception," 28 U.S.C. § 2283 (2006), to enjoin similar class action brought under West Virginia's class action rule); *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 143 (3d Cir. 1998) (after the Third Circuit overturned defective products settlement in federal court, the parties entered into a restructured settlement in Louisiana state court; the Third Circuit upheld district court's refusal to enjoin state-court settlement, holding, *inter alia*, that the district court lacked personal jurisdiction, and federal court review of the state-court settlement would have violated the Full Faith and Credit Act and the *Rooker-Feldman* doctrine).

74. *See, e.g.*, Genevieve G. York-Erwin, Note, *The Choice-of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1802–03 (2009); Laura G. Dooley, *National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation*, 83 N.Y.U. L. REV. 411, 423 (2008); Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1664–65 (2008); Jacob R. Karabell, Note, *The Implementation of "Balanced Diversity" Through the Class Action Fairness Act*, 84 N.Y.U. L. REV. 300, 304 (2009).

75. *See, e.g.*, S. REP. NO. 109-14, at 13–23; 151 CONG. REC. S1225, S1228 (daily ed. Feb. 10, 2005) (statement of Sen. Orrin Hatch); 151 CONG. REC. H723, S726 (daily ed. Feb. 17, 2005) (statement of Rep. F. James Sensenbrenner); 151 CONG. REC. S999-02, S999 (daily ed. Feb. 7, 2005) (statement of Sen. Arlen Specter).

76. *See supra* note 74.

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members actually ended up *losing* money (for instance, one class member recovered $4 but the bank charged her an $80 fee that went towards the $8.5 million attorneys' fee award).[77]

Thus, based on some legitimate—if at times exaggerated—concerns, Congress adopted a landmark statute to ensure that most major class actions could be removed to federal court.[78] President George W. Bush signed CAFA into law on February 18, 2005.[79]

CAFA was deemed necessary because the then-existing law on diversity and removal made it difficult for defendants to remove even nationwide state-law class actions to federal court. Although cases involving federal questions are removable to federal court under 28 U.S.C. §§ 1331 and 1441,[80] the general law of removal, which applied pre-CAFA, permitted removal of state-law class actions to federal court only if a case satisfied the stringent requirements for diversity jurisdiction—complete diversity between plaintiffs and defendants[81] and (absent supplemental jurisdiction) an amount-in-controversy of $75,000 per claimant.[82] Moreover, prior to CAFA, defendants had only one year from the date of filing to remove a class action to federal court,[83] and one defendant in a multi-defendant case could not remove a case to federal court without the

77. S. REP. No. 109-14 at 14–15 (discussing *Bank of Boston* Alabama state-court settlement). *See also* Kamilewicz v. Bank of Boston, 92 F.3d 506 (7th Cir. 1996) (declining, despite concerns, to review the Alabama settlement).

78. Congress carved out narrow exceptions in CAFA for suits that impact primarily the forum state. *See* KLONOFF, ET AL., CASEBOOK, *supra* note 40, at 470–73.

79. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.). The very name of the statute, the Class Action *Fairness* Act (emphasis added), underscored that, in Congress's view, defendants needed a federal forum—especially in cases impacting multiple states—to secure fair treatment. A separate set of CAFA provisions established new rules for class settlements in federal court, including government notification of class settlements, limits on so-called "coupon settlements," restrictions on "net loss settlements" (where class members pay counsel more in fees than their share of recovery), and prohibitions on settlements that favor some class members over others based on their proximity to the forum court. *See* 28 U.S.C. §§ 1712, 1714, 1715(b), (d), (e)(l) (2006); *see generally* KLONOFF, ET AL., CASEBOOK, *supra* note 40, at 621–22 (summarizing CAFA settlement provisions).

80. 28 U.S.C. §§ 1331, 1441 (2006).

81. *Id*. at § 1441(b).

82. 28 U.S.C. § 1332(a) (2006); *see* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 549 (2005) (holding that when named plaintiff satisfies $75,000 amount-in-controversy requirement, 28 U.S.C. § 1367 allows supplemental jurisdiction over class members who do not satisfy the amount-in-controversy requirement).

83. 28 U.S.C. § 1446(b) (2006). *But see* Federal Courts Venue and Jurisdiction Act of 2011, Pub. L. 112-63, 125 Stat. 758 (codified in scattered sections of 28 U.S.C.) (one-year requirement no longer applies if the district court finds that the plaintiff deliberately failed to disclose the amount in controversy to prevent removal).

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consent of all defendants.[84] Finally, removal was not allowed when any of the defendants was a citizen of the state where the suit was brought.[85]

CAFA eliminated these restrictions by (1) permitting removal with "minimal diversity," *i.e.*, any class member diverse from any defendant and an amount in controversy for the entire case of more than $5 million;[86] (2) permitting removal without regard to the one-year deadline for removal prior to CAFA;[87] (3) permitting removal by one defendant without the consent of the other defendants;[88] and (4) permitting removal even when a defendant is a citizen of the state where the suit was brought.[89] Through these and other provisions, [90] CAFA became an important vehicle to ensure that the vast majority of significant class actions were heard in federal court.

CAFA has in fact had an enormous impact in shifting most class actions to federal court.[91] The combination of CAFA and Rule 23(f) gave federal courts the opportunity to address a host of important class certification issues.

III. NEW RIGOROUS FEDERAL CASE LAW

Federal courts have not simply heard and decided more cases as a result of Rule 23(f) and CAFA; they have adopted troublesome new standards applicable to plaintiffs seeking classwide relief. This Part

84. *See, e.g.*, Emrich v. Touche Ross & Co., 846 F.2d 1190, 1193 n.1 (9th Cir. 1988) (interpreting 28 U.S.C. § 1446).

85. 28 U.S.C. § 1441(b).

86. 28 U.S.C. § 1453(b) (2006); 28 U.S.C. § 1332(d)(2), (d)(5)(B). *See* Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345, 1348 (2013) (noting that CAFA provides federal courts with original jurisdiction "if the class [action] has more than 100 members, the parties are minimally diverse, and the 'matter in controversy exceeds the sum or value of $5,000,000'" (quoting 28 U.S.C. § 1332(d)(2), (d)(5)(B)).

87. *Id.*

88. *Id.*

89. *Id.*

90. *See* KLONOFF ET AL., CASEBOOK, *supra* note 40, at 467–77 (summarizing CAFA's jurisdictional provisions and discussing case law, commentary, and legislative history).

91. *See, e.g.*, Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1610 (2008) ("CAFA has increased not only the number of class action removals to federal court, but also the number of class action original filings in federal court" (footnote omitted)); 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. 1723, 1754 (2008) (analysis of class actions in federal courts "provides support for the conclusion that the federal courts have seen an increase in diversity removals and, especially, original proceedings in the post-CAFA period as a result of the expansion of the federal courts' diversity of citizenship jurisdiction"); Gail E. Lees, et al., *Year in Review on Class Actions*, 13 CLASS ACTION LITIG. REP. (BNA) No.4, Feb. 24, 2012, at 225 (noting—indeed, exclaiming—that, following CAFA's enactment, "[C]onsumer class action filings increased by 577% in the district courts in the Ninth Circuit!").

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analyzes the key areas in which federal courts have made class actions more difficult for plaintiffs to bring.[92] Not all courts have adopted these approaches, and in some areas the courts are sharply divided. This Part discusses new evidentiary burdens on plaintiffs; various class certification requirements (the class definition, numerosity, commonality, adequacy, and classes under Rule 23(b)(2) and (b)(3)); certification of settlement classes; "issues classes" under Rule 23(c)(4); and classwide arbitration.[93]

These decisions share a common premise: the class certification decision is the defining moment in a class action, and thus a district court should not permit a classwide proceeding to go forward unless the most exacting criteria are met. The Rule 23(a) and (b) criteria, by their terms, have not changed in any significant way since 1966,[94] but some courts

92. This section does not identify all areas in which courts have imposed new rigorous standards. Rather, the purpose is to identify the most important trends. For instance, the Supreme Court in *Ortiz v. Fibreboard*, 527 U.S. 815 (1999), has imposed rigorous criteria for certifying so-called "limited fund" classes under Rule (23)(b)(1)(B), and it has suggested in dictum that limited fund class actions may never be suitable in mass tort cases. *See* KLONOFF, NUTSHELL, *supra* note 15, at 337–38; *In re* Katrina Canal Breaches Litig., 628 F.3d 185 (5th Cir. 2010) (reversing certification of a limited fund (b)(1)(A) class seeking recovery for victims of Hurricane Katrina); Doe v. Karadzic 192 F.R.D. 133 (S.D.N.Y. 2000) (in light of *Ortiz*, court reversed prior certification of a limited fund class seeking damages for human rights violations allegedly committed in Bosnia-Herzegovina at the behest of Radovan Karadzic). Rule 23(b)(1)(B) has never been a key subdivision for certifying classes, so the practical impact of *Ortiz* is limited. Similarly, courts have held that under Rule 23(b)(1)(A), which is designed to protect a defendant from being subject to conflicting court orders, KLONOFF, NUTSHELL, *supra* note 15, at 76, only claims for declaratory and injunction relief can be certified. *See, e.g.*, Babineau v. Fed. Express Corp., 576 F.3d 1183, 1195 (11th Cir. 2009) (reaffirming prior Eleventh Circuit law). Such a holding renders (b)(1)(A) essentially meaningless given the availability of (b)(2) for declaratory and injunctive relief. Like (b)(1)(B), however, (b)(1)(A) has not been widely utilized, so the practical impact of cases such as *Babineau* is limited. *See generally* Robert H. Klonoff, *Class Actions for Monetary Relief Under Rule 23(b)(1)(A) and (b)(1)(B): Does Due Process Require Notice and Opt-Out Rights?*, 82 GEO. WASH. L. REV. (forthcoming 2013) (discussing Rule 23(b)(1)(A) and (b)(1)(B)), draft *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216082. Finally, some courts have made it more difficult to satisfy Rule 23(a)(3)'s typicality requirement. In most instances, however, the same reasoning would lead to an identical outcome under commonality ((a)(2)), adequacy ((a)(4)), or predominance ((b)(3)) *See, e.g.*, Retired Chicago Police Ass'n v. Chicago, 7 F.3d 584, 598 (7th Cir. 1993) (affirming the district court's denial of class certification based on failure to satisfy typicality and adequacy of representation requirements); Skipper v. Giant Food Inc., 68 F. App'x 393, 397 (4th Cir. 2003) (affirming the district court's denial of class certification for failure to satisfy typicality, commonality, and adequacy of representation requirements).

93. The discussion is presented in logical order, not in order of importance. It begins with the evidentiary standard for class certification, then focuses on the requirements for class certification (threshold, Rule 23(a), and Rule 23(b), *see supra* note 15), and then discusses classwide arbitration.

94. As discussed *infra* notes 153–54 and accompanying text, the 2003 amendments to Rule 23 eased the timeline somewhat (*see* FED. R. CIV. P. 23(c)(1), changing timing of the certification decision from "as soon as practicable" after the filing of suit to "an early practicable time") and also eliminated so-called "conditional" certification. They also added provisions relating to settlement (Rule 23(e)), appointment of class counsel (Rule 23(g)), and attorneys' fees (Rule 23(h)). The

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have become increasingly skeptical in reviewing whether a particular case satisfies those requirements.[95]

A. Heightened Evidentiary Burdens

1. Resolving Merits-Based Disputes at the Class Certification Stage

Rule 23 defines in detail the requirements for class certification,[96] but it says nothing about whether those requirements must be satisfied by evidence (as opposed to merely by pleading). Prior to a landmark 2001 Seventh Circuit decision, *Szabo v. Bridgeport Machines, Inc.*,[97] authored by Judge Easterbrook, most courts permitted plaintiffs to seek class certification based on the pleadings or on only minimal evidentiary support.[98]

For instance, in *Krueger v. New York Telephone Co.*,[99] the court stated that "[t]he Court should not resolve any material factual disputes in the process of determining whether plaintiffs have provided a reasonable basis for their assertions."[100] Similarly, in *Newman v. CheckRite California, Inc.*,[101] the court stated that "[w]hen evaluating a motion for class certification, the Court accepts all well-pleaded facts as true."[102]

Rule 23(f) provided the Seventh Circuit the opportunity to decide what quantum of evidence, if any, plaintiffs needed to submit in support of class certification. In examining the case law, the Seventh Circuit determined that the prevailing approach of looking primarily at the pleadings stemmed from a misreading of the Supreme Court's decision in *Eisen v. Carlisle & Jacqueline*.[103]

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amendments did not, however, alter the certification criteria of Rule 23(a) and (b) or the evidentiary burdens to establish those criteria.

95. *See supra* note 92 and accompanying text.

96. *See* FED. R. CIV. P. 23(a), (b); *see also supra* note 15.

97. 249 F.3d 672 (7th Cir. 2001).

98. *See infra* note 102.

99. 163 F.R.D. 433 (S.D.N.Y. 1995).

100. *Id*. at 438 (citations omitted).

101. No. Civ. S-93-1557 LKK, 1996 WL 1118092 (E.D. Cal. Aug. 2, 1996)

102. *Id.* at *2 (citations omitted); *accord, e.g.*, Avila v. Van Ru Credit Corp., No. 94 C 3234, 1995 WL 22866, at *1 (N.D. Ill. Jan. 18, 1995) ("In considering a motion for class certification, the allegations of the complaint are taken as true and the merits are not considered" (citation omitted)).

103. 417 U.S. 156 (1974). Numerous cases had relied on *Eisen* in holding that courts could not examine the merits in deciding class certification. *See, e.g.*, Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975) ("The Court made clear in [*Eisen*] that [the class certification] determination does not permit or require a preliminary inquiry into the merits"); *In re* Lease Oil Antitrust Litig., 186 F.R.D. 403, 419 (S.D. Tex. 1999) (citing *Eisen* in stating: "In evaluating a motion for class certification, . . . the court does not have the authority to conduct a preliminary inquiry into the merits of the case, and

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The issue in *Eisen* was whether a court had discretion to shift the cost of class notice from the plaintiff (who normally incurred the cost) to the defendant based on the court's assessment that the plaintiff was likely to prevail on the merits. The *Eisen* district court (having been previously reversed by the Second Circuit for denying class certification) had adopted this approach. After conducting a hearing and finding that plaintiffs were likely to prevail on the merits, the district court ordered defendants to pay ninety percent of the cost of notifying millions of class members.[104] In rejecting that approach, the Supreme Court stated: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[105] According to the Court, "[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."[106] Numerous courts interpreted this language to mean that they could not address the merits of a case in addressing class certification, even if an element of class certification overlapped with the merits.[107]

Another Supreme Court case, however, pointed in a different direction. In *General Telephone Co. v. Falcon*,[108] a Title VII case, the Court stated: "Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and *sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question*."[109] The Court concluded "that a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, *after a rigorous analysis*, that the prerequisites of Rule 23(a) [and at least one subdivision of 23(b)] have been satisfied."[110]

By the mid-1990s, and especially in light of *Falcon*, some courts retreated from a strict construction of *Eisen*, articulating the principle that courts should look beyond the pleadings as part of a rigorous class

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hence the substantive allegations contained in the complaint are accepted as true"); Kallus v. Gen. Host Corp., Civ. No. B-87-160, 1988 WL 124074, at *3 (D. Conn. June 30, 1988) (citing *Eisen* in holding that at the class certification stage, "the Court need not inquire into the merits of the case, but need only examine the plaintiffs' allegations").

104. *Eisen*, 417 U.S. at 168.
105. *Id.* at 177.
106. *Id.* at 178 (citation omitted).
107. *See supra* note 103.
108. 457 U.S. 147 (1982).
109. *Id.* at 160 (emphasis added).
110. *Id.* at 161 (emphasis added).

certification analysis.[111] Even these courts, however, generally looked only to see if there was *some* evidence to support class certification and did not take it upon themselves to resolve conflicting testimony going to the merits.[112] In *Szabo*, the Seventh Circuit squarely held that *Eisen* did not prohibit courts from deciding *the merits* when the merits overlapped with an element of class certification.[113] The Seventh Circuit endorsed not only rigorous review of the evidence, but also the *resolution* of conflicting evidence bearing on the merits.

Szabo involved a nationwide class of individuals who purchased allegedly defective machine tools from Bridgeport Machines. The complaint asserted fraud and breach of warranty claims. In attempting to avoid individualized issues involving oral representations by Bridgeport's distributors, the putative class alleged that all of the misrepresentations were authorized or ratified by Bridgeport.[114] Bridgeport denied that assertion. The putative class also argued that the machine tool at issue was "unsuited to any machine tool with which it may be mated," whereas Bridgeport argued that the unit's "operation depends at least in part on the tool it is controlling."[115] In addition to these disputes, which were relevant both to the merits and class certification, the Seventh Circuit noted that there were other important disputes and that these "disputes . . . strongly influence the wisdom of class treatment."[116] Indeed, the court said that the resolution of the ratification issue was "vital to any sensible decision about class certification."[117]

The Seventh Circuit thus ruled that the district court had erred in declining to resolve these disputes. As the appellate court explained, "nothing in . . . *Eisen* . . . prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in [Rule 23] and exercise the discretion it confers."[118] The *Szabo* court reasoned that, unlike a Rule 12(b)(6) motion to dismiss, in which the factual sufficiency

111. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996) ("A district court certainly may look past the pleadings to determine whether the requirements of Rule 23 have been met."); *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996) ("Ordinarily the [class certification] determination should be predicated on more information than the pleadings will provide." (citation omitted).).

112. *See, e.g.*, *In re* Disposable Contact Lens Antitrust Litig., 170 F.R.D. 524, 531–32 (M.D. Fla. 1996) (evidence demonstrating "a 'colorable method' of proving [antitrust] impact" was sufficient) (citation omitted).

113. 249 F.3d at 676–77.

114. *Id.* at 674.

115. *Id.*

116. *Id.* at 675.

117. *Id.* at 674.

118. *Id.* at 677.

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of a case will be determined later by a motion for summary judgment and (possibly) a trial, "an order certifying a class usually is the district judge's last word on the subject; there is no later test of the decision's factual premises (and, if the case is settled, there could not be such an examination even if the district judge viewed the certification as provisional)."[119] As a result, the Seventh Circuit held that "[b]efore deciding whether to allow a case to proceed as a class action . . . a judge should make whatever factual and legal inquiries are necessary under Rule 23."[120] Thus, on remand, the *Szabo* district court needed to resolve all disputed merits issues that overlapped with the elements of class certification.[121]

Virtually every federal circuit to rule on the issue has followed the *Szabo* court's analysis.[122] For instance, a Second Circuit panel, in *In re Initial Public Offering Securities Litigation (*"*IPO*"*)*,[123] repudiated an earlier decision (without even ordering en banc review) and held that "the fact that Rule 23 requirement might overlap with an issue on the merits does not avoid the court's obligation to make a ruling as to whether the requirement is met[.]"[124]

The decision containing the most extensive discussion of this issue is the Third Circuit's opinion in *In re Hydrogen Peroxide Antitrust Litigation*.[125] Citing cases such as *Szabo* and *IPO*, the Third Circuit summarized its detailed analysis as follows:

> [W]e clarify three key aspects of class certification procedure. First, the decision to certify a class calls for findings by the court, not

119. *Id.* at 676.

120. *Id.*

121. *Id.* On remand, the district court ordered a period of more than six months of class discovery, to be followed by a five-day bench trial on class certification. Bridgeport, however, declared bankruptcy before these additional proceedings were completed. *Id. See* Steig D. Olson, *"Chipping Away": The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935, 955–56 (2009) (discussing events on remand in *Szabo* and quoting district court orders).

122. *See, e.g.*, Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 582 (9th Cir. 2010) (en banc) (noting that "every circuit to have considered this issue . . . has reached essentially the same conclusion: *Falcon*'s central command requires district courts to ensure that Rule 23 requirements are actually met, not simply presumed from the pleadings"), *rev'd on other grounds*, 131 S. Ct. 2541 (2011).

123. 471 F.3d 24 (2d Cir. 2006).

124. *Id.* at 27 (criticizing *In re Visa Check/MasterMoney Antitrust Litig*., 280 F.3d 124, 135 (2d Cir. 2001), which held that the court's role at certification was simply to determine whether the evidence supporting satisfaction of Rule 23's requirements was "fatally flawed"); *accord, e.g.*, Oscar Private Equity Invs. v. Allegiance Telecomm., Inc., 487 F.3d 261, 268 (5th Cir. 2007); Vallario v. Vandehey, 554 F.3d 1259, 1265–67 (10th Cir. 2009); Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1266 (11th Cir. 2009).

125. 552 F.3d 305 (3d Cir. 2008).

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> merely a "threshold showing" by a party, that each requirement of Rule 23 is met. Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence. Second, the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action. Third, the court's obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it.[126]

In *Wal-Mart Stores, Inc. v. Dukes*,[127] the Supreme Court touched upon the issues raised in *Szabo* and *Hydrogen Peroxide*. By 2011, when the Court rendered its decision, the proposition that *Eisen* did not preclude courts from rigorously examining the evidence was so clear that the Supreme Court summarily dismissed the pre-*Szabo* reading of *Eisen* as "mistaken[]" and constituting "the purest dictum."[128] The Court stated that "[t]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiffs' cause of action."[129]

The Court has continued to reaffirm this approach in more recent cases. Thus, in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, the Court explained that "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."[130] Similarly, in *Comcast Corp. v. Behrend*, the Court quoted *Dukes* for the proposition that Rule 23 "does not set forth a mere pleading standard"; instead, a party must "be prepared to prove . . . *in fact*" that the requirements of Rule 23(a) and one of the subdivisions of Rule 23(b) have been satisfied.[131]

2. Resolving Conflicting Expert Testimony

The *Szabo* issue is of particular significance in the context of expert witnesses. In many class actions, such as employment and antitrust class actions, plaintiffs rely heavily on expert testimony to demonstrate that

126. *Id*. at 307. The issue of expert testimony is discussed immediately below.
127. 131 S. Ct. 2541 (2011).
128. *Id*. at 2552 n.6.
129. *Id.* at 2551–52 (citations and internal quotation marks omitted).
130. 133 S. Ct. 1184, 1195 (2013).
131. 133 S. Ct. 1426, 1432 (2013) (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551–52) (citations and internal quotation marks omitted; emphasis by *Dukes* Court).

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liability and damages can be proven on a classwide basis. Defendants, in turn, rely on expert testimony to show that individualized proof is necessary. In these instances, the propriety of class certification will depend heavily on what approach the court uses to assess such testimony.

In *Hydrogen Peroxide*, the court held that, even if an expert's testimony survives a challenge under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*,[132] when a class certification issue involves competing expert testimony by the plaintiff's expert and the defendant's expert, the court at class certification must decide which side's expert is more credible.[133] In *Hydrogen Peroxide*, plaintiffs and defendants proffered expert testimony in an antitrust suit on whether the alleged conspiracy could be established at trial through evidence common to the class. Plaintiffs' economist opined that the alleged conspiracy could be established by common proof, but defendant's economist testified to the contrary. The district court held that "'[p]laintiffs need only make a threshold showing that the element of impact will predominately involve generalized issues of proof, rather than questions which are particular to each member of the plaintiff class.'"[134] The Third Circuit reversed, holding that:

> [T]he question at class certification stage is whether, if [impact on the entire class from a conspiracy] is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class. When the latter issue is genuinely disputed, the district court must resolve it after considering all relevant evidence.[135]

The Third Circuit thus rejected the district court's "threshold showing" test, holding instead that "[f]actual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence," and that "to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule

132. 509 U.S. 579 (1993). *Daubert* directed federal courts to perform a gatekeeping function with respect to expert testimony. Specifically, *Daubert* and its progeny instructed courts to consider whether the putative expert's theory or methodology (1) can be tested; (2) has been published or peer-reviewed; (3) has a known rate of error; and (4) is generally accepted within the "relevant scientific community." 509 U.S. at 589–95. In a subsequent case, the Court held that *Daubert* was not limited to scientific testimony, but rather, applied to all expert testimony. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147 (1999).

133. *In re* Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305 (3d Cir. 2008).

134. *Id.* at 321 (quoting district court) (citation and internal quotation marks omitted; alteration in original).

135. *Id.* at 325.

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23."[136] In reaching its decision, the Third Circuit—echoing the theme in *Rhone-Poulenc* and the Advisory Committee Notes to Rule 23(f)—stated that class certification is "often the defining moment in class actions (for it may . . . create unwarranted pressure to settle nonmeritorious claims on the part of defendants)."[137] The court also found support for its ruling in two amendments to Rule 23 adopted in 2003. First, the court cited Rule 23(c)(1)(A), which changed the timing requirement for certification from "as soon as practicable" after the filing of suit to "an early practicable time" following suit.[138] Second, the court cited the elimination in 2003 of Rule 23(c)(1)'s language that a class certification "may be conditional."[139] The court viewed these changes as instructions to the trial court to "consider carefully all relevant evidence and make a definitive determination that the requirements of Rule 23 have been met before certifying a class."[140] In short, as the Seventh Circuit held in *Szabo*, the Third Circuit held in *Hydrogen Peroxide* that the district court must *resolve* conflicting evidence bearing on class certification and merits issues.

To date, the Supreme Court has yet to resolve the issue of what a district court should do when plaintiff and defendant have introduced conflicting evidence bearing on both class certification and the merits of the claims. Should the court resolve the conflict, as the Third and Seventh Circuits have held?

The *Dukes* Court did not squarely decide the issue because it found that plaintiffs' expert evidence, standing alone, did not support commonality. Likewise, in its most recent opinion on the subject, *Comcast Corp. v. Behrend*,[141] the Court did not address the issue—even in dictum—because it found that plaintiffs' expert evidence, standing alone, did not support predominance under Rule 23(b)(3). Nevertheless, the *Comcast* case is important because of the strong signal it sends to lower courts to be skeptical of class actions as well as rigorous in evaluating plaintiffs' expert evidence.

In *Comcast*, the Court held out the possibility that it would deal in depth with how courts should treat expert testimony at the class certification stage. The Court granted *certiorari* on the question

136. *Id.* at 320 (citation omitted).
137. *Id.* at 310 (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 162 (3d Cir. 2001)).
138. *Id.* at 318–19.
139. *Id.* at 319 (internal quotation marks omitted).
140. *Id.* at 320.
141. 133 S. Ct. 1426 (2013).

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"[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."[142] Although the question presented did not raise the "battle of the experts" issue, the fact that the Court agreed to address expert testimony at the class certification stage raised the possibility that the Court might comment (in dictum) on the proper approach when plaintiffs and defendants have submitted conflicting expert testimony.

In *Comcast*, the plaintiff consumers brought an antitrust class action under Rule 23(b)(3). Plaintiffs alleged that Comcast's strategy of concentrating operations in sixteen counties in Pennsylvania, New Jersey, and Delaware had allowed it to charge supra-competitive prices, thereby harming competition and violating the federal antitrust laws.[143] At the district court level, plaintiffs' expert proposed four theories of "antitrust impact"—means by which Comcast's activities had caused economic harm to the class, and which could be proven on a classwide basis. The district court accepted one of the theories, rejected the other three, and certified the class.[144] A divided Third Circuit panel affirmed, but the Supreme Court reversed in a 5–4 decision.

As it turned out, the Court did not reach the question on which it had granted *certiorari* because defendant had failed to preserve the argument that the expert evidence was inadmissible.[145] Nonetheless, the Court reviewed the certification order and found that "certification was improper

142. 133 S. Ct. 24 (2012). This was not the question upon which Comcast sought review. Comcast's question presented was "whether a district court may certify a class action without resolving 'merits arguments' that bear on [Federal Rule of Civil Procedure] 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3)." 133 S. Ct. 1426, 1435 (2013) (Ginsburg and Breyer, JJ, dissenting) (citation omitted; alterations by Court).

143. 133 S. Ct. 1426, 1430 (2013).

144. The four theories of antitrust impact stemmed from Comcast's strategy of concentrating or "clustering" its operations in the designated geographical area. Those four theories were: (1) clustering "made it profitable for Comcast to withhold local sports programming from its competitors, resulting in decreased market penetration by direct broadcast satellite providers"; (2) Comcast's activities reduced competition from "overbuilders"—companies that build competing cable networks in areas where another cable company already operates; (3) Comcast "reduced the level of 'benchmark' competition on which cable customers rely to compare prices"; and (4) the clustering "increased Comcast's bargaining power relative to content providers." *Id.* at 1430–31. Of these four theories, the district court found that only the second one, the "overbuilder" theory, was capable of classwide proof. *Id.* at 1431.

145. *See id.* at 1431 n.4 (noting that Comcast's failure to object to the admission of plaintiffs' expert evidence "would make it impossible for petitioners to argue that [plaintiffs' expert's] testimony was not 'admissible evidence'" under the Federal Rules of Evidence); *see also id.* at 1436 (Ginsburg & Breyer, J.J., dissenting) ("At this late date, Comcast may no longer argue that respondents' damages evidence was inadmissible.").

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because respondents had failed to establish that damages could be measured on a classwide basis."[146] Because plaintiffs' proposed economic model was not specific to the only theory of antitrust impact that the district court had accepted, the Court found that plaintiffs had failed to meet the predominance standard of Rule 23(b)(3).

The Court's opinion provoked a strong dissent, jointly authored by Justices Ginsburg and Breyer. First, the dissent argued that the Court should have dismissed the petition for writ of *certiorari* after it became evident that the question the Court had agreed to decide was no longer in the case (because of Comcast's failure to raise it below). The dissent noted that the failure to dismiss the petition ran counter to the Court's usual practice of dismissing cases as improvidently granted when unforeseen procedural obstacles prevent the Court from reaching the question it originally agreed to decide.[147] Moreover, the dissent contended that the Court's holding represented a "profoundly mistaken view of antitrust law."[148] Finally, the dissent found fault with the majority's willingness, contrary to its usual practice, to "disturb findings of fact in which two courts below have concurred."[149]

3. Reactions to the Szabo/Hydrogen Peroxide *Approach*

Although *Comcast* was decided only recently and thus has not generated substantial commentary, a number of scholars have analyzed and praised the *Szabo*/*Hydrogen Peroxide* line of cases. The late Professor Richard Nagareda, for example, called this case law a "welcome step forward,"[150] while Professor Richard Marcus described that law as a "positive development."[151] Not all courts and commentators, however, have embraced this authority. Several judges and commentators have expressed concern about imposing this high burden on plaintiffs at the class certification stage.[152] Such an approach must inevitably mean that

146. *Id.* at 1431 n.4.

