2012

The New Class Action Landscape: Trends and Developments in Class Certification and Related Topics

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Working Paper No. 435

November 28, 2012

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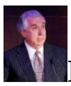**By John C. Coffee, Jr. and** **Alexandra D. Lahav**

September 28, 2012

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Introduction: The Big Issues

Unlike the 2011 Term of the Supreme Court, which featured cases that changed the landscape of class action practice on an across-the-board basis (namely, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, and AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740), the 2012 Term seems more likely to affect specific areas of practice: in particular, securities litigation, antitrust, and labor cases under the Fair Labor Standards Act ("FLSA"). This Memorandum will begin by examining the issues in the four class action cases now pending before the Court and then it will turn to surveying the impact of Wal-Mart and Concepcion, as the lower courts have begun to wrestle with the interpretive issues left by the Court's decisions last Term.

These are not, however, the only issues of consequence. Over the last year, the Second and Third Circuits have handed down major decisions dealing with settlement class actions, which may free settlement classes from some of the restrictions seemingly imposed by Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997). Other courts, particularly the Seventh Circuit, have shown greater recent willingness to experiment with partial certification. Finally, merger and acquisition litigation (both class and derivative actions) has undergone a remarkable shift, migrating out of Delaware (where they was once heavily concentrated) to a variety of state and federal courts. This, in turn, has produced a counter-reaction as some public corporations are asking their shareholders to approve forum selection clauses mandating that such mergers and acquisitions actions be brought exclusively in the company's jurisdiction of incorporation.

This Memorandum will survey these and other current issues, then examine the latest empirical data on class actions, and finally turn to a detailed analysis of the requirements of Federal Rule of Civil Procedure 23.

(1) **The Supreme Court's 2012 Docket**

a. Securities Litigation. Must materiality be shown at class certification? In Connecticut Retirement Plans and Trust Funds v. Amgen, Inc., 660 F.3d 1170 (9th Cir. 2011), the Ninth Circuit held that proving the materiality of the omitted or misstated information (which related to the safety of defendant's products) was not a precondition to the invocation of the "fraud on the market" doctrine and hence the materiality of the misstatement or omission need not be considered at the class certification stage. To invoke the "fraud on the market" presumption, the Ninth Circuit said that plaintiffs needed only to show (1) that the security in question was traded in an efficient market, and (2) that the alleged misrepresentations were public. From this perspective, materiality is a "merits" issue, which should not be considered at the class certification stage because it does not overlap with any issue that must be established to satisfy the requirements of Rule 23. The Seventh Circuit has also accepted this same distinction between materiality as a "merits" issue and the fraud on the market doctrine, which is a necessary class certification issue because, absent its application, each class member would need to show individual reliance and thus the action would fail the predominance test of Rule 23(b)(3).[1] In contrast, the Third Circuit has taken an intermediate position,[2] while the Second and Fifth Circuits appear to require a showing of materiality at class certification.[3] Given this division among the Circuits, it is not surprising that the Court took the case to resolve this division.

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[1] See Schleicher v. Wendt, 618 F.3d 679, 685 (7th Cir. 2010).
[2] In re DVI, Inc. Sec Litig., 639 F.3d 623, 631 (3d. Cir. 2011). The Third Circuit appears to take an intermediate approach which does not require the defendant to demonstrate materiality but does permit the defendant to rebut materiality.
[3] See, e.g., In re Salomon Analyst Metromedia Litig., 544 F.3d 474, 481 (2d Cir. 2008); Oscar Private Equity Invs. V. Allegiance Telecom, Inc., 487 F.3d 261, 264 (5th Cir. 2007); see also In re PolyMedica Corp. Sec. Litig., 432 F.3d 1, 8n.11 (1st Cir. 2005). In truth, all these decisions (other than Amgen) were decided prior to Erica P. John Fund, Inc., v. Halliburton, 131 S. Ct. 2179 (2011), which considered the relationship of the fraud on the market doctrine to class certification and found no need to prove loss causation at the class certification stage. Only Amgen was written in light of Erica P. John Fund, Inc.

Still, there is a further complication on the facts of Amgen. Defendant Amgen did not dispute that the market for its stock was efficient, but claimed that precisely because of that efficiency, the market had already factored into the stock price the impact of various announcements by a regulatory agency (the Food and Drug Administration) and reports by securities analysts that had corrected the defendant's alleged misstatement. Thus, defendants argued that any misstatements could not have affected the issuer's stock market price because the market possessed all available information. This position is known as the "truth on the market" defense—i.e., the idea that an efficient market incorporates not only publicly made false statements by the company but also corrective statements publicly made by others. Amgen is arguing at the Supreme Court that any showing that severs the link between the alleged misrepresentation and the market price of the security rebuts the presumption of reliance under the "fraud on the market" doctrine and makes class certification improper.

In one of its most recent securities litigation decisions, Erica P. John Fund Inc. v. Halliburton, 131 S. Ct. 2179 (2011), the Court made clear last Term that at class certification the district court should not consider a "merit-related' issue, unless it overlapped with a Rule 23 certification issue. No overlap was found in Halliburton. In this light, the issue in Amgen is whether materiality overlaps with the "fraud on the market" doctrine (which if applicable, allows plaintiffs to escape having to prove individual reliance, an inherently "individual" issue for purposes of Rule 23(b)(3)'s predominance test). Plaintiffs will argue that these issues are separate and distinct, but defendants will claim that materiality inherently overlaps when a "truth on the market" defense is raised. More generally, defendants may also claim that materiality inherently overlaps with the "fraud on the market" doctrine because an efficient market only responds to material information, and thus, to show that an efficient market responded to the alleged misinformation or omission, one must first show its materiality.

So viewed, Amgen does not seem likely to have earthshaking impact nor to chill securities class actions (which survive quite well in the Second Circuit where today materiality must be shown at class certification). A decision for defendants would essentially advance the issue of materiality from the summary judgment stage to the class certification stage and make for a more extended mini-trial at class certification. This would have two principal impacts: (1) plaintiffs bear the burden in many Circuits today of having to prove the requisite elements for Rule 23 by a preponderance of the evidence, whereas at the summary judgment stage the burden of proof is on the defendant to demonstrate that a reasonable jury could not consider the information material; and (2) if defendants can win at the class certification stage, they may be able to escape the often multi-million dollar annual costs of discovery in securities litigation. Still, if the Court does take up the "fraud on the market" doctrine more generally, anything could happen. Last year, in Erica P. John Fund, Inc. v. Halliburton, supra, the Court considered the doctrine briefly in the course of holding that loss causation did not need to be shown at class certification. Its tolerance for the doctrine as settled law may persist, but plaintiff's attorneys cannot safely exhale until the decision comes down. If the Court decides to restate or reconsider the "fraud on the market" doctrine, everything is up for grabs in securities litigation.

b. Antitrust Litigation. In Behrend v. Comcast Corporation, 655 F.3d 182 (3d Cir. 2011), the central question again involves the overlap between the merits inquiry and the evidence that must be shown at class certification. Accordingly, this case will have repercussions far beyond antitrust practice. Defendant cable company, Comcast, allegedly engaged in practices known as "clustering" by which it increased its market share in the multichannel video programming market for the Philadelphia Designated Market Area, increasing its market share from 24% in 1998 to around 70% by 2007. Essentially, Comcast purchased and swapped for competing cable systems within this area, allegedly in order to acquire a sufficiently large market share to deter the entry of new competitors into the area. Defendant argued (with some force) that there was little or no prospect of a competitor entering much of this market, and thus damages would necessarily differ on a household by household basis.

The Third Circuit held that an antitrust violation and antitrust injury could be shown through evidence that was common to the class. By a 2 to 1 margin, the majority also found that plaintiffs had shown at class certification by a preponderance of the evidence that they would be able to measure damages on a class-wide basis using common proof. The dissenting judge disagreed as to whether common proof could establish the damages of individual class members and would have remanded to the district court to determine if the use of subclasses could have solved this problem.

Although Comcast sought certiorari on several issues (including the definition of the relevant market), the Court granted certiorari only on the issue of damages, phrasing the question as:

> "Whether 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."

The issue appears to center on whether plaintiffs must show only that damages are capable of common proof at trial on a class-wide basis (i.e., the Third Circuit's position) or present a full-scale methodology for assessing damages at class certification, whose validity the court must approve (after appropriate challenge from defendants). As a practical matter, this would often involve a mini-trial at class certification, which is just what the Third Circuit expressly said that it was trying to avoid. In addition, the Third Circuit expressed doubt that the Daubert standard applied at class certification. 655 F.3d at 206. The Supreme Court has already strongly hinted its view that Daubert applies. See Wal-Mart Stores, 131 S. Ct. at 2553–54. However, there is a procedural problem: defendants never made an objection on Daubert grounds at the district court level, and this may prove a complication that requires a remand for further factual findings.

Ultimately, Comcast's impact could extend well past the antitrust context and require more formal damage models. Historically, courts have generally found that individual variations in damages should not preclude class certification.[4] But extended hearings over the validity of such models (and possibly greater use of subclasses when damages seem likely to vary) may be coming and could in turn raise superiority and manageability issues.

c. Labor and the FLSA. Can you protect your client from a class action by offering the individual plaintiff a complete recovery? This is the issue in Symczyk v. Genesis Healthcare Corp., 656 F.3d 189 (3d Cir. 2011). In general, most courts agree that once a motion for class certification has been filed, an offer of complete recovery under Fed. R. Civ. P. 68 to the putative lead plaintiff will not moot the class action, because the offer does not include full relief for the entire class.

Although this issue has been much litigated in the ordinary class action context, the Fair Labor Standards Act ("FLSA"), 29 U.S.C.A. § 201 et seq., adds a special twist, because it provides only for an opt-in class action (rather than the conventional opt-out class action in which the class representative represents all who fall with the class definition, except for the those who affirmatively opt out). That is, the actual litigant who brings the typical FLSA action

[4] See, e.g., Messner v. Northshore University HealthSystem, 669 F.3d 802, 815 (7th Cir. 2012); Klay v. Humana, 382 F.3d 1241, 1259 (11th Cir. 2004).

for back wages or overtime pay only sues for himself and such other persons, if any, who have affirmatively opted into the action. Typically, courts employ a two-tiered procedure under which the court first provisionally certifies the FLSA action for purposes of notice and discovery. Later, the court may conclusively determine that other plaintiffs who have asked to opt in are similarly situated to the named plaintiff and may join the action. But there is no formal class certification, either under Rule 23 or any other procedural rule, and those who eventually opt in are not yet represented by the named plaintiff at the initial stage.

Given these distinctions, the district court in Genesis Healthcare held that a settlement offer made pursuant to Fed. R. Civ. P. 68 in full satisfaction of plaintiff's individual claims mooted the action and deprived the court of subject matter jurisdiction, at least when the offer was made prior to both the plaintiff's moving for conditional certification and any request by another plaintiff to opt into the action.

The Third Circuit, however, reversed, relying on its earlier decision in Weiss v. Regal Collection, 385 F.3d 337, 390 (3d Cir. 2004), which refused to allow defendants to "pick off" the lead plaintiff in the context of a traditional Rule 23 class action. Recognizing the differences between the two contexts, the Third Circuit still saw no "compelling justification for limiting the relation back doctrine to the Rule 23 setting." 656 F.3d at 199. Effectively, the Third Circuit appears to have upheld the "private attorney general" concept and indeed saw special reasons why the FLSA would be undercut if prospective representatives could be picked off by Rule 68 offers.

Still, in granting certiorari, the Supreme Court may be motivated by a less sympathetic view of the private attorney general and a stricter sense of Article III's case and controversy requirement. Although a divided decision is likely, it seems doubtful that the majority granted certiorari simply to affirm.

What would the impact be of allowing defendants to pick off named plaintiffs in FLSA actions? Here, it is hard to generalize in the era of the Internet. If the prospective class members can communicate or be reached by the prospective class counsel, the fact that the first to file received a complete recovery may encourage others to volunteer. Defendants may find that this tactic works for them only in limited circumstances.

d. CAFA and the Power of the Named Plaintiff. Under the Class Action Fairness Act ("CAFA"), a class action can generally be removed from state to federal court when the amount in controversy exceeds $5 million. In response, some plaintiffs have attempted to defeat the defendant's removal by filing a stipulation that purports to limit the damages sought to less than $5 million (although it is unclear if they can later amend their complaint to increase the damages sought after the case is remanded). In Knowles v. The Standard Fire Insurance Company, 2011 U.S. Dist. LEXIS 130077 (W.D. Ark. December 2, 2011), the district court accepted this procedure, finding that the plaintiff, "as the master of his complaint," could choose what claims to bring and what claims to leave out. Indeed, the district court first found that the defendant had shown by a preponderance of the evidence that the claims likely exceeded $5 million, but then determined that the plaintiff could rebut this showing and establish "to a legal certainty" that the claims were less than $5 million by so stipulating. The Eighth Circuit denied the defendants' interlocutory appeal. 2012 WL 3828891 (8th Cir. January 4, 2012).

On August 31, 2012, the Supreme Court granted certiorari. *See* Std. Fire Ins. Co. v. Knowles, 2012 U.S. LEXIS 5088. Before the Supreme Court, the critical issue is likely to be whether this stipulation can be binding on absent class members in light of the Court's statement last year that in a putative class action "the mere proposal of a class . . . could not bind persons who were not parties." *See* Smith v. Bayer Corp., 131 S. Ct. 2368, 2382 (2011). The petition for certiorari argued that putative class members cannot be bound by the actions of a named plaintiff before class certification and that their due process rights would be violated if such a stipulation could waive their claims. Presumably, after certification, a named plaintiff could do so, but the action will typically be removed before the class certification motion is decided. This is also the first occasion on which the Court will consider CAFA, and the potential breadth of this loophole may strike some justices as defeating the purposes of the legislation.

(2) The Impact of Wal-Mart

As predicted, Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011) has had a significant effect on class action practice. The Wal-Mart opinion sent three distinct messages. First, the majority of the Court announced a new standard for "commonality" under Rule 23(a)(2). Under this standard, the plaintiff must show that the common question or questions can "generate common answers apt to drive the resolution of the litigation." 131 S. Ct. at 2551. This holding has had a significant effect on plaintiffs' ability to certify classes even outside the Title VII realm, although there is a lot of uncertainty among the lower court as to its meaning and many class actions that are not perfectly homogenous continue to be certified. Second, a unanimous Court held that individualized money damages are not available under Rule 23(b)(2). This holding will continue to have a sweeping impact on class action practice. Third, the Court held that individualized defenses were a bar to class certification and rejected the lower courts' attempts to resolve this problem through statistical sampling. Id. at 2561. The effect of this last holding is still up in the air, but defendants have put it to good use by objecting to any class where individualized defenses are available.

a. The New "Commonality." The Court announced a new standard for "commonality" under Rule 23(a)(2) in Wal-Mart. Under this standard, the plaintiff must show that the common question or questions can "generate common answers apt to drive the resolution of the litigation." 131 S. Ct. at 2551. In the sentence most often quoted from the opinion, the common question "must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. Although the Court did not expressly say that it was requiring greater cohesion within the class as a prerequisite to certification, it cited the late Professor Richard Nagareda for the proposition that "[d]issimilarities within the proposed class … [may] … impede the generation of common answers." Id. at 2552. The role of this "common answer," the majority states a page later, is to serve as the "glue holding the alleged reasons for all those decisions together." Id. In short, the more heterogeneous the class, the less likely that there will be sufficient "glue" to make the class certifiable. This holding unquestionably amended Title VII, invalidating class actions where the allegations concerned managerial discretion. The dissent accused the majority of importing the predominance standard from 23(b)(3) money damages class actions into what had always understood to be the less onerous 23(a) inquiry. Id. at 2562. The commonality standard has indeed become tighter, but courts have still certified classes where subordinates exercise some discretion so long as the plaintiff can show a concrete policy adopted by the defendant.

The new commonality has had an impact beyond Title VII jurisprudence to other areas of law, although there is still a great deal of uncertainty as to its application. The bottom line is that there is inconsistency in the lower courts' interpretation of the case. While many courts have interpreted Wal-Mart to tighten the commonality inquiry to something akin to the predominance inquiry in 23(b)(3), broad classes that raise some individual issues or involve discretionary employment policies are still being certified so long as the plaintiffs can point to some kind of uniform conduct on the part of the defendant with respect to all class members. A common trend has not emerged.

In Title VII class actions, the question that remains is how specific the "policy" in question needs to be in order to present a "common question" under this new standard. Courts reviewing the certification of employment discrimination class actions have looked for some employer policy – whether official or unofficial, even a policy with some discretionary elements – in order to distinguish the case before the cases before them from Wal-Mart. Judge Posner's decision in McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012) is a good example of this. That case involved a class of African American financial planners alleging discrimination. The defendant moved for reconsideration of the class certification decision in light of Wal-Mart. This case was similar to Wal-Mart in that the company delegated decisions to branch offices with only a framework for decision-making. The framework allowed brokers to form teams ("teaming framework") if they wanted to with those they wanted to, and dictated the method for distributing accounts when a broker leaves the firm. There was a linkage between the two policies, as successful teams often became more successful by obtaining distributions. The teams, the court noted, "are like little fraternities" because people will be more likely to pick those who are like them when there are people they are unsure about. The court explained: "If the teaming policy causes racial discrimination and is not justified by business necessity, then it violates Title VII as 'disparate impact' employment discrimination—and whether it causes racial discrimination and whether it nonetheless is justified by business necessity are issues common to the entire class and therefore appropriate for class-wide determination." 672 F.3d at 489. The court found that the allegations regarding the account distribution policy could be certified on the same theory, since those on teams will have more revenue, and more revenue means that they will receive better account distribution, this can result in a "spiral effect attributable to company-wide policy and arguably disadvantageous to black brokers [which] presents another question common to the class, along with the question whether, if the team-inflected account distribution system does have this disparate impact, it nevertheless is justified by business necessity." Id. See also Ross v. RBS Citizens, N.A., 667 F.3d 900, 909 (7th Cir. 2012) (holding that an unofficial policy of denying employees earned overtime compensation is "the common answer that potentially drives the resolution of this litigation."); Driver v. AppleIllinois, LLC, 2012 WL 689169, *1 (N.D.Ill. Mar 02, 2012) (holding that because plaintiffs allegations that defendant had a practice (either official or unofficial) of not paying tip workers minimum wage when they were doing non tip work is sufficient for certification).

By contrast, in Bennett v. Nucor Corp., 656 F.3d 802 (8th Cir. 2011) the 8th Circuit denied class certification for class of African American workers at a plant because different departments used different promotion practices involving some objective and some subjective criteria. The Court relied heavily on Wal-Mart for the proposition that the plaintiffs need evidence that there was a similarity across workplaces and that anecdotes from one department not enough to permit class certification plant-wide. For similar outcomes see Bolden v. Walsh Construction Co., 688 F.3d 893 (7th Cir. 2012) (holding that the policy at issue in Title VII racial discrimination class action gave managers discretion, therefore there wasn't the requisite common issue of fact or law under Wal-Mart v. Dukes and rejecting analogy to McReynolds); Ellis v. Costco Wholesale Corp., 657 F.3d 970 (9th Cir. 2011) (remanding employment discrimination action to the district court because commonality findings not sufficiently rigorous).[5]

In other types of class actions, defense motions to reconsider class certification or to decertify class actions give a window into the effect of the new commonality requirement. Some district courts have expressly held that Wal-Mart did not change existing law. For example, in Connor B., ex rel. Vigurs v. Patrick, 278 F.R.D. 30, 33 (D.Mass. Nov 10, 2011), a class action brought by foster children against Massachusetts Department of Children's Services for injuries suffered while in foster care due to systemic deficiencies within the state foster care system, the district court explained that Wal-Mart did not change the law of class actions, but instead provided "guidance on how existing law should be applied to expansive, nation-wide class actions…" 278 F.R.D. at 33. The court pointed out that prior to Wal-Mart, the Supreme Court had already explained that the inquiry into whether the requirements for class certification must be "rigorous" and that the court may look beyond the pleadings on a certification motion. The court further held that it did not need to conduct an evidentiary inquiry to find commonality because the commonality requirement was met with allegations of specific, system wide deficiencies that apply to all children. This was true even though individual children have different experiences within the foster care system and may have suffered different injuries. A similar example can be found in DL v. District of Columbia, 277 F.R.D. 38 (D.D.C. 2011), a case involving allegations that children in the DC school system were denied services under the Individuals with Disabilities and Education Act (IDEA). There the district court held that although plaintiffs had "superficially different allegations" regarding their treatment by the D.C.

[5] On remand, the District Court granted class certification in the Ellis case. Ellis v. Costco Wholesale Corp., 2012 WL 4371817 (N.D.Cal. Sep 25, 2012).

Public Schools, there was a "basic injury common to all members of the class: the denial of their right" to an offer of special education services. Id. at 45. The court distinguishing the case from Wal-Mart on the grounds that this question is "susceptible to classwide proof— e.g., statistical evidence indicating that, compared to similar jurisdictions, the District of Columbia is underserving its population of disabled children." Id. See also Floyd v. City of New York, --- F.R.D. ----, 2012 WL 1868637 (S.D.N.Y. 2012) (certifying class action based on department-wide stop and frisk policy of the New York Police Department); Stinson v. City of New York, 282 F.R.D. 360 (S.D.N.Y. 2012) (certifying class action based on allegations that police officers were issuing summonses without probable cause to meet department-wide quota policy); Morrow v. City of Tenaha, 277 F.R.D. 172,192–94 (E.D.Tex. 2011) (certifying class of Latinos who were stopped for alleged traffic violations and finding commonality in light of statistical evidence showing significant increases in the number of minorities stopped after the adoption of a new police policy); Ortega–Melendres v. Arpaio, 836 F.Supp.2d 959, **19 (D.Ariz. 2011) (certifying class of Latino motorists alleging racial profiling and finding that differences in subjective motivations of officers do not defeat commonality when there is evidence of a departmental policy).

By contrast, in M.D. ex rel. Stukenberg v. Perry, 675 F.3d 832 (5th Cir. 2012), a case involving the foster care system in Texas, the Fifth Circuit held that Wal-Mart heightened the standard for commonality, focusing on the language from that case that the common question must "resolve an issue that is central to the validity of each one of the [individual class member's] claims in one stroke." Id. at 840 (quoting Wal-Mart, 131 S.Ct. at 2551). The court remanded, holding that the district court should have focused on each cause of action separately to demonstrate that common answer could be found for each one. The Fifth Circuit held that the court below had been insufficiently rigorous and specific and should have analyzed all the claims and defenses to see if there is commonality. See also In re Live Concert Antitrust Litigation, --- F.Supp.2d ----, 2012 WL 1021081 (C.D. Cal. Mar. 23, 2012) (reviewing class certification under new, more rigorous standard after Wal-Mart); In re Countrywide Financial Corp. Mortg. Marketing and Sales Practices Litigation, Slip Copy, 2011 WL 6325877 (S.D.Cal. 2011) (denying class certification in action relating to sales of mortgages where, although many documents were standardized, transactions and disclosures varied from borrower to borrower).

In a prominent case the Third Circuit, in evaluating a settlement class, conflated the commonality and predominance requirements, providing further evidence in support of the dissenters' position that Wal-Mart has merged the two inquiries. In Sullivan v. DB Investments, Inc., 667 F.3d 273 (3d Cir. 2011), the Third Circuit approved a settlement finding that both commonality and predominance were met in an antitrust class action alleging price-fixing in the sales of diamonds by DeBeers. The case came to the Third Circuit on appeal by objectors from the settlement, who argued that the different consumer protection laws of the various states defeated commonality. The Court cited Wal-Mart in a unified discussion of commonality and predominance under (23(b)(3), holding that "the answers to questions about De Beers's alleged misconduct and the harm it caused would be common as to all of the class members, and would thus inform the resolution of the litigation if it were not being settled." 667 F.3d at 300. The problem of multiple state laws, the court explained, while a barrier for a litigated class, could be certified for settlement purposes.

Some plaintiffs bringing class actions under multiple states' consumer protection laws have preemptively narrowed their class definition to one state's laws, apparently in response to Wal-Mart. See, e.g., In re Motor Fuel Temperature Sales Practices Litigation, 279 F.R.D. 598

(D.Kan. 2012) (narrowing class to Kansas residents and purchasers only in litigation concerning sales of motor fuel for specified price per gallon without disclosing or adjusting for temperature expansion); In re Ferrero Litigation, 278 F.R.D. 552 (S.D.Ca. 2011) (narrowing class to California residents and purchasers only in litigation alleging misrepresentation of healthfulness of Nutella chocolate spread). We anticipate further contraction in nationwide classes in areas such as consumer and antitrust law.

Although we will address sub-classification later in this section, it is useful to note here that sub-classification may be an antidote to the new commonality in some cases. Some courts have affirmed class certification on liability even when damages would require individualized inquiries that could not survive the commonality analysis. In In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation, 678 F.3d 409 (6th Cir. 2012), the Sixth Circuit affirmed the certification of a class of purchasers of washing machines that were defective in that they permitted the growth of mold. The defendant argued that the class should not be certified because some class members were not injured; their machines were not moldy. The Sixth Circuit held that all washing machine consumers could show that they paid a premium at the time of purchase even if ultimately did not experience that particular injury, so class certification was appropriate. It urged the lower court to sub-classify between those who experienced mold and those who did not for damages purposes.

b. Injunctive Class Actions Under 23(b)(2). The most far reaching holding in Wal-Mart is the limitation of (b)(2) actions to those not requiring individualized relief. The Circuits had long divided on the extent that monetary damages should be available in injunctive class actions under Title VII. Following the advisory committee note to Rule 23, until 2011 all Circuits had held that monetary relief was sometimes available in class actions certified under (b)(2) where the injunctive or declaratory relief predominated over monetary relief, but some interpreted "predominate" more narrowly than others. The Fifth Circuit interpreted the requirement that injunctive relief predominate to mean that the monetary relief had to be merely "incidental" to the injunctive relief sought. This approach limited back pay claims under Title VII, but did not bar them altogether. Allison v. Citgo Petroleum Co., 151 F.3d 402, 415 (5th Cir. 1998). By contrast, the Second and Ninth Circuits had adopted a "totality of the circumstances" test to determine whether money damages predominated over injunctive relief and permitted back pay claims to be included. See Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 164 (2d Cir. 2001); Molski v. Gleich, 318 F.3d 937, 950 (9th Cir. 2003). The Supreme Court resolved this split in Wal-Mart by holding that the class was improperly certified as a (b)(2) class because the back pay claims were not merely "incidental" to the injunctive relief since they required individualized inquiries. The Court declined to adopt the test in Allison, however, and instead expressed skepticism as to whether money damages would *ever* be available in a (b)(2) class action. 131 S. Ct. at 2560. Although the decision left open the possibility that money damages might be obtained in a few contexts where the monetary award was not individualized, it has closed the door on the use of a Rule 23(b)(2) class to obtain back pay under Title VII.

Wal-Mart has had its predicted effect on limiting the remedies that plaintiffs are able to seek in (b)(2) class actions with the result that cases that might have been brought as b(2) classes are now seeking certification under 23(b)(3), and not only in Title VII cases. For example, in Nationwide Life Ins. Co. v. Haddock, 460 Fed.Appx. 26 (2d Cir. 2012), an ERISA class action alleging that the provider violated its fiduciary duties by collecting revenue sharing payments from mutual funds it offered to its annuity contract holders and seeking disgorgement, the appellate court held that the class met the requirements of 23(a), but remanded on the question of whether the class could be certified under 23(b)(2) on due process grounds because each individual class member would be entitled to monetary damages. The court explained that Wal-Mart limited monetary recovery to situations where the relief would be merely "incidental" and that in this case individualized hearings likely were needed and relief was not incidental. Id. See also Bauer v. Kraft Foods Global, Inc., 277 F.R.D. 558 (W.D.Wis. 2012) (declining to certify injunctive class action in ERISA class action, but certifying class under (b)(3)).

But in some other cases courts have certified b(2) class action when the damages incidental to the injunctive or declaratory relief involved restitution or recoupment of fees. See, e.g., Rivera v. Lebanon School Dist., Slip Copy, 2012 WL 2504926 (M.D. Pa. 2012) (certifying (b)(2) class seeking a declaratory judgment and restitution because "restitution [] would flow directly from such declaration."); In re Conseco Life Ins. Co. Life Trend Ins. Marketing and Sales Practice Litigation, Slip Copy, 2011 WL 6372412 (N.D. Ill. Dec. 20, 2011) (reviewing(b)(2) class certification of insurance policy holders and rejecting class treatment for former policy holders but approving treatment for current holders because relief involved restitution of wrongly deducted fees from policy premiums); Ruppert v. Alliant Energy Cash Balance Pension Plan, Slip Copy, 2012 WL 2930205 (W.D. Wis. 2012) (certifying (b)(2) class action involving erroneous lump sum distributions from retirement plans at the request of both parties because damages were mechanically computable); In re Celera Corp. Shareholder Litigation, 2012 WL 1020471, *17+ (Del.Ch. Mar 23, 2012) (interpreting the Delaware Chancery class action rule and holding that certification of (b)(2) class in breach of fiduciary duty case claiming monetary damages was appropriate because there were no individualized damages determinations required). While some district courts continue to hold that so long as the damages attendant injunctive or declaratory relief are mechanically computable, a (b)(2) class may be certified, how long they will continue to do so is an open question.

Individualized issues within a purely injunctive class have also made b(2) certification more difficult. The Fifth Circuit denied (b)(2) certification to a class of children in long term foster care on the grounds that to avoid individualized issues too many subclasses were required. M.D. ex rel. Stukenberg v. Perry, 675 F.3d 832 (5th Cir., 2012). The plaintiffs did not seek a single injunction applicable to all class members, but instead "at least twelve broad, classwide injunctions, which would require the district court to institute and oversee a complete overhaul of Texas's foster care system." 675 F.3d at 845. The 7th Circuit decertified a (b)(2) class of students seeking structural reform of special education programs in public schools. In addition to lacking commonality because the class was too broad and covered too many different possible violations, the court found the plaintiffs did not meet the requirements of (b)(2) because an injunction could not be granted to the class as a whole, but instead the case would require individualized injunctions. Jamie S. v. Milwaukee Public Schools, 668 F.3d 481 (7th Cir. 2012).

Courts are also struggling with whether medical monitoring class actions can be certified under 23(b)(2) after Wal-Mart. For example, in Gates v. Rohm and Haas Co., 655 F.3d 255 (3d Cir. 2011), a class action brought by village residents under Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and state law alleging that a chemical company and its wholly owned subsidiary released pollutant that contaminated their air and drinking water, the court decertified the class on the grounds that it was not sufficiently "cohesive" under 23(b)(2) because there were individual questions regarding the level of exposure to the chemical of each individual class member. Furthermore, the court noted the continuing split in the circuits as to whether medical monitoring was injunctive or monetary relief. Compare Boughton v. Cotter Corp., 65 F.3d 823, 827 (10th Cir.1995) with Zinser v. Accufix Research Inst. Inc., 253 F.3d 1180, 1194–96, amended, 273 F.3d 1266 (9th Cir.2001)). Although the Third Circuit didn't reach the issue, it warned that medical monitoring class actions are likely to lack cohesion because "causation and medical necessity often require individual proof." 655 F.3d at 264. But see Donovan v. Philip Morris USA, Inc., 2012 WL 957633 (D.Mass. Mar 21, 2012) (holding that medical monitoring is injunctive relief under Wal-Mart and therefore certifying a 23(b)(2) class of cigarette smokers).

The new limits on (b)(2) classes will also have an effect on preclusion doctrine, although it is still too early to predict the outcome. Suppose the plaintiffs' attorneys do file a Rule 23(b)(2) class action and cautiously do not seek compensatory relief under Rule 23(b)(3). Or, alternatively, they do seek such compensatory relief in a hybrid proceeding, but the court denies class certification based on the predominance standard of Rule 23(b)(3). In either case, can the class members now sue on their own for compensatory damages? Or will they be barred by res judicata principles once the Rule 23(b)(2) action is resolved?[10] As Justice Scalia emphasized in Wal-Mart, Rule 23(b)(2) intends a mandatory class and does not provide for opting out. Hence, it can be argued that class members who do not successfully maintain a parallel class action in the same proceeding are impermissibly splitting their claims and should therefore be denied the ability to maintain a second action for damages.[11] In this light, if bringing a Rule 23(b)(2) class action were to cost the class their claim to damages, it seems doubtful that the class counsel in

[10] It is clear that the failure to certify the Rule 23(b)(3) class does not bar subsequent individual claims. See Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984). But the resolution of the Rule 23(b)(2) action raises distinct issues about claim splitting and res judicata.

[11] See In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 209 F.R.D. 323, 339 (S.D.N.Y. 2002) ("Claim splitting is generally prohibited by the doctrine of res judicata, see Rest. Jmts 2d §24, which bars parties to a prior action or those in privity with them from raising in a subsequent proceeding any claim that they could have raised in the prior one, where all the claims arise from the same set of operative facts… .").

the Rule 23(b)(2) action can provide adequate representation to its clients when the very act of filing its injunctive action forces the sacrifice of the class members' individual compensatory claims.[12]

These questions can today be given only tentative answers. Some courts have permitted class members to split their claims between injunctive and compensatory classes in hybrid proceedings.[13] A potential way to escape this claim-splitting trap would be for courts to rule that there is a due process right to opt out of the Rule 23(b)(2) class, despite the express language of Rule 23(b)(2). In slightly different settings, several courts have so ruled that the Due Process Clause does trump Rule 23(b)(2) and permits opting out,[14] but the Supreme Court has previously ducked this issue[15] and other courts have ruled to the contrary.[16] In any event, even if a right to opt out is recognized, problems remain on the policy level because most class members are likely to remain passive and take no action (and thereby arguably sacrifice their right later to seek compensation). The better answer might therefore be a ruling that an absent member of a Rule 23(b)(2) class does not split his claim and may later sue – individually or collectively – for compensatory damages, at least when the injunctive action could not seek monetary damages. In

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[12] For such a holding that adequate representation cannot be provided where the injunctive action will cause the loss of compensation claims, see In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 209 F.R.D. 323, 338-340 (S.D.N.Y. 2002).

[13] See Robinson v. Metro-North R.R. Co., 267 F.3d 147, 164-167 (2d Cir. 2000); Holmes v. Continental Can Co., 706 F.2d 1144, 1151-60 (11th Cir. 1983); Eubanks v. Billington, 110 F.3d 87, 91-96 (D.C. Cir. 1997). Such hybrid classes have been accepted in Circuits that did not permit Rule 23(b)(2) actions to seek incidental money damages. See Pella Corporation v. Saltzman, 606 F.3d 391 (7th Cir. 2010). For the most recent approval of a hybrid class by a Circuit Court, see Brown v. Colegio de Abogados De Puerto Rico, 613 F.3d 44 (1st Cir. 2010).

[14] See, e.g., Molski v. Gleich, 318 F.3d 937, 948-49 (9th Cir. 2003); Jefferson v. Ingersoll Int'l, 195 F.3d 804 (7th Cir. 1999); Crawford v. Equifax Payment Services, 201 F.3d 877 (7th Cir. 2000).

[15] The Court granted certiorari on this issue, but then sidestepped the issue. See Ticor Title Ins. v. Brown, 982 F.2d 386 (9th Cir. 1992), cert. granted, 510 U.S. 810 (1993), cert. dismissed 511 U.S. 117 (1994).

[16] See Deboer v. Mellon Mortgage Co., 64 F.3d 1171, 1175-76 (8th Cir. 1995); First Fed. of Mich. v. Barrow, 878 F.2d 912, 919-20 (6th Cir. 1989).

effect, Wal-Mart answers the claim splitting problem, and plaintiffs can argue that they did not split their claims because they lacked the ability (after Wal-Mart) to raise claims for monetary and injunctive relief in the same collective proceeding.[17] But it is too early to predict whether courts will accept this argument.

A further variant on this problem of dual injunctive and compensatory actions also has not yet received attention. Suppose many class members do opt out of the Rule 23(b)(2) class action and pursue individual actions for damages. Assume further that the Rule 23(b)(2) class is successfully litigated and a finding of discrimination is made by the court. Can the individual litigants utilize this finding to their advantage under the doctrine of offensive collateral estoppel?[18] Cases considering non-mutual issue preclusion in the class action context have been rare,[19] but could increase after Wal-Mart. Predictably, defendants will respond that by opting out the individual plaintiffs waived their right to assert offensive collateral estoppel, and plaintiffs will retort that there could be no waiver when they had no choice. Again, new law remains to be made here.

c. Trial by Formula. The Court also held in Wal-Mart that individualized defenses were a bar to class certification. The Court dismissed the Ninth Circuit's attempt to resolve the problem of individualized defenses through statistical sampling, calling this approach "Trial by Formula," Justice Scalia rejected sampling methodology as a technique that abridged defendants' rights and

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[17] A plaintiff could raise both injunctive and compensatory claims in an individual proceeding, but this will generally be economically infeasible. If the Rule 23(b)(3) class is not certified, Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984), would seem to imply that there is no bar to a subsequent individual suit for monetary damages.

