Private Enforcement of Antitrust Law in the United States

A Handbook

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5 Class actions

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§ 5.01 Introduction

Violations of the antitrust laws usually cause widespread injuries to many participants in a market. In cases brought by overcharged purchasers, injuries suffered by any one purchaser, standing alone, are usually too small to make independent pursuit of an individual damage claim cost-effective. It is therefore indispensable, if private civil damage claims are to vindicate the objectives of antitrust law effectively, that claims asserted in multiple courts on behalf of multiple plaintiffs are combined into one or more cases. Some form of orderly, consolidated leadership must also be established to prosecute the consolidated civil claims. In the absence of established procedures for such consolidation, the multiplicity of individual claims and duplicative costs of various kinds would overwhelm any possibility of feasible private antitrust enforcement in many cases.

In the United States, there are three basic procedural mechanisms for the consolidation of antitrust claims, pertaining, respectively, to: consolidation of cases into one court; establishment of common leadership of the consolidated cases; and common resolution of the consolidated claims in a class action. In the discussion below, we address each of those three basic components of the process for aggregation of antitrust claims into class actions.

§ 5.02 Consolidation of cases: The Judicial Panel and CAFA

There are a vast number of courts in which claimants can initiate antitrust cases in the United States, including all federal judicial districts and, under parallel state antitrust laws, state courts. The primary procedure in the United States for preventing judicial chaos stemming from parallel claims in different courts is the statutory mechanism for consolidation of multidistrict litigation (MDL) by the Judicial Panel on Multidistrict Litigation (the Judicial Panel), embodied in 28 U.S.C. § 1407 and in rules promulgated thereunder by the Judicial Panel. When cases that involve common questions of fact are pending in multiple federal districts, parties to those cases are entitled to make a motion under MDL procedures to have all of the cases transferred to a single judicial district for coordination of all pretrial proceedings. Such motions are heard by the Judicial Panel, which holds hearings periodically throughout the year at various locations, and then determines whether to transfer all related cases to a single district for pretrial proceedings. The United States Supreme Court has held that cases that survive pretrial proceedings must be sent back to the original transferor districts for trial.[4] In practice, however, the vast majority of cases are disposed of prior to being sent back to the transferor district, whether through pretrial proceedings or through settlement in those cases that survive pretrial proceedings.

Although some recent commentary attempts to make systematic sense of the criteria that have governed MDL decisions by the Judicial Panel,[5] the prevailing consensus

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[4] Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).

[5] *See* Daniel A. Richards, *Note, An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge,* 78 Fordham L. Rev. 311 (Oct. 2009) (describing trends in the Judicial Panel's selection of transferee district and judge and arguing that factors that influence the Judicial Panel's decisions differ depending on the nature of the claims and the various other criteria).

among practicing class action attorneys is that the Judicial Panel's choice of transferee forum is often driven in part by opaque judicial politics and is highly unpredictable. Regardless of the criteria that determine Judicial Panel decisions, MDL procedures have been very effective in consolidating antitrust cases and avoiding duplication of effort, and the Judicial Panel is generally perceived among practicing attorneys to function smoothly and efficiently, and to eliminate undue complication very effectively when multiple federal cases are filed. When making arguments for tort reform in the United States, proponents of reform often cite the large number of class action cases filed against a defendant in the wake of an antitrust violation, in an effort to exaggerate an appearance of duplicative burdens from multiple class action cases. However, where multiple cases filed in federal court are concerned, Judicial Panel procedures function very well as the first step toward consolidation of large numbers of parallel class actions into a small number of related cases, heard at the same time by a single judge as to all pretrial matters. For example, although data gathered by the Federal Judicial Center for the years 2002–2006 showed an average of more than 78 antitrust class action cases filed each year, the bulk of that number was attributable to duplicative cases that were subsequently consolidated through Judicial Panel procedures into less than nine multidistrict class action cases per year.[6]

A more recent and controversial set of procedures applies to parallel federal and state cases under the Class Action Fairness Act (CAFA), enacted in 2005.[7] CAFA was enacted to provide that most class action cases may be removed, by either the plaintiffs or the defendants, from state court to federal court. The primary exceptions – "home state" and "local controversy" cases in which most or all parties reside in a single state – are seldom applicable, especially in antitrust class actions. After CAFA, nearly all antitrust class actions may successfully be removed to the federal courts, and may then be consolidated into a single forum pursuant to the Judicial Panel procedures discussed above.

§ 5.03 Common case leadership

Even with consolidation by the Judicial Panel under MDL procedures, multi-district litigation would remain chaotic if there were no procedural mechanism for the appointment of common leadership for closely related cases. Federal judges presiding in class action cases have broad authority under Rule 23(d) of the Federal Rules of Civil Procedure to prescribe measures to prevent undue repetition or complication in presenting evidence or argument, as well as authority under Rule 23(g) to appoint class counsel. Additionally, broader guidance to federal courts, concerning how and why to establish common leadership among class counsel, is set forth in § 21.27 of the Manual for Complex Litigation (Fourth) (the Manual), which, while not authoritative, is often cited as persuasive authority.

The policy cornerstone of common, court-appointed representation is that those who

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[6] *See* American Antitrust Institute, The Next Antitrust Agenda: The American Antitrust Institute's Transition Report On Competition Policy To The 44th President 228–29 (Albert A. Foer ed., 2008).

[7] Pub. L. No. 109-2,119 Stat 4 (2005).

"represent" absent parties in litigation must "fairly and adequately represent the interests of the class." The Supreme Court elaborated on this basic principle in the class action context in *Amchem Prods., Inc. v. Windsor*.[8] Since *Amchem*, courts have recognized increasingly that inquiries concerning adequacy of representation also must be applied to class counsel, who often play the leading role in a class action, and not only to the named plaintiffs. Accordingly, in 2003, Rule 23 of the Federal Rules of Civil Procedure was amended to focus the inquiry concerning fairness and adequacy of representation on the attorneys appointed to represent the class, and not only the named party.

Rule 23 sets forth various criteria that "must" be applied by the court in appointing class counsel, including work done by candidate counsel in identifying or investigating potential claims, counsel's past experience in handling similar claims, counsel's knowledge of applicable law, and resources of counsel. Often, however, several firms that wish to be appointed by the court as lead counsel will be comparably qualified under those criteria. Courts are understandably reluctant to draw fine and sometimes unseemly distinctions based on such criteria, in what is sometimes referred to disparagingly as a "beauty contest" among fully qualified law firms. In practice, therefore, as the Manual recognizes, courts commonly follow a so-called "private ordering" approach toward selection of lead counsel for the class, in which "[t]he lawyers agree who should be lead class counsel and the court approves the selection after a review to ensure that the counsel selected is adequate to represent the class interests."[9]

§ 5.04 Common claim resolution

Once related cases have been consolidated, and once common attorney leadership has been established for a case under the procedures described above, it remains necessary to determine the circumstances under which named parties before the court may resolve claims asserted by others who have been injured by the same antitrust violation.

The primary procedural mechanism for resolving antitrust claims brought by overcharged purchasers is a class action under Rule 23 of the Federal Rules of Civil Procedure.[10] In this section we briefly address the following questions: (1) What is an antitrust class action? (2) What is required for a putative class to be certified under Rule 23? (3) How is the class certification decision made? (4) Which issues are resolved in the class action? (5) What special rules govern antitrust settlement classes? and (6) How do class actions and arbitration interact in antitrust cases?

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[8] 521 U.S. 591 (1997).

[9] Manual for Complex Litigation (Fourth) § 21.272. For a discussion of "private ordering" in the context of class counsel's pre-complaint activities, see Chapter 2 of this Handbook.

[10] States have their own class-action procedural devices and their versions are often applied differently than Rule 23, even if the language of their rules is similar. See Smith v. Bayer Corp., 131 S. Ct. 2368, 2377–78 (2011) (observing that the West Virginia Supreme Court has declared "its independence from federal courts' interpretation of the Federal Rules – and particularly of Rule 23"). This is becoming less important, however, due to the ability to remove most class actions to federal court under CAFA. *See id.* at 2382 (CAFA allows defendants to remove most class actions to federal court where Rule 23 applies).

§ 5.05 What is an antitrust class action?

A class action is a procedural mechanism, governed in federal court by Rule 23 of the Federal Rules of Civil Procedure. Rule 23 allows claims of a large group of plaintiffs or defendants to be adjudicated efficiently through all stages of litigation: motion practice, discovery, trial, and potentially settlement. As a procedural device, the applicability of the class action mechanism is independent of the merits of the case.[11] However, class certification analysis frequently "will entail some overlap with the merits of the plaintiff's underlying claim," and when such overlap exists, a court must nonetheless determine whether Rule 23's requirements are in fact satisfied in order to determine whether to certify a class.[12] Classes can be certified where none, some, or all of the members of the class turn out to have meritorious claims.[13] The determination as to which members of a class have meritorious claims, if any, is left to the substantive adjudicatory process (via motions to dismiss, summary judgment, and trial before a finder of fact).[14] Once the adjudicatory process begins, it is not uncommon for classes to shrink in scope as the district court determines, at various stages of motion practice, that certain portions of the class do not have meritorious claims,[15] or cannot appropriately be represented by the named class representatives. Claims of certified classes are also often dismissed in their entirety for lack of merit either at summary judgment or trial. If, on the other hand, a class claim is deemed to be meritorious at trial, then damages should be awarded and distributed to

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[11] *See* Miles v. Merrill Lynch & Co. (*In re* Initial Pub. Offering Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006) (Supreme Court precedent precludes consideration of the merits when a merits issue is unrelated to class certification); American Law Institute, Principles of the Law of Aggregate Litigation § 2.06(a) (2009) [hereinafter "ALI Principles"]. ALI Principles provides:

> If the suitability of multiple civil claims for class action treatment depends upon the resolution of an underlying question concerning the content of applicable substantive law or the factual situation presented, then the court must decide that question as part of its determination whether to certify the class. The obligation recognized in this subsection provides no authorization for the court ruling in the posture of a class-certification ruling to decide a question of law or fact or a mixed question of law and fact if determination of that question is not relevant to the suitability of class-action treatment.

Id.

[12] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011); *see also*, ALI Principles, *supra* note 11, at § 2.06(b) ("When deciding a question of fact pursuant to subsection (a), the court should apply a preponderance-of-the-evidence standard.").

[13] *See* Sullivan v. DB Invs., Inc., 667 F.3d 273, 2011 U.S. App. LEXIS 25185, *42 (3d Cir. 2011) ("Rule 23(6)(3) does not, as used by the objectors and the dissent, require individual class members to individually state a valid claim for relief.")

[14] *See id.* at *69 ("[P]laintiffs need not actually establish the validity of claims at the certification stage.").

[15] *See In re* Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig., 2010 U.S. Dist. LEXIS 131330 (C.D. Cal. Nov. 30, 2010) (holding on motion to dismiss that "Plaintiffs who neither sought repairs pursuant to the recalls nor sought repairs for SUA-related issues may not pursue a claim for breach of express warranty based on the written warranty," while those who did may pursue such a claim); *In re* ARM Fin. Group, Inc. Sec. Litig., 2002 U.S. Dist. LEXIS 13451 (W.D. Ky. July 18, 2002) (plaintiffs with 1933 Act claims dismissed, while those with 1934 Act claims permitted to go forward).

class members either in the aggregate or according to a formula approved by the court. If, as is often the case, a class action settles before trial, then the settlement amount is generally distributed to individual class members by class counsel via a court-approved distribution plan. Regardless of whether the claims of a class are dismissed, settled, or prevail at trial, the class mechanism generally allows defendants, plaintiffs, and the courts to adjudicate a large number of similar claims far more efficiently and consistently than would be possible if the claims in question were adjudicated individually.

§ 5.06 What is required for a putative class to be certified under Rule 23?

5.06.1 Class actions principally seeking damages

5.06.1(a) Requirements embodied in Rule 23

The pertinent requirements for representation in a class action principally seeking damages are set forth comprehensively in Rule 23(a) and (b)(3). Those requirements are generally referred to as: (1) numerosity; (2) commonality; (3) typicality; (4) adequacy of representation; (5) predominance; and (6) superiority. If the requirements of Rule 23 are satisfied, then a class must be certified. This is not a discretionary determination, as Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action."[16]

5.06.1(a)(1) Numerosity

The first requirement is that "the class is so numerous that joinder of all members is impracticable."[17] In most antitrust class actions brought on behalf of overcharged purchasers, this requirement is easily satisfied. The class will generally consist of hundreds, thousands, or even millions of purchasers in a marketplace who were similarly affected during the class period. In some industries, however, the number of direct purchasers who are entitled to sue for antitrust law violations under federal antitrust law will be unusually small. For example, in some cases seeking to recover overcharges for prescription drugs, there may be as few as 30 true direct purchasers from defendant manufacturers.[18] This is somewhat smaller than the 40 plaintiffs conventionally referenced as a benchmark for numerosity.[19] Nevertheless, if smaller numbers of class members are widely dispersed geographically, they still may satisfy the numerosity requirement, since one element of the numerosity analysis involves considerations of judicial economy stemming from the consolidation of widely disparate individual actions into a single case.[20] Classes of as few as 30 plaintiffs have been held to satisfy the numerosity requirement when the plaintiffs have been geographically dispersed.[21]

Antitrust claims brought by persons other than overcharged purchasers, by contrast, often fail to satisfy the "numerosity" requirement of Rule 23. For instance, it is rare indeed

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16 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010).