147. *Id.* at 1435 ("This case comes to the Court infected by our misguided reformulation of the question presented. For that reason alone, we would dismiss the writ of certiorari as improvidently granted.").

148. *Id.* at 1437.

149. *Id.* at 1439 (citations and internal quotation marks omitted).

150. Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 111, 113 (2009).

151. Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 372 (2011).

152. *See, e.g.*, *In re* Mills Corp. Sec. Litig., 257 F.R.D. 101, 108 (E.D. Va. 2009) (stating that inquiry into merits at the class certification stage is "putting the cart before the horse"); Ross v. Abercrombie & Fitch Co., 257 F.R.D. 435, 441 (S.D. Ohio 2009) ("the court's rigorous analysis must

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significant (or even complete) merits discovery must occur before class certification. Plaintiffs cannot be held to the high evidentiary burden imposed by *Szabo* and *Hydrogen Peroxide* without being given every chance to develop all relevant evidence. The result, however, is that the class certification decision must inevitably be delayed, possibly until the end of full merits discovery.

In the author's view, delaying certification until late in the case is contrary to the sequencing set forth in Rule 23. As noted above,[153] the 1966 version of Rule 23 provided that the court should rule on class certification "as soon as practicable after commencement of an action."[154] Although, as the *Hydrogen Peroxide* court noted, Rule 23 was amended in 2003 to alter this language, the new language, "at an early practicable time,"[155] still envisions that the certification decision will occur relatively early in the case. Likewise, the removal of language in Rule 23(c)(1) providing that class certification may be conditional provides no support for imposing a new standard of proof on plaintiffs—especially one that materially alters the timing of, and the discovery necessary for, the certification decision.

Requiring district courts to *resolve* conflicting evidence in ruling on class certification impacts more than just timing and discovery issues. Ultimately, in cases in which the court denies certification because it credits defendant's evidence over plaintiff's evidence, the *Hydrogen Peroxide* approach usurps the jury's role to weigh and adjudicate conflicting evidence. If, for example, both plaintiffs and defendants in an antitrust case have presented admissible, probative expert testimony on how classwide impact will be established, the weighing of such evidence should be done by the jury at trial.

While courts have imposed strict new evidentiary burdens on plaintiffs, they have increasingly permitted defendants to seek denial of class certification without submitting to discovery. For instance, in *Pilgrim v. Universal Health Card, LLC*,[156] the Sixth Circuit upheld the district court's dismissal of class allegations in a nationwide class action,

be limited to the substance and structure of Plaintiff's claims, rather than an inquiry into the merits"); Michael S. Kaufman & John M. Wunderlich, *The Unjustified Judicial Creation of Class Certification Merits Trials in Securities Fraud Actions*, 43 U. MICH. J.L. REFORM 323, 323 (2010); Steig D. Olson, *"Chipping Away": The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935 (2009).

153. *See supra* note 138 and accompanying text.

154. FED. R. CIV. P. 23(c)(1)(A) (amended 1966).

155. FED. R. CIV. P. 23(c)(1).

156. 660 F.3d 943 (6th Cir. 2011).

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reasoning that "we cannot see how discovery or for that matter more time would have helped [plaintiffs]."[157] Other courts have taken this approach as well.[158] Case law requiring plaintiffs to put forward exacting evidentiary proof in support of class certification is difficult to square with case law permitting defendants to move to strike class allegations without allowing plaintiffs even *minimal* discovery. While it is theoretically possible to reconcile the case law, ultimately these cases—taken as a whole—demonstrate that courts are more skeptical about certifying classes than in the past.

This author submits that courts should not resolve disputed factual issues as part of the class certification process. As long as plaintiffs offer substantial, admissible proof from which a jury *could* adjudicate important issues on a classwide basis, plaintiffs should not be required to convince the court that their evidence is more persuasive than defendant's evidence. This approach is consistent with the Court's decision in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, which held that plaintiffs did not need to prove materiality at the certification stage because "the focus of Rule 23(b)(3) is on the predominance of common *questions*," not on the merits answers to those questions.[159]

As noted above, the Supreme Court in *Comcast* did not resolve the *Hydrogen Peroxide* issue (whether the court must resolve conflicting evidence). Nonetheless, the fact that the Court decided the case at all might signal to lower courts that the safest approach in most cases is to reject class certification. As the dissent persuasively argued, the Court should have dismissed the case as improvidently granted instead of relying on arguments not encompassed by the question presented. The Court delved deeply into the highly technical facts, all to the end of reversing a fact-based class certification decision rendered by the district court and upheld by the Third Circuit. Plainly, the message conveyed by the majority is that courts should review motions for class certification with great skepticism. That message was especially clear because the Court subsequently vacated and remanded three other class certification rulings in light of *Comcast*.[160]

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157. *Id*. at 949.

158. *See, e.g.*, Picus v. Wal-Mart Stores, Inc., 256 F.R.D. 651 (D. Nev. 2009) (granting defendants' motion to deny class certification despite recognizing that "the better course is to deny such a motion because the shape and form of a class action evolves only through the process of discovery") (citation and internal quotation marks omitted).

159. 133 S. Ct. 1184, 1195 (2013) (emphasis in original).

160. *See* Butler v. Sears, Roebuck & Co., 702 F.3d 359 (7th Cir. 2012) (finding class certification appropriate in case alleging product defects in washing machines), *vacated and remanded*, No. 12-

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Because *Comcast* was rendered shortly before this article went to press, it is too early to say with certainty what the precise impact of the case will be.[161] Most likely, however, the decision will cause district courts to be even more reluctant than before in certifying class actions, especially when plaintiffs are relying heavily on expert testimony.

4. Resolving Challenges to Admissibility (Including Daubert *Challenges) at the Class Certification Stage*

This author's approach—which cuts back considerably on *Hydrogen Peroxide* and *Szabo*—does not mean that courts should *never* resolve contested issues at class certification. If defendant contends that the evidence relied upon by plaintiffs for class certification would be *inadmissible* at trial, the court must decide the admissibility question at the class certification stage. For example, if testimony relied on by plaintiffs in support of certification would be admissible under one view of the substantive law but inadmissible under another, the court must decide the legal issue to ensure that, in fact, plaintiffs' evidence supporting class certification would in fact be admissible at trial.[162]

The issue of admissibility frequently arises in the expert witness context, where the defendant raises a *Daubert* challenge to the admissibility of an expert's testimony bearing on class certification on the ground that it is not generally accepted in the relevant scientific, technical, or professional community. Some recent decisions have held that the court

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1067, 2013 S. Ct. WL 775366 (June 3, 2013); *In re* Whirlpool Corp. Front-Loading Washer Products Liab. Litig., 678 F.3d 409 (6th Cir. 2012) (affirming certification of similar claims for breach of warranty, negligent design, and failure to warn), *vacated and remanded*, 133 S. Ct. 1722 (No. 12-322) (Apr. 1, 2013); Ross v. RBS Citizens, N.A., 667 F.3d 900, 908 (7th Cir. 2012) (affirming certification of labor class action; finding in particular that "*Dukes* does not change the district court's commonality result"), *vacated and remanded*, 133 S. Ct. 1722 (No. 12-165) (Apr. 1, 2013).

161. *Compare, e.g.*, Stephen A. Fogdall & Christian D. Sheehan, *Expert Testimony at the Certification Stage: The Impact of* Comcast v. Behrend, 123 DLR I-1, 2013, 2013 WL 3201173, at *1 (June 26, 2013) (suggesting that *Comcast* "will likely have a significant impact on the treatment of expert evidence at the class certification stage" and that under *Comcast*, "courts may not sidestep a battle of the experts"), *with* 133 S. Ct. 1426, 1436, 1437 (Breyer & Ginsburg, J., dissenting) (stating that the majority's opinion "breaks no new ground on the standard for certifying a class under Federal Rule of Civil Procedure 23(b)(3)" and that "[t]he Court's ruling is good for this day and case only").

162. For instance, in *Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001), the Second Circuit held that, in a dispute between plaintiffs' and defendants' experts involving how antitrust damages should be calculated, the district court was not required to resolve the underlying legal question about how damages should be calculated. That holding was erroneous, in the author's view, as a subsequent Second Circuit panel held in *In re IPO Securities Litigation*, 471 F.3d 24, 42 (2d Cir. 2006).

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must resolve the *Daubert* challenge at the class certification stage.[163] As the Seventh Circuit stated in *American Honda Motor Co., Inc. v. Allen*:[164]

> [W]hen an expert's report or testimony is critical to class certification . . . a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. That is, the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants.[165]

The Eleventh Circuit has followed *American Honda*, finding that the district court erred in refusing to apply *Daubert* at the class certification stage.[166]

The Eighth Circuit, by contrast, has squarely rejected *American Honda* in *In re Zurn Pex Plumbing Products Liability Litigation*.[167] There, the defendant moved to strike the testimony of two experts on *Daubert* grounds. The district court declined to conduct a full-blown *Daubert* inquiry but instead conducted a "focused" inquiry based on the evidence produced thus far.[168] The Eighth Circuit affirmed the district court's refusal to conduct a full-blown *Daubert* analysis, reasoning:

> Zurn's desire for an exhaustive and conclusive *Daubert* inquiry before the completion of merits discovery cannot be reconciled with the inherently preliminary nature of pretrial evidentiary and class certification rulings. The main purpose of [the] *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony. That interest is not implicated at the class certification stage where the judge is the decision maker.[169]

Several district courts have similarly adopted a modified, less rigorous *Daubert* inquiry.[170] Moreover, some district courts have refused to apply

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163. *See, e.g.*, Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 812–14 (7th Cir. 2012); Am. Honda Motor Co., Inc. v. Allen, 600 F.3d 813 (7th Cir. 2010) (per curiam); Reed v. Advocate Health Care, 268 F.R.D. 573, 594 n.20 (N.D. Ill. 2009).

164. 600 F.3d 813 (7th Cir. 2010).

165. *Id.* at 815–16.

166. Sher v. Raytheon Co., 419 F. App'x 887, 890–91 (11th Cir. 2011) (endorsing *American Honda*).

167. 644 F.3d 604 (8th Cir. 2011), *petition for cert. dismissed*, 133 S. Ct. 1752 (2013).

168. *Id*. at 614.

169. *Id.* at 613 (paragraph break omitted).

170. *See, e.g.*, Williams v. Lockheed Martin Corp. No. 09-cv-1669 WQH (POR), 2011 WL 2200631, at *15 (S.D. Cal. June 2, 2011); La Bauve v. Olin Corp., 231 F.R.D. 632, 644 (S.D. Ala. 2005); Midwestern Mach. v. Nw. Airlines, 211 F.R.D. 562, 565–66 (D. Minn. 2001).

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even a modified version of *Daubert*, holding that *Daubert* is entirely inapplicable at class certification.[171]

The Supreme Court has not resolved this issue. In *Dukes*, the Supreme Court suggested that it was sympathetic with the approach in *American Honda*, but it did not definitively decide the issue. The Court stated: "The District Court concluded that *Daubert* did not apply to expert testimony at the class certification stage of class-action proceedings. *We doubt that is so*, but even if properly considered, [the expert's] testimony does nothing to advance [plaintiffs'] case."[172] As noted, the Supreme Court did not resolve the *Daubert* issue in *Comcast Corp. v. Behrend*, even though that issue was encompassed in the question presented, because defendant had failed to object to the admission of plaintiffs' expert evidence at the trial level, thus waiving the issue.[173]

Although *Hydrogen Peroxide* requires plaintiffs to satisfy too high of a standard at the class certification stage, the same cannot be said of the *American Honda* approach. If an expert will not be permitted to testify at all at trial, plaintiff should not be able to rely on that inadmissible testimony in support of class certification. As one court put it, "class certification decisions must be made based on admissible evidence."[174] A *Daubert* inquiry ensures that plaintiffs' evidence meets minimal standards of reliability and admissibility, and it therefore enables the court to assess whether plaintiffs can prove their claims on a classwide basis with evidence the jury will be permitted to consider. But once the court determines that plaintiffs' evidence satisfies the *Daubert* threshold for admissibility, the court should not resolve the question of whether plaintiffs' or defendants' evidence is more persuasive.

In sum, the court at class certification should conduct a rigorous review of the evidence supporting class certification. That means it should satisfy itself that plaintiffs' evidence, if credited by the fact finder, would establish the elements of the claims on a classwide basis. The court should also satisfy itself that the evidence is admissible, and this determination may involve a full-scale *Daubert* review in the case of expert witness evidence. Once the court determines that plaintiffs' evidence is sufficiently probative to be admissible at trial, however, it should not weigh plaintiffs'

171. *See, e.g.*, Serrano v. Cintas Corp., 2009 WL 910702, at *2 (E.D. Mich. Mar. 31, 2009); Cole v. ASARCO Inc., 256 F.R.D. 690, 696 n.3 (N.D. Okla. 2009).

172. *Dukes*, 131 S. Ct. at 2553–54 (emphasis added) (citation omitted).

173. *See supra* note 145 and accompanying text.

174. DeRosa v. Mass. Bay Commuter Rail Co., 694 F. Supp. 2d 87, 99 (D. Mass. 2010).

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evidence against defendant's evidence in an effort to determine which side's evidence to credit.

B. Stringent Requirement of a Class Definition

Recent case law has also imposed rigorous obligations on plaintiffs in defining the scope of the putative class action. A class definition, of course, is critical to ascertain who is in the class, who is subject to notice, and who is bound by the judgment.[175] Prior to 2003, the requirement of a class definition was solely a matter of case law,[176] and it was not even mentioned in Rule 23.[177] In 2003, Rule 23 was amended to state that "[a]n order that certifies a class action must define the class and the class claims, issues, or defenses."[178] The rule, however, does not elaborate on what constitutes an adequate class definition.

The *Manual for Complex Litigation* contains some general guidance. First, the definition should contain "objective criteria" and "avoid subjective standards (e.g., a plaintiff's state of mind) or terms that depend on resolution of the merits (e.g., persons who were discriminated against)."[179] A definition that turns on the merits is sometimes called a "fail-safe" class, because the class is certified (and a binding judgment entered) only if plaintiff wins the case.[180] Second, "the class definition [should] capture[] all members necessary for efficient and fair resolution of common questions of fact and law in a single proceeding."[181] Third, "[t]he class definition should describe the operative claims, issues, or defenses."[182] The *Manual* also recognizes that more specificity is needed for (b)(3) classes, which allow opt-outs, than for (b)(1) and (b)(2) classes, which are mandatory.[183] In the case of a putative Rule 23(b)(2) class, it states that "[t]here is no need to identify every individual member at the time of certification . . . as long as the court can determine at any given time whether a particular individual is member of the class."[184] A Rule

175. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.222 (4th ed. 2004) [hereinafter "MCL (4th)"].
176. *See* KLONOFF, ET AL., CASEBOOK, *supra* note 40, at 37.
177. *Id.*
178. FED. R. CIV. P. 23(c)(1)(B).
179. MCL (4th), *supra* note 175 at § 21.222.
180. *See, e.g.*, Randleman v. Fidelity Nat'l Title Ins. Co., 646 F.3d 347, 352 (6th Cir. 2011).
181. MCL (4th), *supra* note 175, § 21.222.
182. *Id.*
183. *Id.*
184. *Id.*

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23(b)(3) class, however, "require[s] a class definition that will permit identification of individual class members."[185]

Between 1966 and 2000, relatively few cases turned on the adequacy of the class definition.[186] In most cases, courts allowed plaintiffs to reformulate the definition to satisfy any concerns.[187] In recent years, however, a significant number of courts have utilized the requirement of an adequate class definition to deny class certification. In the last five years alone, dozens of cases have denied class certification because of a flawed definition (either solely on that ground or as one of alternative grounds).[188] Although some of these decisions can be justified on their

185. *Id.*

186. Although there have been instances in which courts denied certification because of a flawed class definition throughout the existence of modern Rule 23, until recently, the overwhelming majority of certification decisions relied primarily on Rule 23's explicit requirements. Indeed, one leading treatise states that, under the traditional approach, "[i]f the general outlines of the membership of the class are determinable at the outset of the litigation, a class will be deemed to exist." 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1760 (3d ed. 2011) (footnote omitted) [hereinafter 7A WRIGHT ET AL.]. As a summary of the entire body of jurisprudence from the 1966 adoption of Rule 23 to the present, this assessment may be accurate, but if one focuses solely on the last few years, a very different picture emerges, in which an increasing number of courts are giving short shrift to the Rule 23(a) and (b) elements and instead going directly to the class definition to deny certification.

187. *See, e.g.*, *id.* (noting the "liberal judicial attitude toward defining the class" and that "it normally is not essential to delimit its membership with a high degree of precision at the class-certification stage").

188. *See, e.g.*, Marcus v. BMW of N. Am., LLC, 687 F.3d 583 (3d Cir. 2012); Romberio v. Unumprovident Corp., 385 Fed. App'x. 423, 430–31 (6th Cir. 2009); Williams v. Oberon Media, Inc., 468 Fed. App'x 768, 770 (9th Cir. 2012); Abby v. Paige, 282 F.R.D. 576 (S.D. Fla. 2012); Berndt v. California Dept. of Corr., No. C03-3174 PJH, 2012 WL 950625, at *8–9 (N.D. Cal. Mar. 20, 2012); Gonzales v. Comcast Corp., No. 10-cv-01010-LJO-BAM 2012 WL 10621, at *20–21 (E.D. Cal. Jan 3, 2012); *In re* Vioxx Prods. Liab. Litig., MDL No. 1657, 2012 WL 2061883, at *3–5 (E.D. La. June 6, 2012); Korsmo v. Am. Honda Motor Co., Inc., No. 11 C 1176, 2012 WL 1655969, at *4–5 (N.D. Ill. May 10, 2012); Melton *ex rel.* Dutton v. Carolina Power & Light Co., 283 F.R.D. 280, 288–89 (D.S.C. 2012); Oginski v. Paragon Properties of Costa Rica, LLC, 282 F.R.D. 672, 677–78 (S.D. Fla. 2012); Rowden v. Pacific Parking Systems, Inc., 282 F.R.D. 581, 585–86 (C.D. Cal. 2012); Allen v. Int'l Truck & Engine Corp., No. 3:07-cv-361, 2011 WL 2975543, at *4–5 (S.D. Ohio July 21, 2011); Bauer v. Dean Morris, L.L.P., No. 08-5013, 2011 WL 3924963, at *3 (E.D. La. Sept. 7, 2011); Clavell v. Midland Funding, L.L.C., No. 10-3593, 2011 WL 2462046, at *5 (E.D. Pa. June 21, 2011); Colapinto v. Esquire Deposition Svcs., LLC, No. CV 09-07584 SJO (PLAx), 2011 WL 913251, at *4 (C.D. Cal. Mar. 8, 2011); Rader v. Teva Parenteral Medicines, Inc., 276 F.R.D. 524, 528–29 (D. Nev. 2011); Schilling v. Kenton Cnty., Ky., No. 10-143-DLB, 2011 WL 293759, at *7–8 (E.D. Ky. Jan. 27, 2011); Shanley v. Cadle, 277 F.R.D. 63, 67–68 (D. Mass. 2011); Xavier v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1089–91 (N.D. Cal. 2011); Benefield v. Int'l Paper Co., 270 F.R.D. 640, 644–45 (M.D. Ala. 2010); Grimes v. Rave Motion Pictures Birmingham, L.L.C., 264 F.R.D. 659, 664–66 (N.D. Ala. 2010); Kissling v. Ohio Cas. Ins. Co., No. 5:10-22-JMH, 2010 WL 1978862, at *3 (E.D. Ky. May 14, 2010); Konik v. Time Warner Cable, No. CV 07-763 SVW (RZx), 2010 WL 8471923, at *10 (C.D. Cal. Nov. 24, 2010); Mann v. TD Bank, N.A., No. 09-1062 (RBK/AMD), 2010 WL 4226526, at *1 (D.N.J. Oct. 20, 2010); McDonald v. Corr. Corp. of Am., No. CV-09-00781-PHX-JAT, 2010 WL 4572758, at *3 (D. Ariz. Nov. 4, 2010); Tech v. United States, 271 F.R.D. 451, 456–57 (M.D. Pa. 2010); Agostino v. Quest Diagnostics Inc., 256 F.R.D. 437, 478–79 (D.N.J. 2009); Cunningham

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particular facts, others have adopted an overly demanding approach to evaluating class definitions.

An example of the latter approach is *Cole v. ASARCO Inc.*[189] In that case, a district court found plaintiffs' proposed class definition of "[a]ll individuals and entities who owned or had an interest in real property in the Class Area as of May 14, 2001" to be "untenable."[190] The court concluded that, "[a]bsent a cognizable class, determining whether plaintiffs or the putative class satisfy the other Rule 23(a) and (b) requirements is unnecessary."[191] Similarly, in *Sanders v. Apple Inc.*,[192] the court granted defendant's motion to strike plaintiff's class allegations.[193] The *Sanders* court couched its discussion of unascertainability in terms of Article III standing, stating that the class needed to "be defined in such a way that anyone within it would have standing."[194] In *Brazil v. Dell, Inc.*,[195] the court struck plaintiffs' class allegations on the ground that the proposed definition, including "California persons or entities who purchased Dell computer products that '[defendant] falsely advertised,'" was an impermissible fail-safe class.[196] And in *Barasich v. Shell Pipeline Co.*,[197] the court found the proposed definition of "[a]ll commercial fisherman whose oyster leases were contaminated by oil discharged during Hurricane Katrina due to the

Charter Corp. v. Learjet Inc., 258 F.R.D. 320, 325–27 (S.D. Ill. 2009); Cole v. ASARCO Inc., 256 F.R.D. 690, 696–97 (N.D. Okla. 2009); *In re* McDonald's French Fries Litig., 257 F.R.D. 669, 673 (N.D. Ill. 2009); Johnson v. Geico Cas. Co., 673 F. Supp. 2d 255, 268 (D. Del. 2009); Mazur v. eBay Inc., 257 F.R.D. 563, 567–68 (N.D. Cal. 2009); Roe v. Bridgestone Corp., 257 F.R.D. 159, 172 (S.D. Ind. 2009); Sanders v. Apple Inc., 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009); Solo v. Bausch & Lomb Inc., No. 2:06-MN-77777-DCN, 2009 WL 4287706, at *4–5 (D.S.C. Sept. 25, 2009); Walls v. Sagamore Ins. Co., No. 07-CV-1020, 2009 WL 890528, at *4 (W.D. Ark. Mar. 31, 2009); Barasich v. Shell Pipeline Co., No. 05-4180, 2008 WL 6468611, at *4 (E.D. La. June 19, 2008); Burkhead v. Louisville Gas & Elec. Co., 250 F.R.D. 287, 294 (W.D. Ky. 2008); Cohen v. Implant Innovations, Inc., 259 F.R.D. 617, 630–31 (S.D. Fla. 2008); *In re* Fosamax Prods. Liab. Litig., 248 F.R.D. 389, 397 (S.D.N.Y. 2008); *In re* Teflon Prods. Liab. Litig., 254 F.R.D. 354, 362 (S.D. Iowa 2008); *In re* Vioxx Prods. Liab. Litig., No. MDL 1657, 2008 WL 4681368, at *10 (E.D. La. Oct. 21, 2008).

189. 256 F.R.D. 690 (N.D. Okla. 2009).

190. *Id.* at 696.

191. *Id.* at 696–97 (citation and internal quotation marks omitted).

192. 672 F. Supp. 2d 978 (N.D. Cal. 2009).

193. *Id.* at 991.

194. *Id.* at 991 (quoting Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006)).

195. 585 F. Supp. 2d 1158 (N.D. Cal. 2008); *see also* Brazil v. Dell, Inc., No. C-07-07100 RMW, 2010 WL 5387831, at *2 (N.D. Cal. Dec. 21, 2010) (certifying class with modified definition that included "all California citizens (with limited exclusions) who purchased through [defendant's] website certain models of Dell computers within specified date ranges . . ."). The court explained that, "[u]nlike earlier proposed class definitions, this class definition does not require a legal determination in order to ascertain class membership." *Id.*

196. *Id.* at 1167.

197. No. 05-4180, 2008 WL 6468611 (E.D. La. June 19, 2008).

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negligence of defendants" to be inadequate, noting in particular that plaintiffs had not included any geographical boundaries in their definition.[198] To the extent that the definitions in those cases were flawed at all, they could have been fixed with minor tinkering. Denying class certification is a judicial overreaction—an approach that is the polar opposite of the approach taken by most courts in the 1960s through the mid-1990s.

In many instances, what courts are doing under the guise of reviewing the class definition is applying the explicit requirements of Rule 23(a) and (b). Indeed, several courts have acknowledged as much.[199] The problem with this approach is that it leaves plaintiffs without clear guidance as to what constitutes an adequate class definition, and also injects confusion over what is required to satisfy each element of Rule 23(a) and (b).

A striking example of confusing the Rule 23 elements with the question of whether the class definition is adequate is *Romberio v. Unumprovident Corp.*,[200] in which the Sixth Circuit reversed the district court's certification of a Rule 23(b)(2) ERISA class. The district court had "defined the class to include only those plan participants and beneficiaries whose long-term disability benefits were denied or terminated 'after being subjected to any of the practices alleged in the Complaint.'"[201] The lower court had rejected defendant's argument that the class definition was flawed because it was indefinite.[202] In an unpublished 2–1 disposition, the appellate court reversed, finding that the only way to determine whether someone's claims were improperly denied was "to engage in individualized fact-finding, and the need for such individualized fact-finding makes the district court's class definition unsatisfactory."[203] The court found that these same concerns meant that the typicality requirement (Rule 23(a)(3)) also was not satisfied, and that the class was not cohesive under Rule 23(b)(2).[204] But the court's class definition analysis confuses

198. *Id.* at *4 (alteration by court).

199. *See, e.g.*, Heisler v. Maxtor Corp., No. 5:06-CV-06634-JF (PVT), 2010 WL 4788207, at *2–3 (N.D. Cal. Nov. 17, 2010) (finding numerosity not met due to unascertainability of class definition); Cole v. ASARCO Inc., 256 F.R.D. 690, 696–97 (N.D. Okla. 2009) (to similar effect); Mann v. TD Bank, N.A., No. 09-1062 (RBK/AMD), 2010 WL 4226526, at *11–17 (D.N.J. Oct. 20, 2010) (finding, as a result of a flawed class definition, that plaintiffs failed predominance, superiority, typicality, and adequacy of representation).

200. 385 Fed. App'x 423 (6th Cir. 2009).

201. *Id.* at 430.

202. *In re* UnumProvident Corp. ERISA Benefits Denial Actions, 245 F.R.D. 317, 322 (E.D. Tenn. 2007).

203. Romberio v. Unumprovident Corp, 385 Fed. App'x 423, 431 (6th Cir. 2009).

204. *Id.* at 431–33.

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the questions of whether the putative class violates Rule 23(a)(3) and Rule 23(b)(2)—because individualized factfinding is necessary to determine if a class member has a valid claim—with the question of whether a person is in the class at all, regardless of whether the class member ultimately prevails on his or her claim. The approach in *Romberio* is especially troublesome because courts are supposed to be less exacting in assessing class definitions in (b)(2) cases than in (b)(3) cases.[205]

The trend of more exacting scrutiny of class definitions has not gone unnoticed. In fact, it has been recognized by one of the nation's leading class action defense attorneys, John Beisner. In a recent article, Beisner noted that "more and more decisions are turning on [the requirement of an ascertainable class definition]."[206] He thus urged class action defense counsel to look for ways to challenge the class definition.[207]

Some decisions have not followed this trend, but instead have taken a more measured approach in addressing class definitions. For instance, the Seventh Circuit has said that crafting a proper class definition "is more of an art than a science."[208] According to the court, problems with a class definition, such as overinclusiveness or a "fail-safe" concern, "can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis."[209] In another case, *Kamar v. RadioShack Corp.*,[210] the Ninth Circuit rejected a challenge to a definition as creating a fail-safe class. In *Kamar*, the district court had certified a class of

> [a]ll California employees of defendant paid on an hourly basis as nonexempt employees for the period of March 2003 to the present who (a) were instructed to and attended a Saturday store meeting or district office meeting without receiving the full amount of mandated premium pay, or (b) worked a split shift schedule without receiving the full amount of mandated premium pay, or (c) fit into both (a) and (b).[211]

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205. *See supra* notes 183–85 and accompanying text.

206. John H. Beisner, Jessica D. Miller & Jordan M. Schwartz, *Ascertainability: Reading Between the Lines of Rule 23*, TOXICS L. REP. (BNA), 2011 WL 899331 (Mar. 17, 2011).

207. *Id.*

208. Messner v. Northshore Univ. Healthsystem, 669 F.3d 802, 825 (7th Cir. 2012).

209. *Id*. The court cited several decisions in which the courts revised the class definition instead of denying class certification. *Id.*

210. 375 Fed. App'x 734 (9th Cir. 2010).

211. *Id.* at 735.

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The Ninth Circuit was not persuaded by the fail-safe argument, instead characterizing the defendant's argument as an "assert[ion] that, in effect, the district court was required to decide the common legal issues before it certified the class."[212] The appellate court noted that the class definition was "not a circular one that determines the scope of the class only once it is decided that a class member was actually wronged," but rather, unlike in a fail-safe class, "if a class member was not legally wronged, [defendant] will be protected against liability to that person."[213]

The Fifth Circuit has gone even further and has explicitly rejected any prohibition on "fail-safe" classes. In *Rodriguez v. Countrywide Home Loans, Inc.*,[214] the defendant argued that the lower court had erred in certifying a class "whose membership [could] only be ascertained," according to defendant, "by a determination of the merits of the case because the class is defined in terms of the ultimate question of liability."[215] The Fifth Circuit, however, disagreed, affirming the lower court and noting that "our precedent rejects the fail-safe class prohibition . . . ."[216] The Fifth Circuit explained that a class is appropriately defined where the class members "are linked by [a] common complaint, and the possibility that some may fail to prevail on their individual claims will not defeat class membership."[217]

Other courts have taken a similarly flexible approach to class definition. These courts have not allowed plaintiffs to proceed with ill-defined classes. Rather, instead of denying class certification outright, they have worked with the plaintiffs to address alleged flaws. An example of this approach is *Campbell v. First American Title Insurance Co.*,[218] a putative class action against a title insurer for violations of Maine statutory and common law. In evaluating plaintiffs' motion for class certification, the district court found that plaintiffs had offered an impermissible "fail-safe" class definition, under which the membership of the class was

212. *Id.* at 736.

