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Class Action Lawsuits: A Legal Overview for the 115th Congress

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Summary

A class action is a procedure by which a large group of entities (known as a "class") may challenge a defendant's allegedly unlawful conduct in a single lawsuit, rather than through numerous, separate suits initiated by individual plaintiffs. In a class action, a plaintiff (known as the "class representative," the "named representative," or the "named plaintiff") may sue the defendant not only on his own behalf, but also on behalf of other entities (the "class members") who are similarly situated to the class representative in order to resolve any legal or factual questions that are common to the entire class.

Courts and commentators have recognized that class actions can serve several beneficial purposes, including economizing litigation and incentivizing plaintiffs to pursue socially desirable lawsuits. At the same time, however, class actions can occasionally subject defendants to costly or abusive litigation. Moreover, because the class members generally do not actively participate in a class action lawsuit, class actions pose a risk that the class representative and his counsel will not always act in accordance with the class members' best interests. In an attempt to balance the benefits of class actions against the risks to defendants and class members, Federal Rule of Civil Procedure 23 establishes a rigorous series of prerequisites that a federal class action must satisfy. For similar reasons, Rule 23 also subjects proposed class action settlements to the scrutiny of the federal courts.

This report serves as a primer on class action litigation in the federal courts. It begins by discussing the purpose of class actions, as well as the risks class actions may pose to defendants, class members, and society at large. The report also discusses the prerequisites that a class action must satisfy before a court may "certify" it—that is, before a federal court may allow a case to proceed as a class action. An **Appendix** to the report also contains a reference chart that graphically illustrates those prerequisites for class certification. The report then discusses Rule 23's restrictions on the parties' ability to settle a certified class action. The report concludes by identifying ways in which Congress could modify the legal framework governing class actions if it were so inclined, with a particular focus on a bill currently pending in the 115th Congress that would effectuate a variety of changes to the class action system.

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Introduction

Class action lawsuits—that is, lawsuits by representative parties on behalf of a group of similar plaintiffs that have aggregated their claims in a single action—are frequently in the forefront of debates over the American private law system. According to the Supreme Court, class actions are the "most adventuresome" innovation in American law.[1] To some commentators, the class action device is the tool that "gives American workers and consumers the power and ability to level the playing field, even when facing the most powerful corporations in the world."[2] To others, class actions are typically brought "to essentially shakedown a defendant—hurting businesses and the American economy."[3] Unsurprisingly then, class actions have been a frequent subject of debate in Congress.[4]

This report serves as a primer[5] on class action law and analyzes areas that have been the focus of congressional discussions concerning class actions. The report first discusses the broader public policy debate over class actions, including why class actions exist and what risks they pose to the American system of civil justice. The report then details what a plaintiff is required to show under the Federal Rules of Civil Procedure in order to achieve class action "certification"—that is, in order to pursue an action on behalf of an entire class. Throughout, the report addresses the ways in which the Supreme Court and lower federal courts have attempted to balance the benefits of class actions against their potential drawbacks.

Lastly, this report discusses key aspects of class action litigation that have been the focus of recent congressional legislative debates. In particular, the report focuses on three areas which have been of particular concern: (1) the cohesiveness (or lack thereof) of the class; (2) ascertainability and administrative feasibility of the class action; and (3) divergent incentives and fees for class counsel compared with the benefits received by class members. The main lens for considering these areas is the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017 (H.R. 985), which passed the House of Representatives in March 2017.[6] Accordingly, this report considers how H.R. 985 would modify existing law, along with other potential avenues for change.

Background on Class Actions

The default rule in American litigation is that a lawsuit is conducted by, or on behalf of, the named parties only.[7] Class actions, however, are an exception to this rule. A class action is a

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[1] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997).

[2] American Association for Justice, *Class Actions*, https://www.justice.org/what-we-do/advocate-civil-justice-system/issue-advocacy/class-actions (last visited Mar. 20, 2018).

[3] Institution for Legal Reform, *Class Actions*, http://www.instituteforlegalreform.com/issues/class-actions (last visited Mar. 20, 2018).

[4] *See, e.g.*, S. REP. NO. 109-14 (2005) (report of the Committee on the Judiciary on the Class Action Fairness Act of 2005).

[5] This report is intended only to provide a broad overview of the law governing class actions. The report necessarily omits—or provides only brief analysis of—certain subjects that are unnecessary for a basic understanding of class action litigation. For more in-depth analysis of class actions, see generally WILLIAM RUBENSTEIN *ET AL.*, NEWBERG ON CLASS ACTIONS (5th ed. 2017).

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

[7] Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 155 (1982) (quoting Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979)).

procedure by which a large group of entities—that is, a "class"[8]—may challenge a defendant's allegedly unlawful conduct in a single lawsuit, rather than through numerous, separate suits initiated by individual plaintiffs.[9] Class actions have an ancient pedigree; analogues to class actions "have been recognized in various forms since the earliest days of English law,"[10] and class actions have "been a fixture" of federal litigation in the United States "for over seventy-five years."[11] Under the modern version of the class action, a plaintiff[12] (known as the "class representative," the "named representative," or the "named plaintiff") may sue the defendant not only on his own behalf, but also on behalf of other entities (the "class members") who are similarly situated to the class representative in order to resolve legal or factual questions that are common to the entire class.[13] To illustrate, if, for example, a large number of consumers all purchased a product that turned out to be defective, one of those consumers could potentially bring a single class action against the manufacturer on his own behalf as well as on behalf of all others who purchased the product, thereby eliminating the need for other plaintiffs to join that consumer's lawsuit or initiate their own separate lawsuits.[14]

Importantly, a class action differs from other forms of litigation involving large numbers of injured persons. In ordinary multiparty litigation, everyone seeking relief from the defendant is a party to the lawsuit and directly participates in the litigation.[15] In a class action, by contrast, the class representative is "the only plaintiff[] actually named in the complaint";[16] the class members are not formal parties to the lawsuit and typically do not directly guide the litigation.[17] The class representative therefore "acts on behalf of the entire class."[18] The class members, by virtue of not

[8] *See, e.g.*, Eubank v. Pella Corp., 753 F.3d 718, 719 (7th Cir. 2014).

[9] *E.g.*, Catholic Soc. Servs., Inc. v. INS, 232 F.3d 1139, 1146-1147 (9th Cir. 2000) ("Class actions 'promote efficiency and economy of litigation' by consolidating numerous individual suits into a single suit.").

[10] Ortiz v. Fibreboard Corp., 527 U.S. 815, 832 (1999).

[11] Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 401 (2014).

[12] A plaintiff may also pursue a class action against a class of *defendants*, as opposed to pursuing a class action on behalf of a class of *other plaintiffs*. *See, e.g.*, FED. R. CIV. P. 23(a) ("One or more members of a class may sue *or be sued* as representative parties.") (emphasis added); Bell v. Disner, No. 3:14CV91, 2015 WL 540552, at *1-6 (W.D.N.C. Feb. 10, 2015) (certifying a class of defendants). "A defendant class action arises when a representative defendant defends on behalf of themselves and other similarly situated parties." William R. Shafton, *California's Uncommon Common Law Class Action Litigation*, 41 LOY. L.A. L. REV. 783, 786 n.17 (2008). However, because defendant class actions are uncommon, *see* Francis X. Shen, *The Overlooked Utility of the Defendant Class Action*, 88 DENV. U. L. REV. 73, 75 (2010), this report focuses exclusively on plaintiff class actions.

[13] *E.g.*, Crawford v. Honig, 37 F.3d 485, 487 (9th Cir. 1994) ("Class actions are representative suits brought on behalf of groups of persons who are similarly situated.").

[14] *See In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 844-45 (6th Cir. 2013) (affirming certification of "class action lawsuit on behalf of Ohio consumers against Whirlpool Corporation alleging that design defects in Whirlpool's . . . washing machines . . . allow mold and mildew to grow in the machines"); Pella Corp. v. Saltzman, 606 F.3d 391, 392 (7th Cir. 2010) (affirming certification of a class action initiated by aggrieved customers alleging that a window manufacturer unlawfully "committed consumer fraud by not publicly declaring the role that [a] purported design defect" in windows purchased by the class members "plays in allowing [the windows to] rot").

[15] *E.g.*, Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc., Case No. 17-cv-00564 NC, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017).

[16] *E.g.*, *id*.

[17] *E.g.*, Williams v. Gen. Elec. Capital Auto Lease, Inc., 159 F.3d 266, 269 (7th Cir. 1998) ("Generally speaking, absent class members are not 'parties' before the court in the sense of being able to direct the litigation."). *But see* Elizabeth Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 849-51 (2017) (arguing that technological and social changes had led to much more active participation by class members in recent years).

[18] *E.g.*, *Williams*, 159 F.3d at 269.

being directly "present before the court," are often referred to as being "absent" from the litigation.[19]

The Purpose of the Class Action Device

The Supreme Court has recognized that the class action device serves several purposes.

Economizing Litigation

First, as the Supreme Court has explained, a "principal purpose" of class actions is to advance "the efficiency and economy of litigation."[20] By consolidating what would normally be multiple suits or a multiple-plaintiff litigation into a single suit sharing common questions, the class action is "designed to avoid . . . unnecessary filing of repetitious papers and motions."[21] If every plaintiff had to independently prove and answer the same common questions, it would typically be "grossly inefficient, costly, and time consuming because the parties, witnesses, and courts would be forced to endure unnecessarily duplicative litigation."[22] Class actions thereby potentially economize litigation by consolidating every class member's claim into a single proceeding.

Aggregation of Individual Claims

A class action also enables large numbers of persons injured by a defendant's unlawful conduct "to obtain relief as a group"[23] when each class member's individual claim is "too small to justify the expense of a separate suit."[24] Oftentimes, when a defendant inflicts comparatively small injuries to a large number of people, no plaintiff standing alone has a sufficient financial "incentive . . . to bring a solo action prosecuting his or her rights."[25] As the Supreme Court has noted, a class action resolves this "problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."[26]

To illustrate, suppose a defendant injures a million consumers for $30.00 in damages each. If each plaintiff had to file a stand-alone suit to recover the money he lost, few would take the trouble to do so. As former federal Judge Richard Posner once colorfully noted, "Only a lunatic or a fanatic sues for $30"[27] because the costs of prosecuting the lawsuit would far exceed the maximum award each victim could recover.[28] Thus, some legal observers have argued that absent some other deterrent, like a successful criminal prosecution, the defendant's $30 million wrong would

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[19] *See, e.g.*, Koby v. ARS Nat'l Servs., Inc., 846 F.3d 1071, 1076 (9th Cir. 2017).

[20] Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159 (1982); Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974).

[21] *Am. Pipe*, 414 U.S. at 550.

[22] *E.g.*, Harlow v. Sprint Nextel Corp., 254 F.R.D. 418, 423 (D. Kan. 2008).

[23] Eubank v. Pella Corp., 753 F.3d 718, 719 (7th Cir. 2014).

[24] *Id*.

[25] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

[26] *Id*. (quoting *Mace*, 109 F.3d at 344).

[27] *E.g.*, Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004).

[28] *See, e.g.*, Thorogood v. Sears, Roebuck & Co., 547 F.3d 742, 744 (7th Cir. 2008) ("If every small claim had to be litigated separately, the vindication of small claims would be rare. The fixed costs of litigation make it impossible to litigate a $50 claim . . . at a cost that would not exceed the value of the claim by many times."); *In re* Modafinil Antitrust Litig., 837 F.3d 238, 257 n.21 (3d Cir. 2016) ("A negative value claim is a 'claim[] that could not be brought on an individual basis because the transaction costs of bringing an individual action exceed the potential relief.'").

go unpunished, and the victims would remain uncompensated. If, however, an individual plaintiff could bring a single class action lawsuit on behalf of everyone the defendant wronged to resolve the common questions, then the plaintiff could potentially aggregate each class member's $30.00 loss, resulting in a potential $30 million recovery.[29] That $30 million potential award would then make it economically rational for attorneys to expend time and resources to pursue the class's claims.[30] Then, if the plaintiff ultimately prevailed in his class action, the resulting award could be divided among the plaintiff, his counsel, and the other class members.[31] In this way, class actions compensate victims who might otherwise go uncompensated[32] and punish wrongdoers who might otherwise go unpunished.[33] However, as explained in greater detail below,[34] a court's decision to *not* allow a particular lawsuit to proceed as a class action can effectively "sound the 'death knell' of the litigation on the part of the plaintiffs"[35] because the individual plaintiff's claim will often be "too small to justify the expense of" prosecuting a non-class action lawsuit.[36]

Protecting Defendants from Inconsistent Adjudications

Lastly, the Supreme Court has stated that the class action serves to protect defendants from repeated and possibly inconsistent adjudications.[37] By consolidating all potential plaintiffs' claims in a single proceeding, a defendant can obtain finality with respect to all future actions, rather than be subject to an unknown number of repeated suits and possibly inconsistent judgments.[38] Finality benefits defendants by freeing them from "the distraction of litigation" and by allowing them to "proceed with [their] business affairs more clearly."[39]

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[29] *See, e.g.*, *Amchem*, 521 U.S. at 617.

[30] *See id.*; CRS Legal Sidebar LSB10044, *Suing Subway: When Does a Class Action Settlement Benefit Only the Lawyers?*, by Kevin M. Lewis [hereinafter Lewis, Subway].

[31] *Cf. In re* US Bancorp Litig., 291 F.3d 1035, 1037 (8th Cir. 2002) (dividing class action settlement award between class counsel, named plaintiffs, and class members).

[32] *E.g.*, Violette v. P.A. Days, Inc., 214 F.R.D. 207, 220 (S.D. Ohio 2003) ("A class action potentially allows for recovery by individuals who otherwise would not have been compensated for [the defendant's] alleged wrongdoings."); *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. M 07-1827 SI, 2012 WL 253298, at *2 (N.D. Cal. Jan. 26, 2012) ("Outside of a class action, it is unlikely that most of these consumers would recover for defendants' wrongdoing.").

[33] *E.g.*, Mullins v. Direct Dig., LLC, 795 F.3d 654, 668 (7th Cir. 2015) (explaining that "deterring and punishing corporate wrongdoing" is an "important policy objective of class actions"); Diakos v. HSS Sys., LLC, 137 F. Supp. 3d 1300, 1307 (S.D. Fla. 2015) ("Class-action lawsuits were designed to be effective tools for deterring wrongdoing."); Barkouras v. Hecker, Civ. No. 06-0366 (AET), 2006 WL 3544585, at *4 (D.N.J. Dec. 8, 2006) (opining that "leaving [defendants] unpunished" for statutory violations was "exactly the kind of result Congress intended to avoid through the creation of the class action form"); Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates Over Ascertainability and Cy Pres*, 65 U. KAN. L. REV. 913, 935 (2017) ("Many view the class attorney in a small-claim class action as a private attorney general representing the public interest in effective deterrence.") [hereinafter Bone, *Class Action Limits*].

[34] *See infra* "How Class Actions Work."

[35] *In re* Modafinil Antitrust Litig., 837 F.3d 238, 249 (3d Cir. 2016). *Accord, e.g.*, Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999).

[36] *E.g.*, *Blair*, 181 F.3d at 834.

[37] United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402-03 (1980). *See also* Bell v. PNC Bank, N.A., 800 F.3d 360, 379 (7th Cir. 2015) (observing that certification works in the defendants' favor by providing a single proceeding in which to adjudicate the claims that will bind all class members).

[38] *See, e.g.*, Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 427 (4th Cir. 2003) ("Class certification . . . promotes consistency of results, giving defendants the benefit of finality and repose.").

[39] William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 830 (2007).

Risks of Class Actions

While the Supreme Court has recognized that the class action device serves several useful purposes, the procedural mechanism also poses risks for the U.S. civil justice system.

