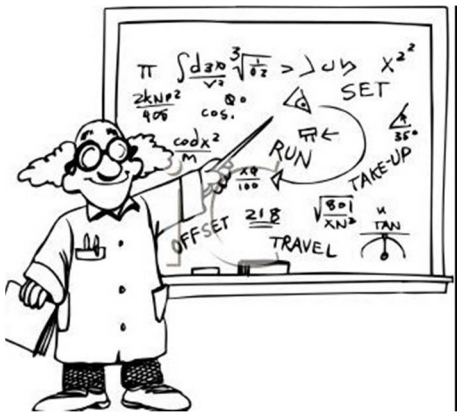

"THE FUTURE AIN'T WHAT IT USED TO BE."*

RIGOROUS ANALYSIS, PREDOMINANCE AND OTHER DEVELOPMENTS IN U.S. CLASS ACTIONS

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* Attributed to Yogi Berra, among others. *See* https://quoteinvestigator.com/2012/12/06/future-not-used/.

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Introduction

Rule 23 of the Federal Rules of Civil Procedure prescribes the requirements that a plaintiff seeking to prosecute a class action must satisfy. Under section (a), the plaintiff must show that: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of fact or law common to the class (commonality); (3) the plaintiff's claims are typical of the claims of the class (typicality); and (4) the plaintiff will fairly and adequately protect the interests of the class (adequacy of representation). In addition, under section (b) if the plaintiff seeks money damages, she must further show that: (1) the questions of law or fact common to the class predominate over questions affecting only individual class members (predominance); and (2) class litigation would be superior to other methods of adjudication, such as litigating individual class member cases (superiority).

Predominance, required by Rule 23(b)(3), has become the Maginot line for most class certification motions today. That was not always so, however.

Some years back, the Supreme Court sent two overarching messages to the lower courts called on to decide whether to permit a class to be certified. On the one hand, in the *Eisen* case, the Supreme Court wrote that Rule 23 does not "give[] a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[1] Yet, on the other hand, in *Falcon* the Court also emphasized that a class "may only be certified if the trial court is satisfied, after a rigorous analysis," that Rule 23's

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[1] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). The Court quoted with approval Judge Wisdom's ruling in *Miller v. Mackey Int'l, Inc.*, 452 F.2d 424, 427 (5th Cir. 1971): "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."

"prerequisites . . . have been satisfied."[2] While the lower courts struggled with the tension between the two messages, more recent rulings, including those in the Supreme Court itself, tilt decidedly in favor of "rigorous analysis." Thus, class certification motions today will receive much closer judicial scrutiny than they did in years past.

This scrutiny occurs not only in the district courts, but also in the circuit courts of appeal. That, too, was not always so. Rule 23(f) of the Federal Rules of Civil Procedure, which authorizes the court of appeals in its discretion to review a district court order granting or denying class certification, was adopted in 1998. Before that, orders on class certification motions rarely received appellate review.

We provide below an overview of notable appellate decisions reflecting the trend in rigorous scrutiny, beginning with *In re Hydrogen Peroxide Antitrust Litigation*[3] and ending with *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*.[4] Although the Third Circuit was not the first court of appeals to push the needle toward rigorous analysis, the Court's *Hydrogen Peroxide* ruling is a good starting point because the Third Circuit, historically, tended to look favorably on class litigation to resolve complex cases.[5]

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[2] *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). Although the *Falcon* Court wrote in reference to Rule 23(a), the lower courts applied the Supreme Court's admonition to all Rule 23 requirements. *See, e.g., Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001) (*opinion amended on denial of reh'g*, 273 F.3d 1266 (2001)); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1078-79 (6th Cir. 1996).

[3] 552 F.3d 305 (3d Cir. 2009).

[4] 568 U.S. 455 (2013).

[5] *Compare, e.g., In re Linerboard Antitrust Litig.*, 305 F.3d 145 (3d Cir. 2002) (affirming the district court's grant of class certification based on a presumption of antitrust injury to all members of the class) *with In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 26 (1st Cir. 2008) (holding that "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

Following this discussion, we address other recent developments in class action litigation, specifically: (1) "mapping" liability theory to impact on class members and damages sustained; (2) rebuttal of predominance evidence; (3) class member "ascertainability" as an element of certification; (4) "numerosity" as a limitation on class certification; (5) class representative "injury-in-fact" as a feature of constitutional standing to sue, and standing to sue for non-plaintiff class members; (6) application of the statute of limitations tolling principle, established in *American Pipe*, to a class action brought after denial of certification; (7) ; appealability of a denial of certification; and (8) the enforceability of arbitration and class action waiver provisions.

I. Predominance in the Fore: *In re Hydrogen Peroxide Antitrust Litigation*[6]

In the *Hydrogen Peroxide* litigation, purchasers of (surprise) hydrogen peroxide alleged a price fixing conspiracy by its manufacturers. The district court certified the class. On appeal to the Third Circuit, the defendants did not dispute the district court's determination that the prerequisites of Rule 23(a) were satisfied. Instead, they challenged the district court's ruling under Rule 23(b)(3) that common questions predominated over individual ones.

The Third Circuit held that a district court must undertake a "rigorous analysis" of the Rule 23 requirements for class certification. That analysis, the Court wrote, may sometimes require the district court to make a "preliminary inquiry into the merits" of a plaintiff's case.[7] Indeed, a district court must not only "***inquir[e] into***" any fact dispute whether a Rule 23 requirement is satisfied, but indeed ***resolve*** the dispute by a preponderance of evidence. That is,

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in a searching inquiry into the viability of that theory and the existence of the facts necessary for the theory to succeed").

[6] 552 F.3d at 305.

[7] *Id*. at 316.

the plaintiff must prove on the evidentiary record that it is more likely than not that the Rule's requirements are met.[8]

The Third Circuit held that the district court was too lenient in its Rule 23 determination. The lower court failed to conduct the type of inquiry needed to determine whether Rule 23(b)(3)'s predominance requirement was satisfied.[9] Specifically, the district court failed to weigh the defendants' expert's testimony, which refuted the evidence offered by the plaintiffs' expert. Further, the district court erroneously relied on the so-called "*Bogosian* short-cut," which permits the impact of price fixing to be presumed once a plaintiff shows that all class members paid higher prices for the products that were the subject of an antitrust conspiracy than they would have paid absent the conspiracy.[10] This presumption did not apply, however, because the plaintiffs had not ***proven*** that there were class wide overcharges during the period of the alleged conspiracy. "We emphasize that '[a]ctual, not presumed, conformance' with the Rule 23 requirements is essential."[11]

The Third Circuit reversed certification and instructed the district court, on remand, to conduct a rigorous analysis of the disputed evidence offered by both sides' experts.

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[8] *Id.* at 320 (emphasis added). *See also Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005) (holding that the district court did not err in resolving factual disputes connected to the merits because "[w]e have stated that in ruling on class certification, a court may be required to resolve disputes concerning the factual setting of the case").

[9] *Id.* at 325.

[10] *Id*. at 325-26 (citing *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977)).

[11] *Id*. at 326 (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 259 F.3d 154,167 (3d Cir. 2001)).

II. Rigorous Analysis Applied

A. *Kohen v. Pacific Investment Management Company, LLC*[12]

In *Kohen*, commodities futures purchasers alleged that the defendant cornered the futures market for 10-year U.S. Treasury notes. The defendant argued on appeal that the district court erred in certifying the class of purchasers because the district court failed to determine "which class members . . . suffered damages,"[13] and instead included purchasers that were unharmed by the defendant's conduct. The Seventh Circuit rejected the argument, holding that such a requirement would be "putting the cart before the horse in a way that would vitiate the economies of class action procedure; in effect the trial would precede the certification."[14]

The Seventh Circuit noted that a class "will often include persons who have not been injured by the defendant's conduct; indeed, this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification."[15] The Seventh Circuit cautioned, however, that a class containing "a great many persons who have suffered no injury" should not be certified. But even then, it might be preferable to preserve class treatment by narrowing the class definition—not by throwing out the class action baby with the unharmed bath water.[16]

Last, the Seventh Circuit rejected the defendant's contention that conflicts among class members, based on their trading results, meant that the named plaintiffs were inadequate

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[12] 571 F.3d 672 (7th Cir. 2009).

[13] *Id.* at 676.

[14] *Id.*

[15] *Id*. at 677.