213. *Id.*

214. 695 F.3d 360 (5th Cir. 2012).

215. *Id.* at 369–70.

216. *Id.* at 370; *accord, e.g.*, Mullen v. Treasure Chest Casino, 186 F.3d 620, 623, 624 n.1 (5th Cir. 1999) (rejecting fail-safe argument for class defined as "all members of the crew of the M/V Treasure Chest Casino who have been stricken with occupational respiratory illness caused by or exacerbated by the defective ventilation system in place aboard the vessel"); Forbush v. J.C. Penney Co., 994 F.2d 1101, 1105 (5th Cir. 1993) (defendant's fail-safe argument was "meritless and, if accepted, would preclude certification of just about any class of persons alleging injury from a particular action").

217. *Rodriguez*, 695 F.3d at 370 (quoting *Forbush*, 994 F.2d at 1105 (citation and internal quotation marks omitted)).

218. 269 F.R.D. 68 (D. Me. 2010).

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dependent upon a legal conclusion.[219] Rather than denying certification, however, the court exercised its discretion to revise the class definition so as to rectify the problem, and it then certified the class.[220]

Consistent with the aforementioned line of cases, the Fifth Circuit recently endorsed a similarly pragmatic approach in the settlement context. In *Union Asset Management Holding A.G. v. Dell, Inc.*,[221] it affirmed a district court's certification of a securities class. The appellate court rejected a challenge to the sufficiency of the class definition, which defined the class as "[a]ll persons who purchased or otherwise acquired the common stock of [defendant], directly or beneficially, between May 16, 2002 and September 8, 2006, inclusive, and were damaged thereby."[222] Class objectors argued that "the 'damaged thereby' language render[ed]" the class definition improper, because the class could not be ascertained without "mini-trials on the merits to determine whether [defendant's] alleged securities fraud has in fact caused damage to each claimant."[223] The Fifth Circuit, however, held that the lower court had not abused its discretion in certifying the class as defined.[224] "In fact," the court noted, "the 'damaged thereby' language is routine in class definitions, and no court has found it to be problematic."[225] Describing the objectors' concern about mini-trials as "misplaced," the Fifth Circuit explained: "Potential class members incurred the alleged damages just by holding stock, and a quick look at the trading records is all that is required to determine whether someone did so."[226] This, said the court, was "a mechanical and objective standard, [and] in no way an individualized 'causal' determination on the merits."[227] *Union Asset* thus represents an encouraging contrast to decisions that have taken an unduly narrow and rigid approach to construing proposed class definitions.

Crafting a clear and workable class definition is difficult. Frequently, plaintiffs need to conduct discovery before arriving at a definition that

219. *Id.* at 74.

220. *Id.* at 73–74, 77–78. For other recent examples, *see, e.g.*, Chakejian v. Equifax Info. Servs., 256 F.R.D. 492, 497–98 (E.D. Pa. 2009); Demmick v. Cellco Partnership, No. 06-2163 (JLL), 2010 WL 3636216, at *6–7 (D.N.J. Sept. 8, 2010); *In re* ABMD Ltd., 439 B.R. 475, 482–84 (Bankr. S.D. Ohio 2010); Morrow v. Washington, 277 F.R.D. 172, 188–89 (E.D. Tex. 2011).

221. 669 F.3d 632 (5th Cir. 2012), *cert. denied sub nom.* Schuleman v. Union Asset Management Holding, A.G., 133 S. Ct. 317 (2012).

222. *Id.* at 639–40 (alteration by court of appeals).

223. *Id.* at 640 (internal quotation marks omitted).

224. *Id*.

225. *Id.* (citations omitted).

226. *Id.* (citations, alteration, and internal quotation marks omitted).

227. *Id.*

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takes into account the nuances of the case. In other situations, an inadequate class definition can often be fixed through simple word changes. Courts that have concerns about a class definition should not deny class certification without giving plaintiffs a meaningful opportunity to draft a workable definition. Many of the recent cases have not followed this approach.

C. Heightened Scrutiny of Numerosity

Rule 23(a)(1) provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if [] the class is so numerous that joinder of all members is impracticable."[228] Until recently, the so-called "numerosity" requirement rarely posed a roadblock to class certification, and defendants frequently stipulated to this element. Classes of forty or more had usually been deemed sufficient,[229] and in some instances courts had upheld classes with as few as thirteen or twenty class members.[230] Thus, the numerosity bar was not high. Indeed, as a practical matter, courts and defendants rarely needed to worry about numerosity: few plaintiffs' lawyers wanted to waste their time pursuing class certification (with all of its hurdles) for a small number of claimants, so there was little reason to be concerned about a dearth of class members. Courts occasionally found numerosity problems,[231] but these decisions tended to be outliers.

Recently, however, some courts have given the numerosity element real teeth—not just in cases where the class truly was too small, but in cases where, despite a reasonable assumption that the class was large, plaintiffs were faulted for not putting forward sufficient evidence to establish the actual class size. Put another way, consistent with the general trend to require more evidentiary proof at the class certification stage, a number of courts now require exacting proof of numerosity, even when common sense would suggest that the class greatly exceeds the minimum number required under the case law. In some instances, numerosity was

228. FED. R. CIV. P. 23(a)(1).

229. Esler v. Northrop Corp., 86 F.R.D. 20, 34 (W.D. Mo. 1979).

230. *See, e.g.*, Dale Elecs. v. R.C.L. Elecs., Inc., 53 F.R.D. 531, 534–36 (D.N.H. 1971) (finding 13 class members sufficient); Rosario v. Cook Cnty., 101 F.R.D. 659, 661–62 (N.D. Ill. 1983) (finding 20 class members sufficient).

231. *See, e.g.*, Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030 (5th Cir. 1981) (upholding finding that numerosity was not satisfied in securities fraud case because plaintiffs offered only evidence of number of shares traded, not number of class members; appellate court held that plaintiffs could provide additional evidence to the district court).

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one of several problems; in others, it was the sole rationale for denying certification.

For instance, in *Vega v. T-Mobile USA, Inc.*,[232] the Eleventh Circuit reversed the district court on numerosity grounds. The case involved a class of T-Mobile employees in Florida who claimed they were denied sales commissions. Plaintiffs' evidence indicated that there were thousands of employees nationwide, but their proof did not address the number of such employees in Florida. The district court—"after first noting that, 'as a general rule, one may say that less than twenty-one is inadequate [for a finding of numerosity], more than forty is adequate, and numbers falling in between are open to judgment based on other factors'"—found that "'well over forty individuals fall within the class definition adopted by this Court.'"[233] In reversing the district court and finding that numerosity was not satisfied, the Eleventh Circuit stated:

> Yes, T-Mobile is a large company, with many retail outlets, and as such, it might be tempting to assume that the number of retail sales associates the company employed in Florida during the relevant period can overcome the generally low hurdle presented by Rule 23(a)(1). However, . . . [i]n this case, the district court's inference of numerosity for a Florida-only class without the aid of a shred of Florida-only evidence was an exercise in sheer speculation.[234]

Nor is the Eleventh Circuit alone in this rigorous approach to numerosity. For example, the Third Circuit, in *Marcus v. BMW of North America, LLC*,[235] reversed the district court's certification of a class, finding that numerosity was not satisfied.[236] There, the court of appeals found that the plaintiff had "offered sufficient company-wide evidence to the District Court to support a finding of numerosity for a nationwide class" of BMW owners with "run-flat" tires ("RFTs"), but that it could only "speculate" as to whether the number of class members in New Jersey was sufficient to satisfy numerosity.[237] Among other things, plaintiffs showed that over 740,000 BMWs nationwide were equipped with RFTs during the class period. Those tires were manufactured by Bridgestone or one of six other manufacturers. Despite the fact that

232. 564 F.3d 1256 (11th Cir. 2009).
233. *Id.* at 1266–67 (quoting district court) (alteration in original).
234. *Id.* at 1267.
235. 687 F.3d 583 (3d Cir. 2012).
236. *Id.* at 588.
237. *Id.* at 595–96.

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numerosity is normally satisfied with forty class members, that New Jersey is a relatively affluent and populous state, and that Bridgestone is a major tire manufacturer, the Third Circuit held that numerosity was not satisfied. As the court explained:

> [T]he District Court found that the New Jersey class met the numerosity requirement because "it is common sense that there will be more members of the class than the number of consumers who complained—probably significantly more," and "common sense indicates that there will be at least 40." That may be a bet worth making, but it cannot support a finding of numerosity sufficient for Rule 23(a)(1). . . .
>
> Of course, Rule 23(a)(1) does not require a plaintiff to offer direct evidence of the exact number and identities of the class members. But in the absence of direct evidence, a plaintiff must show sufficient circumstantial evidence specific to the products, problems, parties, and geographic areas actually covered by the class definition to allow a district court to make a factual finding. Only then may the court rely on "common sense" to forgo precise calculations and exact numbers.[238]

The court concluded that, "[g]iven the complete lack of evidence specific to BMWs purchased or leased in New Jersey with Bridgestone [run-flat tires] that have gone flat and been replaced, the District Court's numerosity ruling crossed the line separating inference and speculation."[239]

The Tenth Circuit, in *Trevizo v. Adams*,[240] took a similarly demanding approach. The facts of *Trevizo* centered around the execution of a search warrant at a Latino-owned business in Salt Lake City. The plaintiffs, thirty-three individuals who were subjected to a "SWAT-style police raid," filed suit under § 1983, alleging "gross improprieties" by the officers, such as "physical and verbal abuse of persons at the scene, including pregnant women and children."[241] Among other things, the plaintiffs sought to certify a class action consisting of persons "who were subjected to the raid but failed to file suit."[242] The district court denied class certification, finding that numerosity was not met, and the Tenth

238. *Id.* at 596 (citations omitted).
239. *Id.* at 597.
240. 455 F.3d 1155 (10th Cir. 2006).
241. *Id.* at 1158–59.
242. *Id.* at 1158.

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Circuit affirmed.[243] In contrast to *Vega* and *Marcus*, the district court in *Trevizo* did not conclude that plaintiffs failed as a matter of proof. Rather, it concluded that eighty-four class members was "not such an overwhelmingly large number as to be prohibitive of joinder."[244] The Tenth Circuit upheld both the result and the district court's reasoning.[245] Other courts have also shown a willingness to accept defendants' challenges to numerosity.[246]

In contrast to the foregoing cases, some courts have been willing to apply common sense, make reasonable assumptions, and permit plaintiffs to develop additional evidence when their existing evidence is deficient. For instance, in *Pederson v. Louisiana State University*,[247] a suit alleging discrimination against women by Louisiana State University in intercollegiate athletics, the Fifth Circuit reversed a district court's finding at trial that plaintiff had not satisfied numerosity. The district court had provisionally certified a class, but expressed concern that numerosity had not been met. After trial, the lower court decertified the class, explaining that plaintiffs "failed to provide evidence that members of the intramural

243. *Id.* at 1163.

244. *Id.* at 1162.

245. *Id.* at 1162–63.

246. *See, e.g.*, Turnage v. Norfolk Southern Corp., 307 F. App'x 918, 921–23 (6th Cir. 2009) (affirming denial of class certification on numerosity grounds in private nuisance action against railroad after a chemical spill; the court of appeals noted that "[r]egardless of the actual number of plaintiffs in this case, their proximity to each other and the discrete and obvious nature of the harm make identifying and contacting them relatively easy"); B.N. *ex rel.* A.N. v. Murphy, No. 3:09-EV-199-TLS, 2011 WL 4496510, at *6 (N.D. Ind. Sept. 27, 2011) (finding all requirements for (b)(2) class satisfied except for numerosity); Burkhart-Deal v. CitiFinancial, Inc., No. 8-1289, 2010 WL 457122, at *2–3 (W.D. Pa. Feb. 4, 2010) (rejecting plaintiff's argument that numerosity was met where approximately 700 of defendant's employees potentially fell within the proposed class definition but where plaintiff proffered affidavits of only ten putative class members; the court added that "the record provide[d] absolutely no grounds for determining that joinder of putative class members would be impracticable, difficult, or inconvenient"); Feinman v. F.B.I., 269 F.R.D. 44, 49–51 (D.D.C. 2010) (denying class certification of plaintiffs who alleged improper withholding of information under the Freedom of Information Act on numerosity grounds where plaintiff "concede[d] that he [was] neither aware nor capable of determining the exact number of individuals who would fall within the scope of the proposed class," and "[P]laintiff's class size estimate of 200 lack[ed] a reasonable basis") (citations and internal quotations omitted); Mays v. Tenn. Valley Auth., 274 F.R.D. 614, 619–20 (E.D. Tenn. 2011) ("judicial economy, the geographical dispersion of the class members, the ease of identifying putative class members, and the practicality with which each individual putative class member could bring suit on their own weigh against" a finding of numerosity); Pelman v. McDonald's Corp., 272 F.R.D. 82, 99–100 (S.D.N.Y. 2010) (finding numerosity not satisfied with respect to proposed "[i]ssues [c]lass" under Rule 23(c)(4)); Tourgeman v. Collins Fin. Svcs., Inc., No. 8-CV-1392 JLS (NLS), 2011 WL 5025152, at *7–9 (S.D. Cal. Oct. 21, 2011) ("[U]nsupported conjecture is insufficient to boost Plaintiff over the relatively low hurdle set by Rule 23(a)(1).").

247. 213 F.3d 858 (5th Cir. 2000).

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and club teams had the desire or ability to compete at the varsity level."[248] The Fifth Circuit reversed, reasoning as follows:

> At trial, [plaintiffs] established that a number of current LSU female students had a desire to try out for varsity soccer or fast-pitch softball. [Defendants] admit that eight people showed up for varsity soccer tryouts. These eight, however, do not constitute the sum total of class members. The class consists of all "female students enrolled at LSU since 1993 and any time thereafter" who wish to participate. Plaintiffs established that, around the time of trial, well over 5,000 young women were playing soccer or fast-pitch softball at the high school level in Louisiana. They also established that many former members of a Baton Rouge soccer club received scholarships to play intercollegiate soccer. As [defendants] point out, these women, because they are not students at LSU, are not members of the putative class. However, considering the talent pool in Louisiana established by these figures and the number of LSU students who come from Louisiana, [plaintiffs] have established that numerous future female LSU students will desire to try out for varsity soccer and fast-pitch softball . . . . Our independent review of the record satisfies us that the numerosity prong has been satisfied.[249]

Similarly, the district court found numerosity satisfied in *Verdow ex rel. Meyer v. Sutkowy*.[250] That case was an action on behalf of nursing home residents who claimed that their Medicaid applications were denied in violation of the Medicaid statute. Even though there were only six known class members, the district court found that numerosity was satisfied because the plaintiffs claimed a class of 226 by extrapolating the six known denials statewide based on the previous year's percentages.[251] Several other cases have taken a similar common sense approach.[252]

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248. *Id.* at 868.

249. *Id.* (paragraph break omitted).

250. 209 F.R.D. 309 (N.D.N.Y. 2002).

251. *Id.* at 312.

252. *See, e.g.*, Arenson v. Whitehall Convalescent & Nursing Home, Inc., 164 F.R.D. 659, 662–63, 663 n.2 (N.D. Ill. 1996) ("The Court is . . . permitted [for purposes of numerosity] to make the common sense assumption that most residents at a nursing home receive medication or medical supplies at some point in their stay."); Johns v. Bayer Corp., 280 F.R.D. 551, 556 (S.D. Cal. 2012) (finding numerosity met where it was "reasonable to assume," based on defendant's national net sales figures, that a sufficient number of people in California purchased defendant's product to satisfy Rule 23(a)(1)); Lowery v. City of Albuquerque, 273 F.R.D. 668, 682–83 (D.N.M. 2011) (finding, based on evidence in the record, that class included "several hundred" members, thus satisfying numerosity); Welch v. Theodorides-Bustle, 273 F.R.D. 692, 695 (N.D. Fla. 2010) (class of Florida drivers satisfied numerosity; even though it was "impossible to know precisely" how many class members existed, the

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Although the case law is conflicting, plaintiffs are nonetheless at risk of losing on class certification if their numerosity argument is based on inference or on appeal to common sense. The strict approach adopted by some courts represents yet another troublesome trend. Indeed, the large number of successful challenges to numerosity—which was once the least demanding requirement of Rule 23(a)—is one of the most dramatic recent developments. Given the small number of class members necessary to establish numerosity,[253] the instances in which numerosity is a valid reason to reject class certification should be rare. Even if plaintiffs' initial filing does not provide sufficient evidence of numerosity, courts should generally give plaintiffs an opportunity to make an adequate presentation.

D. Heightened Scrutiny of Commonality

Rule 23(a)(2) states that members of a class may sue as representatives only if "there are questions of law or fact common to the class."[254] Prior to the Supreme Court's 2011 opinion in *Dukes*,[255] commonality, like numerosity, was rarely an impediment to class certification. Courts were very liberal in finding a question of law or fact that qualified. Indeed, in cases involving Rule 23(b)(3), which requires that common issues *predominate* over individual issues, defendants often chose to focus solely on predominance and frequently stipulated to commonality. Why fight over commonality when plaintiffs were required to meet a much higher predominance threshold? Thus, courts repeatedly emphasized the light burden imposed by commonality, referring to the requirement as one that "is easily met,"[256] and as a requirement that should be "liberal[ly] construe[ed]."[257]

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court found "common sense . . . sufficient to determine that numerosity [was] amply proven") (citation omitted); Flood v. Dominguez, 270 F.R.D. 413, 417 (N.D. Ind. 2010) (numerosity met on basis of seven named plaintiffs and 39 declarants; the court noted that "[a] court must rely on simple common sense when determining whether a class size meets the numerosity requirement") (citation omitted); Foltz v. Del. State Univ., 269 F.R.D. 419, 422 (D. Del. 2010) (finding numerosity met by putative class of "present, prospective, and future" female students of defendant university who had been deterred from taking part in intercollegiate athletics; even though the number of class members could not "be calculated with any specificity, [it was], indisputably, very large").

253. *See supra* notes 229–30 and accompanying text.

254. FED. R. CIV. P. 23(a)(2).

255. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

256. Baby Neal *ex rel.* Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994); *see also* Hochstadt v. Boston Scientific Corp., 708 F. Supp. 2d 95, 102 (D. Mass. 2010).

257. EEOC v. Detroit Edison Co., 515 F.2d 301, 311 (6th Cir. 1975). *Accord, e.g.*, Jenkins v. Raymark, 782 F.2d 468, 472 (5th Cir 1986) (noting that the commonality "threshold [was] not high").

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The Supreme Court's *Dukes* decision appears to have given new meaning to commonality. It has done so even though Wal-Mart focused only minimal attention in its *certiorari* petition on commonality or the other elements of Rule 23(a). Wal-Mart sought *certiorari* on two issues: (1) whether claims for monetary damages could be certified under Rule 23(b)(2) (and, under what circumstances), and (2) "[w]hether the [district court's] certification order conform[ed] to the requirements of Title VII, the Due Process Clause, the Seventh Amendment, the Rules Enabling Act, and Federal Rule of Civil Procedure 23."[258] In the body of its petition, Wal-Mart made only brief mention of commonality.[259] The Court granted *certiorari* on Wal-Mart's first issue but not on its second. Instead, the Court added a second issue of its own for the parties to brief: "Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)."[260] Not surprisingly, in the merits briefing, both Wal-Mart and various *amici* supporting it argued forcefully that commonality was not satisfied.[261] This attention given to commonality in the briefing was well justified; even though the Court's resolution of the (b)(2) issue made it unnecessary for the Court to consider commonality,[262] it devoted extensive discussion to the issue in its opinion.[263]

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258. Petition for Writ of Certiorari at (i), Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (No. 10-277).

259. *See id.* at 24 (arguing in conclusory terms that a lack of classwide proof of discriminatory intent on the part of Wal-Mart "destroys commonality and typicality under Rule 23(a)"); *id.* at 32 (arguing that, "[c]ontrary to the Ninth Circuit's conclusion, it is not enough for the case to present mere common 'questions'; the *answers* to those questions must be found in a lawful and fair trial proceeding." (citation omitted) (emphasis in original)).

260. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 795 (2010).

261. *See, e.g.*, Brief for Petitioner at *18–32, Wal-Mart Stores, Inc. v. Dukes, No. 10-277, 2011 WL 201045 (Jan. 20, 2011) (section of merits brief dedicated to commonality argument); *id.* at *22 ("Wal-Mart's pay and promotion system . . . will not support a finding of commonality, on a company-wide basis, for purposes of Rule 23(a)."); Brief of Costco Wholesale Corporation as Amicus Curiae in Support of Wal-Mart Stores, Inc. at *10–13, No. 10-277, 2011 WL 288902 (Jan. 27, 2011) (arguing that the lower courts erred "in finding commonality on the basis of plaintiffs' aggregated analysis"); Brief of Securities Industry and Financial Markets Association as Amicus Curiae in Support of Petitioner at *10, No. 10-277, 2011 WL 288901 (Jan. 27, 2011) ("Under the Ninth Circuit's commonality test, the fact that employees are evaluated with some subjective components all but creates a presumption that a wide-scale class will be certified."); Brief of the Association of Global Automakers, Inc. as Amicus Curiae in Support of Petitioner at *5, No. 10-277, 2011 WL 288899 (Jan. 27, 2011) (urging Court to "clarify that the threshold showing of commonality required by Rule 23(a)(2) rests on the weight of the pertinent evidence rather than mere assertion or a scintilla of supporting evidence"); *cf.* Brief Amicus Curiae of Civil Procedure Professors in Support of Respondents at *10, No. 10-277, 2011 WL 794121 (Mar. 1, 2011) ("[t]he provision of 23(a) most disputed in this case is the 23(a)(2) commonality inquiry").

262. *See infra* Part III.F.

263. *Dukes*, 131 S. Ct. at 2550–57.

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In *Dukes*, a federal district court certified a class consisting of approximately one and one-half million current and former female Wal-Mart employees. The putative class alleged systematic sex discrimination in violation of Title VII of the Civil Rights Act of 1964, manifested by unequal promotions or pay as compared with the company's male employees. The women alleged that Wal-Mart maintained a "corporate culture" that "permit[ed] bias against women to infect . . . the discretionary decisionmaking of each one of Wal-Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice."[264] While each side presented a wealth of statistical and anecdotal evidence supporting and opposing class treatment, the Court ruled in a 5–4 decision by Justice Scalia that commonality was not satisfied because of the potentially disparate questions underlying each putative class member's claim.[265] The Court found no evidence that Wal-Mart "operated under a general policy of discrimination," and no evidence that all of the company's managers exercised their discretion in a common way such that each class member suffered a common injury.[266]

The key to understanding the commonality holding in *Dukes* is the following language:

> That common contention . . . 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*.[267]

Thus, under the *Dukes* formulation, it is not enough that the question is common; rather, the question must be essential to the outcome of the case. This exacting standard led four Justices, in an opinion by Justice Ginsburg, to accuse the majority of "blend[ing] Rule 23(a)(2)'s threshold [commonality] criterion with the more demanding [predominance] criteria of Rule 23(b)(3), and thereby elevating the (a)(2) inquiry so that it is no longer 'easily satisfied.'"[268] The dissent expressed concern that the "far

264. *Id.* at 2548.

265. The plaintiffs' evidence included statistical evidence of pay and promotion disparities between men and women, 120 anecdotal reports of discrimination from female employees, and testimony from a sociologist "presenting a social framework analysis" on how the company fostered sex discrimination. *Id.* at 2549. The Court's decision with respect to (b)(2) was unanimous. For discussion of this aspect of *Dukes*, *see infra* Part III.F.

266. 131 S. Ct. at 2554–56.

267. *Id.* at 2551 (emphasis added).

268. *Id.* at 2565 (Ginsburg, J., concurring in part and dissenting in part) (citations omitted).

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reaching" majority opinion improperly added a predominance requirement to class actions brought under (b)(1) and (b)(2).[269]

The majority decision in *Dukes* cannot be squared with the text, structure, or history of Rule 23(a)(2). Nothing in the text of Rule 23(a)(2), or in the Advisory Committee Notes thereto, requires that the common question be central to the outcome.[270] Instead of looking at the traditional methods of interpreting Rule 23(a)(2), the majority relied heavily on a law review article by Professor Nagareda.[271] In a passage quoted by the Court, Nagareda argued that:

> What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of classwide proceedings to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.[272]

The Court found this passage to be critical to understanding commonality. Indeed, the quote from Nagareda immediately precedes the Court's conclusion that commonality requires a question "central to the validity of each one of the claims in one stroke."[273]

It is ironic that Justice Scalia, who typically rejects sources other than the plain language in interpreting statutes and rules[274]—and who has criticized his colleagues for relying on law review articles[275]—would author an opinion basing an interpretation of Rule 23(a)(2) on a commentator's general discussion of "[w]hat matters to class

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269. *Id.* at 2566.

270. *Id*. at 2562.

271. *Id.* at 2551, 2556, 2557; *see* Nagareda, *supra* note 150, at 131–33.

272. *Id.* at 2551 (quoting Nagareda, *supra* note 150, at 132) (emphasis added by Court) (alterations in original) (internal quotation marks omitted).

273. *Id.*

274. *See, e.g.*, Black v. United States, 130 S. Ct. 2963, 2970 (2010) (Scalia, J., concurring in part and concurring in the judgment) (taking exception to the majority's "reliance . . . on the Notes of the Advisory Committee in determining the meaning of Federal Rule of Criminal Procedure 30(d)"); United States v. Granderson, 511 U.S. 39, 60 (1994) (Scalia, J. concurring in judgment) ("It is best . . . to apply the statute as written, and to let Congress make the needed repairs"); Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 73 (2004) (Scalia, J., dissenting) ("I have often criticized the Court's use of legislative history because it lends itself to a kind of ventriloquism. The Congressional Record or committee reports are used to make words appear to come from Congress's mouth which were spoken or written by others (individual Members of Congress, congressional aides, or even enterprising lobbyists).").

275. *See, e.g.*, Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174, 1180 (1996) (Scalia, J., dissenting from denial of *certiorari*) (criticizing Justice Stevens's "assert[ion] that . . . the 'no set of circumstances' rule" of United States v. Salerno, 481 U.S. 739 (1987), "never existed," noting that "[f]or that head-snapping proposition, [Justice Stevens] relies upon no less weighty authority than a law-review article").

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certification."[276] Indeed, later in his opinion, Justice Scalia refused to give any weight to the Advisory Committee Notes in construing Rule 23(b)(2).[277] Even if it were clear that Nagareda was discussing commonality, a commentator's opinion—without support from the rule itself—is of questionable weight.

There is still a serious question as to whether Nagareda was even discussing commonality. Justice Ginsburg, writing for the dissent, interpreted the passage from Nagareda's article as addressing Rule 23(b)(3) predominance, not Rule 23(a)(2) commonality.[278] Justice Ginsburg's view is strongly supported by Professor Nagareda's other scholarship.

Specifically, Nagareda was an Associate Reporter for the American Law Institute's project, *Principles of the Law of Aggregate Litigation*.[279] He was the principal author of chapter two, "Aggregate Adjudication."[280] The very first section of chapter two provides, in black letter:

> § 2.01 Definition of Common Issues
>
> Common issues are those legal or factual issues that are the same in functional content across multiple civil claims, *regardless of whether their disposition would resolve all contested issues in the litigation*.[281]

Later, in the next section (2.02), the *Aggregate Litigation* project attempts to reformulate the predominance test by authorizing aggregate treatment "if the court determines that resolution of the common issue would . . .

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276. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. at 2551 (quoting Nagareda, *supra* note 150, at 132) (internal quotation marks omitted).

277. *Id.* at 2559 ("[I]t is the Rule itself, not the Advisory Committee's description of it, that governs."). *See* Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 620 (2010) (noting recent concurring opinions by Justice Scalia in which Scalia expressed disapproval at the majority's partial reliance on the Advisory Committee Notes to Federal Rule of Civil Procedure 15 and the Advisory Committee Notes to Federal Rule of Criminal Procedure 30(d)); *see also* Krupski v. Costa Crociere S.p.A., 130 S. Ct. 2485, 2498 (2010) (Scalia, J., concurring) (joining majority opinion "except for its reliance on the Notes of the Advisory Committee as establishing the meaning of Federal Rule of Civil Procedure 15(c)(1)(C)") (citations omitted); Black v. United States, 130 S. Ct. 2963, 2970 (2010) (Scalia, J., concurring) (taking exception to majority's reliance on Advisory Committee Notes in determining the meaning of Federal Rule of Criminal Procedure 30(d)).

278. *See* 131 S. Ct. at 2566 (Ginsburg, J., concurring in part and dissenting in part) (citing Nagareda, *supra* note 150, at 131) ("Professor Nagareda, whose 'dissimilarities' inquiry the Court endorses, developed his position in the context of Rule 23(b)(3).").

279. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (Am. Law Inst. 2010).

280. *Id.* § 2 at 76.

281. *Id.* § 2.01 at 76 (emphasis added).

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materially advance the resolution of multiple civil claims by addressing the core of the dispute in a manner superior to other realistic procedural alternatives."[282] In the commentary to the text of section 2.02, the *Aggregate Litigation* project states:

> Section (a)(1) further confines aggregate treatment of a common issue in a class action to those situations in which that issue defines the core of the dispute presented by multiple civil claims, not merely its tangential or secondary dimensions. *Identification of a common issue, the resolution of which "materially advances the resolution" of such claims, thus goes significantly beyond identification of the minimal commonality that is among the general requirements for certification of a class action under current rules of civil procedure*.[283]

As the *Aggregate Litigation* project confirms, Nagareda viewed (a)(2) commonality as a minimal requirement. The majority thus relied on an erroneous interpretation of Nagareda's scholarship in its newly-minted definition of commonality. As a result, apart from being a dubious source for construing Rule 23(a)(2), Nagareda's article was not even interpreted correctly by the majority in its reformulation of commonality.