Abusive and Costly Litigation

First, because a class action permits thousands or millions of class members to aggregate their claims,[40] a defendant who opts to defend rather than settle a class action may face "potentially ruinous liability."[41] Consequently, "even if a class's claim is weak, the sheer number of class members and the potential payout that could be required if all members prove liability might force a defendant to settle a meritless claim in order to avoid breaking the company."[42] Thus, without effective legal safeguards, class actions could potentially encourage plaintiffs to file lawsuits that have minimal chances of success in order to extract settlements from defendants.[43] While it would of course be inaccurate to conclude that all class actions are meritless or abusive, it is fair to say that plaintiffs have sometimes attempted to bring class action lawsuits that could charitably be described as fanciful or humorous. To name one example, a resident of California sued the manufacturer of Cap'n Crunch cereal for deceptive advertising, contending that the defendant had unlawfully misled consumers to believe that "Crunchberries" were made of fruit.[44] The court presiding over that case, rather than permitting the case to proceed as a class action, dismissed the case in its entirety, opining that "the survival of the [plaintiff's] claim would require th[e] Court to ignore all concepts of personal responsibility and common sense."[45]

Additionally, even though class actions may economize litigation in some respects,[46] class action litigation still "place[s] an enormous burden of costs and expense upon parties."[47] As one federal district judge has maintained, almost "all class action law suits involve complex issues, which are costly to resolve and often result in protracted proceedings."[48]

Absent Class Members

Secondly, the fact that a class action permits a named plaintiff to represent absent class members raises the concern that the named plaintiff may not always zealously represent the class's interests. As noted above,[49] class action litigation "is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'"[50] "Class members who are not parties to a class action suit" are generally "bound by the judgment in the suit,"[51] even if they

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[40] *E.g.*, Eubank v. Pella Corp., 753 F.3d 718, 720 (7th Cir. 2014).

[41] *E.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2009).

[42] *E.g.*, Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 825 (7th Cir. 2012).

[43] *See, e.g.*, Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1292 (2002) ("Because plaintiffs file frivolous and weak cases to obtain a settlement, the greater prospect of settlement with successful certification should encourage plaintiffs to file more frivolous and weak class action suits.").

[44] Sugawara v. PepsiCo, Inc., No. 2:08-cv-01335-MCE-JFM, 2009 WL 1439115, at *1 (E.D. Cal. May 21, 2009).

[45] *Id*. at *5.

[46] *E.g.*, Ebert v. Gen. Mills, Inc., 823 F.3d 472, 477 (8th Cir. 2016).

[47] *E.g.*, Keil v. Lopez, 862 F.3d 685, 698 (8th Cir. 2017).

[48] *E.g.*, Lachance v. Harrington, 965 F. Supp. 630, 645 (E.D. Pa. 1997).

[49] *See supra* "Background on Class Actions."

[50] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348 (2011).

[51] Crawford v. Honig, 37 F.3d 485, 487 (9th Cir. 1994). *Accord*, *e.g.*, Pelt v. Utah, 539 F.3d 1271, 1284 (10th Cir. 2008)

have not actively participated in the case in any way[52]—and, indeed, even if the parties and the court do not (and cannot) know the specific identities of each and every class member.[53] Class actions thereby effectively "delegate" the "class members' right to a day in court . . . to the named plaintiff."[54] Because class members usually do not control or actively participate in the litigation, class action litigation poses a risk that, without effective safeguards,[55] the class representative may "'sell[] out' the interests of absent class members in favor of his or her own"[56] self-interest or otherwise fail to fairly represent the class.[57]

Lawyer-Driven Litigation

Just as class members usually have no direct control over the class representative, class members also typically "have no control over class counsel."[58] Because each class member's interest in the case is typically small, class members may have relatively little financial interest in the outcome of the litigation for the class as a whole. For instance, if class counsel obtains a favorable result for the class in the $30 million fraud example described above, each class member may win a maximum of only $30, but class counsel could potentially receive a sizable award of attorney's fees.[59] For this reason, courts and commentators have expressed concern that plaintiffs' attorneys may not always act in the best interests of class members, particularly when negotiating a settlement with the defendant. As the U.S. Court of Appeals for the Seventh Circuit ("Seventh Circuit")[60] explained,

> Class counsel rarely have clients to whom they are responsive. The named plaintiffs in a class action, though supposed to be the representatives of the class, are typically chosen by class counsel; the other class members are not parties and have no control over class counsel. The result is an acute conflict of interest between class counsel, whose pecuniary interest is in their fees, and class members, whose pecuniary interest is in the award to the class.[61]

("It is well settled that a class action judgment is binding on all class members.").

[52] *See, e.g.*, Williams v. Lane, 129 F.R.D. 636, 640 (N.D. Ill. 1990) (noting that class members, "*whether or not personally participating in the class action*," are generally "bound by judgments on class claims") (emphasis added).

[53] *See infra* "Ascertainability."

[54] Serv. Spring, Inc. v. Cambria Spring Co., No. 81 C 1835, 1984 WL 2926, at *2 (N.D. Ill. Jan. 6, 1984). *Accord, e.g.*, *In re* Veneman, 309 F.3d 789, 795 (D.C. Cir. 2002) ("Class certification affects the due process rights of absent class members to have their own day in court.").

[55] *See* FED. R. CIV. P. 23(a)(4) (requiring the proponent of a class action to prove, as a prerequisite to class certification, that "the representative parties will fairly and adequately protect the interests of the class"). *See also infra* "Adequate Representation (Rule 23(a)(4))."

[56] *E.g.*, *In re* Triarc Cos., No. C.A. 98-31-SLR, 1998 WL 743673, at *4 n.7 (D. Del. Sept. 30, 1998).

[57] *See, e.g.*, Nesbit v. Unisys Corp., No. 2:05-CV-528-MEF, 2006 WL 2480071, at *5 (M.D. Ala. Aug. 25, 2006) (scrutinizing "the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class" "in order to 'protect the legal rights of absent class members'") (quoting London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1253 (11th Cir. 2003)).

[58] *E.g.*, Pearson v. NBTY, Inc., 772 F.3d 778, 787 (7th Cir. 2014).

[59] "Attorney's fees are the driving engine of class actions: without the prospect of substantial fees, lawyers would not bring them." Alan B. Morrison, *Improving the Class Action Settlement Process: Little Things Mean a Lot*, 79 GEO. WASH. L. REV. 428, 440 (2011).

[60] This report references a significant number of decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Seventh Circuit) refer to the U.S. Court of Appeals for that particular circuit.

[61] *Pearson*, 772 F.3d at 787. *See also In re* Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab.

The structure of class actions may thereby give class counsel "an incentive to negotiate settlements that enrich themselves but give scant reward to" the class members[62]—who, by virtue of being nonparties, may lack a meaningful opportunity to safeguard their interests against enterprising plaintiff's attorneys.[63]

How Class Actions Work

Federal Rule of Civil Procedure 23 governs the initiation and maintenance of class actions in federal[64] court.[65] A class action will not bind absent class members unless and until the court presiding over the case "certifies" the proposed class action under Rule 23.[66] A court may not certify a class unless

1. the proposed class satisfies each of the four mandatory requirements established by Rule 23(a);[67]
2. the proposed class action falls into at least one of the three categories of class actions established by Rule 23(b);[68] and
3. the membership of the proposed class is "ascertainable."[69]

A reference chart illustrating the prerequisites for class certification is available in the **Appendix** of this report.

A court's decision to grant or deny class certification "is often the defining moment" of a class action case.[70] On the one hand, a court's decision to *deny* class certification may effectively "sound the 'death knell' of the litigation on the part of the plaintiffs"[71] "because the representative plaintiff's claim is too small to justify the expense of" initiating and litigating an individual suit.[72] On the other hand, a court's decision to *grant* class certification "may force a defendant to settle

Litig., 369 F.3d 293, 297 (3d Cir. 2004).

[62] *E.g.*, Thorogood v. Sears, Roebuck & Co., 627 F.3d 289, 293 (7th Cir. 2010).

[63] *See, e.g.*, Eubank v. Pella Corp., 753 F.3d 718, 720 (7th Cir. 2014) (describing class counsel as "un-governed as a practical matter by . . . the other members of the class").

[64] Many state courts authorize class action lawsuits. *See* Kenju Watanabe, *Control Transaction Governance: Collective Action and Asymmetric Information Problems and Ex Post Policing*, 36 NW. J. INT'L L. & BUS. 45, 103 (2016) ("Many states have class action systems based on Rule 23 of the Federal Rules of Civil Procedure."). Nonetheless, this report's focus is on federal class action litigation.

[65] *See, e.g.*, Geoffrey C. Shaw, *Class Ascertainability*, 124 YALE L.J. 2354, 2390 (2015).

[66] *E.g.*, FED. R. CIV. P. 23(a)-(c); Antonio Gidi, *Issue Preclusion Effect of Class Certification Orders*, 63 HASTINGS L.J. 1023, 1040 (2012) ("In order to bind class members, a proposed class action must be duly certified. Before the putative class action is certified, there is no formal class action . . .").

[67] *See infra* "Federal Rule of Civil Procedure 23(a)—Mandatory Class Prerequisites."

[68] *See infra* "Federal Rule of Civil Procedure 23(b)—Additional Requirements for Various Types of Class Actions." If a class action falls into the category described in Rule 23(b)(3), then there are additional requirements which must be met prior to certification. These requirements are discussed in detail *infra* at ""Opt Out" Class Actions (Rule 23(b)(3))."

[69] While most courts recognize that an "ascertainability" requirement exists, courts have reached divergent conclusions regarding what a plaintiff must prove to satisfy that requirement. *See infra* "Ascertainability." *See also* CRS Legal Sidebar LSB10091, *How Hard Should It Be To Bring a Class Action?*, by Kevin M. Lewis [hereinafter Lewis, *How Hard Should It Be*].

[70] *E.g.*, *In re* Modafinil Antitrust Litig., 837 F.3d 238, 249 (3d Cir. 2016).

[71] *Id*. *Accord*, *e.g.*, Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999).

[72] *E.g.*, *Blair*, 181 F.3d at 834.

rather than incur the costs of defending a class action and run the risk of potentially ruinous liability,"[73] even if the class's claims have only a minimal chance of success.[74] Because the decision to grant or deny certification is so momentous, the Supreme Court has repeatedly instructed federal courts to conduct a "rigorous analysis" confirming that the prerequisites of Rule 23 are satisfied before certifying a class.[75] The "court 'must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits'" of the class members' claims against the defendant.[76] Nonetheless, the Supreme Court has cautioned that "merits questions may" only "be considered to the extent . . . that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."[77]

The court must conduct the class certification analysis at "an early practicable time" after the commencement of the class action.[78] "The word 'practicable' imports some leeway in determining the timing of such a decision" by the court.[79] Although "the issue of certification should generally be resolved prior to addressing the merits of the plaintiff's claims,"[80] there is no categorical rule prohibiting courts from ruling on case-dispositive motions before deciding whether to certify the proposed class.[81]

"A party seeking class certification" bears the burden to "affirmatively demonstrate his compliance with" each of the requirements described below,[82] and he must satisfy that burden "by a preponderance of the evidence."[83] It is not sufficient to merely "*plead* compliance with the . . .

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[73] *E.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2009).

[74] *E.g.*, *Modafinil*, 837 F.3d at 249 (explaining that class certification may "create unwarranted pressure to settle nonmeritorious claims on the part of defendants").

[75] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350-51 (2011) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982)). *Accord* Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013).

[76] *Modafinil*, 837 F.3d at 249 (quoting *Hydrogen Peroxide*, 552 F.3d at 307). *See also Comcast*, 569 U.S. at 34 ("By refusing to entertain arguments . . . that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry.").

[77] Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 466 (2013).

[78] FED. R. CIV. P. 23(c)(1)(A).

[79] Danny B. *ex rel.* Elliott v. Raimondo, 784 F.3d 825, 837 (1st Cir. 2015). *Accord*, *e.g.*, Collins v. Vill. of Palatine, Ill., 875 F.3d 839 (7th Cir. 2017) ("The word 'practicable' allows for wiggle room."); Elwell v. Air Line Pilots Ass'n Int'l, Civil Action No. 13-cv-02343-REB-CBS, 2014 WL 12741158, at *1 (D. Colo. Aug. 19, 2014) ("The court . . . retains discretion to structure the timing of the class certification decision.").

[80] Quinn v. Specialized Loan Servicing, LLC, 321 F.R.D. 324, 326 (N.D. Ill. 2017). *Accord*, *e.g.*, Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc., No. 08-1330-JTM-KMH, 2015 WL 790081, at *1 (D. Kan. Feb. 25, 2015) ("Most courts rule on certification before dispositive motions."); *In re* Amazon.com, Inc. Fulfillment Ctr. Fair Labor Standards Act (FLSA) & Wage & Hour Litig., Master File No. 3:14-md-2504, 2016 WL 8203223, at *1 (W.D. Ky. Apr. 22, 2016) ("The issue of certification is typically decided prior to deciding dispositive motions.").

[81] *See* Richardson v. Hamilton, 2:17-cv-00134-JAW, 2017 WL 6624027, at *1 (D. Me. Dec. 28, 2017) ("It is well-settled that, absent prejudice to the plaintiff, a court may decide a defendant's dispositive motion in a putative class action before taking up the issue of class certification."); Powers v. Credit Mgmt. Servs., Inc., 776 F.3d 567, 571 n.1 (8th Cir. 2015) ("Although a district court must determine whether to certify a class at 'an early practicable time' in the litigation, it is not uncommon for a district court to rule on a summary judgment motion that will clarify or simplify the litigation prior to ruling on class certification.") (quoting FED. R. CIV. P. 23(c)(1)(A)).

[82] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

[83] *In re* Modafinil Antitrust Litig., 837 F.3d 238, 249 (3d Cir. 2016). *Accord*, *e.g.*, Steimel v. Wernert, 823 F.3d 902, 917 (7th Cir. 2016) ("The party seeking class certification bears the burden of showing, by a preponderance of the evidence, that a proposed class meets the requirements of Federal Rule of Civil Procedure 23."); Johnson v. Nextel Commc'ns Inc., 780 F.3d 128, 137 (2d Cir. 2015) ("The party seeking class certification bears the burden of establishing by a preponderance of the evidence that each of Rule 23's requirements have been met."); Brown v. Nucor Corp., 785 F.3d 895, 931 (4th Cir. 2015) ("Before certifying a class action, courts will require a plaintiff to establish by

Rule 23 requirements"; the plaintiff must instead introduce "*evidence* that the putative class complies with Rule 23."[84]

If a court determines that the class satisfies the requirements for certification, then Rule 23 directs the court to issue a certification order that defines the class and appoints class counsel.[85] As explained later in this report,[86] a court can certify "subclasses" with separate legal representation in a single action, and should do so where interests within the proposed class might diverge.[87] Lastly, the court should then direct notice to the class members as required by Rule 23.[88] The notice required depends on the category under which the class which is certified.[89]

The sections that follow analyze each of the requirements for class certification in detail.[90]

Federal Rule of Civil Procedure 23(a)—Mandatory Class Prerequisites

First, a court may not certify a class action unless the proposed class satisfies all four of the mandatory requirements established by Rule 23(a).[91] "Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—effectively limit the class claims to those fairly encompassed by the named plaintiff's claims."[92]

Numerosity (Rule 23(a)(1))

The plaintiff must first show that the proposed "class is so numerous that joinder of all members"—that is, identifying everyone who claims to be injured by the defendant's conduct and having them actively participate in the lawsuit as named parties—would be "impracticable."[93]

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a preponderance of the evidence that the action complies with each part of Rule 23.").

[84] EQT Prod. Co. v. Adair, 764 F.3d 347, 357 (4th Cir. 2014) (emphasis added). *Accord, e.g.*, *In re* Hyundai & Kia Fuel Econ. Litig., 881 F.3d 679, 690 (9th Cir. 2018) (explaining that the plaintiff must "demonstrate through evidentiary proof" that the proposed class action satisfies the Rule 23 requirements); Harnish v. Widener Univ. Sch. of Law, 833 F.3d 298, 304 (3d Cir. 2016) ("A plaintiff 'may not merely propose a method of meeting Rule 23's requirements without any evidentiary support.'") (quoting Carrera v. Bayer Corp., 727 F.3d 300, 306 (3d Cir. 2013)).

[85] FED. R. CIV. P. 23(c)(1). If there are multiple applications to serve as class counsel, the Court should select the "best possible representation for the class." FED. R. CIV. P. 23 Advisory Committee Notes on 2003 Amendments.

[86] *See infra* "Subclasses and Certification as to Particular Issues."

[87] FED. R. CIV. P. 23(c)(5). *See also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999) ("[I]t is obvious after *Amchem* that a class divided between holders of present and future claims . . . requires division into homogeneous subclasses . . . with separate representation to eliminate conflicting interests of counsel.").