[16] *Id*.

representatives. While the Court acknowledged that some class members might have been able to cover their futures positions to limit their losses, that possibility did not present the type of real conflict necessary to find that adequacy of representation is not satisfied.[17] If such a conflict materialized, "the district court can certify subclasses with separate representation of each."[18]

B. *Wal-Mart Stores, Inc. v. Dukes*[19]

The *Dukes* decision was the first notable Supreme Court ruling on class certification of the 2010's. Present and former Wal-Mart employees alleged that the company had engaged in a systematic policy of failing to promote and provide equal pay to female employees in violation of federal anti-discrimination laws. The plaintiffs, however, had no direct proof of any national directive from Wal-Mart, and they also admitted that promotions and pay decisions were determined on the local and regional levels. Nonetheless, they asserted that a disproportionate share of promotions went to men and that pay for women was often lower, even if a man and woman held the same position.[20] The plaintiffs supported their claims with several expert analyses. For its part, Wal-Mart presented its own experts' reports refuting the claims. The district court certified a class that, by some estimates, numbered as many as 1.5 million women, employed at Wal-Mart's 3,400 stores. The Ninth Circuit (by this time, the Third Circuit's pro-certification successor) affirmed class treatment.[21]

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[17] *Id*. at 679-80.

[18] *Id*. at 680.

[19] 564 U.S. 338 (2011).

[20] *Id*. at 342-45.

[21] *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 577 (9th Cir. 2010) (*en banc*), *rev'd*, 564 U.S. 338 (2011).

At issue before the Supreme Court was whether the plaintiffs had satisfied Rule 23(a)'s commonality requirement. The Court ruled that commonality required more than simply the ability to recite common questions of fact or law. Instead, it requires the plaintiff "***to demonstrate*** that the class members 'have suffered the same injury.'"[22] At the same time, however, the Court recognized that "'[e]ven a single [common] question'" can suffice to satisfy Rule 23(a).[23] The focus is not on the number of questions, but on the nature of the question itself: "What matters to class certification . . . [is] the capacity of a class wide proceeding to generate common answers *apt* to drive the resolution of the litigation."[24]

Thus, to satisfy commonality, the plaintiffs' claims "must depend upon a common contention . . . That common contention, moreover, must be of such a nature that it is capable of class wide 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."[25] And in making such an assessment, the lower court has to conduct a rigorous analysis of the evidence of commonality, even if that requires an inquiry into the merits of the plaintiffs' case.

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[22] 564 U.S. at 350 (emphasis added).

[23] *Id*. at 359 (quoting Richard Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 176, n. 110 (2003)). *See also Suchanek v. Sturm Foods, Inc*., 764 F.3d 750, 756 (7th Cir. 2014) ("Neither Rule 23 nor any gloss that decided cases have added to it requires that *every* question be common.").

[24] *Wal-Mart*, 564 U.S. at 350 (citation and quotation marks omitted). *See also Jimenez v. Allstate Ins. Co*., 765 F.3d 1161, 1165 (9th Cir. 2014) (Commonality "analysis does not turn on the number of common questions, but on their relevance to the factual and legal issues at the core of the purported class' claims . . . . [A] class meets Rule 23(a)(2)'s commonality requirement when the common questions it has raised are 'apt to drive the resolution of the litigation,' no matter their number.") (quoting *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 962 (9th Cir. 2013)).

[25] *Wal-Mart*, 564 U.S. at 350.

Reviewing the evidence, the Supreme Court found that it was not possible to answer the question whether female Wal-Mart employees, as a whole, suffered from discriminatory conduct on the part of their supervisors. There were hundreds of different supervisors, each with discretion on employment matters. The conduct of one supervisor, even if discriminatory, could not be imputed to another.[26] Moreover, the plaintiffs' experts' analyses, while showing regional or national pay disparities, nevertheless failed to establish the existence of discriminatory policies at the individual store level, where these allegedly discriminatory decisions were made. Thus, the analyses on pay disparity did not establish "the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends."[27]

In sum, on the commonality issue, Supreme Court found that the plaintiffs and the purported class members had "little in common but their sex and this lawsuit."[28]

C. *In re Whirlpool Corporation Front-Loading Washer Products Liability Litigation*[29]

In the *Whirlpool* litigation, washing machine purchasers alleged that Whirlpool's front-loading washers were defective because mold and mildew grew in them. The district court certified a purchaser class on claims of breach of warranty and negligent design. The Sixth Circuit recognized that *Wal-Mart* required a rigorous analysis of Rule 23's requirements—even if "'rigorous analysis' may involve some overlap between the proof necessary for class certification and the proof required to establish the merits of the plaintiffs' underlying claims."[30]

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[26] *Id.* at 355.

[27] *Id.* at 357.

[28] *Id*. at 360 (quoting *Dukes*, 603 F.3d at 652 (Kozinski, J. dissenting)).

[29] 678 F.3d 409 (6th Cir. 2012), *vacated sub nom. Whirlpool Corp. v. Glazer*, 569 U.S. 901 (2013), *on remand*, 722 F.3d 838 (6th Cir. 2013).

[30] 678 F.3d at 417.

Making the necessary analysis, the Sixth Circuit affirmed the district court's class certification order.

The Court held that commonality was met because "whether design defects in the [washer] proximately caused mold or mildew to grow and whether Whirlpool adequately warned consumers about the propensity for mold growth are liability issues common to the plaintiff class. These issues are capable of class wide resolution because they are central to the validity of each plaintiff's legal claims and they will generate common answers likely to drive the resolution of the lawsuit."[31]

The Court also held that the class was properly certified even though some class members never experienced a mold problem. "Class certification is appropriate," the Court wrote, "if class members complain of a pattern or practice that is generally applicable to the class as a whole. Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate."[32]

D. *Messner v. Northshore University Healthsystem*[33]

In *Messner*, hospital patients sought to represent a class of individuals who were overcharged on medical services provided by a hospital that had merged in violation of federal antitrust law. The district court refused to certify the class because it found that questions of law and fact individual to proposed members predominated over common ones. Thus, Rule 23(b)'s predominance requirement was not met. The Seventh Circuit reversed because the district court applied too stringent a standard.

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[31] *Id.* at 419.

[32] *Id.* at 420 (quoting *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 428 (6th Cir. 2012)) (internal quotation marks omitted).

[33] 669 F.3d 802 (7th Cir. 2012).

First, the Seventh Circuit found that plaintiffs' expert analysis was sufficient to show that common evidence and common methodology could be used to prove the class' claims. The expert "could show whether and to what extent [the hospital's] post-merger price increases were the result of increased market power resulting from the merger. In other words, [the expert] claimed that he could use common evidence—the post-merger price increases [that the hospital] negotiated with insurers—to show that all or most of the insurers and individuals who received coverage through those insurers suffered some antitrust injury as a result of the merger."[34] The district court erred because it read Rule 23(b)(3) to require "not only common evidence and methodology, but also ***common results*** for members of the class."[35]

Second, as in *Kohen*, the hospital argued that the presence of "many individuals who were not injured" necessarily precluded class treatment.[36] The Court rebuffed this argument because the existence of non-injured class members "is at best an argument that some class members' claims will fail on the merits if and when damages are decided, a fact generally irrelevant to the district court's decision on class certification."[37] While the existence of unharmed class members might create a question whether the class was fatally overbroad, the hospital had failed to show the pervasiveness of these unharmed class members. Accordingly, the potential for uninjured class members was not a basis to deny certification.

By contrast, in *In re Rail Freight Fuel Surcharge Antitrust Litigation*[38]the Court of Appeals for the District of Columbia, vacated certification where the terms of contracts that

[34] *Id.* at 818.

[35] *Id.* at 819 (emphasis added).

[36] *Id.* at 822.

[37] *Id.* at 823.

[38] 725 F.3d 244 (D.C. Cir. 2013).

some of the shipper-plaintiffs had with the defendant-railroads precluded injury to those shippers from the railroads' alleged price-fixing. *Kohen* and *Messner*, however, reflect the prevailing view of the appellate courts: the prospect of uninjured class members does not generally preclude certification.[39] The Supreme Court has declined to rule on whether certification requires a plaintiff to demonstrate "that there is some mechanism to identify the uninjured class members prior to judgment and ensure that uninjured members (1) do not contribute to the size of any damage award and (2) cannot recover such damages." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1049 (2016) (citation and quotations omitted). We discuss both *Rail Freight* and *Tyson* further below.

Also noteworthy, in 2017 the U.S. House of Representatives passed a bill known as the "Fairness in Class Action Litigation Act of 2017."[40] Among other things, the proposed law would require, for certification in cases alleging personal injury or economic loss, that the plaintiff "demonstrate[] that each proposed class member suffered the same type and scope of injury as the named class representative . . . ."[41] The U.S. Senate has not acted on the proposed legislation, however.

E. *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*[42]

Dukes made clear—and the next Supreme Court decision, *Amgen*, confirmed—that in resolving a class certification motion, the court may not only consider merits issues, but also resolve them. However, as the *Amgen* Court also explained, there is "no license to engage in

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[39] *See In re Nexium Antitrust Litig.*, 777 F.3d 9, 14 (1st Cir. 2015) ("We conclude that class certification is permissible even if the class includes a *de minimis* number of uninjured parties.").

[40] H.R. 985, 115th Cong., 1st Sess. (Mar. 13, 2017).

[41] *Id*. §103(a) (proposed §1716 (a)).