[18] See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). This doctrine usually gives discretion to the district court.

[19] See Brown v. Colegio de Abogados de Puerto Rico, 613 F.3d 44 (1st Cir. 2010) (upholding such issue preclusion in the class action setting).

thus was not authorized by the Rules Enabling Act ("REA").[6] 131 S. Ct. at 2561. Although he did not address whether such a procedure violated the Due Process Clause, his acidic language in condemning sampling methodology left little doubt how he would evaluate such a challenge.

The use of statistical evidence is more difficult than ever for plaintiffs, but there are situations where it has been permitted. To begin with, plaintiffs trying to use statistical analysis as the plaintiffs in Wal-Mart did, to show a common result of disparate impact arising from supervisory discretion, are out of luck. See Bolden v. Walsh Const. Co., 688 F.3d 893 (7th Cir. 2012). But courts are still accepting statistical evidence in more standard context. For example, courts have continued to certify classes where plaintiffs' statistical evidence relates to the effect of a specific policy. See Floyd v. City of New York, --- F.R.D. ----, 2012 WL 1868637 (S.D.N.Y. 2012) (certifying class action based on department-wide stop and frisk policy of the New York Police Department based in part on statistical evidence of racial disparities). And courts have reaffirmed the use of aggregate damages in antitrust cases. See In re TFT-LCD (Flat Panel) Antitrust Litigation, Slip Copy, 2012 WL 253298 (N.D. Cal. 2012). We also do not doubt that sampling, such as bellwether trials, will continue to be used in non-class aggregations.

Whereas previously the question of the rigor with which courts needed to review statistical and other expert evidence was in question, it seems clear now that the tide has turned towards a Duabert hearing at the class certification stage, with most courts accepting this requirement. See Powell v. Tosh, 280 F.R.D. 296 (W.D.Ky. 2012) (rigorously reviewing validity of expert testimony in case involving class of property owners suing swine farmers for odor caused by stored swine waste and denying class certification in part); Williams v. Wells Fargo Bank, N.A., 280 F.R.D. 665 (S.D.Fla. 2012) (conducting Daubert analysis of expert testimony);

[6] The REA forbids interpreting any federal rule of civil procedure so as to "abridge, enlarge or modify any substantive right." See 28 U.S.C. §2072(b).

In re Live Concert Antitrust Litigation, No. 06-ML-1745, 2012 WL 1021081 (C.D. Cal. Mar. 23, 2012) (denying certification in part on the basis that the expert evidence offered by plaintiff was incomplete and inadmissible). Just because the courts are engaging in a merits-like inquiry and Daubert analysis, however, does not mean that plaintiffs cannot survive this hurdle. See, e.g., Floyd, --- F.R.D. ----, 2012 WL 1868637 (engaging in significant fact finding and expert evaluation at the class certification stage and granting certification). As noted above, the Supreme Court will tackle this issue in Comcast this term, but the writing is on the wall.

Finally, affirmative defenses have posed a barrier to certification in some cases which likely would have been certified prior to Wal-Mart. See In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Pracs. Litig., Nos. 08md1988 DMS, 10cv0257 (DMS), slip op. at 11 (S.D. Cal. Dec. 16, 2011) (denying class certification based on defendant's right to raise individual affirmative defenses); Witt v. Chesapeake Exploration, LLC, 276 F.R.D. 458, 469 (E. D. Tex. 2011) (denying class certification of breach of contract class action among other things because individual defenses defeated predominance); Corder v. Ford Motor Co., 2012 WL 3045687, *2+ (W.D.Ky. Jul 25, 2012) (denying certification of class of Ford vehicle purchasers under Kentucky consumer protection laws because individual defenses defeated predominance).

Without statistical proof as an antidote to individualized defenses, plaintiffs can attempt to certify a liability-only class pursuant to Rule 23(c)(4). An issue class action on liability only would permit individual litigation on compensatory damages, allowing the defendant to raise individualized affirmative defenses in those proceedings. It is likely that defendants will settle any cases where the amount at stake is significant, that is, cases where there is in fact a risk of individual litigation. But in precisely those cases where the class action is most needed, (i.e., “negative value” cases where plaintiffs would not be able to prosecute suits on their own because the amount at stake is too small), there will be no compensatory phase. Issue classes deciding only liability also create funding problems for class counsel, who would only be able to get paid in the event of a class settlement or if they have a large inventory of cases that they can settle on an aggregate basis. Under this regime, cases presenting low-value claims are unlikely to be brought in the first place because there will not be any means for financing the litigation if class counsel cannot get paid out of a common fund.

(3) The Shift Toward a Preponderance of the Evidence Standard of Class Certification.

Once, only "some showing" was required to establish the elements of Rule 23. Those days were probably over even before Wal-Mart, but Wal-Mart completed the transition. A "rigorous examination" of Rule 23's requirements is now both the formal and the actual standard. The prior prohibition on judicial consideration of the merits at the certification stage

(which the Court seemed to mandate in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974)) has been overturned, at least to the extent that overlaps exist between the merits and the factual and legal issues applicable to any Rule 23 element. Such overlaps seem highly likely in complex litigation.

Although this procedural issue was not a principal focus of Wal-Mart, the Court did address it, noting that:

> A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.

Id. at 2251 (emphasis added). In a footnote the Court went on to distinguish Eisen v. Carlisle & Jacquelin, supra, describing its seeming prohibition of pretrial consideration of the merits as "the purest dictum" (Id. at 2252n.6); then, back in the text, it added:

> In this case, proof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in a pattern or practice of discrimination.

Id. at 2252. Although the Court did not address whether plaintiffs must prove their contentions at class certification by a preponderance of the evidence, the Court did say (as quoted above) that the plaintiff "must be prepared to prove that" the requirements of Rule 23(a) were satisfied. If one must "prove" something in a civil proceeding, no other standard of proof, other than preponderance, seems logical.

Still, the Court has not yet endorsed any broader shift towards pretrial evaluation of the merits at class certification, and furthermore in Erica P. John Fund v. Halliburton, 131 S. Ct. 2179 (2011), the Court made clear that when there is no overlap between the merits and Rule 23's requirements, the lower court should not stray into the merits of the action at class certification. In Halliburton, the Fifth Circuit had followed its established practice that the plaintiff had to provide an empirically valid demonstration of loss causation at the certification of any securities class action. See Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261 (5th Cir. 2007). Some Circuits had strongly disagreed with the Fifth Circuit's position,[7] while the Second Circuit had moved part way in its direction, permitting the defendant to contest loss causation at class certification, but requiring the defendant to bear the burden of proof. See In re Salomon Analyst Metromedia Litigation, 544 F.3d 474 (2d Cir. 2008). In overruling the

[7] Most notably, the Seventh Circuit had emphatically rejected the Fifth Circuit's rule that loss causation must be shown at class certification. See Schleicher v. Wendt, 618 F.3d 679 (7th Cir. 2010) (per Easterbrook, J). A number of district court decisions in other circuits had also disagreed with the Fifth Circuit. See Ross v. Abercrombie & Fitch Co., 2008 U.S. Dist. LEXIS 74538 at *3 (S.D. Ohio August 26, 2008); In re Micron Techs. Inc. Sec. Litig., 247 F.R.D. 627, 634 (D. Idaho 2007); In re LDK Solar Sec. Litig., 255 F.R.D. 519, 530 (N.D. Cal. 2009).

Fifth Circuit, the Court seems to be confining "rigorous analysis" at class certification to "overlap" issues, and not authorizing a broader merits inquiry. That tentative conclusion may have to be reviewed in the wake of the Court's approaching decisions in Amgen and Comcast this term. Further, in the wake of Halliburton, the Second Circuit's burden-shifting position on class certification in Saloman Analyst Metromedia seems untenable, unless the Court finds in Amgen that materiality necessarily overlaps with the "fraud on the market" doctrine (and thus that materiality must be shown at class certification).

On the burden of proof at class certification, the Second, Third, Fifth and, most recently, the Seventh Circuits have clearly placed that burden on the plaintiff and adopted a preponderance of the evidence standard. See In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (Dec. 30, 2008) (rejecting "threshold showing" and requiring the resolution of all factual issues by a preponderance of the evidence standard); Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196, 202 (2d Cir. 2008); Brown v. Kelly 609 F.3d 467, 476 (2d Cir. 2010); Messner v. Northshore University HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012).[8] Other Circuits, however, have refused to adopt the preponderance standard and have relied on the failure of Wal-Mart expressly to adopt such a standard to justify their refusal. Thus, this year, in Gooch v. Life Investors Ins. Co. of Am. 672 F.3d 402, 418 (6th Cir. 2012), the Sixth Circuit expressly declined to adopt the preponderance standard, explained that it instead used a

[8] See also In re American International Group, Inc. Sec. Litig., 265 F.R.D. 157, 164 (S.D.N.Y. 2010); McDonough v. Toys "R" Us, Inc., 638 F. Supp. 2d 461 (E.D. Pa. 2009); Sessions v. Owens-Illinois, Inc., 267 F.R.D. 171 (M. D. Pa. 2010). For a review of district court decisions in other Circuits, see In re HealthSouth Corp. Sec. Litig., 257 F.R.D. 260, 272 (N.D. Ala. 2009) ("[W]hile [the Circuit Courts] have not all been uniform in the precise standard of proof required at the class certification stage, the preponderance of the evidence standard seems to be gaining momentum.") See also Mooney v. Allianz Life Ins. Co., 2009 U.S. Dist. LEXIS 15626 (D. Minn. Feb. 26, 2009). In addition, in 2008, the Tenth Circuit may have effectively adopted the preponderance standard, but it phrased its requirement in terms of the plaintiff having to meet a "strict burden of proof." See Quinn v. Nationwide Ins. Co., 281 Fed. Appx. 771, 2008 WL 2265255 (10th Cir. 2008).

"rigorous analysis" standard with regard to Rule 23's requirements, and added: "We see no reason to superimpose a more specific standard that the Supreme Court . . ." Id. at 418.

The impact of a preponderance standard depends largely on what precisely is meant by its invocation. The Third Circuit has stressed that, for certification purposes, the "preponderance" standard applies not to the elements the plaintiff must eventually prove at trial, but only to Rule 23's requirements. For example, in the antitrust context, "[p]laintiff's burden at the class certification stage is not to prove the element of antitrust impact . . . . [but] to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members."[9] Similarly, to certify a Rule 10(b)(5) class, a Southern District of New York Court has said that "[p]laintiffs need not show definitively that they will be able to demonstrate loss causation; rather, they must demonstrate that the element of loss causation may be proven class-wide, which may be shown by proposing a suitable methodology."[10] In Behrend v. Comcast Corp., 655 F.3d 182 (3d Cir. 2011), which, as discussed earlier, is now before the Court, the Third Circuit re-emphasized this point, threading the doctrinal needle carefully:

> We allow preliminary merits inquiries when necessary for Rule 23 because of the potentially 'decisive effect on litigation' of a certification decision . . ., but those inquiries remain limited and non-binding on the merits at trial. . . . Nothing in Hydrogen Peroxide requires plaintiffs to prove their case at the class certification stage; to the contrary they must establish by a preponderance that their case is one that meets each requirement of Rule 23. To require more contravenes Eisen and runs dangerously close to stepping on the toes of the Seventh Amendment by preempting the jury's factual findings with our own.

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[9] In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, at 311. Although the plaintiffs in Hyrdrogen Peroxide did not actually need to prove antitrust impact, but merely to show that a preponderance of the evidence supported the conclusion that antitrust impact was subject to common proof, they still failed to meet this standard, showing just how much bite the "preponderance" standard can have at certification.

[10] Fogarazzo v. Lehman Bros., 2009 U.S. Dist. LEXIS 67555 at *39 (S.D.N.Y. Aug. 4, 2009) (wherein the district certified a 10(b)(5) claim against a group of major financial institutions).

655 F.3d at 199. The Supreme Court may redraw this line, at last marginally, when it hears both Amgen and Comcast this Term.

In those Circuits endorsing the preponderance standard, the standard's principal effect is to "frontload" issues (such as damage theories or market efficiency) that once would have only been contested at trial, shifting them up front to the class certification stage. This frontloading benefits defendants who were traditionally reluctant to go to trial in a large class action and so often lost the ability to litigate these issues effectively. For example, complex defenses regarding damages may sail over the heads of a typical jury (and may not be sufficiently clear-cut to merit summary judgment), but now defendants may be able to contest these issues at class certification and insist that plaintiffs bear the burden of proof. If this in not yet clearly the law, Comcast could make it so.

The new rules also set the stage for a battle of experts at class certification. Even Circuits that have not yet endorsed the preponderance standard have required that challenges to a critical expert's competence be resolved at class certification and have granted appeals under Rule 23(f) to do so. See American Honda Motor Co. v. Allen, 600 F.3d 813 (7th Cir. 2010). The Third Circuit's decision in Hydrogen Peroxide illustrates the type of expert battle that must now be resolved before certification. There, in an antitrust class action in which the plaintiffs alleged a conspiracy to inflate the prices of hydrogen peroxide and related chemical products, plaintiffs offered an expert, Beyer, who sought to testify that the requisite antitrust impact could be shown through common proof, thereby enabling plaintiffs to satisfy the predominance standard. Specifically, Beyer claimed that he could create a model that could show class-wide antitrust impact. In opposition, defendants' expert, Ordover, presented findings that were "irreconcilable" with those of Beyer and contended that a class-wide model was not feasible. Ordover argued that Beyer was mistaken when he concluded that all hydrogen peroxide products were fungible. Ordover also presented data showing that hydrogen peroxide prices had moved in different ways for different purchasers, indicating that impact was not the same class-wide. These results, Ordover argued, proved that Beyer's attempt to create a class-wide model would fail.

The district court refused to resolve the differences between these experts at the certification stage, and, for the purposes of certification, accepted Beyer's analysis while ignoring Ordover's testimony. The Third Circuit disagreed, and remanded to the district court, explaining:

> In its sound discretion, a district court may find it unnecessary to consider certain expert opinion with respect to a certification requirement, but it may not decline to resolve a genuine legal or factual dispute because of concern for an overlap with the merits. Genuine disputes with respect to the Rule 23 requirements must be resolved, after considering all relevant evidence submitted by the parties . . . . Rule 23 calls for consideration of all relevant evidence and arguments, including relevant expert testimony of the parties.

522 F.3d at 324. The district court, the Third Circuit said, could still certify the class, so long as it concluded that antitrust impact was capable of common proof, but it needed first to consider all relevant expert testimony before reaching any conclusion.

Although these new rulings place an increased burden on the plaintiff, this burden may not always be as forbidding as it initially appears. For example, although the Fifth Circuit formerly required "plaintiffs to establish loss causation in order to trigger the fraud-on-the-market presumption,"[11] it softened the impact of this requirement in 2009 in Alaska Elec. Pension Fund v. Flowserve Corp., 572 F.3d 221 (5th Cir. 2009), by simplifying the proof that would suffice to show loss causation. In this per curiam opinion by a panel that included former

[11] See Oscar Private Equity Investments v. Allegiance Telecom, Inc., 487 F.3d at 265.

Justice O'Connor sitting by designation, the Fifth Circuit ruled that a plaintiff need only show there was a curative disclosure which indicated the earlier false statements were incorrect—or, in its phrase, set forth the "relevant truth" (even if it did not demonstrate the prior statements to be fraudulent). This was a considerably softer, gentler standard for plaintiffs as to what the corrective disclosure must state.

(4) Repetitive Class Actions.

A federal system is inherently exposed to the problem that a class action filed on one level—state or federal—and denied certification there may simply be re-filed elsewhere by a different proposed class representative. In 2002, the mere possibility of such repetitive litigation led the Seventh Circuit (in a decision by Judge Easterbrook) to enjoin any putative class member in the federal class litigation (in which class certification had been denied) from seeking to certify a nationwide class in state court. See In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 333 F.3d 763 (7th Cir. 2003). Last term, the Court rejected this approach in Smith v. Bayer Corporation, 131 S. Ct. 2368 (2011), finding that for two distinct reasons a federal court cannot normally bar repetitive litigation in state court.

The problem of serial litigation is not limited to subsequent cases filed on the other side of the state/federal border. It may also happen that, after class certification is denied in federal court in one case, a subsequent case against the same defendant is filed by a different class representative in another federal court that raises the same allegations. Both facets of this problem of duplicative class actions are examined below.

a. Federal Versus State Class Actions. In Smith v. Bayer Corporation, 131 S. Ct. 2368 (2011), Bayer Corp. sought an injunction from a federal court that had just denied class certification in a federal products liability case against Bayer ordering certain West Virginia state court litigants not to seek class certification in a substantially similar case in state court. Although the facts were similar, the plaintiffs were different. Nonetheless, relying in part on Judge Easterbrook's decision in In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., supra, Bayer argued that the Anti-Injunction Act, 28 U.S.C. § 2283, which generally prohibits federal courts from enjoining state proceedings, did not apply, both because of the statute's relitigation exception and because West Virginia had a state rule on class certification that appeared to closely parallel Fed. R. Civ. P. 23. The district court had granted the injunction, and the Eighth Circuit had upheld it, but the Supreme Court reversed on two separate and independent grounds.

First, it found in determining the scope of the relitigation exception to the Anti-Injunction Act, "every benefit of the doubt goes toward the state court." Id. at 2376. Thus, the relitigation exception was applicable only if the issue decided by the federal court was the "same issue" as that facing the state court. See Chick Kam Choo v. Exxon, Corp., 486 U.S. 140 (1988) (establishing the "same issue" test). The alleged "same issue" in Bayer was essentially whether the requirements for class certification under West Virginia's version of Rule 23 were the same as those of Federal Rule 23. Although the texts of the two rules were virtually identical, the West Virginia Supreme Court had shown greater liberality in applying the predominance standard of its Rule 23. Cautioning that "the federal court must resolve any uncertainty … by leaving the question of preclusion to the state courts," (Id. at 2377), the Supreme Court found this difference in the judicial interpretation of the two rules sufficient to create different issues.

Second, the Supreme Court found that the federal court lacked power to bind nonparties, such as absent class members. Defining a "party" to mean in general "one by or against whom a lawsuit is brought" (Id. at 2379), it found it elementary that a non-named class member was not a "party" to the action (at least where the putative class action had not been certified). This aspect of Bayer could have the greater significance for the future. For example, federal courts sometimes enjoin competing state court litigation in order to encourage a federal court settlement. In recent years, a key issue has been whether there was a pending settlement that the federal court was entitled to protect pursuant to its power under the All Writs Act.[12] The Class Action Fairness Act of 2005 limits the risks to defendants created by this decision, because the possibility of a nationwide class action in state court has become highly unlikely after the passage of the Class Action Fairness Act of 2005 ("CAFA"), which contains special removal provisions to allow defendants to remove most sizable class actions to federal court. See 78 U.S.C. §§1332(d), 1453. Still, after Smith v. Bayer Corp., denial of class certification in federal court in a mass tort or consumer class action could be followed by the filing of multiple class actions in state courts, each limited in scope so as to comply with CAFA. As the Supreme Court’s recent grant of certiorari in The Standard Fire Insurance Co. v. Knowles (11-1450) demonstrates, however, plaintiffs may have a difficult time keeping cases in state court even when they attempt to structure their suit specifically to avoid removal.

b. Successive Federal Class Actions. Duplicative class actions also arise in the federal courts when members of a class that was denied certification before one judge attempt to re-file in order to try their luck before a different judge. Recently, Judge Posner was presented with such a case, and in a matter of first impression ruled that the plaintiff class members were not precluded from relitigating the certification issue in a new action. Smentek v. Dart, 683 F.3d 373 (7th Cir. 2012). The opinion relied largely on Smith v. Bayer, indicating that that decision has legs beyond the state-federal relationship. As the Supreme Court noted in Bayer, “our legal

[12] See Ret. Sys. v. JP Morgan Chase & Co., 386 F.3d 419 (2d Cir. 2009) (finding that a federal court hearing the WorldCom securities class action could not enjoin a parallel (but non-class) Alabama state court litigation where no settlement had yet been reached in the federal court class action).

system generally relies on principles of stare decisis and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs. We have not thought that the right approach (except in the discrete categories of cases we have recognized) lies in binding nonparties to a judgment." 131 S.Ct. at 2381. Given the lack of uniformity among judges on certification issues, Bayer may have far reaching consequences both for class members who want another bite at the apple and for defendants who have to serially oppose class certification.

c. Overlapping Merger Litigation Across Jurisdictions**.** Finally, a pattern has arisen in recent years involving the predictable filing of duplicative class actions in multiple state and federal court challenging the mergers of Delaware (and other) corporations. Although CAFA's removal provision prevents parallel litigation of national class actions of over five million dollars in state court, that legislation contained a carve-out for actions contesting matters of internal corporate law. See 28 U.S.C. § 1453. The intent was to retain state control over corporate governance, and particularly fiduciary breach issues, as that law had long been litigated in Delaware, the home of most large public corporations. Nonetheless, rather than being adjudicated in Delaware (or some other jurisdiction of incorporation), these cases are increasingly being filed in several jurisdictions simultaneously. In some cases, the court in one jurisdiction stays the action and allows it to proceed in a sister court. For example, shareholder suits related to the merger between Bear Stearns and J.P. Morgan during the height of the financial crisis were filed in New York and Delaware. The Delaware Chancery Court stayed the action, allowing it to proceed to resolution in New York. In re Bear Stearns, C.A. No. 3643-VCP, 2008 WL 959992 (Del. Ch. Mar. 31, 2008). Other times one action will proceed expeditiously, and the other will not be stayed but will nevertheless languish. In rare cases, parallel class actions proceed at the same time, imposing duplicative costs on the courts, the defendants, and potentially the plaintiffs.[13] The concern articulated by judges, lawyers and commentators is not only that simultaneous litigation in multiple jurisdictions may waste judicial resources, but even more that the process facilitates a "market for settlements" in which the corporate defendant induces plaintiffs' attorneys to underbid each other and offer the defendant a lower settlement than the competition, thereby effectively engaging in a "reverse auction." Scully v. Nighthawk Radiology Holdings, Inc., Courtroom Status Conference, C.A. No. 5890-VCL (Del. Ch. Dec. 17, 2010), at 25 (accusing counsel of engaging in a reverse auction). Other factors may also explain such overlapping actions. Some plaintiffs' lawyers contend that certain procedural rules in Delaware, including the lack of jury trials in Chancery Court, make litigation less favorable to plaintiffs and that litigation out of Delaware provides a needed safety-valve. Whatever the cause, the result is incontestable: each of the contending teams of plaintiff's attorneys is reluctant to expend resources on discovery or motions prior to obtaining some control over the action, and so a "phantom litigation" is conducted until a settlement (usually for non-monetary benefits, such as revised disclosures) is reached by defendants with one plaintiff's team

Should duplicative litigation be discouraged (and, if so, how)? In state courts, the decision to stay is discretionary. See McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g, 263 A.2d 281, 283 (Del. 1970) (holding that Delaware courts should "freely" use their discretion to stay actions filed in Delaware where parallel actions have been filed in other jurisdictions). In the federal courts, the decision to stay a federal proceeding in light of a

[13] See, e.g., In re Topps Company Shareholders Litig., 924 A.2d 951, 953 (Del. Ch. 2007); In re Topps Co., Inc. Shareholder Litig., 859 N.Y.S.2d 907, at *2 (N.Y. Sup. 2007). See also In re Allion Healthcare Inc. S'holders Litig., C.A. No. 5022–CC, 2011 WL 1135016, at *4 n. 12 (Del. Ch. Mar. 29 2011). For a fuller review, see John C. Coffee, Jr. The Delaware Court of Chancery: Change, Continuity—And Competition, 2012 Columbia Bus. L. Rev. 387, 392–402 (2012).

proceeding in state court is governed by the "Colorado River" doctrine, which favors retaining federal jurisdiction and sets a high bar for staying federal actions. See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 820 (1976) (in determining whether to stay a federal action in favor of a parallel state action, federal courts are to give substantial weight to the "heavy obligation" of the federal courts to exercise their jurisdiction). In general, federal courts seem reluctant to stay the action before them, even when a parallel case is proceeding apace in the state court. See, e.g., McMurray v. De Vink, 27 Fed. Appx 88, 92 (3d Cir. 2002) (overturning stay even though litigation was progressing in Delaware). Nevertheless, some federal courts have stayed merger suits in favor of the court of incorporation. But see In re Countrywide Fin. Corp. Derivative Litig., 542 F.Supp.2d 1160, 1173 (C.D. Cal. 2008) (staying a case where litigation was proceeding in Delaware because of the Delaware court's expertise, the fact that Delaware obtained jurisdiction immediately after the merger was announced and the suit was proceeding apace in Delaware.).

Knowing that in the event of a merger they will face multiple actions in state and federal jurisdictions, some corporations are seeking to avoid suits in multiple jurisdictions by adopting forum selection provisions in their bylaws or corporate charter. One Delaware decision has indicated its approval of this method of addressing the problem, with Vice Chancellor Laster suggesting in dicta that "if boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes." In re Revlon, Inc. S'holders Litig., 990 A.2d 940, 960 (Del. Ch. 2010).

Still, the question remains unresolved whether forum selection provisions, even if adopted by a shareholder vote, will be respected and upheld by courts in jurisdictions outside of the state of incorporation. See Bushanski v. Armacost, 2012 U.S. Dist. LEXIS 112315 (N.D. Cal. Aug. 9, 2012) (staying California federal derivative action pending decision in Delaware Chancery Court on whether forum selection bylaw provisions are binding). One decision has found that forum selection is essentially a matter of federal common law. In Galaviz v. Berg, 763 F. Supp. 2d 1170, 1174-75 (N.D. Cal. 2011), the court refused to enforce a forum selection provision in Oracle's bylaws primarily because it had not been voted on by shareholders. In addition, the Galaviz court found the forum selection clause unenforceable under federal common law. There is contrary Supreme Court case law on this subject, and it remains to be seen whether it can be successfully distinguished. See M/S Bremen v. Zapata's Off-Shore Co., 407 U.S. 1 (1972) (upholding a forum selection under federal common law of admiralty). In Galaviz, Oracle's board had adopted the bylaws, without shareholder consent, after the alleged misconduct occurred. Counsel are now recommending advance adoption by shareholders of such amendments.

(5) The Uncertain Impact of Shady Grove.

In Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company, 130 S. Ct. 1431 (2010), the Supreme Court resolved a conflict between Federal Rule of Civil Procedure 23 and a New York statute that precluded a class action to recover a "penalty" (such as statutory interest), ruling that the Federal Rule trumped the state statute. But if the outcome is clear, the rationale underlying this plurality decision remains in debate, and its scope is uncertain.

The Second Circuit had found that the New York statute (N.Y. Civ. Prac. Law Am. § 901(b)) prevailed because in its view there was no conflict between Rule 23 and the New York Statute. As it saw it, the New York statute addressed the "eligibility" of the particular type of claim for class treatment, while Rule 23 addressed only the certifiability of the class. Further, the Second Circuit characterized the New York statute as "substantive" within the meaning of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), and therefore held that it governed a federal court sitting in a diversity case. Broadly rejecting the Second Circuit's asserted distinction, Justice Scalia opined that "the line between eligibility and certifiability is entirely artificial." Id. at 1438. He concluded that eligibility was an issue entirely up to the plaintiff to determine, and Rule 23 should be read to empower a federal court to certify a class in every case meeting its criteria.

To reach this result, Justice Scalia read the phrase in Rule 23(a) that "[a] class action *may be maintained*" as directed to the plaintiff: "Courts do not maintain actions; litigants do. The discretion suggested by Rule 23's 'may' is discretion residing in the plaintiff: He may bring his claim in a class action if he wishes." Id. at 1438. Justice Scalia also found that the specific exceptions to Rule 23 provided by Congress in various federal statutes proved that Rule 23 otherwise applied: "If Rule 23 did *not* authorize class actions across the board, the statutory exceptions would be unnecessary." Id. at 1438. This interpretation that a class must be certified if the requirements of Rule 23(a) and (b) are satisfied may raise questions about limitations on class certification that do not appear on the face of Rule 23 (such as the later discussed "ascertainability" requirement). But it is premature to assume their demise.

Justice Scalia's certainty and bright-line re-interpretation of Rule 23 are clouded, however, by the fact only three other Justices joined in his plurality opinion (with different Justices concurring in different parts). The traditional rule has long been that federal courts sitting in diversity "apply state substantive law and federal procedural law." Hanna v. Plumer, 380 U.S. 460, 465 (1965). Complexity emerges because state procedural rules sometimes shape the scope of the substantive right under state law. In these cases, the Justices agree that, under the express language of the Federal Rules Enabling Act (28 U.S.C. § 2072 (b)), a federal rule may "not abridge, enlarge or modify any substantive right." For Justice Scalia, however, this meant only that the federal rule must "really regulat[e] procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

In contrast to Justice Scalia, who found that Rule 23 did "really regulate procedure" and that its conflict with the New York statute was plain on its face, the four dissenting judges believed that federal courts needed to balance federal procedural law with state substantive law and should avoid finding conflicts between the two. Even more importantly, Justice Stevens, the critical fifth vote, agreed in part with both sides. With Justice Scalia, he agreed that the New York statute (Section 901) was a procedural rule (and thus not part of New York's substantive law), but also he agreed with Justice Ginsberg that some state procedural rules must be applied by federal courts in diversity cases "because they function as part of the state's definition of substantive rights and remedies." Id. at 1448. For example, he agreed that a state procedural rule limiting damages would likely have to be applied in federal court (citing Gasperini Center for Humanities, Inc., 518 U.S. 415 (1996)). On this basis, many seemingly procedural state rules may actually define or limit a substantive state right and so would have to be applied in state court.

Where then is the dividing line? In his concurring opinion, Justice Stevens concluded that Rule 23 did not violate the Rules Enabling Act, because it was not clear that it "would alter a state-created right." Id. at 1457. In his judgment, only if there was "little doubt" that the federal rule abridged or modified the state-created right, would the Rules Enabling Act require that the state procedural rule be applied in federal court. Id. at 1457. Here, because the state rule against class actions for penalties applied to both New York and non-New York claims that a plaintiff might assert in a New York state court, he declined to view the state procedural rule as closely intertwined with any substantive state right. Presumably, Justice Stevens would have reached the opposite result (and found the class non-certifiable) if the New York state statute had applied exclusively to a limited number of New York statutes authorizing penalties.

Given Justice Stevens' departure from the Court, it is unclear how much weight future cases will give to the criteria he elaborated. Still, it is clear that a majority of the Court did not agree with Justice Scalia that Rule 23 always should govern because it "really regulates" procedure, and a majority (if Justice Stevens is included) seems to believe that balancing federal and state policies is essential. Although the Stevens test would permit state law to trump Rule 23 if the procedural aspects of the state rule were "sufficiently interwoven with the scope of a substantive right or remedy," his test requires "little doubt" as to the abridgement of the state-created right, and thus the occasions on which Rule 23 will be required to yield still seem likely to be relatively few. Following Stevens' analysis, lower federal courts have held that where the specific substantive law contains a prohibition on class actions, Rule 23 will yield to the state substantive requirement that actions be maintained individually. See, e.g., Tait v. BHS Home Appliances Co., 2011 WL 1832941, *8 (May 12, 2011, C.D.Cal.) (denying class certification on the basis that the Tennessee Consumer Protection Act limits claims "individual" actions rather than class action lawsuits). These cases differ from Shady Grove, where the limitation on class actions was included in the general procedural law. No appellate court has addressed this question of prohibitions on class action suits in specific laws so far.

Against this backdrop, let's return to the earlier discussed problem of forum selection clauses in corporate charters and bylaw. Assume that plaintiffs file a class action in a California federal court with respect to a Delaware corporation having such a clause and the class action otherwise complies with Rule 23. In addition to arguing that such a clause should not be enforced as a matter of federal common law (as Galaviz v. Berg, supra, found), plaintiffs might also claim that Shady Grove requires that Rule 23 override any contrary state policy. Here, plaintiffs' argument might rely on Justice Scalia's conclusion in Shady Grove that: "The discretion suggested by Rule 23's 'may' is discretion residing in the plaintiff. He may bring his claim in a class action if he wishes." 130 S. Ct. at 1438.

Although this argument has a surface plausibility, we doubt that it would prevail for at least three independent reasons:

First, forum selection clauses do not on their face conflict with Rule 23. They do not state the conditions under which a class action can be brought, but rather require that all litigation must be brought in a specified forum (albeit usually a non-federal one). See Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956) (holding that whether a contractual arbitration provision presented in a diversity jurisdiction case was enforceable was a question of state law).

Second, even if Shady Grove is applicable to such clauses, this setting is exactly that in which Justice Stevens' concurring opinion states that an important state policy should be respected, because a forum selection clause applies narrowly only to corporations incorporated in that jurisdiction.[14]

Third, the court could decline to certify the class on superiority grounds, because a class action in federal court is arguably not superior to the forum that a majority of the shareholders elected by approving the forum selection clause.

[14] The Court has recognized, well before Shady Grove, that important state corporate governance policies should be respected, even if they seem to conflict with the Federal Rules of Civil Procedure. See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) (finding that a New Jersey security-for-expenses statute applied in federal court, even though no similar provision was in Federal Rules, because New Jersey was properly implementing a substantive corporate policy).

(6) Arbitration and Class Actions.

The Supreme Court's decision last Term in AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), completed a trilogy of arbitration decisions that effectively subordinate state law to the Federal Arbitration Act and open the door for the near universal use of arbitration and class action waiver clauses in retail, consumer and employment contracts.[15] But several lower federal courts appear to be resisting, as discussed below.

Let's begin by reviewing the recent trilogy of cases. First, in Rent-a-Center v. Jackson, 130 S. Ct. 2772 (2010), the Court was faced with an employer's motion to dismiss or stay an employment discrimination suit by its former employee based on an arbitration agreement. The employee alleged that the agreement was unenforceable because it was unconscionable under state law, and the Ninth Circuit agreed. In a 5-4 decision reversing the Ninth Circuit, the Court distinguished two types of challenges to the enforceability of an arbitration agreement. Where an agreement to arbitrate includes a specific provision that the arbitrator will determine the enforceability of the agreement, then under Section 2 of the Federal Arbitration Agreement ("FAA") a party who specifically challenges the enforceability of that special agreement is entitled to have the district court resolve this challenge. But if instead the party challenges the enforceability of the agreement as a whole, then this broader challenge is for the arbitrator to resolve. Because it viewed the employee in Jackson as having not specifically challenged the agreement to arbitrate the enforceability issue, but instead only challenging the validity of the agreement as a whole, the majority found that this latter issue had to go to the arbitrator for

[15] Even before Concepcion, the evidence was, as of 2008, that 80% of financial services and telecommunication consumer contracts contained a class waiver. See Theodore Eisenberg, Geoffrey P. Miller, and Emily Sherwin, Arbitrations' Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts, 41 U. Mich. J. L. Ref. 871, 882–83 (2008). After Concepcion, this rate should increase.

resolution. Viewed today, the impact of Rent-a-Center may be modest in light of Concepcion, which largely eliminates any basis for a judicial challenge to the enforceability of the provision.

In the second case, Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010), the Court faced the issue of whether an arbitration panel could order classwide arbitration, absent some provision in the arbitration agreement authorizing it. The facts involved an alleged antitrust pricefixing conspiracy, and plaintiff AnimalFeeds wanted classwide arbitration on behalf of a class of purchasers of defendant's "parcel tanker transportation services." Seven years earlier, in GreenTree Financial Corp. v. Bazzle, 539 U.S. 444 (2003), plaintiffs had sought the district court to order classwide arbitration, and a plurality of the Supreme Court ruled that the issue had to be remanded instead to the arbitrator. In Stolt-Nielsen, the arbitration panel, relying on Bazzle, had ruled that class wide arbitration was authorized, but the District Court had vacated the award as in "manifest disregard" of the law, because the arbitration panel had failed to adequately consider federal maritime law or New York law.

Writing for the majority, Justice Alito held that the plurality in Bazzle could not have established a binding standard for deciding whether class arbitration is to be allowed; nor, he wrote, could the parties' agreement to class action arbitration be inferred simply based on their agreement to bilateral arbitration. Justice Alito distinguished class wide relief from other procedural issues, which he acknowledged may be implied by parties' consent to arbitration. Although the Ninth Circuit had held that there was no evidence that classwide arbitration conflicted with federal maritime or New York law, Justice Alito disagreed. Specific consent was necessary, he wrote, adding: "This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consent to it by simply agreeing to submit their disputes to an arbitrator." *Id.* at 1775.