[88] FED. R. CIV. P. 23(c)(2).

[89] *See* FED. R. CIV. P. 23(c)(2)(A)-(B).

[90] *See also infra* **Appendix**.

[91] FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members *only if* (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; *and* (4) the representative parties will fairly and adequately protect the interests of the class.") (emphasis added). *Accord, e.g.*, Wright v. Mishawaka Hous. Auth., 225 F. Supp. 3d 752, 761 (N.D. Ind. 2016) ("If any of these elements is missing, the class can't be certified.").

[92] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982)).

[93] FED. R. CIV. P. 23(a)(1).

This prerequisite is known as the "numerosity" requirement.[94] "The numerosity requirement exists because the power of class actions to bind absent class members carries due process risks and should be invoked only when necessary"—namely, when it would not be possible or practicable for all of the class members to participate as formal parties to the suit.[95]

Although the text of Federal Rule of Civil Procedure 23 is "conspicuously devoid of any numerical minimum" of class members "required for class certification,"[96] "numerosity is generally satisfied if there are more than 40 class members,"[97] and generally unsatisfied if the proposed class contains 20 members or fewer.[98] Courts give "classes with between 21 and 40 members . . . varying treatment"; "these midsized classes may or may not meet the numerosity requirement depending on the circumstances of each particular case."[99] While the number of class members is the "starting point" of the numerosity analysis,[100] "the number of members in a proposed class is not determinative of whether joinder is impracticable."[101] Courts also consider a variety of other factors when evaluating numerosity, the most common of which include (i) whether the class members are geographically dispersed; (ii) the financial resources of the class members; (iii) the burden that multiple individual actions would place on the judiciary; and (iv) the ease with which class members may be identified.[102]

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[94] *E.g.*, *In re* Modafinil Antitrust Litig., 837 F.3d 238, 248 (3d Cir. 2016).

[95] William C. Jhaveri-Weeks & Austin Webbert, *Class Actions Under Rule 23 and Collective Actions Under the Fair Labor Standards Act: Preventing the Conflation of Two Distinct Tools to Enforce the Wage Laws*, 23 GEO. J. ON POVERTY L. & POL'Y 233, 258 (2016).

[96] *E.g.*, *Modafinil*, 837 F.3d at 249.

[97] *In re* NFL Players Concussion Injury Litig., 821 F.3d 410, 426 (3d Cir. 2016). *Accord*, *e.g.*, Mulvania v. Sheriff of Rock Island Cty., 850 F.3d 849, 859 (7th Cir. 2017) ("A forty-member class is often regarded as sufficient to meet the numerosity requirement."); Penn. Pub. Sch. Emps.' Ret. Sys. v. Morgan Stanley & Co., 772 F.3d 111, 120 (2d Cir. 2014) ("Numerosity is presumed for classes larger than forty members."). *But see* Ibe v. Jones, 836 F.3d 516, 530 (5th Cir. 2016) (holding that, depending on the circumstances, even classes with more than forty members may be insufficiently numerous).

[98] *E.g.*, *Modafinil*, 837 F.3d at 250; Heredia v. Eddie Bauer LLC, Case No. 16-cv-06236-BLF, 2018 WL 369032, at *5 (N.D. Cal. Jan. 10, 2018); Hoffer v. Jones, Case No. 4:17cv214-MW/CAS, 2017 WL 5586877, at *1 (N.D. Fla. Nov. 17, 2017).

[99] *Modafinil*, 837 F.3d at 250; Wilson v. Anthem Health Plans of Ky., Inc., No. 3:14-cv-743-TBR, 2017 WL 56064, at *4 (W.D. Ky. Jan. 4, 2017). *Accord*, *e.g.*, Lea Family P'ship Ltd. v. City of Temple Terrace, Fla., Case No: 8-16-cv-3463-T-30AAS, 2017 WL 4155459, at *3 (M.D. Fla. Sept. 19, 2017) ("Numbers falling in between [21 and 40] are open to judgment based on other factors.").

[100] *Modafinil*, 837 F.3d at 250.

[101] *Ibe*, 836 F.3d at 528. *Accord*, *e.g.*, *NFL*, 821 F.3d at 426 ("There is no magic number of class members needed for a suit to proceed as a class action."); *Mulvania*, 850 F.3d at 859 ("There is no magic number that applies to every case.").

[102] *See*, *e.g.*, *Modafinil*, 837 F.3d at 253 ("This non-exhaustive list includes: judicial economy, the claimants' ability and motivation to litigate as joined plaintiffs, the financial resources of class members, the geographic dispersion of class members, the ability to identify future claimants, and whether the claims are for injunctive relief or for damages."); *Ibe*, 836 F.3d at 528 (considering "the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim"); *Penn. Pub. Sch. Emps.' Ret. Sys.*, 772 F.3d at 120 (considering "(i) judicial economy, (ii) geographic dispersion, (iii) the financial resources of class members, (iv) their ability to sue separately, and (v) requests for injunctive relief that would involve future class members").

Commonality (Rule 23(a)(2))

The plaintiff must then show that "there are questions of law or fact common to the class."[103] This prerequisite is known as the "commonality" requirement,[104] and it exists to ensure that the claims of the full class are "limit[ed] . . . to those fairly encompassed by the named plaintiff's claims."[105]

In its 2010 decision in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court explained that the commonality prerequisite requires more than an incidental common question within the class; rather, the plaintiff must establish that the claims "depend upon a common contention" that is of such a nature that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[106] Commentators generally agree that *Wal-Mart* expanded the significance of commonality.[107] There, the Court reviewed a decision certifying a proposed class of approximately 1.5 million former and current female Wal-Mart employees. The plaintiffs asserted a sex discrimination against Wal-Mart under Title VII of the Civil Rights Act of 1964, alleging that local Wal-Mart supervisors favored men over women when exercising their discretion over pay and promotion.[108] The plaintiffs presented statistical evidence that local managers were disproportionately using their discretionary authority to favor men, but they did not present any evidence of an express corporate policy against women.[109] The question before the Court was whether this proposed class met the requirement of commonality, given the different nature of the alleged discrimination faced by each class member. As the Court observed, the class members certainly raised "common questions"—for example, "[d]o all of us plaintiffs indeed work for Wal-Mart?" or "[d]o all of our managers have discretion over pay?" or even "[i]s that an unlawful employment practice?"[110] Nevertheless, these sorts of questions were, in the view of the Court, insufficient to satisfy the commonality requirement, as "any competently crafted class complaint literally raises common 'questions.'"[111]

Instead, the Court explained that, to satisfy the commonality requirement, a plaintiff must "demonstrate that the class members 'have suffered the same injury.'"[112] "This does not mean merely that" all of the class members have allegedly "suffered a violation of the same provision of law."[113] Rather, the claims must depend on a common contention that is "capable of classwide resolution"; a classwide proceeding must "generate common answers apt to drive the resolution of the litigation."[114] The Court explained that the plaintiffs in *Wal-Mart* could not satisfy that

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

[104] *E.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011).

[105] *Id*. (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982)).

[106] *Id*. at 350.

[107] Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 699 (2014) ("The *Wal-Mart* Court made Rule 23(a)(2) into something much stricter.") (citing cases) [hereinafter Bone, *Misguided Search*]. *But see* Andrew J. Trask, *Reactions to* Wal-Mart v. Dukes*: Litigation Strategy and Legal Change*, 62 DEPAUL L. REV. 791, 793 (2013) ("Despite the many academics and lawyers who have written otherwise, [*Wal-Mart*] does not represent the 'demise' of the class action.").

[108] 564 U.S. at 342.

[109] *Id*. at 344.

[110] *Id*. at 349.

[111] *Id*.

[112] *Id*. at 350 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982)).

[113] *Id*.

[114] *Id*. (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131-32 (2009)).

requirement because, due to the nature of the underlying Title VII claim, "it w[ould] be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question of *why was I disfavored*."[115] Because the plaintiffs in *Wal-Mart* had presented no evidence of a general corporate policy of discrimination, there was no reason to believe that every class member could point to the same common answer.[116] Lower courts have since affirmed that, as in *Wal-Mart*, a plaintiff generally cannot satisfy the commonality requirement "where the defendant's allegedly injurious conduct differs from plaintiff to plaintiff."[117]

Nevertheless, "commonality does not require perfect identity of questions of law or fact among all class members,"[118] and there is no requirement "that *every* question be common" to the class.[119] To the contrary, "even a 'single common legal or factual issue can suffice'" to satisfy the commonality requirement, provided that all class members have suffered from the same injurious conduct.[120] For example, in *Suchanek v. Sturm Foods, Inc.*, the Seventh Circuit concluded that the district court erred in finding that there was no commonality in a consumer class action involving Keurig-style coffee pods.[121] The defendant in *Suchanek* sold a product which outwardly resembled the original Keurig-brand coffee pods, but which contained instant coffee rather than fresh coffee grounds.[122] Plaintiffs argued that the packaging was deceptive and sought to certify a class on behalf of all consumers of the defendant's product in several states to resolve the common question of whether the packaging was in fact deceptive.[123] The district court refused to certify the class action due to variation within the class members claims.[124] For example, in the view of the district court, some class members may have purchased different versions of the packaging in question.[125] However, the Seventh Circuit vacated the district court's order denying class certification, explaining that these differences within the proposed class did not preclude certification.[126] The Seventh Circuit explained that all that mattered for commonality was the existence of a question decisive to all class members that was capable of a common resolution.[127] The court concluded that the question of whether the packaging in question was materially

[115] *Id*. at 352.

[116] *Id*. at 355.

[117] Suchanek v. Sturm Foods, Inc., 764 F.3d 750, 756 (7th Cir. 2014); Richey v. Matanuska-Susitna Borough, No. 3:14-cv-00170 JWS, 2015 WL 1542546, at *5 (D. Alaska Apr. 7, 2015); Collinge v. IntelliQuick Delivery, Inc., No. 2:12-cv-00824 JWS, 2015 WL 1292444, at *11 (D. Ariz. Mar. 23, 2015).

[118] Reyes v. Netdeposit, LLC, 802 F.3d 469, 486 (3d Cir. 2015). *Accord, e.g.*, Hughes v. Ester C Co., 317 F.R.D. 333, 344 (E.D.N.Y. 2016) ("A perfect identity of facts and law is not required."); Otomo v. Nev. Ass'n Servs., Inc., No. 2:10-CV-2199 JCM (GWF), 2013 WL 1249598, at *2 (D. Nev. Mar. 25, 2013) (same); Ries v. Ariz. Beverages USA LLC, 287 F.R.D. 523, 537 (N.D. Cal. 2012) (same).

[119] *E.g.*, *Suchanek*, 764 F.3d at 756; Ginardi v. Frontier Gas Servs., LLC, No. 4:11-cv-00420-BRW, 2012 WL 1377052, at *2 (E.D. Ark. Apr. 19, 2012).

[120] *In re* AVEO Pharms., Inc. Sec. Litig., Civil Action No. 13-11157, 2017 WL 5484672, at *4 (D. Mass. Nov. 14, 2017) (quoting Swack v. Credit Suisse First Bos., 230 F.R.D. 250, 259 (D. Mass. 2005)). *Accord, e.g.*, *Wal-Mart*, 564 U.S. at 359 ("We quite agree that for purposes of Rule 23(a)(2) 'even a single common question will do.'") (quoting *Wal-Mart*, 564 U.S. at 376 n.9 (Ginsburg, J., dissenting)).

[121] 764 F.3d at 752.

[122] *Id*. at 752-53.

[123] *Id*. at 755.

[124] McManus v. Sturm Foods Inc., 292 F.R.D. 606, 609-20 (S.D. Ill.), *vacated*, *Suchanek*, 764 F.3d 750.

[125] *Id*. at 618.

[126] *Suchanek*, 764 F.3d at 752, 755-78.

[127] *Id*. at 752, 755-78.

misleading to a reasonable person satisfied the commonality requirement because the success of each class member's state law fraud claim depended, at least in part, on the basis of the answer to that question.[128] Nor did it matter for the appellate court that some members of the proposed class were uninjured because, for example, they did not rely on the allegedly deceptive packaging.[129] For the Seventh Circuit, "[h]ow many (if any) of the class members have a valid claim is the issue to be determined after the class is certified."[130] In sum, although *Wal-Mart* reinforces that Rule 23(a)(2)'s commonality requirement is rigorous,[131] cases like *Suchanek* indicate that the commonality requirement is not an insurmountable barrier to class certification.[132]

Typicality (Rule 23(a)(3))

Third, the proposed class representative must satisfy what is known as the "typicality" requirement[133]—that is, that "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[134] The primary purpose of the typicality requirement is to ensure that "the interests of the class and the class representatives are aligned 'so that the latter will work to benefit the entire class through the pursuit of their own goals.'"[135] A proposed class will generally satisfy the typicality requirement if the class representative's claim against the defendant is based on roughly the same legal and factual basis as the claims of the absent class members that the class representative seeks to represent.[136] "Representative claims are 'typical' if

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[128] *Id*. at 758.

[129] *Id*. at 757-58.

[130] *Id*. at 755 (7th Cir. 2014) (quoting Parko v. Shell Oil Co., 739 F.3d 1083, 1085 (7th Cir. 2014)). *See also* Rikos v. Procter & Gamble Co., 799 F.3d 497, 505 (6th Cir. 2015) (holding that plaintiffs are not required to "prove at the class-certification stage that all or most class members were in fact injured"; the plaintiff need only demonstrate "that all members of the class have suffered the 'same injury'") (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011)).

[131] *See, e.g.*, Paul G. Karlsgodt & Dustin M. Dow, *The Practical Approach: How the Roberts Court Has Enhanced Class Action Procedure by Strategically Carving at the Edges*, 48 AKRON L. REV. 883, 885 (2015) ("*Wal-Mart* unquestionably affects the level of scrutiny that lower courts now give to the question whether to certify a case as a class action.").

[132] *See, e.g.*, Trask, *supra* note 107, at 793 ("Despite the many academics and lawyers who have written otherwise, [*Wal-Mart*] does not represent the 'demise' of the class action."); Michael Selmi & Sylvia Tsakos, *Employment Discrimination Class Actions After* Wal-Mart v. Dukes, 48 AKRON L. REV. 803, 804-05 (2015) (arguing that the prediction of some commentators that *Wal-Mart* would "mark the death-knell of employment discrimination class actions based on claims of intentional discrimination . . . has proved inaccurate").

[133] *E.g.*, *In re* NFL Players Concussion Injury Litig., 821 F.3d 410, 427 (3d Cir. 2016).

[134] FED. R. CIV. P. 23(a)(3).

[135] *NFL*, 821 F.3d at 427-28 (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 182-83 (3d Cir. 2001)). *Accord, e.g.*, Mazzei v. Money Store, 829 F.3d 260, 272 (2d Cir. 2016) ("One purpose of the typicality requirement is to ensure that the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."); Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1141 (9th Cir. 2016) ("The test of typicality serves to ensure that 'the interest of the named representative aligns with the interests of the class.'").

[136] *E.g.*, *In re* Schering Plough Corp. ERISA Litig., 589 F.3d 585, 599 (3d Cir. 2009) ("The claims of the class representative must be generally the same as those of the class in terms of both (a) the legal theory advanced and (b) the factual circumstances underlying that theory."); Oshana v. Coca-Cola Co., 472 F.3d 506, 514 (7th Cir. 2006) (holding that "a claim is typical if" the class representative's "claims are based on the same legal theory" as those of the absent class members); Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993) ("Rule 23(a)(3)'s typicality requirement is satisfied when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability."). *But see* Elizabeth M. v. Montenez, 458 F.3d 779, 787 (8th Cir. 2006) ("The presence of a common legal theory does not establish typicality when proof of a violation requires individualized inquiry.").

they are reasonably coextensive with those of absent class members; they need not be substantially identical."[137] Thus, "even relatively pronounced factual differences" between the named plaintiff's claims and those of the class members "will generally not preclude a finding of typicality where there is a strong similarity of legal theories."[138]

Many courts, when evaluating whether a proposed class action satisfies the typicality requirement, also inquire whether the proposed class representative's claim "arises from the same event or practice or course of conduct that gives rise to the claims of other class members."[139] In this respect, the typicality requirement "tend[s] to merge" with the commonality requirement,[140] which likewise examines whether "the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members."[141] Other courts have suggested that typicality overlaps with the "adequate representation" requirement discussed below,[142] which similarly seeks to ensure that representative parties "adequately protect the interests of the class."[143]

Adequate Representation (Rule 23(a)(4))

Fourth, a plaintiff must demonstrate that "the representative parties will fairly and adequately protect the interests of the class."[144] This prerequisite is alternatively known as the "adequacy of representation" requirement,[145] the "adequate representation" requirement,[146] or just the "adequacy" requirement.[147] The "adequate representation inquiry consists of two parts":

1. "The adequacy of the named plaintiffs as representatives of the proposed class's myriad members, with their differing and separate interests"; and
2. "The adequacy of the proposed class counsel."[148]

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[137] *Torres*, 835 F.3d at 1134. *Accord, e.g.*, *NFL*, 821 F.3d at 428 ("Class members need not 'share identical claims.'") (quoting Baby Neal *ex rel.* Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)).