17 Fed. R. Civ. P. 23(a)(1).

18 *See* Meijer, Inc. v. Warner Chilcott Holdings Co., 246 F.R.D. 293, 305–07 & n.13 (D.D.C. 2007).

19 *See* Labauve v. Olin Corp., 231 F.R.D. 632, 665 (S.D. Ala. 2005) (citing cases).

20 *Meijer*, 246 F.R.D. at 306–07.

21 *See id.*

for the number of competitors who are excluded from a marketplace, and who can credibly claim that they otherwise would have met with competitive success in the marketplace, to be large enough to provide the requisite numerosity.

5.06.1(A)(2) COMMONALITY

The second requirement is that "there are questions of law or fact common to the class."[22] Because the same course of conduct in an antitrust case generally has broad effects on prices market-wide, this requirement is nearly always satisfied by the plaintiff's need to plausibly plead unlawful conduct. This requirement has therefore been non-controversial in the class certification context in nearly all antitrust class actions.

Some argue that the Supreme Court upset the status quo regarding commonality in its recent decision in *Wal-Mart Stores, Inc. v. Dukes*.[23] In *Dukes*, even while acknowledging that common questions abounded concerning whether the class members "have all suffered a violation of the same provision of law,"[24] the Court nonetheless surprisingly found that plaintiffs had not "established the existence of any common question."[25] What the court reasoned is necessary in order to present even one "common question" is that the validity of the class's claims "depend on a common contention" as to which "determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke."[26] What that signifies will surely be disputed in future cases.

Early indications from the courts suggest that in many cases the impact of *Dukes* will not upset prior case law on commonality (or in other respects) and may, in fact, be further limited by its unique fact-pattern, as plaintiffs sought to certify a class of 1.5 million female Wal-Mart employees working in approximately 3,500 stores nationwide in a pay and promotion gender discrimination suit. Indeed, a number of recent cases seem to have limited the precedential impact of *Dukes* to its anomalous facts.[27]

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[22] FED. R. CIV. P. 23(a)(2).

[23] 131 S. Ct. 2541 (2011).

[24] *Id*. at 2551.

[25] *Id*. at 2557.

[26] *Id*. at 2551.

[27] *See, e.g.*, Public Emples. Ret. Sys. of Miss. v. Merrill Lynch & Co., 2011 U.S. Dist. LEXIS 93222, 26–27 (S.D.N.Y. Aug. 22, 2011) (noting that "the Supreme Court's clarifying language in *Wal-Mart* has no effect on the commonality determination in this case" because "the facts in *Wal-Mart*, a case in which three named plaintiffs sought to represent a class of 1.5 million women in an employment discrimination suit, are entirely distinguishable from the facts of the instant securities class action."); Churchill v. Cigna Corp., 2011 U.S. Dist. LEXIS 90716, 11–13 (E.D. Pa. Aug. 12, 2011) (decision in *Dukes* "inapposite" because in *Dukes* the issue was local supervisor discretion while "Cigna indisputably has a national policy of denying coverage"); Ugas v. H&R Block Enters., LLC, 2011 U.S. Dist. LEXIS 86769 (C.D. Cal. Aug. 4, 2011) ("Unlike in *Wal-Mart*, here plaintiffs have shown that there was "a common mode of exercising discretion that pervades the entire company. . . ."); *In re* Aftermarket Auto. Lighting Prods. Antitrust Litig., 2011 U.S. Dist. LEXIS 82452, 11–12 (C.D. Cal. July 25, 2011) (analysis of *Dukes* did not affect case in which there was a "general policy" of price-fixing); Behrend v. Comcast Corp., No. 10-2865, 2011 U.S. App. LEXIS 17524, 56–57 n.12 (3d Cir. Aug. 23, 2011) ("The factual and legal underpinnings of [*Dukes*]–which involved a massive discrimination class action and different sections of Rule 23–are clearly distinct from those of this case. [*Dukes*] therefore neither guides nor governs the dispute before us.").

Defendants, however, will seek to isolate the weakest element of a plaintiff's claim, and argue that since the case "depends" on that element, commonality of questions as to other elements is insufficient to create commonality under Rule 23. Defendants may even propose to stipulate to questions that would otherwise be "common," in the hope of persuading a court that since those issues have been stipulated to, determination of their truth or falsity is not necessary and that they therefore cannot present "commonality." Defendants also will rely upon the language in the majority opinion in *Dukes* stating that "[w]hat matters is not the raising of common questions," but whether there are "[d]issimilarities within the proposed class" that "have the potential to impede the generation of common answers."[28] As the dissent in *Dukes* rightly points out, this "dissimilarities" analysis inherently "leads the Court to train its attention on what distinguishes individual class members, rather than on what unites them."[29] By focusing on that language, defendants will try to narrow the focus of district courts to questions that may not be common, and to argue that the existence of other, common questions does not "matter."

Plaintiffs, on the other hand, will point to elements as to which commonality is traditionally very clear – prototypically in antitrust cases, the presence or absence of a conspiracy among the defendants – and will argue that since the class claims logically "depend" upon the truth or falsity of those contentions, those issues establish commonality. In antitrust cases, plaintiffs should have the better of these arguments, since indisputably common questions like the presence or absence of unlawful conspiracy are issues on which liability "depends," and no comparably fundamental and clearly common questions were presented in *Dukes*.

5.06.1(a)(3) Typicality

The third requirement is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[30] This requirement seeks to assure that those seeking to act as class representatives have no divergent interests that could cause them to sacrifice the interests of other class members in order to favor their own interests. In cases brought by classes of overcharged purchasers, all class members usually have been injured in the same way, as a result of increased price levels in the relevant market. Unlike in many other kinds of class actions, therefore, typicality usually is not a major obstacle to the pursuit of a class action in an antitrust case brought by overcharged purchasers.

Nevertheless, in some antitrust cases class members have been injured under different transactional circumstances, such as purchases under different types of contracts, or purchases in materially different markets. Such situations occasionally give rise to divergences of interest within the class, stemming from ways in which the claims of the class representative are atypical. For example, in *Deiter v. Microsoft Corp.*, the court excluded "Enterprise Purchasers" from the class on grounds of typicality because "Enterprise Purchasers," unlike the individual purchasers, purchased bundles of 250 or more software licenses at individually negotiated prices that were "unique to each transaction."[31]

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[28] *Dukes*, 131 S. Ct. at 2551 (internal citation omitted).
[29] *Id.* at 2567 (Ginsburg, J., dissenting).
[30] Fed. R. Civ. P. 23(a)(3).
[31] 436 F.3d 461 (4th Cir. 2006).

5.06.1(A)(4) ADEQUACY OF REPRESENTATION

The fourth requirement is that "the representative parties will fairly and adequately protect the interests of the class."[32] This requirement tends to overlap substantially with the "typicality" requirement discussed above, since divergent interests stemming from representation by an atypical class member are often the reason for any inadequacy of representation by that class member.[33]

As the Supreme Court pointed out in *Amchem*, however, adequacy of representation "also factors in competency and conflicts of class counsel."[34] For example, in the highly-publicized class actions against Christie's and Sotheby's for fixing auction commissions, counsel for clients in U.S. domestic auctions were found not to provide adequate representation to clients who made purchases in foreign auctions. The structure of their compensation as class counsel for U.S. auction clients gave rise to a "structural conflict" that ultimately led class counsel to attempt to compel class members to give up claims arising from foreign auctions for no compensation.[35] Other case law, similarly, has noted an inadequacy of representation in circumstances where class counsel found it expedient in a settlement to release claims of a portion of the class – thereby seemingly recognizing that those claims had substantial value – without providing any sort of consideration in exchange for the forfeiture of those claims.[36]

Another circumstance that may give rise to adequacy problems in antitrust class actions is when a substantial portion of the putative class benefited from the challenged conduct. For example, in *Valley Drug Co. v. Geneva Pharms., Inc.*,[37] the Eleventh Circuit concluded that three national wholesalers included in the plaintiff class, whose transactions collectively comprised more than 50 percent of the aggregate class claims, "experienced a net gain from the absence of generic drugs in the market for terazosin hydrochloride."[38] On that basis, the court in *Valley Drug* vacated a grant of class certification and remanded for consideration of whether a conflict of interest rendered representation of the class inadequate.[39]

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[32] FED. R. CIV. P. 23(a)(4).

[33] *See* Amchem Prods. v. Windsor, 521 U.S. 591, 626 n.20 (1997) (adequacy of representation tends to "merge with" typicality analysis); *Dukes*, 131 S. Ct. at 2551 n.5 (commonality and typicality requirements "tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest") (quoting Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157–58 n.13 (1982)).

[34] *Amchem*, 521 U.S. at 626 n.20.

[35] *In re* Auction Houses Antitrust Litig., 138 F. Supp. 2d 548, 551 (S.D.N.Y. 2001), *aff'd*, 2002 US App. LEXIS 15327 (2d Cir. 2002).

[36] *See, e.g.*, National Super Spuds, Inc. v. New York Mercantile Exchange, 660 F.2d 9, 18 (2d Cir. 1981).

[37] 350 F.3d 1181 (11th Cir. 2003).

[38] *Id.* at 1190.

[39] *Id.* at 1192, 1196. The Eleventh Circuit did engage with plaintiffs' persuasive arguments that such analysis overlooked the fact that the degree to which costs are passed on in prices at the next stage of distribution is not properly considered in federal antitrust law under *Hanover Shoe v. United States Shoe Machinery Corp.*, 392 U.S. 481 (1968). *Valley Drug*, 350 F.3d at 1192–1194.

5.06.1(A)(5) PREDOMINANCE

The fifth requirement, that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members,"[40] is usually the most controversial requirement for antitrust class actions seeking damages. In several prominent cases in recent years, some judges have begun to scale back on the scope of class actions, often by finding that the predominance requirement has not been met. As a result of this trend, counsel and courts have manifested widespread and deep confusion concerning basic principles governing predominance analysis. We discuss below six specific aspects of predominance analysis in which such confusion has been especially noteworthy and problematic.

(1) Any question that affects broad subgroups of plaintiffs is a common question and not an individual question: In recent years, a few courts and many defendants have questioned the predominance of common questions in antitrust cases not by arguing that truly "individual" issues predominate, but instead by arguing merely that the case includes questions not common to the class as a whole. For example, when confronted with state law antitrust claims from many different states, courts have sometimes viewed such differences in state law as weighing against a finding of predominance. To reason in that fashion, however, is inconsistent with the clear language of Rule 23(b)(3), which defines "individual" issues, for purposes of a predominance analysis, to be "questions affecting only individual members" of the class. A difference between the laws of multiple states clearly is not a question "affecting only individual members" of a class. On the contrary, each state's laws in such a case typically affect many thousands, if not millions, of class members. When engaging in a "predominance" analysis, it is important to recognize that questions that affect broad subgroups within the class – whether they are questions of law or of fact – should count on the "common" side of the balance, and not the "individual" side. Even though they may be questions that are not common to the entire class, they nonetheless are not questions "affecting only individual members" of the class.

(2) Predominance is a balancing test, which means that the presence of some individual issues does not necessarily defeat predominance: The plain language of Rule 23(b)(3) requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." A balancing test is thus inherent in the plain language of the statute. The word "predominate" means "to be the stronger or leading element or force"[41] – a phrase which assumes that countervailing, but weaker forces may be at play as well. As recognized in *In re Ford Motor Co. Ignition Switch Products Liability Litigation*, "[t]hat common issues must be shown to 'predominate' does not mean that individual issues need be non-existent. All class members need not be identically situated upon all issues, so long as their claims are not in conflict with each other. . . . The individual differences,

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[40] FED. R. CIV. P. 23(b)(3).

[41] DICTIONARY.COM, http://dictionary.reference.com/browse/predominate (last visited Oct. 5, 2011).

however, must be of lesser overall significance and they must be manageable in a single class action. . . ."[42]

Despite the express text of Rule 23(b)(3), defendants often argue that the presence of even one individual issue precludes certification. This argument is perhaps most commonly advanced in the contexts of statutes of limitations and damages. Some courts have accepted the argument that, in the presence of any individualized questions regarding statutes of limitations or damages, classes cannot be certified.[43] However, such opinions often overlook other tools available to resolve these issues in an efficient manner, consistent with Rule 23(b)(3), and without compromising the fairness of a class verdict.[44] As the Second Circuit noted in *In re Visa Check/MasterMoney Antitrust Litigation*, "the predominance requirement calls only for predominance, not exclusivity, of common questions."[45] In the context of individualized damages issues, most courts have recognized the propriety of conducting a full predominance analysis.[46] The same can be said for cases involving individualized application of the statute of limitations.[47]

Rule 23(b)(3) clearly envisions a weighing and balancing of common and individual issues. It is antithetical to the language of the rule to consider any single or small number of issues, whether it be damages, statutes of limitations, or some other issue, to be so incompatible with class litigation that its mere presence would require denial of class certification.