[42] 568 U.S. 455 (2013).

free-ranging merits inquiries at the certification stage."[43] Rather, the court may consider merits questions "to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."[44]

In *Amgen*, the Supreme Court addressed whether the plaintiff in a securities fraud class action was required to prove materiality of the defendant's misrepresentations in order to satisfy Rule 23's predominance requirement. Both the district court and the Ninth Circuit held that this was not required at the class certification stage and that the class could, therefore, be certified. The Supreme Court similarly agreed and affirmed class treatment.

The Court noted that, while materiality was an essential element of a securities fraud claim, to require proof of it in order to determine whether common questions of law or fact predominate would risk "put[ting] the cart before the horse."[45] Indeed, it was the very centrality of the materiality question that made it predominate over individual questions because if the misrepresentations were material, they would be material for the entire class:

> [A] failure of proof on the issue of materiality would end the case . . . . As to materiality, therefore, the class is entirely cohesive: It will prevail or fail in unison. In no event will the individual circumstances of particular class members bear on the inquiry.[46]

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[43] *Id.* at 466.

[44] *Id. See also EQT Prod. Co. v. Adair*, 764 F.3d 347, 361 (4th Cir. 2014) ("Prior to certifying a class, a district court must definitively determine that the requirements of Rule 23 have been satisfied, even if that determination requires the court to resolve an important merits issue.").

[45] *Amgen*, 568 U.S. at 460.

[46] *Id*.

Significantly, however, the question ***whether*** the misrepresentations ***were*** material did not need to be answered in order for that question to predominate. Rather, the Supreme Court wrote, materiality was best "addressed at trial or in a ruling on a summary-judgment motion."[47]

III. Mapping Liability Theory to Impact and Damages

A. *Comcast Corporation v. Behrend*[48]

Two months after the *Amgen* decision, the Supreme Court decided an appeal from Third Circuit that had affirmed class certification in an antitrust monopolization class action. The Supreme Court placed the onus on the plaintiffs to assure their theory of anticompetitive conduct maps to their expert's analysis of damages stemming from that theory. A significant disconnect between the two will preclude class certification.

The plaintiffs, cable television subscribers, alleged that Comcast swapped its cable systems with a competitor's systems to amass a monopoly position in the Philadelphia market, thus enabling Comcast to charge inflated rates for service. The plaintiffs sought to certify a class of some 2,000,000 cable subscribers, relying on four proposed theories of antitrust injury:

> First, Comcast's clustering [of services in Philadelphia] made it profitable for Comcast to withhold local sports programming from its competitors, resulting in decreased market penetration by direct broadcast satellite providers. Second, Comcast's activities reduced the level of competition from "overbuilders," companies that build competing cable networks in areas where an incumbent cable company already operates. Third, Comcast reduced the level of "benchmark" competition on which cable customers rely to compare prices. Fourth, clustering increased Comcast's bargaining power relative to content providers. ***Each*** of these forms of impact, respondents alleged, increased cable subscription rates throughout the Philadelphia DMA.[49]

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[47] *Id.* at 470.

[48] 569 U.S. 27 (2013).

[49] *Id.* at 31 (emphasis added).

The district court accepted the overbuilder theory as susceptible of common proof, but rejected the three other theories, and certified the class. The Third Circuit affirmed.

The issue in the Supreme Court turned on the damages model that the plaintiffs' expert had prepared for class certification. The model presented an overcharge based on all four theories of liability, without attributing any part of the overcharge to any particular theory of liability. The Supreme Court held that class certification was inappropriate: "a model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to that theory" of injury to the class members.[50] Accordingly, '[i]n light of the model's inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class."[51]

As the Supreme Court put it, the district court's and the Third Circuit's rejection of the need to "'tie each theory of antitrust impact' to a calculation of damages . . . flatly contradicts our cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim."[52]

Following the Supreme Court's ruling, "*Comcast* mapping" has become a frequently litigated issue. The decisions below are illustrative.

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[50] *Id*. at 35.

[51] *Id*. at 38.

[52] *Id*. at 35 (quoting *Behrend v. Comcast Corp.*, 655 F.3d 182, 206 (3d Cir. 2011), *rev'g judgment*, 569 U.S. 27 (2013)).

B. *Butler v. Sears, Roebuck & Co.*[53]

In *Butler* the Seventh Circuit revisited its prior class certification ruling. Before the *Comcast* decision, the Seventh Circuit had reversed the district court's denial of class certification, and ordered certification of two consumer classes alleging that Sears (in seeming competition with Whirlpool) sold defective washing machines. One class of consumers alleged that certain washing machines were defective because they permitted the growth of mold, which created foul odors. The other class claimed that defendant knew that certain washing machines contained a defective computer device that caused the machine to cease operation, and charged customers to replace the defective units.

The Seventh Circuit construed *Comcast* to stand for the proposition "that a damages suit cannot be certified to proceed as a class action unless the damages sought are the result of the class-wide *injury* that the suit alleges."[54] The Court found that no such concern was presented, however, because "all members of the mold class attribute their damages to mold and all members of the control-unit class to a defect in the control unit."[55] Unlike *Comcast*, there was no failure by plaintiffs to base all their damages on the injury that they were complaining they had suffered. In addition, unlike the district court in *Comcast*, in *Butler*, the district court certified only liability—not damages—for class-wide treatment.[56]

[53] 727 F.3d 796 (7th Cir. 2013).

[54] *Id*. at 799 (emphasis in original).

[55] *Id*. at 800.

[56] *Id*.

C. *In re Deepwater Horizon*[57]

Liability, and not damages, similarly was the linchpin for certification in *Deepwater Horizon*. As in *Butler*, the Fifth Circuit declined to adopt an expansive reading of *Comcast*.

Deepwater Horizon was an appeal from approval of a class action settlement in litigation arising from the 2010 explosion and fire on one of BP's offshore oil drilling platforms in the Gulf of Mexico. The magnitude and intricacy of the settlement led to uncommonly close attention paid to the district court's approval order. The settlement objectors—who included settlement signatory BP itself—argued that *Comcast* "precludes certification under Rule 23(b)(3) in any case where the class members' damages are not susceptible to a formula for classwide measurement."[58] The Court of Appeals responded:

> This is a misreading of *Comcast* . . . which has already been rejected by three other circuits. . . . *Comcast* held that a district court errs by premising its Rule 23(b)(3) decision on a formula for classwide measurement of damages whenever the damages measured by that formula are incompatible with the class action's theory of liability. . . . But nothing in *Comcast* mandates a formula for class wide measurement of damages in all cases.[59]

[57] 739 F.3d 790 (5th Cir. 2014).

[58] *Id*. at 815.

[59] *Id*. (citing *Butler*, 727 F.3d at 800, *Whirlpool*, 722 F.3d at 860, and *Leyva v. Medline Indus. Inc*., 716 F.3d 510, 514 (9th Cir. 2013)). In *Leyva*, the Ninth Circuit reversed denial of certification on liability in an employment litigation: "Here, unlike in *Comcast*, if putative class members prove [defendant's] liability, damages will be calculated based on the wages each employee lost due to [defendant's] unlawful practices." *Leyva*, 716 F.3d at 514. That damages might differ among individual class members did not bar certification on liability. *Id*. *See also Jimenez*, 765 F.3d at 1167-68.

The Fifth Circuit similarly rejected the objectors' argument that under *Comcast* "Rule 23(b)(3) requires a reliable, common methodology for measuring class wide damages."[60] "This reading," the Court wrote, "is a significant distortion of *Comcast*."[61] As the Fifth Circuit saw it:

> The principal holding of *Comcast* was that a "model purporting to serve as evidence of damages . . . must measure only those damages attributable to th[e] theory" of liability on which the class action is premised. "If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)."[62]

Thus, the Court of Appeals upheld the certification for settlement purposes.

D. *In re IKO Roofing Shingle Products Liability Litigation*[63]

Unlike *Butler* and *Deepwater Horizon*, certification on damages was, however, front and center in *IKO Roofing*. The Seventh Circuit reversed a district court order denying class certification for a class of purchasers who bought allegedly defective and non-conforming roofing tiles. The Court held that the district court misread *Comcast* and *Dukes* as requiring the plaintiffs to show "commonality of damages."[64] The Seventh Circuit noted that if this was the correct approach, then "class actions about consumer products are impossible, and our post-*Comcast* decision in [*Butler*], must be wrong."[65] *Butler* survived, however, as the Seventh Circuit read *Comcast* to require only that there be a link between the remedies sought and the theories of liability advanced by plaintiffs.

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[60] *Id*. at 817.

[61] *Id*. at 817.

[62] *Id*. at 817 (quoting *Comcast*, 133 S. Ct. at 1433).

[63] 757 F.3d 599 (7th Cir. 2014).

[64] *Id*. at 602.

[65] *Id*.