The Supreme Court's opinion has conflated commonality and predominance. This new interpretation of commonality should not significantly impact (b)(3) classes, which require both commonality and predominance. The *Dukes* decision, however, could have a significant impact on (b)(1) and (b)(2) classes, effectively imposing a predominance requirement where the drafters of Rule 23 chose not to include one.

The full reach of *Dukes* remains to be seen, and not surprisingly, the results are mixed. As noted, in theory, *Dukes* should have less impact in (b)(3) cases. In fact, the *Dukes* commonality test appears to have had a greater impact in (b)(2) cases than in (b)(3) cases. Numerous courts in (b)(3) cases have denied motions to decertify in light of *Dukes*.[284] Other courts in (b)(3) cases have granted certification in the first instance post-

282. *Id.* § 2.02(a)(1) at 82.

283. *Id.* § 2.02 cmt., at 84 (emphasis added).

284. *See, e.g.*, Bouaphakeo v. Tyson Foods, Inc., 2011 WL 3793962, at *3–4 (N.D. Iowa Aug. 25, 2011); Jermyn v. Best Buy Stores, L.P., 276 F.R.D. 167, 168–73 (S.D.N.Y. 2011); Johnson v. Gen. Mills, Inc., 276 F.R.D. 519, 521–22 (C.D. Cal. 2011); *In re* TFT-LCD (FlatPanel) Antitrust Litig., No. M 07-1827 SI, 2012 WL 253298, at *5 (N.D. Cal. Jan. 26, 2012); Driver v. Apple Ill., LLC, No. 06 C 6149, 2012 WL 689169, at *4 (N.D. Ill. Mar. 2, 2012).

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Dukes.[285] By contrast, several courts in (b)(2) cases have rejected class certification based on *Dukes*' commonality standard.[286] There are, however, courts in (b)(2) cases that have rejected defendants' post-*Dukes* commonality arguments and granted certification.[287] Conversely, a few courts have denied certification of (b)(3) classes based on *Dukes*' commonality holding.[288] In short, the post-*Dukes* commonality cases are mixed, but early indications suggest a greater impact in (b)(2) cases than in (b)(3) cases. (The post-*Dukes* case law under (b)(1) is too sparse to draw even preliminary conclusions.) At a minimum, commonality almost certainly will become a standard part of a defendant's attack on class certification.[289]

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285. *See, e.g.*, Abadia-Peixoto v. U.S. Dept. of Homeland Sec., 277 F.R.D. 572, 577 (N.D. Cal. 2011); Bauer v. Kraft Foods Global, Inc., 277 F.R.D. 558, 561–64 (W.D. Wis. 2012); *In re* Bank of Am. Corp. Secs., Derivative, & ERISA Litig., 281 F.R.D. 134 (S.D.N.Y. 2012).

286. *See, e.g.*, M.D. *ex rel.* Stukenberg v. Perry 675 F.3d 832 (5th Cir. 2012) (reversing district court's grant of (b)(2) certification of class alleging systemic constitutional violations in state foster care system; the Fifth Circuit noted that "[a]lthough the district court's analysis may have been a reasonable application of pre-*Wal-Mart* precedent, the *Wal-Mart* decision has heightened the standards for establishing commonality under Rule 23(a)(2), rendering the district court's analysis insufficient"); Nationwide Life Ins. Co. v. Haddock, 460 F. App'x 26, 28–29 (2d Cir. 2012); Ellis v. Costco Wholesale Corp., 657 F.3d 970, 974–75 (9th Cir. 2011); Jamie S. v. Milwaukee Pub. Schs., 668 F.3d 481, 493, 497–98 (7th Cir. 2012); *cf.* DL v. Dist. of Columbia, 713 F.3d 120, 126 (D.C. Cir. 2013) (reversing hybrid (b)(2) and (b)(3) certification of class under Individuals with Disabilities Education Act and related claims where, "[i]n the absence of identification of a policy or practice that affects all class members in the manner *Wal-Mart* requires, the district court's analysis is not faithful to the Court's interpretation of Rule 23(a) commonality").

287. *See, e.g.*, McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 490 (7th Cir. 2012) (distinguishing *Dukes* by finding commonality satisfied because "[t]he incremental causal effect . . . of those company-wide policies—which is the alleged disparate impact—could be most efficiently determined on a class-wide basis."), *cert. denied*, 133 S. Ct. 338 (2012); Connor B. *ex rel.* Vigurs v. Patrick, 278 F.R.D. 30, 33–35 (D. Mass. 2011); Marrilley v. Bonham, No. C-11-02418-DMR, 2012 WL 851182, at *4 (N.D. Cal. Mar. 13, 2012); Lane v. Kitzhaber, No. 3:12-CV-00138-ST, 2012 WL 3322680, at *6–10 (D. Or. Aug. 6, 2012); Floyd v. City of New York, 283 F.R.D. 153, 174–75 (S.D.N.Y. 2012). *Cf.* Cronas v. Willis Grp. Holdings, Ltd., No. 06 Civ. 15295 (RMB), 2011 WL 5007976, at *3 (S.D.N.Y. Oct. 18, 2011) (granting motion for preliminary approval of revised consent decree in (b)(2) case alleging discrimination against defendant's female employees; the court found commonality satisfied, noting that the class included only "317 officer-level women [who] were all employed at a single location, where pay and promotion decisions were subject to a single ultimate decision-maker"). For further discussion on the impact of *Dukes* on commonality, *see* Mary Kay Kane, *The Supreme Court's Recent Class Action Jurisprudence: Gazing into a Crystal Ball*, 16 LEWIS & CLARK L. REV. 1015, 1042–46 (2012).

288. *See, e.g.*, Stockwell v. City & County of San Francisco, No. C-08-5180 PJH, 2011 WL 4803505, at *8 (N.D. Cal. Oct. 11, 2011); Bell v. Lockheed Martin Corp., Civil No. 08-6292 (RBK/AMD), 2011 WL 6256978, at *5 (D.N.J. Dec. 14, 2011).

289. In addition to its potentially enormous impact on Rule 23(a)(2), *Dukes* could also alter the interpretation and application of other aggregation devices. For example, joinder of plaintiffs or defendants under Rule 20(a) requires, among other things, "[a] question of law or fact common to" all plaintiffs (Rule 20(a)(1)) or all defendants (Rule 20(a)(2)). Similarly, Rule 42 permits consolidation of actions before the court if, among other things, those actions "involve a common question or law or

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In sum, the majority turned a minimal requirement into one that could significantly impact class certification, especially in the (b)(2) context. It did so based almost entirely on a misreading of a law review article.

E. New Approaches to "Adequacy of Representation"

The "adequacy of representation" requirement, which governs both class representatives and class counsel, is set forth in Rule 23(a)(4). That provision requires that "the representative parties will fairly and adequately protect the interests of the class."[290] Because class actions are representative actions, "adequacy" is the glue that holds a class together and ensures due process for absent class members.[291] The system breaks down—and potential due process issues arise—if either the class representative or class counsel is incompetent, suffers from a conflict of interest, fails to assert claims with sufficient vigor, or suffers from other flaws that will detract from a full presentation of the merits.

This author has supported the need for careful scrutiny of adequacy and has criticized courts that do not take the requirement seriously.[292] Class representatives and class counsel are fiduciaries to the class, and courts have an obligation to scrutinize their adequacy even if the parties do not contest the issue.[293]

In recent years, several courts have begun scrutinizing adequacy with great care.[294] For instance, in *Creative Montessori Learning Centers v. Ashford Gear, LLC*,[295] the district court had opined that only "'*egregious*'"

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fact[.]" The Multidistrict Litigation Act, 28 U.S.C. § 1407 (2006), allows transfer to a district court for coordinated pretrial proceedings when, among other factors, actions pending in multiple federal courts "involv[e] one or more common questions of fact." 28 U.S.C. § 1407(a). Courts must now consider whether *Dukes*' rigorous Rule 23(a)(2) commonality test will apply to other rules and statutes that include a commonality requirement, and if not, why there is a distinction in interpreting the same words.

290. FED. R. CIV. P. 23(a)(4). Rule 23 was amended in 2003 to add subdivision (g), which directly addresses adequacy of class counsel. As explained in the Advisory Committee Notes to the 2003 amendments, "[t]his subdivision recognizes the importance of class counsel, states the obligation to represent the interests of the class, and provides a framework for selection of class counsel."

291. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) ("[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members."); Hansberry v. Lee, 311 U.S. 32, 42–43 (1940) (under Due Process Clause, class members must "in fact [be] adequately represented by the parties who are present.").

292. *See* Robert H. Klonoff, *The Judiciary's Flawed Application of Rule 23's "Adequacy of Representation" Requirement*, 2004 MICH. ST. L. REV. 671 (2004).

293. *Id*. at 680.

294. *See* Bruce Braverman, *The 'Adequate Representative' Requirement Gains Some Teeth*, 12 CLASS ACTION LITIG. REP. 945 (2011).

295. 662 F.3d 913 (7th Cir. 2011).

misconduct by class counsel would render counsel inadequate.[296] In vacating the district court's certification order, the Seventh Circuit, in an opinion by Judge Posner, held that the correct standard is whether class counsel's misconduct "creates a *serious doubt* that counsel will represent the class loyally."[297] This new standard espoused by Judge Posner properly addresses the due process issues discussed above.

There is, however, a disturbing trend in "adequacy" jurisprudence. That case law focuses not on the ability of class representatives and counsel to vigorously represent the class, but on counsel's selection of the causes of action to assert. The argument is that, by not bringing all potentially viable claims, the representatives and counsel have (1) impermissibly "split" claims, thereby prohibiting class members (pursuant to *res judicata*) from later bringing those omitted claims, or (2) subjected class members to the risk that collateral estoppel could essentially nullify their remaining (unfiled) claims.[298]

As Professor Edward Sherman has noted, plaintiffs and class counsel omit claims for many reasons, including difficult evidentiary or merits issues, to prevent removal of the case to federal court, or for other venue or jurisdictional reasons.[299] They also sometimes omit claims to enhance the likelihood of class certification. For example, plaintiffs and class counsel might omit claims for damages to bolster the chances for certification of an injunctive or declaratory class under Rule 23(b)(2). Or they might omit claims, such as fraud, that pose predominance issues under Rule 23(b)(3), particularly when they have other causes of action (such as breach of warranty or violation of a consumer protection statute) that address the same conduct and seek similar relief but do not pose predominance or manageability problems.[300] Several recent cases, however, have concluded that, by omitting potentially viable claims, the

296. *Id.* at 918 (emphasis added).

297. *Id.* (emphasis added). Other decisions holding class representatives and counsel to high standards include *CE Design, Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 726 (7th Cir. 2011); *Beck v. Maximus, Inc.*, 457 F.3d 291, 299 (3d Cir. 2006); and *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 824 (7th Cir. 2011).

298. *See generally* KLONOFF, ET AL., CASEBOOK, *supra* note 40, at 477 ("[O]ne vital objective of a class-action judgment is to foreclose further adjudication of claims that were—or could have been—adjudicated in the class action (*res judicata* or claim preclusion), as well as issues that were actually determined in, and were necessary to the adjudication of, the class action (collateral estoppel or issue preclusion).").

299. Edward F. Sherman, *"Abandoned Claims" in Class Actions: Implications for Preclusion and Adequacy of Counsel*, 79 GEO. WASH. L. REV. 483 (2011).

300. *Id.*

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class representatives and class counsel are inadequate under Rule 23(a)(4), thus requiring the denial of class certification.

This line of reasoning is not entirely new. A couple of district court cases from the 1980s adopted this approach,[301] but they were largely ignored by courts and class action defense counsel and remained as outliers for many years. Few defendants thought to challenge the adequacy of class counsel or class representatives on this ground.

In 1984, the Supreme Court held, in *Cooper v. Federal Reserve Bank of Richmond*,[302] that a failure of plaintiffs in a Rule 23(b)(2) class action alleging race discrimination to establish a pattern or practice of race discrimination did not bar class members from bringing individual claims of race discrimination against the same defendant. The Court reasoned:

> The [defendant] argues that permitting [the individual class members] to bring separate actions would frustrate the purposes of Rule 23. We think the converse is true. The class-action device was intended to establish a procedure for the adjudication of common questions of law or fact. If the defendant's theory were adopted, it would be tantamount to requiring that every member of the class be permitted to intervene to litigate the merits of his individual claim.[303]

Some commentators have read *Cooper* to undermine arguments against adequacy, given the Court's willingness to permit the individual actions despite a *res judicata* argument.[304] Other commentators have found the

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301. Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 606 (S.D.N.Y 1982) (stating that "a serious question of adequacy of representation arises when the class representatives profess themselves willing . . . to assert on behalf of the class" only certain breach of warranty claims for personal injury or property damage, while forgoing claims for death, personal injury, property damage, and the like, at the risk of preventing class members from later litigating those claims, in order to ensure commonality of the class); Pearl v. Allied Corp., 102 F.R.D 921, 924 (E.D. Pa. 1984) (plaintiffs, who deleted personal injury claims in a suit alleging damages from foam insulation in homes, held to be inadequate because "class members whose claims would be abandoned by the plaintiffs may find themselves precluded from asserting those claims in subsequent actions").

302. 467 U.S. 867 (1984).

303. *Id.* at 880.

304. *See, e.g.*, Edward F. Sherman, *"Abandoned Claims" in Class Actions: Implications for Preclusion and Adequacy of Counsel*, 79 GEO. WASH. L. REV. 483, 485 (2011) ("Following *Cooper*, it could be said that a 'class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damage claims by class members, even if based on the same events.'" (quoting Hiser v. Franklin, 94 F.3d 1287, 1291 (9th Cir. 1996)); Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313, 321–22 (2011) ("Without explicitly addressing the general ban on claim splitting, the *Cooper* Court permitted the absent class members to pursue individual claims of discrimination even though those claims were transactionally related to the pattern claims adjudicated in the class action. Thus, it implicitly assumed that claim preclusion did not bar the absent class members' individual claims . . . .").

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case to have little bearing on the adequacy issue.[305] In any event, *Cooper* certainly did not offer encouragement to defendants who were considering whether to make an adequacy argument based on *res judicata* concerns. Nonetheless, without any change either in Rule 23 or in relevant Supreme Court jurisprudence, defendants began raising adequacy arguments based on omitted claims. Courts, moreover, started taking those arguments seriously.

In an important decision in 1999, a federal district court in Texas found the class representative to be inadequate for deleting damages claims in a race discrimination suit under Rule 23(b)(2). The decision, *Zachery v. Texaco Exploration & Production, Inc.*,[306] distinguished *Cooper* and reasoned as follows:

> The Court is not concerned [as was the Court in *Cooper*] with what would happen if the class in this case is certified and *fails to prevail* on its class action for disparate treatment . . . . If a court certifies a class in this case and the class *prevails* [on the injunctive claim], no one will receive compensatory or punitive damages because the [named] Plaintiffs have unilaterally chosen not to seek them. Whether this bars the other class members from later seeking compensatory damages is an issue that greatly concerns the Court.[307]

The approach in *Zachery* received significant traction when, in 2008, the Fifth Circuit cited the case with approval and applied its reasoning. In *McClain v. Lufkin Industries, Inc.*,[308] the Fifth Circuit held that denial of class certification was proper in a race discrimination suit under 42 U.S.C. § 1981. Plaintiffs sought declaratory relief, injunctive relief, and back pay relief (which was permitted in a (b)(2) class in the Fifth Circuit prior to *Dukes*).[309] They did not, however, bring claims for compensatory or punitive damages. Citing *Zachery*, the Fifth Circuit stated that "if the price of a Rule 23(b)(2) disparate treatment class both limits individual opt-outs

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305. *See, e.g.*, Tobias B. Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 730 ("*Cooper* . . . is a Title VII opinion, not an opinion about the preclusive effects of class action judgments").

306. 185 F.R.D. 230 (W.D. Tex. 1999).

307. *Id.* at 243.

308. 519 F.3d 264 (5th Cir. 2008).

309. *See infra* notes 336–49 and accompanying text.

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and sacrifices class members' rights to avail themselves of significant legal remedies, it is too high a price to impose."[310]

Other recent cases have reached similar results. For instance, in *Cooper v. Southern Co.*,[311] seven African American employees, past and present, of Southern Company and its subsidiaries sued for unlawful discrimination on the basis of race. The seven plaintiffs sought to represent a class of all former and present African American employees on the theory that Southern Company and its three subsidiaries had "common policies and practices" that "foster[ed] a pattern or practice of race discrimination."[312] The plaintiffs argued on appeal, *inter alia*, that the district court erred in refusing to certify either a (b)(2) class allowing back pay (with no (b)(3) class for damages) or a "hybrid class under Rule 23(b)(2) for injunctive relief, while severing the damages phase of the proceedings by allowing opt-outs for damages."[313] The Eleventh Circuit indicated that omitting damages claims to enhance the likelihood of certification under Rule 23(b)(2) raised issues about whether "the named plaintiffs would adequately represent interests of the other putative class members[.]"[314]

Similarly, in *In re Teflon Products Liability Litigation*,[315] an Iowa district court held that named plaintiffs were inadequate because they had "abandon[ed] their original claims for medical monitoring and expressly disavow[ed] any current claim for personal injury."[316] According to the court, the possibility that a subsequent court could determine that the

310. *Lufkin*, 519 F.3d at 283. It should be noted, however, that the *McClain* case has had a complicated history, so its impact on adequacy of representation is not entirely clear. As the case first came to the Fifth Circuit, the district court had denied class certification of plaintiffs' disparate *treatment* claims, but granted certification to a pair of disparate *impact* claims, which were eventually tried before the district judge. *See Lufkin*, 519 F.3d at 272. The Fifth Circuit remanded on multiple grounds, but the class certification of the disparate impact claims was neither contested nor disturbed by the Fifth Circuit. The case was remanded for the lower court to correct an overly vague permanent injunction, and to calculate by formula the back pay to which each class member was entitled. *See* McClain v. Lufkin Industries, Inc., No. 9:97CV63 2010 WL 455351 (E.D. Tex. Jan. 15, 2010) (entering final judgment with re-crafted injunction and individualized awards of back pay), *aff'd*, 649 F.3d 374, *cert. denied*, 132 S. Ct. 589 (2011). The case went up on appeal once more on the issue of attorneys' fees, and the Fifth Circuit found error in the district court's fee determination, remanding the case yet again. *See* 649 F.3d 374 (5th Cir.), *cert. denied*, 132 S. Ct. 589 (2011).

311. 390 F.3d 695 (11th Cir. 2004).

312. *Id.* at 703 (internal quotation marks omitted).

313. *Id.* at 720.

314. *Id.* at 721.

315. 254 F.R.D. 354 (S.D. Iowa 2008).

316. *Id.* at 367.

claims were barred by *res judicata* "prevent[ed] the named plaintiffs' interests from being fully aligned with those of the class."[317]

In *Dukes*, the Supreme Court, in dictum, appeared to lend some support to these cases in the context of collateral estoppel. The *Dukes* plaintiffs sought back pay, but not compensatory damages, arguing that by not seeking compensatory damages, the class could be certified under (b)(2).[318] The *Dukes* plaintiffs' willingness to forgo class claims for compensatory damages in hopes of obtaining certification under Rule 23(b)(2) led the Court to express concern about the risk of precluding class members from seeking compensatory damages in the future:

> In this case . . . the named plaintiffs declined to include employees' claims for compensatory damages in their complaint. That strategy of including only back pay claims . . . created the possibility . . . that individual class members' compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from [because (b)(2) does not allow opt-outs]. If it were determined, for example, that a particular class member is not entitled to back pay because her denial of increased pay or a promotion was *not* the product of discrimination, that employee might be collaterally estopped from independently seeking compensatory damages based on that same denial.[319]

Not all courts have found adequacy concerns based on omitted claims. A number of courts have held that, if some claims are amenable to class treatment, but others are not (and are, therefore, not included as part of the class action), the doctrine of claim splitting does not apply. For example, in *Sullivan v. Chase Investment Services, Inc.*,[320] the plaintiffs sued several financial services companies over allegedly fraudulent marketing of investment services.[321] In holding that the class could be maintained

317. *Id.* at 368. *Accord, e.g.*, Miller v. Balt. Gas & Elec. Co., 202 F.R.D. 195, 203 (D. Md. 2001) (finding that plaintiffs' willingness to cede "compensatory and punitive damages claims [which were in their original complaint] raises serious questions regarding the ability of the named plaintiffs to represent the putative class adequately"); Rader v. Teva Parenteral Medicines, Inc., 276 F.R.D. 524, 5229 (D. Nev. 2011) (denying class certification because, *inter alia*, the plaintiff, in opting to "throw away" emotional distress claims that could be a "major component of class recovery," would preclude class members from pursuing them and create "insurmountable conflict between his own interests and that of the class he wishes to represent").

318. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011). *See* discussion of (b)(2), *infra* notes 336–49 and accompanying text.

319. *Id.* (emphases in original).

320. 79 F.R.D. 246 (N.D. Cal. 1978).

321. *Id.* at 265.

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without risking *res judicata* on claims that were unsuitable for class treatment, the court explained:

> [Plaintiffs] who have claims not raised in this class action because the claims are unsuitable for class treatment can bring those claims on an individual basis, and *res judicata* will not bar those claims because absent class members had no opportunity to litigate those issues in this lawsuit.
>
> What defendants have characterized as 'splitting' causes of action is perfectly appropriate under Rule 23. It is not uncommon for defendants to engage in a course of conduct which gives rise to a variety of claims, some amenable to class treatment, others not. Those claims that are amenable should be prosecuted as class actions in order to realize the savings of resources of courts and parties that Rule 23 is designed to facilitate. . . . *Class representatives must press all claims which can be prosecuted on a class basis, but they need not and should not press for certification of claims that are unsuitable for class treatment*.[322]

In another case, an Ohio state court held that the class representatives were adequate to represent cigarette smokers in a class suit seeking economic damages for alleged fraud, even though the complaint omitted personal injury claims.[323] As the court reasoned:

> Because only certain types of claims are suitable for class treatment, the plaintiffs in a class action may be limited to pursuing only some of their claims. For that reason, a class action 'is one of the recognized exceptions to the rule against claim-splitting.'[324]

Several other courts are in accord.[325]

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322. *Id.* (emphasis added).

323. Marrone v. Philip Morris, USA, Inc., No. 03CA0120-M 2004 WL 2050485, at *5–7 (Ohio Ct. App. Sept. 15, 2004).

324. *Id.* at *6 (quoting Gunnels v. Healthplan Servs., 348 F.3d 417, 432 (4th Cir. 2003)) (citations omitted).

325. *See, e.g.*, Cameron v. Tomes, 990 F.2d 14, 17 (1st Cir. 1993) (a judgment in a class action "binds the class members [only] as to matters actually litigated" and not as to "any claim . . . that was not addressed in the class action") (citations omitted); Gooch v. Life Investors Ins. Co. of Am., 672 F.3d 402, 428 n.16 (6th Cir. 2012) ("Piecemeal certification of a declaratory-relief-only class does not present a problem of preclusion for class members who wish to pursue damages claims"); Gunnells v. Healthplan Services Inc., 348 F.3d 417, 432 (4th Cir. 2003) ("a class action, 'of course, is one of the recognized exceptions to the rule against claim-splitting'" (citing 18 MOORE'S FEDERAL PRACTICE § 131.40[3][e][iii] (2002)); *In re* Universal Serv. Fund Tel. Billing Practices Litig., 219 F.R.D. 661, 669 (D. Kan. 2004) (rejecting adequacy argument where class counsel did not pursue a fraud claim

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The cases finding adequacy issues because plaintiffs have omitted certain claims are troublesome. Indeed, the notion that lawyers must assert all conceivable claims to avoid adequacy attacks—and that they cannot strategically select the claims that are best for the client—is the antithesis of effective advocacy.[326] Moreover, instead of attempting to minimize the *res judicata* and collateral estoppel risks for the omitted claims, these courts deny certification based merely on a fear that there *might* be issue or claim preclusion. A court certifying a class, however, can take a number of steps to minimize the likelihood of serious adverse repercussions because of omitted claims. These include the following:

- If the court wants to establish that all claims not brought are preserved, it can "provid[e] that any judgment in the certified action would be without prejudice, either from issue preclusion or from merger or bar, to the ability of class members to pursue any claims not raised in the complaint itself."[327] Any reservation of rights should, as a matter of fairness, apply equally to class members and defendants so that neither is bound beyond the claims actually litigated.[328]
- If the issue or claim preclusion concern is only about a parallel action or a specific cause of action, the reservation can be narrower to so reflect.[329]

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because of difficulties posed for class certification, stating: "This is not a case where the class representatives are pursuing relatively insignificant claims while jeopardizing the ability of class members to pursue far more substantial, meaningful claims").

326. *Cf.* ROBERT H. KLONOFF & PAUL L. COLBY, WINNING JURY TRIALS: TRIAL TACTICS AND SPONSORSHIP STRATEGIES 32–35 (NITA 3d ed. 2007) (discussing cost of "overtrying" by failing to screen evidence that is presented to a jury).

327. Wolff, *supra* note 305, at 776; *accord, e.g.*, Sherman, *supra* note 299, at 502.

328. The author disagrees with Professor Wolff's assertion that normally the reservation should protect only class members and not defendants. Wolff, *supra* note 305, at 792–94. For example, under Wolff's approach, assume a case in which the class seeks only certification of injunctive claims under (b)(2) and omits damages claims under (b)(3). If the class wins the (b)(2) case and an issue adjudicated therein later arises in individual suits, the individual plaintiffs could obtain issue preclusion. If the class loses on the issue, however, defendants could not seek issue preclusion against the individual class members. *See id.* Such uneven treatment would be unfair and reminiscent of the "one way intervention" that Rule 23 was designed to eliminate when it was promulgated in 1966. *See* London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1252 (11th Cir. 2003) ("One-way intervention occurs when the potential members of a class action are allowed to await . . . final judgment on the merits in order to determine whether participation [in the class] would be favorable to their interests" (quoting Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 547 (1974)) (citation and internal quotations omitted) (alteration and ellipsis by Court of Appeals)).

329. Under Professor Wolff's approach, where there are parallel class actions in state and federal court, a state court "could provide in its certification order that nothing in any judgment or dismissal of

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- If claims are omitted because they would defeat class certification, the court can identify the omitted claims in its order and find that they would not have been suitable for class certification.
- If certain claims are omitted because they are factually or legally weak, the court can so find and thus establish that the class members are not prejudiced by the omission of such problematic claims.
- If the omitted claims are not suitable for class certification but are too small to be brought individually, the court could note on the record the absence of prejudice to the class members.
- If the court remains concerned (notwithstanding the above tools) about the omission of claims for damages in a (b)(2) action, it could allow such claims by permitting notice and opt out under (b)(2).[330]

In short, the court can fashion an order that addresses the omitted claims and attempts to minimize the risk of issue and claim preclusion. It need not overreact by dismissing the class allegations on adequacy grounds.

F. Cutting Back on Rule 23(b)(2)

Dukes was a watershed opinion not only on commonality but also on Rule 23(b)(2). Unlike the commonality decision, which divided the Court 5–4, the Court's (b)(2) ruling was unanimous.[331] In the long run, the (b)(2) ruling may be as important as the commonality ruling.

Rule 23(b)(2) authorizes a class action when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]"[332] Unlike (b)(3), which is

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the action it has certified would have any preclusive impact upon the parallel action currently pending in federal court." Wolff, *supra* note 305, at 772.

330. *See, e.g.*, County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1304 (2d Cir. 1990) (exercising discretion to allow class member to opt out of mandatory limited-fund class); Eubanks v. Billington, 110 F.3d 87, 96 (D.C. Cir. 1997) (noting that the language of former Rule 23(d)(5) (now 23(d)(1)(E)) is "broad enough to permit the court to allow individual class members to opt out of a (b)(1) or (b)(2) class when necessary to facilitate the fair and efficient conduct of the litigation" (citing *Suffolk*, 907 F.2d at 1304)).

331. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011).

332. FED. R. CIV. P. 23(b)(2).

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intended primarily for actions seeking monetary relief,[333] subdivision (b)(2) was "intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate."[334] In explaining Rule 23(b)(2), the Advisory Committee's Note states that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[335] The issue in *Dukes* was whether (b)(2) certification was proper notwithstanding the claim for back pay.

Prior to *Dukes*, courts took several approaches in analyzing the permissibility of monetary claims under (b)(2), but no court held that back pay was an impermissible remedy under (b)(2). Most circuits followed the Fifth Circuit's restrictive approach in *Allison v. Citgo Petroleum*,[336] which allowed monetary claims under (b)(2) only if the claims were "incidental" to the declaratory or injunctive relief.[337] Under the *Allison* approach, "incidental damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established," and liability for such damages "should not require additional hearings to resolve the disparate merits of each individual's case."[338] Even under *Allison*, however, back pay was permissible under (b)(2) because the court deemed the remedy to be "equitable" in nature, and therefore akin to declaratory or injunctive relief.[339] The Fifth Circuit later held, in a race discrimination case construing *Allison*, that damages stemming from allegedly discriminatory insurance pricing were "incidental," because they could be calculated mechanically through a formula or grid. "The prevalence of variables common to the class," the court noted, made "damage computation virtually a mechanical task."[340]

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333. *See Dukes*, 131 S. Ct. at 2557–59.

334. Advisory Committee Notes to 1966 amendments to Rule 23. The Notes add that, although "(b)(2) is not limited to civil-rights cases," such cases are "illustrative" of that subdivision's intended application.

335. *Id.*

336. 151 F.3d 402 (5th Cir. 1998).

337. *Id.* at 415; *accord*, *e.g.*, Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 651 (6th Cir. 2006); Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 330 n.25 (4th Cir. 2006); Lemon v. Int'l Union of Operating Eng'rs, 216 F.3d 577, 580–81 (7th Cir. 2000).

338. *Allison*, 151 F.3d at 415 (citations omitted).

339. *Id.*

340. *In re* Monumental Life Ins. Co., 365 F.3d 408, 419 (5th Cir. 2004) (quoting Ala. v. Blue Bird Body Co., 573 F.2d 309, 326–27 (5th Cir. 1978) (citations, footnote, and internal quotation marks omitted)).