(3) "Every" class member does not have to be injured for a class to be certified: Within many large antitrust classes, there may often be a small number of overcharged purchasers who, for idiosyncratic reasons, were not injured by the challenged conduct. For example, subjective preferences of some class members will sometimes cause

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[42] 174 F.R.D. 332, 340 (D.N.J. 1997) (internal citations omitted).

[43] *See, e.g.*, Emig v. Am. Tobacco Co., Inc., 184 F.R.D. 379, 391 (D. Kan. 1998) ("Even if the statute of limitations was tolled until relatively recently, the court will still have to determine when each class member learned of defendants' alleged concealment. . . . Such a determination involves an individual, fact intensive analysis that makes a class action suit an improper method of adjudicating these claims."); Owner-Operator Independent Drivers Ass'n, Inc. v. New Prime, Inc., 339 F.3d 1001, 1012 (8th Cir. 2003) (individual issues of damages alone predominated over common liability issues).

[44] *In re* Visa Check/MasterMoney Antitrust Litig., 280 F. 3d 124, 140–41 (2d Cir. 2001) (noting district courts retain numerous tools to manage individual issues that might arise at later stages of the litigation, including: (1) bifurcating liability and damage trials, (2) appointing a Special Master to preside over individual damages or claims proceedings, (3) decertifying a class after the liability phase, (4) creating subclasses, or (5) altering the composition of the class).

[45] 280 F.3d 124, 140–41 (2d Cir. 2001).

[46] *See, e.g.*, Seijas v. Republic of Arg., 606 F.3d 53, 58 (2d Cir. 2010) ("[I]t is well-established that the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification.").

[47] *See, e.g., In re* Linerboard Antitrust Litig., 305 F.3d 145, 162 (3d Cir. 2002) ("[T]he mere fact that such concerns may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones."); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 296 (1st Cir. 2000) (that such concerns may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones).

a small number of plaintiffs to pay a higher price for a product, even if the same product is available for a lower price elsewhere. Recent case law reveals stark disagreement concerning whether it is necessary to determine which class members may be subject to such idiosyncratic defenses and/or to exclude them from the class in order for a class to be certified.

Until recently, there was a broad judicial consensus that the presence within a class of a small proportion of class members who were not injured for idiosyncratic reasons would not preclude class certification.[48] Judge Richard Posner, one of the founders of the conservative "law and economics" movement at the University of Chicago and an influential voice in antitrust law circles, has continued to express strong support for this traditional view.[49]

However, in *New Motor Vehicles*, the First Circuit surprisingly held that the plaintiffs' methods of proof were required to "include some means of determining that each class member was in fact injured," and that the plaintiff was required to show "that *all* consumers would pay more" as a result of the challenged antitrust violation.[50] Pursuant to that holding, the district court subsequently granted a motion to dismiss the case, interpreting the First Circuit's ruling that the plaintiffs were required to "establish that *all* class members paid a higher price" to require such result.[51] However, under the First Circuit's opinion, at least as interpreted by the district court, it is difficult to see how one ever could have a successful antitrust class action, because, as Judge Posner recognizes in *Kohen*, it is "inevitable" that a few class members in any large class will not have been injured.

This view of First Circuit law, which could make class actions impossible in many cases, is inconsistent with basic principles concerning class actions and the burden of proof at the class certification stage. All that plaintiffs in an antitrust class action are required to prove with regard to the fact of injury is that it is more likely than not that each class member was injured. Such a showing establishes the requisite *prima facie* case of injury as to each class member. If that showing is based on common proof, then common issues predominate, and it is a question for trial whether the proof is persuasive. Even if some small number of unidentified class members could be shown by the defendants not to have been injured, plaintiffs, at class certification, need only offer common proof that carries the burden of establishing a *prima facie* case of injury as to all class members. In an individual case, it would suffice to establish a case of such *prima facie* injury if the plaintiff were to establish that the clear majority of persons in his position were injured. There is no reason why that

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[48] For a thorough compilation of cases that have rejected a view that "all" class members must be injured in order to establish predominance, *see* J. Douglas Richards & Benjamin D. Brown, *Predominance of Common Questions – Common Mistakes in Applying the Class Action Standard*, 41 Rutgers L. J. 163, 173–74 nn.52–53 (2009).

[49] *See*, e.g., Kohen v. Pacific Investment Management Co. LLC, No. 08-1075 (7th Cir. July 7, 2009) (Posner, J.) (stating that the "possibility or indeed inevitability" that a class "will often include persons who have not been injured by the defendant[']s" conduct does not preclude class certification).

[50] 522 F.3d 6, 27–29 (1st Cir. 2008) (emphasis in original).

[51] *In re* New Motor vehicles Canadian Export Antitrust Litig., MDL No. 1532, slip. op. at 22–23 (D. Me. July 2, 2009) (emphasis in original).

same proof should not be sufficient to establish a *prima facie* case of injury for all class members.

Fortunately, in its recent decision in *Dukes*, the Supreme Court appears to have consigned to the dustbin the few mistaken opinions, such as *New Motor Vehicles*, suggesting that "all" class members must be injured in order for the predominance requirement to be satisfied. In *Dukes*, the majority opinion states outright that whether something on the order of 0.5 percent or 95 percent of the employment decisions at Wal-Mart may have been determined on a discriminatory basis "is the essential question on which respondents' theory of commonality depends."[52] Although the Court likely did not mean to specify 95 percent as some sort of magic threshold, the Court's statement is logically irreconcilable with any view that 100 percent of the class must be impacted before a court can answer the question of common impact in the affirmative. Thus, consistent with the views expressed by Judge Posner in *Kohen*, as well as with the vast majority of prior precedent, common evidence need only establish by a preponderance of the evidence that the clear majority of class members were injured by common unlawful conduct.[53] Such proof would seem sufficient as a matter of law, under *Dukes*, to establish a predominance of common questions.

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[52] 131 S. Ct. at 2554.

[53] While not advocating the extreme view that *all* class members need to be injured for class certification to be granted, at least one economist writing on the subject has opined that common proof of damages should be able to demonstrate "impact on all (or almost all) class members." Brett M. Dickey & Daniel L. Rubinfeld, *Antitrust Class Certification: Towards an Economic Framework*, 66 N.Y.U. Ann. Surv. Am. L. 459, 462 (2011). Respectfully, we assert that this approach runs contrary to the purposes of the antitrust laws as well as standard economic theory. The rationale often used to support the requirement that "almost all" class members must be damaged for a class to be certified is that it would be unjust for any significant number of uninjured class members to have a recovery. But as Judge Hornby recognized in *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 235 F.R.D. 127, 143 n.55 (D. Me. 2006), *reversed in part, vacated in part and remanded*, 522 F.3d 6 (1st Cir. 2008), these arguments about uninjured class members have to be viewed with some skepticism because the transparent truth is that they want to avoid recovery for all plaintiffs. *See id.* ("If the plaintiffs have an adequate model to award aggregate damages, the defendants' concern that some class members may be overcompensated at the expense of other class members seems a little suspect. Under the guise of fairness, the defendants' real objective is to avoid recovery by anyone."). In reality, the key to fairness for negative value cases is to make sure that the *aggregate damages* paid by defendants is fair and proportionate to the harm they caused and the illegal benefits they reaped. This is the approach most in harmony with the antitrust laws whose "primary goal is to prevent wealth transfers from [antitrust] victims to firms with market power." Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. 879 (2008).

The public policy benefits to focusing on aggregate damages are recognized in 15 U.S.C. § 15(d), which makes proof of "common impact" unnecessary in *parens patriae* cases brought for price-fixing by state attorneys general. That statute provides that in *parens patriae* cases in which price-fixing is found:

> [D]amages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

(4) Unique affirmative defenses that defendants may have against individual class members should not defeat class certification: Recently defendants have attempted to revive a flawed argument first rejected by the Ninth Circuit in 1975 – that defendants' right and potential ability to assert affirmative defenses like causation against individual plaintiffs can defeat class certification. In antitrust class actions, as mentioned above, a defendant can always assert that subjective preferences of some class members will sometimes cause a small number of plaintiffs to pay a higher price for a product, even if the same product is available for a lower price elsewhere. Likewise in securities class actions, a defendant can always argue that a few members of a large class may, in fact, have known about the challenged misstatements or omissions and purchased the security anyway. The danger is that defendants will try to use a possibility that a small number of individual class members may be vulnerable to individual affirmative defenses as an excuse to derail class certification entirely.

The most famous and influential case dealing with this argument is the Ninth Circuit decision in *Blackie v. Barrack*.[54] In *Blackie*, the Ninth Circuit rejected this argument, while recognizing its dangers, holding that:

> The right to disprove causation will not render the action unmanageable. A defendant does not have unlimited rights to discovery against unnamed class members; the suit remains a representative one. . . . We think procedures can be found and used which will provide fairness to the defendants and a genuine resolution of disputed issues while obviating the danger of subverting the class action with delaying and harassing tactics.[55]

Two recent decisions in the Southern District of New York addressing this same argument have followed the intellectual path blazed by *Blackie*. In *In re Monster Worldwide, Inc. Sec. Litig.*,[56] a backdating pay case, Judge Rakoff rejected defendants' arguments that many companies may have engaged in stock option backdating and that certain members of the class may have known about or suspected options backdating at Monster. The court ruled that "despite all of this speculation, Monster provides no direct evidence that any putative class member actually knew about option backdating at Monster before the scandal became public," and properly certified the class.[57] Similarly, in *Lapin v. Goldman Sachs & Co.*,[58] Judge Sullivan certified a class and found that defendants had offered no proof demonstrating "that any potential class plaintiff – including investment banks – had actual knowledge of, or participated in, any alleged fraud." Judge Sullivan concluded by pointing out that if

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Id. We believe it would be appropriate to follow this approach in negative value antitrust actions. This approach would maximize Kaldor-Hicks efficiency, resulting in the greatest good. Even if the aggregate approach is not adopted, however, there is no justification in law, public policy, or economics for restricting class actions to situations where almost all of the class members have been damaged. A far lower threshold, perhaps a simple majority of class members, would be far more compatible with the purposes of the antitrust laws and bring the results much nearer to Kaldor-Hicks efficiency.

54 524 F.2d 891, 906 (9th Cir. 1975).

55 Blackie v. Barrack, 524 F.2d 891, 906 (9th Cir. 1975).

56 251 F.R.D. 132 (S.D.N.Y. 2008).

57 *Id.* at 137.

58 254 F.R.D. 168, 184 (S.D.N.Y. 2008).

this argument were permitted to succeed, defendants could "defeat class certification merely by citing comments by certain industry participants that note the potential for a type of fraud in the industry."[59]

This does not mean defendants are deprived of their right to bring affirmative defenses against individual class members. They retain their right to assert affirmative defenses against individual class members, but that right comes into play after common issues of liability are resolved in a class-wide trial. This happened recently, for example, in *In re Vivendi Universal, S.A. Sec. Litig.*,[60] a securities class action which went to trial and resulted in a jury verdict for the plaintiffs. The district court refused to enter final judgment for plaintiffs after the jury verdict, however, because defendants had the right to challenge individual issues of reliance against members of the class in individual trials if they chose.[61] That is the proper time to deal with potential affirmative defenses against individual class members – not at class certification.

(5) Because predominance of common questions means predominance at trial, issues of law that will be resolved without a trial do not affect predominance: Federal Rule of Civil Procedure 23(b)(3)(D) identifies "the likely difficulties in managing a class action" as one factor to be considered when deciding whether common issues predominate over individual ones. While Rule 23(b)(3)(D) does not define what "managing a class action" means, the Supreme Court has made it clear that "managing a class action," in the Rule 23(b)(3)(D) context, means managing a class action *at trial*.[62]

Since manageability at trial is the issue to be considered under Rule 23(b)(3)(D), issues that can be resolved prior to trial (e.g., issues which can be decided on summary judgment or a motion to dismiss) should not be considered when determining predominance on a motion for class certification. The First Circuit recognized this explicitly in *Waste Mgmt. Holdings, Inc. v. Mowbray*,[63] when it held:

> Rule 23(b)(3)(D) . . . states that "the difficulties likely to be encountered in the management of a class action" are pertinent to the predominance inquiry. Nonetheless, when "confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997) (citation omitted). By like token, when the court supportably finds that an issue which, in theory, requires individualized factfinding is, in fact, highly unlikely to survive

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[59] *Id.*

[60] 2011 U.S. Dist. LEXIS 17514, 219–221 (S.D.N.Y. Feb. 17, 2011).

[61] *Id.* at 219 ("For this reason, courts in securities fraud actions have consistently recognized that issues of individual reliance can and should be addressed after a class-wide trial, through separate jury trials if necessary.") (citing numerous cases).

[62] *See* Amchem Prods. v. Windsor, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial."); Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2146 (1974) ("Commonly referred to as 'manageability,' this consideration encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit.").