Stolt-Nielsen's indication that class-wide arbitration was disfavored set the stage for the decisive preemption question that came before the Court in Concepcion. In the underlying case, Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), the Ninth Circuit had held both that (1) a class action waiver provision in AT&T's standard form contract for its cell phones was unconscionable under California law, and (2) the FAA did not preempt California law governing the unconscionability of class action waivers.

In Concepcion, the Court once again split 5-4, this time over the impact of the savings clause in Section 2 of the FAA, which purports to immunize from preemption generally applicable contract defenses (which language on its face would appear to include the defense of unconscionability). In 2005, the California Supreme Court had held that a mandatory arbitration provision was unconscionable unless classwide arbitration was available, because bilateral arbitration did not create the same deterrent effect as a class action. See Discover Bank v. Superior Court, 36 Cal. 4th 148, 30 Cal. Rptr 3d 76, 113 P.3d 1100 (2005). Effectively, Discover Bank allowed consumers to demand classwide arbitration ex post. Relying on Discover Bank, the Ninth Circuit had found AT&T's arbitration provision in its retail cell phone contracts unconscionable and thus not subject to FAA preemption (because unconscionability was a contract defense sheltered by Section 2's saving clause). The resulting confrontation pitted the Court's respect for federalism and state courts against its dislike of class actions.

Federalism lost. The five justice majority found that state law rules are preempted when they stand as an obstacle to the accomplishment of the FAA's objectives. As a result, contract law defenses (e.g., fraud or duress) may still be available, but only so long as they do not impede the FAA's objective (namely, "to ensure that private arbitration agreements are enforced according to their terms" (*Id.* at 1748)). The "obstacle preemption" approach adopted by

Concepcion had been generally disfavored by the Court, but classwide arbitration proved to be even more unpalatable to the majority.

Following Concepcion, numerous decisions have similarly preempted the state law of those states that find a class action waiver unconscionable. See Cruz v. Cingular Wireless LLC, 648 F.3d 1205 (11th Cir. 2011); Pendergast v. Sprint Nextel Corp., 2012 U.S. App. LEXIS 17512 (11th Cir. August 20, 2012); Homa v. Am. Express Co., 2012 U.S. App. LEXIS 17763 (3rd Cir. 2012); Coneff v. AT & T Corp., 673 F.3d 1155 (9th Cir. 2012); Kilgore v. Keybank, N.A., 673 F.3d 947 (9th Cir. 2012) (finding that California's preclusion of arbitration in injunctive relief cases is also governed by Concepcion and thus preempted by the FAA).

More interesting (but not rare) are those decisions that appear to be resisting Concepcion. Resistance, however, invites renewed Supreme Court attention. Here, the leading example is Italian Colors Rest. v. Am. Express Travel Related Services Co. (In re Am. Express Merchants' Litig.), 667 F.3d 204 (2d Cir. 2012), cert. granted, 2012 U.S. LEXIS 8697 (Nov. 9, 2012), in which the Second Circuit distinguished Concepcion on the grounds that that decision found only that the FAA preempted state law, whereas in this case it was a federal statutory policy (the antitrust laws) that was frustrated by a class action waiver. The Supreme Court's grant of certiorari is hardly surprising, and the Second Circuit's decision essentially asserts a public policy argument against the arbitration of federal claims—an issue on which even the Ninth Circuit has now seemingly yielded, agreeing that arbitration must be enforced. See Coneff v. AT & T Corp., 673 F.3d 1155 (9th Cir. 2012). Indeed, the position of the majority in the Second Circuit elicited a narrow vote (and a testy exchange) on whether the Second Circuit should hear the case *en banc*. See In re Am. Express Merchants' Litig.), 681 F.3d 139 (2d Cir. 2012) (declining to hear case *en banc*). Dangerous as it is to predict the outcome of any case before the

Supreme Court, the Court has already rejected a challenge to the enforceability of arbitration agreements under the FAA based on a different federal statute (the Credit Repair Organization Act). See CompuCredit Corp. v. Greenwood, 132 S. Ct. 666 (2011).

A few decisions have declined to compel arbitration on narrower grounds, such as by finding the contract to have been invalid (but not unconscionable) under state law. Thus, in Carey v. 24 Hour Fitness USA, Inc., 669 F.3d 202 (5th Cir. 2012), the Fifth Circuit found the arbitration agreement contained in an employee's handbook to be "illusory" because it contained a "change in terms" clause that would have allowed the defendant to unilaterally amend it and escape arbitration. Other courts have found issue preclusion to justify refusing to compel arbitration, when the dispute had earlier been litigated in a state court proceeding. See Community State Bank v. Strong, 661 F.3d 1241 (11th Cir. 2011).

Despite Stolt-Nielsen's distaste for class-wide arbitration, at least one Circuit Court has upheld class-wide arbitration based on its reading of a specific contract—at least where the arbitrator has also read the contract to permit class arbitration and had ordered it. See Sutter v. Oxford Health Plans, 675 F.3d 215 (3rd Cir. 2012).[16] Such rulings by the arbitrator will likely be rare.

The one area where federal courts do still find arbitration provisions to be unconscionable and unenforceable is with respect to attorney fees and cost awards. Where an arbitration agreement provided that the customer must pay the bank's costs in any dispute, regardless of the outcome, the Eleventh Circuit has found this provision to be unconscionable, but still compelled arbitration after striking down this provision. See Powell-Perry v. Branch Banking & Trust Co., 2012 U.S. App. LEXIS 15781 (11th Cir. 2012); Barras v. Branch Banking & Trust Co., 685 F.3d

[16] But see Litman v. Cellco P'ship, 666 F.3d 225 (3rd Cir. 2011) (disregarding state law requiring class-wide arbitration and compelling individual arbitration under the FAA).

1269 (11th Cir. 2012). See also Anthowski v. Taxmaster Inc., 2011 U.S. App. LEXIS 25693 (3rd Cir. December 22, 2011) (provision requiring consumer to bear all costs of other party may have been substantively unconscionable).

Eventually (if sadly), the Second Circuit will be compelled to accept the Supreme Court's rejection of public policy arguments as a basis for refusing to compel arbitration. Issues will still predictably arise as to the enforceability of fee shifting and cost provisions that impose high costs on the consumer, but the likelihood is that, even if these provisions are ultimately invalidated, courts will first sever the issues and compel arbitration.

(7) Daubert and Class Certification.

Behrend v. Comcast Corporation, 655 F.3d 182 (3d Cir. 2011), will likely present the occasion on which the Supreme Court finds that Daubert v. Merrell Dow Pharmaceuticals, Inc., 669 F.3d 802, 812–813 (7th Cir. 2011), applies to the class certification stage and requires the district court to resolve any challenge to expert testimony relied upon to establish a necessary finding at that stage. This is a conclusion that some Circuits have already reached. See American Honda Motor Co. v. Allen, 600 F.3d 813, 815–816 (7th Cir. 2010); Messner v. Northshore Univ. Health Systems, 669 F.3d 802, 812–813 (7th Cir. 2011) (specifying criteria to be used). In contrast, the Third Circuit in Comcast, possibly fearing the need for minitrials at class certification, avoided this issue. The Supreme Court's own attitude in favor of Daubert hearings at class certification appears to have been expressed in dicta in Wal-Mart, supra, at 2553–54. Since then, a number of district courts have conducted such hearing at class certification. See, e.g., Powell v. Taub, __F.R.D. __, 2012 WL 692049 (W.D. 2012) (denying class certification in part based on a Daubert review of the expert testimony); Williams v. Wells Fargo Bank, N.A., __ F.R.D. __, 2012 WL 566067 (S.D. Fla. 2012); In re Live Concert Antitrust

Litig., 2012 WL 1021081 (C.D. Cal. March 23, 2012); Floyd v. City of New York, __ F.R.D. __, 2012 WL 1868637 (S.D.N.Y. 2012).

(8) Partial Certification.

Precisely because the "predominance" requirement of Rule 23(b)(3) constitutes a formidable barrier to class certification in Rule 23(b)(3) cases, some courts—state and federal—are showing an increasing interest in partial certification. Fed. R. Civ. P. 23 (c)(4) provides that "when appropriate, an action may be brought or maintained as a class action with respect to particular issues." Courts have long disagreed, however, as to when such "partial" or "issue" certification is "appropriate." Among the leading cases that have approved partial certification are In re Nassau County Strip Search Cases, 461 F.3d 219 (2d Cir. 2006), Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910 (7th Cir. 2003) (Posner, J.), and Engle v. Liggett Group, 945 So. 2d 1246 (Fla. 2006), which is discussed below. But, in an important decision in 2008, the Second Circuit in McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008), reversed the partial certification of a tobacco class action on liability issues alone because "larger issues such as reliance, injury and damages" would remain to be dealt with in individual actions and thus certification would not "materially advance the litigation." Whether McLaughlin reflects a general distrust of partial certification or more a skepticism of sampling procedures and tobacco class actions can be reasonably debated.

The most important recent decision approving partial certification is McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, 672 F.3d 482 (7th Cir. 2012), discussed above. In that case the influential Judge Richard Posner found the use of partial certification to be "appropriate" in a post-Wal-Mart Title VII discrimination suit. Under Title VII, plaintiffs cannot recover damages (compensatory or punitive) without proof of intentional discrimination, but they can obtain equitable relief (including an injunction) based on a showing of "disparate impact" (i.e., a discriminatory effect, even if not intended). Plaintiffs in McReynolds thus sought partial certification on two issues: (1) disparate impact, and (2) their entitlement to injunctive relief. The district court denied such certification, and plaintiffs appealed the denial of certification pursuant to Rule 23(f).

Specifically, at issue were Merrill Lynch's "teaming" policy and its "accounts distribution policy." Judge Posner described the "teaming policy" as permitting "teams" that were "little fraternities" (*Id.* at 489) and recognized that this practice could have a disparate impact on minority group brokers at Merrill Lynch who were not chosen for a "team." Given that the class consisted of some 700 black brokers (a relatively modest class size in his view), he found the judicial economy from consolidation of these cases pursuant to Rule 23(c)(4) outweighed "any concern with possible inaccuracies from their being lumped together." Id. at 491. In his view, this balancing should depend on whether consolidation would force defendants into "betting one's company on a single jury verdict." Id. This is a reprise of his well-known view that "immature" torts should not be certified in class actions. See In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299-1300 (7th Cir. 1995). In McReynolds, given the modest size of the class, the substantial financial resources of Merrill Lynch, and the fact that only injunctive relief was at issue, he saw no difficulty in ordering partial certification. As a roadmap then, McReynolds suggests that partial certification is most appropriate in cases where the defendant does not face a "bet-the-company" decision as a result.

For the future, if Comcast makes it more difficult to prove damages through common proof on a class-wide basis, the predictable response of plaintiffs may be to seek partial certification and later prove damages in individual trials. This is essentially what happened in the next discussed case.

Unlike McReynolds, Engle v. Liggett Group, 945 So.2d 1246 (Fla. 2006), was a case where astronomic liability was at issue. There, the Florida Supreme Court effectively did what the Second Circuit McLaughlin refused to do by upholding and giving res judicata effect to the liability and general causation findings reached by the jury in a class action covering Florida smokers, but otherwise reversing the damages and decertifying the class. In substance, this compromise amounted to partial certification. Under Engle, Florida smokers were given one year to file individual actions and seek to prove proximate causation and damages. Thousands did, but in 2008, a federal district court in Florida enjoined all former Engle class members from using the Engle Phase I findings (in the manner permitted by the Florida Supreme Court) in any proceeding to establish any element of their claim. See Brown v. R.J. Reynolds Tobacco, Co., 576 F. Supp. 2d 1328 (M.D. Fla. 2008). On appeal, the Eleventh Circuit vacated the district court's order and directed that the Phase I findings were to be given full preclusive effect to the extent of the jury's findings. See Brown v. R.J. Reynolds Tobacco Co., 611 F.3d 1324 (11th Cir. 2008).

A number of the resulting state court actions brought pursuant to *Engle* have been removed to federal court. See, e.g., Carl v. Phillip Morris USA Tobacco Co., 2010 U.S. Dist. LEXIS 12913 (S.D. Fla. Feb. 16, 2010). No attempt is here made to assess the overall impact of *Engle*, but it is a dramatic and ongoing experiment.

(9) "Settlement Only" Classes.

Whatever the formal legal standards, a legal realist cannot help but observe that courts relax their certification standards in the case of "settlement-only" classes. The barriers to settlement-only classes involve the fair distribution among class members, balancing concerns collusion that sells out the interests of weaker class members and the need to end litigation and dispose of the funds efficiently. Several important decisions upholding settlement-only classes demonstrate they are experiencing a renaissance.

The Second Circuit held that settlement class actions can overcome problems posed by a legal requirement of individual reliance in In re American International Group Securities Litigation, 689 F.3d 229 (2d Cir. 2012). In that securities case, the District Court had refused to certify the class on the grounds that because the fraud-on-the-market presumption did not apply in the case, the plaintiffs would have to prove individual reliance. As a result, the lower court held, individual issues predominated and no class could be certified. The Second Circuit reversed and remanded, holding that even if the fraud-on-the-market presumption did not apply (and it declined to reach this question) this was not a barrier to class certification. Id. at 232. If the plaintiffs had to prove individual reliance, the court explained, the class action would not be manageable as a *litigation* class, but could still be certified as a settlement-only class because "with a settlement class, the manageability concerns posed by numerous individual questions of reliance disappear." Id. at 241. The manageability question, the court explained, is not co-equal with the predominance requirement but instead one potential component of the predominance inquiry that the court need not consider in the settlement-only context. Accordingly, the plaintiffs' inability to invoke the fraud-on-the-market presumption did not bar certification of a settlement class. Instead, the question the district court needed to determine is whether the claims of the class members "are sufficiently similar as to yield a cohesive class." Id. at 240. The court remanded the case for consideration of whether other concerns, such as an overbroad class definition, or the disposition of valuable state-law claims of some class members or other inter-class conflicts, affect the certification inquiry.

Whether reliance is a manageability issue under 23(b)(3)(D) that need not be considered in settlement-only certification or a broader predominance issue that poses a potential barrier to certification of any class at all may be a question of categorization, but it will ultimately determine the viability of many class actions. Other courts have found reliance to be a predominance issue rather than a manageability issue in contexts outside securities where there was no settlement proposed. See, e.g., Mazza v. American Honda Motor Co., Inc., 666 F.3d 581 (9th Cir. 2012) (decertifying consumer class action because individual reliance issues meant individual questions predominated). We also note that the importance of reliance as a barrier to certification was raised in a different context when Justice Scalia stayed a Louisiana state court class tobacco class action where, among other things, the state court had relaxed the reliance requirement. See Philip Morris USA, Inc. v. Scott, 131 S. Ct. 1 (2010). Ultimately the Supreme Court unanimously denied certiorari. Philip Morris USA Inc. v. Jackson, 131 S.Ct. 3057 (2011).

In the AIG case, after denying the class certification motion, the district court had also granted a long-dormant motion that had been filed by the defendants at the outset of the litigation seeking judgment on the pleadings and stayed at their request. The Second Circuit vacated this ruling, explaining that "Defendants in class action suits are entitled to settle claims pending against them on a class-wide basis even if a court believes that those claims may be meritless, provided that the class is properly certified under Rules 23(a) and (b) and the settlement is fair under Rule 23(e)." Id. at *11.

The question of whether and how defendants can settle claims that might be meritless was also presented in another important settlement-only class action case, Sullivan v. DB

Investments, Inc., 667 F.3d 273 (3d Cir. 2011). In that case the Third Circuit approved a settlement-only class which required the court to overlook significant variance in state laws among the plaintiff class members. The Third Circuit found that although differences in state consumer protection laws would likely bar certification of a litigation class, it did not present a barrier to settlement. Furthermore, the court held that sub-classification based on these differences was not necessary, citing concerns of class "balkanization" in the face of sub-classification.

The Third Circuit has a history of balancing the concerns of balkanization against potential distributional unfairness against sub-classification. See also In re Insurance Brokerage Antitrust Litig., 579 F.3d 241 (3d Cir. 2009) (approving a class action settlement that allocated the recovery among three distinct classes of plaintiffs without creating subclasses). Other circuits, however, favor sub-classification in such cases. For example, the Second Circuit rejected in a 2-1 decision a major class action settlement of a copyright infringement case because of the failure to create a subclass for the least favored group of claimants. See In re: Literary Works in Electronic Databases Copyright Litigation, 654 F.3d 242 (2d Cir. 2011). The majority found that the district court had abused its discretion in certifying the class and approving the settlement where no subclass represented those claimants who had not copyrighted their claims. The Second Circuit reasserted these concerns in In re American International Group Securities Litigation, discussed above. The Fifth Circuit similarly rejected a settlement class that the district court had approved in In re Katrina Canal Breaches Litig., 628 F.3d 185 (5th Cir. 2010). Certification was sought under Rule 23(b)(1)(B) under a "limited fund" rationale, with the parties claiming that the $21 million fund consisted of all the available insurance proceeds. The Fifth Circuit rejected both the certification and the settlement, finding that no procedures had been specified for the allocation of the fund among a wide range of differently situated class members. The Court also implied that it believed the fund would largely go to reimbursing administrative costs and legal expenses. Accordingly, the circuits seem to be splitting on the question of whether differences in state laws present a barrier to settlement-class certification.

In a concurrence to the Sullivan opinion that promises to be influential, Judge Scirca addressed the broader issue of the standards that ought to apply to settlement classes. Judge Scirca noted the difficulties in settlement classes differ from those in litigated classes. In the litigated class action, manageability is a key concern, whereas in settlement classes, issues of fairness, concerns about collusion and adequacy of representation loom larger. As a result of these differences, he argued that in settlement classes the interpretation of the requirements of commonality and predominance should focus on the conduct of the defendant rather than the potential differences between the plaintiffs. 337 F.3d at 335-36. The standard for commonality should be the same as that for supplemental jurisdiction – whether there is a "common nucleus of operative fact." This of course is far different than the standard articulated by the Supreme Court in Wal-Mart that the common question should resolve all of the claims "in one stroke," although Judge Scirca cites that standard as well. Id. at 335. The standard for predominance, he explained, should similarly focus on the defendant's conduct but also on the settlement's structure so that it is fair to differently situated class members. Nevertheless, the Judge explained, even a claim that has little chance of success might be fairly settled. This is both because it is not certain that the claim has zero value and because fairness to the defendant requires including all claims so that it can achieve global peace. Id. at 339. As the majority noted "were we to mandate that a class include only those alleging 'colorable' claims, we would effectively rule out the ability of a defendant to achieve 'global peace' by obtaining releases from all those who might wish to assert claims, meritorious or not." Id. at 310.

It is worth noting that in Sullivan the court did not think that the plaintiffs' interests were being traded off against one another, that is, that those with non-meritorious claims were receiving a windfall at the expense of those with meritorious claims. At least in the Third Circuit, it is still possible to certify a settlement class even where there are widely different underlying legal standards in play.

Part I: A Brief Census of Class Actions

Overall, the latest available data indicate that the numbers of class action filings are increasing (although not in all categories).[39] After the passage of the Class Action Fairness Act the number of class actions based on the federal courts' diversity jurisdiction increased significantly, and overall class action activity increased by 72%. The numbers of contracts, consumer protection or fraud and property-torts cases based on state law all increased. So did Fair Labor Standards Act class actions. But the data indicated that filings of securities class actions, civil rights class actions and tort/personal injury class actions all decreased.

[39] The overall number of filings have increased since 2007, but civil filings have not increased by much. Civil filings have increased by 5.8%, criminal filings have increased by 18.5% and bankruptcy filings have increased by 125.9% since 2007. To total number of civil filings in 2011, which is the latest numbers reported as of this writing, was 294,336, vastly exceeding in raw numbers the number of criminal filings (103,638), but far less than the number of bankruptcy filings (1,571,183). The number of cases terminated has also increased by 27.2% since 2007. 324,190 civil cases were terminated in 2007. The data is available at http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2011.aspx

No comprehensive census of class actions exists.[17] The data provided above is from an excellent study of class actions conducted by the Federal Judicial Center [FJC] after the enactment of the Class Action Fairness Act.[18] These statistics are not the last word for several reasons. First, they are based on data from 2007, so they are a bit dated at this point. Second, the FJC study compared class actions in 88 districts during two discrete time periods – January and June 2001 and the same six month period in 2007. As a result, the study does not provide a longitudinal view of developments in class actions. For example, the data show there was a 62% decrease in securities class actions from 2001 to 2007. But since the six month period the researchers studied in 2001 was particularly active for securities class actions, this apparent decrease may not tell us much about trends in securities class actions.

Have the numbers of removals increased? The FJC study revealed that the number of removals of class actions increased, but by 2007 returned to the levels of removals before CAFA was passed. Why is this the case? The overall increase in diversity actions filed in the federal courts makes it likely that class counsel are choosing to file in federal court rather than await removal. It may also be that fewer cases are being filed in state court when plaintiffs predict the case may be removed, or maybe some defendants are choosing to remain in state court.

Which federal courts see the most cases? Previous studies indicated that as of 2004 more class actions were filed in the Second and Ninth Circuits than any other – a total of 40 percent of all class actions were filed in those Circuits. This was predicted to change when CAFA opened

[17] For many years, the Administrative Office of the U.S. Courts published data on the number and types of class actions filed annually, but it ceased to do so at the end of 2004 because the data was inaccurate. *See* Judicial Business of the United States Courts, 2004 Annual Report of the Director, Leonidas Ralph Mecham, available at http://www.uscourts.gov/judbus2004/contents.html.

[18] Emery G. Lee III and Thomas E. Willging, *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions* (April 2008) at 2, available at http://www.fjc.gov/library/fjc_catalog.nsf; Emery G. Lee III and Thomas E. Willging, *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions* (November 2008) available at http://www.fjc.gov/library/fjc_catalog.nsf.

the courthouse door to state class actions. The FJC study found that diversity filings doubled in eight of the twelve Circuits after the Class Action Fairness Act. The greatest increase in cases removed to the federal courts were in the D.C., First and Ninth Circuits. The greatest increases in diversity cases filed in the federal courts were in the Third, Ninth and Eleventh Circuits, but all Circuits saw an increase in filings based on the courts' original diversity jurisdiction in the comparison period.

What happened to these cases? Most of these suits went nowhere and a few settled. Of the diversity class actions filed in the federal courts during the period studied by the Federal Judicial Center, the parties proposed settlement in 21 of the 235, that is, in nine percent of the cases. All of these settlements were approved, although in three cases the court only approved the settlement after the parties modified it. Before settlement, most plaintiffs had to overcome at least one dispositive motion. One fifth of the cases were dismissed as a result of a dispositive motion. Plaintiffs filed motions to certify a class in fewer than a quarter of the class actions filed. In 56 percent of the cases, no motions were filed at all. There were only five cases in the sample in which the judge actually granted a motion to certify a litigation class, and all five settled. Finally, of the diversity cases that were removed, plaintiffs filed motions to remand 75 percent of the time, and the judge granted those motions almost 70 percent of the time. Of the cases not remanded, plaintiffs voluntarily dismissed the action 38 percent of the time.

In sum, all signs point to a marked increase in class action filings in the federal courts, especially with respect to labor, contracts, consumer/fraud and property damage class actions. These increases are accounted for largely by the passage of CAFA and the rise in FLSA class actions.

Part II: Class Action Certification Developments Under Rule 23(a)

Traditionally, class action certification decisions were reviewed under an "abuse of discretion" standard, with no distinction being made between decisions that grant certification and those that deny it. Still, this has begun to change in some circuits. A leading example is the Second Circuit, which still applies an "abuse of discretion" standard to the review of grants of certifications, but examines denials de novo. In Parker v. Time Warner Entertainment Co., 331 F.3d 13, 18 (2d Cir. 2003), the Second Circuit noted: "We review class certification rulings for abuse of discretion. We review de novo the district court's conclusions of law that informed its decision to deny class certification." (citing Turner v. Beneficial Corp., 242 F.3d 1023, 1025 (11th Cir. 2001)). De novo review, it added, is "review without deference." *Id*. at 18 (citing Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 168-69 (2d Cir. 2001)). Parker also emphasizes that denial of class certification is generally inappropriate without prior discovery. Id. at 21-23. After the Court's searching review of the evidence supporting certification in Wal-Mart, appellate review in cases where the lower court has certified a class may also be less deferential than in the past.

Although the recent decisions discussed above mandating a "preponderance of the evidence" standard will necessitate greater formality at the certification stage, it is not yet clear how far courts will go towards requiring a mini-trial at class certification. Still, each of the following requirements of Rule 23(a), including the ascertainability requirement which is not formally part of the Rule but has been adopted by courts, will likely be litigated more intensively than in the past:

(1) Numerosity

Although seldom dispositive, the numerosity requirement has been long thought to impose a bottom limit on class certification that was in the range of twenty to forty class members (with the critical variable within this range being the ease of joinder). See, e.g., Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986); Pruitt v. City of Chicago, Illinois, 472 F.3d 925, 926 (7th Cir. 2006). Some decisions treat forty class members as presumptively satisfying the numerosity standard. See Damassia v. Duane Reade, Inc., 250 F.R.D. 152, 156 (S.D.N.Y. 2008); DeMarco v. Nat'l Collector's Mint, Inc., 229 F.R.D. 73, 80 (S.D.N.Y. 2005); Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995) (numerosity presumed when class is comprised of 40 or more members); Stewart v. Abraham, 275 F.3d 220, 226–27 (3d Cir.2001) (same). Conversely, the Second Circuit presumes that any number below 21 is too few. See MacNamara v. City of New York, 2011 U.S. Dist. LEXIS 53829 (S.D.N.Y. May 10, 2011) at *27. For other courts, the minimum presumptive level may be higher. See Polich v. Burlington N. Inc., 116 F.R.D. 258, 261 (D. Mont. 1987) (presumption of numerosity exists at 60 member level).

Within the 20 to 40 range, Second Circuit cases require that five factors be balanced: "(1) the judicial economy that will arise from avoiding multiple actions; (2) the geographic dispersion of members of the proposed class; (3) the financial resources of those members; (4) the ability of the members to file individual suits; and (5) requests for prospective relief that may have an effect on future class members." See Ansari v. New York University, 179 F.R.D. 112, 114 (S.D.N.Y. 1998); Robidoux v. Celani, 987 F.2d 931 (2d Cir. 1993). Even in a larger case of 100 or more class members, the failure to show geographic diversity or that the class members were otherwise incapable of bringing individual suits can lead a court to refuse to find sufficient numerosity. See Deen v. New Sch. Univ., 2008 U.S. Dist. LEXIS 7846 (S.D.N.Y. Feb. 1, 2008) (class exceeding 100 members rejected on this ground where the size of the potential damages would have supported individual litigation).

Where there are subclasses, Second Circuit case law requires each subclass must have more than the presumptive 40 members or must meet the special factors under *Ansari*. See MacNamara v. City of New York, 2011 U.S. Dist. LEXIS 53829 (S.D.N.Y. May 10, 2011) at *41 to *42. Defendants have sometimes asserted that these numbers have to be reduced by the number of plaintiffs likely to opt out or pursue alternative dispute resolution procedures. MacNamara, however, holds that individuals are considered class members until they opt out and that the mere possibility of future opting out should not preclude a finding of numerosity. See also Cuzco v. Orion Builders, Inc., 477 F.Supp. 2d 628, 632 n. 2 (S.D.N.Y. 2007); Gortat v. Capala Bros., Inc., 2010 U.S. Dist. LEXIS 35451 (S.D.N.Y. April 9, 2010). Within the 20-40 range, courts in the Second Circuit have disagreed as to whether the existence of parallel individual actions reduces the initial "judicial economy" factor under Ansari. MacNamara finds that little weight should be placed on the existence of parallel actions. Id. at *44-*45. Conversely, in Broad-Bussel Family Ltd. P'shp v. Bayou Group LLC (In re Bayou Hedge Fund Inv. Litig.), 2008 U.S. Dist. LEXIS 7339 (S.D.N.Y. Jan. 24, 2008), the district court refused to certify a subclass of twenty-nine plaintiffs who claimed they were defrauded into investing in defendant's hedge fund. The court found that certain proposed class members had already commenced individual actions against the defendant and concluded that it would not be impractical for the remaining twenty-one class members to do so as well.

Outside the Second Circuit, in Jones v. Roy, 202 F.R.D. 658, 665 (M.D. Ala. 2001), a twenty-one member class was similarly denied certification on the basis of the earlier noted 20-40 person rule. Within the 20 to 40 person range, the Court noted that factors such as geographic diversity, judicial economy and the ease of identifying members of the class would be decisive.

In addition to the above quantitative test, numerosity can also be flunked because of vagueness of pleading or the failure to specify an ascertainable standard for identifying class members. A good example is Trevizo v. Adams, 455 F.3d 1155 (10th Cir. 2006), in which the owners, employees and customers of a combination restaurant, bakery and tortilla factory sued over the enforcement of a search warrant. Some 33 individuals were named as representatives in the original class action complaint, but ten were dismissed when they failed to appear for depositions. Still, the class of customers and employees was alleged to include many more who could not easily be joined, in part because English was not their primary language or they feared deportation as illegal immigrants. None of these justifications were sufficient for the Tenth Circuit, which resisted any strict numerical test, but found the nature of the injuries too vaguely pled in the complaint to render it possible to determine the number of persons affected.

A related and recurring situation in which Rule 23(a)(1) can come into play involves disputes between the parties as to how many members among a broader group were actually injured. The proponent of certification, of course, bears the burden of proof. A good example is provided by Golden v. City of Columbus, 404 F.3d 950 (6th Cir. 2005), in which the putative class consisted of tenants in Columbus, Ohio, whose water service had been terminated (or was about to be terminated) because the prior tenant had been delinquent in paying. Plaintiffs alleged a pattern under which new tenants could not obtain water service without paying the prior tenant's bill. Plaintiffs asserted that there were roughly 150,000 renters in the City of Columbus, but produced no evidence about the number whose water service had been terminated. The Sixth Circuit found that on this basis the numerosity requirement was not satisfied, because it was too speculative to determine the size of the potential class of victims in the absence of better evidence. Similarly, in Alkire v. Irving, 330 F.3d 802, 820 (6th Cir. 2003), the named plaintiff claimed that hundreds of potential plaintiffs had been unconstitutionally incarcerated without a probable cause hearing for failure to pay court costs or civil debts (as plaintiff had been following his arrest for drunken driving). The defendants searched court records and asserted that they could discover only nine similar cases. Using an abuse of discretion standard, the Sixth Circuit upheld the district court's denial of certification on the ground that numerosity had not been shown.

On the practical level, subclassing can have a decisive effect on numerosity. In Harik v. California Teachers Ass'n, 326 F.3d 1042 (9th Cir. 2003), the plaintiffs were non-union member teachers in eight California school districts who objected to the deduction by local unions of "agency fees" from their pay in order to compensate the unions for activities, such as collective bargaining, contract administration, and grievance adjustment. Seeking primarily injunctive relief in a Rule 23(b)(2) class, the plaintiffs asserted that the local unions could not deduct such fees unless they provided the non-members with audited financial statements justifying the fees. The district court certified eight plaintiff classes covering each of eight school board districts, but refused to certify either a state-wide class or a defendant class.

On appeal, the Ninth Circuit panel found that the class members in three of the relevant associations amounted only to seven, nine, and ten members, respectively. Id. at 1051. Reading the Supreme Court decision in General Telephone Co. v. EEOC, 446 U.S. 318, 330 (1980), to impose an absolute minimum limit of fifteen, the Ninth Circuit reversed these certifications. Although it might have been possible to certify a single state-wide class on these facts, the Ninth Circuit sidestepped this issue, instead disposing of the action on its legal merits.

Defense counsel in securities class actions have clearly recognized that if they can convince the court that the class needs to be divided into subclasses, they may be able to defeat certification on numerosity grounds. This defense would not work in "stock drop" Rule 10b-5 class actions where the putative class numbers in the thousands, but it can work where debt securities with slightly varying terms have been sold to a limited group of institutional investors. See Abu Dhabi Commer. Bank v. Morgan Stanley & Co., 269 F.R.D. 252, 257-58 (S.D.N.Y. 2010). In these cases, not only may subclassing destroy certification, but the special status of institutional investors may indicate to the court (as in Abu Dhabi) that joinder is a simpler, more feasible technique for a collective action than class certification.

At the opposite end of the spectrum, possibly the most aggressive use of the numerosity requirement to deny certification occurred in Monahan v. City of Wilmington, 49 Fed. Appx. 383, 2002 U.S. App. LEXIS 23417 (3d Cir. Sept. 24, 2002). There, partly on numerosity grounds, the district court refused to certify a class consisting of 120 non-African-American members of a police department who were the alleged victims of reverse discrimination. It concluded that because the plaintiffs were all closely situated, they could all be joined. While this dismissal seemingly sets a high water mark in terms of the number of class members found insufficient to satisfy Rule 23(a)(1), the Third Circuit ducked this issue on appeal, upholding the denial of class certification on predominance grounds and declining to reach the issue of numerosity. Similarly, in Clark v. State Farm Mut. Auto. Ins. Co., 245 F.R.D. 478 (D. Colo. 2007), the Court rejected a class of 115 members. This putative class consisted of pedestrian accident victims whose insurer had allegedly failed to offer them coverage that was mandatory under Colorado law. However, the Court found that sixty-five of the potential class members had already settled with the defendant. Because more than half the potential class members had already settled, the court doubted that most other class members would choose to pursue their claims against State Farm in court. Based on this assumption and the relative proximity of the proposed class members, the court held that joinder was not impracticable and that numerosity was therefore not met.

Proof that large numbers of persons purchased defendant's product or services does not alone suffice to show numerosity, absent a demonstration that some significant number of them reside within the geographic description of the class. Thus, in Vega v. T-Mobile USA, Inc., 564 F.3d 1256 (11th Cir. 2009) the Eleventh Circuit concluded that the district court had abused its discretion when it found that numerosity for a Florida-only class was satisfied without any evidence regarding the number of class members actually in Florida. Although plaintiffs, seeking to certify a Florida-only class of all T-Mobile retail sales associates, had presented evidence that defendant T-Mobile employed thousands of retail sales associates nationwide, plaintiffs had not presented "any evidence whatsoever" regarding the number of class members in Florida, and thus failed to show numerosity. Similarly, in Lengle v. Attorneys' Title Guar. Fund, Inc., 2002 U.S. Dist. LEXIS 18398 (N.D. Ill. Sept. 26, 2002), the named representative asserted that the defendant had violated RESPA (12 U.S.C. §2601) by charging recording fees for services that class members did not want. Although this plaintiff could show that the defendant had handled over 50,000 real estate closings a year, he could not show that forty individuals (or even one) had been charged for undesired services. While the district court acknowledged that reasonable estimates could be made based on "common sense assumptions," it ruled that plaintiffs had the burden of showing, based on evidence cited in their complaint, that a minimum number of plaintiffs had been injured sufficient to show numerosity. Mere informed speculation, it said, could not satisfy that burden.

A similar analysis was recently adopted by the Third Circuit in Marcus v. BMW of North America, 687 F.3d 583 (3rd Cir. 2012). That court rejected a "common sense" approach and held that the plaintiff had not presented sufficient evidence that enough consumers had bought a

BMW with the offending tires that were at the root of plaintiffs' complaint to meet the numerosity requirement. Conversely, in Fields v. Maram, 2004 U.S. Dist. LEXIS 16291 (N.D. Ill. Aug. 16, 2004), Medicaid patients sued, seeking motorized wheelchairs, and defendants responded that the number of class members could not be reliably determined. The Court held that plaintiffs' statistical evidence, while not identifying the precise number of class members, was nonetheless adequate to estimate that a sufficient number of class members existed to warrant class treatment.

The numerosity inquiry sometimes overlaps with the developing "ascertainability" requirement discussed in Part IV. Even when the number of class members appears to be in the tens of thousands, certification can be denied when plaintiffs are unable to show any reasonable way of identifying the potential class members. See Saf-T Gard Int'l v. Wagener Equities, Inc., 251 F.R.D. 312 (N.D. Ill. 2008) (finding that although faxes were sent to thousands in possible violation of the Telephone Consumer Protection Act, thereby satisfying numerosity, certification must still be denied in absence of any list or reasonable means of identifying class members). The Southern District recently held this requirement does not apply in (b)(2) class actions. Floyd v. City of New York, 82 Fed.R.Serv.3d 833 (S.D.N.Y. 2012).

Where the number of plaintiffs is not known, but can potentially be established by discovery, district courts have been upheld in permitting discovery on this issue. See Kaufman v. American Family Mutual Ins. Co., 601 F.3d 1088 (10th Cir. 2010).