In *IKO Roofing*, the purchasers' theory of liability led to two theories of damages. One was based on the defendant's delivery of non-conforming tiles, with damages measured as the difference between the market price for a conforming tile and that of a non-conforming tile, and the difference was applied to the entire class' purchases. The second theory of damages was predicated on the point in time that the non-conforming tiles actually failed in use, with damages determined on buyer-specific basis. The Seventh Circuit held that "neither approach [to damages] runs afoul of *Comcast*: both the uniform and the buyer-specific remedies match the theory of liability."[66] Accordingly, the Seventh Circuit reversed the denial of certification and remanded for further consideration.

E. *In re Modafinil Antitrust Litigation*[67]

The Third Circuit considered the application of *Comcast* in a pharmaceutical "pay-for-delay" case. The plaintiffs were wholesalers who purchased the drug modafinil directly from Cephalon, its manufacturer. The wholesalers alleged that Cephalon and four generic competitors settled patent litigation under agreements that delayed entry of generic versions of modafinil and thus conspired to violate the Sherman Act. The plaintiffs were a class of wholesalers who purchased the drug directly from defendant Cephalon, manufacturer of Provigil, brand name modafinil. After the district court certified the class, the defendants appealed on the ground that the wholesalers failed to show predominance.[68]

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[66] *Id.* at 603. *See also In re U.S. Foodservice, Inc. Pricing Litig.*, 729 F.3d 108, 123 n.8 (2d Cir. 2013) ("Plaintiffs' proposed measure for damages is thus directly linked with their underlying theory of classwide liability . . . and is therefore in accord with the Supreme Court's recent decision in [*Comcast*] . . . . [T]he Supreme Court held that courts should examine the proposed damages methodology at the certification stage to ensure that it is consistent with the classwide theory of liability and capable of measurement on a classwide basis.").

[67] 837 F.3d 238 (3d Cir. 2016) (as amended).

[68] *See also* p. 27-30 (discussing the court's analysis of the numerosity requirement).

Defendants argued that plaintiffs' damages model lacked *Comcast*-compliance because it did not: (1) allocate damages among Cephalon and the four generic competitors; (2) attribute specific amounts of harm to each individual pay-for-delay settlement payment; or (3) identify those class members harmed by each settlement.[69] The defendants further argued that since only two of the original five manufacturer-defendants remained, the plaintiffs' damages model was inappropriate. The Court of Appeals disagreed. Because plaintiffs' theory was that each individual settlement contributed to market-wide harm and because each of the defendants was jointly and severally liable for the harm, a new model was not required.[70]

F. *In re Rail Freight Fuel Surcharge Antitrust Litigation*[71]

While the Fifth, Sixth and Seventh Circuits read *Comcast* in ways that resulted in grants of class certification, in *Rail Freight* the D.C. Circuit came to a different conclusion. The plaintiffs alleged that four major rail carriers agreed to fix the fuel surcharges imposed on freight shippers, purportedly to cover fuel cost increases. But some of the shippers had "legacy contracts" with the defendants, which provided they would be subject to fuel surcharge formulas that predated the conspiracy.[72] In consequence, not all shippers were affected by the conspiracy.

The plaintiffs' argument in favor of class certification hinged on two regression models prepared by their expert, both of which, when taken together, "set forth a persuasive inference of causation: certain common factors predominate in the determination of freight rates; controlling for those common factors, analysis of defendants' transaction data reveals that there was a structural break in the relationship between freight rates and fuel prices around [the start of the

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[69] 837 F.3d at 262.

[70] *Id.*

[71] 725 F.3d 244 (D.C. Cir. 2013).

[72] *Id*. at 248.

Class Period]."[73] The defendants, however, criticized the regressions as "defective" because it "detects injury where none could exist."[74] Specifically, when the regression models were applied to shippers with "legacy contracts," the model yielded positive damages results – "false positives" – something that should not have happened since legacy shippers were unaffected by the defendants' conspiracy. Nonetheless, the district court certified a class of shippers that paid these allegedly price-fixed surcharges, including within the class shippers with legacy contracts.

The D.C. Circuit reversed. The Court noted that *Comcast* "sharpens the defendants' critique of the damages model as prone to false positives,"[75] and that the district court failed to appreciate the effect of these false positives. Relying on *Comcast*, the D.C. Circuit wrote: "[i]t is now clear . . . that Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it."[76] Because the district court, in a pre-*Comcast* ruling, had failed to consider whether these false positives rendered the plaintiffs' expert's regression models unreliable for purposes of showing predominance, the D.C. Circuit remanded for further consideration.[77]

[73] *Id.* at 250 (citation and quotations omitted).

[74] *Id.* at 252-53.

[75] *Id.* at 253.

[76] *Id.* at 255.

[77] On remand, the D.C. District Court denied class certification, citing concerns with the proof on predominance offered by plaintiffs, including the apparent presence of uninjured class members and the need for individualized proceedings to determine damages. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 292 F. Supp. 3d 14, 132–41(D.D.C. 2017). That decision has been appealed.

IV. Predominance Revisited: Individual Issues and Sample Evidence

A. *Halliburton Co. v. Eric P. John Fund, Inc.*[78]

Halliburton is an outgrowth of an issue in the Court's earlier *Amgen* decision: which confirmed using the fraud-on-the-market theory to establish reliance in a federal securities fraud class action. The fraud-on-the-market approach relieves the plaintiff of any need to show individual reliance on the claimed misrepresentation underlying the case. The defendants in *Halliburton* sought to have the Supreme Court overturn *Basic Inc. v. Levinson*[79], the precedent that created the fraud-on-the-market presumption. The defendants argued, among other things, that the "presumption cannot be reconciled with [the Supreme Court's] recent decisions governing class action certification under Federal Rule of Civil Procedure 23."[80]

The Supreme Court rejected the defendants' argument, stating that, consistent with *Wal-Mart* and *Comcast*, the plaintiffs in securities class actions are required to prove that the fraud-on-the-market presumption applies by showing "publicity [of the misstatement], materiality [of the misstatement], market efficiency, and market timing."[81] All this must be done before class certification. In so holding, the Court reaffirmed the teaching of *Wal-Mart* and *Comcast* that the plaintiff in a would-be class action must ***prove***, rather than merely ***plead***, compliance with the elements of Rule 23. The *Halliburton* Court therefore recognized that, once a federal securities fraud plaintiff had presented the facts needed to invoke the fraud-on-the-market presumption in moving for class certification, the defendant was entitled to offer evidence rebutting the presumption.

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[78] 134 S. Ct. 2398 (2014).

[79] 485 U.S. 224 (1988).

[80] *Halliburton*, 134 S. Ct. at 2412.

[81] *Id.*

However, the Court also noted that if the defendant's attempted rebuttal consisted of showing that particular class members did not rely on the alleged misstatement, that proof would ***not*** mean that individualized questions for those members "will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3). That a defendant might attempt to pick off the occasional class member here or there through individualized rebuttal ***does not*** cause individual questions to predominate."[82]

B. *Tyson Foods, Inc. v. Bouaphakeo*[83]

Much of the briefing to the Supreme Court related to a predominance issue discussed earlier: whether the presence of arguably uninjured class members precluded certification. The Supreme Court avoided this issue, however. Instead, ruling narrowly, the Supreme Court addressed the proof that a plaintiff could offer to establish predominance.

In *Tyson* employees sued the company for violations of the federal Fair Labor Standards Act (FLSA), alleging that they were not paid overtime wages for time spent "donning and doffing" protective outerwear.[84] The parties did not dispute that recovery required each employee to "prove that the amount of time spent donning and doffing, when added to his or her regular hours, amounted to more than 40 hours in a given week."[85] Tyson argued that these inquiries were "necessarily person-specific" and would "predominate over the common questions raised by respondents' claims, making class certification improper."[86] The employees answered by offering expert proof, based on a sample of time needed "don[] and doff[]," and

[82] *Id.* at 2412 (emphasis added).

[83] 136 S. Ct. 1036 (2016).

[84] *Id.* at 1041.

[85] *Id.* at 1046.

[86] *Id.*

argued that "individual inquiries [were] unnecessary because it can be assumed each employee donned and doffed for the same average time observed in [their expert's] sample."[87] The lower courts held that the plaintiffs' expert proof sufficed for certification.

The Supreme Court noted that '[i]n a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class."[88] The Court further held that "[w]hether a representative sample may be used to establish class wide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action."[89] The Court reasoned that a representative sample is often the only practicable means to present data related to a defendant's liability. In such a situation, a class action plaintiff's use of a representative sample is similarly appropriate whenever "each class member could have relied on that sample to establish liability if he or she had brought an individual action."[90]

The Court found that the employees were similarly situated: "each employee worked in the same facility, did similar work, and was paid under the same policy."[91] For this reason, any employee in the class could rely on the same study to prove their damages in an individual action. Accordingly, the Supreme Court upheld the lower courts' reliance on the representative sample on class certification.

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[87] *Id.*

[88] *Id.*

[89] *Id.* at 1049.

[90] *Id.* at 1046.

[91] *Id.* at 1048.