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The Second Circuit, in *Robinson v. Metro-North Commuter R.R.*,[341] adopted a more expansive view of Rule 23(b)(2), holding that a district court should assess the appropriateness of (b)(2) certification in light of "the relative importance of the remedies sought, given all of the facts and circumstances of the case."[342] Under this so-called *ad hoc* test, back pay could be recovered, but so could other types of potentially significant damages, as well, even if they were more than "incidental." The Second Circuit, seizing upon the language of the Advisory Committee Notes, stated that the issue was whether the injunctive or declaratory relief was "predominant[]" in terms of the benefit to the class.[343] The Ninth Circuit en banc adopted a similar approach in *Dukes*, holding that a class may seek monetary damages under (b)(2) as long as such damages are not "'superior [in] strength, influence or authority' to injunctive or declaratory relief."[344]

The Supreme Court in *Dukes* rejected the Second and Ninth Circuits' reliance on the "predominance" standard set out in the Advisory Committee Notes. The Court noted that "it is the Rule itself, not the Advisory Committee's description of it, that governs."[345] It also rejected *Allison*'s conclusion that back pay was recoverable under (b)(2) because it is an equitable remedy, noting that "[t]he Rule does not speak of 'equitable' remedies generally but of injunctions and declaratory judgments."[346] According to *Dukes*, "individualized monetary claims belong in Rule 23(b)(3)."[347] Noting that (b)(3), but not (b)(2), affords the protections of notice and opt-out, the Court left open the possibility that the assertion of *any* monetary claims under (b)(2), even if incidental, would violate the class members' due process rights.[348] The Court did not decide the issue, however, because it found that claims for back pay could not be characterized as "incidental" given the "individualized" nature of such relief.[349]

It is surprising that the four Justices who dissented in *Dukes* on the commonality prong said nothing about the Supreme Court's far-reaching

341. 267 F.3d 147 (2d Cir. 2001).
342. *Id.* at 164 (citations and internal quotation marks omitted).
343. *Id.*
344. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 616 (9th Cir. 2010) (en banc), *rev'd*, 131 S. Ct. 2541 (2011).
345. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011) (alterations in original).
346. *Id.* at 2560.
347. *Id.* at 2558.
348. *Id.* at 2559 (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985)).
349. *Dukes*, 131 S. Ct. at 2560.

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(b)(2) ruling, which is more restrictive than any federal circuit court decision. As noted, *Allison*, which had been attacked by various courts and commentators as being too rigid,[350] *permitted* back pay claims under (b)(2), and other Fifth Circuit case law permitted other damages claims as well in (b)(2) civil rights cases.[351] Indeed, every circuit to address the issue had permitted back pay in a (b)(2) discrimination action.[352] It is especially surprising that Justice Ginsburg, who wrote the dissenting opinion on commonality, and had years of experience litigating sex discrimination claims,[353] would join the majority's (b)(2) analysis without comment. In any event, *Dukes* has now established the controlling approach for analyzing (b)(2) classes.

It is too early to know what the full impact of the (b)(2) ruling in *Dukes* will be. The early cases appear to be mixed.[354] Some courts have rejected (b)(2) actions that seek money in addition to injunctive or declaratory relief.[355] Certainly, contrary to the prevailing view pre-*Dukes*, plaintiff classes will no longer be able to seek back pay under (b)(2) if the back pay claims raise individualized issues. But the potential impact of *Dukes* goes beyond back pay claims. Many other forms of monetary relief had been

350. *See, e.g.*, Suzette M. Malveaux, *Fighting to Keep Employment Discrimination Class Actions Alive: How* Allison v. Citgo*'s Predomination Requirement Threatens to Undermine Title VII Enforcement*, 26 BERKELEY J. EMP. & LAB. L. 405, 419 (2005) (criticizing *Allison* on grounds that, *inter alia*, the "restrictive predomination requirement jeopardizes employees' ability to obtain full relief" in Title VII cases); W. Lyle Stamp, Comment, *Getting Title VII Back on Track: Leaving* Allison *Behind for the* Robinson *Line*, 17 BYU J. PUB. L. 411, 411 (2003) (criticizing *Allison*'s "unduly stringent requirements").

351. *See supra* Part III.F (discussing *In re* Monumental Life Ins. Co., 365 F.3d 408 (5th Cir. 2004)).

352. *See, e.g.*, Reeb v. Ohio Dep't of Rehab & Corr., 435 F.3d 639, 650 (6th Cir. 2006); Cooper v. S. Co., 390 F.3d 695, 720 (11th Cir. 2004), *overruled on other grounds;* Ash v. Tyson Foods, Inc., 546 U.S. 454, 457 (2006); Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894, 896 (7th Cir. 1999); Kirby v. Colony Furniture Co., 613 F.2d 696, 699–700 (8th Cir. 1980); Rich v. Martin Marietta Corp., 522 F.2d 333, 342 (10th Cir. 1975); Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971).

353. Prior to her appointment to the Supreme Court, Justice Ginsburg successfully argued several landmark cases on equal protection and gender equality, including *Frontiero v. Richardson*, 411 U.S. 677 (1973) (striking down federal law requiring different criteria for male and female military spousal dependency) and *Duren v. Missouri*, 439 U.S. 357 (1979) (holding state law granting automatic exemption from jury duty to all women who requested it resulted in an unconstitutional underrepresentation of women in jury venires and violated the criminal defendant's right to a trial by jury chosen from a fair cross-section of the community).

354. *See* Mary Kay Kane, *The Supreme Court's Recent Class Action Jurisprudence: Gazing into a Crystal Ball*, 16 LEWIS & CLARK L. REV. 1015, 1036–41 (2012) (discussing post-*Dukes* jurisprudence under Rule 23(b)(2)).

355. *See, e.g.*, Gates v. Rohm & Haas Co., 655 F.3d 255, 262–70 (3d Cir. 2011) (affirming the district court's holding that proposed medical monitoring class did not meet requirements of (b)(2) or (b)(3)); Bell v. Lockheed Martin Corp., No. 08-6292 (RBK/AMD) 2011 WL 6256978 (D.N.J. Dec. 14, 2011); *In re* Motor Fuel Temperature Sales Practices Litig., 279 F.R.D. 598 (D. Kan. 2012) (redefining a (b)(2) class to certify damages claims under (b)(3)).

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permitted pre-*Dukes* as part of (b)(2) actions, including statutory damages[356] and declaratory relief resulting in recalculation of retirement benefits.[357] The validity of these precedents is now open to question.[358]

G. Heightened Scrutiny of Predominance

Most class actions are brought under Rule 23(b)(3).[359] Rule 23(b)(3) authorizes a class action when the court finds: (1) "that the questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[360] When (b)(3) was first introduced in 1966, it was considered "the most complicated and controversial portion" of modern Rule 23.[361] Today, most class actions are certified under (b)(3).[362] Yet, in recent years, the courts have made it far more difficult to certify class actions under (b)(3) by summarily finding, after identifying significant individualized issues, that predominance cannot be satisfied. They do so without carefully *weighing* those individualized issues against the common issues.

Two lines of cases in which the predominance requirement has often been fatal to class certification are those involving common law fraud claims and those implicating the laws of multiple jurisdictions. These two areas are discussed below. A third topic discussed below relates to individualized damages. Prior to *Comcast*, courts had generally held that the need for individualized proof of damages did not defeat class certification.[363] *Comcast* now raises a serious question on that score.

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356. *See, e.g.*, Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 462 (N.D. Cal. 1994) (allowing plaintiffs to seek minimum statutory damages as incidental to the primary injunctive relief sought under the Americans with Disabilities Act).

357. *See, e.g.*, Berger v. Xerox Corp. Retirement Income Guar. Plan, 338 F.3d 755, 763 (7th Cir. 2003).

358. *See, e.g.*, Delarosa v. Boiron, Inc., 275 F.R.D. 582, 591–93 (C.D. Cal. 2011) (court held that actual, punitive, and limited statutory damages were "incidental" but that claims for monetary damages available only to a subclass of senior citizens and disabled persons were not).

359. KLONOFF ET AL., CASEBOOK, *supra* note 40, at 30.

360. FED. R. CIV. P. 23(b)(3).

361. Charles A. Wright, *Class Actions*, 47 F.R.D. 169, 178 (1970).

362. KLONOFF ET AL., CASEBOOK, *supra* note 40, at 30.

363. *See, e.g.*, Klay v. Humana, Inc., 382 F.3d 1241, 1259 (11th Cir. 2004) ("[N]umerous courts have recognized that the presence of individualized damages issues does not prevent a finding that common issues in the case predominate." (citations omitted; alteration in original)); Gunnells v. Healthplan Services, Inc., 348 F.3d 417, 427–28 (4th Cir. 2003) ("Rule 23 contains no suggestion that the necessity for individual damage determinations . . . forecloses class certification."); Smilow v. Southwestern Bell Mobile Systems, Inc., 323 F.3d 32, 40 (1st Cir. 2003) ("Where, as here, common

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1. Fraud Cases

Many courts have adopted essentially a *per se* view that fraud suits involving questions of individual reliance are not suitable for class certification.[364] The Fifth Circuit first articulated this principle in 1996 in *Castano v. American Tobacco Co.*,[365] stating that "a fraud class action *cannot* be certified when individual reliance will be an issue."[366] Seven years later that Circuit was similarly emphatic, stating at the very beginning of its opinion in *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance Co.*,[367] that "[f]raud actions that require proof of individual reliance cannot be certified [under Rule 23(b)(3)] because individual, rather than common, issues will predominate."[368] Put another way, regardless of the importance of the common issues, questions of individual reliance are so paramount that no common issues can justify certification.

Sandwich Chef was a fraud-based putative RICO class action by a company that operated delicatessens in a number of states, alleging that 141 casualty insurance companies charged class members excessive premiums on workers' compensation insurance policies. A major issue was whether the class members were aware that carriers were charging them more than the filed premium rates and nonetheless agreed to those charges. The court noted that

> [d]efendants [were] entitled to attempt to undercut [the class members' proof that they detrimentally relied on the invoices as reflecting the filed rates] with evidence that might persuade the trier of fact that policyholders knew the amounts being charged varied

questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain." (citations omitted)); Bell Atlantic Corp. v. AT&T Corp., 339 F.3d 294, 306 (5th Cir. 2003) ("Even wide disparity among class members as to the amount of damages suffered does not necessarily mean that class certification is inappropriate" (citation omitted)).

364. An important exception is in certain securities fraud cases, where courts do not require proof of individualized reliance from each class member. In *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), the Court held that a presumption of reliance applies when trading occurs in an "efficient" market that accurately reflects all publicly disclosed information in the price of the stock. *See* KLONOFF, NUTSHELL, *supra* note 15, at 359–62; *infra* Part IV.A.

365. 84 F.3d 734 (5th Cir. 1996).

366. *Id.* at 745 (emphasis added).

367. 319 F.3d 205 (5th Cir. 2003).

368. *Id.* at 211.

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> from rates filed with regulators and that they had agreed to pay such premiums.[369]

Finding no basis for a presumption of reliance, the court held that the district court had improperly certified the class.[370]

Similarly, the Eighth Circuit, citing with approval the Fifth Circuit's language in *Castano*, held that the district court had erred in certifying a consumer protection class action involving issues of individualized reliance.[371] Numerous other cases have taken a rigid view that predominance is defeated—virtually automatically—when individualized reliance issues exist.[372]

Other courts, while not using such emphatic language, have made clear that the burden on the class to satisfy predominance would be onerous. For instance, in *McLaughlin v. American Tobacco Co.*,[373] the Second Circuit held that a case alleging false advertising by tobacco companies was not suitable for class certification because "reliance [on the ads as the reason for smoking was] too individualized to admit of common proof.[374]

Not all courts have taken such a strict approach. As the Eleventh Circuit stated in *Klay v. Humana, Inc.*,[375] "the simple fact that reliance is an element in a cause of action is not an absolute bar to class certification."[376] Thus, for example, some courts have recognized that class certification is appropriate in fraud cases that involve uniform misrepresentations or omissions.[377] Indeed, the Advisory Committee Notes

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369. *Id*. at 220.

370. *Id.* at 224. The rationale of *Sandwich Chef* has been criticized. *See, e.g.*, Leah Bressack, Note, *Small Claim Mass Fraud Actions: A Proposal for Aggregate Litigation Under RICO*, 61 VAND. L. REV. 579, 592 (2008) (criticizing the approach to RICO taken in *Sandwich Chef* and other cases on the grounds that "requir[ing] individualized proof of reliance[] generally precludes class certification," thereby "forc[ing] individualized adjudications that will never occur."). The Supreme Court later held that a plaintiff asserting a RICO claim for mail fraud did not need to show reliance, either as an element of the claim or as a prerequisite to establishing proximate causation. *See* Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639 (2008).

371. *In re* St. Jude Med. Inc., Silzone Heart Valve Prods. Liab. Litig., 522 F.3d 836, 838 (8th Cir. 2008).

372. *See, e.g.*, Gunnells v. Healthplan Services, Inc., 348 F.3d 417, 434 (4th Cir. 2003); McManus v. Fleetwood Enters., Inc., 320 F.3d 545, 549–50 (5th Cir. 2003).

373. 522 F.3d. 215 (2d Cir. 2008).

374. *Id.* at 225; *accord, e.g.*, UFCW Local 1776 v. Eli Lilly & Co., 620 F.3d 121, 132–37 (2d Cir. 2010) (relying on *McLaughlin* in overturning certification of a fraud claim).

375. 382 F.3d 1241 (11th Cir. 2004).

376. *Id.* at 1258.

377. *See, e.g.*, Moore v. Painewebber, Inc., 306 F.3d 1247, 1255 (2d Cir. 2002) (Sotomayor, J.) ("[E]vidence of materially uniform misrepresentations is sufficient to demonstrate the nature of the misrepresentation; an individual plaintiff's receipt of and reliance upon the misrepresentation may then be simpler matters to determine"); *In re* United Energy Corp. Solar Power Modules Tax Shelter Invs. Sec. Litig., 122 F.R.D. 251, 255 (C.D. Cal. 1988) (finding class certification proper notwithstanding

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to Rule 23 make precisely this point. Although the Notes state that a fraud suit may be inappropriate for certification if there are "material variation[s] in the representations" or "in the kinds or degrees of reliance" by class members, the Notes further provide that a "a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by an individuals within the class."[378] A number of courts have specifically recognized that the Advisory Committee Notes support certification in certain types of fraud cases.[379]

In an important unpublished opinion, *Jenson v. Fiserv Trust Co.*,[380] the Ninth Circuit explicitly departed from courts that find individualized reliance to be fatal to predominance. The class consisted of investors who made investments and lost money and who claimed that they were victims of a Ponzi scheme.[381] A subclass consisted of investors who made those investments through defendant Fiserv's accounts. Fiserv argued that a fraud case based on alleged oral misrepresentations could not be certified and that the district court erred in certifying the subclass. The Ninth Circuit disagreed, finding that the "'center of gravity'" of the fraud predominated over the existence of individualized communications.[382] It noted that "[t]he Ponzi scheme itself would have to be proved or controverted over and over were the case not to proceed as a class action."[383] It emphasized that "common issues do not necessarily fail to predominate simply because reliance must be shown."[384]

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oral representations where case focused on standardized letters); Spark v. MBNA Corp., 178 F.R.D. 431, 436 (D. Del. 1998) (noting, in finding predominance despite reliance issues, that "[i]n this case . . . it is fair to assume that most individuals who opened up credit card accounts after receiving the offer from [defendant] did so because . . . of the [annual percentage rate]"); Shankroff v. Advest, Inc., 112 F.R.D. 190, 193 (S.D.N.Y. 1986) (noting in certifying class that "the facts as alleged show that defendant's course of conduct concealed material information from an entire putative class").

378. FED. R. CIV. P. 23(b)(3) advisory committee's notes to 1966 amendment.

379. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) ("Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws") (citation omitted); Miles v. Am. Online, Inc., 202 F.R.D. 297, 304 (M.D. Fla. 2001) (although the Advisory Committee Notes warn that some fraud cases might not be suitable for class certification, the Notes "also find it appealing to use a class device to resolve cases involving 'fraud perpetrated on numerous persons by the use of similar misrepresentations'") (citation omitted); *PaineWebber*, 306 F.3d at 1253 ("fraud actions must . . . be separated into two categories: fraud claims based on uniform misrepresentations . . . and fraud claims based on individualized misrepresentations").

380. 256 Fed. App'x 924 (9th Cir. 2007).

381. *Id.*

382. *Id.* at 926 (quoting *In re* First Alliance Mortgage Co., 471 F.3d 977, 991 (9th Cir. 2006)).

383. *Id.* (citation omitted).

384. *Id.* (citation omitted).

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It may well be that, under the particular circumstances in *Castano* and *Sandwich Chef*, individual issues outweighed common issues. Indeed, *Castano* involved a problematic, newly minted tort theory: "addiction as injury."[385] The problem in *Castano*, *Sandwich Chef*, and similar cases, however, is that the courts reach the conclusion against class certification without carefully balancing the common issues against the individual issues. As the Ninth Circuit's *Jenson* decision reflects, a class action may avoid the need to retry, for each class member, the core theory of liability, or at least the underlying alleged misconduct. Only by balancing that benefit against the time and effort required to prove reliance for each class member can a proper decision be made on predominance. If the case involves alleged uniform written communications, for example, the reliance issues may be quite manageable. The notion adopted by some courts that fraud cases involving individualized reliance are *per se* unsuitable flies in the face of the Advisory Committee Notes, which makes clear that in fraud cases, the facts of each case must be considered.[386] As one court stated in another context, "the mere fact that questions peculiar to each individual member of the class action remain after the common questions of the defendant's liability have resolved does not dictate the conclusion that a class action is impermissible."[387]

2. Choice-of-Law

The treatment of fraud and reliance by some courts finds an exact parallel in cases involving the laws of multiple states. Multiple states' laws may be implicated in nationwide or other multi-state class actions based on state-law claims, such as consumer protection acts, negligence, unjust enrichment, fraud, or breach of contract. Various choice-of-law approaches frequently dictate that the law of each class member's home state will govern.[388] Numerous courts hold that when the laws of multiple states are involved and are not uniform, class certification is essentially

385. Castano v. Am. Tobacco Co., 84 F.3d 734, 747 n.24 (5th Cir. 1996).

386. *See supra* note 378.

387. Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988).

388. Choice-of-law principles may point to the various jurisdictions in which class members find themselves, based upon the "nature of the claims involved," or upon "a contextual determination that the jurisdiction in which each class member is found has the most significant interest in controlling the resolution of that class member's claim or, similarly, has the most significant relationship to the underlying dispute." PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *supra* note 279, § 2.05, cmt. b, at 131. Under a second approach, the laws of the class members' jurisdictions might be grouped into a limited number of patterns. *Id.* Alternatively, a single state's law might apply, assuming that the choice is not arbitrary and that defendant was on notice of the applicable legal standard. *Id.*

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per se inappropriate. Some courts base their decision on a lack of predominance. As the Fifth Circuit stated in *Stirman v. Exxon Corp*.,[389] "[i]n order for common issues to predominate"[390] the state laws at issue "must be uniform in [the] necessary aspects . . . ."[391] Other courts base their decision on a failure to show that the class action would be manageable, as required by Rule 23(b)(3)(D).[392]

A recent example of this rigid approach to choice-of-law is the Sixth Circuit's decision in *Pilgrim v. Universal Health Card, LLC*,[393] discussed above.[394] The Sixth Circuit upheld the district court's decision granting defendants' motion to deny class certification, without affording plaintiffs any opportunity to conduct discovery, because the laws of the 50 states were involved.[395] Although the court purported not to rule out completely the possibility that a case could satisfy predominance despite the application of multiple states' laws,[396] it in fact left little room for certifying classes involving the laws of multiple states. For example, the court quoted a prior Sixth Circuit case stating that "'[i]f more than a few of the laws of the fifty states differ,'" then "'the district judge would face an impossible task of instructing a jury on the relevant law.'"[397] It also quoted a Seventh Circuit opinion holding that "'[b]ecause these claims must be adjudicated under the law of so many jurisdictions,'" the class was unmanageable.[398] The fact that the Sixth Circuit held that plaintiffs were not entitled even to limited discovery relating to predominance underscored that any significant choice-of-law issues are, in the Sixth Circuit's view, fatal to certification.

In the 1980s and 1990s, several courts were willing to certify class actions, notwithstanding choice-of-law issues. For instance, in *In re Copley Pharmaceutical, Inc.*,[399] the Wyoming district court sharply criticized courts that were unwilling to certify class actions involving multiple states' laws. The suit was a nationwide product liability class

389. 280 F.3d 554 (5th Cir. 2002).
390. *Id.* at 564–65.
391. *Id.* at 565 n.9.
392. Examples include *Castano*, 84 F.3d at 743–44 (relying on manageability as well as predominance); and *In re* Gen. Motors Corp. Dex-Cool Prods. Liab. Litig., 241 F.R.D. 305, 324 (S.D. Ill. 2007) (same).
393. 660 F.3d 943 (6th Cir. 2011).
394. *See supra* notes 156–57 and accompanying text.
395. *Pilgrim*, 660 F.3d at 946–47.
396. *Id.* at 947.
397. *Id.* at 948 (quoting *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996)).
398. *Id.* (quoting *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1018 (7th Cir. 2002)).
399. 161 F.R.D. 456 (D. Wyo. 1995).

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action against Copley Pharmaceutical alleging that its drug Albuterol was contaminated.[400] Focusing on manageability under the superiority component of Rule 23(b)(3), the court held that certification was appropriate. It stated that "the decision whether to attempt to manage a class under differing laws is committed to the discretion of the trial court."[401] The court emphasized that only one defendant had been sued, that the product had been safely manufactured by other generic drug companies, and that Copley had admitted that some of its product was contaminated and that it was liable for injuries resulting from that contamination.[402] The court cited several cases, primarily from the 1980s, stating that choice-of-law issues did not render a case *per se* unsuitable for class certification.[403]

Even more recently, courts have occasionally suggested that choice-of-law issues are not necessarily fatal.[404] The Eleventh Circuit's decision in *Klay v. Humana, Inc*.[405] is illustrative. Although the Eleventh Circuit held that the district court abused its discretion in certifying state breach of contract claims on a nationwide basis, it made clear that choice-of-law was not the concern. The court stated that "if the applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards, then certification of subclasses embracing each of the dominant legal standards can be appropriate."[406] With respect to breach of contract, the court said that "[a] breach is a breach is a breach, whether you are on the sunny shores of California or enjoying a sweet autumn breeze in New Jersey."[407]

As with reliance in a fraud suit, there should be no *per se* rule that choice-of-law issues defeat class certification. Assuming that a single state's law does not apply (for instance, the law of the defendant's principal place of business), the court should carefully analyze the circumstances of the case based on: (1) the extent of variations in the state laws (and the number of states' laws at issue); (2) the ability to minimize differences through subclasses; and (3) the strength of the common issues.

400. *Id.* at 457.
401. *Id.* at 465 (citation omitted).
402. *Id.*
403. *Id.* at 466.
404. *See, e.g.*, Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 594 n.3 (3d Cir. 2012) ("[P]redominance is not defeated merely because different states' laws apply to different class members' claims.") (citations omitted).
405. 382 F.3d 1241 (11th Cir. 2004).
406. *Id*. at 1262 (citation omitted).
407. *Id*. at 1263 (citation omitted).

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Although *Rhone-Poulenc* suggests that even nuances are critical,[408] a proper inquiry should focus not on nuances but on whether the laws are the same in "functional content."[409] Of course, the burden is on the plaintiff to show, through a precise analysis of the applicable laws and a proposed case management plan, that common issues predominate and that the trial of the case would be manageable.

3. Individualized Damages Issues

Prior to *Comcast*, most courts had recognized that the presence of individualized damages issues normally did not defeat class certification.[410] After *Comcast*, this proposition has arguably been called into question. In *Comcast*, the Court stated:

> [I]t is clear that, under the proper standard for evaluating certification, respondents' model falls far short of establishing that *damages* are capable of measurement on a classwide basis. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class.[411]

This language can be read to suggest that individualized damages issues raise serious predominance concerns. On the other hand, the dissent in *Comcast* stressed that the majority opinion did not contradict the "nigh universal" body of case law holding "that individual damages calculations do not preclude class certification under Rule 23(b)(3)."[412] In part, the disagreement between the majority and dissent on this point stemmed from the unusual procedural posture of the case: plaintiffs had not contested the proposition that class certification would be *inappropriate* if individualized damages issues existed.[413]

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408. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995).

409. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.05(b)(2), 129 (Am. Law Inst. 2010).

410. *See supra* note 363.

411. 133 S. Ct. 1426, 1433 (2013) (emphasis added).

412. *Id.* at 1437 (Ginsburg & Breyer, JJ., dissenting) (citations omitted); *see also* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1196 (2013) ("Rule 23 . . . does not require a plaintiff seeking class certification to prove that each 'elemen[t] of [her] claim [is] susceptible to classwide proof." (citation omitted; alterations in original)).

413. *See Comcast Corp. v. Behrend*, 133 S. Ct. at 1437 (Ginsburg & Breyer, JJ., dissenting) (citing plaintiffs' brief).

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It remains to be seen whether *Comcast* will now cause lower courts to depart from the traditional rule that individualized damages issues normally do not defeat class certification. Courts and commentators are already divided on what the impact of the case will be.[414] If courts begin to require, as a prerequisite to class certification, that plaintiffs provide a methodology for proving damages on a classwide basis, this will be yet another major impediment to class certification.

H. Settlement Certification

In many cases, plaintiffs' counsel and defendants are able to agree upon the terms of a classwide settlement even before the court has certified a class.[415] Indeed, the very uncertainty over whether a class would even be certified often helps to bring the two sides to the bargaining table. In *Amchem Products, Inc. v. Windsor*,[416] a putative class action involving alleged injuries from asbestos, the Supreme Court held that, when class certification is sought simultaneously with approval of a classwide settlement, the parties cannot avoid rigorous compliance with Rule 23. Although the Court said that, in the settlement context, "a district court need not inquire whether the case, if tried, would present intractable management problems [when certification is sought under Rule 23(b)(3)]," the Court concluded that the other requirements of Rule 23 (including the four requirements of Rule 23(a) and the other requirements of (b)(3) (excluding manageability)) "demand undiluted, *even heightened*, attention

414. *See, e.g.*, John H. Beisner, Jessica D. Miller & Geoffrey M. Wyatt, *From Cable TV to Washing Machines: The Supreme Court Cracks Down on Class Actions*, 14 BNA Insights 10 (May 24, 2013) (arguing that it "follows from the *Comcast* decision that plaintiffs must put forth a method sufficient to calculate damages on a classwide basis in Rule 23(b)(3) class actions"); Richard A. Epstein, *The Precarious Status of Class Action Litigation after* Comcast v. Behrend, Apr. 8, 2013, http://pointoflaw.com/columns/2013/04/the-precarious-status-of-class-action-antitrust-litigation-after-comcast-v-behrend.php ("Will [*Comcast*] be treated as a misadventure in pleading or a major revolution in the proof of damages in consumer class actions? Only time will tell."); *see also* Roach v. T. L. Cannon Corp., No. 3:10-cv-0591, 2013 WL 1316452, at *3 (N.D.N.Y. Mar. 29, 2013) (finding that *Comcast* required denial of class certification where plaintiffs failed to offer a "damages model susceptible of measurement across the entire class"); *but see* Leyva v. Medline Industries, Inc., 716 F.3d 510, 514–16 (9th Cir. 2013) (holding that district court abused its discretion in denying class certification because of individualized damages and finding that *Comcast* did not change prior case law holding that individualized damages ordinarily do not defeat class certification); Munoz v. PHH Corp., No. 1:08-cv-0759-AWI-BAM, 2013 WL 2146925, at *24 (E.D. Cal. May 15, 2013) ("The *Comcast* decision does not infringe on the longstanding principle that individual class member damage calculations are permissible in a certified class under Rule 23(b)(3).").

415. *See, e.g.*, Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL L. STUD. 811, 819 (2010) ("68 percent of the federal [class action] settlements in 2006 and 2007 were settlement classes").

416. 521 U.S. 591 (1997).

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in the settlement context."[417] The Court based its decision, *inter alia*, on the text of Rule 23(b)(3), which does not differentiate for certification purposes between a litigation class and a settlement class.[418] Applying the predominance requirement to the settlement class before it, the Court held that the "sprawling class the District Court certified" failed to satisfy that requirement.[419] The Court flatly rejected the argument that a settlement class should be approved—without regard to the certification requirements—as long as it was fair:

> [C]ourts must be mindful that the Rule as now composed sets the requirements they are bound to enforce. . . . Federal courts . . . lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is "fair," then certification is proper. . . . [C]ertification cannot be upheld [in this case], for it rests on a conception of Rule 23(b)(3)'s requirements irreconcilable with the Rule's design.[420]

A number of courts have invalidated settlements in light of *Amchem*. For example, in *In re Grand Theft Auto Video Game Consumer Litigation*,[421] the district court decertified a settlement class of consumers pursuing fraud claims, holding that Rule 23(b)(3) predominance was defeated by the need to prove individualized reliance and the need to apply multiple states' laws.[422] The court relied on the Second Circuit's decision in *Denney v. Deutsche Bank AG*,[423] which in turn relied heavily on *Amchem*.[424] Echoing *Amchem*, the *Grand Theft Auto* court stated that "[t]rial manageability issues aside, . . . the 'requirements of [Rule 23(a)

417. *Id.* at 620 (emphasis added).

418. *Id.* at 622–25. In addition to relying on the Rule's text, the *Amchem* Court noted that, if a class could be certified without satisfying the requirements for a litigation class, "[c]lass counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer. . . ." *Id.* at 621 (citation omitted). *See also* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.06 cmt. a, at 213 (Am. Law Inst. 2010); Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003). In addition to finding that predominance was not satisfied, the Court also found that the putative class failed to meet Rule 23(a)(4)'s adequacy of representation requirement. *Amchem*, 521 U.S. at 625–28.

419. *Amchem*, 521 U.S. at 622–23.

420. *Id.* at 620.

421. 251 F.R.D. 139 (S.D.N.Y. 2008).

422. *Id.* at 146.