Probably the smallest class recently certified was in Novella v. Westchester County, New York Carpenters' Pension Fund, 443 F. Supp. 2d 540 (S.D.N.Y. 2006), which certified a class of disability pensioners consisting of only 24 members. Balancing the five factors specified in Ansari, supra, the Court found lacking both the first or "judicial economy" factor and the last or "prospective relief" factor (because no individual suits had been filed). Still, it deemed these factors to be outweighed by the geographic dispersion of the class across multiple counties and the limited financial resources and business sophistication of the aged members of the proposed class (who in the court's opinion would not be able to bring individual actions).

At the other end of the continuum from too few plaintiffs is the problem of too many plaintiffs. In In Re Managed Care Litig., 209 F.R.D. 678 (S.D. Fla. 2002), plaintiffs sought to certify a class of 145 million citizens. The district court found such a class to be inherently "unmanageable." Arguably, the "practical" advice here may be to be to plead a class of more than 40 plaintiffs, but always less than 145 million plaintiffs.

(3) Commonality

As discussed above, a common trend has yet to emerge in the interpretation of the commonality standard in the wake of Wal-Mart, but what is clear is that we have a new commonality standard. Whereas previously commonality was an easy standard to meet if the plaintiffs could show any issue of fact or law in common, Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 155 (2d Cir. 2001), now the issue of fact or law in common to the class must drive the resolution of the litigation. In the wake of Wal-Mart, earlier precedents must be regarded with great skepticism because Wal-Mart substantially rewrites the commonality standard. Ultimately, Wal-Mart turns the commonality test from a search for a common question to a search for a dispositive common question.

The standard for commonality is tighter, but there is enough discretion in the question of whether an issue "drives" the litigation that very similar classes are being certified in some circuits but denied class certification in others. Compare Connor B., ex rel. Vigurs v. Patrick, 278 F.R.D. 30, 33 (D.Mass. Nov 10, 2011) with M.D. ex rel. Stukenberg v. Perry, 675 F.3d 832 (5th Cir. 2012). Both of these cases involved civil rights allegations of mismanagement of foster care systems and in both cases defendants objected to certification on the grounds that individual treatment of foster children meant that the class lacked commonality under Wal-Mart. Yet in Connor B. the Massachusetts District Court granted certification on the theory that the common question was the mismanagement of the foster care system, while in M.D. ex rel. Stukenberg the Fifth Circuit denied certification on the grounds that the class was not sufficiently homogeneous to meet the commonality requirement.

The emerging standard in large-scale civil rights and Title VII litigation is that plaintiffs must demonstrate a policy that is centrally implemented. But that policy may involve within it some discretion by individual actors. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012), discussed above, is a good example of a commonality finding based on an employer's policy that involved both discretionary and specific elements.

Since the most rigorous application of the new commonality overlaps considerably with the preponderance requirement of Rule 23(b)(3), it is unlikely to affect money damages cases practically speaking. Nevertheless, the emerging trend of refusing to find commonality where defendants used multiple contracts or made oral representations to consumers has been solidified by the Wal-Mart opinion. See, e.g., Moore v. PaineWebber, Inc., 306 F.3d 1247 (2d Cir. 2002) (denying class certification in part because defendant made separate and arguably different oral misrepresentations to each client about an insurance plan); In re Countrywide Financial Corp. Mortg. Marketing and Sales Practices Litigation, Slip Copy, 2011 WL 6325877 (S.D.Cal. 2011) (denying class certification in action relating to sales of mortgages where, although many documents were standardized, transactions and disclosures varied from borrower to borrower).

(4) Typicality

Rule 23(a)(3) requires that the proposed class satisfy the prerequisite of "typicality," namely that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Historically, the typicality requirement had not been viewed as a demanding standard, and did not require a complete identity of claims. Rather, as the Second Circuit explained in Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 155 (2d Cir. 2001): "Typicality … is satisfied when each class member's claims arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." See also Marisol A. v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997); In re Vivendi Universal, 242 F.R.D. 76 (S.D.N.Y. 2007); Daffin v. Ford Motor Co., 458 F.3d 549 (6th Cir. 2006) ("Daffin's claim is typical of the class because the class members' theory is that Ford breached its express warranty by providing vehicles with defectively designed throttle body assemblies, causing Daffin and other class members to receive vehicles worth less than the vehicles that conform to the promises allegedly contained in the warranty agreement.").

As a practical matter, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 157 n.13 (1982). Still, some decisions distinguish the two on the following basis: traditional commonality refers to the group characteristics of the class as a whole, while typicality refers to individual characteristics. Chang v. United States, 217 F.R.D. 262, 269 (D.D.C. 2003) (citing Jarvaise v. Rand Corp., 212 F.R.D. 1, 3 (D.D.C. 2002)). For example, in Stearns v. Ticketmaster Corp., 655 F.3d 1013 (9^{th} Cir. 2011), plaintiffs alleged fraud in an Internet ticket selling scheme that encouraged consumers to sign up for fee-based awards. Yet, one of the two proposed lead plaintiffs claimed not to have been deceived and the other had no idea how he had been signed up for the program (he guessed that his son had signed him up). Although there were sufficient common issues in this case to satisfy commonality, the court found that neither proposed representative was typical of the class where neither claimed to have been deceived.

By contrast, in In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation, 678 F.3d 409 (7th Cir. 2012), the court found that although there were differences class members and class representatives, these differences were not sufficient to defeat typicality. A class action was brought by consumers alleging defective design of washing machines caused them to grow mold. Whirlpool argued that the class representatives were not typical because they had experienced mold problems whereas many other class members had not, and because they had taken different remedial measures to abate the mold problem. The court gave credence to expert testimony that nothing plaintiffs did could affect the mold problem, therefore the different remedial measures taken by the class representatives were not material. Furthermore, the court held that the named plaintiffs might be able to show that all consumers were injured at point of sale because they paid a higher premium for a defective washer, so that the fact that the class representatives actually experienced mold did not make them too different from those that did not. Id. at 421.

More than any other requirement in Rule 23(a), typicality focuses on the cohesion within the proposed class. Ironically (because Wal-Mart largely ignores the issue of typicality), this was a key issue on the facts of Wal-Mart where the class had 1.5 million members who were or had been employed in 3,400 stores across all 50 states, with each store having between 40 and 53 separate departments and 80 to 500 staff positions. 131 S. Ct. at 2547. In almost any Circuit other than the Ninth, the idea of three named plaintiffs (Dukes, Kwapnoski, and Arena) representing these 1.5 million class members would have been rejected on grounds of typicality.

In some of these other Circuits, the more recent tendency has been to define typicality in stricter terms than the Ninth and Second Circuits' more permissive standard. For example, in Prado-Steiman v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000), the Court said that typicality measures whether a sufficient nexus exists between the claims of the named representative and those of the class at large. Similarly, in Bacon v. Honda of Am. Mfg., Inc., 370 F.3d 565 (6th Cir. 2004), a Title VII case predating Wal-Mart, the Sixth Circuit held that two named plaintiffs lacked both typicality and commonality because they were not denied promotions. The Sixth Circuit suggested that no employee could be typical of a wide range of class members that included both workers and supervisors, production-line workers and those in administrative positions, and employees in four different plants (each with different production capabilities) and over thirty departments. See also Hines v. Widnall, 334 F.3d 1253 (11th Cir. 2003) (holding that it was fatal to the typicality requirement that none of the named representatives had hiring or transfer claims (which claims were alleged in the complaint) and that the class included both white collar, non-professional employees and professional civil service employees); In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 209 F.R.D. 323 (S.D.N.Y. 2002) (proposed class of residential well owners whose wells had been contaminated by a gasoline additive, known as MTBE, were found not to meet the test for typicality because the contamination of each well arose through a factually unique set of circumstances); Dunnigan v. Metro. Life Ins. Co., 214 F.R.D. 125 (S.D.N.Y. 2003) (denying class certification on grounds of typicality where plaintiff was subject to unique legal defenses that would become the focus of the litigation).

Typicality may also present a barrier where class representatives and class members are from different states. In Stirman v. Exxon Corp., 280 F.3d 554, 558 (5th Cir. 2002), for example, the Fifth Circuit rejected a class of royalty interest owners from fifteen states in part because the differences among the legal claims of class members from different states. The differences among the state laws presented an insurmountable problem: "Given the differences among state laws, it cannot be said that … [the proposed representative's] claims are `typical' of the class as it is currently defined, that is, to include all leases." Id. at 562.

Arguments that the availability of individual defenses defeats typicality are gaining traction. Compare Ellis v. Costco Wholesale Corp., 657 F.3d 970, 985 (9th Cir. 2011) (class representative not typical because subject to individual defenses that are different from other class members) with Floyd v. City of New York, --- F.R.D. ----, 2012 WL 1868637 (S.D.N.Y.,2012) (finding that individualized defenses did not make the named plaintiffs atypical because the availability of these defenses was in fact typical of many class members.). Beck v. Maximus, 457 F.3d 291(3d Cir. 2006), shows how far this rule can reach. There, the defendant debt collector argued that its letter to the named plaintiff's employer was sent as a result of a bona fide error. The Third Circuit found that if (1) the error resulted from an unintentional transmission, (2) the error was the result of a good faith mistake as to the debtor's identity, and (3) the defendant could also show that it employed adequate procedures to prevent such errors, then it might have a bona fide error defense that would defeat the named representative's typicality and adequacy.

Typicality can often do the work of the predominance standard where (1) predominance is inapplicable either because the case is not being certified under Rule 23(b)(3)), or (2) predominance is easily satisfied because reliance is not an element of the cause of action. A good example of the latter is Oshana v. Coca-Cola Company, 472 F.3d 506 (7th Cir. 2006), in which plaintiffs alleged that the class was deceived by the defendant's failure to disclose that the fountain version of the cola soft drink (unlike the bottled version) contained the artificial sweetener, saccharin. The class consisted of all those who had drunk the fountain version after 1999. The Seventh Circuit found the class representative not to be typical of the class because some class members had relied on the absence of saccharin, while others clearly had not and a class representative who had not relied could not be typical of class members who had. Similarly, typicality was lacking in Stirman v. Exxon Corp., supra, because of the differences in applicable state law. In both cases, typicality can be used to raise by the back door a problem about variation within the class, but typicality, unlike predominance, is a universal requirement

Some cases flunk typicality because the factual circumstances or injuries are inherently individualized. Thus, in Doe v. Chao, 306 F.3d 170 (4th Cir. 2002), amended by 2002 U.S. App. LEXIS 28140 (Sept. 20, 2002), aff'd, 540 U.S. 614 (2004), the Fourth Circuit affirmed the District Court's rejection of plaintiffs' class certification because the injuries seemed inherently individualized. Plaintiffs, who allegedly suffered from black lung disease, claimed that the Department of Labor had wrongfully disclosed their identities in violation of the Privacy Act, thereby causing them emotional distress. The district court, in denying the class certification on grounds of typicality, found that the individualized nature of each plaintiff's emotional distress claims is "likely to be so variable and fact-specific that damages issues overwhelm liability, precluding class certification." Id. at 183-84 (citing Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 342-44 (4th Cir. 1998), for the proposition that individualized nature of damages can destroy typicality). The Fourth Circuit agreed and added that typicality would also be undermined because "the claims of the named representatives would differ from those of unnamed class members with potentially time-barred claims." Id. at 184. The Supreme Court affirmed, but mentioned the certification question only in passing, while focusing instead on the potentially massive recoveries in Privacy Act claims. See Doe v. Chao, 540 U.S. 614, 636-37 (2004).[44]

Conversely, other more liberal decisions continue to emphasize that all members in the class do not need to rely on identical legal theories where plaintiffs allege a common course of conduct and highly similar legal theories. Thus, in Hicks v. Morgan Stanley & Co., 2003 U.S. Dist. LEXIS 11972 (S.D.N.Y. July 16, 2003), the district court found that for purposes of typicality and adequacy of representation, Sections 11 and 12(a)(2) of the Securities Act of 1933 did not differ significantly. Hence, a lead plaintiff who had standing to assert a Section 11 claim, but not the Section 12(a)(2) claim, could serve as the lead plaintiff for a class whose members held either or both claims.[45]

(5) Adequacy of Representation (Rule 23(a)(4))

The adequacy-of-representation requirement "encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representative will adequately prosecute the action." Busby v. JRHBW Realty,

[44] For similar cases found to be excessively individualized, see Johnson v. Kansas City Southern Railway Company, 208 Fed. Appx. 292, 2006 U.S. App. LEXIS 28904 (5th Cir. Nov. 21, 2006) (issues involving real property alongside a railway corridor too individualized for one representative to bind all others); Payton v. County of Carroll, 473 F.3d 845 (7th Cir. 2007) (arrest and detention practices varied too greatly among counties for representatives in one county to represent all detained arrestees in a civil rights class action); In re Fosamax Prods. Liab. Litig., 248 F.R.D. 389 (S.D.N.Y. 2008) (Plaintiffs' claims would require highly individualized proof regarding their osteonecrosis of the jaw condition, defeating typicality); In re Welding Fume Prods. Liab. Litig., 245 F.R.D. 279 (N.D. Ohio 2007) (Typicality not satisfied because plaintiffs' injuries were highly individualized based on their degree of exposure to welding fumes, and because there was no single course of conduct by the multiple defendants, as they manufactured many different welding products).

[45] For other decisions that find the typicality requirement of Rule 23(a)(3) to have been satisfied, see Beattie v. CenturyTel, Inc., 511 F.3d 554 (6th Cir. 2007) (typicality met in consumer fraud case regarding telephone billing because, although class members encountered the alleged deceptive billing practices in this telecommunications fraud case in different ways, they were subject to the same purportedly illegal practices); In Wells Fargo Home Mortg. Overtime Pay Litig., 527 F. Supp. 2d 1053 (N.D. Cal. 2007) (typicality was met even though class representatives are not typical of all the class members in terms of their day-to-day work activities, because the policy at issue was company-wide and affects all class members in the same way).

Inc., 513 F.3d 1314, 1323 (11th Cir. 2008); Grimes v. Fairfield Resorts, Inc., 2007 U.S. App. LEXIS 1958 at *6 (11th Cir. Jan. 30, 2007) (quoting Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1189 (11th Cir. 2003)).

1. Conflicts Within the Class.

Perhaps the most important recent case exemplifying the first rationale for denying certification (i.e., a conflict within the class) is In re Literary Works in Electronic Databases Copyright Litigation, 664 F.3d 242 (2d Cir. 2011). There, class members fell into three groups depending on whether (and when) they had registered their copyrights. Most of the class fell into category C (whose members had not registered their copyrights and hence held legally weaker claims). Although the class representatives had claims falling into all three categories, no representative exclusively represented category C, and all these representatives held stronger category A and B claims. Because the representatives' logical incentives were to favor categories A and B over C and there was no representative for C alone, the Second Circuit overturned the settlement on adequacy grounds in a split 2-1 decision. Only subclassing and additional class representatives would appear capable of solving this problem.

Notwithstanding the strong statement in Literary Works, the more common approach in recent cases has been to begin by recognizing that "not all intra-class conflicts will defeat the adequacy requirement" (see Dewey v. Volkswagen Aktiengesellschaft, 681 F.3d 170, 184 (3d Cir. 2012)), but only conflicts that are "fundamental" (see Ward v. Dixie Nat'l Life Ins. Co., 595 F.3d 164, 180 (4th Cir. 2010); Valley Drug Co. v. Geneva Pharms. Inc., 350 F.3d 1181, 1189 (11th Cir. 2003)).

What makes an intra-class conflict "fundamental"? Here, the recent tendency of federal courts has been to be cautious, with courts regularly stating that "a conflict that is unduly speculative . . . . is generally not fundamental." See Dewey v. Volkswagen Aktiengesellschaft, 681 F.3d at 184; Kohen v. Pac. Inv. Mgmt. Co., LLC, 571 F.3d 672, 680 (7th Cir. 2009). Although the conflict in Amchem Products between past claimants and future claimants (who have been exposed but not yet manifested injury from asbestos) was clearly "fundamental," not all conflicts between past and future claimants are similarly "fundamental." A useful example is supplied by Dewey v. Volkswagen Aktiengesellschaft, supra, where the class consisted of persons owning certain models of Volkswagen that allegedly had roofs likely to leak under certain conditions. Defendants argued that the class was fundamentally split between those class members "who have already suffered leakage and those who have not yet suffered leakage" (*Id.* at 185), and analogized this division to the similar past/future division in Amchem Products. The Third Circuit agreed that "[t]his case bears some resemblance to Amchem and raises some of the same concerns" in that some wanted "immediate compensation for existing injuries" while others were "primarily concerned with securing an adequate inflation-protected fund to provide compensation for future injury." Id. at 185. Still, even while it found some misalignment of interests, it saw this problem as "not so starkly problematic" as in Amchem Products. Distinguishing in Amchem Products, it said that even those class members who had suffered past injury could still suffer future injury and thus would also want protection against leakage for the future. Thus, it deemed the intra-class conflict "unduly speculative." Id. at 186. Agreeing with the Sixth Circuit in Gooch v. Life Investors Ins. Co. of Am., 672 F.3d 402, 429 (6th Cir. 2012), the Third Circuit panel observed that "each class member naturally derives different amounts of utility from a class-wide settlement," and this alone does not give rise to a "fundamental" conflict that denies adequacy of representation.

A second recent Circuit Court decision refusing to deem a recognized conflict to be "fundamental" is In re K-Dur Antitrust Litigation, 686 F.3d 197 (3d Cir. 2012). Here, the asserted conflict in an antitrust case stemmed from the fact that some members of the class (all national wholesalers) had been "net beneficiaries" from weak competition in the specific market, while other class members had been "net losers." Defendants argued that this conflict gave these national wholesalers "financial incentives to delay generic entry," while the rest of the class had the reverse incentives. Recognizing that the cases were split and that some decisions had found such a conflict to preclude certification (see Valley Drug Co. v. Geneva Pharms. Inc., 350 F.3d 1181 (11th Cir. 2003)), the Third Circuit still decided that the conflict was not "fundamental" because all class members had legally valid claims and a common interest in maximizing their recovery in the litigation.

2. Conflicts Between Counsel and the Class.

The other major inquiry under Rule 23(a)(4) involves class counsel. Here, the most interesting recent decision is In the Matter of Aqua Dots Prods. Liab. Litig., 654 F.3d 748 (7th Cir. 2011) (Easterbrook, J.). Defendants had produced a dangerous children's product that caused nausea and even unconsciousness, but recalled the product after discovery of the problem. Roughly 600,000 of the more than one million defective kits had been returned. Plaintiffs who challenged the adequacy of the recall program sued in a class action, seeking a full refund under state consumer protection statutes. The district court declined to certify a Rule 23(b)(3) on grounds of superiority, ruling that an adequate recall program was superior to a class action. Finding this novel interpretation unsupported by the text of Rule 23, the Seventh Circuit held instead that plaintiffs' attempt to seek a duplicative remedy that would not benefit many (and perhaps most) members of the class but that would involve high transaction costs (chiefly, notice and attorneys' fees) implied that the representatives and their counsel could not "adequately protect the interests of the class" under Rule 23(a)(4). In short, bringing a pointless action implies that plaintiffs and their counsel are not adequate to protect the class members' true interests. Obvious as that may be, a court's determining at the outset of the litigation that a case is pointless represents a unique example of the new overlap between the merits and Rule 23's criteria.

3. Other Conflicts.

Adequacy of representation often overlaps with typicality, and cases may discuss one or the other prerequisite. For example, the capacity for adequate representation can be undercut where it is shown that the class representatives hold claims that are weaker than those of most class members. This was the basis upon which certification was denied in Randall v. Rolls-Royce Corporation, 637 F.3d 818 (7th Cir. March 30, 2011) (Posner, J.). In this action based on the Equal Pay Act, the female class representatives earned pay exceeding the base pay of most male employees in similar employment grades. Although the district court also found this factor to result in a lack of typicality, Judge Posner emphasized that if the named plaintiffs are subject to a defense that would not defeat unnamed class members, they cannot be adequate representatives for the class. He also noted that the named plaintiffs included middle-ranking executives who had authority within the company over compensation and thus could be subject to special defenses on this ground as well.

Similarly, the Seventh Circuit held in Premium Plus Partners L.P. v. Goldman, Sachs & Co., 2011 U.S. App. LEXIS 16148 (7th Cir., August 5, 2011), that proposed class representatives who had either settled their individual claims against the defendant in an individual action or who had lost the same claim in an individual suit could not serve as an "effective representative" for the class in a securities fraud suit. The court relied on the lack of typicality between those who had already settled or lost their claim and the other class members, but it might as well have cited Rule 23(a)(4). However this problem is articulated, the bottom line is (as Judge Easterbrook wrote) that "[i]t takes a representative with a live claim to carry on a class action." *Id.* at *13.

Although the search for conflicts within the class usually focuses on economic conflicts,[19] the Eleventh Circuit broadened the inquiry, stating that its focus "is on whether some ... members claim to have been harmed by the same conduct that benefitted other members of the class...." Grimes v. Fairfield Resorts, Inc., 2007 U.S. App. LEXIS 1958 at *10 to *11 (11th Cir. Jan. 30, 2007). In Grimes, the issue was whether timeshare purchasers in a resort should be able to book stays at other properties owned by, or in a reciprocal agreement with, the defendant resort—in effect, a dispute over resort policy. Ordinarily, such a conflict might be resolved by narrowing the class or using subclasses, but no such solution worked on the facts of this case according to the Eleventh Circuit. See also In re Ford Motor Company, 471 F.3d 1233 (11th Cir. 2006) (finding conflict among dealer groups within Ford Motor's dealer system to prevent class certification under Rule 23(a)(4)).

4. Adequate Stake in the Litigation.

Can assignees of some class members serve as adequate representatives of the class? Although the district court had denied certification in part on this ground, the Second Circuit in Cordes & Co. Fin. Servs., Inc. v. A. G. Edwards & Sons, Inc., 502 F.3d 91 (2d Cir. 2007), a decision important on multiple grounds, reversed and found that assignees, even though they did not technically fall within the definition of the class as set forth in the complaint, were not

[19] For recent cases, see Seijas v. The Republic of Argentina, 606 F.3d 53 (2d Cir. 2010) (because different groups of plaintiffs were in competition with each other to recover judgments, lead counsel representing several of these competing groups in separate actions had a conflict of interest and could not be an adequate representative); Flag Telecom Holdings, LTD. v. Bande, 574 F.3d 29 (2d Cir. 2009) (investors purchasing before corrective disclosure could not represent those purchasing after release of corrective disclosure).

disqualified from serving as class representatives (but still remanded for a further inquiry into their adequacy). Despite defendants' claims that "trafficking" in claims should be prohibited and that Article III's "case and controversy" requirement was offended, the Second Circuit focused instead on the economic alignment between the assignee/representatives and the other class members.

In another odd factual setting, the named representative in Sampson v. W. Sierra Acceptance Corp., 2004 U.S. Dist. LEXIS 11779 (N.D. Ill. June 25, 2004), settled her claims with one defendant (Western Sierra) after certification had been initially denied. Later, class certification was granted against a different defendant (Ridge Chrysler), who then sought to disqualify plaintiff Sampson from serving as the class representative, arguing that plaintiff Sampson had already received her full damages and had no personal stake in the litigation. See United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980). The District Court, however, found that the settlement recovery was less than the maximum damages potentially recoverable and permitted plaintiff Sampson to remain as the class representative, even though other class members still had potential claims against Western Sierra. These claims against Western Sierra, it said, could still be asserted on an individual basis (even though the statutory damages were capped at $100 to $1,000 plus attorneys' fees). The Court appears to have been primarily influenced by the fact that Ridge Chrysler had gone out of business and the action was only against its insurance fund. See Sampson v. Ridge Chrysler, 2004 U.S. Dist. LEXIS 5415 (N.D. Ill. Apr. 1, 2004).

5. Heightened Standard for Adequacy of Representation under PSLRA?

An important question has arisen in the Fifth Circuit regarding whether the Private Securities Litigation Reform Act of 1995 ("PSLRA") raised the adequacy standard for securities class actions. To date, every decision outside the Fifth Circuit has appeared to have disagreed with its position that the PSLRA raised the standard, and even the Fifth Circuit appears to have retreated to an uncertain extent on this point. In overview, the PSLRA establishes a multi-step process for appointing a lead plaintiff: First, the court publicizes the pendency of the action, the class period, and the nature of the claims asserted. Second, the court identifies the presumptive lead plaintiff, who is the plaintiff with the largest financial interest in the relief sought by the class, and, third, it determines whether any member of the putative class can rebut the presumption. See In re Cavanaugh, 306 F.3d 726 (9th Cir. 2002).

In Berger v. Compaq Computer Corp., 257 F.3d 475 (5th Cir. 2001), a securities class action followed Compaq's announcement in 1998 that sales from one of its North American commercial channels were not meeting expectations. The four named class representatives alleged that Compaq had attempted to inflate its stock price by fraudulently "overselling" products (or "channel stuffing") to distributors, knowing that they would not be able to resell the products to consumers at the same rates. After the District Court certified the class, Compaq petitioned for interlocutory review. On appeal, Compaq argued that the District Court had improperly presumed the adequacy of both the plaintiff class representatives and their counsel in the absence of specific proof to the contrary. Principally, Compaq relied on the inability of the class representatives to explain many of the allegations in their complaint or the legal theories on which their attorneys had relied. *Id.* at 480–81 and n.10. The Court found two problems with the District Court's presumption of adequacy: "First, it inverts the requirement that the party seeking certification bears the burden of proving all elements of Rule 23(a). Second, it effectively abdicates—to a self-interested party—the court's duty to ensure that the due process rights of the absent class members are safeguarded." *Id.* at 482.

In an attempt to provide guidance for the District Court on remand, the Fifth Circuit panel indicated the correct standard for adequacy under the PSLRA:

> Any lingering uncertainty, with respect to the adequacy standard in securities fraud class actions, has been conclusively resolved by the PSLRA's requirement that securities class actions be managed by active, able class representatives who are informed and can demonstrate they are directing the litigation. In this way, the PSLRA raises the standard adequacy threshold.

Id. at 483 (emphasis added). Berger thus seemed to entail a detailed inquiry into the class "representatives' own qualifications to take an active role in and control the litigation." *Id.* at 484. Conceivably, this might require use of attorneys as class representatives (which is now actually occurring in the Fifth Circuit).

Nonetheless, in a subsequent per curiam denial of the plaintiffs' motion for rehearing in Berger v. Compaq Computer Corp., 279 F.3d 313 (5th Cir. 2002), the Berger court may have backed away from its original position, holding instead that its standard for adequacy was rooted in circuit precedent, rather than in the PSLRA. Although the plaintiffs argued that the original Berger court had created an independent requirement for the adequacy standard by reading the provisions of the PSLRA into Rule 23(a)(4), the Fifth Circuit panel denied this accusation, replying that "We have not…created an additional requirement under rule 23(a)(4)…beyond that required by our long-established standards for rule 23 adequacy of class representatives." *Id.* at 313–314.[20]

No other court seems to have followed Berger's call for higher adequacy standards, and several seem to have rejected it. The first decision to do so was In re Theragenics Corp. Secs.

[20] Nonetheless, Berger II also said that "the lead plaintiff should be an investor capable of understanding and controlling the litigation." *Id.* at 313.

Litig., 205 F.R.D. 687 (N.D. Ga. 2002), where the district court focused on the second Berger decision (Berger II) and concluded:

> In ruling on the [Berger] plaintiffs' motion for rehearing, the [Berger] court backed away from [the position that the PSLRA raised the standard of adequacy] and stated that the result in that case was based upon prior circuit precedent rather than the Reform Act. This Court is not persuaded that it should follow the original opinion in Berger. To do so would require the Court to ignore controlling Eleventh Circuit authority.

Id. at 696.

Even before the Berger court retraced its footsteps, the Third Circuit had rejected the concept of a heightened adequacy standard based on the PSLRA. See In re Cendant Corp. Litig., 264 F.3d 201 (3d Cir. 2001). The Cendant appeal grew out of the District Court's approval of a $3.2 billion settlement of a securities fraud class action brought against Cendant Corporation and its auditors, Ernst & Young, and also a $262 million fee award to the plaintiff's counsel. Several stockholders appealed the selection of the CalPERS group, which had the largest financial interest, as the lead plaintiff. In partial reply, the court provided a detailed analysis of the adequacy standard under the PSLRA:

> The overall structure and legislative history of the statute suggest that in appointing a lead plaintiff a district court should engage in the following analysis. The initial inquiry (i.e., the determination of whether the movant with the largest interest in the case otherwise satisfies Rule 23) should be confined to determining whether the movant has made a *prima facie* showing of typicality and adequacy. The initial clause of the statute, which governs triggering the presumption, refers to determinations made by "the court," 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I), but the second, which deals with rebutting it, speaks of "proof by a member of the purported plaintiff class." § 78u-4(a)(3)(B)(iii)(II). This phrasing suggests that the threshold determination of whether the movant with the largest financial losses satisfies the typicality and adequacy requirements should be a product of the court's independent judgment, and that arguments by members of the purported plaintiff class as to why it does not should be considered *only* in the context of assessing whether the presumption has been rebutted.

Id. at 131–32.

Overshadowing even the Third Circuit's decision is the Ninth Circuit's decision in In re Cavanaugh, 306 F.3d 726 (9th Cir. 2002). There, the District Court had rejected a group of five businessmen as the lead plaintiff, even though they clearly had the largest financial stake in the action (approximately $3.3 million, which was over ten times greater than that of the next highest contender). Each had larger amounts at stake than the self-employed investor selected by the court, who had incurred only modest losses of $59,000. United States District Court Judge Vaughn R. Walker rejected the lead plaintiff application of the five businessmen because this group had entered into a contingent fee contract with their attorneys (Milberg, Weiss) that provided for an increasing percentage of the recovery fee formula, which topped out at 30%. Judge Walker found that an increasing percentage fee formula was sufficiently unfavorable to the class as to rebut the presumption that the largest stakeholder was "the most adequate plaintiff."

Moreover, as Judge Walker saw it, "because no institutional investors are involved in this case, the primary objective of the presumption is absent," and hence he could downgrade the presumption in favor of the largest stakeholder to the lesser rank of simply "one important element of this decision." See In re Quintus Sec. Litig., 148 F. Supp. 2d 967, 972 (N.D. Cal. 2001).

Rejecting this entire line of reasoning, the Ninth Circuit replied that: "This, of course, was error. Congress enacts statutes, not purposes, and courts may not depart from the statutory text because they believe some other arrangements would better serve the legislative goals." Cavanaugh, 306 F.3d at 731–32. As the Ninth Circuit saw it, once the District Court had freed itself from the statutory presumption, it could then engage in a dubious "freewheeling comparison of the parties competing for lead plaintiff, questioning them about their business acumen, their knowledge of the lawsuit and, especially, their fee arrangements with their respective lawyers." *Id.* at 732. But such comparisons are not authorized by the PSLRA, the Ninth Circuit said, because it simply does not matter that another proposed lead plaintiff is "more adequate" or "more typical" than the lead plaintiff with the largest stake—so long as the lead plaintiff with the largest stake satisfies the traditional adequacy standard. In Cavanaugh, the Ninth Circuit both reaffirmed that the PSLRA did not heighten the adequacy standard and expressly disagreed with the Berger decision. *Id.* at 736–39.

So where are we left? Until recently, Berger had seemed to stand alone. But in a recent Southern District of New York decision, a proposed lead plaintiff was disqualified for its "inadequate familiarity with, and concern for, the litigation." See In re Monster Worldwide, Inc. Sec. Litig., 2008 U.S. Dist. LEXIS 53466 (S.D.N.Y. July 14, 2008). There, United States District Judge Jed Rakoff rejected the Steamship Trade Association-International Longshoremen's Association Pension Fund as a lead plaintiff on this ground after the pension fund's co-chair "testified that he did not know the name of the stock at issue in this case, did not know the name of either individual defendant, did not know whether STA-ILA ever owned Monster stock," and lacked knowledge of many other essential facts. *Id.* at 9. In addition, he also testified that he was the plaintiff's employee most familiar with the litigation. Obviously dissatisfied, Judge Rakoff wrote that he refused to "be a party to this sham" and concluded the pension fund "has no interest in, genuine knowledge of, and/or meaningful involvement in this case and is simply the willing pawn of counsel. STA-ILA cannot remotely be relied upon to protect the interests of the class against the possibly competing interests of the attorneys." *Id.* at *12.

Judge Rakoff's rejection of the lead plaintiff as inadequate under the PSLRA was based entirely on Second Circuit precedent relating to the adequacy of class representatives, and no reference was made to the Berger decision or to the possibility that the PSLRA mandated a higher standard of adequacy. In a 2009 decision, Iron Workers Local No. 25 Pension Fund v. Credit-Based Asset Servicing and Securitization, 616 F. Supp. 2d 461 (S.D.N.Y. 2009), Judge Rakoff similarly disqualified a union pension fund from serving as lead plaintiff, where the fund had entered into a "monitoring" agreement with its counsel under which the law firm would monitor the fund's investments on a cost-free basis and advise the fund of opportunities for class litigation, on the understanding that the fund would employ the law firm if it undertook the litigation. The court found this arrangement to "foster . . . the very tendency toward lawyer-driven litigation that the PSLRA was designed to curtail." The decision implies, however, that if the pension fund had sought disinterested legal advice before hiring the law firm, the monitoring arrangement would have been less problematic.

Other courts addressing the subject continue to reject the broader Berger approach. See Carrier v. Am. Bankers Life Assur. Co., 2008 DNH 31 (D.N.H. 2008). In overview, Monster Worldwide and Iron Workers Local No. 25 Pension Fund are unlike Berger in that they seem less focused on the competence or adequacy of the lead plaintiff and more on whether the lead plaintiff had been captured by the large plaintiffs' law firms in those cases.

6. Conflicts Because of a Class Member's Alleged Control of Class Counsel.

Relationships between class counsel and either a class member or a third party have been attacked in two recent cases, but both times unsuccessfully. In In re International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (McKnight v. General Motors Corp.), 457 F.3d 969 (6th Cir. 2007), retirees objected to a settlement involving the modification of their health care benefits. Their claim was essentially that class counsel and the class representation had been selected and dominated by the UAW, which allegedly gave a priority to the interests of current workers. The Sixth Circuit brushed aside these objections, stating that:

> [C]ourts customarily demand evidence of improper incentives for the class representatives or class counsel–such as a promise of excessive attorney fees in return for a low-cost, expedited settlement–before abandoning the presumption that the class representatives and counsel handled their responsibilities with the independent vigor that the adversarial process demands.... No such problem exists here, as the settlement does not determine [counsel's] fees.... Without more, we must afford [counsel] and the class representatives the normal presumption—that they handled their responsibilities independently and zealously.

Id. at *26 to *27.

Similarly, in Feder v. Electronic Data Systems Corp., 429 F.3d 125 (5th Cir. 2005), although the defendant asserted that the lead plaintiff in a securities class action was subject to conflicts that deprived the class of an adequate representative, the Fifth Circuit found the unusual fee arrangements in the case did not impair adequacy of representation. The lead plaintiff was the Department of the Treasury of the State of New Jersey ("New Jersey"), and it retained a retired New Jersey state court judge to oversee all securities class actions in which New Jersey was involved (and to serve as principal liaison with class counsel). But class counsel (in each case), and not New Jersey, was responsible for paying this special liaison's fees. The defendant asserted that, but for the use of the special counsel, New Jersey could not have satisfied the Fifth Circuit's requirement of an "informed" lead plaintiff under Berger I and that compensation by class counsel of this special monitor robbed the monitor of its independence. The Fifth Circuit agreed that the use of such a special counsel enabled New Jersey to meet its enhanced standards under Berger I, but rejected the claim that the relationship amounted to "some sort of bribe." See

429 F.3d at 134. Emphasizing that the arrangement had been fully disclosed to the court at the outset, the Fifth Circuit saw no problem with the procedure.

7. Adequacy of Representation of Future Claimants.

Since Amchem Prods. v. Windsor, 521 U.S. 591 (1997), doubt has surrounded whether future claimants can ever be adequately represented, because they typically are not even aware that they are claimants at the time of litigation. In Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001), the Second Circuit elevated this concern to a new level of doctrinal significance, when it permitted a collateral attack on a nearly 20 year old prior class action settlement, involving Agent Orange, and held that two Vietnam veterans had not been adequately represented in the prior class action and thus were not bound by the outcome. The impact of Stephenson was to raise new doubts about whether a mass tort settlement can ever definitively release the defendants from all potential liability to future claimants. In Dow Chem. Co. v. Stephenson, 539 U.S. 111 (2003), an equally divided Court affirmed most of the Second Circuit's decision in a per curiam opinion, but vacated the removal of state court actions raising only state law claims in light of Syngenta Crop Prot. Inc. v. Henson, 537 U.S. 28 (2002). The net result is continuing uncertainty and an increased likelihood of collateral attacks, particularly in mass tort cases.