V. Ascertainability: How Identifiable are Class Members?

While not an express element of Rule 23, some courts require plaintiffs to establish that the proposed class is "definite" or "ascertainable."[92] These recent lower court rulings have begun to percolate up to the courts of appeal, which currently are split on whether plaintiffs need to prove that there is an "administratively feasible" way to identify class members. Thus far, the Supreme Court has declined to review the issue.[93]

A. *Marcus v. BMW of North America, LLC*[94]

In *Marcus*, the Third Circuit not only adopted an ascertainability requirement, but also set a high bar for establishing it. A proposed class of purchasers and lessees of certain BMWs equipped with Bridgestone run-flat-tires (RFTs) brought an action against BMW and Bridgestone for failing to disclose defects the tires. Although the district court certified the class, the Court of Appeals vacated and remanded the case. A main appellate issue was the ascertainability of class members. As the Court put it, "an ***essential*** prerequisite of a class action . . . is that the class must be currently and readily ***ascertainable*** based on objective criteria."[95]

The ascertainability issues were two-fold. First, the court was troubled by the lack of records available to identify those vehicles (a) factory-equipped with Bridgestone RFTS, and (b) purchased or leased from New Jersey dealerships. Second, even if the relevant cars and tires could be identified "defendants' records would not indicate whether all potential class members' Bridgestone RFTs 'have gone flat and been replaced,' as the class definition requires, because

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[92] *See generally* 1 *Newberg on Class Actions* § 3:2 (5th ed.) (discussing ascertainability).

[93] *ConAgra Brands, Inc. v. Briseno*, 138 S. Ct. 313 (2017) (denying certiorari); *Direct Dig., LLC v. Mullins*, 136 S. Ct. 1161, 1162 (2016) (same).

[94] 687 F.3d 583 (3d Cir. 2012).

[95] *Id.* at 592-93 (emphasis added).

the class is not limited to those persons who took their vehicles to BMW dealers to have their tires replaced."[96]

Accordingly, the Third Circuit instructed the district court to "resolve the critical issue of whether the defendants' records can ascertain class members and, if not, whether there is ***a reliable, administratively feasible*** alternative."[97] The Third Circuit further emphasized that, absent records, class member self-identification was likely insufficient to certify: "[f]orcing BMW and Bridgestone to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications."[98]

Since *Marcus*, the Third Circuit has re-visited ascertainability on several other appeals.[99] We address one of the Court's more recent decisions.

B. *Byrd v. Aaron's Inc.*[100]

Here, computer users filed suit against Aaron's, an electronics retailer for alleged violations of the Electronic Communications Privacy Act (ECPA). According to the plaintiffs, Aaron's installed spyware on computers that it leased, which collected screenshots, keystrokes, and webcam images from the computer and its users. The district court denied certification for failure to demonstrate class member ascertainability.

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[96] *Id.* at 594.

[97] *Id.* at 594 (emphasis added).

[98] *Id.*

[99] *See Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013); *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013); *Grandalski v. Quest Diagnostics Inc.*, 767 F.3d 175, 184 (3d Cir. 2014); *Byrd v. Aaron's Inc.*, 784 F.3d 154 (3d Cir. 2015), *as amended* (Apr. 28, 2015); *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 441 (3d Cir. 2017).

[100] 784 F.3d 154.

The Third Circuit reaffirmed that ascertainability is a two-part inquiry. A plaintiff must show that: "(1) the class is 'defined with reference to objective criteria'; and (2) there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'"[101] However, the Court also emphasized that "[t]he ascertainability inquiry is narrow" and that "[i]f defendants intend to challenge ascertainability, they must be exacting in their analysis and not infuse the ascertainability inquiry with other class-certification requirements."[102] Thus ascertainability was, in the Court's view, an independent requirement for certification—and not to be conflated with Rule 23's other requirements.

C. *Briseno v. ConAgra Foods, Inc.*[103]

By contrast, the Ninth Circuit recently rejected ascertainability (in the form of "administratively feasible" identification) as an independent class certification requirement. Consumers who purchased defendant's cooking oil products brought a class action alleging that the products' "100% Natural" label was false or misleading because the products included bioengineered ingredients. The defendant opposed certification, arguing that "consumers do not generally save grocery receipts and are unlikely to remember details about individual purchases of a low-cost product like cooking oil."[104] In consequence, according to the defendant, there was no "administratively feasible way to identify members of the proposed class[]."[105] The district court granted certification, however.

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[101] *Id.*at 163 (quoting *Hayes*, 725 F.3d at 355).

[102] *Id.* at 165.

[103] 844 F.3d 1121 (9th Cir. 2017), *cert denied*, 138 S. Ct. 313, _U.S._ (2017).

[104] *Id.* at 1125.

[105] *Id.* at 1124.

On appeal, the Court of Appeals relied on the Supreme Court's *Amchem* decision, which precedent instructs that "Federal courts . . . lack authority to substitute for Rule 23's certification criteria a standard never adopted."[106] Thus, because Rule 23 does not mention a "freestanding administrative feasibility prerequisite," the Circuit Court was unwilling to impose one. Further, the Court found such a requirement unnecessary because Rule 23's express requirements and longstanding procedural safeguards already appropriately addressed any policy concerns that class member ascertainability might implicate. For instance, while ascertainability proponents argue that the requirement mitigates administrative burdens, as the Ninth Circuit saw it, the existing manageability element of the superiority requirement already achieves this goal.[107]

The Court also rejected the concern that self-identification could never suffice to prove class member identity. Individuals would be unlikely to risk committing perjury by submitting a false claim involving low-cost consumer goods. Moreover, to address this risk, courts "can rely, as they have for decades, on claim administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques tailored by the parties and the court."[108]

The House of Representative's "Fairness in Class Action Litigation" bill, referred to earlier, sides with the Third Circuit's approach to ascertainability.[109]

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[106] *Id.* at 1126 (alteration in original) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622 (1997)).

[107] *Id.* at 1128.

[108] *Id.* at 1130-1131 (quoting *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 667 (7th Cir. 2015)). *See also In re Petrobras Securities*, 862 F.3d 250, 264 (2d Cir. 2017) (ascertainability "requires only that a class be defined using objective criteria that establish a membership with definite boundaries").

[109] H.R. 985, 115th Cong., 1st Sess. §103(a) (proposed §1718 (a)) (Mar. 13, 2017). *See also* p. 11, above.

VI. Numerosity: How Many Class Members is Enough?

The numerosity element of Rule 23 generally is not controversial. However, from time to time class action defendants dispute this requirement. The *Modafinil* case,[110] previously discussed, is an example, and there the defense challenge resulted in the Third Circuit adopting a new "framework" for analyzing numerosity.[111]

First, the court stated that district courts should always start their analysis with the number of class members. While refraining from imposing a minimum required number of class members for certification, the Court instructed that the analysis "be particularly rigorous when the putative class consists of fewer than forty members."[112] With at most 25 potential members in *Modafinil*, the numerosity inquiry required rigorous analysis.

Because some class members in *Modafinil* were partial assignees of claims of other class members, coming up with a precise number was contested. The Court of Appeals held that the partial assignees should be included as class members: "The text of Rule 23(a)(1)," the Court emphasized, "says nothing about the number of claims; instead, it refers to the number of class *members*."[113] The Court thus directed that the district court determine the exact number of claimants using this approach on remand.

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[110] *Modafinil*, 837 F.3d 238.

[111] *See also* pp. 18-19, above (discussing the *Modafinil* Court's treatment of predominance).

[112] *Id.* at 250. Citing to 5 James Wm. Moore, et al., *Moore's Federal Practice* § 23.22 and William B. Rubenstein, 5 *Newberg on Class Actions* § 3:12, the Court wrote that a class of 20 or fewer class members is usually insufficient to meet the numerosity requirement, while a class with more than 40 members is generally sufficient.

[113] *Id.* at 251. The Court said that while partial assignees may be part of a class, they have less individual rights than other class members. For example, under Third Circuit precedent, a partial assignee may not opt-out of the class. *Id.* at 252 (citing *In re Fine Paper Litig.*, 632 F.2d 1081, 1091 (3d Cir. 1980)).

Next, the Court of Appeals set out for the first time a non-exhaustive list of factors that a district court should consider when determining whether joinder of all the class members would be impracticable. The listed factors were: "[1] judicial economy, the claimants' ability and motivation to litigate as joined plaintiffs, [2] the financial resources of class members, [3] the geographic dispersion of class members, [4] the ability to identify future claimants, and [5] whether the claims are for injunctive relief or for damages."[114] The Court further cautioned that these factors should not be given equal weight. Instead, the Court called out "judicial economy and the ability to litigate as joined parties" as "of primary importance.[115]

On judicial economy, the focus should be "whether the class action mechanism is substantially more efficient than joinder of all parties."[116] Here, however, the lower court held that certification would best serve judicial economy when the litigation was in its late stage.[117] The Third Circuit, rejected this approach: "the late stage of litigation is not by itself an appropriate consideration to take into account as part of a numerosity analysis."[118] As the Court of Appeals explained, using late stage of litigation as a consideration would favor finding numerosity in nearly all complex cases where class certification rulings are often deferred for many years.