[138] *NFL*, 821 F.3d at 428. *Accord, e.g.*, Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp., 762 F.3d 1248, 1259 (11th Cir. 2014) ("The typicality requirement may be satisfied despite substantial factual differences . . . when there is a strong similarity of legal theories."); DG *ex rel.* Stricklin v. Devaughn, 594 F.3d 1188, 1198-99 (10th Cir. 2010) ("Provided the claims of [the n]amed [p]laintiffs and class members are based on the same legal or remedial theory, differing fact situations of the class members do not defeat typicality.").

[139] *Oshana*, 472 F.3d at 514. *Accord, e.g.*, Just Film, Inc. v. Buono, 847 F.3d 1108, 1118 (9th Cir. 2017) ("It is sufficient for typicality if the plaintiff endured a course of conduct directed against the class."); *Newton*, 259 F.3d at 183 ("If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established."); *Robidoux*, 987 F.2d at 936-37 ("When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met.").

[140] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 n.5 (2011).

[141] Suchanek v. Sturm Foods, Inc., 764 F.3d 750, 756 (7th Cir. 2014). *Accord, e.g.*, Johnson v. Nextel Commc'ns Inc., 780 F.3d 128, 137 (2d Cir. 2015) (same); Reyes v. Netdeposit, LLC, 802 F.3d 469, 486 (3d Cir. 2015) ("A court's focus must be 'on whether the defendant's conduct is common as to all of the class members.'") (quoting Sullivan v. DB Invs., Inc., 667 F.3d 273, 298 (3d Cir. 2011)).

[142] *See infra* "Adequate Representation (Rule 23(a)(4))."

[143] Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982). *See also* Hassine v. Jeffes, 846 F.2d 169, 176 n.4 (3d Cir. 1988) (noting that both typicality and adequacy of representation evaluate sufficiency of named plaintiff).

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

[145] *E.g.*, *In re* NFL Players Concussion Injury Litig., 821 F.3d 410, 428 (3d Cir. 2016).

[146] *E.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011).

[147] *E.g.*, *In re* Online DVD-Rental Antitrust Litig., 779 F.3d 934, 942 (9th Cir. 2015).

[148] Gomez v. St. Vincent Health, Inc., 649 F.3d 583, 592 (7th Cir. 2011). *Accord, e.g.*, Jones v. Singing River Health Servs. Found., 865 F.3d 285, 294 (5th Cir. 2017) ("Rule 23(a)(4) involves examination of both the representatives' counsel and the representatives themselves."); *In re* Cmty. Bank of N. Va. Mortg. Lending Practices Litig., 795 F.3d

Adequacy of the Class Representative

"The adequacy inquiry" serves primarily "to uncover conflicts of interest between named parties and the class they seek to represent."[149] "To assure vigorous prosecution" of the proposed class action, courts consider

1. "Whether the class representative has adequate incentive to pursue the class's claim"; and
2. "Whether some difference between the class representative and some class members might undermine that incentive."[150]

"Conflicts of interest between the named plaintiffs and the class they seek to represent" can potentially defeat class certification on adequacy grounds.[151] Importantly, however, a conflict between the class representative and the absent class members will defeat class certification only if the conflict is "fundamental to the suit" and goes "to the heart of the litigation."[152]

The Supreme Court's opinion in *Amchem Products v. Windsor* illustrates this concept.[153] In that case, the plaintiffs sought to certify a settlement-only class consisting of all persons who had either been exposed or who had a family member who was exposed to the defendant's asbestos—a class of unknown size that may well have contained tens of thousands of persons.[154] The action sought to settle all present and future asbestos-related claims that might be brought against the defendant, once and for all, on behalf of this untold number of class members, some of whom were already sick and others of whom were presently uninjured and might never be injured in the future.[155]

The Supreme Court concluded that this proposed class action could not proceed for a number of reasons, one of which was that the class could not satisfy the adequacy requirement.[156] The proposed class contained both the currently injured and those who might manifest an injury only in the future, leading to a "serious intra-class conflict."[157] In particular, the uninjured plaintiffs had an interest in an "ample, inflation-protected fund for the future," while currently injured plaintiffs had the diametrically opposed interest of "generous immediate payments."[158] Because

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380, 392 (3d Cir. 2015) ("The adequacy requirement primarily examines two matters: the interests and incentives of the class representatives, and the experience and performance of class counsel.").

[149] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997).

[150] *In re* Payment Card Interchange Fee & Merch. Discount Antitrust Litig., 827 F.3d 223, 231 (2d Cir. 2016). *Accord, e.g.*, Larson v. AT&T Mobility LLC, 687 F.3d 109, 132 (3d Cir. 2012) ("The adequacy inquiry . . . has two purposes: to determine (1) that the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously, and (2) that there is no conflict between the individual's claims and those asserted on behalf of the class.").

[151] Berger v. Compaq Comput. Corp., 257 F.3d 475, 480 (5th Cir. 2001). *See also, e.g.*, Riffey v. Rauner, 873 F.3d 558, 563-64 (7th Cir. 2017) (explaining that "a class is not fairly and adequately represented" for the purposes of Rule 23(a) "if class members have antagonistic or conflicting claims"); Rodriguez v. West Publ'g Corp., 563 F.3d 948, 959 (9th Cir. 2009) ("An absence of material conflicts of interest between the named plaintiffs and . . . other class members is central to adequacy.").

[152] *Online DVD-Rental*, 779 F.3d at 942. *Accord, e.g.*, Carriuolo v. Gen. Motors Co., 823 F.3d 977, 989 (11th Cir. 2016); *In re* Payment Card Interchange Fee & Merch. Discount Antitrust Litig., 827 F.3d 223, 231 (2d Cir. 2016).

[153] 521 U.S. 591.

[154] *Id*. at 602-03.

[155] *Id*. at 597.

[156] *Id*. at 625.

[157] *Id*. at 610.

[158] *Id*. at 626-27.

of these conflicts of interest, the Court concluded that structural assurances of fairness, like separate subclasses with separate representation,[159] were needed to ensure adequate representation.[160] After *Amchem*, the lower courts have avoided similar conflicts of interest by certifying separate subclasses, each with their own counsel and class representative.[161]

Not all conflicts, however, require such treatment. Some conflicts are not fundamental, and therefore do not threaten class certification on adequacy grounds. For instance, most courts have agreed that a named plaintiff's eligibility for "incentive awards that are intended to compensate class representatives for work undertaken on behalf of a class . . . do not, by themselves, create an impermissible conflict between class members and their representatives," even if those incentive awards will result in the named plaintiff receiving more money than the absent class members.[162] Because such awards do not dull the named plaintiff's motivation to "prosecute the action vigorously on behalf of the class," a named plaintiff who stands to receive an incentive award at the conclusion of the litigation will generally be able to adequately represent the class.[163]

In addition to assessing whether a fundamental conflict renders the named plaintiff unable to adequately represent the absent class members, a few courts also consider whether the proposed class representative "possess[es] a sufficient level of knowledge and understanding to be capable of 'controlling' or 'prosecuting' the litigation."[164] Many other courts, however, "disfavor . . . 'attacks on the adequacy of a class representative based on the representative's ignorance'" about the litigation, especially in complex cases.[165]

Adequacy of Class Counsel

The adequacy inquiry also requires the court to evaluate the "competency and conflicts of class counsel."[166] The court must ensure that the attorney who seeks to represent the class is "qualified, experienced, and generally able to conduct the litigation."[167]

Rule 23 "lists several non-exclusive factors that a district court must consider in determining 'counsel's ability to fairly and adequately represent the interests of the class,'"[168] including

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[159] Subclasses are provided for by FED. R. CIV. P. 23(c)(5). *See infra* "Subclasses and Certification as to Particular Issues."

[160] 521 U.S. at 626-27.

[161] *See, e.g.*, *In re* NFL Players Concussion Injury Litig., 821 F.3d 410, 431-32 (3d Cir. 2016).

[162] *In re* Online DVD-Rental Antitrust Litig., 779 F.3d 934, 943 (9th Cir. 2015). *Accord, e.g.*, Berry v. Schulman, 807 F.3d 600, 613-14 (4th Cir. 2015).

[163] *Online DVD-Rental*, 779 F.3d at 943. *Accord, e.g.*, *Berry*, 807 F.3d at 613-14.

[164] *See, e.g.*, Ibe v. Jones, 836 F.3d 516, 529 (5th Cir. 2016).

[165] *In re* Flag Telecom Holdings, Ltd. Sec. Litig., 574 F.3d 29, 42 (2d Cir. 2009) (quoting Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 61 (2d Cir. 2000)). *Accord, e.g.*, Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 430 (4th Cir. 2003) ("In a complex lawsuit . . . the representative need not have extensive knowledge of the facts of the case in order to be an adequate representative."); New Directions Treatment Servs. v. City of Reading, 490 F.3d 293, 313 (3d Cir. 2007) ("A class representative need only possess 'a minimal degree of knowledge necessary to meet the adequacy standard.'") (quoting Szczubelek v. Cendant Mortg. Corp., 215 F.R.D. 107, 119 (D.N.J. 2003)).

[166] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 n.20 (1997).

[167] Beattie v. CenturyTel, Inc., 511 F.3d 554, 562 (6th Cir. 2007); Marisol A. v. Giuliani, 126 F.3d 372, 378 (2d Cir. 1997). *Accord, e.g.*, Jones v. Singing River Health Servs. Found., 865 F.3d 285, 294 (5th Cir. 2017) ("The adequacy requirement mandates an inquiry into the zeal and competence of the representative's counsel.").

[168] *E.g.*, *In re* Cmty. Bank of N. Va., 622 F.3d 275, 292 (3d Cir. 2010) (quoting FED. R. CIV. P. 23(g)(1)(B)).

1. the work counsel has done in identifying or investigating potential claims in the action;
2. counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
3. counsel's knowledge of the applicable law; and
4. the resources that counsel will commit to representing the class.[169]

Under this section, courts have also scrutinized any conflicts that a class representative may have with class counsel. As the Seventh Circuit explained in *Eubank v. Pella Corporation*, "[c]lass representatives are . . . fiduciaries of the class members, and fiduciaries are not allowed to have conflicts of interest without the informed consent of their beneficiaries."[170] In that case, the court reversed an order certifying a class because the class counsel was the son-in-law of the class representative, leading to a "grave conflict of interest" because the class representative had less reason to attempt to constrain the fee to counsel.[171] Other courts have found that representation is inadequate where the named plaintiff was a friend and former business partner with class counsel,[172] or where the named plaintiff was an employee of class counsel.[173]

However, not every preexisting relationship between class counsel and the named plaintiff is fatal to class certification. In *Levitt v. Southwest Airlines Co.*, for example, the Seventh Circuit upheld a class where one of the two class representatives was co-counsel with lead class counsel in a separate case.[174] Although the *Levitt* court reduced the attorney's fee award by $15,000 because the attorney had failed to disclose the conflict, the court nonetheless affirmed the class certification order in part because counsel had successfully obtained a favorable settlement for the class.[175]

Federal Rule of Civil Procedure 23(b)—Additional Requirements for Various Types of Class Actions

"In addition to the[] four general requirements" for classes established by Rule 23(a), "there are additional requirements that must be met depending on the type of class [action] the [plaintiff] seeks to certify."[176] "There are three types of class actions that can be maintained, and Rule 23(b)(1)-(3) specifies the additional requirements that apply to each of them."[177] If the proposed class action does not satisfy the requirements of any of those three categories, the court must deny

[169] FED. R. CIV. P. 23(g)(1)(A). *See also Cmty. Bank of N. Va.*, 622 F.3d at 292 (specifying that the Rule 23(g)(1)(A) factors govern the determination of whether counsel is adequate for the purposes of Rule 23(a)(4)'s adequacy requirement); *In re* NII Holdings, Inc. Sec. Litig., 311 F.R.D. 401, 407-08 (E.D. Va. 2015) (same); Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen. Motors Corp., No. 07-CV-14074-DT, 2008 WL 2968408, at *19-20 (E.D. Mich. July 31, 2008) (same).

[170] 753 F.3d 718, 723-24 (7th Cir. 2014).

[171] *Id*. at 724.

[172] London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1255 (11th Cir. 2003); Susman v. Lincoln American Corp., 561 F.2d 86, 90, 95 (7th Cir. 1977).

[173] Shroder v. Suburban Coastal Corp., 729 F.2d 1371, 1375 (11th Cir. 1984).

[174] 799 F.3d 701, 713 (7th Cir. 2015).

[175] *Id*. at 715-16.

[176] Huffman v. Prudential Ins. Co. of Am., No. 2:10-cv-05135, 2016 WL 5724293, at *3 (E.D. Pa. Sept. 30, 2016). *Accord*, *e.g.*, FED. R. CIV. P. 23(b).

[177] *Huffman*, 2016 WL 5724293, at *3. *Accord*, *e.g.*, FED. R. CIV. P. 23(b)(1)-(3).

class certification.[178] As is true of the Rule 23(a) requirements, the court must perform "a rigorous analysis" to determine whether the Rule 23(b) requirements are satisfied.[179]

Incompatible Standards of Conduct/Limited Funds (Rule 23(b)(1))

Rule 23(b)(1) provides that a class action may be maintained if prosecuting separate actions by individual class members would create a risk of

> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.[180]

Class members have no right to opt out of a Rule 23(b)(1) class,[181] as "allowing class members to opt out of the class and pursue individual claims would deplete the fund to the detriment of other class members."[182]

Inconsistent or Varying Adjudications (Rule 23(b)(1)(A))

"The phrase 'incompatible standards of conduct' refers to the situation where 'different results in separate actions would impair the opposing party's ability to pursue a uniform continuing course of conduct.'"[183] So, for example, if separate lawsuits proceeding in different courts could result in one court ordering the defendant to reimburse a plaintiff from a retirement plan while another court prohibits the plaintiff from recovering anything from that plan, then "the risk of inconsistent orders . . . satisfies Rule 23(b)(1)(A)."[184]

Limited Fund Class Actions (Rule 23(b)(1)(B))

"Class actions certified under Rule 23(b)(1)(B) . . . typically involve limited pools of money that may not be adequate to cover the claims of all plaintiffs,"[185] as may occur when there are

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[178] *See* FED. R. CIV. P. 23(b).

[179] Comcast Corp. v. Behrend, 569 U.S. 27, 33-34 (2013) ("Certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied . . . The same analytical principles govern Rule 23(b).") (internal citations omitted).

[180] FED. R. CIV. P. 23(b)(1).

[181] *E.g.*, Penn. Chiropractic Ass'n v. Blue Cross Blue Shield Ass'n, No. 09 C 5619, 2011 WL 6819081, at *15 (N.D. Ill. Dec. 28, 2011) ("Rule 23(b)(1)(A) does not permit opt-outs."); Stott v. Capital Fin. Servs., Inc., 277 F.R.D. 316, 326 (N.D. Tex. 2011) (explaining that a member of a Rule 23(b)(1)(B) cannot opt out "because allowing class members to opt out of the class and pursue individual claims would deplete the fund to the detriment of other class members"). *See generally infra* "Notice and Opt-Out."

[182] *Stott*, 277 F.R.D. at 326. *Accord, e.g.*, Fed. Ins. Co. v. Caldera Med. Inc., Case No. 2:15-cv-00393-SVW-PJW, 2016 WL 5922313, at *3 (C.D. Cal. July 25, 2016) ("If a class member could opt out of a limited fund class action, pursue her claim, and collect her purse, the entire point of the aggregate proceeding would be undermined.").