[63] 208 F.3d 288, 298 (1st Cir. 2000).

> typical pretrial screening (such as a motion to strike or a motion for summary judgment), a concomitant finding that the issue neither renders the case unmanageable nor undermines the predominance of common issues generally will be in order.[64]

Despite the presence of Supreme Court and First Circuit precedent, defendants and even courts still occasionally cite to issues that can be dealt with pre-trial as evidence of a lack of predominance of common questions under Rule 23(b)(3)(D) for class certification purposes. For instance, in *Telecomm Tech. Servs. v. Siemens Rolm Communs., Inc.*,[65] the district court cited issues including whether "Rolm had copyright or patent protection on the product" and the "parameters of the numerous undefined markets" as obstacles to class certification – issues that seemingly could have been handled before trial. Similarly, in class actions brought under the laws of multiple states, defense counsel sometimes argue that common questions will not predominate due to differences among state laws that involve threshold legal issues, but which can be effectively resolved through a motion to dismiss or for summary judgment. As correctly recognized in *Waste Management*, such issues should not be considered when conducting a "predominance" analysis, since predominance contemplates the issues that will predominate at trial, not in pre-trial proceedings that are resolved as a matter of law.

(6) Predominance of common questions need not be established in order to certify a settlement class: As shown in the fifth aspect of predominance analysis discussed above, the First Circuit in *Waste Management* rightly recognized that predominance of common questions means predominance at trial. Where, by contrast, there is to be no trial due to settlement, a predominance analysis is unnecessary. This was recently recognized, for example, in *In re New Motor Vehicles Canadian Export Antitrust Litigation*,[66] where Judge Hornby, citing *Waste Management*, recognized that predominance concerns are no longer pertinent in the settlement context.[67] Similarly, the American Law Institute has recently recognized in its Principles of the Law of Aggregate Litigation that in determining whether to certify a settlement class, "[t]he court need not conclude that common issues predominate over individual issues"[68] and that "[s]o long as there is sufficient commonality to establish that the class is generally cohesive, the propriety of a settlement need not depend on satisfaction of a 'predominance requirement.'"[69] Although one occasionally sees arguments made that predominance must be established in order to certify a settlement class, such an argument would be contrary to these better reasoned authorities.[70]

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[64] *See also* Sullivan v. DB Invs., Inc., 667 F.3d 273, 2011 U.S. App. LEXIS 25185, *61–62 (3d Cir 2011)

[65] 172 F.R.D. 532, 548 (N.D. Ga. 1997).

[66] 269 F.R.D. 92 & nn.88–89 (D. Me. 2010).

[67] *See also In re* New Motor Vehicle Canadian Exp. Antitrust Litig., 270 F.R.D. 30, 34–35 (D. Me 2011) (reiterating principle after First Circuit vacated and remanded original decision on other grounds).

[68] ALI Principles, *supra* note 11, at § 3.06.

[69] *Id.* § 3.06, Comment A.

[70] For further discussion of settlement classes and settlement practice generally, see Chapter 12 of this Handbook.

5.06.1(A)(6) SUPERIORITY

The last requirement for class actions seeking to recover damages under Rule 23(b)(3) is that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23 identifies a number of criteria for a court to consider in making that determination. However, given the breadth of the superiority question, those criteria provide little concrete guidance for a court to consider. In substance, the "superiority" requirement functions as a catchall that permits a court to consider additional criteria that seem important to it in any particular case, without being rigidly bound by the more specific criteria that precede it. In practice, most U.S. courts tend to focus on the more specific criteria for class certification that are previously stated in Rule 23 and that are discussed above, rather than on a free-ranging "superiority" analysis.

One prominent exception, however, is Judge Easterbrook's opinion in *In re Bridgestone/Firestone, Inc. Tires Prods. Liability Litigation*, in which the Seventh Circuit prohibited class treatment of a nationwide case under state laws on policy bases having little, if any, grounding in specific Rule 23 requirements.[71] Specifically, Judge Easterbrook suggested that to consolidate all of the state law claims in a single federal class action reflected "the model of the central planner" and did violence to "principles of federalism" by "keep[ing] the litigation far away from state courts."[72] For a period of time, that decision and the principles articulated in it made it substantially more difficult to persuade federal judges to certify classes in cases arising under multiple state laws. However, such reasoning should be less viable in the wake of the Class Action Fairness Act of 2005 (CAFA), which reflects Congress' own policy determination that state law claims frequently should be consolidated into the federal courts regardless of federalism concerns.[73] It would hardly be fair or reasonable to require that nearly all state law class actions be removed to federal court for consolidation, pursuant to CAFA and the MDL procedures described above, and then to deny class certification on the basis that the case then involves multiple state laws that are better considered by state courts.

5.06.1(B) "STANDING" REQUIREMENTS OVER AND ABOVE THOSE OF RULE 23?

The Supreme Court has stated unequivocally that Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action."[74] Nevertheless, in apparent contradiction to that principle, some district courts in recent years have required that class representatives have the "standing" to represent absent class members.[75] This highly questionable determination has been most recently and prominently repeated in the specialized area of securities class actions brought on

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[71] 288 F.3d 1012, 1020 (7th Cir. 2002).

[72] *Id.*

[73] For further discussion of CAFA, see Chapter 2 and Chapter 4 of this Handbook.

[74] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010).

[75] *See, e.g.*, *In re* Eaton Vance Corp. Secs. Litig., 220 F.R.D. 162, 165-171 (D. Mass. 2004) (plaintiffs lacked standing to bring claims for violations of the securities laws against four related mutual funds when the proposed lead plaintiffs purchased shares from two of the funds); *In re* Terazosin Hydrochloride Antitrust Litig., 160 F. Supp. 2d 1365, 1370–72 (S.D. Fla. 2001) (holding, in a multistate class action containing claims under state antitrust laws, that the class lacked standing to represent plaintiffs from certain states because there was no lead plaintiff from those states).

behalf of purchasers of mortgage backed securities. In those cases, some district courts have held that named plaintiffs who purchased certain mortgage backed securities cannot bring actions on behalf of purchasers of other mortgage backed securities issued under the same registration statement because they lack Article III standing to do so.[76]

A requirement that a named plaintiff have "standing" to represent absent class members constitutes a fundamental misconception about standing, Rule 23, and class actions. Normally, no party can litigate anyone else's claims. Class actions, however, constitute "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[77] In the class action context, a named plaintiff must establish his own personal standing to bring a cause of action, but his ability to represent *other* claimants via a class action is governed by Rule 23. As the Supreme Court long ago explained, once the named plaintiff in a putative class action establishes that its injury is "real and immediate, not conjectural or hypothetical," it "shift[s] the focus of examination from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.'"[78]

The circuit courts have repeatedly and correctly reminded the district courts of the true relationship between Rule 23 and Article III standing and, on occasion, have provided corrective guidance to the district courts on this issue.[79] Leading

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[76] *See* Me. State Ret. Sys. v. Countrywide Fin. Corp., 722 F. Supp. 2d 1157, 1163 (C.D. Cal. 2010) ("Every court to address the issue in a [Mortgage-Backed Security (MBS)] class action has concluded that a plaintiff lacks standing under [] Article III of the U.S. Constitution . . . to represent the interests of investors in MBS offerings in which the plaintiffs did not themselves buy.") (citing *In re* IndyMac Mortgage-Backed Securities Litig., 718 F. Supp. 2d 495 (S.D.N.Y. 2010); Public Employees' Retirement System of Mississippi v. Merrill Lynch, 714 F. Supp. 2d 475 (S.D.N.Y. 2010)).

[77] Gen.Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 155 (1982).

[78] Sosna v. Iowa, 419 U.S. 393 (1975) (quoting Fed. R. Civ. P. 23(a)).

[79] *See* Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 5912 (8th Cir. 2009) ("The district court erred by conflating the issue of Braden's Article III standing with his potential personal causes of action under ERISA."); Arreola v. Godinez, 546 F.3d 788 (7th Cir. 2008) (Article III standing concerns only whether the named plaintiff suffered an injury redressable by a lawsuit; questions regarding the plaintiff's ability to seek relief on behalf of a class should be answered in the context of Rule 23); Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 504 F.3d 229, 241 (2d Cir. 2007) ("To establish Article III standing in a class action . . . for every named defendant there must be at least one named plaintiff who can assert a claim directly against that defendant, and at that point standing is satisfied and only then will the inquiry shift to a class action analysis."); Payton v. County of Kane, 308 F.3d 673, 677-82 (7th Cir. 2002) (permitting plaintiff class to sue 19 counties for similar violations even though the named plaintiffs did not include representatives from each of the 19 counties); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154 (3d Cir. 2001) ("[W]hether an action presents a 'case or controversy' under Article III is determined vis-a-vis the named parties. . . . Once threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court, and there remains no further separate class standing requirement in the constitutional sense." (quoting 1 Newberg on Class Actions § 2.05 at 2–29 (3d ed., 1992)); *In re* Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 307 (3d Cir. 1998) (once a representative plaintiff demonstrates a personal injury-in-fact traceable to the conduct of the defendant, "there remains no further separate class standing requirement in the constitutional sense . . . [;] the issue [becomes] one of compliance with the provisions of Rule 23, not one of Article III standing" (internal quotations omitted)); Piazza v. Ebsco Indus., 273 F.3d 1341, 1351 (11th Cir. 2001) ("Even though Piazza

commentators have also provided correct guidance on this point.[80] Despite this repeated and consistent guidance from the circuit courts, some district courts (as illustrated most vividly by the recent cases in the mortgage-backed securities context) have conflated the requirements of Article III standing and Rule 23. These decisions, in addition to being legally erroneous and logically flawed, decrease the efficiency of class actions as they require class representatives from each county, securitization offering, ERISA plan, or state when bringing a class action. This makes class actions "considerably more cumbersome to initiate, and in turn, less effective in overcoming a lack of incentives to prosecute individual rights and in "achiev[ing] economies of time, effort, and expense."[81]

An issue that has contributed further confusion to this question of "standing" to represent absent class members has been when decisions about standing should be made. In addressing whether a class representative has standing to assert its own claim, various courts and authorities have rightly focused on whether that issue should be decided before or after class certification.[82] In some courts, however, that focus on timing seems to have confused the courts into assuming, without carefully reasoned analysis, that a court has discretion to decline to certify a class based on whether the plaintiff would have standing

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only has standing to assert this breach of fiduciary duty claim for the period of his participation in the [ERISA] Plan, he may still represent the class [which includes other periods] if his claim has the requisite *typicality*."); Goodman v. Lukens Steel Co., 777 F.2d 113, 122 (3d Cir. 1985) ("[C]ontrary to the defendants' contentions, the issue here is one of compliance with the provisions of Rule 23, not one of Article III standing. Each of the named plaintiffs has presented claims of injury to himself and has alleged facts which present a case or controversy under the Constitution."); Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 423 (6th Cir. 1998) ("[O]nce a potential ERISA class representative establishes his individual standing to sue his own ERISA-governed plan, there is no additional constitutional standing requirement related to his suitability to represent the putative class of members of other plans to which he does not belong.").

[80] 1 Newberg on Class Actions § 2:7 (4th ed. 2010) ("Whether or not the named plaintiff who meets individual standing requirements may assert the rights of absent class members is neither a standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions."); *id.* at § 2.9 ("[W]hen a class plaintiff shows individual standing, the court should pass to Rule 23 criteria to determine whether, and to what extent, the plaintiff may serve in a representative capacity on behalf of the class."); 7AA Wright & Miller, Fed. Prac. & Proc. Civ. § 1785.1 (3d ed. 2010). Wright & Miller provide:

> Representative parties who have a direct and substantial interest have standing; the question whether they may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation. . . . While a potential class representative must demonstrate individual standing vis-a-vis defendant, once standing has been established, whether he will be able to represent the putative class, including absent class members, depends solely on whether he is able to meet the additional criteria encompassed in Rule 23.

Id.

[81] *In re* Relafen Antitrust Litig., 221 F.R.D. 260, 268–70 (D. Mass. 2004) (quoting *Amchem*, 521 U.S. at 615–17).

[82] *See* Linda S. Mullenix, *Standing and Other Dispositive Motions after Amchem and Ortiz; The Problem of "Logically Antecedent" Inquiries*, 2004 Mich. St. L. Rev. 703, 729 (2004).

to assert on its own behalf the claims of absent class members.[83] Although the question whether a named plaintiff has standing to assert its own claims can properly be considered by a court either before or after class certification, that does not mean that "standing" to assert the claims of absent class members is a permissible element of a class certification analysis.

5.06.2 Class actions principally seeking equitable or declaratory relief

The first four criteria for damage class actions that are discussed above – numerosity, commonality, typicality and adequacy – are also applicable to classes seeking injunctive relief. Instead of predominance and superiority, however, the additional requirement for a class action seeking injunctive relief is that the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole."[84] In most antitrust class actions, if the substantive legal requirements for an injunction are satisfied in a case, this requirement that the class be generally affected will be satisfied as well. Thus, although there is frequent dispute in cases concerning whether the requirements for injunctive relief are satisfied as to any plaintiff, it is rare for the requirement of broader impact on the class to be separately disputed in the context of a class action for injunctive relief.