Stephenson re-opened a 1984 class action settlement in the Agent Orange mass tort litigation that had resolved both present and future claims relating to the exposure of Vietnam veterans to Agent Orange. This settlement had set up a $180 million settlement fund against which claims for death or disability could be made until 1994. In the instant case, however, the two plaintiffs, Stephenson and Isaacson, discovered their injuries after the settlement fund had been exhausted.

Although the Second Circuit panel found that the two plaintiffs fell within the original class definition and that adequacy of representation had been reviewed and properly approved on the appeal of the 1984 settlement, it still permitted the collateral attack to proceed. This seemed inconsistent with the Ninth Circuit's decision in Epstein v. MCA, Inc., 179 F.3d 641 (9th Cir. 1999). Still, without deciding whether it would follow Epstein, the Stephenson panel drew a critical distinction. In assessing adequacy of representation, it said that the appellate court must not only consider the district court's evaluation of the class representative's and class counsel's adequacy to represent the class, but it must also determine whether, "after the termination of the suit . . . the class representative adequately protected the interests of the class." 273 F.3d at 258–59. This second question, it said, "involves a review of the class representative's conduct of the entire suit—an inquiry which is not required to be made by the trial court but which is appropriate in a collateral attack on the judgment." *Id.*

Stephenson would appear to invite collateral attacks on class action settlements (although possibly only by future claimants whose claims arose after the settlement's approval). Given any such settlement's new vulnerability to collateral attack, mass tort defendants may well become more skeptical of the wisdom of attempting to achieve a mass tort settlement that binds future claimants.

Stephenson also raised an even more fundamental problem with settlements covering future claimants. It expressed grave doubt (but did not actually hold) that the notice given to future claimants could ever be adequate because such claimants "may not be aware of their exposure or realize the ramifications of exposure [and] without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out." *Id.* at 260. Given this overhanging uncertainty, mass tort class action settlements seem increasingly risky for defendants, who might be forced to pay twice if the settlement can be collaterally attacked. Citing Stephenson, a Southern District decision, Meachem v. Wing, 227 F.R.D. 232 (S.D.N.Y. 2005), refused to approve a settlement in a civil rights case relating to procedures for the termination of welfare benefits because adequate notice could not be given to persons who would be subject to such termination decisions in the future (i.e., the functional equivalent of future claimants).[21]

8. Adequacy of Representation When Both Injunctive and Individual Relief Is Sought.

The Second Circuit has recently suggested that when class actions seeking both injunctive and damages relief are bifurcated, the party who served as an adequate representative in the injunctive stage might not necessarily serve as an adequate representative in the damages stage. In Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147 (2d Cir. 2001), African-American employees of Metro-North brought Title VII claims alleging race discrimination with respect to promotion and discipline. The employees moved to bifurcate the trial into liability and damages phases, which the District Court denied. On appeal, Metro-North argued that if the trial was bifurcated, then the Class Plaintiffs could not serve as adequate representatives, because they might not vigorously pursue the individual relief following the liability stage. The Second Circuit panel declined to accept this argument as a basis on which to deny certification:

> Rather, the preferable course is for the district court to revisit the question of the Class Plaintiffs' 'fitness' to represent the class if and when the individual-relief stages of the claims occur. Then, if the district court deems it appropriate, it can direct that class members who are entitled to seek individual relief be named as additional class representatives.

[21] For another recent decision expressing concerns about the status of future claimants in class actions, see G-I Holdings, Inc. v. Bennet, 2008 U.S. Dist. LEXIS 43218 (D. N.J. May 30, 2008). Conversely, for a decision interpreting Stephenson narrowly, see Pyle v. New York Life Ins. Co., 2008 U.S. Dist. LEXIS 21638 (W.D. Pa. Mar. 19, 2008).

Id. at 171.

Nonetheless, a variation on this argument did work in In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 209 F.R.D. 323 (S.D.N.Y. 2002). There, the District Court found that absent class members could not be adequately represented by class members who were seeking only injunctive relief in a putative class action against petroleum companies by well owners whose wells were allegedly contaminated by methyl tertiary butyl ether (MTBE), a gasoline additive that had been proven to be carcinogenic in animals. Assuming that "claim splitting" was prohibited by law even in the context of class actions, the Court reasoned that any personal injury or property claims of the absent class members would likely be barred under the principles of res judicata. That is, purely "injunctive" plaintiffs could not represent compensatory plaintiffs, because their interests were not aligned, and what spelled success to one group might imply failure to the other.

A similar theme arose in In re Fosamax Prods. Liab. Litig., 248 F.R.D. 389 (S.D.N.Y. January 3, 2008), where the Court, in denying certification, questioned the adequacy of the class representatives and suggested that it was "undermined by their decision to seek monetary damages themselves but only medical monitoring for the class." *Id.* at *39. As Judge Keenan pointed out, the medical monitoring class would arguably preclude the other class members from receiving any monetary recovery in individual suits under principles of res judicata.

These unresolved issues about impermissible claim splitting between injunctive and compensatory actions and the impact of res judicata take on a new urgency in the wake of Wal-Mart. If a Rule 23(b)(2) class action is brought for injunctive relief, it could bar subsequent class or individual actions for compensatory damages. Although there is no truly dispositive law on this question, two approaches might avoid this problem: (1) A hybrid class could be brought with different class representatives and class counsel for the two subclasses (i.e., the injunctive subclass and the compensatory subclass), or (2) Individuals planning to seek compensatory relief could seek to opt out of the injunctive class, arguing that they have a due process right to exit the class which trumps the language in Rule 23(b)(2) that precludes opting out.[22] Both approaches have their limitations: First, a Rule 23(b)(3) class will be difficult to certify in most employment cases (even if the class size and scope is narrowed in response to Wal-Mart). Second, Justice Scalia suggested in Wal-Mart that Rule 23(b)(2) provides for a mandatory action and does not permit opting out; hence, maintaining an injunctive action may preclude a parallel suit under Rule 23(b)(3) action for damages. Further, subsequent individual actions for damages may also be deemed impermissible "claim splitting." No authoritative law yet exists on these questions in the wake of Wal-Mart.

The better answer may be for courts to rule that suing separately for injunctive relief on a class basis and for compensatory damages on an individual basis does not amount to impermissible claim splitting because (in light of Wal-Mart) the plaintiffs had no real opportunity to unite their two claims. But there can be no assurance today that courts will so rule. In this light, counsel in a Rule 23(b)(2) action may need to give appropriate warnings to class members, and to consider carefully if the relief sought in that action truly outweighs the possible loss of compensatory damages.

9. Other Questions of Adequacy.

Other circuits reviewing the question of whether a named plaintiff adequately represents a class have conducted highly fact-specific inquiries, sometimes approving and sometimes rejecting the adequacy of the class representative on grounds that currently defy generalization.

[22] As discussed earlier, some cases have permitted this. See Molski v. Gleich, 318 F.3d 937, 948–49 (9th Cir. 2003); Jefferson v. Ingersoll Int'l, 195 F.3d 804 (7th Cir. 1999).

In Paton v. N.M. Highlands Univ., 275 F.3d 1274 (10th Cir. 2002), the Tenth Circuit reversed a decision in which the District Court had decertified a class based on a named plaintiff's inadequacy. The case involved a claim by coaches and female student athletes against the University alleging violations of Title IX, the Equal Protection Clause, and the New Mexico Constitution. The District Court had decertified the class because the named plaintiff had not been enrolled in school in New Mexico since 1998. However, because the district court had, two months earlier, found this same named plaintiff an adequate representative when she had not been enrolled in the university at that time, the Tenth Circuit found this an insufficient basis on which to decertify the class.

In Thompson v. Jiffy Lube Int'l, Inc., 2008 U.S. Dist. LEXIS 54704 (D. Kan. July 16, 2008) a district court found that significant variations in state law could defeat adequacy. The Court concluded "the variations in fact, potential defenses, and different laws applicable to the plaintiff's claims" were enough to create "a significant divergence of interests between Mrs. Thompson and members of the proposed classes." *Id.* at *68. The plaintiffs had alleged that Jiffy Lube had a broad policy of pressuring customers into buying unnecessary extra services and charging extra fees that they were prohibited from charging.

A number of cases have upheld the adequacy of representation against claims that the representatives or their counsel failed to assert meritorious claims or otherwise followed a legal strategy of which absent class members later disapproved. See In re Integra Realty Res., Inc., 262 F.3d 1089 (10th Cir. 2001) (holding that named class representative's failure to move for dismissal or summary judgment upon grounds that some class members believed would be successful did not affect adequacy of representation, where the named representative conducted extensive discovery on behalf of the class, filed a motion for dismissal or summary judgment on other grounds, conducted extended negotiations, and filed slightly less than 400 pages of legal analysis and factual support for proposed settlement).

Similarly, In re Mex. Money Transfer Litig., 267 F.3d 743, 747 (7th Cir. 2001) (Easterbrook, J.), arose out of a MoneyGram and Western Union promotion stating, "Send $300 to Mexico for $15." The plaintiffs alleged that this promotion was fraudulent because the companies collected not only the $15 paid at the counter, but also the difference between the retail currency exchange rate quoted to customers and the wholesale interbank rate, for transactions of $5 million or more, at which the defendant companies bought pesos. The plaintiffs alleged that the quoted prices should include this "FX spread" (approximately $25 per transaction) or that the defendants must at least give the price they pay for pesos, so that customers could work out the spread. The plaintiffs sought treble damages under RICO and state anti-fraud laws. Eventually the case settled for far less than the $300 million that plaintiffs estimated that defendants made off the FX spread each year. At the fairness hearing, objectors claimed that they had been inadequately represented because the plaintiffs had not raised a California state-law claim that would have potentially increased the recovery. The court held simply that "the class representatives cannot be branded as inadequate on account of their decision to abjure reliance on California law." *Id.* at 748.

On the other hand, in Smith v. Sprint Communs. Co., 387 F.3d 612 (7th Cir. 2004), the Seventh Circuit, over a strong dissent, vacated an order certifying a nationwide settlement class and enjoining competing state class actions. Intervenors convinced the Seventh Circuit that class members would be better off in many cases in state court. In addition, the settlement was negotiated by counsel who were, in the Supreme Court's phrase in Amchem, "disarmed"—i.e., unable to use the threat of litigation to press for a better settlement because the action could not have been certified for trial. The case stands, with Amchem and Ortiz, as one of the few settlement classes to be overturned.

A distinct body of case law has dealt with the incentives of the class representatives. For example, does the payment of incentive fees by class counsel to these representatives give them an excessive interest in settlement and an unacceptable willingness to defer to their counsel? In Rodgriguez v. West Publishing Corp., 563 F.3d 948 (9th Cir. 2009), a case involving such incentive payments, the Ninth Circuit affirmed the approval of the class settlement, but reversed the fee award to class counsel and remanded the case to the district court, instructing it to consider the effect of these incentive agreements on class counsel's entitlement to a fee award. This result seems a compromise intended to discourage the payment of such incentive fees.

Other recent Seventh Circuit cases have also been critical of plaintiff's incentives. In Culver v. City of Milwaukee, 277 F.3d 908 (7th Cir. 2002) (Posner, J.), the Seventh Circuit upheld the District Court's ruling that the named plaintiff was an inadequate representative of a class of white males in an action alleging discrimination in hiring by the police department. Judge Posner wrote:

> [T]he district judge was justifiably skeptical of Culver's adequacy to represent even his own subclass. Culver made only perfunctory efforts back in 1993 to obtain a job application, and shortly afterwards he obtained another job, with which he is content. Having thus no interest in injunctive relief and not seeking damages either (he admits that his claim is moot), Culver not surprisingly has pursued the suit in a most lackadaisical manner. In the eight years that it has been pending, he has yet to identify any other members of either the larger class or his subclass. He has done nothing to move the case forward except file a flurry of frivolous motions to recuse the various district judges who have succeeded each other in the unrewarding task of shepherding this case.

Id. at 912. The key factor in Posner's analysis seems to have been that the named plaintiff's own claim was moot, thus giving him no incentive to press the action. Although this did not make the class's claims moot, it did render him undermotivated and thus "presumptively inadequate." *Id.*

Economic and family conflicts have long been understood to be capable of rendering class counsel an inadequate representative. In Bradburn Parent/Teacher Store v. 3M, 2004 U.S. Dist. LEXIS 16193 (E.D. Pa. Aug. 17, 2004), the fact that one of the plaintiff's attorneys was married to the majority shareholder of the plaintiff was found to render such counsel unable to adequately represent the class, because this relationship gave the majority shareholder a perverse incentive to pay an excessive fee to class counsel.

10. Adequacy and the Reverse Auction Problem.

Two important Seventh Circuit decisions, both written by Judge Posner, have focused the adequacy determination on class counsel's performance and incentives. In Culver v. City of Milwaukee, 277 F.3d 908 (7th Cir. 2002), Judge Posner's starting point was that class counsel is not an agent, but "realistically a principal. Indeed, the principal." Id. at 913. Having decided that the case's slow and erratic pace was probably the class counsel's fault, Judge Posner searched for an appropriate remedy and decided that when class certification is denied, with the result that the statute of limitations began to run again, class members should receive notice - - presumably at the class counsel's expense. Id. at 914. Because this was a broad and arguably quite punitive rule, he added a qualification: if clearly there was no "prejudice" (possibly, for example, because class members knew of the outcome or, alternatively, never knew of the existence of the suit), notice would not be required. Otherwise, he wrote:

> Rule 23(e) should therefore be understood as imposing a duty on the district judge that is nondelegable, he being himself a fiduciary of the class... The judge's duty is to order notice unless the risk of prejudice to

> absent class members is nil and to review for adequacy the form of notice proposed by class counsel in response to the order.

Id. at 915. In the case of a large, nationwide class, this duty may impose a potentially enormous penalty on an unsuccessful class counsel. Even if newspaper notice is deemed adequate, the cost of defeat has now gone up substantially.

A few months after Culver, Judge Posner, again writing for the Seventh Circuit, returned to the topic of class counsel's adequacy in Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277 (7th Cir. 2002). Noting once more the potential for disloyalty by class counsel to the class, Judge Posner focused this time on the phenomenon of the "reverse auction," which he defined as "the practice whereby the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant." Id. at 282. This term, which was coined in a 1995 law review article (see Coffee, Class Wars: the Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1370–73 (1995)), fit the facts before him, as Judge Posner saw it, because the defendants had been confronted with pending class actions in several state and federal courts and specifically "faced substantial exposure in a Texas class action," which had been certified and which sought damages of up to $2 billion. At this point, defense counsel invited to lunch several Chicago solo practitioners, who did not then have a case pending against the defendants. At this now famous Metropolitan Club lunch, defense counsel appears to have outlined a global settlement and indicated that the settlement fund should be in the range of $25 million (but with no class member receiving more than $15); any money left in the fund would also revert to the defendants. Defendants also agreed to pay attorney's fees to plaintiffs' counsel of $4.25 million. 288 F.3d at 282-83.

The Seventh Circuit both found that this settlement was inadequate (chiefly because the court did not justify its valuation) and that plaintiffs' counsel's "representation of the class was almost certainly inadequate, an independent reason for disapproving the settlement." *Id.* at 284. On remand, the settling parties presented a "sweetened" settlement with improved terms to a new district court judge, who conducted a lengthy hearing. At the end of this hearing, the court again concluded that class counsel had failed to sustain their burden of showing that the settlement was fair and that class counsel had provided inadequate representation. In so finding, the district court emphasized that class counsel had not obtained (or even sought) adequate discovery, that one defendant had been included at the last minute, and would receive a release, without additional compensation being received by the class, and that class counsel and the principal defendants had met to discuss potential settlement figures even before the suits were filed. See Reynolds v. Beneficial Nat'l Bank, 260 F. Supp. 2d 680 (N.D. Ill. 2003).

The last chapter to date in this continuing saga came in 2004 when the defendants in Reynolds objected to class certification, even though they had previously supported certification when they had chosen the plaintiffs' counsel. The Seventh Circuit ruled that the doctrine of judicial estoppel precluded the defendant lenders from challenging certification after they had previously assented to it. See Carnegie v. Household Int'l Inc., 376 F.3d 656 (7th Cir. 2004).

For more recent decisions rejecting "settlement" class actions in which hints of questionable behavior by class counsel were discernable, see In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortgage Loan Litig., 418 F.3d 277 (3d Cir. 2005) (discussed infra); Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781 (7th Cir. 2004). Other courts have recently been more cautious about finding a "reverse auction" (although they have recognized the possibility). In Larson v. AT&T Mobility LLC, 687 F.3d 109 (3d Cir. 2012), the

Third Circuit upheld a district court's determination that a "reverse auction" had not taken place, but relied principally on the fact that a "retired district judge, who oversaw five months of intense settlement negotiations, specifically dismissed the idea that the settlement was the product of a reverse auction or collusion." Id. at 121 n. 18. Use of such a monitor may be a practical answer to this problem.

Part III: Rule 23(b) Developments

A class that meets the requirements of 23(a) must still satisfy the requirements of 23(b)(1), 23(b)(2) or 23(b)(3). Until the decision in Wal-Mart, much of the action was in attempts to certify class actions seeking substantial money damages under 23(b)(2), but since that decision effectively resolved the circuit split on this issue, there was little action in this area over the last year.

(1) 23(b)(1)

Probably the least utilized section of Rule 23(b), Rule 23(b)(1)(B) authorizes a non-opt out, mandatory class action, usually relating to a "limited fund." The attractions to the settling parties are that Rule 23(b)(1)(B) does not provide for notice or an opportunity to opt out; nor need the predominance standard of Rule 23(b)(3) be satisfied. Case law has, however, placed severe constitutional limits on the use of the "limited fund" doctrine. In Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), the Supreme Court reversed a certification of a mandatory class under Rule 23(b)(1)(B) because the district court had failed to ascertain and independently evaluate the limits of a global settlement fund, which liquidated actual and potential asbestos tort damages. 527 U.S. at 864. Ortiz made clear that the settlement itself cannot create the limited fund.[50]

Attempts to certify "limited fund" class actions under Rule 23(b)(1)(B) continue without success. In In re Katrina Canal Breaches Litig., 628 F.3d 185 (5th Cir. 2010), the district court certified a class based on a "limited fund" rationale, where some $21 million (allegedly consisting of all the available insurance proceeds) had been deposited in the fund. Revealingly, the municipal defendants made no payment or contribution. As proposed, the limited fund was to be distributed to a wide range of victims of Hurricane Katrina. The Fifth Circuit rejected both the class certification and the settlement approval because no procedures or criteria were specified by which to allocate the fund among very differently situated class members (thereby flunking the third criterion under Ortiz that claimants be treated equitably among themselves). The Fifth Circuit also indicated its suspicion that the fund would be exhausted simply by administrative expenses and certain defense costs – and thus provide no benefit to class members.

Similarly, in Klein v. O'Neal, 2006 U.S. Dist. LEXIS 5436 (N.D. Tex. Feb. 13, 2006), plaintiffs were equally unsuccessful in attempting to certify a "limited fund" class in a mass torts case involving a pharmaceutical product used on newborn infants.[51] The defendant manufacturer claimed that it was without assets and that its insurance proceeds were insufficient. Although

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[50] Although most Rule 23(b)(1)(B) classes involve limited funds, this is not invariably the case. Other actions can also be brought under this section where, for other reasons, the adjudication is likely to be dispositive of the rights of all class members. See In re Integra Realty Resources Inc., 354 F.3d 1264 (10th Cir. 2004); Eslava v. Gulf Tel. Co., 2007 U.S. Dist. LEXIS 57959 (S.D. Ala. Aug. 7, 2007). In Taylor v. United Techs. Corp., 2008 U.S. Dist. LEXIS 43655 (D. Conn. June 3, 2008), class certification was granted covering past, current and future participants in an ERISA plan in a suit alleging breaches of fiduciary duty by the Plan's Investment Committee and other administrators. ERISA cases may be the most likely context for continued use of Rule 23(b)(1) certifications.

[51] Although unsuccessful as a Rule 23(b)(1)(B) class action, this case was ultimately certified under Rule 23(b)(3). See Klein v. O'Neal, 705 F. Supp. 2d 632 (N.D. Tex. 2010). It probably represents the only mass tort class action for personal injuries that has been settled and certified in recent years.

plaintiffs argued that Ortiz was inapplicable because the proposed class was not a settlement class, the District Court still held that Ortiz specified three conditions to any "limited fund" class action, whether or not the action involved a settlement class: (1) "The first and most distinctive characteristic is that the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all claims." Ortiz, 527 U.S. at 838. (2) The second characteristic is that "the whole of the inadequate fund was to be devoted to the overwhelming claims." Ortiz, 527 U.S. at 839. (3) The third is that "the claimants identified by a common theory of recovery were treated equitably among themselves." 527 U.S. at 839. The Supreme Court described these three conditions as "presumptively necessary." 527 U.S. at 842. Because the plaintiffs had not adequately estimated the maximum size of the aggregated claims, the District Court found Ortiz's first condition not to have been satisfied.[52]

What facts can justify restricting the class members' right to opt out and pursue individual remedies under Rule 23(b)(1)? A useful example is supplied by In re Schering Plough ERISA Litig., 589 F.3d 585 (3d Cir. 2009), where employees in a defined contribution retirement plan sued over declines in the company's stock price that had lowered the value of their retirement plan. Because the alleged breaches of fiduciary duty, if true, would affect all plan participants, this factor was found to satisfy Rule 23(b)(1)(B). Although the case was remanded, ERISA plans provide an apt illustration of when a single class proceeding covering all covered

[52] One decision has, however, certified a mandatory punitive damages class action under Rule 23(b)(1)(B). See Baker v. Washington Mutual Finance Group, LLC, 193 Fed. Appx. 294, 298 (5th Cir. 2006). The defendant, who had issued insurance policies to the class members, had ceased operations and appeared to have a net worth of $50 to $70 million. The settlement contained no injunctive relief, but established a $3.5 million limited fund to resolve all punitive damage claims. Whether these facts were sufficient to satisfy Ortiz's standards seems debatable, because Ortiz principally insisted that the settlement could not create the limited fund (and here the district court did). The result seems inconsistent with In re Simon II, 407 F.3d 125 (2d Cir. 2005), which is discussed below.

employees is necessary. See also Spano v. The Boeing Co., 633 F.3d 574 (7th Cir. 2011) (approving class certification with similar rationale); Stott v. Capital Financial Services, Inc., 277 F.R.D. 316 (N.D.Tex. Sep 12, 2011)(approving (b)(1)(B) settlement class of shareholders arising out of an alleged Ponzi scheme).

Other attempts to utilize the "limited fund" justification for a Rule 23(b)(1) certification have also met appellate resistance. Ortiz defined a "limited fund" class action as one that aggregated "claims … made by numerous persons against a fund insufficient to satisfy all claims." Ortiz, 527 U.S. at 834. In In re Simon II Litig., 211 F.R.D. 86 (E.D.N.Y. 2002) and In re Simon II Litig., 2002 U.S. Dist. LEXIS 25632 (E.D.N.Y. Oct. 22, 2002), United States District Judge Jack Weinstein attempted to use the Constitution to justify a limited fund on the rationale that due process and the Eighth Amendment placed a ceiling on repetitive awards of punitive damages for the same conduct. This "limited punishment" theory had been endorsed (and criticized) in recent law review commentary.[53] A few decisions had earlier certified mandatory punitive damages classes. See In re the Exxon Valdez, 1995 WL 527990, at *9 (D. Alaska 1995); In re Agent Orange Prod. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y. 1983), aff'd In re Diamond Shamrock Chems. Co., 725 F.2d 858, 862 (2d Cir. 1984). Notably, the case arising out of the Exxon Valdez spill was certified as a class action on *defendant's* motion, and was ultimately was heard by the Supreme Court on the question of excessive punitive damages. Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) (striking down punitive damages award as excessive). This indicates that defendants may sometimes see the benefit of a punitive damages

[53] See generally, Elizabeth Cabraser & Thomas Sobol, Equity for the Victims, Equity for the Transgressor, 74 Tulane L. Rev. 2005, 2023 (2000); Joan Steinman, Managing Punitive Damages: A Role for Mandatory "Limited Generosity" Classes and Anti-Suit Injunctions?, 36 Wake Forest L. Rev. 1043 (2001). But see Richard Nagareda, Punitive Damages Class Actions and the Baseline of Tort, 36 Wake Forest L. Rev. 943 (2001).

class.

In In re Simon II Litig., 407 F.3d 125 (2d Cir. 2005), the Second Circuit vacated Judge Weinstein's "limited punishment" class, based on the Supreme Court's instruction in Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), that Rule 23 should not be construed liberally. The Second Circuit found the constitutional "cap" on punitive damages to be too theoretical and unsupported by concrete evidence that some plaintiffs in individual actions would be eventually denied punitive damages. It also speculated (but did not necessarily hold) that a punitive damages award in the absence of a compensatory recovery might violate State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003), because the jury could not determine if a sufficient nexus existed between the punitive damages and the actual and potential harm to the plaintiff class.

Although less frequently litigated, Rule 23(b)(1)(A) class actions have also received skeptical appellate scrutiny with the certification being reversed. See Pipefitters Local 636 Insurance Fund v. Blue Cross Blue Shield of Michigan, 654 F.3d 618 (6th Cir. 2011) (reversing class certification on interlocutory appeal on the grounds that there was no basis to believe that different adjudications would expose the insurer to different affirmative duties or impair its ability to pursue a uniform course of conduct). Following Ortiz, the 11th Circuit ruled that only actions seeking injunctive or declaratory relief can be certified under Rule 23(b)(1)(A), because money damages cases do not pose a risk of inconsistent adjudications. See Babineau v. Federal Express Corp., 576 F.3d 1183, 1195 (11th Cir. 2009) (request for injunctive relief inadequate when "primary remedy sought in this case is unquestionably monetary relief for past failure to compensate employees"). See also Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1193 (9th Cir.2001). But see Harris v. Koenig, 271 F.R.D. 383, 393 (D.D.C. Nov 12, 2010) (holding rationale in Babineau inapplicable in ERISA context where adjudication concerns the entire plan).

(2) 23(b)(2)

The primary role of Rule 23(b)(2) class actions is to provide injunctive or declaratory relief. Individualized money damages cannot be awarded under Rule 23(b)(2), but the availability of standardized damages in injunctive class actions remains open. In Wal-Mart, the Court expressed skepticism as to whether money damages would *ever* be available in a (b)(2) class action. 131 S. Ct. at 2560.

a. Monetary relief flowing to the class as a whole. It seems clear that Title VII class actions going forward will have to seek class certification under 23(b)(3) in order to bring claims for back pay. Cases in other substantive areas are likely to be similarly affected, so that plaintiffs are forced to meet the higher 23(b)(3) standard to obtain any monetary relief. See, e.g., Nationwide Life Ins. Co. v. Haddock, Slip Copy, 2012 WL 360633 (2d Cir. 2012) (remanding ERISA class action on the question of whether the class could be certified under 23(b)(2) because each individual class member would be entitled to monetary damages).

The issue for the future is: when are money damages sufficiently specified by a formula or statutory penalty that they are not individualized and so can be awarded under Rule 23(b)(2)? Some courts have certified (b)(2) class actions where the monetary relief component flows directly from the injunctive relief. See, e.g., Rivera v. Lebanon School Dist., Slip Copy, 2012 WL 2504926 (M.D. Pa. 2012) (certifying (b)(2) class seeking a declaratory judgment and restitution because "restitution [] would flow directly from such declaration."); In re Celera Corp. Shareholder Litigation, 2012 WL 1020471, *17+ (Del.Ch. Mar 23, 2012) (holding that certification of (b)(2) class in breach of fiduciary duty case claiming monetary damages was appropriate because there were no individualized damages determinations required). The most important case in this area remains In re Monumental Life Ins. Co., 365 F.3d 408 (5th Cir. 2004). That case was a class action brought by African-American policyholders who challenged defendant insurers' alleged practice of paying lower benefits and charging higher premiums to African-Americans in the sale of low-value life insurance. The district court denied class certification, finding that monetary relief predominated over injunctive relief, but the Fifth Circuit reversed. Certification under Rule 23(b)(2), it said, did not hinge on the subjective intent or desires of the class representatives or their counsel, but on whether monetary relief could flow directly to the class as a whole on the claims forming the basis for injunctive or declaratory relief. Apparently, the Fifth Circuit believed that the differential between the insurance premiums charged African-American policyholders versus that charged other policyholders could be easily and objectively calculated in Monumental.

Accordingly, whether classes seeking monetary relief based on formula or statutory penalty might survive as (b)(2) class actions after Wal-Mart remains an open question. Statutory damages cases, it should be noted, face other hurdles. In Parker v. Time Warner Entertainment Co., 331 F.3d 13 (2d Cir. 2003), the Second Circuit remanded a case seeking statutory damages under (b)(2) because the statutory damages arguably "flow directly from a finding of liability on the claims for class-wide injunctive and declaratory relief." In a separate concurring opinion, Circuit Judge Jon O. Newman focused on the enormous size of the class – 12 million subscribers – and the possibility that a $1,000 minimum damages award per class member could bankrupt the defendant. Given that the sheer size of the back pay claims in Wal-Mart played a part in the Court's view that monetary relief was not appropriate in that case, the question of whether substantial monetary damages, no matter how formulaic, can ever be available in a (b)(2) class action will rise again.

b. Medical monitoring. The Circuits continue to be split on the question of whether medical monitoring class actions can be certified as injunctive class actions. The Third Circuit has indicated, but did not definitively decide, that medical monitoring class actions are likely not certifiable under 23(b)(2) after Wal-Mart because these types of actions raise causation issues that require individual proof, therefore not demonstrating the type of cohesion required for an injunctive class action to be certified. See Gates v. Rohm and Haas Co., 655 F.3d 255 (3d Cir. 2011). By contrast, a Massachusetts district court certified an injunctive class action for medical monitoring holding that this was a form of injunctive relief. See Donovan v. Philip Morris USA, Inc., 2012 WL 957633 (D.Mass. Mar 21, 2012).

c. Variations in injunctive relief. Even in cases seeking only pure injunctive relief, both the Fifth and Seventh Circuits have interpreted the Court's rejection of (b)(2) certification in Wal-Mart to spell the death knell for cases seeking injunctions that are not across the board. See M.D. ex rel. Stukenberg v. Perry, 675 F.3d 832, 845 (5th Cir., 2012) (denying certification under 23(b)(2) where plaintiffs sought "at least twelve broad, classwide injunctions, which would require the district court to institute and oversee a complete overhaul of Texas's foster care system."); Jamie S. v. Milwaukee Public Schools, 668 F.3d 481 (7th Cir. 2012) (decertifying (b)(2) class in part because the case would require individualized injunctions). These cases show a doctrinal spillover of the Court's more restrictive view on commonality into the (b)(2) analysis.

Prior to Wal-Mart, several Circuits had declined to certify a suit for rescission or restitution (plus in one case injunctive relief) as a class under Rule 23(b)(2), but the logic of these cases differ. In Christ v. Ben. Corp., 547 F.3d 1292 (11th Cir. 2008), the Eleventh Circuit emphasized that TILA did not confer a right to injunctive or equitable relief. There, the district court had both certified a nationwide class, granted injunctive relief, and awarded over $22 million in restitution or disgorgement fees under TILA. The Eleventh Circuit noted that no rights to injunctive or equitable relief were expressly conferred by TILA on the plaintiffs and therefore ruled that certification under Rule 23(b)(2) was improper. Plaintiffs' request for declaratory relief was also found to be an insufficient basis for granting Rule 23(b)(2) certification. Alternatively, the Court also held that plaintiffs had failed to demonstrate typicality under Rule 23(a) because of choice of law problems inherent in a nationwide class. In Andrews v. Chevy Chase Bank, 545 F.3d 570 (7th Cir. 2008), cert. denied, 129 S. Ct. 2864 (2009), the Seventh Circuit characterized rescission as a "purely personal remedy" that it doubted Congress had intended to authorize class-wide under TILA.[54]

d. Manageability and Rule 23(b)(2)

Even though "manageability" is not expressly referenced in Rule 23(b)(2), it is being used by some courts as a way to curtail the expansive use of Rule 23(b)(2). In In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 209 F.R.D. 323 (S.D.N.Y. 2002), a multi-state class of private well owners sued 20 oil companies, alleging that their groundwater had been contaminated as a result of the use of a gasoline additive, known as "MTBE." The plaintiffs sought to proceed as a class under Rule 23(b)(2) or, alternatively, under Rule 23(b)(3), but the District Court found the action to be so broad in the relief requested as to be "unmanageable."

[54] For similar opinions in the First and Fifth Circuits, see McKenna v. First Horizon Home Loan Corp., 475 F.3d 418 (1st Cir. 2007) and James v. Home Constr. Co., 621 F.2d 727 (5th Cir. 1980).

Initially, the MTBE Court suggested that Rule 23(b)(2) certification would be appropriate in the tort context only where a class seeks only medical monitoring, and thus when a single actor or a few actors have caused a discrete accident or contamination of an isolated geographic area, such a certification should be denied. The Court also characterized the case before it as "a hybrid environmental contamination/products liability class, seeking mandatory injunctive relief in the form of clean water and well remediation … where the class members are geographically dispersed; a large group of actors manufactured the product in question but the contamination stems directly from such diverse causes as burst pipelines, car accidents, and leaking USTs; and the level and effect of the contamination differ dramatically among the putative class members." Id. at 342.

Addressing the issue of Rule 23(b)(2) certification, the Court found three problems with certification. First, the court found that individualized issues such as the level of contamination, the source of the contamination, how the contamination affected each plaintiff, and the nature of the relief requested, all rebutted the presumption of cohesiveness. The Court pointed out that if it "were to grant plaintiffs' request and issue an order directing the defendants to provide `clean water' to the class, it could not do so without crafting a specific remedy for each class member," which is "an impermissible result under Rule 23(b)(2)." Id. at 344.

Second, the court found the injunction that plaintiffs requested for "the provision of clean water" and "remediation of contaminated wells" to be too broad to satisfy Rule 65(d)'s requirement of specificity. The court noted that the only injunction possible, were the class certified under Rule 23(b)(2), would be one of "broad guidelines," which is impermissible in light of the Rule 65(d) requirement.

Third, the court found it problematic that not all polluters were before the court: "Any injunctive order issued by this Court would bind `only the parties to the action, their officers, agents, servants, employees, and attorneys.'" Id. at 346.

Both the Fourth and the Tenth Circuits have also ruled that manageability may be a factor in a Rule 23(b)(2) certification decision. See Shook v. El Paso County, 386 F.3d 963 (10th Cir. 2004); Shook v. Bd. of County Comm'rs, 2008 U.S. App. LEXIS 18542 (10th Cir. Aug. 29, 2008). Other courts, while not calling this requirement "manageability" have held that individualized issues that would not create a barrier to certification under 23(a) nevertheless prohibit certification under 23(b)(2). This phenomenon is discussed in "variations in injunctive relief," above. See also Heffner v. Blue Cross and Blue Shield of Ala., Inc., 443 F.3d 1330 (11th Cir. 2006) (vacating certification of 23(b)(2) class on the grounds that individual issues of reliance overshadowed common questions).

An earlier decision in the Fifth Circuit, however, disagreed with this analysis. See Forbush v. J.C. Penney Co., 994 F.2d 1101, 1105 (5th Cir. 1993).

(3) 23(b)(3)

a. Predominance. The requirement of Rule 23(b)(3) that common issues of law and fact "predominate" over individual issues is the principal hurdle to the certification of class actions seeking money damages. Many decisions find predominance to be lacking because of factors such as: (1) variations in state law; (2) the need to show individual reliance in a fraud case; (3) proximate causation (particularly in mass tort cases); or (4) the difficulty of measuring damages. For recent examples in which predominance has defeated class certification because of factual or legal complexity, see Marcus v. BMW of N. Am., LLC, 687 F.3d 583 (3d Cir. 2011); Pilgrim v. Universal Health Card, LLC, 600 F.3d 943 (6^{th} Cir. 2011); Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935 (9th Cir. 2009); Babineau v. Federal Express Corp., 576 F.3d 1183 (11th Cir. 2009).

Those courts that are more liberally disposed towards certification take the position that "the predominance requirement is met if this common question is at the heart of the litigation." Powers v. Hamilton County Public Defender Commission, 501 F.3d 592, 619 (6th Cir. 2007). This line of cases holds that "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 been resolved does not dictate the conclusion that a class action is impermissible." *Id.* at 619 (citing Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988)). Powers then specifically added that: "Cases alleging a single course of wrongful conduct are particularly well-suited to class certification." *Id.* Thus, focusing the pleadings on a "single factual theory of wrongdoing" may be essential for the plaintiff's attorney, and the need to individualize damages will not be fatal under this more liberal view.