[183] Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1193 (9th Cir. 2001).

[184] *See* Stanford v. Foamex L.P., 263 F.R.D. 156, 173 (E.D. Pa. 2009) ("For example, if Stanford were successful in his plan-wide claim, but 'Participant A' were unsuccessful when raising the same claims in an individual account action, one court order would require defendants to reimburse Participant A while another court order would foreclose such recovery. Such competing orders lead to incompatible standards of conduct for the defendants . . . The risk of inconsistent orders arising from parallel plan-wide and individual account claims satisfies Rule 23(b)(1)(A).").

[185] Cashman v. Dolce Int'l/Hartford, Inc., 225 F.R.D. 73, 93 (D. Conn. 2004). *Accord, e.g., In re* Katrina Canal

"multiple claims to a single, tangible fund, such as a bank account, trust, insurance policy, or proceeds from a sale of an asset."[186] In such cases involving "limited funds," "every award made to one claimant" would reduce "the amount of funds available to other claimants until, in the absence of equitable management of the fund, some claimants are able to obtain full satisfaction of their claims, while others are left with no recovery at all."[187] Rule 23(b)(1)(B) therefore ensures "equitable distribution of those limited funds, so that the first plaintiffs bringing claims do not deprive later suing plaintiffs the opportunity to press their own claims."[188] Rule 23(b)(1)(B) classes are therefore "designed to protect plaintiffs from one another."[189]

Injunctive or Declaratory Relief (Rule 23(b)(2))

A plaintiff may obtain class certification pursuant to Rule 23(b)(2) by demonstrating that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[190] "Colloquially, 23(b)(2) is the appropriate rule to enlist when the plaintiffs' primary goal is not monetary relief, but rather to require the defendant to do or not do something that would benefit the whole class."[191]

In order to obtain class certification under Rule 23(b)(2), the plaintiff must demonstrate that "a single injunction or declaratory judgment would provide relief to each member of the class."[192] Rule 23(b)(2) does "not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant."[193] In other words, the relief sought by the proposed class must be "indivisible, benefitting all members of the (b)(2) [c]lass at once."[194]

Breaches Litig., 628 F.3d 185, 191 (5th Cir. 2010) ("A 'limited fund' action, which aggregates numerous claims against a fund insufficient to satisfy them all, is one type of class action traditionally encompassed by Rule 23(b)(1)(B)."); Santomenno v. Transamerica Life Ins. Co., 310 F.R.D. 451, 463 (C.D. Cal. 2015) (describing limited fund cases as the "paradigmatic" Rule 23(b)(1)(B) case).

[186] *Stott*, 277 F.R.D. at 326. *See also, e.g.*, *Fed. Ins. Co.*, 2016 WL 5922313, at *3 ("Classic illustrations of limited fund class actions include claims to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime accident suit, and others.").

[187] *In re* Black Farmers Discrimination Litig., 856 F. Supp. 2d 1, 16 (D.D.C. 2011). *See also, e.g.*, McLaurin v. Prestage Foods, Inc., 271 F.R.D. 465, 478 (E.D.N.C. 2010) ("Rule 23(b)(1)(B) is invoked in 'limited fund' circumstances, whereby individual lawsuits may exhaust the limited amount of assets available and leave some claimants without a remedy.").

[188] *E.g.*, *Cashman*, 225 F.R.D. at 93-94.

[189] *Id*. at 93. *See also, e.g.*, Harris v. Koenig, 271 F.R.D. 383, 392 (D.D.C. 2010) ("Rule 23(b)(1)(B) seeks to prevent prejudice to other class members who did not participate in the litigation.").

[190] FED. R. CIV. P. 23(b)(2). "Injunctive relief" refers to a court order either commanding an entity to take some specified action or forbidding an entity from taking some specified action. *See* BLACK'S LAW DICTIONARY (10th ed. 2014). "Declaratory relief" refers to a court order that formally "determine[s] the legal status or ownership of a thing." *Id*.

[191] Chi. Teachers Union, Local No. 1 v. Bd. of Educ. of City of Chi., 797 F.3d 426, 441 (7th Cir. 2015).

[192] Jennings v. Rodriguez, 138 S. Ct. 830, 852 (2018) (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011)).

[193] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011).

[194] Berry v. Schulman, 807 F.3d 600, 609 (4th Cir. 2015). *See also Wal-Mart*, 564 U.S. at 360 ("The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'") (quoting Nagareda, *supra* note 114, at 132).

Nor does Rule 23(b)(2) "authorize class certification when each class member would be entitled to an individualized award of monetary damages."[195] Courts generally agree that "a 23(b)(2) class cannot seek money damages unless the monetary relief" sought is merely "incidental to the injunctive or declaratory relief" requested by the class.[196]

Rule 23(b)(2), like Rule 23(b)(1), generally "provides no opportunity for (b)(2) class members to opt out."[197] Courts have concluded that "these procedural safeguards are not required because a (b)(2) class is presumed to be homogenous in nature, with few conflicting interests among its members."[198] As a result, "all class members" of a certified Rule 23(b)(2) class will generally "be bound by a single judgment" at the conclusion of the litigation.[199]

"Opt Out" Class Actions (Rule 23(b)(3))

"The most common" type of class action is an action certified pursuant to Federal Rule of Civil Procedure 23(b)(3),[200] which authorizes "class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded" from the class.[201] "Rule 23(b)(3) applies to most classes seeking monetary relief."[202] Unlike the two types of class action described above, Rule 23(b)(3) grants class members an opportunity to opt out of the class, as explained in greater detail below.[203]

"To qualify for certification under Rule 23(b)(3), a proposed class must meet two prerequisites beyond the Rule 23(a) prerequisites."[204] The plaintiff must demonstrate that:

1. "The questions of law or fact common to class members predominate over any questions affecting only individual members"; and

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[195] *Wal-Mart*, 564 U.S. at 360.

[196] *Chi. Teachers Union, Local No. 1*, 797 F.3d at 443. *Accord, e.g.*, *Berry*, 807 F.3d at 609 ("Where monetary relief is 'incidental' to injunctive or declaratory relief, Rule 23(b)(2) certification may be permissible."); Amara v. CIGNA Corp., 775 F.3d 510, 520 (2d Cir. 2014) (concluding that Rule 23(b)(2) "does not foreclose an award of monetary relief when that relief is incidental to a final injunctive or declaratory remedy").

[197] Ebert v. Gen. Mills, Inc., 823 F.3d 472, 480 (8th Cir. 2016). *Accord, e.g.*, FED. R. CIV. P. 23(c)(2)(A). *See generally infra* "Notice and Opt-Out."

[198] Casa Orlando Apartments, Ltd. v. Fed. Nat'l Mortg. Ass'n, 624 F.3d 185, 199 (5th Cir. 2010). *Accord, e.g.*, Coleman v. Gen. Motors Acceptance Corp., 296 F.3d 443, 447 (6th Cir. 2002) (explaining that opt-out rights "are considered unnecessary for a Rule 23(b)(2) class because its requirements are designed to permit only classes with homogenous interests"); *Berry*, 807 F.3d at 612 ("The premise behind certification of mandatory classes under Rule 23(b)(2) is that, because the relief sought is uniform, so are the interests of class members, making class-wide representation possible and opt-out rights unnecessary.").

[199] Gates v. Rohm & Haas Co., 655 F.3d 255, 264 (3d Cir. 2011). *Accord, e.g.*, *In re* St. Jude Med., Inc., 425 F.3d 1116, 1121 (8th Cir. 2005) ("'Unnamed members are bound by the action without the opportunity to opt out' of a Rule 23(b)(2) class.") (quoting Barnes v. Am. Tobacco Co., 161 F.3d 127, 142-43 (3d Cir. 1998)).

[200] Baker v. Masco Builder Cabinet Grp., Inc., No. CIV. 09-5085-JLV, 2011 WL 1256907, at *2 (D.S.D. Mar. 30, 2011); Christine P. Bartholomew, *The Failed Superiority Experiment*, 69 VAND. L. REV. 1295, 1299 (2016).

[201] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614-15 (1997). *Accord, e.g.*, FED. R. CIV. P. 23(b)(3).

[202] Donovan v. St. Joseph Cty. Sheriff, Cause No. 3:11-CV-133-TLS, 2012 WL 1601314, at *7 (N.D. Ind. May 3, 2012). *Accord, e.g.*, Ronald W. Breaux *et al.*, *A Guide to Data Protection and Breach Response—Part 2*, 26 No. 8 INTELL. PROP. & TECH. L.J. 23, 26 (2014) (stating that "most classes seeking monetary relief rely" on Rule 23(b)(3)).

[203] *See infra* "Notice and Opt-Out."

[204] *Amchem*, 521 U.S. at 615.

2. "A class action is superior to other methods for fairly and efficiently adjudicating the controversy."[205]

These prerequisites are known as "predominance" and "superiority," respectively.[206]

Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[207] The predominance requirement's "purpose is to 'ensure that the class will be certified only when it would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'"[208] The predominance question is complex, and courts have not set forth a clear methodology for determining whether a proposed class action satisfies the predominance requirement.[209] Most courts agree that "[t]he main concern of the predominance inquiry under Rule 23(b)(3) is the balance between" the "individual and common" questions raised by the proposed class action.[210] "An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member.'"[211] A common question, by contrast, "is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'"[212] A plaintiff may satisfy the predominance requirement if the "issues that are 'susceptible to generalized, class-wide proof' are 'more prevalent or important'" to the case than the issues that require individualized proof.[213]

The Supreme Court has provided general guidelines on predominance. The most significant Supreme Court case on predominance is *Amchem*, discussed above.[214] There, the Court rejected a class containing all persons who had either been exposed or who had a family member who was exposed to the defendant's asbestos.[215] In considering whether to certify this class, the Court, explaining that the purpose of predominance is to test "whether proposed classes are sufficiently cohesive to warrant adjudication by representation," held that there were too many questions of

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

[206] *E.g.*, Sykes v. Mel S. Harris & Assocs. LLC, 780 F.3d 70, 81 (2d Cir. 2015).

[207] *Amchem*, 521 U.S. at 623.

[208] Myers v. Hertz Corp., 624 F.3d 537, 547 (2d Cir. 2010) (quoting Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc. 502 F.3d 91, 104 (2d Cir. 2007)).

[209] 5-23 MOORE'S FEDERAL PRACTICE – CIVIL § 23.45 (2018) ("There is no precise test for determining whether common questions of law or fact predominate, however. Instead, the Rule requires a pragmatic assessment of the entire action and all the issues involved.") (citing cases).

[210] *In re* Hyundai & Kia Fuel Econ. Litig., 881 F.3d 679, 691, at *3 (9th Cir. 2018). *Accord, e.g.*, *Myers*, 624 F.3d at 549.

[211] Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) (quoting RUBENSTEIN, *supra* note 5 § 4:50).

[212] *Id*. (quoting RUBENSTEIN, *supra* note 5 § 4:49).

[213] Harnish v. Widener Univ. Sch. of Law, 833 F.3d 298, 304 (3d Cir. 2016) (quoting *Tyson Foods*, 136 S. Ct. at 1045). *Accord, e.g.*, *In re* Petrobras Sec., 862 F.3d 250, 270 (2d Cir. 2017) ("Th[e] predominance requirement is satisfied if: (1) resolution of any material legal or factual questions can be achieved through generalized proof, and (2) these common issues are more substantial than the issues subject only to individualized proof."); Bridging Cmtys. Inc. v. Top Flite Fin. Inc., 843 F.3d 1119, 1124 (6th Cir. 2016) ("To satisfy the predominance requirement in Rule 23(b)(3), a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof.").

[214] *See supra* "Adequacy of the Class Representative."

[215] 521 U.S. 591, 602-03 (1997).

too great a significance which were peculiar to the categories of class members and to individual class members for predominance to be met.[216] Specifically, the Court noted the following:

> Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury . . . each has a different history of cigarette smoking . . . . Differences in state law . . . compound these disparities.[217]

Amchem thus stands for the proposition that divergent questions on the facts or on the law within the class can defeat predominance. So, for example, many lower courts have held that a proposed class action may violate the predominance requirement if each class member's claim is governed by a materially different set of substantive laws, which can occur when class members who live in different states sue the defendant under different state laws.[218] Where "variations in state law raise the potential for the application of multiple and diverse legal standards and a related need for multiple jury instructions" or "multiply the individualized factual determinations that the court would be required to undertake in individualized hearings,"[219] those variations may "overwhelm the ability of the trier of fact meaningfully to advance the litigation through classwide proof" and thereby defeat predominance.[220]

However, the lower courts have not concluded that *any* difference of circumstance or damages within the class automatically means a failure to meet the predominance requirement. For example, the Seventh Circuit suggested that predominance could be satisfied in *Suchanek v. Sturm Foods, Inc.*,[221] also discussed above.[222] In that case, involving consumers in eight different states who had purchased instant-coffee coffee pods, the class of consumers would have encountered the allegedly deceptive advertising necessarily in a particularized context based on the individual's circumstances, leading to individualized questions on reliance and causation. Nonetheless, the court concluded that the question of whether the advertising was materially misleading could still be resolved on a class basis.[223] The court explained that, because it "would

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[216] *Id*. at 623.

[217] *Id*. at 624 (internal quotation marks and citations omitted). *See also In re* Hyundai & Kia Fuel Econ. Litig., 881 F.3d 679, 691 (9th Cir. 2018) ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance.") (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996)); Mazza v. Am. Honda Motor Co., 666 F.3d 581, 596 (9th Cir. 2012) ("Because the law of multiple jurisdictions applies here . . . variances in state law overwhelm common issues and preclude predominance for a single nationwide class."). *But see, e.g.*, Sullivan v. DB Invs., Inc., 667 F.3d 273, 297 (3d Cir. 2011) (noting that variations in state law do not always defeat predominance).

[218] *See, e.g.*, Casa Orlando Apartments, Ltd. v. Fed. Nat'l Mortg. Ass'n, 624 F.3d 185, 194 (5th Cir. 2010) ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance."); *Hyundai*, 881 F.3d at 691 (same). *But see, e.g.*, *Sullivan*, 667 F.3d at 297 (noting that variations in state law do not always defeat predominance).

[219] Cole v. Gen. Motors Corp., 484 F.3d 717, 726 (5th Cir. 2007). *See also, e.g.*, Pilgrim v. Universal Health Card, LLC, 660 F.3d 943, 948 (6th Cir. 2011) ("If more than a few of the laws of the fifty states differ . . . the district judge would face an impossible task of instructing a jury on the relevant law.").

[220] Johnson v. Nextel Commc'ns Inc., 780 F.3d 128, 137 (2d Cir. 2015). *Accord, e.g.*, *Mazza*, 666 F.3d at 596 ("Because the law of multiple jurisdictions applies here . . . variances in state law overwhelm common issues and preclude predominance for a single nationwide class.").

[221] 764 F.3d 750 (7th Cir. 2014).

[222] *See supra* "Commonality (Rule 23(a)(2))."

[223] 764 F.3d at 760.

be a straightforward matter" to resolve the individualized issues of reliance and causation in "individualized follow-on proceedings," class certification was likely appropriate.[224]

Similarly, courts have generally confirmed that individualized damages inquiries generally do not preclude class certification.[225] Because "individual issues of damages" are often "easy to resolve because the calculations are formulaic" and "district courts have many tools to decide individual damages" in an efficient manner, individualized damages calculations will rarely eclipse the issues common to all class members.[226] Thus, in most jurisdictions, the plaintiff "need not show that each member's damages . . . are identical" in order to obtain class certification.[227]

Lastly, a few federal appellate courts have held that "[e]ven if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues."[228] However, the Fifth Circuit, in its oft-cited opinion in *Castano v. American Tobacco Co.*, disagreed, stating that Rule 23(c)(4) may not be used to sever particular issues in order to avoid the application of predominance to the entire claim; according to the Fifth Circuit, Rule 23(c)(4) is simply a "housekeeping rule" which permits courts to certify particular issues when the class as a whole meets the other requirements of the Rule.[229] The Third Circuit has adopted yet another approach, applying a multifactor test to determine whether it is appropriate to certify an issue class.[230]

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[224] *Id*. The Seventh Circuit remanded to allow the district court to "apply[] the legal standards and principles" announced in *Suchanek* "in the first instance." *Id*. at 761.