Outside the antitrust context, it had long been accepted practice to view various types of monetary relief, such as back pay in employment cases, as falling within the penumbra of injunctive or declaratory relief within the meaning of Rule 23(b)(2). Although such practices had little application in the antitrust field, they seem to have been significantly curtailed by the Supreme Court in its recent decision in *Dukes*. In *Dukes*, the Court unanimously held that plaintiffs' claims for back pay could not be certified in a Rule 23(b)(2) class because the damages sought were not merely "incidental to" injunctive or declaratory relief. Specifically, the Court reasoned that because Wal-Mart was entitled to assert individualized defenses to plaintiffs' Title VII backpay claims, these claims necessarily sought "individualized" relief, rather than relief that was merely incidental to the injunctive and declaratory relief. The Court further stated that, for a claim to be properly certified under Rule 23(b)(2), it is necessary that "a single injunction or declaratory judgment would provide relief to each member of the class."[85] According to the Court, even when a claim seeks injunctive or declaratory relief as distinguished from monetary relief, "[i]t does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant."[86]

From the standpoint of antitrust class actions, the Supreme Court's delineation of the

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[83] *See, e.g.*, Smith v. Lawyers Title Ins. Corp., No. 07-12124, 2009 WL 514210 (E.D. Mich. Mar. 2, 2009) (citing Mullenix, *supra* note 82).

[84] Fed. R. Civ. P. 23(b)(2).

[85] 131 S. Ct. at 2557.

[86] *Id.* In this aspect, *Dukes* seems to mirror analytical principles adopted in ALI's Principles of the Law of Aggregate Litigation, which make the distinction between Rule 23(b)(2) classes, as to which no opt-out rights are necessary, and Rule 23(b)(2) classes, as to which opt-out rights are necessary, turn on whether the remedies sought in the case are "indivisible" or "divisible." ALI Principles, *supra* note 11, at § 2.04.

boundaries of Rule 23(b)(2) in *Dukes* may raise new issues to be resolved. In many antitrust cases, the antitrust claims that are asserted are coupled with additional claims for unjust enrichment. Those claims generally do not seek an individualized recovery for each unjust enrichment plaintiff. Instead, they seek to disgorge from the defendants a pool of unjust gains which, in equity and good conscience, the defendant should not be permitted to retain. Despite the fact that such disgorged profits would be monetary in nature, they would not seem to constitute "individualized" relief within the meaning of the legal standards established for Rule 23(b)(2) in *Dukes*. *Dukes* may therefore have opened the door to certification of unjust enrichment classes in antitrust cases, notwithstanding the monetary nature of the disgorgement remedy in question.

§ 5.07 How is the class certification decision made?

Whether a putative class satisfies Rule 23 and should be certified is determined solely by the district court after making findings of fact concerning the factors delineated in Rule 23. A decision on class certification is not final, and a judge can certify or decertify a class at any time in the proceedings, though Rule 23(c)(1) does recommend that a certification order should issue at "an early practicable time after a person sues or is sued as a class representative." A party who disagrees with a district court's decision on class certification may file a motion with the Court of Appeals requesting discretionary interlocutory appeal under Rule 23(f) of the Federal Rules of Civil Procedure.

A primary source of controversy in recent years has been the degree to which a court should resolve questions of fact in deciding questions of class certification. That controversy culminated in the Supreme Court's decision in *Dukes*, which gave the lower courts a clear holding 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."[87] In other words, whether merits issues arise during the class certification inquiry is of no moment. The courts are obligated to conduct a "rigorous analysis," and "[f]requently that 'rigorous analysis' will entail some overlap with the merits of the plaintiffs' underlying claim. That cannot be helped."[88] With these phrases, the Supreme Court has eliminated any doubt that may still have remained, at least in some circuits, as to whether a court must find that the requirements of Rule 23 are in fact satisfied in order properly to certify a class.

Nevertheless, the Court does not hold that class certification requires a full trial on all merits questions. Nothing in the *Dukes* opinion or other Supreme Court cases so suggests. On the contrary, in another recent opinion, the Supreme Court confirmed that if an element of a claim does not relate to the Rule 23 factors, it should not be considered at all at class certification.[89] Instead, to determine whether the requirements of Rule 23(b)(3)

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[87] 131 S. Ct. at 2551.

[88] *Id.*

[89] Erica P. John Fund, Inc. v. Halliburton Co., 180 L. Ed. 2d 24, 31–33 (2011) (loss causation, which is a required element of a private securities fraud claim based on violations of § 10(b) of the Securities and Exchange Act of 1934 and SEC Rule 10b-5, does not have to be shown for class certification); *see also* ALI Principles, *supra* note 11, § 2.06(a) (The obligation to decide factual questions necessary to class certification "provides no authorization for the court to engage a

are met, all that a court must do is make factual findings that the factors of numerosity, commonality, typicality, adequacy, predominance, and superiority are met. In making the predominance determination, in particular, the court should identify the merits "questions" that are to be tried in a case, and should weigh those that are common to multiple class members against those that affect "only individual members" of the class. Rule 23 does not ask the court to resolve those questions on their merits, nor does it ask the court to determine which side of the disputed issues is correct. Language in the recent appellate case law prior to *Dukes* clearly recognized that to do so is inappropriate, and nothing in *Dukes* purports to change that aspect of the prior case law.

First, in *In re New Motor Vehicles Canadian Export Antitrust Litigation*, the First Circuit recognized that "the validity of plaintiffs' theory is a common disputed issue" and that "[i]t will be for the fact finder to decide whether this theory is persuasive."[90] The First Circuit explained that a court deciding class certification should not be making such "persuasiveness" determinations with regard to "hard factual proof," but instead should only scrutinize the plaintiffs' arguments for a satisfactory "explanation of how the pivotal evidence behind plaintiffs' theory can be established."[91]

Second, in *IPO*, the Second Circuit emphasized that in making determinations concerning whether the requirements of Rule 23 are satisfied, "a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement."[92] Nothing in *Dukes* suggests that merits questions that are unrelated to any of the requirements of Rule 23(b)(3) are appropriately to be resolved by a court in order to rule on a class certification motion.

Third, in *In re Hydrogen Peroxide Antitrust Litigation*, the Third Circuit stated that "Plaintiffs' burden at the class certification stage is not to prove" its case, but rather "the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof through evidence that is common to the class rather than individual to its members."[93] Likewise, later in its *Hydrogen Peroxide* opinion, the Third Circuit stated that "the question at [the] class certification stage is whether, if such impact is plausible in theory, it is also *susceptible to proof* at trial through available evidence common to the class."[94] Thus, with regard to the key question of predominance, the

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question of law or fact in the posture of a class-certification ruling if determination of that question does not bear upon the suitability of class-action treatment."); *id.* at comment (e) to § 2.06 ("Questions unrelated to the suitability of class-action treatment are appropriately engaged by the court through other procedural vehicles, such as summary judgment, or through pretrial rulings."); *id.* at Reporters' Notes to comment (e) to § 2.06. The Reporters' Notes to comment (e) of ALI Principles provide:

> Well-established principles for summary judgment call for the moving party to show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Wholesale displacement of these principles by the lesser threshold of a mere preponderance of the evidence – the standard prescribed for the class-certification setting – threatens an unwarranted intrusion by the court upon the role of the factfinder at trial.

Id.

90 522 F.3d 6, 29 (1st Cir. 2008) [hereinafter *New Motor Vehicles*].

91 *Id.*

92 *Id.* at 41.

93 552 F.3d 305, 311–12 (3d Cir. 2008).

94 *Id.* at 325 (emphasis added).

question is only whether antitrust impact in the case is "capable of" or "susceptible to" proof through common evidence, not whether the element of antitrust impact has been proved on the merits or whether the court finds the plaintiff's evidence on that issue to be more persuasive than the defendants' opposing evidence. In determining whether impact is "capable of" or "susceptible to" proof through common evidence, *Hydrogen Peroxide* makes clear that the touchstone is to identify "the method or methods by which plaintiffs propose to use the evidence to prove impact at trial."[95] In that respect, the Third Circuit in *Hydrogen Peroxide* echoes the First Circuit's ruling, in *New Motor Vehicles,* that the court is required only to ascertain that there is a satisfactory "explanation of how the pivotal evidence behind plaintiff's theory can be established."[96]

For a period of time, other language in these decisions confused many attorneys and even some courts into believing that a court deciding class certification is now permitted to determine broadly whether it is persuaded by all of the plaintiffs' methods of common proof, thereby transforming the court's role from that of merely identifying common and individual questions in a case into the much more problematic role of determining the correct answers to key merits questions. Those who advocate this forced view of the case law emphasize language from *Hydrogen Peroxide*, for example, in which the Third Circuit states that "the court must resolve all factual and legal disputes relevant to class certification, even if they overlap with the merits." Those taking the radical view contend that such language requires a court, in effect, to determine at the time of class certification whether the plaintiffs' proposed common proof of their case is correct or incorrect, by a standard of the preponderance of the evidence. The effect of such an incorrect interpretation of recent case law would have been revolutionary. It would effectively have called for the court to stop class action cases from going to a jury even when there are "genuine issues of material fact" that would preclude summary judgment, in effect substituting a court's own evaluation of key merits questions for that of the jury.

Fortunately, the Third Circuit has now explicitly repudiated such incorrect interpretations of its *Hydrogen Peroxide* opinion in *Behrend v. Comcast Corp*.[97] In *Behrend*, the Third Circuit explicitly states that "nothing" in its *Hydrogen Peroxide* opinion "indicated that class certification hearings were to become actual trials in which factual disputes are to be resolved" or "requires plaintiffs to prove their case at the class certification stage."[98] Indeed, the *Behrend* opinion goes still further, correctly emphasizing that to interpret *Hydrogen Peroxide* to invite such mini-trials or proof of claims on class certification would run "dangerously close to stepping on the toes of the Seventh Amendment by preempting the jury's factual findings with our own."[99] The Third Circuit in *Behrend* also points out that such interpretation of *Hydrogen Peroxide* has been "uniformly" criticized in recent scholarship.[100]

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[95] *Id.* at 312.

[96] *See also In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 312 (3d Cir. 2008) (quoting *New Motor Vehicles* for proposition that "a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate . . . .").

[97] 2011 U.S. App. LEXIS 17524 (3d Cir. Aug. 23, 2011).

[98] *Id.* at **45–46.

[99] *Id.* at *46.

[100] *Id.* One of the law review articles referenced by the Third Circuit in that regard was co-

The Third Circuit recently reaffirmed this view in *Sullivan* where it confirmed that "there is no 'claims' or 'merits' litmus test incorporated into the predominance inquiry beyond what is necessary to determine preliminarily whether certain elements will necessitate individual or common proof."[101]

The Third Circuit, and the scholarly commentary that it references in *Behrend*, are not the only recent authorities that have rejected a view that class certification should be a context for effective trial of all merits questions. Importantly, in its *Principles of the Law of Aggregate Litigation*, the American Law Institute has urged that:

> Well-established principles for summary judgment call for the moving party to show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Wholesale displacement of these principles by the lesser threshold of a mere preponderance of the evidence – the standard prescribed for the class-certification setting – threatens an unwarranted intrusion by the court upon the role of the factfinder at trial.[102]

These statements by ALI strongly support the Third Circuit's opinion in *Behrend*, and should diminish the likelihood that other courts might make the errors that defense counsel were beginning to urge, routinely, based largely on the Third Circuit's confusing and unfortunate language in *Hydrogen Peroxide*.

Nothing in Supreme Court jurisprudence has ever conflicted with the Third Circuit's clarifying language in *Behrend* and the views expressed on this point in the ALI Principles. To be sure, like much of the recent Court of Appeals case law, the Supreme Court's decision in *Dukes* has stated definitively that in order to certify a class a court must make either "findings" or "determinations" that the prerequisites to class certification are satisfied. However, one must consider the substance of the specific class action requirements in question. In the *IPO* case, for example, the Second Circuit illustrated its statements with regard to the need for "determinations" by reference to the requirement of numerosity, stating that "in considering whether the numerosity requirement is met, a judge might need to resolve a factual dispute as to how many members are in a proposed class. Any dispute about the proposed class must be resolved. . . ."[103] This is true of the numerosity requirement, which on its face calls for the court to determine how numerous are the class members. Some other class action requirements, similarly, call for a court to make outright determinations of fact. For example, the requirement of adequacy of representation requires that the court find the representation to be in fact adequate.

By contrast, the key point, which is sometimes lost on those who wish to interpret recent Court of Appeals authority in a way that hinders class actions, is that, unlike Rule 23 requirements like numerosity or adequacy, the requirement of predominance does not

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authored by one of the co-authors of this chapter. *See* J. Douglas Richards, *Heart of Darkness: A Satirical Commentary*, 66 N.Y.U. Ann. Surv. Am. L. 569 (2011) (criticizing a conceptually similar policy proposal, by former Antitrust Modernization Commission member Jonathan M. Jacobson, that before certifying a class, a court should require a plaintiff to establish a 40 percent probability of success on the merits of its claims).