Courts define the predominance requirement differently. Those more sympathetic to class certification state that the plaintiff must prove that "issues subject to generalized proof and applicable to the class as a whole predominate over issues that are subject to only individual proof." See Randleman v. Fidelity Nat'l Title Co., 646 F.3d 347, 362–63 (6th Cir. 2011). Conversely, those courts less sympathetic to class certification repeatedly state that even if a question is "common in the colloquial sense," the predominance requirement is only satisfied if the common questions could be "definitively answered for all class members using a generalized set of facts and producing one unified conclusion." See Hancock v. Chicago Title Ins. Co., 263 F.R.D. 383, 388 (N.D. Tex. 2009), *aff'd sub nom*, Benavides v. Chicago Title Ins. Co., 636 F.3d

699 (5th Cir. 2011); Ahmad v. Old Republic Nat'l Title Ins. Co., 2012 U.S. App. LEXIS 16001 (5th Cir. August 12, 2012).

Because numerous cases show how the predominance requirement can defeat class certification, it is more useful to begin with the somewhat rarer appellate case in which the predominance requirement is found to have been satisfied. In Young v. Nationwide Mut. Ins. Co., 2012 U.S. App LEXIS 18625 (6th Cir. Sept. 6, 2012), plaintiffs alleged that the defendant insurer had charged them for a local government tax on their insurance premiums that was either not owed or was less than had been billed to them. The overbilling appears to have occurred because of mistakes about the particular local government district in which plaintiffs resided. Defendants sought to deny certification on the theory that plaintiffs "cannot establish the causation element of their claims without reviewing the communications between each policyholder and insurance agent to decipher where the error originated." Id. at *31. Plaintiffs responded "that verification processes using geocoding software would catch most types of errors and that defendants caused each class members' injury simply by failing to use such processes." Id. at *32. The Sixth Circuit agreed that the existence and reasonableness of such techniques was "a predominant issue central to each of the Plaintiff's claims and subject to generalized proof." Id.

Recent cases show the variety of ways in which the predominance requirement can be read to bar certification:

1. Antitrust. The three required elements of an antitrust claim are: (1) violation of the antitrust laws; (2) antitrust injury and causation, and (3) damages. See Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 98 (2d Cir. 2007) (quoting In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 135 (2d Cir. 2001)). The second of these

elements–antitrust injury–requires each plaintiff to prove that it has suffered "antitrust injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). Potentially, antitrust injury can be an individual issue that precludes certification under the predominance standard of Rule 23(b)(3). Numerous recent cases have analyzed this "antitrust injury" requirement.[23] Recently, both the Second and Third Circuits appear to have simplified this requirement. In Cordes, 502 F.3d 91, the plaintiffs alleged a horizontal price-fixing conspiracy to fix the spreads charged by underwriters in certain initial public offerings. The district court had denied certification on the ground that "the antitrust injury element of [the] lawsuit presents questions individual to each class member." Id. at 106.

The Second Circuit reversed, dividing the question of antitrust injury into "two distinct questions":

> "One is the familiar factual question whether the plaintiff has indeed suffered harm, or 'injury-in-fact.' The other is the legal question whether any such injury is 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.' Brunswick, 429 U.S. at 489."

Id. at 106.

Viewed in this way, the Second Circuit said that the issue came down "to a single question—whether injury-in-fact can be proved by common evidence." Id. at 107. The plaintiffs' expert had testified that "the court could use a single formula to establish the supracompetitive prices a plaintiff had paid," while "the defendants' expert thought no such formula could be constructed." Id. at 107. The Second Circuit remanded for a determination of whether it was feasible to determine "the but-for fee" (i.e., the fee that would be paid in the

[23] For a recent decision finding "antitrust injury" present for certain Sherman Act claims, but lacking for Clayton Act claims, see Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297 (3d Cir. 2007).

absence of collusion) and then compare it with the fee actually paid, which procedure, it implied, would permit certification of the class.

The Second Circuit also raised two other possibilities to be considered on remand: (1) even if injury-in-fact proved to be an individual question, did it predominate over the other common questions?; and (2) could partial certification under Rule 23(c)(4)(A) be used, as the Second Circuit had earlier suggested in In re Nassau County Strip Search Cases, 461 F.3d 219, 222 (2d Cir. 2006)?

Similarly, the Third Circuit recently found that plaintiffs were able to establish by its preponderance standard that they would be able to prove through common evidence (1) class-wide antitrust impact and (2) a common methodology by which to quantify damages on a class-wide basis. See Behrend v. Comcast Corp., 665 F.3d 182 (3d Cir. 2011). Essentially, plaintiffs alleged that through a series of acquisitions and contracts defendant cable providers had raised their market share in the relevant Philadelphia market from 23% to 77% and that this increase implied higher costs on non-basic cable programs. Nonetheless, the Supreme Court's recent decision to grant certiorari in this case strongly suggests that a new standard for proof of antitrust injury and damages may be forthcoming from the Court. See Comcast Corp. v. Behrend, 2012 U.S. LEXIS 4754 (June 26, 2012).

Decisions in other Circuits have been considerably less receptive to finding "antitrust injury" to be susceptible to common proof. In Robinson v. Tex. Auto. Dealers Ass'n, 387 F.3d 416 (5th Cir. 2004), the Fifth Circuit reversed the conditional certification of a class of over one million consumers who had purchased automobiles in Texas since 1994. In 1994, the Texas Automobile Dealers Association ("TADA") had instructed its members to charge the Texas Vehicle Inventory Tax ("VIT") as a separate line item added on to the price of the car, and plaintiffs challenged this policy as amounting to horizontal price-fixing. The Fifth Circuit assumed for purposes of its decision that the conduct constituted price-fixing, but still found that by including in the class every purchaser who paid the VIT, plaintiffs had grouped consumers with divergent negotiating histories into a single class and thereby created an overbroad class that failed the test of predominance. In its view, some consumers had not been injured by the separate itemization of the VIT because they had insisted on an all-inclusive, bottom-line price (with the result that the dealer bore the tax), while other consumers had negotiated only the auto price (a "top-down" negotiating strategy in its words) and so had borne the tax. The critical factual question thus became whether a class member had suffered an actual injury. Because only an individualized assessment by the district court of each consumer's negotiating approach could resolve this issue, the individual issues were found to predominate over the common ones.[24] Robinson stands as the leading decision requiring an "intense factual investigation" in connection with the certification of an antitrust class action. Id. at 420.[25]

Market definition can also determine whether predominance can be satisfied. In Blades v. Monsanto Co., 400 F.3d 562 (8th Cir. 2005), plaintiff farmers alleged that defendants had conspired to inflate the price of genetically modified corn and soybean seeds. The district court found that the requirements of Rule 23(a) were satisfied, but that the predominance requirement of Rule 23(b)(3) was not because neither the existence of a conspiracy to fix prices nor the resulting harm constituted a question common to the class. Because of the wide distribution in geography, markets and prices among the class members, the district court found that each

[24] See also Weisfeld v. Sun Chem. Corp., 84 Fed. Appx. 257, 2004 U.S. App. LEXIS 277 (3d Cir. Jan. 9, 2004) for a similar decision (discussed infra at Part IV (a)).
[25] Conversely, some other courts employ the opposite presumption that an antitrust class action is certifiable. See In re Lorazepam & Clorazepate Antitrust Litig., 202 F.R.D. 12, 22 (D.D.C. 2001).

farmer's claim was highly individualized. The Eighth Circuit affirmed, stressing the lack of common evidence leading to a conclusion of a common class-wide injury.

An essentially similar case is Heerwagen v. Clear Channel Communications, 435 F.3d 219 (2d Cir. 2006), which involved an alleged conspiracy to fix the price of rock concert tickets in violation of Section 2 of the Sherman Act (15 U.S.C. § 2). Although the defendant possessed obvious market power, the district court found that the relevant market was local (because purchasers in a distant city would not travel to the local venue based on cheaper local ticket prices). Put differently, even if rock concerts were promoted nationally, a potential ticket purchaser was unlikely to travel to attend a rock concert outside the purchaser's local geographic region simply based on relative ticket prices. Because the relevant market was local, individualized questions would predominate as to each local market.

According to the First Circuit, novel antitrust cases require a more rigorous examination of the plaintiffs' factual claims and the merits of their case. In Brown v. Am. Honda (In re New Motor Vehicles Canadian Exp. Antitrust Litig.), 522 F.3d 6 (1st Cir. 2008) the First Circuit panel explained:

> When a Rule 23 requirement relies on a novel or complex theory as to injury, as the predominance inquiry does in this case, the district court must engage in a searching inquiry into the viability of that theory and the existence of the facts necessary for the theory to succeed.

Id. at 26. In this case the plaintiffs' novel theory was that defendants violated the Sherman Act when they acted in ways to reduce the number of Canadian cars in the American market. Plaintiffs argued that the higher value of the American dollar, the liberal trade agreements between the United States and Canada, and the similarities between American and Canadian cars created excellent arbitrage opportunities for selling Canadian cars in the American market. They claimed that defendant automobile manufactures had acted together in various ways to reduce the supply of cheaper Canadian cars in the American market and thereby violated the Sherman Act. "But for" these acts, plaintiffs alleged, American consumers would have paid less for automobiles. The First Circuit vacated the injunctive class, finding that a live controversy no longer existed because currency rates had changed. The damages action was also remanded to the district court, but with instructions that it must undertake a careful assessment of the merits of the action and plaintiffs' evidence before certifying the action.

Another obstacle to a finding of predominance is the continuing dispute over whether the need for individualized damage determinations precludes a finding of predominance. Compare In re Magnetic Audiotape Antitrust Litig., 2001 U.S. Dist. LEXIS 7303 at *25 (S.D.N.Y. June 1, 2001) (blanket rule that damages issues should not defeat certification) with Pickett v. IBP Inc., 182 F.R.D. 647 (M.D. Ala. 1998) (individualized damages can render class unmanageable), rev'd on other grounds, 209 F.3d 1276 (11th Cir. 2000). On this issue of damage variation and predominance, the Sixth Circuit has recently held that predominance could be met "even where there are individual variations in damages." See In re Scrap Metal Antitrust Litig., 527 F.3d 517, 535 (6th Cir. 2008). Plaintiffs in this case were manufacturers who generated scrap metal as a byproduct of their industrial activities. They alleged violations of the Sherman Act against the dealers who purchased their scrap metal, through the price-fixing of bids. The plaintiffs sought an aggregate recovery, based on expert testimony showing that prices had been depressed 16.4% market-wide by the scrap metal dealers' collusion, but the Sixth Circuit wrote more broadly. The Court stated that, since "the 'fact of damages' was a question common to the class" the predominance standard would be passed "even if the amount of damages sustained by each individual class member varied." Id. Under Scrap Metal, individualized damages in antitrust will not defeat predominance so long as "the defendants conspired to interfere with the free market pricing structure." Id. [26]

Similarly, the Ninth Circuit has repeatedly ruled that "the mere fact that there might be differences in damages calculations is not sufficient to defeat class certification." Stearns v. Ticketmaster Corp., 2011 U.S. App. LEXIS 17454 at *29 to *30 (9th Cir. August 22, 2011) (citing cases).

Settlement classes in antitrust cases have historically received judicial deference. In particular, the Third Circuit has taken a far more hospitable view of an antitrust class action when it is presented as a settlement class action. In In re Warfarin Sodium Antitrust Litig., 391 F.3d 516 (3d Cir. 2004), eleven consumers and consumer groups challenged certification of a nationwide class alleging anticompetitive behavior and false information by DuPont in connection with its seeking to dissuade consumers from using a generic alternative to a DuPont product. Because the Third Circuit agreed that DuPont's actions toward the class were part of a broad national campaign, it found the commonality and predominance requirements easily satisfied. Because the injury was economic and not physical, it also did not consider damages to require much individual proof of injury. Finally, because this was a settlement class, it said that variations in state law were not a preclusive barrier and did not imply a lack of commonality. In its view, all the class representatives' claims arose from the same alleged conduct by DuPont and involved the same legal theories, thereby allowing it to find "typicality" also to be satisfied. Although the Third Circuit noted in a footnote that it would have been the better approach to use

[26] An interesting recent case on whether the issue of damages can defeat class certification is Busby v. JRHBW Realty, Inc., 513 F.3d 1314 (11th Cir. 2008), which found that when a fee was charged for no services performed, the absence of any value simplified the damage determination and removed the issue as an obstacle to class certification.

subclasses, it accepted the certification of a single class, including consumers and third-party payors.

The Third Circuit's view that predominance is less of an obstacle to settlement class certification was re-affirmed and extended in Sullivan v. DB Investments Inc., 667 F.3d 273 (3d Cir. 2011), cert. denied, 2012 U.S. LEXIS 2656 (Apr. 2, 2012). See also Denney v. Jenkens & Gilchrist, 230 F.R.D. 317, 335 (S.D.N.Y. 2005) (certification of settlement class upheld where no evidence suggested collusion, despite issues of varying state law and individual reliance), rev'd on other grounds, Denney v. Deutsche Bank AG Sec. Inc., 443 F.3d 253 (2d Cir. 2006). Settlement classes continue to receive favored treatment.

2. Mass Torts. Mass tort cases are relatively more likely to run afoul of the predominance requirement. Since Amchem Prods. v. Windsor, 521 U.S. 591 (1997), few attempts have even made to certify a mass torts class action for personal injuries under Rule 23(b)(3).[27] The MTBE litigation, which was discussed above and involved a gasoline additive, illustrates the problems. There, the plaintiffs argued that, even if (b)(2) certification were inappropriate, Rule 23(b)(3) certification was permissible. On the question of predominance, the plaintiffs argued that several common issues predominated over individual issues: the defendants' decision to use MTBE, their shared knowledge of its dangers, the existence of alternatives to MTBE, and the foreseeability of gasoline releases.

In spite of these common issues, the Court was troubled by the fact that the plaintiffs' injuries did not result from a single incident, as in most environmental mass torts. The Court noted that all of the precedents plaintiffs cited involved a plaintiff class that was injured by a

[27] An exception exists to every generalization. In Klein v. O'Neal, 705 F. Supp. 2d 632 (N. D. Tex. 2010), a mass tort class action was settled and certified in 2010 that provided for a $90 to $110 million settlement. The case involved a drug that caused infant deaths and had been litigated for five years.

single incident, such as the release of a chemical within a specific geographic location. In contrast, the present case involved "contamination over many years across four states indirectly caused by twenty defendants in conjunction with innumerable third parties who released the contaminant into the environment." 209 F.R.D. at 350. In denying Rule 23(b)(3) certification, the Court noted that: "Predominance cannot be found because a different intermediate or third party actor…has directly caused harm to each plaintiff by releasing gasoline in the vicinity." *Id.*

Those mass tort cases that are certified usually involve a single tort feasor and claims only for property damages. An example is Olden v. Lafarge Corp., 383 F.3d 495 (6th Cir. 2004), which involved the operation of a single cement manufacturing plant in Michigan. Defendants argued that individual issues predominated over common issues (and so precluded certification of a Rule 23(b)(3) class) because the toxins affected different individuals and their properties differently. Although the Sixth Circuit rejected this claim, it noted that if complications arose the district court could later bifurcate the issue of liability from the issue of damages pursuant to Rule 23(c)(4)(A). In finding that common issues predominated, the Sixth Circuit stressed (i) the objective nature of the evidence of property damage (e.g., the amount of cement dust that had fallen on the properties), (ii) the common nature of the injunctive relief sought (closing the cement plant), and (iii) the clear common cause of the injury (a single source—unlike in the MTBE case). The Court also certified this case as a Rule 23(b)(2) class action for injunctive relief (and rejected the claim that the individualized damages sought precluded such a certification), stressing that the injunctive relief here was important and not incidental. See also Gintis v. Bouchard Transportation Company, Inc., 596 F.3d 64 (1st Cir. 2010) (also a single tort feasor, property damage class action).

Olden stands in sharp contrast to Ball v. Union Carbide Corp., 385 F.3d 713 (6th Cir. 2004) (discussed supra), where the same year the same Circuit refused to certify an environmental mass torts case involving radioactive materials at Oak Ridge, Tennessee. What was the difference? A legal realist might suggest that the difference lay in the fact that Union Carbide involved personal injuries and long-term exposure, while Olden involved principally property damage.

3. Fraud, Securities and RICO cases: The Problem of Proving Reliance. The issue of reliance has increasingly become the key problem in the certification of a variety of class actions, such as those for securities fraud, consumer fraud, or products liability. To the extent that the reliance of each individual plaintiff in the class must be proven, then common issues of law and fact will seldom predominate. To overcome this reliance hurdle, potential plaintiff classes typically argue that they are entitled to a rebuttable presumption of reliance, as has been recognized in some securities fraud cases. A recurring question thus facing federal courts today is how far to extend these precedents.

a. Gambling Fraud. In Poulos v. Caesar's World, Inc., 379 F.3d 654 (9th Cir. 2004), plaintiffs alleged that defendant casino operators had defrauded them through a course of fraudulent and misleading acts that induced class members to play video poker and electronic slot machines. While the Ninth Circuit accepted for purposes of the class certification decision the allegation that fraudulent statements had been made, it found the decision to gamble to be highly subjective and to raise issues related to the consumer's knowledge, motivations, and expectations that were inherently individual in character and thus precluded a finding of predominance. Further, it found that a presumption of reliance was not warranted where the allegations of fraud could not be characterized primarily as claims of omission.

b. Securities Fraud. In the securities context, proof of reliance is generally not required when the "fraud on the market" doctrine applies or (less certainly) when a fiduciary breaches his or her duty by failing to disclose material facts (at least when the fiduciary discloses nothing at all). See Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972). If these doctrines are not applicable (based on the factors discussed below), the case can generally not be certified. However, the Second Circuit has ruled this year that, in the context of a settlement class, the inapplicability of the "fraud on the market" doctrine does not prevent certification. See Secs. Litig. v. General Reinsurance Corp. (In re Am. Int'l Group, Inc.), 689 F.3d 229 2d Cir. 2012). This decision, which found individual reliance to be chiefly a matter of manageability and not predominance, so far stands alone, but seemingly permits a "disarmed" plaintiff's attorney (who cannot get to trial) to settle a class action.

One of the more important recent developments in securities litigation may involve something that did not happen: the Second Circuit refused to cut back the "fraud on the market" doctrine so that it did not apply to statements made by securities analysts. It is often unclear whether an individual analyst's statements affected the market price (either because the individual analyst was unimportant or because his views were counterbalanced by other analysts taking different or even contrary positions). In In re Salomon Analyst Metromedia Litig., 544 F.3d 474 (2d Cir. 2008), the Second Circuit held that the doctrine is not limited to statements made by the issuer, but extends to statements made by other actors, such as securities analysts. However, it remanded the case to the District Court to permit defendants to have an opportunity to rebut this presumption in connection with the court's determination of whether the predominance requirement was satisfied. In the actual case, the analyst was Jack Grubman, possibly the most influential analyst in the telecommunications industry, but in other cases an analyst may have little influence and after the Salomon decision appears open to attack. This decision seems consistent with the Fifth Circuit's similar ruling on rebuttal of the "fraud on the market" presumption in Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 270 (5th Cir. 2007).

The "fraud on the market" doctrine's application is also uncertain when the plaintiff attacks conduct, rather than statements, in a securities fraud class action. In Stoneridge Investment Partners LLC v. Scientific-Atlanta, 552 U.S. 148 (2008), the Court emphasized that the deceptive conduct there at issue was never communicated to the market and hence reliance on it could not be shown. It can be debated whether Stoneridge calls into question the Third Circuit's creative (but vulnerable) analysis in Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154 (3d Cir. 2001). There, the putative plaintiff class consisted of clients of broker-dealers who had traded on NASDAQ and allegedly breached their duty of best execution to their clients. In essence, the plaintiff class alleged that in spite of the broker-dealers' legal duty to execute trades under the most "favorable terms reasonably available," the broker-dealers had simply been executing orders at the National Best Bid and Offer ("NBBO") spread, instead of investigating other alternatives that offered potentially better prices. The plaintiffs also argued that defendants' uniform practice of executing trades at the NBBO price, even when better prices were available elsewhere, and their failure to disclose this practice to customers, warranted a presumption that plaintiffs had relied on this non-disclosure. Conversely, the defendants argued that some of the plaintiffs, particularly the institutional investors, knew of these execution practices, such that reliance on non-disclosure of the execution practice could not be said to have occurred class-wide.

After analyzing a long line of cases discussing situations in which plaintiff classes are entitled to a presumption of reliance, the Third Circuit boiled down these arguments in Newton to their core policy: "The proper approach to the problem of reliance is to analyze the plaintiff's allegations, in light of the likely proof at trial, and determine the most reasonable placement of the burden of proof of reliance…Presuming reliance class-wide is proper when the material nondisclosure is part of a common course of conduct." *Id.* at 175–76.

Comparing the facts in Newton in which broker-dealers had failed to disclose their policy of executing NASDAQ trades at the NBBO price to those cases in which a securities dealer fails to disclose its policy of overcharging investors, the Court held that the defendants' actions constituted a potentially fraudulent common course of conduct from which reliance could be presumed. From a policy perspective, the court emphasized that:

> Because their allegations of a uniform nondisclosure would make it impractical for investors to affirmatively prove their lack of knowledge of defendants' practice, the burden of rebutting a presumption of reliance is properly placed on defendants here. Therefore, under this set of facts, we hold presuming reliance would be appropriate because defendants allegedly failed to disclose their trade execution practice.

Id. at 177.

Notwithstanding this protracted discussion of reliance, the Third Circuit panel still affirmed the District Court's denial of certification. It found that the proposed class of investors could not satisfy the predominance requirement of Rule 23(b)(3) because individual questions surrounded the issue of whether each class member had sustained economic injury: "Examining millions of trades to ascertain whether or not there was injury…mean[s] that individual issues [overwhelm] common questions among the class." *Id.* at 187. The court also held that the class did not satisfy the superiority requirement of 23(b)(3). The critical problem in the Third

Circuit's mind seems to have been that bids or offers within the NBBO spread were not constantly available; hence, only some class members could have been injured.

In an interesting counterpoint to Newton, the Third Circuit later that year refused to presume reliance in Johnston v. HBO Film Mgmt., 265 F.3d 178 (3d Cir. 2001). The complaint in Johnston alleged that the defendant brokers had distributed uniform marketing materials to their sales representatives that emphasized Michael Douglas's participation in the production of films, but failed to disclose that he was not under contract to produce any films for Cinema Plus. The materials specifically read:

> The Partnership has contracted for Michael S. Phillips and Michael Douglas to render producing services for a minimum of two and a maximum of four feature-length motion pictures for the Partnership.... Either Mr. Phillips and/or Mr. Douglas will be actively involved in a production capacity in all phases of production of all Partnership Films produced under the Mercury/Douglas Agreement.

Id. at 182. The plaintiffs alleged that they relied on their brokers' misrepresentations and omissions of material information as well as on those in the prospectus when they invested in Cinema Plus. But the court refused to presume reliance:

> Here, there is neither a finding, nor evidence upon which we reasonably could find, that the brokers utilized, and the plaintiffs received, a uniform sales pitch or uniform representations regarding investing in Cinema Plus. Therefore, it is questionable whether, or to what extent, the alleged misrepresentation facilitated or influenced the sales of Cinema Plus units. Accordingly, we find that the district court did not err in concluding plaintiffs were not entitled to a presumption of reliance, and therefore did not abuse its discretion in concluding the plaintiffs failed to establish the predominance requirement of Rule 23(b).

Id. at 194. Unlike in Newton, where the defendants engaged in a "common course of conduct," here the defendants did not necessarily use a "uniform sales pitch." This absence of a "common course of conduct" seems to be the key distinguishing fact.

A second limitation on the "fraud on the market" doctrine has sprung from increasing judicial skepticism about the limits of market efficiency. In Unger v. Amedisys Inc., 401 F.3d 316 (5th Cir. 2005), the Fifth Circuit found that a security traded on Nasdaq was still not traded in an efficient market. The plaintiffs had filed a suit under Rule 10b-5 following a restatement of the defendant corporation's earnings and then moved to certify a class of all purchasers who had bought Amedisys Stock from November 15, 2000 to June 13, 2001. The District Court certified the Rule 23(b)(3) class based on a fraud-on-the-market theory of presumed reliance. On interlocutory appeal, the major issue before the Fifth Circuit was the sufficiency of evidence to support the fraud-on-the-market theory. Although the Fifth Circuit acknowledged that reliance may be presumed when "a fraudulent misrepresentation or omission impairs the value of a security traded in an efficient market," the defendant was a small-cap stock, traded in a less-organized market, and hence, it said, the presumption that the market was efficient fell away, and efficiency had to be proven. The Court compared the degree of proof required here to the standards for Rule 12(b)(1) and 12(b)(2) motions and listed eight factors (and a number of cases) by which to gauge market efficiency. E.g., Cammer v. Bloom, 711 F. Supp. 1264 (D.N.J. 1989); Krogman v. Sterritt, 202 F.R.D. 467 (N.D. Tex. 2001). The Court did not go so far as to say that no over-the-counter market may be efficient, but suggested that there was a wide gulf between a market that trades millions of shares daily, and the market on which defendant traded. Applying the facts, the Court found that the District Court had relied on only three factors as a "checklist" for showing an efficient market, rather than performing a thorough analysis of market efficiency, and thus erred in certifying the class based on a fraud-on-the-market theory.

More recently, the Fifth Circuit has again ruled that a stock traded on Nasdaq (in its National Market System) did not satisfy the requirements for the "fraud on the market" doctrine.

See Bell v. Ascendant Solutions, Inc., 422 F.3d 307 (5th Cir. 2005). Although this decision was more procedural than Unger in its reasoning, it cited the same eight factor test for efficiency. *Id.* at 313 n.10. While other Circuits have to date been less aggressive on this score, the First Circuit in In re Polymedica Corp. Securities Litigation, 432 F.3d 1 (1st Cir. 2005), has reversed a District Court that used an overly expansive definition of stock market efficiency, vacating its certification of the class. Instead of the District Court's test (that "market professionals generally consider most publicly announced material statements about the companies"), it directed that the district court could only certify the class under the "fraud on the market" doctrine if it found that the stock's "price fully reflected all publicly available information." *Id.* at 10–13.

c. Consumer Fraud. The Newton Court's willingness to presume reliance based on the fact that the material nondisclosure was part of a "common course of conduct" has taken only limited root at best in other Circuits—with the notable exception of the Eleventh Circuit. Initially, the Circuit seemed to endorse a strong position that reliance was a factor that must be proven individually. In Sikes v. Teleline, Inc., 281 F.3d 1350 (11th Cir. 2002), a parent whose child had repeatedly called an automated 900-number to play a "Let's Make a Deal" game brought a class action against AT&T, asserting claims under RICO and various state laws. Although the district court certified the class, finding that "reliance may be virtually presumed," the Eleventh Circuit reversed, agreeing with AT&T. It stressed that "[t]he 'integrity of the market' is not at issue in this case, and AT&T did not owe these plaintiffs a fiduciary duty in the way that a broker may owe his client a fiduciary duty." *Id.* at 1363–64. Because the "fraud-on-the-market" doctrine did not apply, individual issues of reliance predominated, precluding certification.

Today, the reasoning in Sikes might be different after the Supreme Court's unanimous decision in Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639 (2008), which found that plaintiffs asserting claims predicated on mail fraud under RICO are not required to show reliance, either as an element of their claim or as a prerequisite to establishing proximate causation. Nonetheless, even if the reasoning needs to be different, the result in Sikes might remain the same because lower courts have found that third-party reliance must still be shown in order to establish proximate causation. See UFCW Local 1776 v. Eli Lilly and Company, 620 F.3d 121 (2d Cir. 2010).

Uniquely, the Eleventh Circuit has taken the most "liberal" approach to the issue of reliance for purposes of Rule 23(b)(3) certification. In Klay v. Humana, 382 F.3d 1241 (11th Cir. 2004) [28], a class of physicians had sued defendant HMOs under RICO, alleging violations of the mail and wire fraud statutes and that the HMOs had systematically underpaid them for various classes of patients. The district court certified the class, and defendants appealed primarily based on the issue of predominance. The district court had found that common questions of fact and law predominated because the case involved common factual issues, viz. "defendants' medical necessity requirements, defendants' use of actuarial guidelines, defendants' use of an automated claims system and comparable software ... and automatically delaying and denying claims as well as other uniform activities designed to deny, delay or decrease reimbursement or payments to physicians." On appeal, the Eleventh Circuit noted that RICO claims are based on a national conspiracy, which by nature is proven by common evidence. The Court then moved to the question of reliance, which, under Sikes, required each individual plaintiff to prove that she or he relied on the misrepresentations underlying the mail and wire

[28] In a subsequent decision in this litigation, the Eleventh Circuit also upheld the District Court's decision not to enforce a broad arbitration provision that the HMO had inserted in its contracts with doctors. See Klay v. Pacificare Health Systems, Inc., 389 F.3d 1191 (11th Cir. 2004).

fraud. Acknowledging the Fifth Circuit's prior holding in Castano that "a fraud class action cannot be certified when individual reliance will be an issue", the Eleventh Circuit distinguished the basis for that conclusion, which relied on variations in representations made to plaintiffs in order to show the absence of a standardized representation. Here, however, it said, the representations by defendants "conveyed essentially the same message—that the defendants would honestly pay physicians the amounts to which they were entitled." The Court then discussed Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718 (11th Cir. 1987), in which the court certified a securities class action despite the necessity of individual proof of reliance because of the existence of a common conspiracy. Similarly in the instant case, the Court found that the proof relating to the existence of a national conspiracy, a pattern of racketeering activity, and a "Managed Care Enterprise", would be common to the class and predominate over any individualized issues. It held that a reasonable factfinder could conclude, on a class-wide basis, that each individual plaintiff had relied on the defendants' representations.

The Court next rejected the assertion that individualized assessments of damages made the case unsuitable for class certification, because most of the damages assessments could be obtained simply by reference to computerized records. Furthermore, the benefit of litigating the liability issue all at once outweighed any burden of individualized damage inquiries: "It is ridiculous to expect 600,000 doctors across the nation to repeatedly prove [the] complicated and overwhelming facts [of a national conspiracy, a pattern of racketeering activity, and a "Managed Care Enterprise"]."

Having found that issues common to the class predominated, the Court affirmed the District Court's certification of the RICO classes, with the suggestion that the classes be split between the fee-for-service and capitation plaintiffs, since modes of proof will likely be different for each. In contrast, the Eleventh Circuit panel refused to certify the state-law claims. Although it found, with respect to the breach of contract claims, that the law of contract breach is uniform enough among the several states to permit a nationwide class, the individual issues of fact (e.g., the sheer number of different contracts, the individual circumstances of each breach) vastly predominated. While, under the RICO claim, evidence of conspiracy was central, the state law breach of contract claims would treat evidence of conspiracy as merely circumstantial. Furthermore, the "common" breach of contract, caused by various faulty computer algorithms which improperly grouped medical procedures together, was not common to all the doctors in the class. Rather, each faulty computer algorithm affected only a handful of doctors; therefore, separate subclasses would be required for each allegedly improper grouping algorithm. The unjust enrichment claims also required a similarly individualized factual determination. The alleged violations of various states' prompt-pay statutes were problematic for several reasons. First, only certain states have prompt-pay statutes, so at the least a subclass would be required. Second, each statute had different legal requirements, as well as different factual requirements to make out a claim. Because none of the state-law claims contained common issues of law or fact that predominated, the Court reversed class certification on the state law issues.

Important a precedent as Klay v. Humana may be, the Eleventh Circuit does not appear to always adhere to it. In Heffner v. Blue Cross and Blue Shield of Alabama Inc., 443 F.3d 1330 (11th Cir. 2006), the Eleventh Circuit found that before an ERISA class action could be certified, all class members had to be shown to have relied on the summary plan description ("SPD") sent them by the plan administrator. This was said in the context of an ERISA class consisting of as many as 240,000 participants and in a case where certification was sought under Rule 23(b)(2) (which has no predominance requirement). Lacking any predominance requirement to rest its holding on, the Eleventh Circuit relied instead on Rule 23(b)(2)'s language that the plaintiffs had to prove that "final injunctive relief ... with respect to the class as a whole" was appropriate. *Id.* at 1344 (emphasis added).

In the Ninth Circuit, a presumption of reliance has also been seen as justified, based on Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-154 (1972), but apparently only in cases involving omissions (and not affirmative misrepresentations). See Binder v. Gillespie, 184 F.3d 1059, 1064 (9th Cir. 1999). Anticipating the outcome in Bridge by six years, the First Circuit also found that proof of reliance is not required under civil RICO. See Sys. Mgmt. Inc. v. Loiselle, 303 F.3d 100, 103–104 (1st Cir. 2002). In a related area, the Third Circuit has found that reliance need not be shown under the Truth in Lending Act ("TILA"). See Schnall v. Amboy Nat'l Bank, 279 F.3d 205, 217 (3d Cir. 2002).[29]

In contrast, the Fourth and Fifth Circuits continue to apply a strong rule that reliance is an individual factor that precludes predominance. See Gunnells v. Healthplan Servs., 348 F.3d 417 (4th Cir. 2003); Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205 (5th Cir. 2003). However, to the extent that these decisions rejected a RICO class action, they may no longer be relevant precedents after the Supreme Court's decision in Bridge v. Phoenix Bond & Indemnity Co., discussed earlier.

b. The "Choice of Law" Problem. Another common issue that many Circuit courts have recently addressed under the predominance requirement of Rule 23(b)(3) is the "choice of law" problem. The "choice of law" problem arises when the claims of a class are governed by the laws of multiple states. Facing this problem, courts often deny certification based on the grounds that common questions of law do not predominate, that the class action will not be the superior

[29] But see Turner v. Beneficial Corp., 242 F.3d 1023, 1028 (11th Cir. 2001) (en banc) (detrimental reliance is an element under TILA); Perrone v. GMAC, 232 F.3d 433, 436–40 (5th Cir. 2000) (same).

method of litigation, or that the class action might not be manageable as such. An example is Grandon v. Merrill Lynch & Co., 2003 U.S. Dist. LEXIS 16003 (S.D.N.Y. Sept. 10, 2003), where plaintiffs alleged that defendants had charged excessive markups on the bonds sold to class members, in violation of both Rule 10b-5 under the federal securities laws and state fiduciary duties. The district court first found that an individualized assessment of each transaction was necessary, thus implying that factual issues predominated over the common issue of Rule 10b-5's legal requirements. Then, in dealing with state fiduciary duties, the court found (more debatably) that the fiduciary duties of securities brokers were materially different in each of the 50 states. Such variation in state law implied, the court found, not only that common issues of law did not predominate but that a single nationwide class would not be manageable because of the need for multiple subclasses.

Where contract claims are at issue, some courts have been willing to find that the law of contract breach is sufficiently uniform so as to permit a nationwide class. See, e.g., Klay v. Humana, supra. Conversely, in Clausnitzer v. Fed. Express Corp., 248 F.R.D. 647 (S.D. Fla. 2008), a district court distinguished Klay v. Humana, supra, finding that "choice of law issues" defeated predominance for a nationwide class in an employment contract dispute. Klay was distinguishable, it said, because the contracts before it were more individualized and were not form contracts.

Another answer to the "choice of law" problem is to find that the law of a single jurisdiction controls. United States District Judge Jack Weinstein used this approach in Simon v. Philip Morris, Inc., 124 F. Supp. 2d 46 (E.D.N.Y. 2000), where he was confronted with a nationwide class of smokers suing tobacco companies that had allegedly conspired to conceal the dangers of smoking. Because these claims implicated the laws of every state, the Court sought a legal rationale for resolving at least the general liability portion of the claims under New York law. The court relied on Babcock v. Jackson, 191 N.E.2d 279 (1963), which had adopted an "interest analysis" for New York torts conflicts, thereby departing from the former lex loci delicti standard. The Babcock court emphasized practicality: "Justice, fairness, and the 'best practical result' may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." Id. at 283.

Based on Babcock principles, the Simon court held that the general liability questions raised by the Rule 23(b)(3) class could be addressed under New York law, since New York had the most substantial interest, whereas individual questions of damages would be addressed under the laws of each state. The court emphasized that it was "dealing with human institutions that, unlike the exquisite machinery of atomic physicists with tolerances approaching zero, must interpret the law reasonably." 124 F. Supp. 2d at 77.