[225] Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) ("When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.") (internal quotations and citations omitted). *See also* Carriuolo v. Gen. Motors Co., 823 F.3d 977, 988 (11th Cir. 2016) ("Individualized damages calculations are insufficient to foreclose the possibility of class certification, especially when, as here, the central liability question is so clearly common to each class member."); Vaquero v. Ashley Furniture Indus., Inc., 824 F.3d 1150, 1155 (9th Cir. 2016) ("The need for individualized findings as to the amount of damages does not defeat class certification."); Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 374-75 (3d Cir. 2015) ("Individual damages calculations do not preclude class certification under Rule 23(b)(3).").

[226] Brown v. Electrolux Home Prods., Inc., 817 F.3d 1225, 1239 (11th Cir. 2016). *See also*, *e.g.*, *In re* Deepwater Horizon, 739 F.3d 790, 816-17 (5th Cir. 2014); Bustillos v. Bd. of Cty. Comm'rs of Hidalgo Cty., 310 F.R.D. 631, 658 (D.N.M. 2015) (noting that, where "an objective—usually formulaic—damages determination can be made without individual subjective inquiry," the need for "individual damage calculations" will "rarely defeat a predominance finding"). *But see Brown*, 817 F.3d at 1239-40 ("The black-letter rule that individual damages do not always defeat predominance . . . has always been subject to exceptions. For example, individual damages defeat predominance if computing them 'will be so complex, fact-specific, and difficult that the burden on the court system would be simply intolerable.'") (quoting Klay v. Humana, Inc., 382 F.3d 1241, 1259, 1260 (11th Cir. 2004), *abrogated in part on other grounds by* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008)).

[227] Just Film, Inc. v. Buono, 847 F.3d 1108, 1120 (9th Cir. 2017). *Accord*, *e.g.*, Butler v. Sears, Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013) ("It would drive a stake through the heart of the class action device . . . to require that every member of the class have identical damages.").

[228] *In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219, 225 (2d Cir. 2006) (quoting Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996)). *See also* McLaughlin v. Am. Tobacco Co, 522 F.3d 215, 234 (7th Cir. 2008). *See generally infra* "Subclasses and Certification as to Particular Issues."

[229] 84 F.3d 734, 745 (5th Cir. 1996).

[230] Gates v. Rohm & Haas Co., 655 F.3d 255, 273 (3d Cir. 2011) (declining to join these cases or the Fifth Circuit on this issue and electing to apply a multifactor test based on the *Final Draft of the Principles of Applied Litigation* to determine whether issue classing is appropriate).

Superiority

In addition to satisfying the predominance requirement, a plaintiff seeking certification of an opt-out class pursuant to Rule 23(b)(3) must also show that "a class action is superior to other methods for fairly and efficiently adjudicating the controversy."[231] "The focus of this analysis is on 'the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs.'"[232] To determine whether a class action would be superior to the available alternatives, the Rule sets out four factors for courts to consider:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.[233]

These four factors are "nonexhaustive."[234]

The last of those four factors—"the likely difficulties in managing a class action,"[235] also known as "manageability"—"is, by far, the most critical concern in determining whether a class action is a superior means of adjudication."[236] To determine whether a proposed class action would be more manageable than alternative methods for adjudicating the dispute, the court must consider "the whole range of practical problems that may render the class action format inappropriate for a particular suit,"[237] such as "potential difficulties in notifying class members of the suit, calculation of individual damages, and distribution of damages."[238]

The superiority inquiry asks *not* whether the proposed class action "will create significant management problems," but rather "whether it will create relatively *more* management problems than any of the alternatives" potentially available to the class members.[239] If the mere existence of

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

[232] Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc., 601 F.3d 1159, 1183-84 (11th Cir. 2010) (quoting Klay v. Humana, Inc., 382 F.3d 1241, 1259, 1269 (11th Cir. 2004), *abrogated in part on other grounds by* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008)). *Accord, e.g.*, *In re* Cmty. Bank of N. Va. Mortg. Lending Practices Litig., 795 F.3d 380, 409 (3d Cir. 2015) ("The superiority requirement asks a district court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication.").

[233] FED. R. CIV. P. 23(b)(3). *Accord, e.g.*, *In re* NFL Players Concussion Injury Litig., 821 F.3d 410, 434-35 (3d Cir. 2016) (specifying that courts should consider the FED. R. CIV. P. 23(b)(3) factors when performing the superiority inquiry).

[234] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997).

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

[236] Sykes v. Mel S. Harris & Assocs. LLC, 780 F.3d 70, 82 (2d Cir. 2015). *Accord, e.g.*, Skinner v. Best Buy Co., 2:06-cv-03749-FMC-Ex, 2008 WL 11339648, at *3 (C.D. Cal. Mar. 18, 2008) ("Courts consider manageability the most important."); Pitt v. City of Portsmouth, Va., 221 F.R.D. 438, 446 (E.D. Va. 2004) ("Manageability is perhaps the most important consideration in a Rule 23(b)(3) determination.").

[237] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 164 (1974).

[238] *E.g.*, Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1304 (9th Cir. 1990); Mills v. Foremost Ins. Co., 269 F.R.D. 663, 680 (M.D. Fla. 2010); Djikstra v. Carenbauer, Civil Action No. 5:11-CV-152, 2013 WL 12136594, at *7 (N.D. W. Va. Jan. 3, 2013).

[239] Williams v. Mohawk Indus., Inc., 568 F.3d 1350, 1358 (11th Cir. 2009) (emphasis added); George v. Nat'l Water

manageability problems was enough to defeat class certification, then no class action would ever be certified, as virtually "all class actions pose[] manageability concerns" by virtue of their scope and complexity.[240]

"The superiority of a class action also depends on the existence of a realistic alternative to class litigation."[241] For instance, the court could compare the advantages and disadvantages of allowing the case to proceed as a class action to those of other adjudicatory procedures, such as "multiple individual actions, coordinated individual actions, consolidated individual actions, [or] test cases."[242] However, a proposed class action generally satisfies the superiority requirement if the plaintiff's claims would likely not be adjudicated at all absent a class action.[243]

Proposed class actions are particularly likely to satisfy the superiority requirement "where recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis."[244] Where, by contrast, "individual damages run high," such that individual class members "have a substantial stake in the dispute and" consequently "do not lack the means of obtaining representation," then separate suits by individual plaintiffs may be a realistic and superior alternative to class action litigation.[245]

Notice and Opt-Out

"Class members are bound by [any] judgment" ultimately entered in a certified class action, "whether favorable or unfavorable."[246] Thus, to protect the rights of absent class members, Rule 23(b)(3) affords class members an opportunity to withdraw from—that is, "opt out"[247]—of a certified Rule 23(b)(3) class.[248] A person who opts out of a certified Rule 23(b)(3) class will not

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Main Cleaning Co., 286 F.R.D. 168, 183 (D. Mass. 2012). *Accord, e.g.*, Schwartz v. Avis Rent a Car Sys., LLC, Civil Action No. 11-4052 (JLL), 2014 WL 4272018, at *14 (D.N.J. Aug. 28, 2014) ("The Court must query not whether there will be any manageability problems, but whether reasonably foreseeable difficulties render some other method of adjudication superior to class certification.").

[240] *See* Crane v. Int'l Paper Co., No. Civ.A. 3:02-3352-22, 2005 WL 3627139, at *11 (D.S.C. Apr. 19, 2005). *See also, e.g.*, Dibb v. Allianceone Receivables Mgmt., Inc., Case No. 14-5835 RJB, 2015 WL 8970778, at *13 (W.D. Wash. Dec. 16, 2015) ("While all class actions are by nature more complex than other litigation, this case will not be overly difficult to manage.").

[241] Rowden v. Pac. Parking Sys., Inc., 282 F.R.D. 581, 585 (C.D. Cal. 2012). *Accord, e.g.*, Morris v. Davita Healthcare Partners, Inc., 308 F.R.D. 360, 375 (D. Colo. 2015) ("A class action is the superior method for managing litigation if no realistic alternative exists.").

[242] *See* George v. Nat'l Water Main Cleaning Co., 286 F.R.D. 168, 183 (D. Mass. 2012).

[243] *E.g.*, Gunnells v. Healthplan Servs., 348 F.3d 417, 426 (4th Cir. 2003) ("[T]he adjudication of [the] matter through a class action [is] superior to no adjudication of the matter at all.").

[244] Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1175 (9th Cir. 2010). *Accord, e.g.*, Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 545 (6th Cir. 2012) (noting that a proposed class action is particularly likely to satisfy the superiority requirement "where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages").

[245] Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc., 601 F.3d 1159, 1184 (11th Cir. 2010). *Accord, e.g.*, Woods v. Vector Mktg. Corp., No. C-14-0264 EMC, 2015 WL 5188682, at *13 (N.D. Cal. Sept. 4, 2015) (explaining that the "superiority factor . . . weighs against certification where individual damages 'run high' such that individual class members have a strong interest 'in making individual decisions on whether and when to settle'").

[246] *E.g.*, Calderone v. Scott, 838 F.3d 1101, 1104 (11th Cir. 2016).

[247] *See, e.g.*, Coleman v. Gen. Motors Acceptance Corp., 296 F.3d 443, 448 (6th Cir. 2002).

[248] FED. R. CIV. P. 23(c)(2)(B)(v) (providing "that the court will exclude from the class any member who requests exclusion"). *See also* FED. R. CIV. P. 23(c)(2)(B) (requiring notice to members of Rule 23(b)(3) classes).

As explained above, class actions under other subsections of Rule 23(b) generally do not afford class members similar opt-out rights. *See supra* "Incompatible Standards of Conduct/Limited Funds (Rule 23(b)(1))"; "Injunctive or

be bound by any judgment or settlement ultimately entered in the case.[249] He may then, if he wishes, commence his own individual lawsuit challenging the defendant's alleged misconduct.[250]

Ascertainability

Most courts have concluded that, in addition to the aforementioned prerequisites enumerated in Federal Rule of Civil Procedure 23(a)-(b), a plaintiff seeking to certify a class action must also show that the membership of the proposed class is "ascertainable."[251] Although not articulated in Rule 23 explicitly, courts have concluded that Rule 23 implicitly requires the named plaintiff to prove that members of the proposed class are "ascertainable."[252] To satisfy this "ascertainability" requirement, "the members of the proposed class" must be "readily identifiable."[253] "The purpose of the ascertainability requirement is to avoid 'satellite litigation' over who is a member of the class and to 'properly enforce the preclusive effect of [a] final judgment' by clarifying 'who gets the benefit of any relief and who gets the burden of any loss.'"[254]

Significantly, however, courts have disagreed regarding what a plaintiff must prove in order to satisfy the ascertainability requirement.[255] As explained below, some courts have required the named plaintiff to demonstrate an "administratively feasible mechanism" for determining whether putative class members fall within the class definition, while other courts have explicitly refused to adopt any such requirement.

Declaratory Relief (Rule 23(b)(2))."

[249] *E.g.*, *Calderone*, 838 F.3d at 1104; McElmurry v. U.S. Bank Nat'l Ass'n, 495 F.3d 1136, 1139 (9th Cir. 2007) ("Once the district court certifies a class . . . all class members are bound by the judgment unless they opt out of the suit.").

[250] *See, e.g.*, Randall v. Rolls-Royce Corp., 637 F.3d 818, 820 (7th Cir. 2011) (explaining that opting out allows the class member "to litigate [his] claims in a new suit"); *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 861 (6th Cir. 2013) ("Any class member who wishes to control his or her own litigation may opt out of the class under Rule 23(c)(2)(B)(v).").

[251] *See, e.g.*, *In re* Petrobras Sec., 862 F.3d 250, 260 (2d Cir. 2017) ("'Most circuit courts of appeals have recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be readily identifiable,' often characterized as 'an "ascertainability" requirement.'") (quoting Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc., 821 F.3d 992, 995 (8th Cir. 2016)); Carriuolo v. Gen. Motors Co., 823 F.3d 977, 984 (11th Cir. 2016) ("A plaintiff seeking to represent a proposed class must establish that the proposed class is . . . clearly ascertainable."); *In re* Nexium Antitrust Litig., 777 F.3d 9, 19 (1st Cir. 2015) ("The definition of the class must be 'definite,' that is, the standards must allow the class members to be ascertainable.") (quoting RUBENSTEIN, *supra* note 5 §§ 3:1, 3:3). *See also* EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014) ("We have repeatedly recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.' Our sister circuits have described this rule as an 'ascertainability' requirement. However phrased, the requirement is the same."). *See generally* Lewis, *How Hard Should It Be*, *supra* note 69.

[252] *Petrobras*, 862 F.3d at 260 (noting that the ascertainability requirement is "implicit," rather than explicitly enumerated in Rule 23); Mullins v. Direct Dig., LLC, 795 F.3d 654, 657 (7th Cir. 2015) (same). *See also Sandusky*, 821 F.3d at 995 ("Most of the other circuit courts of appeals have 'recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be "readily identifiable" . . . an "ascertainability" requirement.'").

[253] *E.g.*, *Petrobras*, 862 F.3d at 264.

[254] Bernstein v. Virgin Am., Inc., Case No. 15-cv-02277-JST, 2016 WL 6576621, at *11 (N.D. Cal. Nov. 7, 2016) (quoting Xavier v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011)).

[255] *See generally* Lewis, *How Hard Should It Be*, *supra* note 69.

Courts Adopting an "Administrative Feasibility" Requirement

For example, to certify a class action in the Third and Eleventh Circuits, the plaintiff must show that

1. "the class is defined with reference to objective criteria"; and
2. "there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition."[256]

To be "defined with reference to objective criteria,"[257] membership in a class cannot be based on subjective considerations "such as class members' state of mind."[258] The "administratively feasible" requirement, by contrast, mandates that there be "a 'manageable process'" to identify class members "that does not require much, if any, individual inquiry."[259] "If individualized fact-finding or mini-trials will be required to prove class membership," then the proposed class action cannot "satisfy the ascertainability requirement."[260] As a result, when a plaintiff alleges, for instance, that a defendant manufacturer falsely and deceptively advertised a product to the class members, but the plaintiff produces no evidence that it would ultimately be possible to identify which purchasers bought that product, that plaintiff cannot satisfy the administrative feasibility requirement.[261] If, by contrast, "'objective records' . . . can 'readily identify'" who purchased the product in question, then the plaintiff can satisfy the administrative feasibility requirement.[262]

Courts Rejecting an "Administrative Feasibility" Requirement

Other courts, including the Second, Sixth, Seventh, Eighth, and Ninth Circuits, have concluded that the plaintiff is *not* required to "prove at the certification stage that there is a 'reliable and administratively feasible' way to identify all who fall within the class definition."[263] Instead,

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[256] City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc., 867 F.3d 434, 439 (3d Cir. 2017). *Accord, e.g.,* Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 946 (11th Cir. 2015) ("A class is not ascertainable unless the class definition contains objective criteria that allow for class members to be identified in an administratively feasible way.").

[257] *See City Select,* 867 F.3d at 439.

[258] *Id.* at 439 n.3. *See also, e.g., In re* Plastics Additives Antitrust Litig., Civil Action No. 03-2038, 2006 WL 6172035, at *14 (E.D. Pa. Aug. 31, 2006) ("The use of subjective variables to define the parameters of a proposed class defeats the requisite precision for class certification."); Lipstein v. UnitedHealth Grp., 296 F.R.D. 279, 291 (D.N.J. 2013) (concluding that proposed "class suffer[ed] from an ascertainability problem" because class membership was based not "on objective criteria, as . . . recent precedents demand, but on subjective" considerations).

[259] Carrera v. Bayer Corp., 727 F.3d 300, 307-08 (3d Cir. 2013) (quoting RUBENSTEIN, *supra* note 5 § 3:3). *Accord Karhu*, 621 F. App'x at 946.

[260] *Carrera,* 727 F.3d at 307. *Accord Karhu*, 621 F. App'x at 949.

[261] *See Carrera*, 727 F.3d at 308-09 ("The evidence put forth by Carrera is insufficient to show that retailer records in this case can be used to identify class members . . . There is no evidence that a single purchaser of [the product] could be identified using records of customer membership cards or records of online sales.").