101 Sullivan v. DB Invs., Inc., 667 F.3d 273, 2011 U.S. App. LEXIS 25185, *66 (3d Cir. 2011).

102 ALI Principles, *supra* note 11, Notes to comment (e) to § 2.06.

103 *IPO*, 471 F.3d at 40.

ask a court to determine whether proposed common methods of proof are correct or incorrect, persuasive or unpersuasive. Instead, all it asks the court to do is determine that common questions are presented that "predominate" and that the plaintiff genuinely has common methods of proof. Once that key point is grasped, it becomes clear that *Dukes* and recent Court of Appeals case law is far less radical than some have contended. Merits questions need not be answered in order for a court to determine that they are common questions. Accordingly, for a court in the context of the predominance inquiry to determine whether the plaintiffs' proposed common proof is correct or incorrect would violate the Second Circuit's admonition in *IPO* that "a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement."[104]

Most district courts that have been confronted with the more revolutionary interpretation of *IPO*, *Hydrogen Peroxide*, and *New Motor Vehicles* thus far have rejected the argument, thereby reaching conclusions consistent with the Third Circuit's opinion in *Behrend* and with corresponding views espoused in the ALI Principles.[105]

§ 5.08 Which issues are resolved in a class action?

Even in those antitrust cases where a class action cannot be certified as to all issues, Rule 23(c)(4) explicitly permits a class action to be maintained as to particular issues. For example, as the Advisory Committee Notes to Rule 23(c)(4) recognize, a class can be certified as to liability and "members of the class may thereafter be required to come in individually and prove amounts of their respective claims." Confronted with more "rigorous" scrutiny of questions of impact under *Dukes* and prior Courts of Appeals decisions, some plaintiffs' counsel will occasionally seek to establish key elements of liability such as unlawful conspiracy in a class action, and to leave impact on individual plaintiffs and the quantification of their damages to be resolved in later, individual proceedings. There has been a sharp controversy in class action case law, however, over whether such a process is appropriate.

On one hand, Rule 23(c)(4) provides on its face that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." In *Cordes & Co. Financial Services v. A.G. Edwards & Sons, Inc.*,[106] the Second Circuit reversed a denial of class certification and remanded the case to the district court to consider certification of part of the case under Rule 23(c)(4). In *Chiang v. Veneman*,[107] the Third Circuit observed that "courts commonly use Rule 23(c)(4) to certify some elements of liability for class determination, while leaving other elements to individual adjudication." Other case law similarly bears this out.[108] These cases reflect a strong consensus, which is also reflected in ALI's Principles of the Law of Aggregate Litigation, that the courts should

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104 *Id.* at 41.

105 *See* Richards & Brown, *supra* note 48, at 171 n. 49 (citing and quoting from many cases).

106 502 F.3d 91 (2d Cir. 2007).

107 385 F.3d 256, 267 (3d Cir. 2004).

108 *See, e.g.*, Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996); *In re* Nassau County Strip Search Cases, 461 F.3d 219, 221 (2d Cir. 2006) ("[A] court may employ Rule 23(c)(4)(A) to certify a class as to an issue regardless of whether the claim as a whole satisfies the predominance test.").

permit aggregate treatment of any common issue whenever "resolution of the common issue would (1) materially advance the resolution of multiple civil claims by addressing the core of the dispute in a manner superior to other realistic procedural alternatives . . . ."[109]

On the other hand, defendants seeking to oppose Rule 23(c)(4) certification primarily rely upon *Castano v. Am. Tobacco Co*.[110] In *Castano*, the Fifth Circuit took the view that Rule 23(c)(4) can be applied only when the predominance requirement of Rule 23(b)(3) has been met with regard to the claim as a whole, reasoning that "[r]eading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended." A few courts, particularly in the Eastern District of Pennsylvania, have agreed with this reasoning in *Castano.*[111] However, the majority of courts and commentators appear generally to disagree with *Castano*.[112] As the Second Circuit appropriately explains in *Nassau County*, the *Castano* court's view would inappropriately "render subsection (c)(4) virtually nil."[113]

§ 5.09 How do class actions and arbitration interact in antitrust cases?

In recent years, the rapid rise of arbitration agreements has raised novel and pressing questions regarding the availability of class proceedings when antitrust plaintiffs are subject to an arbitration agreement that either (a) is silent as to class procedures or (b) expressly bans such procedures. As discussed at the beginning of this chapter, antitrust claims that are small in absolute value or small in relation to the significant expenses of developing and prosecuting complex antitrust claims cannot feasibly be pursued absent class procedures, which allow for aggregation of claims and pooling of resources. Arbitration agreements that seek to bar class procedures and leave available only individual arbitration therefore pose a significant threat to private antitrust enforcement. The interpretation and enforceability of such agreements has been hotly disputed, and advocates for consumers, employees, and other likely class plaintiffs, as well as many state courts and lower federal courts concerned that arbitration agreements may be wielded to surreptitiously eliminate class action rights and exculpate corporate wrongdoers, have been engaged in a push-and-pull with corporate interests seeking to minimize class action exposure and with a Supreme Court enamoured of the Federal Arbitration Act (FAA) and skeptical of class arbitration. These issues have only become more urgent since the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*,[114] holding that states

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[109] ALI Principles, § 2.02 (a).

[110] 84 F.3d 734 (5th Cir. 1996).

[111] *See* Arch v. Am. Tobacco Co., 175 F.R.D. 469, 496 (E.D. Pa. 1997); Blain v. Smithkline Beecham Corp., 240 F.R.D. 179, 189–91 (E.D. Pa. 2007); Gates v. Rohm and Haas Co., 265 F.R.D. 208, 234 (E.D. Pa. 2010).

[112] *See* 7A Wright & Miller, Fed. Prac. & Pro. § 1790 (3d ed. 2005); 2 Alba Conte & Herbert Newberg, Newberg on Class Actions § 4:23 (2010); *id.* at § 18:7 (2002); Fleischman v. Albany Medical Center, 2010 WL 681992 (N.D.N.Y. July 28, 2009).

[113] 461 F.3d at 226–27.

[114] No. 09-893, 563 U.S. ____, 131 S. Ct. 1740 (Apr. 27, 2011).

may not generally require the availability of class arbitration in consumer disputes consistently with the FAA.[115]

5.09.1 Background regarding arbitration and antitrust

Before discussing *Concepcion*, a brief history is in order. Although the Federal Arbitration Act was enacted in 1925,[116] arbitration is a relatively recent development in the realm of antitrust. Arbitration was originally conceived as an alternative forum for resolution of private – primarily contractual – disputes. In 1968, the Second Circuit held that antitrust claims are not arbitrable, reasoning that antitrust enforcement is a matter of strong public interest and that courts should not relinquish responsibility over legal matters of significant public concern and great complexity to private resolution.[117]

This understanding was uniformly held by the Courts of Appeals for nearly two decades until it was unsettled by the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*.[118] The *Mitsubishi* Court held that a broad arbitration agreement between internationally diverse parties must be enforced under the FAA and the United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards, "even as to the antitrust claims."[119] Though the holding was limited to the international context presented, the Court "confessed some skepticism" toward *American Safety*'s conclusion that antitrust claims were generally not arbitrable, and rejected the argument that arbitrators were not sufficiently competent and neutral to conduct antitrust proceedings.[120] Most importantly, the Court explained that "without doubt, the private cause of action plays a central role in enforcing antitrust law and thus furthering the national interest in a competitive economy," but that "does not compel the conclusion" that parties may not agree to arbitration.[121] Rather, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[122]

Mitsubishi marked the changing of the tides on arbitration of statutory claims. Though the case concerned enforceability of an arbitration agreement between similarly sophisticated businesses, and some expected it to be limited to negotiated agreements between

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[115] Congress thus far has not passed any laws addressing this dispute. However, several members reintroduced legislation that would specifically invalidate pre-dispute binding arbitration agreements requiring arbitration of consumer, employment, or civil rights disputes, and, on October 4, 2011, two senators introduced legislation which would ban mandatory arbitration clauses in cell phone and mobile service contracts – the type of contracts at issue in *Concepcion*. *See* Arbitration Fairness Act, H.R. 1873, S. 987, 112th Cong. (2011); Consumer Mobile Fairness Act, S. 1192 (2011).

[116] The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2011).

[117] American Safety Equipment Corp. v. J. P. Maguire & Co, 391 F.2d 821, 826-28 (2d Cir. 1968).

[118] 473 U.S. 614 (1985).

[119] *Id*. at 620.

[120] *Id*. at 633–34.

[121] *Id*. at 634–35.

[122] *Id*. at 637.

sophisticated parties or to the international context, no such limitations took hold. In 1991, the Supreme Court observed in *Gilmer v. Interstate/Johnson Lane Corp*. that "it is by now clear that statutory claims may be the subject of an arbitration agreement" and that such agreements are enforceable in the absence of Congressional intent "to preclude a waiver of judicial remedies for the statutory rights at issue,"[123] "so long as the prospective litigant may effectively vindicate" the statutory cause of action consistent with the purpose of the statute.[124] Today, antitrust claims are generally subject to arbitration agreements.[125]

5.09.2 The emergence of arbitration agreements as a shield against class proceedings

In cementing the arbitrability of statutory claims in *Gilmer*, the Supreme Court also touched for the first time on the interplay between class proceedings and arbitration. The plaintiff in *Gilmer* opposed arbitration of his Age Discrimination in Employment Act (ADEA) claim partly on the ground that the arbitration agreement would deprive employees of the opportunity to proceed by way of a collective action, a proceeding similar to a class action that is specifically provided for by the ADEA. In rejecting plaintiff's argument, the Court noted that collective arbitration might be available under the relevant arbitration provisions.[126] The Court thus implied that class arbitration might be permissible and consistent with the FAA and Due Process.

Another decade passed with few courts or arbitrators addressing the availability of classwide arbitration, and few classwide arbitrations taking place.[127] Indeed, despite the *Gilmer* Court's suggestion that collective arbitration might have been available to employees in 1991, the major arbitration associations lacked any guidelines on how class arbitrations could proceed. Taking advantage of the general unavailability of class arbitration and the expansion of the FAA to allow for predispute agreements to arbitrate statutory claims, corporations increasingly introduced broad arbitration provisions into their contracts requiring plaintiffs to arbitrate any claims against them – and, by default, to do so in an individual capacity. Some even began to include language explicitly requiring that arbitration proceed on an individual rather than class basis.[128] Although proponents of

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123 500 U.S. 20, 32 (1991).

124 *Id*. at 28 (quoting *Mitsubishi*, 473 U.S. at 637).

125 *See, e.g*., Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010); Seacoast Motors of Salisbury, Inc. v. DaimlerChrysler Motors Corp., 271 F.3d 6, 11 (1st Cir. 2001) ("We think time has passed by the *American Safety* doctrine and so hold."); Kotam Elec., Inc. v. JBL Consumer Prods., 93 F.3d 724, 728 (11th Cir. 1996) (en banc) ("In light of *Mitsubishi* and its progeny . . . we hold that . . . arbitration agreements concerning domestic antitrust claims are enforceable."); Nghiem v. NEC Elec., 25 F.3d 1437, 1441 (9th Cir. 1994) (Supreme Court decisions compel conclusion that domestic antitrust claims generally are arbitrable).

126 500 U.S. at 32.

127 *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm & Mary L. Rev. 1, 38 (2000) (few courts had ordered arbitration to proceed on a classwide basis and the author had found only one instance in which an arbitrator ordered class arbitration).

128 *See id*. at 5–6; *see also* Miriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 396–98 (2005).

arbitration focused publicly on arbitration's ability to deliver quicker results at lower cost, as compared to litigation, many advocates and attorneys encouraged corporations to use arbitration agreements specifically to reduce exposure to class actions, and the practice became increasingly commonplace.[129]

The Supreme Court finally addressed the intersection of class actions and arbitration head on in *Green Tree Financial Corp. v. Bazzle*.[130] In *Bazzle*, a plurality of the Court held that "whether the contracts forbid class arbitration" was for the arbitrator to decide, and remanded for the arbitrator to make that decision.[131] The opinion had two significant implications. First, it signalled the Court's approval of class arbitration. Accordingly, arbitration associations quickly leapt into action, developing rules for handling class arbitrations.[132] Second, by framing the question of class arbitrability as whether or not the agreement "forbid[s] class arbitration," the Court seemed to establish a presumption that broad arbitration provisions permit class arbitration absent express agreement otherwise. Indeed, as of 2009, only 5 percent of post-*Bazzle* putative class arbitrations before the American Arbitration Association (AAA) resulted in findings that the arbitration clause did not permit class arbitration.[133] Such reasoning is sound: if a broad arbitration clause sets forth an agreement to arbitrate all disputes and to make available all relief that would be available in the judicial forum, such a clause should not be read to silently exclude a significant class of disputes from arbitration. Thus, following *Bazzle*, class arbitrations finally commenced in significant numbers.