In sharp contrast, the Seventh Circuit in In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 288 F.3d 1012 (7th Cir. 2002) (Easterbrook, J.), declined to certify a nationwide consumer class action on behalf of SUV buyers and lessees of cars outfitted with tires having a high rate of failure. Personal injury claims were not asserted; rather, the plaintiffs argued breach of contract (on the theory that the vehicles were not merchantable) and consumer fraud (the undisclosed, high failure rate of the tires made them worth less than represented). Still, the Seventh Circuit reasoned that "[n]o class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of Fed. R. Civ. P. 23(a), (b)(3). . . . Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable." *Id.* at 1015-18.

The Seventh Circuit went on to articulate an extensive economic policy argument justifying its decision. Criticizing the class action on economic grounds, Judge Easterbrook wrote that "[w]hen courts think of efficiency, they should think of market models rather than central-planning models." From this perspective, he said, the "'decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions' will yield the information needed for accurate evaluation of mass tort claims." *Id.* at 1020. The Court further argued that the "central planner" model does violence to principles of federalism and Rule 23.[30]

While other recent decisions do not attempt to state the same "law and economics" justifications, denials of certification because of choice of law issues can be found in most Circuits. In Stirman v. Exxon Corp., 280 F.3d 554 (5th Cir. 2002), the owner of a royalty interest under natural gas leases brought a prospective class action against Exxon, alleging that Exxon had breached an implied covenant to market natural gas so as to obtain the highest price possible. The Fifth Circuit held that the class could not be certified as one in which common questions of law and fact predominated, since no showing was made that state laws were consistent in recognizing an implied covenant to market in a natural gas lease. In Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180 (9th Cir. 2001), a pacemaker implantee brought a class action against the maker of his device, seeking class certification with respect to claims for negligence, products liability, and medical monitoring. Once again, the Ninth Circuit held that

[30] For other examples of the "choice of law" problem in the Seventh Circuit, see In re Mex. Money Transfer Litig., 267 F.3d 743, 747 (7th Cir. 2001) (Easterbrook, J.) ("Sometimes class treatment will be inappropriate even if all of these things are true, when recovery depends on law that varies materially from state to state."); Isaacs v. Sprint Corp., 261 F.3d 679 (7th Cir. 2001) (Posner, J.) ("[class treatment] seems decidedly inappropriate. The case involves different conveyances by and to different parties made at different times over a period of more than a century…in 48 different states (plus the District of Columbia) which have different laws…This is a nightmare of a class action."). But see In re Warfarin Sodium Antitrust Litig., 391 F.3d 516 (3d Cir. 2004) for an analysis disagreeing that choice of law problems preclude a nationwide class action (at least in the "settlement only" context).

the Rule 23(b) requirements of predominance and superiority were not met, in part because the claims would require the application of the laws of all states.

c. Damages and Predominance. Because damages are often highly individualized, defendants sometimes seek to assert that this factor precludes a finding of predominance. In Ward v. Dixie National Life Insurance Company, 595 F.3d 164 (4th Cir. 2010), the claim was that cancer patients had such individualized damages that their class action against an insurance company was precluded on predominance grounds. Nonetheless, the Fourth Circuit upheld the district court's certification, because it found that an identical formula (actual charges minus amount paid) prevailed across all plaintiffs. *Id.* at 180.

d. Superiority and Manageability. Although the predominance inquiry tends to dominate certification disputes under Rule 23(b)(3), that provision also states that a class is only available when "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." In addition, in evaluating this issue of superiority, Rule 23(b)(3)(D) instructs the court to consider "the likely difficulties in managing a class action," and this has become known as the "manageability" requirement.

Judicial decisions seldom discuss the superiority at length or explore its policy rationale, but one very recent exception is Young v. Nationwide Mut. Ins. Co., 2012 U.S. App. LEXIS 18625 at *33 (6th Cir. September 6, 2012), where the Court collected the recent precedents concerning superiority and wrote:

> "b. Superiority
> '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.' Amchem Prods., 521 U.S. at 617 (citation omitted). In considering whether the superiority requirement of Rule 23(b)(3) is satisfied, courts consider 'the difficulties likely to be encountered in the management of a class action.'

> Beattie, 511 F.3d at 567. '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.' Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980).
>
> '[C]ases alleging a single course of wrongful conduct are particularly well-suited to class certification.' Powers, 501 F.3d at 619; see also Sterling, 855 F.2d at 1197 (acknowledging an 'increasingly insistent need' to certify class actions for lawsuits arising out of a 'single course of conduct'). Where many individual inquiries are necessary, a class action is not a superior form of adjudication. See Pipefitters Local 636 Ins. Fund, 654 F.3d at 631. However, where a threshold issue is common to all class members, class litigation is greatly preferred. Daffin, 458 F.3d at 554 ('Permitting individual owners and lessees of 1999 or 2000 Villagers to litigate their cases is a vastly inferior method of adjudication when compared to determining threshold issues of contract interpretation that apply equally to the whole class.')."

Id. Superiority is usually invoked as a secondary reason for denial, once a court has concluded that some other Rule 23 requirement has not been met, and it is less likely to stand alone as a justification for denying certification. Nonetheless, there are some contexts in which superiority alone will defeat certification.

(1) Duplicative Litigation. Duplicative litigation may lead a court to conclude that superiority requirement alone requires the court to deny certification. Recently the Fourth Circuit reached such a result in Gregory v. Finova Capital Corp., 442 F.3d 188 (4th Cir. 2006). Finova involved unsecured creditors of The Thanxton Group ("TGI") alleging misrepresentations in the registration statements for defendant's notes, in violation of section 11 of the Securities Act of 1933. TGI was also in bankruptcy, and the unsecured creditors brought an adversary complaint in those proceedings, seeking to have their claims put before those of

TGI's secured creditors. Despite the bankruptcy proceeding,[31] the district court certified two classes of TGI noteholders against the bankrupt defendant.

The Fourth Circuit reversed and decertified the class, concluding that a class action was clearly not superior to the bankruptcy proceeding. To adjudicate the adversary claim, the bankruptcy court would likely have to resolve the issues presented in the class action, making the actions unnecessarily duplicative. Even though punitive damages and interest would not be available to the noteholders in the bankruptcy proceeding, the Fourth Circuit found this disparity did not overcome its doubts about superiority. Finova concluded that since the actions would be duplicative, both because (i) success in the bankruptcy proceeding would make the plaintiffs "more or less whole" and (ii) there was no danger of unfairness present (because there would be "a single result for all of the noteholders" in either forum), superiority was lacking.

(2) Disproportionate Damages. In cases involving immense potential statutory damages for defendants coupled with virtually no actual harm to plaintiffs, some courts have invoked superiority to defeat certification. In a number of cases under the Fair and Accurate Credit Transactions Act ("FACTA"), courts in the Eleventh and Ninth Circuits have relied on superiority to deny certification. See, e.g. Leysoto v. Mama Mia I., Inc., 255 F.R.D. 693, 698 (S.D. Fla. 2009); Saulic v. Symantec Corp., 596 F. Supp. 2d 1323, 1328 (C.D. Cal. 2009). FACTA, which regulates the information businesses may print on customer's credit card receipts, includes statutory damages for various violations of the act. When businesses include too much information on customer receipts, they can become subject to statutory damages for countless defendants, even though the offending receipts have not caused any harm. To prevent crippling liability, some courts have refused to certify these classes. The Seventh Circuit,

[31] Rule 23(b)(3)(B) states that "the extent and nature of any litigation concerning the controversy already begun by or against class members" is a relevant factor in superiority decisions.

however, has ruled that these considerations, though valid, are better saved for the damages phase of a trial. See, e.g., Harris v. Best Buy Co., Inc., 254 F.R.D. 82, 90 (N.D. Ill. 2008).

(3) Manageability. One answer to choice of law problems is to use multiple subclasses, placing jurisdictions with similar legal standards in the same subclass. The problem with this approach is that it can quickly become highly complex and perhaps beyond the jury's comprehension. A recent example is In re Paxil Litigation, 212 F.R.D. 539 (C.D. Cal. 2003), in which plaintiffs sued a drug manufacturer for marketing a drug that was allegedly habit-forming and that produced severe withdrawal symptoms. Recognizing that the laws of the 50 states varied considerably, plaintiffs proposed a total of twelve subclasses, which reflected both differences in applicable state law and differences in the gravity of each class member's injury. The district court declined to certify, finding both that the number of subclasses was not manageable and that the classes had been defined in such a way that the composition of each subclass was only determinable at the conclusion of the proceeding. See also In re Paxil Litigation, 218 F.R.D. 242 (C.D. Cal. 2003).

Even in cases where predominance is met, manageability may still pose an obstacle. In Jenkins v. Hyundai Motor Fin. Co., 2008 U.S. Dist. LEXIS 23073 (S.D. Ohio 2008), the Court concluded that the heart of plaintiff's claim was the question of whether, prior to selling class members' repossessed vehicles, Hyundai sent the appropriate notices required by the UCC in each of the relevant forty-nine states. Here, the court found that "common issues of law and fact predominate" regarding this claim. Id. at 22. Nonetheless, class certification was denied because differences in other provisions of each state's UCC made the hurdle of manageability "the most apposite and difficult to overcome," thereby defeating superiority. Id.

(4) Superiority and the Negative Value Suit. Although the “negative value” suit, as earlier noted, has been called the best justification for a class action (see e.g., In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995) (Posner, J.)), recent courts have divided over how much weight should be given this factor, particularly where some of the plaintiff class members have positive value suits. The Third Circuit has been particularly ready to cite this factor as a consideration in approving class certification. See In re Warfarin Sodium Antitrust Litig., 391 F.3d 516 (3d Cir. 2004). However, in Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154 (3d Cir. 2001), the facts of which are discussed above, the Third Circuit panel noted that the negative value claim, particularly when some class members had positive value claims, does not by itself justify a class action:

> Contending each individual claim is so small that only a class action will provide a remedy, plaintiffs maintain that denying certification will absolve defendants from wrongdoing. The District Court rejected this rationale as a "basis for excusing plaintiffs from proving the essential elements of their cause of action." (citation omitted). We agree. Recently we held this factor "by itself is insufficient to overcome the hurdles of predominance and superiority and efficient and fair management of a trial, which Rule 23(b) requires." (citation omitted). We also recognize that some class members, such as large institutional investors who fall within the class definition, arguably would have a significant financial stake to raise stand-alone claims.

Id. at 191. This language clearly shows a Circuit, not otherwise unsympathetic to the class action, unwilling to find the requirements of 23(b) satisfied for the sake of vindicating the negative value claims of many, if not all, of the class members.

Similarly, the District Court in In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., supra, also displayed an unwillingness to bend the requirements of Rule 23 in the face of the negative value claims of many class members. Although the court had already denied Rule 23(b)(3) certification after its predominance inquiry, discussed above, the Court went on to discuss superiority anyway. Even though the plaintiffs contended that the suit was a classic "negative value" suit, in which the costs of enforcement in individual actions would exceed the expected individual recovery, thereby making the class action superior to other forms of litigation, the district court rejected this analysis, noting that the plaintiffs had also alleged that "contamination by detectable levels of MTBE automatically results in a reduction of property value, for every class member." Thus, it found that the case was not a "true" negative value case: "unlike a true negative value claim, such as those seen in antitrust cases, these plaintiffs may employ tort lawyers, on a contingency basis, to bring individual actions." 209 F.R.D. at 350. Thus, a class action was not the superior means of adjudication, because individual actions did not necessarily have a negative value. This attitude suggests that even where the claims of some plaintiff class members have a negative value (as some of the claims here surely did), so long as many of the class members had positive value claims, the issue of superiority will require a more complex assessment.

Part IV: Related Issues: Partial Certification, Ascertainability, and Standing

This section will primarily consider problems in class definition.

(1) Partial Certification Under Rule 23(c)(4)

Fed. R. Civ. P. 23(c)(4) states that "when appropriate, an action may be brought or maintained as a class action with respect to particular issues." Courts disagree today, however, as to when such "issue certification" is "appropriate." This question has grown in importance precisely as courts have to read the predominance requirement more rigorously. Thus, for example, a court might use Rule 23(c)(4) to certify a liability issue for class-wide adjudication, while leaving more individualized issues, such as proximate cause or damages, to be decided at separate trials on an individualized basis. This "issue certification" approach seems most promising in cases involving one or more common liability issues, but also highly individualized facts that preclude any class wide determination as to damages, proximate causation, or reliance. The arguments in favor of partial certification include greater judicial efficiency, an opportunity for both parties to adjudicate certain complex issues once instead of in countless separate trials, and an increased opportunity for plaintiffs to pool their resources to gain at least partial victories in what would otherwise be impossibly burdensome, "negative value" individual cases.

As noted at the outset of this Memorandum, the most important recent use of "issue" certification is in McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, 672 F.3d 482 (7th Cir. 2012), where the Seventh Circuit found such certification "appropriate" in a Title VII employment discrimination case where the issue certified involved the "disparate impact" of Merrill Lynch's "teaming" and account distribution policies. The liability issue so certified did not require proof of any intention to discriminate (whereas other theories of liability did), and thus its resolution would significantly advance the case by resolving a central issue. Equally important to the Seventh Circuit, the class was not so large that certification might coerce the defendant (Merrill Lynch) into settling. Whether the Seventh Circuit would have reached the same result in the case of a much larger class (or a significantly smaller defendant) is open to question under the carefully limited language of its opinion.

Notwithstanding McReynolds, there continues to be a significant division among the Circuits on the use of Rule 23(c)(4). More conservative Circuits view Rule 23(c)(4) as a mere "housekeeping rule," which allows common questions to be certified only when the cause of action, taken as a whole, meets the predominance requirement of Rule 23(b)(3). See Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n. 21 (5th Cir. 1996). Over the years a number of other

Circuits have disagreed with Castano and taken a more liberal view towards approving partial certifications.[32] In particular, the Second Circuit ruled broadly in In re Nassau County Strip Search Cases, 461 F.3d 219 (2d Cir. 2006) that district courts may certify a class on a particular issue regardless of whether plaintiffs' claims, as a whole, satisfy the predominance test. As it acknowledged, its rule was in sharp contrast to Castano v. Am. Tobacco Co., which had held that courts could not employ Rule 23(c)(4)(A) to single out the issue of liability for class treatment unless the "cause of action, as a whole, first satisfies Rule 23(b)(3)'s predominance requirement." 461 F.3d at 223.

However, this more liberal approach to Rule 23(c)(4) has not gained the support of all Circuits,[33] and even the Second Circuit may have retreated somewhat from its prior support of partial certification. In McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008), the Second Circuit took a different view of partial certification than it had in the Nassau County Strip Search case. McLaughlin involved plaintiff smokers who brought a RICO suit against tobacco companies, alleging deception regarding the marketing of light cigarettes as healthier than regular cigarettes. The court reaffirmed its stance 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.'" McLaughlin, 522 F.3d at 234 (quoting In re Nassau County Strip Search Cases, 461 F.3d at 227). Yet the court refused to use partial certification on issues that might on their own satisfy all the requirements of Rule 23, such as the defendant's scheme to defraud. The court held that "given the number of questions that would remain for individual adjudication, issue certification would not 'reduce the range of issues in

[32] The First, Second, Third, Fourth, Seventh and Ninth Circuits have all issued decisions within the last six years supporting partial certification.

[33] In Henry v. St. Croix Alumina, LLC, 2008 U.S. Dist. LEXIS 43755 (D.V.I. June 3, 2008) the District of the Virgin Islands recently adopted Castano's approach, though the court did use partial certification for a very limited (b)(2) claim.

dispute and promote judicial economy.'" McLaughlin, 522 F.3d at 234 (quoting Robinson v. Metro-N. Commuter R.R., 267 F.3d 147, 168 (2d Cir. 2001)). In McLaughlin, because the smokers' "larger issues such as reliance, injury, and damages" could only be dealt with individually, the court declined to use partial certification for the common issues. Perhaps the fairest assessment is this: issue certification after McLaughlin is not appropriate where resolution of the particular issue "would not materially advance the litigation because it would not dispose of larger issues." *Id.* at 234. See also Abu Dhabi Commer. Bank v. Morgan Stanley & Co., 269 F.R.D. 252 (S.D.N.Y. 2010).

Some Circuits appear to support a more liberal use of partial certification. See Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). One decision in the Fourth Circuit also seems to adopt a similar position. See Gunnells v. Healthplan Servs. Inc., 348 F.3d 417, 439 (4th Cir. 2003). In In re Chiang, 385 F.3d 256 (3d Cir. 2004), the Third Circuit permitted partial certification in a case in which the district court had certified an impossibly broad and non-ascertainable class consisting of "All persons who are Black, Hispanic, female and/or Virgin Islanders who applied or attempted to apply for ... [specified assistance loans from the USDA] ... and who believe they were discriminated against on the basis of race, gender or national origin." Although the Third Circuit found commonality established by a laundry list of discriminatory practices with respect to the waiting lists used by the defendant, it recognized that any showing that each plaintiff qualified for credit inherently involved an individualized determination. Trying to sustain the class (which the district court had certified based on strong evidence of discrimination), the Third Circuit chose to certify only the issue of the discriminatory waiting list under Rule 23(c)(4), and it redefined the class to include "all Virgin Islanders," which it saw as a national origin capable of being the object of discrimination.

More recently, the Third Circuit has sought to bridge the division among the Circuits by finding a compromise. In Gates v. Rohm & Haas Co., 655 F.3d 255 (3d Cir. 2011), the Third Circuit upheld the district court's refusal to certify but suggested that, in determining the propriety of partial certification under Rule 23(c)(4), courts should look to the non-exclusive criteria set forth in the American Law Institute's Principles of Aggregate Litigation (in particular, §§ 2.02–.05 and 2.07–2.08 (2010)). Id. at 272–73. Although the ALI's list is long and general, the key consideration may often be "the efficiencies to be gained by granting partial certification in light of realistic procedural alternatives." The goal, the Third Circuit said, is "to treat common things in common and to distinguish the distinguishable." Id. at 273 (citing Chiang, 385 F.3d at 256). Applying the Third Circuit's test, it is conceivable that in a securities fraud case where the prerequisite for the "fraud on the market" doctrine could not be shown, the case could still be certified as to the principal liability issues (materiality, scienter, and loss causation), but each class member would later have to prove reliance individually.

Finally, because context counts, the context of environmental litigation may be particularly appropriate for partial certification. In Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910 (7th Cir. 2003), the district court had certified a class of residents who lived within one to two miles of defendant's factory, which allegedly had leaked a noxious solvent, TCE, into the ground water, thereby contaminating local water supplies and impairing property values. The district court limited certification to the "core" questions of whether the defendant had caused contamination of the area and the geographic extent of such contamination, reserving for individual hearings the issues of the fact and extent of the injury, if any, suffered by individual class members. Finding the gains to judicial efficiency from class treatment to outweigh any possible injury to the defendant, the Seventh Circuit in a decision by Judge Posner upheld certification. Critical to Judge Posner's decision to uphold certification was his finding that the defendant would suffer no prejudicial injury, even if the common question of causation was determined adversely to it, because the plaintiffs would still be required to prove the fact and extent of damages in individual proceedings. In this light, the critical difference between the instant case and his earlier decision in In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995), appears to have been the absence in Judge Posner's mind of any extortionate threat caused by the aggregation of claims in Met-Coil. Indeed, he specifically noted: "When enormous consequences turn on the correct resolution of a complex factual question, the risk of error in having it decided once and for all by one trier of fact rather than letting a consensus emerge from several trials may be undue." 319 F.3d at 912 (citing Bridgestone/Firestone and Rhone-Poulenc). Apparently, this risk was not present in Met-Coil because even if the trial court decided causation incorrectly, other courts would still have to determine damages. Met-Coil seems highly consistent with Judge Posner's later decision for the Seventh Circuit in McReynolds. Both were smaller classes, did not involve "immature" torts, and did not threaten defendants with a liability too big to be tried.

The First Circuit has also recently approved partial certification. In Smilow v. Southwestern Bell Mobile Sys., Inc., 323 F.3d 32 (1st Cir. 2003), the district court had first certified a class action on behalf of wireless telephone customers against a telecommunications provider, based on both contract and state and federal statutory theories, but then decertified the class on the grounds that common issues of fact did not predominate. In decertifying the class, it particularly relied on the seeming need for separate damages hearings for the individual plaintiffs. Reversing the district court, the First Circuit found that common questions of law and fact existed because plaintiffs' claims were based on a standard form contract that defendants used with every member of the class. Although defendants argued that a waiver defense existed that would require individualized hearings, the First Circuit found that this defense was also common to the class (even if applied differently to different class members). Writing prior to Wal-Mart, it added that courts have been reluctant to deny class certification based simply on an affirmative defense against individual class members. Thus, in its view, the class satisfied the predominance requirement notwithstanding the individual nature of the waiver determinations.

The possibility of individual damage determinations also did not preclude certification in the Smilow Court's judgment. Individuation of damages, it said, was rarely dispositive of class treatment under Rule 23(b)(3). Because there was a significant possibility that damages could be calculated from computer records and objective criteria, it doubted that there would be any need for individualized damage determinations. Even if a mechanical computation later proved to be impossible, the First Circuit concluded that the district court should not assume this at the outset, but could later decertify or modify the class or limit its certification to the common issues.

The most dramatic use of partial certification has occurred at the state level. In a decision that is the polar opposite of McLaughlin, the Florida Supreme Court in Engle v. Liggett Group, Inc., 945 So. 2d 1245 (Fla. July 6, 2006), effectively upheld a class-wide determination by the jury of the central liability issues, while relegating the issues of proximate causation and damages to individual trials. Although it reversed the jury's award of $145 billion in punitive damages and ordered the decertification of the class that had previously been certified for smoking-related injuries, the Florida Supreme Court relied on federal case law and the Florida equivalent to Rule 23(c)(4)(A) to find that partial certification was proper on the liability issues. Thus, it gave res judicata effect to the jury's findings that (1) smoking cigarettes causes certain cancers and related heart diseases; (2) nicotine is addictive; (3) defendants had placed on the market an unreasonably dangerous product; (4) defendants had concealed material information not otherwise known; (5) defendants agreed to misrepresent information relating to health effects of smoking; (6) defendants were negligent. These findings, it ruled, could stand, and would be given res judicata effect in any subsequent trial between an individual class member and the defendants if such individual action were filed within one year of the mandate in the case.

Thousands of former Engle class members filed suit in Florida state and federal courts (over 4,000 in Duval County alone). Defendants appear to be removing these cases to federal court when possible, but no overall assessment of this two-stage litigation experiment is yet possible.

(2) Ascertainability

Numerous courts and commentators have agreed that a fundamental prerequisite of a class action is that the class must be readily ascertainable based on objective criteria. See, e.g., John v. Nat'l Sec. Fire & Cas. Co., 501 F.3d 443, 445 (5th Cir. 2007); In re Initial Public Offering Sec. Litig., 471 F.3d 24, 30 (2nd Cir. 2006); Oshana v. Coca-Cola Co., 472 F.3d 506, 513 (7th Cir. 2006); Crosby v. Social Sec. Admin. of the U.S., 796 F.2d 576, 580 (1st Cir. 1986); 1 William Rubenstein et al., Newberg on Class Actions, § 3.2–3.3 (5th ed.); 7A Charles Alan Wright, et al., Federal Practice and Procedure § 1760 (3rd ed. 2005). Still, ascertainability is not an express requirement of Fed. R. Civ. P. 23, and most of the decisions requiring it have been in class actions where certification was sought under Rule 23(b)(3). As discussed below, the status of this requirement in class actions where certification is sought under Rule 23(b)(2) is less clear, and one recent decision holds that ascertainability is not required in this context. See Floyd v. City of New York, 2012 U.S. Dist. LEXIS 68676 (S.D.N.Y. May 16, 2012) (discussed below).

The ascertainability requirement serves multiple objectives. First, by insisting on the easy identification of class members, it reduces "serious administrative burdens that are incongruous with the efficiencies expected in a class action . . ." See Sannerman v. Chrysler Corp., 191 F.R.D. 441, 445 (E.D. Pa. 2000). Second, "it protects absent class members by facilitating the 'best notice practicable' under Rule 23(c)(2) in a Rule 23(b)(3) class action." Marcus v. BMW of North America, LLC, 687 F.3d 583, 593 (3d Cir. 2012). Third, it protects defendants by ensuring that those persons who will be bound by the judgment are clearly identifiable. See Xavier v. Philip Morris USA, Inc., 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011).

From this perspective, a class that is defined based on subjective criteria is not manageable because the court would have to make individualized determinations as to who fell within the class. Thus, courts regularly state that: "A class is ascertainable when defined by objective criteria that are administratively feasible." McBean v. City of New York, 2009 U.S. Dist. LEXIS 72690 at *38 (S.D.N.Y. Aug. 14, 2009).[34] Some shortcomings in class definition occur over and over. For example, when membership in the class is made dependent upon liability in the underlying litigation (i.e., the class is defined as "all persons injured by defendant's wrongful conduct"), this would require individualized determinations. Moreover, if a defendant were held not liable on the merits, it is not clear which class members, if any, would be bound by the resulting judgment. Similarly, when the class definition is so vague or amorphous that it is unclear who falls within the class, or where the class is defined so broadly as

[34] When a court believes a class is so vaguely defined that determining and notifying all the members of the class is not possible, certification of the class will be denied. In other words, "the class description must be sufficiently definite for the court to ascertain member status." Rose v. Saginaw County, 232 F.R.D. 267, 271 (E.D. Mich. 2005) (quoting Rink v. Cheminova, Inc., 203 F.R.D. 648, 659 (M.D. Fla. 2001)). Courts follow this approach because, "[a] vague class definition portends significant manageability problems for the court." Rink v. Cheminova, Inc., 203 F.R.D. 648, 660 (M.D. Fla. 2001).

to include those without legitimate claims against the defendant, courts have also regularly found "ascertainability" not to have been satisfied.

Finally, the ascertainability requirement conserves judicial resources. For judges to conduct individual inquiries into the class membership of each possible member would require extensive time and effort, but may aid little in the resolution of the actual litigation. Courts are generally resistant to undertaking this task and as a general rule "have declined to certify a class where the proposed definition would not enable identification of class members short of individualized fact-finding." LaBauve v. Olin Corp., 231 F.R.D. 632, 662 (S.D. Ala. 2005).

Although class definitions based on subjective criteria often fail the ascertainability requirement, courts are prepared to find that "[a]n identifiable class exists if its members can be ascertained by reference to objective criteria." Zapka v. Coca-Cola Co., 2000 U.S. Dist. LEXIS 16552 (N.D. Ill. Oct. 26, 2000). Still, "[w]here membership in the class requires a subjective determination, the class is not identifiable." Dunnigan v. Metropolitan Life Insurance Co., 214 F.R.D. 125, 135 (S.D.N.Y. 2003); see also McBean v. City of New York, 2009 U.S. Dist. LEXIS 72690 at *38 (S.D.N.Y. Aug. 14, 2009). A subjective criterion that commonly results in a class definition failing "ascertainability" is any definition that involves the class member's state of mind (for example, whether the class member was deceived or relied upon the defendant's disclosures or statements). See Oshana v. Coca-Cola Co., 472 F.3d 506 (7th Cir. 2006). Using a state of mind as part of the class definition would force a court to conduct individualized inquiries on this subject, even before it was clear that Rule 23's standards could be satisfied.

Class definitions that make the defendant's liability to the plaintiff an essential element of class membership are equally vulnerable. "Class definitions which require the court to determine the merits of every individual's claim to determine if they are within the class generally do not satisfy [the ascertainability] requirement." Rodriguez v. Gates, 2002 U.S. Dist. LEXIS 10654 at *32 (C.D. Cal. May 30, 2002). When plaintiffs attempt to craft clever fail-safe classes, courts have rejected them. See Genenbacher v. Centurytel Fiber Co. II, LLC, 244 F.R.D. 485, 487 (C.D. Ill. 2007). A leading reason why courts reject such "fail-safe" definitions is that they offend the principles of *res judicata*. If all those persons to whom the defendant is found not liable, either on a class-wide basis or on more specific grounds, were thereby excluded from the class, then the finding of non-liability would immediately lose any preclusive effect against these persons.

Although the ascertainability requirement need not be met prior to class certification, it must be met "at some point in the case." In re Initial Pub. Offering Sec. Litig., 471 F.3d 24, 45 (2d Cir. 2006). Because the requirement must be met eventually and because confronting the issue early on can preserve judicial resources, most courts prefer to treat ascertainability as a threshold requirement. See Dunnigan v. Metropolitan Life Insurance Co., 214 F.R.D. 125, 135 (S.D.N.Y. 2003); Conigliaro v. Norwegian Cruise Line, 2006 U.S. Dist. LEXIS 95576 (S.D. Fla. 2006).

Grayer cases involve class definitions that involve complex or difficult calculations or detailed record searches. Some decisions hold that where nothing in a company's database shows whether individuals should be included in the class, the class definition fails on ascertainability grounds. See, e.g., Clavell v. Midland Funding LLC, 2011 U.S. Dist. LEXIS 65721 (E.D. Pa. June 21, 2011); Sadler v. Midland Credit Mgmt. Inc., 2008 U.S. Dist. LEXIS 51198 (N.D. Ill. July 3, 2008). A recent representative case is Marcus v. BMW of North America, LLC, 687 F.3d 583 (3rd Cir. 2012). There, the New Jersey subclass was defined as "current and former owners and leasees of [certain models of] BMW vehicles equipped with run-flat tires manufactured by Bridgestone . . . and sold or leased in the United States whose Tires have gone flat and been replaced." Probably unintentionally, this overbroad class definition included not only (1) owners and leasees who bought a new or used BMW from a New Jersey dealer, but also (2) subsequent owners or leasees who bought or leased a used BMW vehicle in New Jersey from anyone, and even (3) subsequent owners or leasees who bought or leased a used BMW vehicle anywhere in the country from anyone whose BMW was originally sold or leased in New Jersey. Defendant protested that it had no records by which to identify such subsequent owners, but could only identify vehicles sold in New Jersey by BMW dealers. Although plaintiffs proposed to redefine the class on remand to the district court, the Third Circuit held that the district court "must resolve the critical issue of whether defendants' records can ascertain class members and, if not, whether there is a reliable administratively feasible alternative." The Third Circuit also ruled out any "method that would amount to no more than ascertaining by potential class members' say so."

Few decisions have faced whether ascertainability also applies to a Rule 23(b)(2) class action. In Floyd v. The City of New York, 2012 U.S. Dist. LEXIS 68676 (S.D.N.Y. 2012), a class of arrested persons asserted that the New York Police Department engaged in a policy and/or practice of unlawfully stopping and frisking people based on their race in violation of the Fourth and Fourteenth Amendments and sought broad injunctive relief. The class was defined as "all persons who have been or in the future will be unlawfully stopped in violation of the Fourth Amendment." Id. at *42. Defendants claimed that this definition was too indefinite and administratively infeasible to permit certification, and clearly the class was not "ascertainable" in the usual sense. In response, United States District Judge Shira Scheindlin found that the ascertainability requirement did not apply to Rule 23(b)(2) class actions. She emphasized that the Advisory Committee that had drafted Rule 23(b)(2) had written in a Reporter's Note to Rule 23 that the Rule 23(b)(2) class was envisioned to apply especially "in the civil rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Id. at 43 (quoting language of Advisory Committee Note) (emphasis added). Also, Rule 23(b)(2) does not require notice to the members of the class, which is one of the standard justifications for insisting upon a precise definition of the class, but here inapplicable.

Decisions in the Second Circuit and other Circuits seem to have reached outcomes consistent with Floyd, even if they have been less explicit. See Marisol v. Giuliani, 126 F.3d 372 (2d Cir. 1997); Shook v. El Paso County, 386 F.3d 963, 972 (10th Cir. 2004); Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972) (ascertainability is not required when "the conduct complained of is the benchmark for determining whether a subdivision (b)(2) class exists."); Baby Neal v. Casey, 43 F.3d 48, 54 (3d Cir. 1995).

(3) Standing Issues

Must every member of a class have suffered injury and thus have standing to sue? Some courts have refused to certify classes when even a few class members lacked standing to bring a claim against the defendant, but other courts disagree on how rigorously to enforce this requirement. For an example of a court taking a very hard line on this issue and stating that a class definition that includes any members who lack standing will fail, see Adashunas v. Negley, 626 F.2d 600, 604 (7th Cir. 1980). See also Conigliaro v. Norwegian Cruise Line, 2006 U.S. Dist. LEXIS 95576 (S.D. Fla. 2006); Oshana v. Coca-Cola Bottling Co., 225 F.R.D. 575, 580 (N.D. Ill. 2005). The Second Circuit proclaimed not long ago that "no class may be certified that contains members lacking Article III standing . . . . The class must therefore be defined in such a way that anyone within it would have standing." Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006).

Conversely, other courts have been much more permissive with regard to whether all class members must have standing.[35] Most notably, in a recent Seventh Circuit opinion, Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672 (7th Cir. 2009), cert. denied, 176 L. Ec. 2d 151 (2010), Judge Posner openly disagreed with the strong stand that other courts, including previous Seventh Circuit opinions, had taken on this requirement. The defendant in Kohen, PIMCO, was accused of violating Section 9(a) of the Commodity Exchange Act by cornering the futures market in Ten Year U.S. Treasury notes due February 2012. The proposed class definition included all persons who bought these futures on the Chicago Board of Trade within certain dates. PIMCO argued that not all members of the proposed class had been harmed, and that certification should therefore be denied. Even if PIMCO had cornered the market on these notes and therefore driven up prices, the defendant argued, this would have only harmed those who had been betting on the futures going down, and would have actually benefited those who had bought into the futures expecting them to go up. PIMCO argued that some of the members of the proposed class only bought futures during the class period as a hedge against their overall bet that prices would rise, that these persons therefore were not harmed by PIMCO's actions, and that they therefore lacked standing. PIMCO further argued that the fact that certain proposed class members lacked standing should defeat class certification.

Judge Posner agreed with the defendants that some of the members of the proposed class might not have been harmed. But he went on to state that "a class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable" and that this

[35] For example, see Singer v. AT&T Corp., 185 F.R.D. 681, 689 (S.D. Fla. 1998); Elliott v. ITT Corp., 150 F.R.D. 569, 574 (N.D. Ill. 1992).

alone does not preclude certification. Instead, Kohen concludes, "[a]s long as one member of the certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." See also DG ex rel. Stricklin v. Devaughn, 504 F.3d 1177, 1198 (10th Cir. 2010) ("Rule 23's certification requirements [do not] require all class members to suffer harm. . . ."); Johnathan v. ING Bank, Fsb., 2012 U.S. Dist. LEXIS 123627 (D. Del. August 27, 2012) (agreeing).

Kohen acknowledges that there are "statements in some cases that it must be reasonably clear at the outset that all class members were injured by the defendant's conduct." Although Judge Posner believed that these decisions overstated, he did indicate his support for a more limited use of the standing requirement. If either "the definition is so broad that it sweeps within it persons who could not have been injured by the defendant's conduct" or "it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant," then the class may not be certified. In Judge Posner's view, the actual facts of those cases in which certification was denied because some class members had not been injured actually fell within his above exceptions; thus, he believes those courts properly denied certification, but merely worded their denials too broadly.

Although Judge Posner agreed with defendant's argument that "'a proper class definition cannot be so untethered from the elements of the underlying cause of action that it wildly overstates the number of parties that could possibly demonstrate injury,'" he also concluded that the word "wildly" was essential to the correctness of the above statement. Under Kohen, if a plaintiff merely overstates the possible size of the class, but not "wildly" so, this will apparently not doom certification.

A very different type of standing issue arises when the class representative has suffered injury but not the same type of injury as all class members. For example, suppose the class representative bought one of several types of debt securities sold by the defendants, but not all types, while other class members bought these remaining types. Once, this issue might have been seen as simply one of adequacy of representation under Rule 23(a)(4) (because the class representative would logically seek to settle its own type of injury at a higher value than other types of injury that it did not experience). More recently, however, courts have seen this as an issue of standing and have not allowed the class representative to sue with respect to injuries that only other class members experienced. See Abu Dhabi Commer. Bank v. Morgan Stanley & Co., 651 F. Supp. 2d 155, 169–170 (S.D.N.Y. 2009).

Currently, there is divided authority within the Second Circuit as to whether a lead plaintiff in a securities class action based on Rule 10b-5 can sue with respect to securities that it did not purchase or sell. See Employees' Ret. Sys. v. J.P. Morgan Chase & Co., 2011 U.S. Dist. LEXIS 33498 (S.D.N.Y. May 9, 2011); LaPietra v. RREEF Am., LLC, 738 F. Supp. 2d 432, 439 (S.D.N.Y. 2010); In re Lehman Bros. Sec. & ERISA Litig., 684 F. Supp. 2d 485, 490–91 (S.D.N.Y. 2010). It is, however, settled that in an action based on Section 11 or Section 12 of the Securities Act of 1933, one or more lead plaintiffs must have brought each of the types of securities in order for the class action to be maintained.