[262] *See* Byrd v. Aaron's Inc., 784 F.3d 154, 159, 162 (3d Cir. 2015) (finding that plaintiff satisfied ascertainability requirement where the defendant's "own records" revealed "the full identity who leased or purchased" computers containing software that the defendant allegedly used to spy on customers) (quoting Grandalski v. Quest Diagnostics Inc., 767 F.3d 175, 184 n.5 (3d Cir. 2014)).

[263] Mullins v. Direct Dig., LLC, 795 F.3d 654, 657 (7th Cir. 2015). *Accord In re* Petrobras Sec., 862 F.3d 250, 264 (2d Cir. 2017) ("We conclude that a freestanding administrative feasibility requirement is neither compelled by precedent nor consistent with Rule 23, joining four of our sister circuits in declining to adopt such a requirement."); Briseno v. Conagra Foods, Inc., 844 F.3d 1121, 1123 (9th Cir. 2017) ("A separate administrative feasibility requirement to class certification is not compatible with the language of Rule 23."); McKeage v. TMBC, LLC, 847 F.3d 992, 998 (8th Cir. 2017); Rikos v. Procter & Gamble Co., 799 F.3d 497, 525 (6th Cir. 2015).

It is unclear whether the Fourth Circuit imposes a freestanding administrative feasibility requirement like the Third and

plaintiffs in these jurisdictions need only demonstrate that membership in the proposed class is "defined clearly and based on objective criteria."[264] So, for instance, a class composed of "persons who acquired specific securities during a specific time period" satisfies the objective criteria requirement, as the "subject matter, timing, and location" of those purchases are all a matter of objective fact.[265] On the other hand, "classes that are defined by subjective criteria, such as by a person's state of mind, fail the objectivity requirement" even in jurisdictions that have not adopted the administrative feasibility requirement.[266]

Certification

If the plaintiff satisfies all of the applicable requirements discussed in the previous sections of this report,[267] the court may enter an order "certify[ing] the action as a class action."[268] "An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel."[269] Once a class is certified according to Rule 23, all class members—except for members of a Rule 23(b)(3) class who affirmatively opt out—are bound by the court's rulings in the case.[270]

Importantly, "certification of a class is always provisional in nature until the final resolution of the case."[271] "A district court 'retains the ability to monitor the appropriateness of class certification throughout the proceedings and to modify or decertify a class at any time before final judgment.'"[272]

Eleventh Circuits. *Compare* EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014) (citing treatise stating that "the requirement that there be a class will not be deemed satisfied unless it is administratively feasible for the court to determine whether a particular individual is a member"), *with Briseno*, 844 F.3d at 1126 n.6 ("It is . . . far from clear that the Fourth Circuit requires an affirmative demonstration of administrative feasibility as a separate prerequisite to class certification.").

It is likewise unclear whether the First Circuit imposes an administrative feasibility requirement. *Compare In re* Nexium Antitrust Litig., 777 F.3d 9, 19 (1st Cir. 2015) (stating that a "court may proceed with certification so long as" the "mechanism for distinguishing the injured from the uninjured class members" is "administratively feasible"), *with Briseno*, 844 F.3d at 1126 n.6 (opining that the First Circuit has "not actually imposed the" ascertainability requirement "in the same manner as has the Third Circuit . . . Requiring plaintiffs to propose a mechanism for eventually determining whether a given class member is entitled to damages is different from requiring plaintiffs to demonstrate an administratively feasible way to identify *all* class members at the certification stage.").

[264] *Mullins*, 795 F.3d at 659. *Accord, e.g.*, *Petrobras*, 862 F.3d at 264 ("The ascertainability doctrine that governs in this Circuit requires only that a class be defined using objective criteria that establish membership with definite boundaries."); *McKeage*, 847 F.3d at 998 ("A class may be ascertainable when its members may be identified by reference to objective criteria."); *Rikos*, 799 F.3d at 525 ("For a class to be sufficiently defined, the court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria.").

[265] *See Petrobras*, 862 F.3d at 269.

[266] *See, e.g.*, *Mullins*, 795 F.3d at 660.

[267] *See supra* "Federal Rule of Civil Procedure 23(a)—Mandatory Class Prerequisites"; "Federal Rule of Civil Procedure 23(b)—Additional Requirements for Various Types of Class Actions""; "Ascertainability."

[268] FED. R. CIV. P. 23(c)(1)(A).

[269] FED. R. CIV. P. 23(c)(1)(B). *See also* FED. R. CIV. P. 23(g) (standards governing the appointment of class counsel).

[270] *E.g.*, Turner v. Bruister & Assocs., Inc., Civil Action No. 07-S-2331-NW, 2009 WL 10688975, at *1 (N.D. Ala. Feb. 5, 2009).

[271] Carriuolo v. Gen. Motors Co., 823 F.3d 977, 988 (11th Cir. 2016). *Accord, e.g.*, FED. R. CIV. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment.").

[272] Whitlock v. FSL Mgmt., LLC, 843 F.3d 1084, 1090 (6th Cir. 2016) (quoting *In re* Integra Realty Res., Inc., 354 F.3d 1246, 1261 (10th Cir. 2004)). *Accord, e.g.*, Sullivan v. DB Invs., Inc., 667 F.3d 273, 322 (3d Cir. 2011).

Ordinarily, interlocutory orders (that is, nonfinal judgments) are not appealable.[273] Accordingly, a litigant may generally not immediately appeal a district court's order granting or denying class certification.[274] However, because a district court's decision to grant or deny class certification is so consequential, the Federal Rules of Civil Procedure grant the federal courts of appeals "broad discretion"[275] to permit a litigant to file an interlocutory appeal "from an order granting or denying class action certification."[276] Appellate courts apply a variety of legal standards when deciding whether to grant an interlocutory appeal of an order granting or denying class certification.[277] However, most courts consider whether the class certification order is "manifestly erroneous,"[278] as well as whether granting an interlocutory appeal will allow the appellate court to resolve an unsettled and important issue of class action law.[279]

Subclasses and Certification as to Particular Issues

Federal Rule of Civil Procedure 23 authorizes the court to divide a class "into subclasses that are each treated as" a separate class for the purposes of the class action.[280] Splitting a proposed class into subclasses may be appropriate, for example, "to prevent conflicts of interest" between subgroups of class members[281] that might otherwise preclude class certification on adequacy[282]

[273] 28 U.S.C. § 1291.

[274] *E.g.*, Plata v. Davis, 329 F.3d 1101, 1106 (9th Cir. 2003) ("Class certification orders generally are not immediately appealable.").

[275] *In re* NFL Players Concussion Injury Litig., 775 F.3d 570, 580 (3d Cir. 2014). *Accord, e.g.*, Reliable Money Order, Inc. v. McKnight Sales Co., 704 F.3d 489, 497 (7th Cir. 2013) ("We have 'unfettered discretion whether to permit [an interlocutory appeal of a class certification order].'"); FED. R. CIV. P. 23 advisory committee's note to 1998 amendment ("Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals . . . The court of appeals is given unfettered discretion whether to permit the appeal . . . .").

[276] FED. R. CIV. P. 23(f). *See also, e.g.*, Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999) (explaining that "the reasons Rule 23(f) came into being" are that "for some cases the denial of class status sounds the death knell of the litigation" and that "a grant of class status can put considerable pressure on the defendant to settle").

[277] *Compare* Harrington v. Sessions, 863 F.3d 861, 873-74 (D.C. Cir. 2017) (listing only three "limited circumstances" in which interlocutory review of a class certification order is permissible), *with Reliable Money Order*, 704 F.3d at 497 (holding, contrary to the D.C. Circuit's circumscribed approach to interlocutory review, that courts of appeals "have 'unfettered discretion whether to permit the appeal'" of a class certification decision) (quoting *Blair*, 181 F.3d at 833), *with* EQT Prod. Co. v. Adair, 764 F.3d 347, 356-57 (4th Cir. 2014) (establishing a "five-factor test to assess the appropriateness of granting a Rule 23(f) petition").

[278] *See, e.g.*, *Harrington*, 863 F.3d at 874; *EQT*, 764 F.3d at 357; Chamberlan v. Ford Motor Co., 402 F.3d 952, 959 (9th Cir. 2005).

[279] *See, e.g.*, *Harrington*, 863 F.3d at 874 (permitting interlocutory appeals "when the certification decision presents an unsettled and fundamental issue of law relating to class actions"); *EQT*, 764 F.3d at 357 (considering, among other factors, "whether the appeal will permit the resolution of an unsettled legal question of general importance"); Prado-Steiman *ex rel.* Prado v. Bush, 221 F.3d 1266, 1275 (11th Cir. 2000) ("A court should consider whether the appeal will permit the resolution of an unsettled legal issue that is 'important to the particular litigation as well as important in itself.'").

[280] FED. R. CIV. P. 23(c)(5).

[281] *In re* Ins. Brokerage Antitrust Litig., 579 F.3d 241, 271 (3d Cir. 2009). *Accord, e.g.*, Bridgeview Health Care Ctr., Ltd. v. Clark, 816 F.3d 935, 940 (7th Cir. 2016) ("The purpose of subdivision is to protect divergent interests.").

[282] *See supra* "Adequate Representation (Rule 23(a)(4))."

grounds.[283] "District courts have broad discretion in determining whether to . . . divide a class action into subclasses."[284]

Federal Rule of Civil Procedure 23 also authorizes the court to permit an action to proceed as a class action only "with respect to particular issues."[285] So, for instance, "if a case requires determinations of individual issues of causation and damages" that cannot be resolved classwide, "a court may 'bifurcate the case into a liability phase and a damages phase,'" whereby the court determines liability on a classwide basis and then conducts separate individualized hearings to determine each class member's damages.[286]

Post-Certification

"Once certified, the class action can then proceed to discovery, pretrial, and trial."[287] The members of the certified class who do not (or cannot) opt out of the class will generally be bound by any judgment ultimately rendered in the case with respect to the issues that have been certified.[288] Because a certified class action potentially presents "opportunities for abuse as well as problems for courts and counsel in the management of cases . . . a district court has both the duty and the broad authority to . . . enter appropriate orders governing the conduct of counsel and parties,"[289] such as "orders that . . . determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument."[290]

Settlement

Significantly, however, "very few class actions are tried";[291] most instead culminate in a settlement.[292] Just as a final judgment entered in a certified class action that proceeds to trial generally binds the absent class members, a class action settlement typically binds absent class

[283] *See, e.g.*, *In re* Literary Works in Elec. Databases Copyright Litig., 654 F.3d 242, 249 (2d Cir. 2011) (noting that, where a "fundamental" conflict "among subgroups of a class" might otherwise "prevent class certification," the conflict can potentially "be cured by dividing the class into separate 'homogeneous subclasses . . . with separate representation to eliminate conflicting interests'") (quoting Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999)).

[284] Randleman v. Fid. Nat'l Title Ins. Co., 646 F.3d 347, 355 (6th Cir. 2011). *Accord, e.g.*, *Ins. Brokerage Antitrust Litig.*, 579 F.3d at 271 ("A district court hearing a class action has the discretion to divide the class into subclasses and certify each subclass separately . . . We accord substantial deference to district courts with respect to their resolution of this issue.").

[285] FED. R. CIV. P. 23(c)(4).

[286] McMahon v. LVNV Funding, LLC, 807 F.3d 872, 876 (7th Cir. 2015) (quoting Mullins v. Direct Dig., LLC, 795 F.3d 654, 671 (7th Cir. 2015)). *Accord, e.g.*, Olden v. LaFarge Corp., 383 F.3d 495, 496-97, 509 (6th Cir. 2004).

[287] John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1446 (2003).

[288] *E.g.*, Rattray v. Woodbury Cty., Iowa, 614 F.3d 831, 835 (8th Cir. 2010) ("Absent class members . . . generally are bound by a judgment rendered in a class action."); Berger v. Compaq Comput. Corp., 257 F.3d 475, 480 (5th Cir. 2001) ("Absent class members are conclusively bound by the judgment in any class action brought on their behalf.").

[289] Gulf Oil Co. v. Bernard, 452 U.S. 89, 99-100 (1981).

[290] FED. R. CIV. P. 23(d).

[291] *E.g.*, Redman v. RadioShack Corp., 768 F.3d 622, 638 (7th Cir. 2014).

[292] *E.g.*, CE Design Ltd. v. King Supply Co., 791 F.3d 722, 725 (7th Cir. 2015) ("Almost all class actions are settled."); Bone, *Class Action Limits*, *supra* note 33, at 942 ("Most class actions settle.").

members[293] who do not (or cannot) opt out of the class.[294] Because "plaintiffs in a class action may release claims that were or could have been pled in exchange for settlement relief"; a settlement agreement may thereby preclude class members from pursuing "claims not presented in the complaint" if those claims are "based on the identical factual predicate as that underlying the claims in the settled class action."[295]

Because the settlement of a certified class action will bind absent class members,[296] "the claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval,"[297] and "any class member may object to the" proposed settlement of a certified class action.[298] "The court may approve" the proposed settlement "only after a hearing and on finding that it is fair, reasonable, and adequate."[299] "The burden is on the settlement proponents to persuade the court that the agreement is fair, reasonable, and adequate for the absent class members who are to be bound by the settlement."[300] Although different courts consider different factors when determining whether a proposed settlement is "fair, reasonable, and adequate,"[301] the following factors are particularly common:

- whether the class members favor or disfavor the proposed settlement;
- the complexity, expense, and likely duration of the continued litigation that would occur if the court rejected the settlement;
- the likelihood that the class would prevail if the case proceeded to a trial on the merits; and

[293] *E.g.*, Halley v. Honeywell Int'l, Inc., 861 F.3d 481, 494 (3d Cir. 2017) ("A judgment pursuant to a class settlement can bar later claims based on the allegations underlying the claims."); California v. IntelliGender, LLC, 771 F.3d 1169, 1180 (9th Cir. 2014) ("It is axiomatic that final, court-approved settlements preclude class members from seeking the same relief for the same claims a second time.").

[294] *See* Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund, 582 F.3d 30, 38 (1st Cir. 2009) ("Class members, *unless they opt out*, are legally bound by a settlement.") (emphasis added); Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 772 (7th Cir. 2013) ("Unless [class members] opt out of the class they will be bound by the . . . settlement.").

[295] *In re* Literary Works in Elec. Databases Copyright Litig., 654 F.3d 242, 249 (2d Cir. 2011). *Accord, e.g.*, Berry v. Schulman, 807 F.3d 600, 616 (4th Cir. 2015) ("In class action settlements, parties may release not only the very claims raised in their cases, but also claims arising out of the 'identical factual predicate.'") (quoting *Literary Works*, 654 F.3d at 248).

[296] *E.g.*, *In re* Katrina Canal Breaches Litig., 628 F.3d 85, 196 (5th Cir. 2010) (specifying that "absent class members" are "bound by the settlement"); Reppert v. Marvin Lumber & Cedar Co., 359 F.3d 53, 56-57 (1st Cir. 2004) ("After . . . appropriate notice is given, if the absent class members fail to opt out of the class action, such members will be bound by the court's actions, including settlement and judgment, even though those individuals never actually receive notice.").

[297] FED. R. CIV. P. 23(e).

[298] FED. R. CIV. P. 23(e)(5). *See also* FED. R. CIV. P. 23(e)(1) (providing that "the court must direct notice in a reasonable manner to all class members who would be bound by" a proposed settlement).

[299] FED. R. CIV. P. 23(e)(2). Class action settlements are therefore "unlike settlements in ordinary suits," which as a general rule need not be "approved by the court." *E.g.*, *In re* Initial Pub. Offering Sec. Litig., 243 F.R.D. 79, 82-83 (S.D.N.Y. 2007).

[300] *Katrina*, 628 F.3d at 196. *Accord, e.g.*, Faught v. Am. Home Shield Corp., 668 F.3d 1233, 1239 (11th Cir. 2011).

[301] *Compare* Halley v. Honeywell Int'l, Inc., 861 F.3d 481, 488-89 (3d Cir. 2017) (listing a total of fifteen factors to consider when evaluating a class action settlement), *with* Gascho v. Glob. Fitness Holdings, LLC, 822 F.3d 269, 276 (6th Cir. 2016) (listing seven factors, some of which overlap with the factors enumerated in *Halley*, others of which do not), *with In re* Motor Fuel Temperature Sales Practices Litig., 872 F.3d 1094, 1116-1117 (10th Cir. 2017) (establishing a four-factor test that overlaps only minimally with the factors enumerated in *Halley* and *Gascho*).