Because *Bazzle* substantially undermined the strategy of relying on broad arbitration agreements to reduce exposure to class claims that had taken shape following *Gilmer*, corporations have now changed tactics. They increasingly insert language waiving class procedures into arbitration agreements to better protect against class proceedings.[134] In turn, this has spurred class plaintiffs and advocates to focus on avenues to defeat enforcement of arbitration agreements with class waiver provisions, including asserting arguments – discussed further below – that such waivers are unconscionable as a matter of state contract law, or unenforceable as a matter of federal law because they would prevent vindication of statutory rights. And courts, sympathetic to claims that compelling individual arbitration of low-value or highly complex claims would

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[129] *See* Sternlight, *supra* note 127, at 5–12 (discussing trend); *see also* Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 Franchise L.J. 141, 142 (1997) (encouraging franchisors to adopt arbitration agreements because binding arbitration is "one of the strongest pieces of armor" in protecting against class actions).

[130] 539 U.S. 444 (2003).

[131] *Id.* at 452–53.

[132] *See* Brief of the American Arbitration Association as Amicus Curiae in Support of Neither Party, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010), at 3–4. *See also* American Arbitration Association, Supplementary Rules for Class Arbitrations (effective October 8, 2003), *available at* http://www.adr.org/sp.asp?id=21936 (last visited July 31, 2011); JAMS Class Action Procedures, *available at* http://www.jamsadr.com/rules-class-action-procedures/ (last visited July 31, 2011).

[133] *Id.* at 22.

[134] *See* Gilles, *supra* note 128, at 410; Sarah Clasby Engel & Sherry Tropin, *Class Action Arbitration: A Plaintiff's Perspective*, 5 Fla. Int'l U. L. Rev. 145, 148 (2009).

amount to precluding enforcement of such claims or enforcing exculpatory contracts, increasingly began invalidating class arbitration waivers or entire arbitration agreements.[135]

5.09.3 Stolt-Nielson *and agreements that are "silent" as to class arbitration*

In 2010, the Supreme Court returned to the issues raised in *Bazzle* in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*.,[136] and once again seemed to change the ground rules governing class arbitration. Like *Bazzle, Stolt-Nielsen* concerned a defendant's argument that class arbitration was improper where the arbitration agreement was silent as to class arbitration. This time, however, the Court held that the arbitrator exceeded his powers in determining that class arbitration was permitted under the agreement where it was unambiguously "silent" as to class arbitration.[137] Arguably, this represents a departure from the presumption previously gleaned from *Bazzle*, whereby class arbitration was presumed to be available when the agreement was silent on the issue. Some commentators considered this perceived turnabout to be the death knell for a class arbitration movement that had only just taken off, as arbitration agreements are rarely drafted explicitly to permit class arbitration.[138]

However, *Stolt-Nielsen*'s impact has proven to be less severe than many anticipated. As the Second Circuit explained, the Supreme Court simply held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so."[139] This is hardly novel. Further, the *Stolt-Nielsen* court's decision that the arbitrator had exceeded its power in requiring class arbitration was premised on the unusual fact that the parties had assertedly stipulated that "their agreement was 'silent' in the sense that they *had not reached any agreement* on the issue of class arbitration," thus preventing the conclusion that the parties had agreed to class arbitration.[140] In contrast, the Second Circuit concluded that nothing was amiss where an arbitrator construed a broad arbitration agreement providing the rights and remedies available in courts, but not specifically mentioning class arbitration, to mean that the parties intended to include the right to proceed as a class and to seek class remedies.[141] Far from it, a contrary reading "would fail to give effect to the employees' contractual

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[135] *See, e.g., In re* Am. Express Merch. Litig., 634 F.3d 187, 199 (2d Cir. 2011) (arbitration provision unenforceable because class waiver would preclude plaintiffs from enforcing their federal statutory antitrust rights).

[136] 130 S. Ct. 1758 (2010).

[137] 130 S. Ct. at 1768–74.

[138] *See* Keerthi Sugumaran, *Comment: Arbitration—United States Supreme Court Sounds the Death Knell for Class Arbitration—Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 130 S. Ct. 1758 (2010)*, 16 Suffolk J. Trial & App. Adv. 147 (2011); Lea Haber Kuck & Gregory A. Litt, *Will Stolt-Nielsen Push Consumer, Employment and Franchise Disputes Back Into the Courts*?, 4 N.Y. Dispute Resolution Lawyer 16 (Spring 2011) (noting that the decision "has been widely heralded as a death knell for class arbitration").

[139] Jock v. Sterling Jewelers Inc., 646 F.3d 113, 121 (2d Cir. July 1, 2011) (quoting *Stolt-Nielsen*, 130 S. Ct. at 1775).

[140] *Id*. at 120 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1768) (emphasis added).

[141] *Id*. at 127.

rights and expectations" under the agreement.[142] Thus, unless parties have specifically stipulated that they did not reach an agreement regarding the availability of class arbitration, arbitrators may continue to engage in contractual interpretation in assessing whether an arbitration agreement that does not specifically reference class procedures provides for class arbitration.[143]

5.09.4 **Concepcion** *and the road ahead*

Finally, in April 2011, the Supreme Court again returned to the intersection of class actions and arbitration in *AT&T Mobility LLC v. Concepcion*.[144] *Concepcion* concerned a putative consumer class action alleging that AT&T engaged in false advertising and fraud by charging customers $30.22 in sales tax on phones advertised as free.[145] Before the district court, AT&T moved to compel individual arbitration, and the court denied the motion, finding that the class waiver rendered the agreement unconscionable under California law pursuant to the "*Discover Bank*" rule.[146] The *Discover Bank* rule classifies as unconscionable class waivers whenever three factors are present: (1) a consumer contract of adhesion; (2) settings with predictably small damages; and (3) an allegation that defendant engaged in a scheme to cheat large numbers of people out of individually small sums. The Ninth Circuit affirmed, rejecting AT&T's argument that the FAA preempted the *Discover Bank* rule.

A split court reversed and remanded, holding that the FAA preempted the state *Discover Bank* rule because "requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[147] Stating that the purpose of the FAA is to "ensure that private arbitration agreements are enforced according to their terms" so that parties may design "efficient, streamlined procedures tailored to the type of dispute," the Court reasoned that this objective would be frustrated by the *Discover Bank* rule "allow[ing] any party to a consumer contract to demand [class arbitration] *ex post*" in circumvention of the arbitration agreement.[148] Notably, the Court described the three factors purporting to limit the *Discover Bank* rule as "toothless and malleable," resulting in a bright line rule that simply "classif[ies] most

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142 *Id.*

143 *See* Smith & Wollensky Restaurant Group v. Passow, 2011 U.S. Dist. LEXIS 4495 (D. Mass. Jan. 18, 2011) (*Stolt-Nielson* did not compel conclusion that arbitration agreement not referencing class proceedings did not permit class arbitration); Louisiana Health Svc. Indemnity Co. v. Gambro, 756 F. Supp.2d 760, 2010 U.S. Dist. LEXIS 135579 (W.D. Louisiana December 2, 2010) (arbitrator's determination that class arbitration was available was not inconsistent with *Stolt-Nielson* because arbitrator applied appropriate legal principles rather than relying on own policy preferences).

144 131 S. Ct. 1740 (2011).

145 131 S. Ct. at 1744.

146 *Id.* at 1745 (citing Discover Bank v. Superior Court, 113 P.3d 1100 (2005)).

147 *Id.* at 1748. Notably, the opinion did not uphold the validity of AT&T's arbitration agreement or class ban, but simply held that the *Discover Bank* rule applied by the lower courts to invalidate the ban was preempted by the FAA, and remanded the case for further proceedings. *Id.* at 1753.

148 *Id.* at 1748, 1750.

collective-arbitration waivers in consumer contracts as unconscionable."[149] The Court also quickly dismissed the dissent's arguments that California acted within its authority to regulate contracts in setting forth circumstances in which it would be reasonable to believe that the terms of a contract might operate to insulate the author from liability by discouraging small dollar claims.[150] The Court stated that even if some claims "might . . . slip through the legal system" without class proceedings, such possibility does not allow states to "require a procedure that is inconsistent with the FAA," and further that the record before the Court indicated that the *Concepcion* plaintiffs would be more than able to resolve their claims pursuant to the arbitration agreement.[151]

Many of those who did not already believe that *Stolt-Nielsen* had killed the class action seem to be convinced that *Concepcion* will ultimately complete the job.[152] Certainly, the opinion evinces considerable suspicion regarding class arbitration.[153] Moreover, the *Discover Bank* rule the Court struck down had been frequently applied to invalidate class waivers in consumer cases and therefore prevent corporations from effectively exculpating themselves from liability for small value violations of the law. However, *Concepcion* neither fully insulated class waivers nor closed the door on class proceedings confronting potential arbitration agreements. Particularly in the antitrust context, there are at least seven bases on which antitrust class actions may continue to thrive.

First, as discussed above, arbitration agreements that do not contain class waivers remain open to constructions that allow for class arbitration.[154]

Second, as the Second Circuit has recognized, *Concepcion* does not foreclose the "vindication of statutory rights" analysis that has been applied to successfully invalidate class waivers in the antitrust context.[155] The Supreme Court has repeatedly explained that compelled arbitration of statutory claims is permissible and consistent with the statutes providing for the underlying cause of action "so long as the litigant effectively may vindicate its statutory cause of action in the arbitral forum,"[156] and that conversely, if the enforcement of a pre-dispute arbitration agreement would operate to "preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum,"[157] plaintiff's showing of such preclusion would indeed constitute a defense to enforcement of the arbitration clause. Following this doctrine, as well as noting Supreme Court authority recognizing that class proceedings are frequently essential to make prosecution of certain claims feasible,[158] the First and Second Circuits have declined to compel class plaintiffs to

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149 *Id.* at 1746, 1750.

150 *See id.* at 1753.

151 *Id.*

152 *See, e.g.*, Editorial, *Gutting Class Actions*, N.Y. Times, May 13, 2011, at A26.

153 *See Concepcion*, 131 S. Ct. at 1752 (critiquing class arbitration for "greatly increas[ing] risk to defendants," including "the risk of 'in terrorem' settlements that class actions entail" and class arbitrations would similarly invite).

154 *See, e.g.*, Jock v. Sterling Jewelers Inc., 646 F.3d 113 (2d Cir. July 1, 2011).

155 *In re* American Express Merchants' Litig., 667 F.3d 204 (2d Cir. 2012).

156 *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 637).

157 Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 90–91 (2000).

158 *See, e.g.*, Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class

arbitrate antitrust claims where plaintiffs demonstrated that the individual arbitrations required under the arbitration agreement would be cost-prohibitive, and thus would prevent vindication of plaintiffs' statutory rights under the Sherman Act.[159] Moreover, the Second Circuit has specifically recognized that this doctrine survives *Concepcion*. In *In re American Express Merchants' Litigation*,[160] the Second Circuit considered the Supreme Court's decision in *Concepcion*, and concluded that it did not address the issue of "whether a class-action arbitration waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights."[161] Indeed in *Conception*, there was no reason to address whether a class arbitration ban would be enforceable if it operated to preclude vindication of plaintiffs' rights, as no evidence had been presented demonstrating that plaintiffs would *not* be able to vindicate their claims through individual arbitration. To the contrary, the Court noted that the record demonstrated that plaintiffs' claims were "most unlikely to go unresolved," as both the district and circuit courts had concluded that the particular terms of the arbitration provision at issue provided "sufficient . . . incentive" for prosecution of individual claims and ensured that individual customers were "essentially guarantee[d] to be made whole."[162] Thus, as recognized in *In re American Express Merchants' Litigation*, the Supreme Court's decision in *Concepcion* does not disturb the line of cases holding that arbitration agreements are not enforceable if they operate to preclude vindication of a plaintiff's statutory rights.

Relatedly, *Concepcion* addressed only the preemption of *state* law by the FAA, and does not require enforcement of a class waiver under the FAA where doing so would conflict with *federal* law, such as the Sherman Act. Thus, the District Court for the Southern District of New York denied a motion to reconsider in light of *Concepcion* its order declining to enforce an arbitration agreement with class waiver, explaining that because plaintiff could not pursue her Title VII pattern or practice discrimination claim in individual arbitration, enforcing the agreement would present a conflict with federal law.[163] The Supreme Court's application of preemption analysis to a state law conflict in

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action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.").

159 *See* Kristian v. Comcast Corp., 446 F.3d 25, 55–61 (1st Cir. 2006) (applying the vindication of statutory rights analysis in invalidating and severing a class ban in arbitration agreement in arbitration suit where expert expenses and attorney's fees would significantly outweigh individual recovery); *In re* American Express Merchants' Litig., 667 F.3d 204 (2d Cir. 2012) (holding that an arbitration agreement containing a class waiver was unenforceable in antitrust suit because "the evidence . . . . establishes, as a matter of law, that the costs of plaintiffs' individually arbitrating their dispute . . . . would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws"); *see also* Dale v. Comcast Corp, 498 F.3d 1216 (11th Cir. 2007) (applying Georgia unconscionability law in finding a class waiver unenforceable in Cable Act suit, but utilizing the vindication of statutory rights analysis and relying on findings that plaintiffs would "effectively be precluded" from vindicating their claims if limited to individual claims due to the high costs of bringing a claim relative to the potential recovery).