423. 443 F.3d 253, 270 (2d Cir. 2006) ("[I]nquiry into the fairness of a settlement cannot supplant the inquiries under Rules 23(a) and (b) regarding whether the requirements for class certification have been met." (citing *Amchem*, 521 U.S. at 619–21)) (citation omitted).

424. *See supra* notes 416–20 and accompanying text.

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and (b)] should not be watered down by virtue of the fact that the settlement is fair or equitable.'"[425]

Likewise, in *In re Ephedra Products Liability Litigation*,[426] the district court relied heavily on *Amchem* in refusing to certify a settlement class of plaintiffs who had ingested an allegedly dangerous dietary supplement. The court stated:

> In *Amchem*, the Court . . . rejected the argument . . . that certification requirements are relaxed when litigation is to be obviated by a settlement. "[P]roposed settlement classes sometimes warrant more, not less, caution on the question of certification." . . .
>
> Application here of Rule 23 standards reveals that the proposed certification is deficient for, *inter alia*, some of the same reasons addressed in *Amchem*.[427]

The refusal of some courts to certify settlement classes is not the only consequence of *Amchem*. Many recent mass actions have settled outside of the class action process. For instance, the highly publicized multidistrict Vioxx and Zyprexa pharmaceutical claims settled without class certification.[428] In his concurring opinion in *Sullivan v. DB Investments, Inc.*,[429] Judge Scirica related this phenomenon to *Amchem*. He opined that class settlement of mass tort cases had become problematic as a result of the Supreme Court's opinion, "leading some practitioners to avoid the class action device."[430] Judge Scirica further noted that "some observers believe there has been a shift in mass personal injury claims to aggregate non-class settlements."[431]

This alternative settlement route is troublesome: unless the court chooses to treat a case as akin to a class action and thus carefully reviews

425. *Grand Theft Auto*, 251 F.R.D. at 146 (quoting *Denney*, 443 F.3d at 270).

426. 231 F.R.D. 167 (S.D.N.Y. 2005).

427. *Id.* at 170 (quoting *Amchem*, 521 U.S. at 620 n.16). For additional examples of courts either refusing to certify or decertifying settlement classes based on *Amchem*, *see, e.g.*, *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 249–57 (2d Cir. 2011), *on remand from* 130 S. Ct. 1237 (2011); *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 299 (3d Cir. 2005); *In re Motor Fuel Temperature Sales Practices Litig.*, 271 F.R.D. 263 (D. Kan. 2010); and *Gilliam v. HBE Corp.*, 204 F.R.D. 493 (M.D. Fla. 2000).

428. Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506, 507 n.5, 513 (2011).

429. 667 F.3d 273 (3d Cir. 2011) (Scirica, J., concurring), *cert. denied sub nom.* Murray v. Sullivan, 132 S. Ct. 1876 (2012).

430. *Id.* at 334.

431. *Id.* (citing Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 U. KAN. L. REV. 775, 801 (2010)) (additional citations omitted).

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the settlement and the amount of attorneys' fees,[432] the settling plaintiffs receive none of the protections that Rule 23(e) and Rule 23(h) provide for class actions, including judicial evaluation of the fairness of the settlement and the reasonableness of attorneys' fees.[433] As Judge Scirica stated: "[The increase in large non-class settlements] is significant, for outside the federal rules governing class actions, there is no prescribed independent review of the structural and substantive fairness of a settlement including evaluation of attorneys' fees, potential conflicts of interest, and counsel's allocation of settlement funds among class members."[434]

Some courts, notwithstanding *Amchem*, have relaxed the Rule 23 criteria for settlement classes. For instance, one district court has noted in the choice-of-law context that "courts are more inclined to find the predominance test met" when the case involves a settlement class rather than a litigation class.[435] Other courts have emphasized *Amchem*'s holding that the manageability component of (b)(3) does not apply to (b)(3) settlement classes without grappling with possible predominance issues posed by the particular case. The Third Circuit took this latter approach in a recent en banc decision, *Sullivan v. DB Investments, Inc.*[436] In upholding a settlement class despite state law differences, the court noted: "The correct outcome is even clearer for certification of a settlement class because the concern for manageability that is a central tenet in the

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432. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 554 (E.D. La. 2009) ("[T]he Vioxx global settlement may properly be analyzed as occurring in a quasi-class action, giving the Court equitable authority to review contingent fee contracts for reasonableness." (citations and internal quotation marks omitted)); *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. 05-1708, 2008 WL 682174, at *17 (D. Minn. Mar. 7, 2008) (court reviewed reasonableness of fees because the private settlement "has many of the characteristics of a class action and may be properly characterized as a quasi-class action subject to general equitable powers of the court" (citations and internal quotation marks omitted)); *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006) (to the same effect).

433. *See* FED. R. CIV. P. 23(e); *see also, e.g.*, Roger C. Cramton, *Lawyer Ethics on the Lunar Landscape of Asbestos Litigation*, 31 PEPP. L. REV. 175, 194 (2003) ("Consolidated cases that involve hundreds or thousands of claimants involve an even greater problem because all of the protections of class actions have been eliminated"); Willging & Lee, *supra* note 431, at 803 ("[F]ew, if any, of the special procedural protections available to class members are afforded to litigants who settle their cases in a nonclass consolidated settlement." (footnote omitted)); Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 U. KAN. L. REV. 889, 898 (2010) ("[B]ecause these claims are not certified as class actions, they proceed in a procedural no man's land—somewhere in between individual litigation and class action litigation, but without the protections of either." (footnote omitted)).

434. *Sullivan*, 667 F.3d at 334 (Scirica, J., concurring) (footnotes omitted).

435. Ersler v. Toshiba Am. Inc., No. CV-07-2304, 2009 WL 454354, at *4 (E.D.N.Y. Feb. 24, 2009) (citation omitted).

436. 667 F.3d 273 (3d Cir. 2011) (en banc), *cert. denied sub nom.* Murray v. Sullivan, 132 S. Ct. 1876 (2012).

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certification of a litigation class is removed from the equation."[437] The court stated that "we can find no persuasive authority for deeming the certification of a class for settlement purposes improper based on differences in state law."[438] The court reached this conclusion notwithstanding numerous cases holding, in the trial context, that the existence of multiple state laws defeats predominance as well as manageability.[439] Indeed, in *Amchem* itself, the Court quoted the Third Circuit's decertification order, which noted that "[d]ifferences in state law . . . compound [the] disparities" among class members.[440]

The Second Circuit's recent decision in *In re American Intern. Group, Inc. Securities Litigation*[441] is another example of a court focusing on *Amchem*'s manageability holding as a way to approve a settlement. There, the district court had refused to certify a (b)(3) class because it found that the fraud-on-the-market presumption did not apply to the plaintiffs' securities fraud claims, and therefore, that predominance was not satisfied.[442] The Second Circuit, however, held that, under *Amchem*, "a settlement class ordinarily need not demonstrate that the fraud-on-the-market presumption applies to its claims in order to satisfy the predominance requirement."[443] The court reasoned that, since "a securities fraud class's failure to satisfy the fraud-on-the-market presumption primarily threatens class certification by creating 'intractable management problems' at trial," and since "settlement eliminates the need for trial," the class's failure to qualify for the *Basic v. Levinson* presumption did not preclude certification of a settlement class.[444] This case, however, ignores the fact that—putting aside manageability—reliance issues raise a predominance problem,[445] and *Amchem* held that predominance must be satisfied even for settlement classes.

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437. *Id.* at 302; *see also In re* Warfarin Sodium Antitrust Litig., 391 F.3d 516, 529–30 (3d Cir. 2004) (upholding certification of a settlement class under Rule 23(b)(3) and reasoning that differences in state law do not present manageability problems when a case settles).

438. *Sullivan*, 667 F.3d at 304.

439. *See, e.g.*, *In re* Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 349–52 (D.N.J. 1997); Marshall v. H & R Block Tax Servs. Inc., 270 F.R.D 400, 407–10 (S.D. Ill. 2010); *In re* Prempro, 230 F.R.D. 555, 561–63 (E.D. Ark. 2005); *see also supra* note 299 and accompanying text.

440. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 624 (1997) (citation omitted).

441. 689 F.3d 229 (2d Cir. 2012).

442. *In re* Am. Int'l Grp., Inc. Sec. Litig., 265 F.R.D. 157 (S.D.N.Y. 2010).

443. 689 F.3d at 232.

444. *Id.* (quoting *Amchem*, 521 U.S. at 620).

445. *See supra* Part III.G.1.

Numerous commentators have been critical of *Amchem*.[446] For example, prominent plaintiff lawyer Elizabeth Cabraser has stated: "[T]he multibillion-dollar settlement, rejected by the Supreme Court, was lost forever, and thousands of claimants who would gladly have traded their pristine due process rights for substantial monetary compensation have been consigned to the endless waiting that characterizes asbestos bankruptcies."[447]

As indicated above, the rigorous scrutiny of Rule 23's requirements presents a number of practical problems in the settlement certification context. First, as Judge Scirica observed, *Amchem* has led some practitioners to avoid the class action route altogether,[448] resulting in an increase in mass actions settling outside the class action process.[449] The settling plaintiffs are thus deprived of the protections of Rule 23(e) and Rule 23(h). Moreover, requirements that are important only in the context of litigation should not play a role in the settlement context. *Amchem*'s conflation of class settlement with class litigation undermines the benefits of avoiding litigation and may result in plaintiffs being unable to pursue socially beneficial settlements.[450]

In 1996 the Advisory Committee proposed creating a fourth type of class under Rule 23(b), often referred to as the "settlement class." The proposed rule provided that "the parties to a settlement [may] request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial."[451] As the draft Advisory Committee Notes stated regarding that proposed rule:

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446. *See, e.g.*, Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475 (2005); Joseph W. Gelb, Yoav M. Griver & Seth C. Berman, *Class Action Settlements in the Aftermath of* Amchem Products *and* Ortiz, 55 BUS. LAW. 1439, 1441–43 (2000); Alex Raskolnikov, *Is There a Future for Future Claimants After* Amchem Products, Inc. v. Windsor*?*, 107 YALE L.J. 2545 (1998); *cf.* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES 127 (1995) ("I cannot agree with those who would have the courts attempt to treat mass tort cases on a one-by-one basis, as though they were two-car accidents."); *but see* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 372 (2000) (noting that *Amchem* and *Ortiz* have "chilled the use of the more manipulative devices by which defendants and class counsel could structure a settlement that maximized their interests at the expense of the class members—most notably, the 'settlement class action'" (footnote omitted)).

447. Cabraser, *supra* note 446, at 1476.

448. Sullivan v. DB Invs., Inc., 667 F.3d 273, 334 (3d Cir. 2011) (Scirica, J., concurring), *cert. denied sub nom.* Murray v. Sullivan, 132 S. Ct. 1876 (2012).

449. *See supra* notes 429–30 and accompanying text.

450. *See, e.g.*, Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177 (2009) (discussing the benefits of settlement).

451. Proposed FED. R. CIV. P. 23(b)(4), 167 F.R.D. 523, 559 (1997).

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> [C]ertification of a (b)(3) class is affected by the many differences between settlement and litigation of class claims or defenses. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are to be litigated. Settlement can be reached, however, on terms that surmount such difficulties. Many other elements are affected as well. A single court may be able to manage settlement when litigation would require resort to many courts. And, perhaps most important, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation. Important benefits may be provided for those who, knowing of the class settlement and the opportunity to opt out, prefer to participate in the class judgment and avoid the costs of individual litigation.[452]

The ALI's project, *Principles of the Law of Aggregate Litigation*, for which this author served as Associate Reporter, also addresses this precise problem. Under the ALI's approach, "[i]n any case in which the parties simultaneously seek certification and approval of the settlement, the case need not satisfy all of the requirements for certification of a class for purposes of litigation."[453] Instead, the court may approve the settlement if it finds that the relief afforded by the settlement is fair, that the class members are treated equitably, and that the settlement was negotiated at arm's length; and if it further finds that "significant common issues exist," that "the class is sufficiently numerous to warrant classwide treatment," and that "the class definition is sufficient to ascertain who is and who is not included in the class."[454] Importantly, under the ALI approach, "[t]he court need not conclude that common issues predominate over individual issues" in order to approve a settlement class.[455] This approach would prevent outcomes like the one in *Grand Theft Auto*,[456] where courts feel

452. Proposed FED. R. CIV. P. 23(b)(4) advisory committee's note. The proposal was abandoned following the Supreme Court's opinion in *Amchem*. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.06 cmt. a, at 215 (Am. Law Inst. 2010) (citing 167 F.R.D. 523, 559 (1997)); *see* Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615 (1997) (discussing proposed Rule 23(b)(4)); Christopher J. Willis, *Collision Course or Coexistence?* Amchem Products v. Windsor *and Proposed Rule 23(b)(4)*, 28 CUMB. L. REV. 13 (1997) (criticizing the proposal).

453. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.06(a), 212 (Am. Law Inst. 2010).

454. *Id.* § 3.05(a), 204; § 3.06(b), 212.

455. *Id.* § 3.06(b), 212.

456. *See supra* notes 421–22 and accompanying text.

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constrained to reject a class settlement because of predominance issues that were irrelevant in the settlement context.

I. Issues Classes

One of Rule 23's tools to help courts resolve common issues is Rule 23(c)(4). Under that provision, a court can certify particular issues even if individualized issues remain for adjudication. As Rule 23(c)(4) provides, "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."[457] The Advisory Committee Notes state:

> This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.[458]

This rule has created significant conflict and confusion among the courts and thus is not frequently utilized.[459]

One line of cases views (c)(4) as a "housekeeping" rule that does not alter the usual predominance inquiry under Rule 23(b)(3). In other words, the case as a whole must still satisfy the predominance test. A leading case for this view is *Castano v. American Tobacco Co.*,[460] a putative class action brought by smokers. In that case, the court rejected the district court's attempt to try certain liability and damages issues:

> A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial. Reading [R]ule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate

457. FED. R. CIV. P. 23(c)(4).

458. FED. R. CIV. P. 23(c)(4) advisory committee's note.

459. *See* Edward F. Sherman, *"Abandoned Claims" in Class Actions: Implications for Preclusion and Adequacy of Counsel*, 79 GEO. WASH. L. REV. 483, 497 n.90 (2011) (citing other commentary); PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02 cmt. a, at 84 (2010).

460. 84 F.3d 734 (5th Cir. 1996).

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> the predominance requirement of [R]ule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.[461]

Several courts have followed *Castano*'s approach.[462] For instance, in *Arch v. American Tobacco Co.*,[463] the district court denied certification of a class of Pennsylvania smokers, holding that the entire case must satisfy the predominance requirement before common issues may be severed for trial. The court stated:

> Before a district court may certify common issues pursuant to (c)(4), the court must first find that a cause of action, as a whole, satisfies the predominance requirement of (b)(3). After the court determines that (b)(3) has been satisfied as to the whole cause of action, then the court may use (c)(4) as a "housekeeping rule . . . to sever common issues for trial." *Plaintiffs cannot read the predominance requirement out of (b)(3) by using (c)(4) to sever issues until the common issues predominate over the individual issues*.[464]

Some courts refuse to certify issues classes by misperceiving the very purpose of such classes. For instance, in *In re Genetically Modified Rice Litigation*,[465] the court refused to certify an issues class, finding that "a trial limited to common issues would not resolve any individual plaintiff's *claims*."[466] Given that issues classes are designed precisely to avoid resolving any *claims* (hence the term "*issues* classes"), this reasoning ignores the basic premises underlying certification of issues classes. As *Genetically Modified Rice* suggests, some courts are simply averse to making substantial use of Rule 23(c)(4).

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461. *Id.* at 745 n.21; *see also In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995). One commentator has stated, regarding the combined effect of *Castano* and *Rhone-Poulenc* on certification of issues classes: "In the late 1990s, the salutary trend toward issue litigation stopped short, following a prominent pair of court of appeals decisions . . . . [C]ourts have repeatedly rejected class certification when cases have required resolution of individual issues of any significance." Jon Romberg, *Half a Loaf is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 252 (2002) (footnote omitted).

462. *See, e.g.*, Norwood v. Raytheon Co., 237 F.R.D. 581 (W.D. Tex. 2006); Kreger v. Gen. Steel Corp., No. 07-575, 2010 WL 2902773 (E.D. La. July 19, 2010); Siegel v. Shell Oil Co., 256 F.R.D. 580 (N.D. Ill. 2008); Cohn v. Mass. Mut. Life Ins. Co., 189 F.R.D. 209 (D. Conn. 1999).

463. 175 F.R.D. 469 (E.D. Pa. 1997).

464. *Id.* at 496 (quoting *Castano*, 84 F.3d at 745 n.21).

465. 251 F.R.D. 392 (E.D. Mo. 2008).

466. *Id.* at 400 (emphasis added).

Other courts, however, have taken a different approach. The Second Circuit, for example, stated in *McLaughlin v. American Tobacco Co.*[467] that "a court may employ [subsection] (c)(4) to certify a class as to common issues that do exist, 'regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement.'"[468] The key issue, according to the Second Circuit, is whether the case as a whole will be "materially advance[d]."[469] In *McLaughlin*, the Second Circuit decertified a class of former smokers who brought a RICO action against cigarette manufacturers, holding that certification could not be based on Rule 23(c)(4):

> We recognize that a court may employ Rule 23(c)(4) to certify a class as to common issues that do exist, "regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement." Nevertheless, in this case, given the number of questions that would remain for individual adjudication, issue certification would not "reduce the range of issues in dispute and promote judicial economy." Certifying, for example, the issue of defendants' scheme to defraud, *would not materially advance the litigation because it would not dispose of larger issues* such as reliance, injury, and damages.[470]

Along the same lines, the ALI explains:

> [The] aggregate treatment of a common issue will materially advance the resolution of multiple civil claims more frequently when the issue concerns "upstream" matters focused on the generally applicable conduct of those opposing the claimants in the litigation, as distinct from "downstream" matters focused on those claimants themselves.[471]

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467. 522 F.3d 215 (2d Cir. 2008).

468. *Id.* at 234 (quoting Robinson v. Metro-N. Commuter R.R., 267 F.3d 147, 168 (2d Cir. 2001)); *accord, e.g.*, *In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219, 227 (2d Cir. 2006).

469. *McLaughlin*, 522 F.3d at 234.

470. *Id.* (citations omitted); *accord, e.g.*, *In re* St. Jude Med., Inc., 522 F.3d 836, 841 (8th Cir. 2008) (declining to find predominance satisfied and citing *McLaughlin* in noting that "issue certification" is inappropriate "where the predominance of individual issues is such that limited class certification would do little to increase the efficiency of the litigation"); *In re* Baycol Prods. Litig., 218 F.R.D. 197, 209 (D. Minn. 2003) (holding that certification of select issues for class treatment was inappropriate; such an approach would not materially advance the disposition of the litigation given that additional proceedings would "still be required to determine issues of causation, damages, and applicable defenses").

471. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02 cmt. a, at 84 (Am. Law Inst. 2010) (citation omitted); *accord, e.g.*, MCL4TH § 21.24, at 273 (4th ed. 2004); BARBARA J.

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The Third Circuit, noting the conflict among the circuits, has taken a different approach. In *Gates v. Rohn & Haas Co.*,[472] the court articulated eight non-exclusive factors that should guide whether issue certification is appropriate.[473] These factors include, among several others: (1) "the impact partial certification will have on the constitutional and statutory rights" of the parties; (2) "the repercussions certification of an issue(s) class will have on the effectiveness and fairness of resolution of [the] remaining issues"; and (3) "the efficiencies to be gained by granting partial certification in light of realistic procedural alternatives."[474]

Some courts have made genuine use of issues classes. For instance, the Seventh Circuit has been receptive to issues classes in cases involving environmental harm[475] and employment discrimination.[476] In the environmental context, the court (in an opinion by Judge Posner) held in *Mejdrech v. Met-Coil Systems Corp.*[477] that the trial court properly certified two issues in a case alleging groundwater contamination: (1) "whether [defendant] leaked [the substance at issue] in violation of law," and (2) "whether [the substance] reached the soil and groundwater beneath the homes of the class members."[478] Without citing Rule 23(c)(4), the court noted that, after the classwide resolution of the common issues, "[t]he individual class members will still have to prove the fact and extent of their individual injuries."[479] Nonetheless, the fact that individual issues would remain did not mean that an issues class was inappropriate:

> If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which

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ROTHSTEIN & THOMAS E. WILLGING, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 10 (Fed. Judicial Ctr. 3d ed. 2010) ("The test is whether the resolution of common issues advances the litigation as a whole, as opposed to leaving a large number of issues for case-by-case adjudication."); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 831–32 (1997) (describing more readily certified "upstream cases" as those in which "the harm is alleged to be some uniform course of conduct by the defendant, from which everything else follows," and differentiating "downstream" cases, where courts must "find fact after fact with regard to each individual plaintiff"). For further discussion of these issues, *see* Romberg, *supra* note 461, at 251–53 (2002) (criticizing *Castano* and *Rhone-Poulenc*, explaining the utility of issues classes, and discussing "downstream cases").

472. 655 F.3d 255 (3d Cir. 2011).

473. *Id.* at 273 (citing PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 2.02–05 (2010)).

474. *Gates*, 655 F.3d at 273; *see also* Hohider v. United Parcel Serv., Inc., 574 F.3d 169, 200–202 (3d Cir. 2009) (also listing a variety of criteria relevant to (c)(4) certification).

475. *See* Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910 (7th Cir. 2003).

476. Allen v. Int'l Truck & Engine Corp., 358 F.3d 469 (7th Cir. 2004); McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 338 (2012).

477. 319 F.3d 910 (7th Cir. 2003).

478. *Id.* at 911.

479. *Id*. at 912.

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> is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings.[480]

Similarly, in a post-*Dukes* race discrimination case, the Seventh Circuit, in an opinion by Judge Posner, held that the district court had erred in refusing to certify an issues class.[481] The issue in dispute was whether "the defendant has engaged and is engaging in practices [violating the antidiscrimination laws] that have a disparate impact (that is, a discriminatory effect, though it need not be intentional) on the members of the class."[482] Although the court recognized that individualized suits for back pay and damages might be necessary (in the event (b)(3) could not be used for the monetary claims), it had "trouble seeing the downside of . . . limited [issue] class . . . treatment."[483] Thus, the court held that resolution of the disparate impact issue "can most efficiently be determined on a class-wide basis."[484]

Mirroring the disagreement among the circuits, commentators have taken a variety of divergent positions with regard to issues classes—drawing on the differing approaches espoused in *Castano* and *McLaughlin* and their respective progeny.[485] Views range from endorsement of *Castano*'s strict approach[486] to zealous support for certification of issues classes as a means to efficiently resolve critical and widespread societal

480. *Id.* at 911.

481. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 492 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 338 (2012).

482. *McReynolds*, 672 F.3d at 483.

483. *Id.* at 492.

484. *Id.* at 491.

485. *Compare, e.g.*, Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 238–40 (2003) (emphasizing the Rule's qualification, "[w]hen appropriate," and arguing that "issue classes to split off the question of liability from the calculus of monetary relief are 'appropriate' when underlying substantive law itself marks a clear separation of those two facets of class members' claims"), *and* Jenna G. Farleigh, *Splitting the Baby: Standardizing Issue Class Certification*, 64 VAND. L. REV. 1585, 1630 (2011) (proposing that the Supreme Court articulate a "multifactor balancing test to assist lower courts in making decisions on issue class appropriateness"), *and* Jon Romberg, *Half a Loaf is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 334 (2002) (strongly supporting the use of issues classes), *with* Laura J. Hines, *Challenging the Issue Class Action End Run*, 52 EMORY L.J. 709, 712 (2003) ("Rule 23(c)(4)(A), in its current form, simply cannot authorize an issue class action end-run around the predominance requirement for class actions that otherwise would fail to satisfy that requirement.").

486. *See, e.g.*, Hines, *supra* note 485, at 711–12.

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issues without diluting the litigation "in a sea of individual consequences."[487]

The strict *Castano* approach is difficult to defend. If Rule 23(c)(4) is merely a "housekeeping" device, then plaintiffs would never utilize it. Why certify just an issue if the entire case satisfies predominance? Plaintiffs will gain far more leverage over defendants for settlement purposes—and will greatly simplify their path to recovery in the event of a trial—if they try the entire case, not just one or two isolated issues. The approach of *Genetically Modified Rice Litigation* is equally unsound. As noted, the very purpose of an issues class is to resolve discrete issues, not to resolve claims.

The "materially advance" test urged by some courts and commentators is a sensible one. There is no use in adjudicating an issue if the case as a whole would not benefit. That test properly avoids the need for the court to determine whether the common issues in the case predominate over the individualized issues. The Third Circuit's multi-factor approach, by contrast, provides insufficient guidance, especially given that the myriad factors are not exclusive. The "materially advance" test accomplishes the essence of what the Third Circuit is trying to achieve, but without the complications.

Wholly apart from the rigid *Castano* approach to Rule 23(c)(4), the certification of issues classes is complicated by the Seventh Amendment. That Amendment provides in relevant part that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[488] The so called "Reexamination Clause" received little attention until the mid-1990s, when two federal appellate decisions relied on the Seventh Amendment as a reason for decertifying classes that bifurcated certain class issues and left other issues to individualized adjudication.[489] Both courts—the Seventh Circuit in *Rhone-Poulenc* and the Fifth Circuit in *Castano*—were concerned that the juries hearing the individual issues would have to reconsider the classwide findings in the process.[490] Writing for the court in *Rhone-Poulenc*, Judge Posner rested the court's holding on the premise that subsequent juries in that case would need to decide such issues as comparative negligence and proximate causation, resulting in de facto

487. Romberg, *supra* note 461, at 334.

488. U.S. CONST. amend. VII, cl. 2.

489. *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303–04 (7th Cir. 1995); Castano v. Am. Tobacco Co., 84 F.3d 734, 750–51 (5th Cir. 1996).

490. *Rhone-Poulenc*, 51 F.3d at 1303; *Castano*, 84 F.3d at 747.

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reexamination of the classwide verdict.[491] In addition, addressing the Seventh Amendment issue more generally, Judge Posner stated:

> The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them . . . and not reexamined by another finder of fact. . . . How the resulting inconsistency between juries could be prevented escapes us.[492]

In *Castano*, the Fifth Circuit invoked essentially the same reasoning. The court emphasized the specific individual issues in the case, such as proximate causation and damages, in squarely rejecting (on Seventh Amendment grounds) the proposal that such individual issues be decided by a second jury or group of juries. The court stated: "The Seventh Amendment entitles parties to have fact issues decided by one jury, and prohibits a second jury from reexamining those facts and issues."[493]

Some commentators have supported the *Castano* and *Rhone-Poulenc* approach to the Seventh Amendment. For instance, one commentator, citing *Castano*, has argued that "[b]ifurcated trial plans . . . raise serious constitutional issues under the Seventh Amendment's Reexamination Clause."[494]

For the most part, however, courts and commentators have been critical of invoking the Seventh Amendment as a reason not to certify an issues class. For instance, one court has noted that the strict approach taken by some circuits would "effectively eviscerate[]" Rule 23(c)(4) and would conflict with the Advisory Committee Notes' endorsement of issues classes.[495] A number of commentators have expressed similar views. For instance, Professor Tobias Wolff stated the following with respect to *Castano*:

> Perhaps the court was proceeding on some misguided instinct that it should not be possible to accomplish through successive lawsuits what the Seventh Amendment would prevent a court from doing in a single, bifurcated proceeding. (This instinct was misguided, of

491. *Rhone-Poulenc*, 51 F.3d at 1303.
492. *Id.*
493. *Castano*, 84 F.3d at 750 (footnote omitted).
494. Linda S. Mullenix, *Nine Lives: The Punitive Damage Class*, 58 U. KAN. L. REV. 845, 882 n.229 (2010).
495. *In re* Copley Pharm., Inc., 161 F.R.D. 456, 461 (D. Wyo. 1995). *Accord, e.g.*, Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1232 (9th Cir. 1996); Arthur Young & Co. v. U.S. Dist. Court, 549 F.2d 686, 692–97 (9th Cir. 1977).

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> course, because the Supreme Court had already rejected that proposition some twenty years earlier.)[496]

Similarly, Professor Woolley has argued that "the Reexamination Clause should not pose a serious obstacle to the use of issue classes."[497] He reasoned that:

> [T]he separate trial of overlapping issues does not necessarily violate the Seventh Amendment Reexamination Clause. The Clause requires only that later juries respect the formal findings of the first jury. Within these broad parameters, the Clause does not prohibit later juries from independently evaluating evidence on a previously decided issue in order to decide a related issue. For that reason, the Clause allows a jury charged with deciding the issue of comparative negligence to rehear evidence presented to an earlier jury on the defendant's negligence, provided the later jury understands that the formal findings of the earlier jury are binding. . . . The separate trial of overlapping issues may not always be desirable. But there is no sound basis for concluding that the convocation of a second jury in such circumstances will necessarily lead to violation of the Seventh Amendment. Reliance on the Seventh Amendment Reexamination Clause thus obscures the real issue: Will certification of an issue class assist in the fair and accurate determination of a particular controversy?[498]

The Third Circuit employed similar reasoning in *In re Paoli Railroad Yard PCB Litigation*,[499] stating: "[T]he Seventh Amendment prohibition is not against having two juries *review* the same evidence, but rather against having two juries *decide* the same essential issues."[500]

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496. Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 736 (2005) (citing Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 517–42 (1998), and Parklane Hosiery Co. v. Shore, 439 U.S. 322, 333–37 (1979)).

497. Woolley, *supra* note 496, at 500.

498. *Id.* at 542 (Professor Woolley also notes that *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 498–99 (1931), on which the Fifth and Seventh Circuits relied in *Castano* and *Rhone-Poulenc*, "applie[d] an approach far more liberal than that of the Fifth and Seventh Circuit." *Id.* at 522.). *Accord, e.g.*, Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 832 (2004) ("The Seventh Amendment does not prohibit separate juries from considering 'overlapping' evidence . . . . What the Seventh Amendment guarantees is that separate juries will not *decide* the same issue." (emphasis added)).

499. 113 F.3d 444 (3d Cir. 1997).

500. *Id.* at 453 n.5 (emphasis added) (internal quotation marks omitted).