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[114] *Id.* at 253 (bracketed matter added).

[115] *Id.*

[116] *Id.* at 254.

[117] The district court was concerned that "[j]oinder of the absent class members would likely require additional rounds of discovery, which would only further delay a trial date" and "if cases were brought within other jurisdictions, additional discovery is certainly a possibility, and separate trials could result in inconsistent verdicts." *King Drug Co. of Florence v. Cephalon, Inc.*, 309 F.R.D. 195, 206–07 (E.D. Pa. 2015), vacated and remanded by *Modafinil,* 837 F.3d 238.

[118] *Modafinil*, 837 F.3d at 254.

Finally, the Circuit Court examined the ability and motivation of the plaintiffs to litigate via joinder. The Court found, once again, that the district court erred, this time because the lower court "focused . . . on whether the individual plaintiffs could have *brought* their own, individual suits," rather than on whether they could have *pursued* their claims through joinder.[119] Here, some class members had estimated claims of over $1 billion. According to the Court of Appeals, these class members could "hardly be considered as candidates who need the aggregative advantages of the class device."[120] By contrast, other class members had claims below $1 million. Because the district court did not consider whether it would have been uneconomical for these plaintiffs to be joined as parties in a traditional suit, the Court reversed on this additional basis.

VII. Rigor on the Road

A. Constitutional Standing to Sue: *Spokeo, Inc. v. Robins*[121]

Article III of the U.S. Constitution prescribes that federal court jurisdiction extends only to "cases" and "controversies"—a limitation often referred to as "constitutional standing to sue." Constitutional standing has three elements: "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[122] The Supreme Court's *Spokeo* decision examined the injury-in-fact element of constitutional standing. And while constitutional standing is not an express requirement of Rule 23, since the Supreme Court's 2016 ruling, this

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[119] *Id.* at 258.

[120] *Id*.

[121] 136 S. Ct. 1540 (2016).

[122] *Id. at* 1547.

overarching limitation—and specifically the injury-in-fact element—has become an increasingly common issue in class actions.

Briefly, Spokeo operated a website that allowed users to search for information about individuals using their name, email address, or phone number. An anonymous Spokeo user apparently searched for information about an individual named Thomas Robins, and, according to Robins, Spokeo provided inaccurate information to the requestor.[123] Robins sued Spokeo individually and on behalf of a class, alleging violations of the Fair Credit Reporting Act of 1970 (FCRA). Under the FCRA, consumer reporting agencies such as Spokeo must "follow reasonable procedures to assure maximum possible accuracy of" consumer reports.[124]

Although the Ninth Circuit upheld Robins' standing to sue, the Supreme Court vacated that ruling. The Supreme Court emphasized that "the injury-in-fact requirement requires a plaintiff to allege an injury that is both '**concrete *and* particularized**.'"[125] As the Supreme Court explained, "[f]or an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'"[126] For concreteness, the injury "must actually exist" and be "real . . . not abstract."[127]

An injury, the Supreme Court further wrote, does not necessarily need to be tangible to be concrete. Rather in some circumstances "violation of a procedural right granted by statute can be sufficient . . . to constitute injury in fact" and "a plaintiff in such a case need not allege any

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[123] *Id.* at 1546. Spokeo reported that Robins "is married, has children, is in his 50's, has a job, is relatively affluent, and holds a graduate degree," all of which allegedly was incorrect. *Id.*

[124] 15 U.S.C. § 1681e(b) (2012).

[125] *Spokeo,* 136 S. Ct. at 1545 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–181 (2000) (bold emphasis added)).

[126] *Id.* at 1548 (quoting *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560, n.1 (1992)).

[127] *Id.* at 1548 (citations omitted).

additional harm beyond the one Congress has identified."[128] That said, alleging merely "a *bare* procedural violation" is not necessarily enough.[129]

Instead of considering both injury-in-fact features, the Ninth Circuit had focused only on particularity, and that was insufficient to establish constitutional standing. The Supreme Court therefore remanded to enable the Ninth Circuit to decide whether Spokeo's dissemination of inaccurate information pleaded a concrete injury.

Spokeo's Supreme Court victory proved pyrrhic. On remand the Ninth Circuit held that Robins' alleged injuries were sufficiently concrete: "FCRA procedures," the Court of Appeals wrote, "were crafted to protect consumers' (like Robins') concrete interest in accurate credit reporting about themselves."[130] The Supreme Court declined to review the Court of Appeals' remand ruling.

Since the Supreme Court's decision, lower federal courts have diverged on what, exactly, constitutes an injury-in-fact. Class actions arising from company data breaches and from disclosure of online user information generally have regularly dealt with this issue. The next two cases are illustrative.

1. *Attias v. Carefirst, Inc.*[131]

Customer data maintained by the defendants, a group of health insurance companies, was hacked in 2014. The defendants, however, did not discover—and thus did not announce—the data breach until nearly a year later. Shortly after the announcement, customers of the defendants

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[128] *Id.* at 1549.

[129] *Id.* at 1550 (emphasis added).

[130] *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1115-17 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 931 (2018).

[131] 865 F.3d 620 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 981 (2018).

began several class actions, asserting various state-law claims. The district court held that the plaintiffs lacked standing and dismissed the cases. In the district court's view, an "increased risk of identity theft as a result of the data breach" was too speculative to constitute an injury-in-fact.[132]

On appeal, the principal question was "whether the plaintiffs ha[d] plausibly alleged a risk of future injury that is substantial enough to create Article III standing."[133] The Court of Appeals upheld Article III standing, and reversed the dismissal:

> "Here . . . an unauthorized party has already accessed personally identifying data on CareFirst's servers, and it is much less speculative—at the very least, it is plausible—to infer that this party has both the intent and the ability to use that data for ill. . . . No long sequence of uncertain contingencies involving multiple independent actors has to occur before the plaintiffs in this case will suffer any harm; a substantial risk of harm exists already, simply by virtue of the hack and the nature of the data that the plaintiffs allege was taken."[134]

The Supreme Court declined further review.

2. *In re SuperValu, Inc.*[135]

While the facts of *SuperValu* are similar to those of *Attias,* the case outcome differs. In *SuperValu,* a chain of grocery stores were the victims of multiple cyber-attacks. Following the attacks, the stores announced that the attack may have resulted in the theft of customers credit

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[132] *Id.* at 623.

[133] *Id.* at 626.

[134] *Id.* at 628-29. *See also Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983 (9th Cir. 2017) (because the Video Privacy Protection Act (VPPA) is intended to protect online user control of personally identifiable information, wrongful disclosure confers standing despite the absence of "consequential harm."); *Perry v. Cable News Network, Inc*., 854 F.3d 1336, 1340 (11th Cir. 2017) (upholding standing under the VPPA although the plaintiff did "not allege any additional harm beyond the statutory violation").

[135] 870 F.3d 763 (8th Cir. 2017).

card information.[136] Customers thereafter filed class actions, but, of the sixteen named plaintiffs, only one, David Holmes, alleged that his credit card information had actually been compromised.[137] The district court evaluated the standing of all the plaintiffs together, concluding that injury-in-fact was not sufficiently pleaded:

> [B]ecause the complaint alleged only an "isolated single instance of an unauthorized charge" suffered by plaintiff Holmes, there was insufficient evidence of misuse of plaintiffs' Card Information connected to defendants' data breaches to "plausibly suggest[ ] that the hackers had succeeded in stealing the data and were willing and able to use it for future theft or fraud."[138]

On appeal, the plaintiffs argued that they had sufficiently pled injury "because the theft of their Card Information due to the data breaches at defendants' stores creates the risk that they will suffer identity theft in the future."[139] The Eighth Circuit cited to findings from a 2007 report from the General Accounting Office, which suggested that consumers affected by a data breach of this type were not faced with a substantial risk of identity theft or credit/debit card fraud.[140] Therefore, the Court held that, Holmes aside, the plaintiffs had failed to plead the "substantial risk of future identity theft" needed to show standing.[141]

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[136] *Id.* at 766.

[137] *Id.* at 766. Holmes alleged that following the data breach he "noticed a fraudulent charge on his credit card statement and immediately cancelled his credit card, which took two weeks to replace." *Id.* at 767 (quotations omitted).

[138] *Id.* at 768 (brackets in original).

[139] *Id.* at 768-69.

[140] *Id.* at 771.