160 667 F.3d 204 (2d Cir. 2012).

161 *Id.*

162 *Concepcion*, 131 S. Ct. at 1753 (internal quotations omitted).

163 Chen-Oster v. Goldman Sachs & Co, No. 1:10-cv-06950, 2011 U.S. Dist. LEXIS 73200 (S.D.N.Y. July 11, 2011). The United States Department of Labor and Equal Employment

Concepcion does not determine how potential conflicts between the FAA and federal law should be resolved. [164]

Third, *Concepcion*'s holding that the *Discover Bank* unconscionability rule adopted in California was preempted by the FAA certainly does not eliminate all unconscionability challenges to class arbitration waivers. Rather, the Court found that the *Discover Bank* rule was inconsistent with the purposes of the FAA because it understood the rule to broadly permit any party to a consumer contract to "ex post" reject the terms of an otherwise valid arbitration agreement and to unilaterally demand class arbitration. Unconscionability remains a valid defense to contracts and a basis for invalidation of an arbitration agreement under the FAA, and unconscionability determinations based on other considerations, including a demonstrated inability for a plaintiff to vindicate rights under a class arbitration waiver, should survive *Concepcion*.[165]

However, the scope of state challenges remaining after *Concepcion* clearly will be actively litigated for years to come throughout state and federal courts. Already, though some courts appear to be appropriately limiting *Concepcion* to the context of the mechanical state rule addressed, others have read the opinion to broadly preclude arguments that class waivers are unconscionable where they would deter large numbers of claims and act to exculpate the drafter – even where plaintiffs have introduced evidence of a strong exculpatory effect.[166] Such decisions are not mandated by *Concepcion*, which struck down a broad state rule that required no evidence of such exculpation, and where no such evidence was in the record.

Opportunities Commission have recently advanced the arguments adopted in *Chen-Oster*, and argued that class arbitration waivers are unenforceable if they would prevent vindication of statutory rights even after *Concepcion*. *See* Brief of the Secretary of Labor and EEOC as Amici Curiae, D.R. Horton, Inc. v. Cuda, No. 12-CA-25764 (filed before the National Labor Relations Board, July 27, 2011).

[164] *See also In re* American Express Merchants' Litig., 667 F.3d 204 (2d Cir. 2012) ("*Concepcion* plainly offers a path for analyzing whether a state contract law is preempted by the FAA. Here, however, our holding rests squarely on a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrablity.") (internal quotation omitted).

[165] *See* Hamby v. Power Toyota Irvine, No. 11cv544-BTM (S.D. Cal. July 18, 2011) (allowing plaintiff to conduct discovery on issue of whether the arbitration agreement and class arbitration ban are unconscionable, and explaining that *Concepcion* "does not stand for the proposition that a party can never oppose arbitration on the ground that the arbitration clause is unconscionable"); *In re* Checking Account Overdraft Litig., No. 09-MD-02036-JLK (S.D. Fla. June 3, 2011) (permitting discovery pertaining to viability of individual arbitration before ruling on motion to compel arbitration). Similarly, where plaintiffs can show that significant procedural unconscionability infects the class waiver, particularly where other aspects of the arbitration agreement may combine to demonstrate substantive one-sidedness, unconscionability should remain a valid defense to individual arbitration. *See, e.g.*, Skirchak v. Dynamics Research Corp., 508 F.3d 49, 63 (1st Cir. 2007) (class action waiver buried in email attachment to employees was unconscionable where body of email indicated that the attachment did not limit or change employees legal rights and non-response was considered acceptance).

[166] *See* Cruz v. Cingular Wireless, LCC, No. 07-00714-cv-FTM-29-DNF, 2011 U.S. App. LEXIS 16811 (11th Cir. Aug. 11, 2011) (considering same arbitration agreement at issue in *Concepcion*, and concluding the plaintiffs' evidence that class waiver would cause most claims to slip through cracks, exculpating defendant, only provided support for the policy argument against enforcement rejected in *Concepcion*).

Still other courts also have misunderstood *Concepcion*'s scope. For example, a Colorado district court expressed sympathy for plaintiffs who asserted that they would not be able to pursue their claims at all if compelled to arbitrate individually, but reasoned that the *Concepcion* Court "considered the fact that the Concepcions and other class plaintiffs would be denied any recovery by its ruling, and ruled against the plaintiffs nonetheless," thus leaving the court "bound" to compel arbitration even where it would limit plaintiffs ability to recover.[167] However, *Concepcion* did not include such an analysis and does not bind courts to such a harsh rule; to the contrary, the *Concepcion* Court emphasized that the plaintiffs' claims "were most unlikely to go unresolved" and that both the district and circuit courts had found the arbitral scheme sufficient to ensure prosecution of plaintiffs' claims and permit full relief.

Fourth, although antitrust claims are generally arbitrable, in some cases plaintiffs' claims may not fall within the scope of the relevant arbitration agreement, thus allowing class action litigation to proceed. Arbitration agreements generally include broad language requiring arbitration of "all disputes arising out of" or "relating to" a contract or a relationship created through contract, and such language is generally construed liberally in accordance with the Supreme Court's repeated admonition that any doubts about the scope of arbitrable issues should be resolved in favor of arbitration.[168] However, in some instances antitrust claims have been found to fall outside the scope of the arbitration agreement. For example, in *AlliedSignal, Inc. v. B.F. Goodrich Co.*,[169] the Seventh Circuit held that a Clayton Act claim asserting injury from inflated prices was not within the scope of an arbitration provision because the underlying contract did not regulate pricing. Similarly, in *Coors Brewing Co. v. Molson Breweries*,[170] the Tenth Circuit held that while some of Coors' antitrust claims against licensee Molson were governed by an arbitration clause, others were not because they did not relate to the parties' underlying license agreement. The viability of such an argument in any given case will of course turn on the language of the arbitration provision setting forth its scope, as well as the relationship between the underlying contract and the claims asserted.

Fifth, though corporations will increasingly seek to include arbitration agreements with explicit class waivers in consumer, employment, franchise, supply, and other contracts likely to provide exposure to class actions following *Concepcion*, that process will take time. *Concepcion* will not work an instant change, and defendants generally may not impose a new class ban on members of a putative class after litigation has commenced.[171] Further, if litigation has already commenced and a defendant has not timely

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167 Bernal v. Burnett, 2011 U.S. Dist. LEXIS 59829, at *20 (D. Colo. June 6, 2011).

168 *See* JLM Indus. v. Stolt-Nielsen *SA*, 387 F.3d 163, 171-76 (2d Cir. 2004) (price-fixing claims fell within scope of arbitration clause in standard contracts because injuries alleged resulted from entering into the contracts).

169 183 F.3d 568, 573 (7th Cir. 1999).

170 51 F.3d 1511, 1515-16 (10th Cir. 1995).

171 *See* Williams v. Securitas Sec. Servs. USA, Inc., No. 10-7181, 2011 U.S. Dist. LEXIS 75502, (July 13, 2011) (ordering defendant to rescind class and collective action waiver agreement sent to employees after some employees filed collective claims under the Fair Labor Standards Act, and concluding that *Concepcion* did not preclude determination that the agreement constituted an unfair and confusing communication to possible plaintiffs In violation of FLSA); *In re* Currency Conversion Fee Antitrust Litig., 361 F. Supp. 2d 237 (S.D.N.Y. 2005) (refusing enforcement of

asserted its right to arbitrate, such right may be forfeited.[172] That being said, defendants are now well aware of the value of compelling arbitration where doing so may prevent class proceedings, and businesses are fast incorporating arbitration clauses with class bans into their contracts and forms. The Wall Street Journal noted mere months after *Concepcion* that, "emboldened" by the Supreme Court's decision, "some small and regional U.S. banks are prohibiting unhappy customers from taking their complaints to court or joining class-action lawsuits, instead resolving them to resolve disputes through arbitration."[173]

Sixth, mandatory arbitration provisions may not be included in certain types of contracts, limiting corporations' ability to insert class waivers or other potentially exculpatory provisions. Federal law expressly prohibits inclusion of mandatory arbitration agreements in specific contract types, including franchise agreements between automobile manufacturers and dealers,[174] and residential mortgage loans.[175] Further, many courts have held that because the McCarran Ferguson Act[176] authorized states to regulate the business of insurance and bars application of federal law to supersede state law governing insurance, states may ban or limit the use of arbitration clauses in insurance agreements without running afoul of the FAA.[177] Many states have thus prohibited insurance companies from using mandatory arbitration clauses; *Concepcion* does not impact the validity of such state laws.[178]

Seventh and finally, in many putative antitrust class actions, there simply is no contractual relationship between plaintiffs and certain non-signatory defendants, and thus no opportunity to include an arbitration agreement banning class procedures.[179] For example, in *Ross v. Am. Express Co.*,[180] plaintiff holders of Visa, Mastercard, and Diners' Club credit cards filed suit against American Express and certain other defendants alleging participation in an antitrust conspiracy to charge inflated fees on certain transactions. The Second

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class action bans mailed by defendant to members of putative class); H&R Block, Inc. v. Haese, 82 S.W.3d 331, 333, 336 (Tex. App. 2002) (refusing enforcement of class ban incorporated after class action was filed, as such action constituted "an unauthorized, impermissible, knowing and intentional communication with members of the plaintiff class" that would "obstruct the trial court in discharge of its duty to protect the plaintiff class"); Bilbrey v. Cingular Wireless LLC, 164 P.3d 131, 134 (Okla. 2007) (finding unconscionable and refusing to enforce retroactive arbitration clause banning class proceedings contained in a lengthy form contract of adhesion plaintiff signed long after initiating class action).

172 *See* Zuckerman Spaeder, LLP v. Auffenberg, 646 F.3d 919, 2011 U.S. App. LEXIS 15661, 8-9 (D.C. Cir. July 29, 2011) (finding defendant forfeited right to compel arbitration by not asserting it "at the first available opportunity" and prejudicing opposing party); Nino v. Jewelry Exchange, Inc., 609 F.3d 191, 208 (3d Cir. 2010) (same); Lewallen v. Green Tree Serv. LLC, 487 F.3d 1085, 1090 (8th Cir. 2007) (same).

173 Robin Sidell, *No Day in Court for Bank Clients*, The Wall Street Journal, August 2, 2011.

174 15 U.S.C. § 1226.

175 15 U.S.C. § 1639c(e)(1).

176 15 U.S.C. § 1012(b).

177 *See* McKnight v. Chi. Title Ins. Co., 358 F.3d 854, 859 (11th Cir. 2004).

178 *See, e.g., Lawson v. Life of South*, No. 4:06-cv-00042, 2011 U.S. App. LEXIS 16412, *31–33 (11th Cir. Aug. 10, 2011) (Pryor, J. concurring).

179 *See* National Consumer Law Center, *Life After Concepcion*, 29 NCLC Reports 21, 23 (March/April 2011).

180 547 F.3d 137 (2d Cir. 2008).

Circuit held that because defendants were not parties to the cardholder agreements and had no direct contractual relationship with the cardholders, defendants could not avail themselves of the arbitration clauses in plaintiffs' cardholder agreements or otherwise compel plaintiffs to arbitrate the dispute with them in the absence of plaintiffs' agreement.[181] Similarly, many states permit indirect purchaser suits under state antitrust law, and in such situations there may be no contractual relationship, and thus no arbitration agreement to bind the parties.[182]

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[181] *See also* Lawson v. Life of South, No. 4:06-cv-00042, 2011 U.S. App. LEXIS 16412 (11th Cir. Aug. 10, 2011) (denying non-signatory defendant's motion to compel arbitration pursuant to arbitration agreement plaintiffs entered with third party, and rejecting defendant's argument that it could compel arbitration under equitable estoppel and third-party beneficiary theories); *but see In re* Wholesale Grocery Products Antitrust Litig., No. 0:09-cvi00983-ADM-AJB (D. Minn. July 5, 2011) (declining to follow *Ross v. Am. Express Co*., and holding that plaintiffs were bound to arbitrate their claims against the non-signatory under the doctrine of equitable estoppel because (1) the claims allege "substantially interdependent and concerted misconduct between the non-signatory defendant and a signatory to the arbitration agreement"; and (2) the claims are "intimately founded in and intertwined with" the arbitration agreement).

[182] Only direct purchasers, who will be bound by a contract and likely an arbitration agreement, may bring claims based on federal antitrust laws under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1976). There is continuing debate over whether *Illinois Brick* is good or bad policy. To the extent that the introduction of arbitration agreements into direct purchaser agreements will hinder private enforcement of antitrust laws, that may ultimately provide additional support for the viewpoint, expressed by the Antitrust Modernization Commission four years ago, that *Illinois Brick* should be overruled. *See* Antitrust Modernization Commission, Report and Recommendations 270 (April 2007).