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Like the strict rules-based approach to (c)(4), the rigorous application of the Seventh Amendment is troublesome. The focus should be solely on whether successive juries are *deciding* the same issues, not on whether they are merely hearing overlapping evidence.

J. Defendants' Ability to Eliminate Class Actions Through Arbitration Clauses

Perhaps the most compelling class action is the so-called "negative value suit." A negative value suit is one in which the "stakes to each class member [are] too slight to repay the cost of suit."[501] In such cases, the class members have *no* practical remedy without a class action.[502] The Supreme Court in *Amchem* emphasized this precise point:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.[503]

The Court made a similar point in *Deposit Guaranty National Bank of Jackson, Mississippi v. Roper*,[504] explaining that "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."[505] Put another way, the class action device permits "the aggregation of the claims of a large number of persons who have similar or identical claims, none of which—standing alone—would justify the suit."[506] Without the class action device, a company or individual could

501. *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300 (7th Cir. 1995).

502. *See, e.g.*, Genevieve G. York-Erwin, *The Choice-of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1809 (2009) ("[N]egative value claims rarely settle—aggregately or individually—without certification." (footnote omitted)); Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1861 (2006) ("It is well understood that aggregation is the key to the viability of many claims routinely brought as class actions, particularly what are termed the negative value claims, in which the transaction costs of prosecuting individual actions make enforcement impossible absent aggregation.").

503. Amchem Products, Inc., v. Windsor, 521 U.S. 591, 617 (1997) (citation and internal quotation marks omitted).

504. 445 U.S. 326 (1980).

505. *Id.* at 339.

506. Fiss, *supra* note 1, at 24.

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cause small harm to many people, knowing that the costs of bringing individual suits would be too great to warrant hiring an attorney and filing a lawsuit. The class action empowers the injured parties, providing them with a vehicle for recovering the harm suffered and serving as a deterrent against similar conduct in the future.

To avoid classwide litigation, businesses are now inserting arbitration clauses in a variety of contexts, requiring arbitration of disputes and prohibiting class action suits either in court or in arbitration.[507] As one commentator has stated:

> Developed in the late 1990s . . . the [class action] waiver works in tandem with standard arbitration provisions to ensure that any claim against the corporate defendant may be asserted only in a one-on-one, nonaggregated arbitral proceeding. More virulent strains of the clause force the would-be plaintiff to waive even her right to be represented as a passive, or absent, class member in the event some other injured person manages to commence a class proceeding.[508]

Arbitration clauses have become common in consumer contracts; one 2010 study found that companies inserted such clauses into seventy-five percent of such contracts.[509]

Arbitration clauses have the support of federal law. The Federal Arbitration Act (FAA), in particular, embodies a strong federal policy favoring arbitration. Under section 2 of the FAA, agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[510] Prior to the Supreme Court's opinion in *AT&T Mobility LLC v. Concepcion*,[511] a number of courts had held that provisions prohibiting classwide arbitration

507. *See, e.g.*, Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 396 (2005) (noting that starting in late 1990s, corporate counsel was encouraged "to consider redrafting contracts to include provisions requiring consumers and others to waive the right to participate in class actions or even group arbitrations"); Christina Johnson, Comment, *Employment and Consumer Arbitration Agreements: Does It Limit Your Ability to Bring or Participate in a Class Action?*, 52 S. TEX. L. REV. 273, 277 (2010) (noting "onslaught" of arbitration agreements in standardized contracts); Bryon Allyn Rice, Comment, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard*, 45 HOUS. L. REV. 215, 220–25 (2008) (discussing the history of class actions and arbitration clauses).

508. Gilles, *supra* note 507, at 375–76.

509. Johnson, *supra* note 507, at 278 (citing Jonathan D. Glater, *Companies Unlikely to Use Arbitration With Each Other*, N.Y. TIMES, Oct. 6, 2008, at B4).

510. 9 U.S.C. § 2 (2006).

511. 131 S. Ct. 1740 (2011).

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were unconscionable under state law.[512] In *Concepcion*, the Court rejected this reliance on state unconscionability law, holding that the FAA's savings clause preempted an unconscionability defense.[513]

The Supreme Court had explored these issues prior to *Concepcion*, albeit without reaching so broadly. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[514] the Court confronted a contractual arbitration provision that neither provided for, nor precluded, classwide arbitration.[515] A panel of arbitrators had determined that the provision allowed classwide arbitration, pursuant to a supplemental agreement between the parties that provided the panel with this decision-making authority.[516] The Supreme Court, however, rejected this determination, finding that the panel had overstepped the bounds of the FAA.[517] The Court then set forth a broader rule, holding that under the FAA, where an arbitration provision is silent as to the parties' intent on the issue, a party may not be subjected involuntarily to classwide arbitration.[518] The Court explicitly stated: "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."[519]

One year later, the Court issued its opinion in *Concepcion*. The case involved a claim by Vincent and Liza Concepcion for $30.22 in sales tax, an amount they claimed that AT&T wrongfully charged when it offered "free" phones.[520] The Concepcions attempted to pursue class litigation, but AT&T had asserted an arbitration clause that barred both class litigation and arbitration.[521] The district court, relying on the California Supreme

512. *See, e.g.*, Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005), *abrogated by Concepcion*, 131 S. Ct. 1740; Muhammad v. Cnty. Bank, 912 A.2d 88 (N.J. 2006); Scott v. Cingular Wireless, 161 P.3d 1000 (Wash. 2007) (en banc); Brewer v. Mo. Title Loans, Inc., 323 S.W.3d 18 (Mo. 2010); Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250 (Ill. 2006).

513. *Concepcion*, 131 S. Ct. at 1742.

514. 130 S. Ct. 1758 (2010).

515. *See id.* at 1765 (quoting arbitration clause).

516. *Id.* at 1766. The panel relied on *Green Tree Financial Corp. v. Bazzle*, in which a plurality of the Supreme Court held that "[a]rbitrators are well situated" to determine whether a particular arbitration provision allows classwide arbitration. 539 U.S. 444, 453 (2003) (plurality opinion); *see also* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 446 (2006) (holding that the purported illegality of a contract containing an arbitration clause was to be determined by the arbitrator rather than the state court).

517. *Stolt-Nielsen*, 130 S. Ct. at 1770.

518. *Id.* at 1775.

519. *Id.* (emphasis in original).

520. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744–45 (2011).

521. *Id.*

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Court's decision in *Discover Bank v. Superior Court*,[522] denied AT&T's motion to compel arbitration, holding that the arbitration clause was unconscionable under California law.[523] The Ninth Circuit affirmed, holding that the FAA "does not expressly or impliedly preempt California law governing the unconscionability of class action waivers in consumer contracts of adhesion."[524]

The Supreme Court reversed the Ninth Circuit, holding that such a state-law unconscionability defense was in fact preempted by the FAA.[525] The Court reasoned, *inter alia*, that when Congress enacted the FAA, it did not even envision the concept of classwide arbitration.[526] With respect to the FAA generally, the Court noted that "our cases . . . have repeatedly described the Act as 'embod[ying] [a] national policy favoring arbitration.'"[527] And, drawing on *Stolt-Nielsen*, along with the Court's prior FAA jurisprudence striking down various limitations on arbitration provisions,[528] the Court stated that "California's *Discover Bank* rule similarly interferes with arbitration."[529] Moreover, sounding the *Rhone-Poulenc* blackmail theme, the Court noted that "class arbitration greatly increases risks to defendants" and is "no different" than "the risk of 'in terrorem' settlements that class actions entail" in the courtroom setting.[530]

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522. 113 P.3d 1100 (Cal. 2005), *abrogated by Concepcion*, 131 S. Ct. 1740. In *Discover Bank*, the court fashioned a rule that rendered class action waivers in certain consumer contexts essentially *per se* unconscionable: "[W]hen [a class action or class arbitration] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . such waivers are unconscionable under California law and should not be enforced." 113 P.3d at 1110.

523. Laster v. T-Mobile USA, Inc., No. 05cv1167, 2008 WL 5216255, at *14 (S.D. Cal. Aug. 11, 2008), *aff'd sub nom*. Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom*. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

524. Laster v. AT&T Mobility LLC, 584 F.3d 849, 856 (9th Cir. 2009), *rev'd sub nom*. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

525. *Concepcion*, 131 S. Ct. at 1755–56.

526. *Id.* at 1751.

527. *Id.* at 1749 (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006)).

528. *See, e.g.*, Preston v. Ferrer, 552 U.S. 346 (2008) (holding that the FAA preempted a California law requiring that parties exhaust certain administrative remedies prior to arbitration); *see also Buckeye Check Cashing*, 546 U.S. at 445–47 (holding that a challenge to the validity of an agreement containing an arbitration clause must be decided by the arbitrator, not a court, regardless of whether the challenge is brought in state or federal court); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) (holding that the federal district court abused its discretion in denying arbitration pending the disposition of related state action); Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008) (holding that the FAA's statutory grounds for judicial modification or vacatur are the exclusive grounds under which parties can seek expedited review of an arbitration award).

529. *Concepcion*, 131 S. Ct. at 1750.

530. *Id.* at 1752.

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The Court also noted that "[a]rbitration is poorly suited to the higher stakes of class litigation."[531]

In his dissent, Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan) rejected the majority's reasoning and noted the important benefits of class actions. Without class arbitration, the dissent noted, such claims would not be pursued:

> What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim? *See, e.g.*, *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30").[532]

More recently, in *CompuCredit Corp. v. Greenwood*,[533] the Court issued another setback to those seeking classwide dispute resolution. In that case, which involved the Credit Repair Organization Act (CROA),[534] consumers contended that the statute's statement of "a right to sue a credit repair organization" meant that the CROA was not subject to the FAA. The issue arose after the defendant moved to compel arbitration of a federal court class action based on an arbitration clause containing a class action waiver. The suit alleged that CompuCredit, in issuing credit cards, misrepresented the credit card's limit and also misrepresented the extent to which the credit card would rebuild the consumer's poor credit history. The Court, in an opinion by Justice Scalia, held that the language of the CROA was not sufficiently clear to exclude the statute from the reach of the FAA. Thus, the arbitration clause was enforceable.[535] Only Justice Ginsburg dissented.[536]

In the first federal appellate court decision to interpret *Concepcion* in depth, *Cruz v. Cingular Wireless, LLC*,[537] plaintiffs attempted to argue that a ban on class action arbitration should not be enforceable if plaintiffs can

531. *Id.*
532. *Id.* at 1761 (Breyer, J., dissenting).
533. 132 S. Ct. 665 (2012).
534. 15 U.S.C. § 1679(a) (2006).
535. *Greenwood*, 132 S. Ct. at 672–73.
536. *Id.* at 676 (Ginsburg, J., dissenting). The Court was unanimous, however, in its reversal of another case (not in the class action context) in which West Virginia's highest court had "held unenforceable all predispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes." Marmet Heath Care Center, Inc. v. Brown, 132 S. Ct. 1201, 1202 (2012) (per curiam). The Court stated that the West Virginia court's holding "was both incorrect and inconsistent with clear instruction in the precedents of this Court." *Id.* at 1203.
537. 648 F.3d 1205 (11th Cir. 2011).

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provide concrete proof that bringing an individual action would not be cost effective. The Eleventh Circuit held that such an argument was foreclosed by *Concepcion*:

> [I]n light of *Concepcion*, state rules mandating the availability of class arbitration based on generalizable characteristics of consumer protection claims—including that the claims "predictably involve small amounts of damages," that the company's deceptive practices may be replicated across "large numbers of consumers," *and that many potential claims may go unprosecuted unless they may be brought as a class*—are preempted by the FAA, even if they may be "desirable."[538]

Would-be class plaintiffs fared only slightly better in *Coneff v. AT&T Corp.*,[539] a post-*Concepcion* case from the Ninth Circuit. Plaintiffs filed a class complaint in federal court, and the district court denied AT&T's motion to compel arbitration "on state-law unconscionability grounds, relying primarily on the [arbitration] agreement's class-action waiver provision."[540] The Ninth Circuit reversed the lower court's holding that the agreement was substantively unconscionable, finding that the unconscionability argument was preempted by the FAA.[541] Interestingly, however, the Ninth Circuit remanded the case for the district court to evaluate plaintiffs' "procedural unconscionability arguments."[542]

In the wake of *Concepcion*, commentators' predictions about the future of classwide arbitration have varied considerably. Professor Colin Marks, addressing the various possible interpretations of *Concepcion*, stated as follows:

> [A]lthough there is support for interpreting the *Concepcion* decision narrowly, it is more likely that a broader interpretation was intended. *However, the metes and bounds of this opinion have yet to be explored.* Nonetheless, under [a] broad interpretation, the effect on consumers will be to discourage individuals from seeking redress for their claims. *The decision may actually encourage businesses to breach contractual obligations with impunity when the individual*

538. *Id.* at 1212 (emphasis added) (citations omitted).
539. 673 F.3d 1155 (9th Cir. 2012).
540. *Id.* at 1157.
541. *Id.* at 1157–61.
542. *Id.* at 1161. *See also* Quilloin v. Tenet HealthSystem Philadelphia, Inc., 673 F.3d 221, 233 (3d Cir. 2012) (holding that a Pennsylvania state law, similar to the California state law in *Concepcion*, was "clearly preempted" by the FAA).

> *sums owed are too small to justify—in the mind of a reasonable consumer—the time and effort to seek a remedy*.[543]

Several commentators have echoed Professor Marks's prediction regarding *Concepcion*'s practical consequences in the consumer context.[544] Professor David Schwartz goes so far as to argue that *Concepcion* effectively "destroys consumer and employment class actions."[545]

Some commentators, however, have suggested that, in at least some circumstances, "*Concepcion* is not necessarily the death knell for classwide arbitration."[546] Yet even such qualified optimism seems misplaced in light of the Court's post-*Concepcion* decision in *American Express Co. v. Italian Colors Restaurant*.[547] In that case, plaintiffs—merchants who accept American Express cards—attempted to sue the defendant credit card company for violating federal antitrust laws. The arbitration agreement between the parties, however, provided that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis."[548]

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543. Colin P. Marks, *The Irony of* AT&T v. Concepcion, 87 IND. L.J. SUPP. 31, 32 (2012) (emphasis added).

544. *See, e.g.*, Dirk W. de Roos & Russell O. Stewart, *Legal Trends and Best Practices in Class Arbitration*, COLO. LAW. 47, 52 (2011) (suggesting that *Concepcion* "is likely to result in more arbitrations of consumer contracts and greater use of class action waivers," and further stating that "[a]bsent some legislative changes to the FAA's breadth of preemption, *Concepcion* also may substantially curtail class actions in contractual disputes"); Ronald W. Novotny, *Drafting Class Arbitration Waivers After* AT&T Mobility v. Concepcion, 66 DISP. RESOL. J. 40, 44 (2012) ("[F]or employers who have not yet decided to implement a mandatory arbitration program, the *Concepcion* case provides another significant incentive for doing so."); *see also, e.g.*, Donald R. Frederico & Clifford H. Ruprecht, AT&T Mobility LLC v. Concepcion: *Is* Feeney *Finis?*, 55-4 BOSTON B.J. 13, 15 (2011) (noting "the need for class proceedings to vindicate small-dollar consumer claims," and suggesting that after *Concepcion* challenges to arbitration clauses containing class action waivers on grounds of "fraud, duress or similar state law doctrines would often raise individual issues, even if otherwise successful, [and thus] may preclude class certification").

545. David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 267 (2012).

546. Don Zupanec, *Class Arbitration—Federal Arbitration Act—Title VII Claim*, 26 No. 10 FED. LITIGATOR 9 (2011). *See also* Daniel Fisher, *After Arbitration Ruling, Watch Warren's Consumer Bureau*, FORBES, Apr. 27, 2011, www.forbes.com/sites/danielfisher/2011/04/27/after-arbitration-ruling-watch-warrens-consumer-bureau/ ("[c]orporate attorneys best not gloat too much" over *Concepcion* because consumers do better in arbitration than in class actions); Andrew J. Trask, *Arbitration Strategy After* AT&T Mobility v. Concepcion, 40 PROD. SAFETY & LIAB. REP. (BNA) 110, Jan. 23, 2012 *available at* http://www.mcguirewoods.com/news-resources/publications/products_liability/trask-bna.pdf (criticizing dire comments about *Concepcion* as "hyperbole" and arguing that the decision "has hardly killed the [class action] device").

547. 133 S. Ct. 2304 (2013).

548. *Id.* at 2308 (citation and internal quotation marks omitted; alteration in original).

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The district court granted defendant's motion to compel individual arbitration, but a sharply divided Second Circuit held that the Supreme Court's holdings in *Stolt-Nielsen* and *Concepcion* did not "require that all class-action waivers be deemed per se enforceable."[549] The appellate court concluded that the mandatory class action waiver clause before it was unenforceable because the plaintiffs had demonstrated that "the practical effect of enforcement would be to preclude [plaintiffs'] ability to bring federal antitrust claims."[550] The Second Circuit denied rehearing en banc, with five judges dissenting.

In a 5–3 decision by Justice Scalia, the Supreme Court reversed. The majority rejected the notion that there should be a case-by-case analysis of whether a class action waiver renders it impossible to vindicate federal rights. "[T]he antitrust laws," wrote the Court, "do not guarantee an affordable procedural path to the vindication of every claim."[551]

Additionally, rejecting the Second Circuit's attempt to distinguish *Concepcion*, the Court found that *Concepcion* "all but resolve[d] this case."[552] Notably, the *American Express* Court described *Concepcion* as having established "that the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims."[553]

Justice Kagan wrote the dissent in *American Express* (for herself and Justices Breyer and Ginsburg). In her dissent, she criticized the majority for ignoring the Court's precedents establishing the effective vindication doctrine, and in particular for the majority's focus on curtailing the use of class actions. The fact that the arbitration agreement explicitly prohibited class arbitration, Justice Kagan wrote, was "only part of the problem"; the "agreement also disallow[ed] any kind of joinder or consolidation of claims or parties."[554] In sum,

> The Court today mistakes what this case is about. To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled. So the Court does not consider that Amex's

549. *In re* Am. Express Merch.'s Litig., 667 F.3d 204, 214 (2d Cir. 2012), *rev'd*, 133 S. Ct. 2304 (2013).
550. *Id.*
551. 133 S. Ct. 2304, 2309.
552. *Id.* at 2312.
553. *Id.* at 2312 n.5.
554. *Id.* at 2317 (Kagan, J., dissenting).

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> agreement bars not just class actions, but "other forms of cost-sharing . . . that could provide effective vindication." . . .
>
> As a result, Amex's contract will succeed in depriving Italian Colors of any effective opportunity to challenge monopolistic conduct allegedly in violation of the Sherman Act. . . . In the hands of today's majority, arbitration threatens to become . . . a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability.[555]

In short, *American Express* shut the door on one of the few viable ways in which lower courts could have limited or distinguished *Concepcion*. The combined effect of *Concepcion* and *American Express* is to deal a crippling blow to the adjudication of many kinds of small-claims cases.

IV. THE CURRENT STATE OF CLASS ACTIONS AND AVENUES FOR REFORM

A. Exceptions to the Trends

It would be a mistake to conclude, even with all of the case law trends discussed in Part III, that class actions are dead. To begin with, in some of the areas discussed above, the courts are in conflict.[556] Thus, plaintiffs can attempt to avoid some of the worst federal case law by filing in circuits that are most receptive to class actions.[557] Indeed, such a strategy is confirmed by the empirical research of the Federal Judicial Center (FJC) regarding post-CAFA filings:

> The FJC data show that, while every circuit experienced some post-CAFA increase in diversity class action filings, the growth varied dramatically. The district courts within the Ninth Circuit saw by far the biggest post-CAFA increase, growing nearly sixfold from 2004. Given lawyers' perception of the Ninth Circuit as relatively liberal on class certification, the disproportionate growth of filings in its districts should come as no surprise. Nor is it surprising to see large jumps in diversity class action filings within the Third Circuit, where they nearly quadrupled, and within the Second and Eleventh

555. *Id.* at 2320 (emphasis in original; citations omitted).

556. For instance, as this article has shown, courts are in conflict over how to address class definitions, numerosity, and issues classes.

557. *See, e.g.*, York-Erwin, *supra* note 74, at 1804–05 ("Many more nationwide classes are filed originally in favorable federal circuits since removal now appears inevitable."); *see also* note 91 *supra* and accompanying text.

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> Circuits, where they more than doubled. The growth was much smaller in the Fourth, Sixth, Seventh, Eighth, and Tenth Circuits.[558]

In addition, as Professor Howard Erichson observes, this type of forum shopping can take place not only *between*, but also *within* individual circuits. Specifically, there were significant post-CAFA increases in the number of class actions filed in the Central District of California, the Northern District of California, the Eastern District of Pennsylvania, the Eastern District of New York, and the District of New Jersey.[559] Erichson suggests that "[t]his forum selection is consistent with the perception of the Ninth, Third, and Second Circuits as providing relatively favorable law on class actions, and may also reflect perceptions of particular federal district judges."[560]

Moreover, courts are receptive to certifying certain kinds of cases even in the current climate (although some of these cases may be impacted by *Concepcion* and *American Express*).[561] For instance, securities fraud suits involving securities traded on a major stock exchange are commonly certified.[562] Such cases tend to involve overarching issues that impact all class members, and seek damages that can be easily calculated. Under *Basic Inc. v. Levinson*,[563] a "presumption of reliance" attaches when the stock trades in an "efficient market."[564] This presumption avoids the problem that "requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would prevent such

558. Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1613 (2008) (citing Thomas E. Willging & Emery G. Lee III, Fed. Judicial Ctr., The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Third Interim Report to the Judicial Conference Advisory Committee on Civil Rules (2007)) (footnotes omitted).

559. *Id.* at 1614 (footnote omitted).

560. *Id.* (footnotes omitted).

561. *See, e.g.*, Ashby Jones, *After* AT&T *Ruling, Should We Say Goodbye to Consumer Class Actions?*, WALL ST. J. L. BLOG (Apr. 27, 2011), http://blogs.wsj.com/law/2011/04/27/after-att-ruling-should-we-say-goodbye-to-consumer-class-actions/ (quoting Professor Brian Fitzpatrick as saying that the consequences of *Concepcion* "could be staggering" because "virtually all class actions today occur between parties who are in transactional relationships with one another" who are "able to enter arbitration agreements with class action waivers," and "[o]nce given the green light, it is hard to imagine any company would not want its shareholders, consumers and employees to agree to such provisions") (internal quotation marks omitted).

562. *See, e.g.*, *In re* Bank of Am. Corp. Secs., Derivative, & ERISA Litig., 281 F.R.D. 134 (S.D.N.Y. 2012); *In re* Washington Mut. Mortg.-Backed Secs. Litig., 276 F.R.D. 658 (W.D. Wash. 2011); Pub. Emps. Ret. Sys. of Miss. v. Goldman Sachs Grp., Inc., 280 F.R.D. 130 (S.D.N.Y. 2012); Lumen v. Anderson, 280 F.R.D. 451 (W.D. Mo. 2012).

563. 485 U.S. 224 (1988).

564. *Id.* at 246–48.

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plaintiffs from proceeding with a class action, since individual issues would overwhelm the common ones."[565]

The Court has recently addressed the *Basic* presumption in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*.[566] There, the Court held that a securities class action plaintiff does not need to prove, at the class certification stage, that the defendant's alleged misrepresentations were material. Although a plaintiff "certainly must prove materiality to prevail on the merits," it need not do so at the class certification stage because "Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class."[567]

Also noteworthy is the Supreme Court's decision in *Erica P. John Fund, Inc. v. Halliburton Co.*[568] There, the Court held that a securities fraud plaintiff need not prove that the defendant's misconduct caused the economic loss at issue (a concept known as "loss causation") in order to certify a class.[569]

Along similar lines, the passage of the Private Securities Litigation Reform Act of 1995 (PSLRA)[570] has not resulted in the extinction of securities class actions. Although the PSLRA certainly did impose some elevated requirements for securities plaintiffs, securities cases nonetheless remain among the types of cases most commonly found to be amenable to class treatment.[571]

At bottom, securities fraud class actions continue to thrive. In cases in which the efficiency of the market is not obvious, courts may require strict

565. Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2185 (2011) (quoting *Basic*, 485 U.S. at 242) (citation, alterations, and internal quotation marks omitted). *See also supra* note 364 and accompanying text (discussing certification of fraud claims).

566. 133. S. Ct. 1184 (2013).

567. *Id.* at 1191 (emphasis in original). It should be noted that several Justices appear ready to consider whether *Basic* should be overruled. *See* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1204 (2013) (Alito, J., concurring) (noting that "recent evidence suggests that [the *Basic*] presumption may rest on a faulty economic premise." (citations omitted)); *id.* at 1209 n.4 (Thomas, J., dissenting) (stating that the "*Basic* decision itself is questionable," but that the Court had not been asked to revisit it in that case); *cf. id.* at 1206 (Scalia, J., dissenting) (arguing that the majority's "holding does not merely accept what some consider the regrettable consequences of the four-Justice opinion in *Basic*; it expands those consequences from the arguably regrettable to the unquestionably disastrous").

568. 131 S. Ct. 2179 (2011).

569. *Id.* at 2186.

570. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

571. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 818 (2010)) (finding that securities class actions represented, by a broad margin, the largest category of settlement classes in 2006 and 2007).

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evidentiary proof at the class certification stage.[572] But in most major securities fraud cases, plaintiffs should be able to establish an efficient market with little difficulty.

Similarly, wage and hour cases are commonly certified. Many wage and hour cases take the form of collective actions, as provided for by the Fair Labor Standards Act[573] (rather than Rule 23 class actions). "Unlike a class action under Rule 23(b), in which potential plaintiffs are included in the class unless they opt-out, a Section 216(b) collective action requires potential plaintiffs to affirmatively opt-in to the suit by filing a written consent with the court."[574] Most courts have found that FLSA collective actions are not affected by the Supreme Court's (b)(2) ruling in *Dukes*. Specifically, although some courts have held otherwise, the great body of case law, both pre- and post-*Dukes*, holds that the "rigorous analysis" required for class certification does not apply to collective actions.[575]

Another area in which class actions retain at least some measure of their former vitality is in cases brought under the Employee Retirement

572. *See, e.g.*, Conn. Ret. Plans & Trust Funds v. Amgen Inc., 660 F.3d 1170, 1175 (9th Cir. 2011) (applying "rigorous analysis" in affirming class certification of securities claims), *aff'd*, 133 S. Ct. 1184 (2013).

573. 29 U.S.C. §§ 201–219 (2006).

574. Nehmelman v. Penn Nat'l Gaming, Inc., 822 F. Supp. 2d 745, 750 (N.D. Ill. 2011) (citation and internal quotations omitted).

575. *See, e.g.*, Gilmer v. Alameda-Contra Costa Transit Dist., No. C 08-05186 CW, 2011 WL 5242977, at *7 (N.D. Cal. Nov. 2, 2011) (denying defendants' motion to decertify FLSA collective action; the court stated that *Dukes* "does not stand for the proposition that an employer is entitled to an individualized determination of an employee's claim for back pay in all instances in which a claim is brought as a collective or class action"); Essame v. SSC Laurel Operating Co., 847 F. Supp. 2d 821, 828 (D. Md. 2012) (rejecting defendant's invocation of *Dukes* and conditionally certifying FLSA collective action; noting "Rule 23 standards are generally inapplicable to FLSA collective actions"); Robinson v. Ryla Teleservices, Inc., No. CA 11-131-KD-C, 2011 WL 6667338, at *3–4 (S.D. Ala. Dec. 21, 2011) (same); Winfield v. Citibank, 843 F. Supp. 2d 397, 409 (S.D.N.Y. 2012) (conditionally certifying collective action, the court noted that "numerous courts . . . have refused to apply *Dukes* on motions for conditional certification under the FLSA") (citing cases); *but see* MacGregor v. Farmers Ins. Exch., No. 2:10-CV-03088, 2011 WL 2981466, at *4 (D.S.C. July 22, 2011) (finding the reasoning in *Dukes* "illuminating" in the context of a proposed FLSA collective action, the district court denied certification, noting that "if there is not a uniform practice but rather decentralized and independent action by supervisors that is contrary to the company's established policies, individual factual inquiries are likely to predominate and judicial economy will be hindered rather than promoted by certification of a collective action"); Blaney v. Charlotte-Mecklenburg Hosp. Auth., No. 3:10-CV-592-FDW-DSC, 2011 WL 4351631, at *8–10 (W.D.N.C. Sept. 16, 2011) (to similar effect); *see also* Leyva v. Medline Indus., Inc., 716 F.3d 510, 514–16 (9th Cir. 2013) (post-*Comcast* case reversing district court's denial of certification in wage and hour case); *cf.* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1529 (2013) (observing that "Rule 23 [class] actions are fundamentally different from collective actions under the FLSA" (citation omitted)).

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Income Security Act ("ERISA").[576] The same might be said, to a lesser extent, with respect to antitrust claims.[577]

Indeed, it would be an oversimplification to suggest that the Supreme Court has been uniformly anti-class action. As noted above, in *Halliburton*, the Court rejected cases that required a plaintiff to prove loss causation at the class certification stage.[578] Also, as noted, in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, the Court held that proof of the materiality of alleged misrepresentations was not a prerequisite to class certification under the fraud on the market theory.[579] In *Smith v. Bayer Corp.*,[580] the Court held that a federal district court, after denying class certification, could not enjoin a West Virginia state court from certifying a similar class against the same defendant.[581] And in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,[582] the Court held that a federal court could certify a Rule 23 class action in a suit under New York's no-fault insurance law (seeking statutory interest and penalties on insurance benefits allegedly owed to plaintiffs), even though section 901(b) of the New York Civil Practice Law and Rules prohibits a class action suit to recover a statutory penalty or minimum recovery (unless specifically authorized by statute).[583] These four cases expand plaintiffs' ability to bring class actions.[584] Nonetheless, in terms of their practical

576. 29 U.S.C. §§ 1001–1461 (2006). For examples of post-*Dukes* decisions granting certification of ERISA classes, *see Bauer v. Kraft Foods Global, Inc*., 277 F.R.D. 558, 562–64 (W.D. Wis. 2012) (certifying (b)(3) class but denying certification under (b)(2) because individualized damages calculations would be necessary); *Meznarich v. Morgan Waldron Ins. Mgmt*., LLC, No. 1:10-CV-02532 2011 WL 4634021, at *9 (N.D. Ohio Sept. 30, 2011) (certifying ERISA class under Rule 23(b)(1)(A); court rejected defendants' argument that plaintiffs had not shown the commonality required by *Dukes*); and *Merrimon v. Unum Life Ins. Co. of Am.*, 845 F. Supp. 2d 310, 326–27 (D. Me. 2012) (certifying ERISA class under (b)(3)).