[141] *Id.* at 768. *See also Crupar-Weinmann v. Paris Baguette America, Inc.*, 861 F.3d 76, 81 n.1 (2d Cir. 2017) ("where the plaintiff alleges no particular harm beyond a purely procedural violation, and Congress has found that *that* particular bare procedural violation does not increase the risk of the relevant material harm, the plaintiff lacks standing to proceed with such a suit."); *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909 (7th Cir. 2017) (although the defendant

The case survived nonetheless because "[e]ach plaintiff's standing must be assessed individually."[142] And Holmes "suffered a fraudulent charge on the credit card he previously used to make a purchase at one of defendants' stores affected by the data breaches. This misuse of Holmes' Card Information was credit card fraud and thus a form of identity theft."[143] Accordingly, Holmes's allegations of actual data misuse after the breach sufficed "to demonstrate that *he* had standing."[144] There was no need to establish injury-in-fact for the other plaintiffs or that unnamed class members generally had been injured, as Holmes' own standing to sue did not, as the lower court incorrectly held, depend on whether others also had standing.[145]

3. Standing of Non-Plaintiff Class Members

As *Spokeo* reflects, Article III constitutional standing is a threshold question in every federal litigation, whether a class action or an individual case. However, in a class action the plaintiff may allege a claim arising under the law of the plaintiffs' home state, as well as on behalf of unnamed class members who reside in other states (non-home states) and whose claims arise under the laws of those non-home states. There often is no dispute that the named plaintiff has constitutional standing to assert the claim arising under the law of its home state. But the named plaintiff typically cannot assert injury based on violation of the laws of the non-home states where alleged class members also reside. Then, defendants may argue that the plaintiff lacks constitutional standing to sue under the laws of non-home states, and, therefore, cannot represent alleged class members who reside in those non-home states.

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violated the Cable Communications Policy Act, there was no standing where the plaintiff "has not alleged any plausible (even if attenuated) risk of harm to himself from such a violation.").

[142] *Id.* at 773.

[143] *Id.* at 772.

[144] *Id.* at 773 (emphasis added).

[145] *Id.*

This defense argument raises the question raised whether the named plaintiff's lack of constitutional standing to sue under the laws of non-home states requires outright ***dismissal*** of the claims asserted under those laws, thus narrowing the class pleaded to home-state residents. Or, should the matter, instead, be analyzed and resolved under Rule 23 when the court is called on to determine whether to certify a class that includes members residing in those other non-home states? The prevailing appellate view is that the defense argument "'conflat[es] the standing inquiry with the inquiry under Rule 23 about the suitability of a plaintiff to serve as a class representative[.]' . . . [I]t is best to confine the term "standing" to the Article III inquiry and thus to keep it separate from the plaintiff's entitlement to relief or her ability to satisfy the Rule 23 criteria."[146]

The Second Circuit's recent decision in *Langan v. Johnson & Johnson Consumer Companies, Inc.*,[147] is illustrative. Langan, a Connecticut resident, filed a class action alleging that Johnson & Johnson (J&J) misrepresented several baby products as "natural," when in fact they were not. Langan pleaded violations of both Connecticut law on behalf of consumers in Connecticut and of the laws of several other states on behalf of consumers in those states. The district court denied summary judgment, and certified a class of consumer who purchased J&J's baby products in Connecticut and the others states.

Langan's standing to allege a Connecticut law violation was undisputed. However, on appeal J&J argued that Langan lacked constitutional standing "to bring a class-action on behalf of consumers in states other than Connecticut . . . ."[148] Rejecting the argument, the Court of

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[146] *Arreola v. Godinez,* 546 F.3d 788, 795 (7th Cir. 2008) (quoting *Payton v. Cty. of Kane,* 308 F.3d 673, 677 (7th Cir. 2002)).

[147] 897 F.3d 88 (2d Cir. 2018).

[148] *Id.* at 91.

Appeals held that "whether a plaintiff can bring a class action under the state laws of multiple states is a question of predominance under Rule 23(b)(3), not a question of standing under Article III."[149]

Accordingly, where a class action plaintiff satisfies constitutional standing to allege a claim under its home state's law, the Article III requirement is met. There is no need to show that alleged class members in non-home states also have constitutional standing to sue, although the named plaintiff's ability to include these individuals in the class is appropriately considered on class certification.

B. Appealability: *Microsoft Corp. v. Baker*[150]

Rule 23(f) of the Federal Rules of Civil Procedure authorizes the court of appeals, in its discretion, to permit an appeal from a district court order granting or denying class certification. If the court of appeals denies permission to appeal, the lower court's ruling can be reviewed only if the final judgment in the case is appealed.[151] *Microsoft* arose from the plaintiffs' attempted work-around the discretionary feature of Rule 23(f).

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[149] *Id.* at 96. *See also Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 361-62 (3rd Cir. 2015) ("[O]nce Article III standing 'is determined vis-a-vis the named parties . . . there remains no further separate class standing requirement in the constitutional sense.'. . . [U]nnamed, putative class members need not establish Article III standing. Instead, the 'cases or controversies' requirement is satisfied so long as a class representative has standing . . . .") (citations omitted); *In re Deepwater Horizon*, 739 F.3d 790, 798-808, 821-27 (5th Cir. 2014) (extended discussion of case law in the majority and dissenting opinions).

[150] 137 S. Ct. 1702 (2017).

[151] Subsection (f) was added to Rule 23 in 1998. Prior to that, appellate review of lower court rulings on class certification were rare. *See generally id*. at 1707-10.

Purchasers of Microsoft's Xbox 360 videogame console brought a class action alleging product design defects.[152] After the district court denied certification, the purchasers petitioned for permission to appeal under Rule 23(f). They argued that the district court's decision created a "death-knell situation"—one where refusal to certify a class effectively ends the lawsuit because the small amount involved in the individual claim makes it economically prohibitive to litigate the claim to final judgment.[153]

The Ninth Circuit denied review, after which the plaintiffs voluntarily dismissed their own case with prejudice. Plaintiffs stated that after voluntary dismissal, they intended to appeal the district court's order striking their class allegations.[154] On appeal after dismissal, the Ninth Circuit upheld jurisdiction under 28 U.S.C. § 1291 because the stipulated dismissal was a "sufficiently adverse–and thus appealable–final decision."[155]

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[152] *Baker* was the second-class action lawsuit against Microsoft for this same defect. In the earlier case, *In re Microsoft Xbox 360 Scratched Disc Litig.*, No. C07-1121-JCC, 2009 WL 10219350 (W.D. Wash. Oct. 5, 2009), the Court denied certification because individual issues were held to predominate. *Id.* at *7. The *Baker* plaintiffs argued that the prior class certification ruling did not control because an "intervening Ninth Circuit decision constituted a change in law sufficient to overcome the deference ordinarily due, as a matter of comity." *Microsoft*, 137 S. Ct. at 1710.

[153] *Microsoft*, 137 S. Ct. at 1711. The Supreme Court previously rejected the death knell argument in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

[154] *Microsoft*, 137 S. Ct. at 1711.

[155] *Baker v. Microsoft Corp.*, 797 F.3d 607, 612 (9th Cir. 2015), *rev'd and remanded*, 137 S. Ct. 1702 (2017). Under § 1291, courts of appeals "have jurisdiction of appeals from all *final decisions* of the district courts of the United States." 28 U.S.C. § 1291 (emphasis added).

The Supreme Court granted review and held that courts of appeals lack § 1291 jurisdiction in these circumstances.[156] The Supreme Court expressed three main concerns with the Xbox purchasers' approach.

First, the Court noted the potential for protracted litigation and piecemeal appeals. Under plaintiffs' approach, they *alone* would "determine whether and when to appeal an adverse certification ruling," and they had the power to appeal every adverse district court certification ruling by simply dismissing their case.[157]

Second, the purchasers' approach would allow indiscriminate appellate review of interlocutory orders—an idea that "undercuts Rule 23(f)'s discretionary regime."[158] The Court emphasized Rule 23(f)'s evolution and eventual adoption: "[o]ver years the Advisory Committee on the Federal Rules of Civil Procedure studied the data on class-certification rulings and appeals, weighed various proposals, received public comment, and refined the draft rule and Committee Note." [159]As a result, "Rule 23(f) reflects the rulemakers' informed assessment, permitting . . . interlocutory appeals of adverse certification orders, whether sought by plaintiffs or defendants, solely in the discretion of the courts of appeals."[160]

Finally, the purchasers' approach was one-sided. The Court observed that only *plaintiffs* could use dismissal to secure compel an immediate appeal, even though "the 'class issue' may be

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[156] *Microsoft*, 137 S. Ct. at 1712.

[157] *Id.* at 1713-14.

[158] *Id.* at 1714.

[159] *Id.*

[160] *Id.* at 1714.

just as important to defendants, for '[a]n order granting certification . . . may force a defendant to settle rather than . . . run the risk of potentially ruinous liability.'"[161]

C. *American Pipe* "Stacking"*: China Agritech, Inc. v. Resh*[162]

Years ago, in *American Pipe*,[163] the Supreme Court held that filing a class action tolls the statute of limitations for all would-be class members pending a court decision whether to grant certification.[164] If the court denies certification, the tolling ends, and the limitations period begins to run again, But "members of the failed class could timely intervene as individual plaintiffs in the still-pending action, shorn of its class character,"[165] or else they could file a new suit, regardless of whether the limitations period would have run, absent the tolling.