A final standing issue can arise when the facts leave it uncertain whether the proposed plaintiff acted as an agent or a principal. In W.R. Huff Asset Management Co., LLC v. Deloitte & Touche LLP, 549 F.3d 100 (2d Cir. 2008), the Second Circuit held that an investment advisor that had both discretionary authority to make investment decisions on its clients' behalf and a power of attorney authorizing it to file suit for its clients still lacked constitutional standing to bring a securities class action on their behalf. Plaintiff W.R. Huff served as the investment advisor for a group of public employee pension funds and made the investment decision on their behalf to invest in Adelphia Communications Corp. Nonetheless, the Second Circuit found that it did not hold a valid assignment of its aggrieved investors' claims and so had not been "injured-in-fact." See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

The need under W.R. Huff for the plaintiff to hold an ownership stake in order to sue may lead in the future to assignments to the investment advisor by one or more class members of their interest in the securities, but this will still leave open the question of whether such an advisor can serve as a lead plaintiff where it has title only to a small percentage of the legal claims (even though it is the appointed representative of a large number of investors). Also unresolved by the decision is status of the real party in interest under Rule 17(a) of the Federal Rules of Civil Procedure.

Part V: Special Litigation Contexts

Two contexts merit special attention: (1) antitrust and (2) securities.

(1) Antitrust

Antitrust class actions now lie under the shadow of the Supreme Court's impending decision in the case of Comcast Corp. v. Behrend, 2012 U.S. LEXIS 4754 (June 25, 2012) (granting certiorari). As earlier discussed, the Third Circuit's liberal approach to showing antitrust injury in Behrend v. Comcast Corp., 655 F.3d 182 (3d Cir. 2011) may not be accepted by the Court. Historically, it had long been assumed that antitrust price-fixing cases were particularly suitable for class action treatment. See Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 615 (1997); Alabama v. Blue Bird Body Co., 573 F.2d 309, 322 (5th Cir. 1978). In the

Second Circuit, Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91 (2d Cir. 2007), discussed earlier, is consistent with the Third Circuit's more liberal attitude, but its rule still requires antitrust injury to be shown through common evidence. Otherwise, a finding that the common issues predominate will not be possible. Both Robinson v. Tex. Auto. Dealers Ass'n, 387 F.3d 416 (5th Cir. 2004) and Blades v. Monsanto Co., 400 F.3d 562 (8th Cir. 2005), each discussed earlier, show more conservative Circuits raising the hurdle for plaintiffs because they require a showing that all members of the class suffered an antitrust injury. To the extent that this requires an individualized hearing, this would normally preclude a finding of predominance.

A good illustration of this problem of showing a class-wide injury is afforded by Weisfeld v. Sun Chem. Corp., 84 Fed. Appx. 257, 2004 U.S. App. LEXIS 277 (3d Cir. Jan. 9, 2004). There, the Third Circuit affirmed the denial of class certification in an antitrust action alleging that printing ink manufacturers conspired by implementing a "no hire" policy pursuant to which they agreed not to hire each others' employees. The problem again was the need to show harm or economic injury to each class member. Those employees who did not desire to transfer firms arguably suffered no harm or injury,[36] thereby raising an individualized issue that could destroy predominance. See also In re Terazosin Hydrochloride Antitrust Litig., 223 F.R.D. 666 (S.D. Fla. 2004) (certification denied where plaintiffs failed to demonstrate the absence from the proposed class of any class members who had benefitted from the alleged anticompetitive agreements at issue). Overbroad classes can result in intra-class conflicts, thereby causing the

[36] Conceivably, common proof was possible that wages were reduced even for workers not interested in transferring employers because of the absence of competition.

class representative to fail the "adequacy of representation" standard, or the predominance requirement, or even the typicality standard.

In the recent past, the Third Circuit has adopted a "presumption of impact" applicable to horizontal price-fixing cases. *See* In re Linerboard Antitrust Litig., 305 F.3d 145, 151 (3d Cir. 2002). This permits the plaintiffs to use "evidence of a common antitrust injury to every class member flowing from an alleged antitrust violation [to], in certain circumstances, satisfy the requirements of Rule 23(b)(3)." Weisfeld, 2004 U.S. App. LEXIS 277, at *9. But these circumstances now appear to be limited.

(2) Securities Fraud

Although the standard "stock drop" class action involving a publicly traded firm has long been thought to be easily certifiable because of the "fraud on the market doctrine," this is becoming less true, and securities class actions have begun to encounter serious certification problems, as discussed below.

First, the Court will soon hear the appeal in Connecticut Retirement Plans and Trust Funds v. Amgen Inc., 660 F.3d 1170 (9th Cir. 2011) and thereby resolve a split in the Circuits as to whether the materiality of the misstatement or omission must be shown at class certification. Because some Circuits (including the Second Circuit) already require such a showing, the impact of this decision will not likely be earth-shaking—unless the Court uses this opportunity to reconsider the "fraud on the market" doctrine.

Second, courts are tightening their criteria for determining when a market is efficient. See In re PolyMedica Corp. Sec. Litig., 432 F.3d 1 (1st Cir. 2005); Unger v. Amedisys Inc., 401 F.3d 316 (5th Cir. 2005); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154 (3d Cir. 2001); Johnston v. HBO Film Mgmt., 265 F.3d 178 (3d Cir. 2001).

Third, debt securities do not trade in efficient markets and so do not qualify for the "fraud on the market presumption." See Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196 (2d Cir. 2008). This problem may preclude class treatment in much of the impending litigation following the "Libor" scandal, as many of the instruments involved do not trade in efficient markets.

Fourth, the substantive elements of a Rule 10b-5 cause of action have been increased and enhanced by recent decisions, most notably in Janus Capital Group Inc. v. First Derivative Traders, 131 S. Ct. 2206 (2011), as discussed below.

Counterbalancing these decisions to some degree, however, the Supreme Court determined last Term that plaintiffs were not required to prove loss causation at the class certification stage (because it was not relevant to the "fraud on the market" presumption). See Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179 (2011). This result overturned law in both the Fifth and Second Circuit (where loss causation could at least be contested at class certification with the burden on the defendant).

Although Halliburton seems to signal that the Court accepts the "fraud on the market" presumption, one cannot safely reach this decision until Amgen is resolved. In addition, still other issues loom in the distance. In a footnote in Wal-Mart, the majority of the Court, in the course of illustrating the recurring overlap between the merits and the requirements of Rule 23, observes that not only must the plaintiffs prove market efficiency to trigger the "fraud on the market" presumption at the class certification hearing, but that this is "an issue that they will surely have to prove again at trial in order to make out their case on the merits." 131 S. Ct. at 2552 n. 6. Assume then that a securities class action is certified based on a showing by plaintiffs that the market was efficient. At trial, defendants assert that they wish to raise as an affirmative defense that some members of the class still did not rely on the alleged material misinformation. Defendants' theory might be that the indexed investors within the class do not rely on the market to price securities (because they are too indexed to care about individual stocks), or their theory might be that some (or all) institutional investors possessed private information (from whatever source) that they did not rely on the publicly available information released by the defendant issuer. Either way, defendants are seeking to rebut Basic v. Levinson's presumption that in an efficient market investors rely on the market to accurately price securities. The real objective here may be not to win on this defense but to convince the court that (1), the action is simply not manageable, (2) individual actions by institutional investors would be superior to a class action, or (3) the individual issues still predominate, given the nature of the class's members. This issue has not yet been squarely faced.

Even if we assume that the securities class action will remain viable, the substantive scope of Rule 10b-5 and other fraud actions continues to be narrowed by the Court. Last Term, in Janus Capital Group, Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011), the Court held that only a "maker" of a statement could be sued under Rule 10b-5 and to be a "maker," one had to do more than create the statement (as the SEC had argued in its amicus brief), but had to possess control over the entity publishing the statement. Effectively, this implies that secondary participants cannot be sued under Rule 10b-5 (except for certain "attributed" statements to which they consent).

Almost as significant as the Supreme Court's decision in Janus Capital is the Second Circuit's recent decision in Fait v. Regions Fin. Corp., 655 F.3d 105 (2d Cir. 2011). There, the Second Circuit found that certain statements in a registration statements filed by the issuer with the SEC concerning goodwill and loan loss reserves were statements of opinion, rather than statements of fact. As a result, even though plaintiffs were suing under Sections 11 and 12 of the Securities Act of 1933 (which do not require proof of scienter and, in the case of Section 11, essentially impose strict liability on the issuer), the plaintiffs were required to prove not only that the statements were objectively false, but also that the defendants did not subjectively believe them. This has long been the standard of liability for a false statement of opinion. See Virginia Bankshares v. Sandberg, 501 U.S. 1083, 1095–96 (1991). But statements about loan loss reserves and other accounting items had not previously been viewed as statements of opinion. On the practical level, Fait means that even in a Section 11 case where the plaintiff does not have to prove scienter, it may still be often required to show a lack of good faith by the defendant (and the difference between such a standard and the scienter standard may only be marginal).

Although the Second Circuit raised a new barrier to securities litigation in Fait, it substantially lowered the barriers to certification of a settlement class in securities cases in In re American International Group Securities Litigation, 2012 U.S. App. LEXIS 16911 (2d Cir. August 13, 2012). There, it reversed a district court that had refused to certify a settlement class because it found the "fraud on the market" doctrine inapplicable and therefore concluded that predominance could not be shown for purposes of Rule 23(b)(3). Finding that the applicability of the "fraud on the market" doctrine primarily went to the manageability of the action (which need not be shown, under Amchem Products, when the action will not be tried), it remanded to the district court for further proceedings. The result seems to mean that settlement classes can be certified in the Second Circuit, even when the plaintiff's attorney is "disarmed" by the fact that the action cannot be brought to trial.

In addition to changes in the case law, the Securities Litigation Uniform Standards Act ("SLUSA") has also become a serious obstacle to securities class litigation. Attempts to raise state securities law claims—either in state court or federal court—are increasingly blocked by SLUSA, which preempts such claims when raised in an actual or constructive class action. See BT Secs. Corp. v. W.R. Huff Asset Mgmt. Co., LLC, 891 So. 2d 310 (Ala. 2004) (SLUSA applies retroactively); Blaz v. Belfer, 368 F.3d 501 (5th Cir. 2004) (discussing SLUSA but basing dismissal on statute of limitations).

Appellate review of SLUSA decisions may often not be available. In Kircher v. Putnam Funds Trust, 373 F.3d 847 (7th Cir. 2004), the Seventh Circuit did grant review and found SLUSA inapplicable where the investors did not allege loss "in connection with" a purchase or sale of securities, but claimed instead that the defendants' conduct diminished value to all investors in the fund. Although the Seventh Circuit—unlike the Second and Ninth Circuits[37]—concluded that the district court's decision to remand to the state court was reviewable by it on a direct appeal, this decision was reversed by the Supreme Court in Kircher v. Putnam Funds Trust, 126 S. Ct. 2145 (2006), which held that a district court's order remanding a case to state court was not reviewable under 28 U.S.C. § 1447(d). As a result, a district court decision that misapplies SLUSA seems essentially beyond appellate review.

Attempts to evade SLUSA by not alleging fraud "in connection with" a purchase or sale will, however, no longer work. In Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 542 U.S. 71 (2006), the Court held that SLUSA preempted a holders' class action in which the plaintiff investors claimed that the fraudulent conduct by the defendants caused them to continue to hold overvalued securities (but not to buy or sell them). Thus, they alleged that SLUSA was inapplicable because the fraud was not "in connection with" the purchase or sale. Although this

[37] See Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 332 F.3d 116 (2d Cir. 2003); United Investors Life Ins. Co. v. Waddell & Reed, Inc., 360 F.3d 960 (9th Cir. 2004).

theory was sustained by the Second Circuit, the Supreme Court reversed, finding that the phrase "in connection with" required only that the fraud coincide with the securities transaction.

Dabit does not, however, imply that the "holder's action" is dead, but only that it may not be brought in a class action or a constructive class action that SLUSA preempts. Large institutional investors may well find that their interests are better served suing individually (or in small collective groups of less than fifty that do not therefore amount to constructive class actions under SLUSA) in order to use state causes of action (such as the typical state Blue Sky statute or a holder's action). Often, state Blue Sky statutes do not require proof of scienter. Such suits could be brought in either state court or in federal court based on pendant or diversity jurisdiction.

Part VI: Other Issues

(1) Mootness and Offers of Judgment to the Class Representatives

Mootness will take center stage this year as the Supreme Court considers whether an offer of judgment in a FLSA class action can moot the action. See Genesis HealthCare Corp. v. Symczyk (Docket No. 11-1059). As noted above, the fact that FLSA class actions are opt-in class actions differentiates them from most forms of class action litigation. While this decision will be an important one, it is unclear what impact it will have on opt-out class actions.

In other types of litigation, as noted earlier, most courts agree that once a motion for class certification has been filed, an offer of complete recovery under Fed. R. Civ. P. 68 to the putative lead plaintiff will not moot the class action, because the offer does not include full relief for the entire class. For example, in Weiss v. Regal Collections, 385 F.3d 337 (3d Cir. 2004), the Third Circuit reversed the district court's dismissal of a putative class action on the grounds that the defendant had offered the plaintiff a settlement in the amount of statutory damages available under the Fair Debt Collection Practices Act ($1,000). The Third Circuit held that allowing defendants to "pick off" a representative plaintiff in this manner would frustrate the goals of both Rule 23 and the FDCPA, citing Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980). See also Pitts v. Terrible Herbst, Inc., 653 F.3d 1081, 1091–92 (9th Cir.2011) (holding that rejected offer of full amount of plaintiffs claim does not moot the offer even when made before motion for class certification); Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239, 1249–50 (10th Cir.2011) (same); Carroll v. United Compucred Collections, Inc., 399 F.3d 620 (6th Cir. 2005).

A split remains in the Circuits regarding whether a plaintiff must file the motion for class certification before this class action exception to mootness doctrine attaches, or whether the exception attaches unless the plaintiff was dilatory in filing their certification motion. Weiss, supra, 385 F.3d at 348. The Seventh Circuit recently reaffirmed its adherence to the stricter view: a plaintiffs' acceptance of a Rule 68 offer prior to class certification motions moots the action. Damasco v. Clearwire Corp., 662 F.3d 891 (7^{th} Cir. 2011). The court suggested that the way to prevent the defendants from frustrating attempts to certify a class action is "Class-action plaintiffs can move to certify the class at the same time that they file their complaint. The pendency of that motion protects a putative class from attempts to buy off the named plaintiffs." Id. at 896.

(2) Default Judgments in Class Actions

In Davis v. Hutchins, 321 F.3d 641 (7th Cir. 2003), plaintiffs sought damages under the Fair Debt Collection Practices Act, and defendant defaulted. After a damages hearing, the district court awarded a default judgment of $2,000 in actual and statutory damages to the named representatives and $500,000 for the class (plus attorney's fees and costs at over $18,800). On appeal, the Seventh Circuit reversed, finding that no class damages could be awarded because no class had even been certified. See also Partington v. American Intern. Specialty Lines Ins. Co., 443 F.3d 334, 340 (4th Cir. 2006) (agreeing that although factual allegations are deemed admitted in the default judgment, the questions of law as to class certification are not).

Although a default judgment implies that the defendant admits all factual allegations in the complaint, this rule does not apply to the class certification issue because Rule 23(c) imposes an independent duty on the court to determine that all the requirements of Rule 23 are satisfied. Does this mean that defendants can escape class damages by defaulting? Presumably no! The court merely is required to hold a hearing on notice to the parties to evaluate the requirements of Rule 23.

(3) Rule 23(f) Interlocutory Appeal

Cases and Circuits continue to disagree on the standards applicable to Rule 23(f). In Chamberlan v. Ford Motor Co., 402 F.3d 952 (9th Cir. 2005) (per curiam), the Ninth Circuit denied permission to appeal the granting of class certification in a products liability case under California law, which alleged that the plastic intake manifolds used in certain Ford vehicles were more subject to cracking than the aluminum manifolds used in other cars. The District Court certified a Rule 23(b)(3) class, and Ford requested permission under Rule 23(f) to appeal. Surveying the already complex Rule 23(f) jurisprudence on when permission to appeal may be granted, the Ninth Circuit followed the Seventh Circuit in Blair v. Equifax Check Servs., Inc., 181 F.3d 832 (7th Cir. 1999), and the Eleventh Circuit in Prado-Steiman v. Bush, 221 F.3d 1266 (11th Cir. 2000). Essentially, the Ninth Circuit noted three general categories of cases that may be granted appeal:

(1) where a questionable denial or granting of certification sounds a "death knell" of the litigation because, for example, the representative plaintiff's case is too small to justify the expense of litigation or the class certification puts considerable pressure on defendants to settle;

(2) where interlocutory appeal would facilitate the development of an unsettled area of law; and

(3) where the district court's class certification was manifestly erroneous.

These categories were put forth as guidelines, and not a rigid test. Applying these guidelines, the court found no reason to grant an appeal, since there was (1) no death knell – as Ford was a large enough company that it could withstand the effect of a class-action judgment against it; (2) no unsettled areas of law; and (3) no manifest error in the District Court's decision.

By contrast, in <u>In re Delta Air Lines</u>, 310 F.3d 953, 957-62 (6th Cir. 2002), the Sixth Circuit stated the criteria it would follow in deciding whether to grant an interlocutory appeal under Rule 23(f). Reviewing the standards of other Circuits on this question, it said: (1) no hard-and-fast rule is possible or acceptable; (2) a Rule 23(f) appeal cannot become routine; and (3) some assessment of the merits of the class certification decision must enter into the decision to grant the interlocutory appeal. More specifically, the Sixth Circuit indicated that it would be most likely to grant appeals in "death knell" cases in which the denial of certification effectively ended the litigation. Next, cases raising novel or unsettled issues were also plausible candidates for appeal. The likelihood that the certification decision would be reversed on appeal was also a factor, particularly when there was a possibility that the district court's decision would escape review because of the pressure to settle. Finally, the posture of the case before the district court was relevant, and any indication that the district court would reconsider its certification decision after discovery or other developments should discourage granting an interlocutory appeal. In the initial case, the Sixth Circuit noted that massive potential damages were involved, but doubted that these damages would be sufficient to force defendants to settle. Because the issues involved in the appeal were enmeshed with the merits of the case, the Sixth Circuit declined to grant the Rule 23(f) appeal. See also In re Norton Healthcare Inc. Retirement Plan, 2011 WL 8007765, *1+ (6th Cir. May 18, 2011) (reasserting appellate discretion under Rule 23(f)).

An issue that continues to plague the courts is whether a party may appeal requests to modify or reconsider class certification under 23(f). The Seventh Circuit recently held that a plaintiff may appeal the modification of an order certifying a class. Matz v. Household Intern. Tax Reduction Inv. Plan, 687 F.3d 824 (7th Cir. 2012). Although the text of 23(f) states that "A court of appeals may permit an appeal from an order granting or denying class-action certification," Judge Posner nevertheless held that an order modifying certification may be reviewed based on language in the Advisory Committee Notes stating that "the rule confers on the court of appeals 'a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.'" Id. at 825. See Gelder v. Coxcom Inc., --- F.3d ----, 2012 WL 3194826 (10th Cir. Aug 08, 2012) (permitting appeal under 23(f) on rejected motion for reconsideration of certification order).

In Fleischman v. Albany Medical Center, 639 F.3d 28, 31–32 (2d Cir.2011), the Second Circuit denied a 23(f) appeal on motion to amend class certification order when that motion was denied, on the grounds that this would render the time to appeal a certification order toothless by encouraging parties to file motions to amend the class certification order. However, in that case there was no change to the class certification order that the District Court had initially issued. An order from the court below that changes the "status quo" might be different. As the Seventh Circuit explained in a different case upholding the plaintiff's right to appeal under 23(f), "So if it becomes clear in the course of the lawsuit, as a result of new law or newly learned facts, that the denial of certification was erroneous, and if years of litigation lie ahead before a final judgment can be expected, and if therefore an appeal from the denial of certification may either end the litigation or at least place it on a path to swift resolution, the court of appeals should have discretion to allow the appeal." McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 486 (7th Cir. 2012). As the Seventh Circuit itself noted in Matz, supra, the Advisory Committee Notes specify that the appellate jurisdiction extends to orders granting or denying class certification and "no other type of Rule 23 order is covered by this provision." Accordingly, this decision is likely to engender some litigation going forward.

One issue has seemingly been resolved with respect to Rule 23(f): its deadline for obtaining interlocutory review of an order denying class certification cannot be extended by the trial court vacating and reentering its order. See Jenkins v. BellSouth Corporation, 491 F.3d 1288 (11th Cir. 2007) (holding that there is only a single opportunity for seeking interlocutory appeal of a denial of class certification and the district court is without authority to circumvent this deadline); In re DC Water & Sewer Authority, 561 F.3d 494 (D.C. Cir. 2009).

(4) Opt-In Classes

The Fair Labor Standards Act of 1938 (29 U.S.C. §§201-219) provides for an entirely different procedure for collective litigation under which each litigant must affirmatively opt-in. Rule 23 does not apply to such litigation (largely because the legislation was passed well before the 1966 liberalization of Rule 23). Instead, FLSA actions are conditionally certified if the court finds that the named plaintiffs have made at least a "modest factual showing" that they are "similarly situated" to potential class members and that the potential class members were "victims of a common policy or plan that violated the law." Kelly v. Bluegreen Corp., 256 F.R.D. 626, 629-630 (W.D. Wis. 2009). Only at that point is notice given to other potential plaintiffs, inviting them to opt-in. Three issues are examined below:

(a) How does Wal-Mart apply to FLSA actions (if at all)?

(b) Can plaintiffs jointly bring an FLSA action along with a class action on other related grounds? and

(c) Can a court ever certify an opt-in class under Rule 23?

(a) Wal-Mart's Applicability to FLSA Class Actions. A number of courts have held Wal-Mart v. Dukes inapplicable to FLSA class actions because of the procedural differences between Rule 23 and FLSA class actions. See, e.g. Lagasse v. Flextronics America, LLC, Slip Copy, 2012 WL 2357442 (D.R.I., June 01, 2012) (declining to apply Wal-Mart to FLSA class actions); Myles v. Prosperity Mortg. Co., Slip Copy, 2012 WL 1963390 (D.Md. May 31, 2012) (same); Winfield v. Citibank, N.A., 843 F.Supp.2d 397 (S.D.N.Y. Feb.9, 2012) (stating that "numerous courts ... have refused to apply Dukes on motions for conditional certification under the FLSA, concluding that the Rule 23 analysis had no place at this stage of the litigation" and listing cases). However, a few courts have held either that the Court's analysis is directly applicable to FLSA class actions or at the very least "illuminating." See, e.g., Ruiz v. Serco, Inc., 2011 U.S. Dist. LEXIS 91215 (W.D. Wisc. August 5, 2011) (noting that while the requirements of conditional certification under the FLSA were "lenient," Wal-Mart "generally provides guidance in deciding when certification of a collective action under the FLSA is appropriate."); MacGregor v. Farmers Insurance Exchange, 2011 U.S. Dist. LEXIS 80361 (D.S.C. July 22, 2011) (denying conditional certification in an FLSA case, after discussing Wal-Mart and finding it "illuminating.") In both cases, defendants argued that there was decentralized and independent action by supervisors contrary to the company's established policies.

(b) Are FLSA and Rule 23 Compatible? Suppose in a case involving alleged FLSA-type "wage and hour" violations, plaintiffs seek to bring in federal court both a collective proceeding based on the FLSA and also a class action challenging the same practices under state law (with jurisdiction in the latter action being based on diversity grounds). In Ervin v. OS Restaurant Services, Inc., 632 F.3d 971 (7th Cir. 2011), the Seventh Circuit upheld this hybrid action, reversing the district court. See also Calderon v. GEICO General Ins. Co., 279 F.R.D. 337 (D.Md., February 14, 2012) (holding that Rule 23 and FLSA class actions are not incompatible). However, difficult problems are likely to arise in the allocation of any settlement, as class members cannot share in the FLSA recovery unless they have affirmatively opted in (while the FLSA claimants will also be class members in the state law cause of action unless they opt out).

(c) Opt-In Classes Under Rule 23? Can a court certify an opt-in class in order to resolve jurisdictional issues? In Kern v. Siemens Corp., 393 F.3d 120 (2d Cir. 2004), the district court had certified an opt-in class in a case arising out of a train fire in Austria. Because most class members were not U.S. citizens and had to agree to be bound by the judgment, the District Court required them to opt in, relying on the Court's "equitable powers." The Second Circuit reversed. Although the Second Circuit said that a district court might require class members to take some affirmative steps as a condition of ultimate recovery, the use of an opt-in procedure was impermissible, and courts may not certify a class of those who "consent to being included." The Second Circuit also noted that Rule 23 is exclusive and district courts lack "equitable powers" to go beyond Rule 23's boundaries. Along with the Simon II decision rejecting a "punitive damages" Rule 23(b)(1) mandatory class, this decision seems to show the Second Circuit faithfully honoring the Supreme Court's instruction in Ortiz that federal courts should decline all invitations to the creative extension of Rule 23.

(d) Appeals of Settlements by Non-Named Class Members. Non-named class members can appeal a settlement, without intervening, so long as they had objected at the fairness hearing and were bound by the settlement. Devlin v. Scardelletti, 536 U.S. 1 (2002) (resolving a circuit split on the issue). Appellant, a member of the Transportation Communications International Union's retirement plan, objected to a settlement reached in a class action regarding that plan's benefits package (of which he was a nonnamed class member), but failed to intervene in the action. Despite failing to intervene, appellant sought to appeal the district court's approval of the settlement. The Court stressed that the issue was not whether the appellant had standing (the court held he clearly satisfied both Article III and prudential standing), but "whether petitioner should be considered a `party' for the purposes of appealing the approval of the settlement," since only a "party" has the right to bring an appeal. In determining who qualified as a party, the Court stressed that:

> What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement. It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing. To hold otherwise would deprive nonnamed class members of the power to preserve their own interests in a settlement that will ultimately bind them, despite their expressed objections before the trial court.

536 U.S. at 10. The Court noted that this made the holding of Devlin particularly relevant in a Rule 23(b)(1) class, where there was no opt-out option, but did not discuss whether the holding would also apply to Rule (b)(2) and (b)(3) opt-out classes. The Court also explained that the appellant "will only be allowed to appeal that aspect of the District Court's order that affects him," in this case "the District Court's decision to disregard his objections." Id. at 9.

Subsequent cases have generally read Devlin broadly to include opt out classes. See Fidel v. Farley, 534 F.3d 508 (6th Cir. 2008); Churchill Vill., L.L.C. v. GE, 361 F.3d 566 (9th Cir. 2004); Weinman v. Fid. Capital Appreciation Fund (In re Integra Realty Res., Inc.), 354 F.3d 1246, 1251 (10th Cir. 2004). But see In re Gen. Am. Life Ins. Co. Sales Practices Litig., 302 F.3d 799 (8th Cir. 2002)(suggesting in dicta that Devlin should probably only be applied to Rule (b)(2) cases). Deciding that Devlin should apply to opt-out classes, the Ninth Circuit in Churchill Village explained that:

> Because each objector's claim is too small to justify individual litigation, a class action is the only feasible means of obtaining relief. By terminating all class actions relating to the dishwasher recall, the settlement will effectively bind the objectors. They therefore occupy precisely the status the *Devlin* Court sought to protect.

361 F.3d 572. Although courts have generally been lenient in expanding Devlin beyond (b)(1) classes, they have also placed limits on Devlin as well. In particular, courts have stressed that while intervention is not necessary to appeal under Devlin, objection at the fairness hearing, in the manner prescribed by the district court, is a prerequisite to applying Devlin. See Weinman v. Fid. Capital Appreciation Fund (In re Integra Realty Res., Inc.), 354 F.3d 1246, 1258 (10th Cir. 2004).

Courts have also made clear that only when nonnamed class members are bound by a judgment do they have a right to appeal. See Daniels v. Bursey, 430 F.3d 424 (7th Cir. 2005)(where a class was never certified and a settlement with only the named plaintiffs did not bind proposed class member, those proposed nonnamed members lacked the right to appeal the settlement); AAL High Yield Bond Fund v. Deloitte & Touche LLP, 361 F.3d 1305 (11th Cir. Ala. 2004). Similarly, the Seventh Circuit recently held that a non-profit council that represented tenants in Chicago housing projects could not appeal a settlement involving such tenants because it was a non-party that was not bound by the settlement. See Gautreaux v. Chi. Hous. Auth., 475 F.3d 845 (7th Cir. 2007).

(5) State Law Developments.

Notwithstanding the Class Action Fairness Act ("CAFA"), major developments in class action litigation continue to occur at the state court level. The Florida decision in Engle, which was discussed earlier, may be the most noteworthy such case, but other examples show some state courts aggressively moving in directions diametrically opposed to the recent trend of federal decisions.

The distance between federal class action law and the law in some states is best exemplified by Scott v. American Tobacco Co., 36 So. 3d 1046 (La. App. 4 Cir. 2010). There, a jury had determined that the defendant tobacco companies had "knowingly and deliberately addicted the population of Louisiana smokers to a product known by them to be both addictive and extremely toxic," and the court ordered the defendants to fund a smoking cessation program for the class members who desired to quit smoking. No individual determination of addiction was made, and the Louisiana Court of Appeals upheld this result on the premise that "no class member or other person who is not dependent on cigarettes would consider availing himself of a cessation program." Additionally, the court found that it was not necessary to establish the reliance element in the class's fraud claim through direct proof of individual reliance. Rather, because of the defendants' lengthy course of prohibited conduct affecting a large number of Louisiana smokers, it said that a causal connection between smoking and the classwide reliance on the defendants' communications could be instead demonstrated by circumstantial evidence. Finally, the court precluded the defendants from raising a variety of affirmative defenses. On certiorari to the Supreme Court, Justice Scalia stayed the judgment, on the ground that the Louisiana court's elimination of proof of detrimental reliance raised serious constitutional issues. Philip Morris USA, Inc. v. Scott, 131 S. Ct. 1 (2010). Yet, despite his stay, the Supreme Court ultimately and unanimously denied certiorari. Philip Morris USA Inc. v. Jackson, 131 S.Ct. 3057 (2011).

Another example of state court activism that deviates markedly from federal practice is GMC v. Bryant, 285 S.W. 3d 634 (Ark. 2008). There, the Supreme Court of Arkansas held that the lower court did not err when it certified a nationwide class without first engaging in any choice of law analysis, even though the laws of fifty one different jurisdictions would be at issue in the litigation. The plaintiff had alleged a variety of claims related to allegations that General Motors concealed the defective designs of the parking-brake system of certain pickup trucks and sport utility vehicles. Nonetheless, the Arkansas Supreme Court held: "We cannot say that our class-action jurisprudence requires an Arkansas circuit court to engage in a choice-of-law analysis prior to certifying a class." Id. at 641.

In federal court, it can be confidently predicted that Rule 23(b)(3) would be interpreted in all Circuits to find a lack of predominance that barred a nationwide class on these same facts. General Motors argued that the Arkansas court's approach violated due process, but the Supreme Court did not grant certiorari. Because GMC v. Bryant is a pre-CAFA case, its significance may be limited; and the idea that choice of law analysis could be deferred until after class certification may prevail only in Arkansas.

State court’s reactions to the Supreme Court’s recent changes to Rule 23 in Wal-Mart v. Dukes are mixed. Some state courts have rejected the Supreme Court’s analysis in Wal-Mart. For example, Delaware recently held Wal-Mart inapplicable to its determination of the propriety of a (b)(2) shareholder class action for breach of fiduciary duty in connection with a merger even though money damages were at issue. In re Celera Corp. Shareholder Litigation, 2012 WL 1020471, *17 (Del.Ch. Mar 23, 2012). Other state courts discuss commonality under their state class action rule without mentioning Wal-Mart's new commonality standard. See, e.g., Faigin v. Diamante, --- S.W.3d ----, 2012 WL 89978 (Ark. Jan 12, 2012). Still other state courts have adopted the Supreme Court's reasoning to their own versions of Rule 23 without much discussion. See, e.g., Jackson v. Unocal Corp., 262 P.3d 874, 885 (Colo. Oct 31, 2011); City of San Diego v. Haas, 143 Cal.Rptr.3d 438, 460 (Cal.App. 4 Dist. Jun 29, 2012).

Conclusion and Evaluation: A Diminished Future

Although many commentators have heralded the death of the class action, especially since the Supreme Court's decision in Wal-Mart v. Dukes, the data still show that filings of class action suits are increasing. Even as the barriers to class certification grow, a number of high profile class actions have been able to meet the new commonality standard. Nevertheless, the usefulness of the class action as a deterrent has been significantly curtailed and will continue to shrink, even in areas that have thus far been considered appropriate for class treatment such as antitrust. Today, the only class actions that seem capable of posing a significant deterrent threat are probably in the securities law field.

Three observations emerge from our survey of class action law this year. First, the Supreme Court has sided with the more conservative circuits in its class action jurisprudence of late, and the cases before the Court this term give ample opportunity for the Court to further raise the standards that plaintiffs must meet at certification. The routine application of Daubert to class certification motions, and the ensuing battle of the experts, now seems inevitable. In all likelihood, the Court will increasingly expand the merits inquiry required at the class certification stage, leading to extended mini-trials at the certification stage.

Second, commonality has joined predominance as a significant barrier to class certification in all types of class actions. Some courts, particularly the Second and Seventh Circuits, continue to certify injunctive class actions in the civil rights and even employment discrimination areas. By contrast, the Fifth Circuit has have taken a much harder stand on these types of cases, refusing to certify even class actions that seek purely injunctive relief on commonality grounds. See, e.g., M.D. ex rel. Stukenberg v. Perry, 675 F.3d 832 (5th Cir. 2012).

Third, consumer class actions face the risk of extinction as arbitration clauses, such as the one upheld in AT&T v. Concepcion, proliferate. It is unclear whether actions by state's attorneys general can fill much of this breach. Notably, some courts have declined to uphold such clauses, Carey v. 24 Hour Fitness USA, Inc., 669 F.3d 202 (5th Cir. 2012), but over time companies will respond to these rulings and strengthen their arbitration contracts to effectively limit their exposure to consumer class actions.

Three frontiers of class action practice are emerging. The first is settlement class actions. There is some pushback against the limits of commonality and predominance in settlement-only actions. The Second and Third Circuits certified settlement-only classes this year, even where issues of individual reliance or multiple state laws would ordinarily bar certification of a litigation class. How far the Supreme Court's statement in Amchem that a settlement-only class need not meet Rule 23(b)(3)'s manageability requirement can be stretched remains to be seen. In any event, Amchem's idea that a "disarmed" plaintiff's attorney could not provide adequate representation now seems to be honored more in the breach than in the observance.

The second emerging frontier involves “partial” or “issue certification” in class actions. The best hope for the survival of the class action in money damages cases may lie in the expansion of issue certification under Rule 23(c)(4). Then, even if reliance and proximate causation requirements are strictly enforced, the defendant's liability could be established at the class trial, and individual issues, such as reliance, proximate causation, or damages, could be established in separate proceedings. For example, in a Title VII employment discrimination class action, the court might certify a Rule 23(b)(3) class on the "pattern of discrimination" issues, and then relegate the affirmative defenses raised by the defendant to individual actions (where, after Wal-Mart, the defendant would receive an individualized hearing). This would reduce the impact of the "predominance" roadblock. See, e.g. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, 672 F.3d 482 (7th Cir. 2012).

Issue classification will become more important if Comcast makes it more difficult to prove damages through common proof on a class-wide basis. If the courts will permit it, issue classification can resolve liability issues that are expensive to litigate, leaving issues that are less expensive to litigate (such as reliance or proximate causation) to individual suits. Still, even with issue classes financing an issue class action will remain a barrier to issue class actions unless defendants ultimately settle.

Finally, duplicative and parallel class actions continue to present problems for both federal and state courts. Delaware corporations are responding to the trend of multijurisdictional class actions filed in the wake of mergers by adopting forum selection clauses in their bylaws, and potentially corporate charters. The validity of these clauses in corporate bylaws is currently being litigated, but even so courts are likely to uphold forum selection clauses in corporate charters. In the aftermath of Smith v. Bayer, the federal courts faced with repetitive class actions brought by new class representatives have allowed the new class representatives to seek certification. This phenomenon demonstrates the continuing role of discretion in class action certification decisions and the inconsistency of outcomes even between judges in the same Circuit. Even with the tightening of standards, plaintiffs believe that different judges or courts will rule differently on class certification motions.

Despite increased filings and particularly the growth of FLSA class actions, the long term future of the class action remains in doubt, even for areas of law that have traditionally been understood to be appropriate for class treatment, such as antitrust litigation. Only some basic compromises (such as the acceptance of partial certification) seem capable of preserving it as a broad form of litigation practice.