577. *See, e.g.*, *In re* Vitamin C Antitrust Litig., 279 F.R.D. 90, 110 (E.D.N.Y. 2012) (certifying (b)(3) damages class and (b)(2) injunction class in case alleging illegal conspiracy to fix vitamin prices and limit supply); *In re* Wellbutrin XL Antitrust Litig., No. 08-2431 2011 WL 3563385, at *16 (E.D. Pa. Aug. 11, 2011), and 282 F.R.D. 126, 131 (E.D. Pa. 2011) (certifying (b)(3) classes of direct and indirect purchasers, respectively, of pharmaceuticals); *In re* Aftermarket Auto. Lighting Prods. Antitrust Litig., 276 F.R.D. 364, 375 (C.D. Cal. 2011) (certifying (b)(3) class of direct purchasers).

578. *See supra* notes 568–56 and accompanying text.

579. 133. S. Ct. 1184 (2013); *see also supra* notes 566–67 and accompanying text.

580. 131 S. Ct. 2368 (2011).

581. *Id.* at 2382.

582. 130 S. Ct. 1431 (2010).

583. *Id.* at 1437–38 (plurality opinion); 1448 (Stevens, J., concurring in judgment); *see also* N.Y. C.P.L.R. 901(b) (MCKINNEY 2011).

584. *See* Mary Kay Kane, *The Supreme Court's Recent Class Action Jurisprudence: Gazing into a Crystal Ball*, 16 LEWIS & CLARK L. REV. 1015, 1030–31 (2012) (concluding that "there is no overarching theme or theory underlying the Court's most recent class-action jurisprudence," but rather that cases like *Dukes*, *Concepcion*, *Shady Grove*, and *Bayer* "presented circumstances that allowed the Court to develop differing determinations, some of which may appear to be class-action friendly and

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importance, these cases pale in comparison with *Concepcion*, *American Express*, *Dukes*, and *Amchem*. Moreover, the Court's insistence on deciding the procedurally flawed *Comcast* case—instead of dismissing it as improvidently granted—strongly suggests that several Justices are determined to cut back on class actions whenever they can. Indeed, Justice Kagan, in her dissent in *American Express*, suggested that a majority of the Court was "bent on diminishing the usefulness of Rule 23."[585]

B. Possible Approaches to the Recent Trends

As discussed above, plaintiffs can sometimes avoid adverse precedents by carefully selecting the federal circuit in which to file. In addition, as noted, certain kinds of cases remain amenable to certification. Nonetheless, plaintiffs face a serious uphill battle in many contested class actions. As Part III discussed, some courts have gone too far in restricting class actions. Cases such as *Dukes*, *Concepcion*, *American Express*, *Castano*, and *Hydrogen Peroxide* do more than adopt new rules. They suggest a suspicion about class actions generally, premised on the assumption that the class action is a blunt instrument to coerce settlement and secure large attorneys' fee awards.[586] Considerations such as the "pressure" on defendants to settle or the availability of attorneys' fees should play no part in either the decision whether to grant Rule 23(f) review or in the decision whether to certify a class. As the plurality noted in *Shady Grove*, "[b]y its terms [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action."[587] Or, as the Eleventh Circuit stated in *Klay v. Humana, Inc*., "[m]ere pressure to settle is not a sufficient reason for a court to avoid certifying an otherwise meritorious class action suit."[588]

With respect to the *Hydrogen Peroxide* and *Szabo* issues, while it is appropriate to demand that plaintiffs support class certification with

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others of which appear to favor class opponents"). *Cf.* Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (2013) (holding that a putative class plaintiff's stipulation that he will seek less than $5 million in damages does not defeat federal jurisdiction under Class Action Fairness Act). *Knowles* was a unanimous decision that does not cut one way or the other on the viability of class actions generally.

585. 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting).

586. *See, e.g.*, *supra* note 530 and accompanying text.

587. *Allstate*, 130 S. Ct. at 1437.

588. 382 F.3d 1241, 1275 (11th Cir. 2004). *Accord In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 145–46 (2d Cir. 2001) (Sotomayor, J.) ("Given [our] conclusions regarding the soundness of the class under Rule 23, the dissent's comments about the possibility that certification will coerce defendants into settlement are largely inapposite . . . . Meanwhile, the dissent underestimates the powerful policy considerations that favor [class] certification . . . .").

evidence, the court should not weigh competing evidence as part of the class certification process. Moreover, some courts have taken too stringent an approach to the class definition, numerosity, commonality, adequacy (based on omitted claims), (b)(2), (b)(3), issues classes, and settlement classes. Finally, the Supreme Court's opinions in *Concepcion* and *American Express* are especially troublesome and will have far-reaching consequences.

There is no easy solution to the issues discussed in this Article. Indeed, the proper approach will differ from issue to issue. On some issues, courts can alter their approach as a matter of case law. On other issues—those on which the Supreme Court has rendered a decision or where there is an unresolved conflict among the circuits—a rule change may be required.[589] And with respect to arbitration and the FAA, congressional action is necessary.

To be more specific, with respect to the heightened evidentiary standards of proof (the *Hydrogen Peroxide* issue), a change in the prevailing circuit court approach will require either a definitive Supreme Court pronouncement or a rule change. With respect to the class definition, district courts have discretion to be more liberal in reviewing class definitions (and in allowing plaintiffs to revise flawed definitions). As for numerosity, courts should hold plaintiffs to a preponderance of the evidence standard, but not at the expense of common sense, or by requiring direct proof where circumstantial evidence suffices. Both the class definition and numerosity cases tend to be very fact-specific. Neither Supreme Court review nor rule change appears necessary. With regard to commonality, the Supreme Court has already spoken in *Dukes*. Any change in the approach to commonality will have to be by rule change. With respect to adequacy concerns based on omitted claims, district courts have discretion to address possible issue and claim preclusion concerns up front, as opposed to denying class certification based on the lack of adequate representation.

Rule 23(b)(2) is more complicated. The Supreme Court has left open the question whether even "incidental" damages are permitted in a (b)(2) action.[590] Certainly, (b)(2) actions involving individualized damages appear foreclosed by *Dukes* as a matter of due process. But there are at least two ways that courts can structure a (b)(2) action without running afoul of *Dukes*. First, courts can certify "hybrid" classes: a (b)(2) class for

589. As a member of the Advisory Committee on Civil Rules, the author is loath to urge specific proposals in the context of a law review article.

590. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2560 (2011).

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injunctive and declaratory relief and a (b)(3) class for damages.[591] Second, courts could address *Dukes*' due process concerns by providing notice and opt-out rights in (b)(2) actions involving non-incidental monetary claims.[592]

In applying the predominance test (*e.g.*, to fraud cases involving reliance or to cases involving multiple states' laws), district courts have the leeway to weigh these individualized issues against the common issues in the case. Although some appellate courts suggest that reliance or choice-of-law issues are *per se* fatal on predominance (or manageability) grounds, a district court should not be faulted for rigorously comparing common issues to individual issues. With respect to individualized damages, *Comcast* is sufficiently unclear that, unless and until the Supreme Court offers more definitive guidance, courts can continue to apply the general rule that individualized damages do not defeat class certification.

In the class settlement context, changing the ground rules set forth in *Amchem*—a decision based on the language of Rule 23—would require a rule change. With respect to issue classes, the conflicts regarding Rule 23(c)(4) and the Seventh Amendment could be resolved by the Supreme Court, or addressed by a rule change. Of course, the Supreme Court would have the last word on whether any such rule change comports with the Seventh Amendment.

Finally, because *Concepcion* and *American Express* were based on interpretations of the FAA, the only viable approach to address those rulings is through legislation. A rule change will not work.

CONCLUSION

The class action device, when used responsibly by capable counsel under the watchful eye of the court, provides a powerful remedy for achieving mass justice. For small-claim cases, it provides the only vehicle for recovery, absent a public enforcement action. The threat of a class action also provides deterrence against wrongdoing. For wrongdoing that inflicts harm sufficient to warrant individual lawsuits, a class action avoids the need to resolve the same common issues repeatedly for each claimant.

591. *See, e.g.*, Easterling v. Conn. Dept. of Corrs., 278 F.R.D. 41 (D. Conn. 2011) (post-*Dukes* case certifying "hybrid" (b)(2)/(b)(3) classes).

592. *See, e.g.*, Cnty. of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1304 (2d Cir. 1990) (allowing opt-outs in mandatory class); Eubanks v. Billington, 110 F.3d 87, 93–94 (D.C. Cir. 1997) (noting that courts have discretion to permit opt-outs in (b)(1) and (b)(2) actions); FED. R. CIV. P. 23(c)(2) (permitting notice in (b)(1) and (b)(2) actions).

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In adjudicating class action issues, courts should return to basic principles; they should not lose sight of the fact that the class action can be a useful and efficient device. And they should not allow an abstract concern about blackmail settlements or the possibility of abuse by class counsel to raise the overall bar for certification.

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APPENDIX A: OUTCOMES OF CASES APPEALED UNDER RULE 23(f) BETWEEN NOV. 30, 1998 AND MAY 31, 2012[593]

District Court certified at least one class; Court of Appeals affirmed certification of at least one class	Cite	Circuit	Date
Beattie v. CenturyTel, Inc.	511 F.3d 554	6th	12/18/07
Beck v. Boeing Co.	60 Fed.Appx.38	9th	2/25/03
Behrend v. Comcast Corp.	655 F.3d 182	3d	8/23/11
Bertulli v. Independent Ass'n of Continental Pilots	242 F.3d 290	5th	2/13/01
Blair v. Equifax Check Services, Inc.	181 F.3d 832	7th	6/22/99
Brown v. Kelly	609 F.3d 467	2d	6/24/10
Carnegie v. Household Intern., Inc.	376 F.3d 656	7th	7/16/04
Carroll v. United Compucred Collections, Inc.	399 F.3d 620	6th	3/2/05
Chiang v. Veneman	385 F.3d 256	3d	9/20/04
Connecticut Retirement Plans & Trust Funds v. Amgen Inc.	660 F.3d 1170	9th	11/8/11
Culpepper v. Irwin Mortg. Corp.	253 F.3d 1324	11th	6/15/01
Daffin v. Ford Motor Co.	458 F.3d 549	6th	8/18/06
De Leon-Granados v. Eller and Sons Trees, Inc.	497 F.3d 1214	11th	8/31/07
DG ex rel. Stricklin v. Devaughn	594 F.3d 1188	10th	2/8/10
Drayton v. Western Auto Supply Co.	2002 WL 32508918	11th	3/11/02
Dukes v. Wal-Mart Stores, Inc.	603 F.3d 571	9th	4/26/10
Feder v. Electronic Data Systems Corp.	429 F.3d 125	5th	10/24/05
Gates v. Towery	430 F.3d 429	7th	11/29/05
Gray v. Hearst Communications, Inc.	444 Fed.Appx. 698	4th	8/25/11
Gunnells v. Healthplan Services, Inc.	348 F.3d 417	4th	10/30/03
In re Constar International Inc. Securities Litigation	585 F.3d 774	3d	10/29/09
In re DVI, Inc. Securities Litigation	639 F.3d 623	3d	3/29/11
In re Flag Telecom Holdings, Ltd. Securities Litigation	574 F.3d 29	2d	7/22/09
In re Household International Tax Reduction Plan	441 F.3d 500	7th	3/20/06
In re Linerboard Antitrust Litigation	305 F.3d 145	3d	9/5/02
In re Visa Check/MasterMoney Antitrust Litigation	280 F.3d 124	2d	10/17/01
In re Whirlpool Corp. Front–Loading Washer Products Liability Litigation	678 F.3d 409	6th	5/3/12

593. Defendant classes are not included in this table. Nor are cases included in which Rule 23(f) review was sought and denied. Examples of cases excluded for this reason include *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005); and *In re Sumitomo Copper Litig.*, 262 F.3d 134 (2d Cir. 2001). This appendix includes only published cases (including cases found on LEXIS and Westlaw). Finally, because courts do not always cite Rule 23(f), it is difficult to be sure that every single case has been located.

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In re Xcelera.com Securities Litigation	430 F.3d 503	1st	12/13/05
In re Zurn Pex Plumbing Products Liability Litigation	644 F.3d 604	8th	7/6/11
Klay v. Humana, Inc.	382 F.3d 1241	11th	9/1/04
Kohen v. Pacific Inv. Management Co. LLC	571 F.3d 672	7th	7/7/09
Lozano v. AT & T Wireless Services, Inc.	504 F.3d 718	9th	9/20/07
McManus v. Fleetwood Enterprises, Inc.	320 F.3d 545	5th	2/14/03
Mejdrech v. Met-Coil Systems Corp.	319 F.3d 910	7th	2/11/03
Olden v. LaFarge Corp.	383 F.3d 495	6th	9/7/04
Pella Corp. v. Saltzman	606 F.3d 391	7th	5/20/10
Ross v. RBS Citizens, N.A.	667 F.3d 900	7th	1/27/12
Schleicher v. Wendt	618 F.3d 679	7th	8/20/10
Shahriar v. Smith & Wollensky Restaurant Group, Inc.	659 F.3d 234	2d	9/26/11
Staton v. Boeing Co.	327 F.3d 938	9th	4/29/03
Tardiff v. Knox County	365 F.3d 1	1st	4/9/04
Waste Management Holdings, Inc. v. Mowbray	208 F.3d 288	1st	3/31/00
White v. Imperial Adjustment Corp.	75 Fed.Appx. 972	5th	10/2/03

Total Number of Cases in this Category: 43

District Court certified at least one class; Court of Appeals reversed, leaving no class certified	Cite	Circuit	Date
Am. Honda Motor Co., Inc. v. Allen	600 F.3d 813	7th	4/7/10
Anderson v. U.S. Dept. of Housing & Urban Development	554 F.3d 525	5th	12/31/08
Andrews v. Chevy Chase Bank	545 F.3d 570	7th	9/24/08
Beck v. Maximus, Inc.	457 F.3d 291	3d	8/4/06
Berger v. Compaq Computer Corp.	257 F.3d 475	5th	7/25/01
Bolin v. Sears, Roebuck & Co.	231 F.3d 970	5th	10/27/00
Bonlender v. American Honda Motor Co., Inc.	286 Fed.Appx. 414	9th	7/22/08
Carter v. West Pub. Co.	225 F.3d 1258	11th	9/7/00
Casas v. American Airlines, Inc.	304 F.3d 517	5th	9/17/02
CE Design Ltd. v. King Architectural Metals, Inc.	637 F.3d 721	7th	3/18/11
City of Hialeah, Fla. v. Rojas	311 F.3d 1096	11th	11/8/02
Colbert v. Dymacol, Inc.	302 F.3d 155	3d	8/28/02
Cole v. General Motors Corp.	484 F.3d 717	5th	4/10/07
Coleman v. General Motors Acceptance Corp.	296 F.3d 443	6th	7/22/02
Creative Montessori Learning Centers v. Ashford Gear LLC	662 F.3d 913	7th	11/22/11
Danvers Motor Co., Inc. v. Ford Motor Co.	543 F.3d 141	3d	9/12/08
De Asencio v. Tyson Foods, Inc.	342 F.3d 301	3d	9/8/03
Dechert v. Cadle Co.	333 F.3d 801	7th	6/24/03
Doiron v. Conseco Health Ins. Co.	279 Fed.Appx. 313	5th	5/28/08

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District Court certified at least one class; Court of Appeals reversed, leaving no class certified	Cite	Circuit	Date
Durant v. Servicemaster Co.	109 Fed.Appx. 27	6th	8/11/04
Elizabeth M. v. Montenez	458 F.3d 779	8th	8/15/06
Franze v. Equitable Assurance	296 F.3d 1250	11th	7/11/02
Friedman v. Market Street Mortg. Corp.	520 F.3d 1289	11th	3/20/08
Gariety v. Grant Thornton, LLP	368 F.3d 356	4th	5/12/04
Gene & Gene, L.L.C. v. BioPay, L.L.C.	624 F.3d 698	5th	10/22/10
Gene And Gene LLC v. BioPay LLC	541 F.3d 318	5th	8/14/08
Gilchrist v. State Farm Mut. Auto. Ins. Co.	390 F.3d 1327	11th	11/18/04
Glover v. Standard Federal Bank	283 F.3d 953	8th	3/21/02
Gooch v. Life Investors Ins. Co. of America	672 F.3d 402	6th	2/10/12
Gregory v. Finova Capital Corp.	442 F.3d 188	4th	3/14/06
Harper v. Sheriff of Cook County	581 F.3d 511	7th	9/8/09
Hawkins v. Comparet-Cassani	251 F.3d 1230	9th	5/30/01
Heffner v. Blue Cross and Blue Shield of Alabama, Inc.	443 F.3d 1330	11th	3/29/06
Heimmermann v. First Union Mortg. Corp.	305 F.3d 1257	11th	9/18/02
Hohider v. United Parcel Service, Inc.	574 F.3d 169	3d	7/23/09
In re Allstate Ins. Co.	400 F.3d 505	7th	3/8/05
In re Bridgestone/Firestone, Inc.	288 F.3d 1012	7th	5/2/02
In re Hydrogen Peroxide Antitrust Litigation	552 F.3d 305	3d	12/20/08
In re Initial Public Offering Securities Litigation	471 F.3d 24	2d	12/5/06
In re LifeUSA Holding Inc.	242 F.3d 136	3d	3/5/01
In re Lockheed Martin Corp.	412 Fed.Appx. 892	7th	3/15/11
In re New Motor Vehicles Canadian Export Antitrust Litig.	522 F.3d 6	1st	3/28/08
In re PolyMedica Corp. Securities Litigation	432 F.3d 1	1st	12/13/05
In re Salomon Analyst Metromedia Litigation	544 F.3d 474	2d	9/30/08
In re Schering Plough Corp. ERISA Litigation	589 F.3d 585	3d	12/21/09
In re Simon II Litigation	407 F.3d 125	2d	5/6/05
In re St. Jude Medical, Inc.	425 F.3d 1116	8th	10/12/05
In re St. Jude Medical, Inc.	522 F.3d 836	8th	4/9/08
In re Wells Fargo Home Mortg. Overtime Pay Litigation	571 F.3d 953	9th	7/7/09
Isaacs v. Sprint Corp.	261 F.3d 679	7th	8/14/01
Jefferson v. Ingersoll Intern. Inc.	195 F.3d 894	7th	10/25/99
Kartman v. State Farm Mut. Auto. Ins. Co.	634 F.3d 883	7th	2/14/11
Kirkland v. Midland Mortg. Co.	243 F.3d 1277	11th	3/7/01
Langbecker v. Electronic Data Systems Corp.	476 F.3d 299	5th	1/18/07
Lienhart v. Dryvit Systems, Inc.	255 F.3d 138	4th	6/26/01
Lierboe v. State Farm Mut. Auto. Ins. Co.	350 F.3d 1018	9th	12/1/03
London v. Wal-Mart Stores, Inc.	340 F.3d 1246	11th	8/7/03
Luskin v. Intervoice-Brite Inc.	261 Fed.Appx. 697	5th	1/8/08

District Court certified at least one class; Court of Appeals reversed, leaving no class certified	Cite	Circuit	Date
M.D. ex rel. Stukenberg v. Perry	675 F.3d 832	5th	3/23/12
Madison v. Chalmette Refining, L.L.C.	637 F.3d 551	5th	4/4/11
McKenna v. First Horizon Home Loan Corp.	475 F.3d 418	1st	1/29/07
McLaughlin v. American Tobacco Co.	522 F.3d 215	2d	4/3/08
Mims v. Stewart Title Guar. Co.	590 F.3d 298	5th	12/9/09
Murray v. Auslander	244 F.3d 807	11th	3/13/01
Nafar v. Hollywood Tanning Systems, Inc.	339 Fed.Appx. 216	3d	8/5/09
Nationwide Life Ins. Co. v. Haddock	460 Fed.Appx. 26	2d	2/6/12
O'Sullivan v. Countrywide Home Loans, Inc.	319 F.3d 732	5th	2/7/03
Oscar Private Equity Investments v. Allegiance Telecom, Inc.	487 F.3d 261	5th	5/16/07
Parra v. Bashas', Inc.	536 F.3d 975	9th	7/29/08
Patterson v. Mobil Oil Corp.	241 F.3d 417	5th	2/5/01
Piazza v. Ebsco Industries, Inc.	273 F.3d 1341	11th	11/30/01
Pickett v. Iowa Beef Processors	209 F.3d 1276	11th	4/20/00
Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Michigan	654 F.3d 618	6th	8/12/11
Powers v. Lycoming Engines	328 Fed.Appx. 121	3d	3/21/09
Prado-Steiman ex rel. Prado v. Bush	221 F.3d 1266	11th	8/11/00
Rahman v. Chertoff	530 F.3d 622	7th	6/26/08
Reeb v. Ohio Dept. of Rehabilitation & Correction	81 Fed.Appx. 550	6th	11/18/03
Reeb v. Ohio Dept. of Rehabilitation & Correction	435 F.3d 639	6th	1/24/06
Regents of University of California v. Credit Suisse First Boston	482 F.3d 372	5th	3/19/07
Rivera v. Wyeth-Ayerst Laboratories	283 F.3d 315	5th	2/15/02
Robertson v. Monsanto Co.	287 Fed.Appx. 354	5th	7/18/08
Robinson v. Texas Auto. Dealers Ass'n	387 F.3d 416	5th	10/5/04
Romberio v. Unumprovident Corp.	385 Fed.Appx. 423	6th	1/12/09
Rutstein v. Avis Rent-A-Car Systems, Inc.	211 F.3d 1228	11th	5/11/00
Sacred Heart Health Systems, Inc. v. Humana Military Healthcare	601 F.3d 1159	11th	3/30/10
Samuel-Bassett v. KIA Motors America, Inc.	357 F.3d 392	3d	2/5/04
Sandwich Chef of Texas, Inc. v. Reliance Nat. Indem. Ins. Co.	319 F.3d 205	5th	1/21/03
Sher v. Raytheon Co.	419 Fed.Appx. 887	11th	3/9/11
Smith v. Texaco, Inc.	263 F.3d 394	5th	8/22/01
Spano v. The Boeing Co.	633 F.3d 574	7th	1/21/11
Stirman v. Exxon Corp.	280 F.3d 554	5th	2/1/02
Szabo v. Bridgeport Machines, Inc.	249 F.3d 672	7th	5/4/01
Thorogood v. Sears, Roebuck and Co.	547 F.3d 742	7th	10/28/08
UFCW Local 1776 v. Eli Lilly and Co.	620 F.3d 121	2d	9/10/10
Unger v. Amedisys Inc.	401 F.3d 316	5th	2/17/05

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District Court certified at least one class; Court of Appeals reversed, leaving no class certified	Cite	Circuit	Date
Vallario v. Vandehey	554 F.3d 1259	10th	2/4/09
Valley Drug Co. v. Geneva Pharmaceuticals, Inc.	350 F.3d 1181	11th	11/14/03
Vega v. T-Mobile USA, Inc.	564 F.3d 1256	11th	4/7/09
Vizena v. Union Pacific R. Co.	360 F.3d 496	5th	2/26/04
Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of America	453 F.3d 179	3d	6/30/06
West v. Prudential Securities, Inc.	282 F.3d 935	7th	3/7/02

Total Number of Cases in this Category: 101

District Court denied certification entirely; Court of Appeals affirmed, leaving no class certified	Cite	Circuit	Date
Am. Seed Co., Inc. v. Monsanto Co.	271 Fed.Appx. 138	3d	4/1/08
Arreola v. Godinez	546 F.3d 788	7th	10/14/08
Bell Atlantic Corp. v. AT&T Corp.	339 F.3d 294	5th	7/16/03
Bell v. Ascendant Solutions, Inc.	422 F.3d 307	5th	8/23/05
Benavides v. Chicago Title Ins. Co.	636 F.3d 699	5th	3/23/11
Blades v. Monsanto Co.	400 F.3d 562	8th	3/7/05
Corley v. Orangefield Independent School Dist.	152 Fed.Appx. 350	5th	10/13/05
Delodder v. Aerotek Inc.	2012 WL 862819	9th	3/15/12
Garcia v. Johanns	444 F.3d 625	DC	3/31/06
Gates v. Rohm and Haas Co.	655 F.3d 255	3d	8/25/11
Gonzalez v. Asset Acceptance, LLC	308 Fed.Appx. 429	11th	1/26/09
Grimes v. Fairfield Resorts, Inc.	331 Fed.Appx. 630	11th	1/30/07
Guy v. Lexington-Fayette Urban County Government	2012 WL 1592745	6th	5/2/12
Heerwagen v. Clear Channel Communications	435 F.3d 219	2d	1/10/06
In re Aqua Dots Products Liability Litigation	654 F.3d 748	7th	8/17/11
Johnston v. HBO Film Management, Inc.	265 F.3d 178	3d	9/14/01
Love v. Johanns	439 F.3d 723	DC	3/3/06
Malack v. BDO Seidman, LLP	617 F.3d 743	3d	8/16/10
Maldonado v. Ochsner Clinic Foundation	493 F.3d 521	5th	7/19/07
McNair v. Synapse Group Inc.	672 F.3d 213	3d	3/6/12
Monahan v. City of Wilmington	49 Fed.Appx. 383	3d	10/18/02
Moore v. PaineWebber, Inc.	306 F.3d 1247	2d	10/10/02
Myers v. Hertz Corp.	624 F.3d 537	2d	10/27/10
New Jersey Carpenters Health Fund v. Rali Series 2006-QO1 Trust	2012 WL 1481519	2d	4/30/12
Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.	259 F.3d 154	3d	8/6/01
Pastor v. State Farm Mut. Auto. Ins. Co	487 F.3d 1042	7th	5/23/07
Piggly Wiggly Clarksville, Inc. v. Interstate	100 Fed.Appx. 296	5th	6/7/04

District Court denied certification entirely; Court of Appeals affirmed, leaving no class certified	Cite	Circuit	Date
Brands Corp.			
Poulos v. Caesars World, Inc.	379 F.3d 654	9th	8/10/04
Rattray v. Woodbury County, IA	614 F.3d 831	8th	8/5/10
Rodney v. Northwest Airlines, Inc.	146 Fed.Appx. 783	6th	8/22/05
Smith v. University of Washington, Law School	233 F.3d 1188	9th	12/4/00
Steering Committee v. Exxon Mobil Corp.	461 F.3d 598	5th	8/18/06
Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.	546 F.3d 196	2d	10/14/08
Thorn v. Jefferson-Pilot Life Ins. Co.	445 F.3d 311	4th	3/9/06
Turner v. Beneficial Corp.	242 F.3d 1023	11th	2/22/01
Vinole v. Countrywide Home Loans, Inc.	571 F.3d 935	9th	7/7/09
Wiesfeld v. Sun Chemical Corp.	84 Fed.Appx. 257	3d	1/9/04
Williams v. Veolia Transp. Services, Inc.	379 Fed.Appx. 548	9th	5/14/10
Zinser v. Accufix Research Institute, Inc.	253 F.3d 1180	9th	6/15/01

Total Number of Cases in this Category: 39

District Court denied certification entirely; Court of Appeals reversed, finding the lower court erred in denying certification	Cite	Circuit	Date
Alaska Elec. Pension Fund v. Flowserve Corp.	572 F.3d 221	5th	6/19/09
Allen v. Int'l Truck & Engine Corp.	358 F.3d 469	7th	2/13/04
Bateman v. Am. Multi-Cinema, Inc.	623 F.3d 708	9th	9/27/10
Brown v. Nucor Corp.	576 F.3d 149	4th	8/7/09
Busby v. JRHBW Realty, Inc.	513 F.3d 1314	11th	1/17/08
Cliff v. Payco General American Credits, Inc.	363 F.3d 1113	11th	3/25/04
Cordes & Co. Financial Services, Inc. v. A.G. Edwards & Sons, Inc.	502 F.3d 91	2d	9/11/07
Edwards v. The First American Corp.	385 Fed.Appx. 629	9th	6/21/10
Ervin v. OS Restaurant Services, Inc.	632 F.3d 971	7th	1/18/11
Hagan v. Rogers	570 F.3d 146	3d	6/19/09
In re Monumental Life Ins. Co.	365 F.3d 408	5th	4/2/04
Lindsay v. Government Employees Ins. Co.	448 F.3d 416	DC	5/26/06
McKowan Lowe & Co., Ltd. v. Jasmine, Ltd.	295 F.3d 380	3d	6/26/02
McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.	672 F.3d 482	7th	2/24/12
Messner v. Northshore University HealthSystem	669 F.3d 802	7th	1/13/12
Murray v. GMAC Mortg. Corp.	434 F.3d 948	7th	1/17/06
Parker v. Time Warner Entertainment Co., L.P.	331 F.3d 13	2d	6/2/03
Sepulveda v. Wal-Mart Stores Inc.	275 Fed.Appx. 672	9th	4/25/08
Sheinberg v. Sorensen	606 F.3d 130	3d	5/28/10

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District Court denied certification entirely; Court of Appeals reversed, finding the lower court erred in denying certification	Cite	Circuit	Date
Smilow v. Southwestern Bell Mobile Systems, Inc.	323 F.3d 32	1st	3/7/03
Stearns v. Ticketmaster Corp.	655 F.3d 1013	9th	8/22/11
Stillmock v. Weis Markets, Inc.	385 Fed.Appx. 267	4th	7/1/10
United Steel, et al v. ConocoPhillips Co.	593 F.3d 802	9th	1/6/10
Williams v. Mohawk Industries, Inc.	568 F.3d 1350	11th	5/28/09
Wolin v. Jaguar Land Rover North America, LLC	617 F.3d 1168	9th	8/17/10
Yokoyama v. Midland Nat. Life Ins. Co.	594 F.3d 1087	9th	2/8/10

Total Number of Cases in this Category: 26

Total Number of Cases in All Categories: 209