The Supreme Court revisited *American Pipe* in *China Agritech,* where the Court considered this question: "Upon denial of class certification, may a putative class member, in lieu of promptly joining an existing suit or promptly filing an individual action, commence ***a class action*** anew beyond the time allowed by the applicable statute of limitations?"[166] The Court's answer: *American Pipe* does not allow a "follow-on class action past expiration of the statute of limitations."[167] So, the tolling from the first class action may not be "stacked" on to extend the limitation period applicable to a later class case.

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[161] *Id.* at 1715 (quoting *Coopers & Lybrand*, 437 U.S. at 476).

[162] 138 S. Ct. 1800 (2018).

[163] *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

[164] *China Agritech*, 138 S. Ct. at 1804.

[165] *Id.*

[166] *Id.* (emphasis added).

[167] *Id.*

Briefly, in 2011, purchasers of China Agritech's common stock filed a class action, alleging that the company committed securities fraud.[168] After discovery, the district court denied class certification.[169] Thereafter, purchasers filed a second, similar class action within the limitations period; once again, the court denied certification.[170] Purchasers filed yet a third securities fraud class action against China Agritech. However, this time the statute of limitations had run.

The district court dismissed the suit as untimely, holding that the prior lawsuits did not toll the time to begin another class action.[171] The Ninth Circuit reversed, writing that to allow "future class action named plaintiffs, who were unnamed class members in previously uncertified classes, to avail themselves of *American Pipe* tolling . . . would advance the policy objectives that led the Supreme Court to permit tolling in the first place."[172]

The Supreme Court disagreed. The Court reasoned that the "'efficiency and economy of litigation' that support tolling of individual claims . . . do not support maintenance of untimely successive class actions . . . ."[173] Instead, additional class action filings, the Court wrote, "should be made early on, soon after the commencement of the first action seeking class certification."[174] Early filing forces "all would-be [class] representatives" to come forward and allows the district court to "select the best plaintiff with knowledge of the full array of potential class

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[168] *Id.*

[169] *Id.* at 1805.

[170] *Id.*

[171] *Id.*

[172] *Id.* (quoting *Resh v. China Agritech, Inc.*, 857 F.3d 994, 1004 (9th Cir. 2017), *rev'd and remanded by* 138 S. Ct. 1800 (2018)).

[173] *China Agritech*, 138 S. Ct. at 1806.

[174] *Id.*

representatives and class counsel."[175] The Court's ruling thus encourages all would-be class plaintiffs to "file suit well within the limitation period and seek certification promptly."[176]

D. Arbitration and Class Action Waiver Provisions: *Epic Systems Corporation v. Lewis*[177]

Under the Federal Arbitration Act (FAA) an agreement to arbitrate is "valid, irrevocable, and enforceable . . . ."[178] The FAA evinces a "liberal federal policy favoring arbitration agreements,"[179] and requires enforcement of agreements to arbitrate claims arising under both federal and state statutes. So, for example, the FAA applies to federal antitrust claims,[180] federal securities fraud claims, [181] and federal age discrimination claims.[182] Although the FAA has a "savings" clause—which authorizes invalidating an agreement to arbitrate "upon such grounds as exist at law or in equity"[183]—the provision has had little traction in the Supreme Court in recent years.

A common companion to a contractual agreement to arbitrate is a class action waiver provision, which requires that any arbitration proceed on an individual, rather than class, basis. The Supreme Court has enforced these waivers even in the face of contrary state law

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[175] *Id.* at 1807.

[176] *Id.* at 1811. *See also Supreme Auto Transport, LLC v. Arcelor Mittal USA, Inc*., No. 17-2910, slip op. at 12 (7th Cir. Sept. 6, 2018) (rejecting tolling where class plaintiffs in an amended complaint were not named in the original class complaint, and where their claims were not encompassed by those in the original complaint).

[177] 138 S. Ct. 1612 (2018).

[178] 9 U.S.C. § 2 (2012).

[179] *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

[180] *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985).

[181] *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987).

[182] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

[183] 9 U.S.C. § 2 (2012)

provisions,[184] and even where litigating an individual claim would be cost-prohibitive.[185] In the most recent Supreme Court ruling on class arbitration, *Epic Sys. Corp.*, the case law upholding waivers of class arbitration clashed with national labor policy, which favors collective employee action. In a 5-4 ruling, national labor policy lost.

The employees here had entered into employment agreements, which included arbitration and class action waiver provisions. Despite their signed contracts, the employees sought to assert class action claims for violations of the Fair Labor Standards Act (FLSA). They seemingly were on solid ground, as a 2012 decision of the National Labor Relations Board (NLRB) held that the National Labor Relations Act (NLRA) nullifies the FAA in FLSA cases.[186]

The employers sought to compel arbitration, and the case thus raised the following question: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?"[187] The Supreme Court majority answered yes: "In the Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms. . . . Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful."[188]

The employees' argument that their agreements to arbitrate were invalid because "they require[d] individualized arbitration proceedings instead of class or collective ones"[189] fell on

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[184] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

[185] *American Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

[186] *In re D. R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012).

[187] *Epic Sys.* 138 S. Ct. at 1619.

[188] *Id.* at 1619.

[189] *Id.* at 1622.

deaf ears. In the majority's view, an argument that "a contract is unenforceable *just because it requires bilateral arbitration* is . . . one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability."[190]

By contrast, in dissent Justice Ginsberg cited the NLRA and "over 75 years" worth of precedent:

> [T]he [National Labor Relations] Board has held that the NLRA safeguards employees from employer interference when they pursue joint, collective, and class suits related to the terms and conditions of their employment. . . . For decades, federal courts have endorsed the Board's view, comprehending that "the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7."[191]

The majority was not persuaded, however.

Conclusion

The messages from recent appellate decisions are unmistakable. First, arbitration agreements and class action waiver provisions are likely to stop a U.S. federal court class action in its tracks. Second, even if these obstacles can be overcome, there are no shortcuts to class certification in the federal courts. Just the opposite, class certification proceedings have become increasingly contentious, time-consuming and expensive. Reports from multiple experts on both sides, and extensive evidentiary hearings, are commonplace.[192] Rigorous scrutiny under Rule 23 is the norm.

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[190] *Id.* at 1623 (emphasis in original).

[191] *Id.* at 1637-38, (quoting *Leviton Mfg. Co. v. N.L.R.B.,* 486 F.2d 686, 689 (1st Cir. 1973)).

[192] *See, e.g., Behrend*, 655 F.3d at 188 (four-day evidentiary hearing and 32 expert reports submitted), *judgment rev'd*, 569 U.S. 27 (2013); *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1205-06 (N.D. Cal. 2013) (one-day evidentiary hearing and four expert reports submitted); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-1175, 2014 WL 7882100, at *16 (E.D.N.Y. Oct. 15, 2014) (three-day evidentiary hearing with 20 hours of expert testimony,

In *Comcast*, the Supreme Court reminded that "[t]he class action is an 'exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'"[193] Thus, plaintiffs seeking to sue as class representatives must meet Rule 23's standards through the presentation of supporting evidence, and they must also be prepared to address the underlying merits of their claims to the extent necessary to determine whether Rule 23 has been satisfied. Anything less risks a decision denying certification.

One other message may also be noteworthy: not only classes with a really, really large number of members—as in *Dukes* and *Comcast*—but also ones with a really, really small number of members—as in *Modafinil*—are likely to be really, really hard to certify!

When the court grants certification, the settlement needle moves markedly towards the plaintiffs and the represented class. And although many certified cases therefore settle, some do not, but are dismissed, despite certification, on summary judgment.[194] When class cases are tried on the merits, the upside potential can be huge. In *In re Urethane Antitrust Litig.*, a jury held Dow Chemical liable for price fixing and awarded damages of $400,049,039, which the Court trebled to $1,060,847,117.[195] By contrast, in *Nexium* the jury found for the defendant after trial.[196]

Dated: September 28, 2018

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and an additional day of argument), *report and recommendation adopted*, 2015 WL 5093503 (E.D.N.Y. July 10, 2015).

[193] *Comcast*, 569 U.S. at 33 (citation omitted); *see also Tyson Foods*, 136 S. Ct. at 1053 (Thomas, J., dissenting).

[194] *See, e.g., Lanovaz v. Twinings N. Am., Inc.*, No. 12-CV-02646-RMW, 2016 WL 4585819, at *2 (N.D. Cal. Sept. 2, 2016) (summary judgment granted based on plaintiff's lack of standing after a class for injunctive relief was certified), *aff'd*, 726 F. App'x 590 (9th Cir. 2018).

[195] *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1252 (10th Cir. 2014).

[196] *In re Nexium (Esomeprazole) Antitrust Litig.*, 842 F.3d 34 (1st Cir. 2016).