- the current stage of the litigation and the amount of discovery the parties have completed.[302]

When evaluating a proposed class action settlement, the court must also determine whether "any attorneys' fees claimed as part of the settlement are reasonable" and whether "the settlement itself is reasonable in light of those fees."[303] To make that determination, the court assesses whether the proposed award of attorney's fees is "unreasonably excessive in light of the results achieved" by the proposed settlement.[304]

Additionally, the court must evaluate whether the proposed settlement will actually benefit the class in some meaningful way.[305] The court must "be assured that the settlement secures an adequate advantage for the class in return for" absent class members giving up their "litigation rights against the defendants."[306] So, for instance, a court may not approve a settlement that affords class counsel a substantial fee but gives the class nothing but effectively worthless injunctive relief.[307]

Legislative Proposals for Changing Class Action Law

As the foregoing discussion illustrates, the Federal Rules of Civil Procedure and the federal courts interpreting those rules have attempted to balance the interests inherent in the class action device. If Congress concludes that Rule 23 and the judicial decisions interpreting it have properly struck that balance, it may leave the existing class action framework unchanged.

If, instead, Congress wishes to modify the existing laws governing class actions to make them more or less favorable to plaintiffs, defendants, class members, or class counsel, Congress has multiple options. Calls to modify the class action framework have primarily focused on three areas: (1) the cohesiveness (or lack thereof) of the class; (2) ascertainability and the administrative feasibility of the class action; and (3) divergent incentives and fees for class counsel compared with the benefits received by class members. For instance, Members of Congress have introduced a variety of proposals to change the class action system in recent years,

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[302] *See, e.g.*, *Halley*, 861 F.3d at 488; *Gascho*, 822 F.3d at 276; *In re* Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 946 (9th Cir. 2011); *Katrina*, 628 F.3d at 194-95.

[303] *Katrina*, 628 F.3d at 196. *Accord, e.g.*, *Halley*, 861 F.3d at 496 ("A thorough judicial review of fee applications is required for all class action settlements."); *Bluetooth*, 654 F.3d at 941 ("While attorneys' fees and costs may be awarded in a certified class action . . . courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount."). *See also* FED. R. CIV. P. 23(h) (establishing standards governing the award of attorneys' fees in certified class actions).

[304] *E.g.*, *In re* Hyundai & Kia Fuel Econ. Litig., 881 F.3d 679, 706 (9th Cir. 2018) (quoting *Bluetooth*, 654 F.3d at 943).

[305] *See generally* Lewis, *Subway*, *supra* note 30.

[306] *Katrina*, 628 F.3d at 195. *Accord, e.g.*, *In re* NFL Players Concussion Injury Litig., 821 F.3d 410, 436 (3d Cir. 2016) (explaining that the court must "assur[e] that the settlement represents adequate compensation for the release of the class claims"); Koby v. ARS Nat'l Servs., Inc., 846 F.3d 1071, 1076, 1079 (9th Cir. 2017) (holding that lower court "abused [its] discretion by approving" a class action settlement that gave class members "nothing of value" in exchange for "their right to assert damages claims against the defendant").

[307] *See In re* Subway Footlong Sandwich Mktg. & Sales Practices Litig., 869 F.3d 551, 554-55, 556-57 (7th Cir. 2017) (overturning class action settlement that paid attorneys $520,000 but gave class members nothing more than worthless promises). *But see In re* Motor Fuel Temperature Sales Practices Litig., 872 F.3d 1094, 1119-20 (10th Cir. 2017) (affirming class action settlement that merely gave class members an "informational benefit"). *See generally* Lewis, *Subway*, *supra* note 30.

including modifying Rule 23,[308] restricting the ability of private parties to waive class action treatment in financial adviser contracts,[309] and proposing that certain classes would be presumed to meet the requirement of commonality.[310] Most notably, on March 9, 2017, the House of Representatives passed H.R. 985, known as the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017 (FICALA).[311] FICALA represents possibly the most sweeping set of proposed modifications to the class action device that has been proposed in years, suggesting a host of changes to the operation of class actions in federal courts.

Cohesiveness of the Class

Cohesiveness was the focus of the Supreme Court's attention in both *Amchem* and *Wal-Mart*, discussed above.[312] In each of those cases, the Court reversed the certification of the class action because, in one way or another, the class claims had severe differences which made class treatment inappropriate.[313] The Court in *Wal-Mart* framed the lack of cohesiveness as being about commonality—the lack of a single common question which could resolve an issue "central to the validity of each one of the claims in one stroke."[314] In *Amchem*, this concern about cohesion centered on Rule 23(b)(3)'s predominance requirement: the number and importance of the disparate questions among the class members claims made class treatment inappropriate.[315]

As noted above, however, there is no consistent approach in the lower courts with respect to cohesiveness on either commonality or predominance.[316] Splits have arisen between the federal courts as to a number of questions, such as the importance of individualized damages to the predominance inquiry[317] and the use of the issue class to segregate the common issues notwithstanding predominance for the claim as a whole.[318] Some commentators and judges

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[308] H.R. 5367, 115th Cong. § 2 (2d Sess. 2018) (proposing to amend Rule 23 to prohibit the class action device's use in cases "alleg[ing] the misclassification of employees as independent contractors").

[309] H.R. 585, 115th Cong. § 3 (1st Sess. 2017).

[310] S. 1535, 112th Cong. § 205(e) (1st Sess. 2011).

[311] H.R. 985, 115th Cong. § 1(a) (1st Sess. 2017) [hereinafter "FICALA"].

[312] *See supra* "Commonality (Rule 23(a)(2))"; "Predominance."

[313] *See supra* "Commonality (Rule 23(a)(2))"; "Predominance."

[314] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 338 (2011).

[315] Amchem Prods. v. Windsor, 521 U.S. 591, 624-25 (1997).

[316] *See supra* "Commonality (Rule 23(a)(2))"; "Predominance." The Supreme Court itself is divided on these issues. *See* Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1053-55 (2016) (Thomas, J., dissenting) (in case involving the nonpayment of overtime pay for time spent donning and doffing protective gear in food processing facility, arguing in dissent that the district court erred at the class certification stage by finding predominance; noting that "[t]he plaintiffs' claims here had one element that was clearly individualized: whether each employee worked over 40 hours without receiving full overtime pay" and arguing that the court should have appreciated that this issue defeated predominance); *Wal-Mart*, 564 U.S. at 377 (2011) (Ginsburg, J., dissenting) (arguing that class should have been a 23(b)(3) class and the court improperly blended the commonality and predominance inquiry; this "leads the Court to train its attention on what distinguishes individual class members, rather than on what unites them"). *See also* Mullenix, *supra* note 11, at 428-29 ("[T]he jurisprudence applicable to the Rule 23(b)(3) damages class action . . . is riddled with conflicting doctrine relating to the rule's predominance and superiority requirements.").

[317] *See supra* "Predominance."

[318] *Compare* In re Nassau Cty. Strip Search Cases, 461 F.3d 219, 229-30 (2d Cir. 2006) (holding that "a court may employ subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement"), *with* Castano v. Am. Tobacco Co, 84 F.3d 734, 745 (5th Cir. 1996) ("The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial."). *See also supra* "Subclasses and Certification as to Particular Issues."

(including some Supreme Court Justices in dissent) have argued that the courts have failed to strike the correct balance.[319] Some have maintained that some courts have expanded class action certification beyond the bounds of what should be permissible particularly with respect to classes including both injured and uninjured parties, impermissibly broadening the traditional power of courts.[320] Others disagree and argue that the courts have placed too much emphasis on cohesiveness at the expense of judicial efficiency, suggesting that the class action should be expanded further.[321]

As passed by the House, FICALA proposes to add several sections to Title 28 of the U.S. Code that would alter this area of class action law. Proposed 28 U.S.C. § 1716 would bar federal courts from certifying a class seeking monetary relief for personal injury or "economic loss" unless the plaintiff demonstrates that "each proposed class member suffered the same type and scope of injury as the named class representative."[322] Every certification order in federal court would have to contain a determination "based on a rigorous analysis of the evidence presented" that the plaintiff certified this requirement.[323] FICALA does not define the phrase "type and scope of injury."[324]

FICALA would also add 28 U.S.C. § 1720, which would prohibit so-called "issue classes," by prohibiting a federal court from issuing "an order granting certification . . . with respect to particular issues pursuant to Rule 23(c)(4)[325] . . . unless the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites" of Rule 23.[326]

The committee report from the House Judiciary Committee (the "Committee Report")[327] confirms that these sections are driven by concerns over cohesiveness. In particular, the Committee Report notes a goal of ensuring that "similarly injured people" are grouped in a single class action. The alleged purpose is to prevent "uninjured class members" receiving money that could go to those with actual injuries, in order to create "classes in which those who are most injured receive the

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[319] *See, e.g.*, *Tyson Foods*, 136 S. Ct. at 1053-55 (Thomas, J., dissenting) (arguing that court misread predominance inquiry and wrongly certified a noncohesive class); *id.* at 1053 (Roberts, C.J., concurring) (arguing that "if there is no way to ensure that jury's damages award goes only to injured class members, that award cannot stand"); In re Nexium Antitrust Litig., 777 F.3d 9, 32-33 (1st Cir. 2015) (Kayatta, J., dissenting) (arguing that class containing both injured and noninjured plaintiffs raised administrative issues which were unresolved); Sullivan v. DB Investments, Inc., 677 F.3d 273, 340-41 (3d Cir. 2011) (en banc) (Jordan, J., dissenting) (maintaining that nationwide class action, involving antitrust laws of 50 states, against De Beers, by direct and indirect purchasers of diamonds, "violates the Rules Enabling Act and basic principles of federalism"). *See also* MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (2009).

[320] H.R. REP. NO. 115-25, at 17 (2017) ("FICALA would simply make clear what already should be clear to the Federal courts, namely that uninjured class members are incompatible with Rule 23(b)(3)'s current requirement that classes should not be certified unless common legal and factual issues predominate in the class action.").

[321] Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1106-07 (2013) (arguing that the cohesiveness requirement as articulated in *Amchem* is counterproductive; "the Court did not explain how class cohesiveness promotes fairness or serves day-in-court values, or even why cohesiveness should be measured in terms of common versus individual questions."). *See also* Bone, *Misguided Search*, *supra* note 107, at 680-682.

[322] FICALA § 103.

[323] *Id.*

[324] H.R. REP. NO. 115-25, at 47 (2017) (Dissenting Views) ("The terms 'economic loss' and 'scope of injury' are undefined.")

[325] *See supra* "Subclasses and Certification as to Particular Issues."

[326] FICALA § 102.

[327] H.R. REP. NO. 115-25 (2017).

most compensation."[328] The Committee Report cites *Wal-Mart Stores, Inc. v. Dukes* as the source of the principle, particularly the Supreme Court's statement that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members."[329] With respect to proposed Section 1720, the Committee Report suggests that the purpose of this provision is to codify the approach to issue classes announced by the Fifth Circuit in *Castano v. American Tobacco Co.*, discussed above, that a "district court cannot manufacture predominance" by segregating the issues it wishes to certify into a separate predominance inquiry—rather, the court must evaluate predominance for the cause of action as a whole.[330]

Critics of FICALA, including those cited in the Committee Report, have argued that far from protecting absent class members, these provisions would simply lead to fewer individuals being able to obtain relief through class litigation. As these critics point out, the term "scope of injury" in proposed Section 1716 is undefined.[331] Furthermore, these critics argue that at the early stage of litigation when class certification is supposed to occur, the exact "scope" of an injury cannot be measured with any precision, and the proposed section would effectively require "a decision on the merits before trial and before appropriate class members can even be identified."[332] Because of this structure, FICALA critics argue that uninjured class members, or class members with different injuries, are an inevitable component of class actions, as membership in a class has never equated to an "entitlement to damages."[333] Further, the critics argue that proposed Section 1720 would particularly threaten certain types of civil rights class actions, which can be maintained only as to particular issues such as liability because, as demonstrated in cases like *Wal-mart v. Dukes*,[334] individualized questions tend to predominate in such suits.[335]

In some ways, the arguments above echo larger disputes. On the one hand, a relatively broader view of cohesiveness enables courts to provide resolutions for injured class members where they might not otherwise exist. For example, in *Nassau County Strip Search Cases*, the Second Circuit approved class treatment in a case involving an allegedly unconstitutional blanket strip search policy for Nassau County misdemeanor detainees.[336] By approving class action treatment on the issues of whether the defendants had implemented the policy and whether they were liable for it, the court sidelined the individualized questions relating to whether some class members might have been appropriately searched.[337] *Nassau County* serves as an example of a case where few of the class members would have had an incentive to seek redress individually for injury they had

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[328] *Id*. at 17. *See also* Andrew Trask, *The New, Improved FICALA – What's In the House Class Action Bill?*, CLASS ACTION COUNTERMEASURES, https://www.classactioncountermeasures.com/2017/02/articles/strategy/the-new-improved-ficala-whats-in-the-house-class-action-bill/ (last visited Feb. 14, 2017).

[329] H.R. REP. NO. 115-25, at 17 (2017). (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (internal quotations and citations omitted)).

[330] 84 F.3d 734, 745 n.21 (1996).

[331] H.R. REP. NO. 115-25, at 47 (2017) (dissenting view); *see also* Lynnette Miner & Jocelyn D. Larkin, H.R. 985*: Holding Down Civil Rights Class Actions*, IMPACT FUND (Feb. 16, 2017), https://www.impactfund.org/legal-practitioner-blog/hr-985.

[332] H.R. REP. NO. 115-25, at 53-54 (2017).

[333] *Id.*

[334] *Wal-Mart*, 131 S. Ct. at 2550.

[335] H.R. REP. NO. 115-25, at 56 (2017) (dissenting view). *See, e.g.*, *In re* Nassau Cty. Strip Search Cases, 461 F.3d 219, 229-30 (2d Cir. 2006) (certifying a class of all misdemeanor detainees subject to a blanket strip search policy on issues of liability, notwithstanding issues of highly individualized questions on defenses and damages).

[336] 461 F.3d at 222.

[337] *Id*. at 229-30.

sustained—in this case, an allegedly unlawful strip search.[338] As such, supporters of relaxation of cohesiveness would likely argue that *Nassau County* is indicative of why it is necessary to permit otherwise noncohesive classes to proceed and why the change proposed by Section 1717 to issue classes would harm plaintiffs.

On the other hand, some commentators have argued that resolving the rights of absent class members without a strong element of cohesion threatens the constitutional values of individual rights and separation of powers.[339] According to these commentators, individual rights are threatened because noncohesive class actions undermine an individual's right to a "day in court."[340] Where large classes resolve questions on behalf of absent class members on the basis of an opt-out system, absent class members may be deprived of the individual autonomy rights and the right to control their own cases, a problem that is less severe when classes are highly cohesive.[341] Further, these commentators argue that separation of powers is undermined because the proper role of the courts is to resolve claims that are in front of them—it is the role of legislatures to devise solutions to generalized problems affecting large swaths of society.[342] Where a class action is certified and the class members are not truly cohesive, especially where the damages are small and class members are unlikely to receive a meaningful benefit, courts, in the view of these commentators, act more like legislatures or administrative agencies by disciplining corporations and handing out bounties to class counsel, rather than by redressing individual rights and handing out relief to injured persons.[343]

Codifying the Ascertainability Doctrine

The circuit split over ascertainability discussed above[344] has likewise captured the attention of policymakers. FICALA would add Section 1718 to Title 28 of the U.S. Code, which would forbid a federal court from granting certification of a class action without determining that there is "a reliable and administratively feasible mechanism" for determining whether putative class members fall within the class definition and for determining how to distribute to a substantial majority of class members any monetary relief secured.[345] This new provision would codify the approach currently in use within the Third and Eleventh Circuits discussed above.[346]

To support this provision, the FICALA's Committee Report majority favorably cites a dissenting opinion by Judge Kayatta in the First Circuit, stating that district courts should have to "identify a culling method to ensure that the class, by judgment, includes only members who were actually injured."[347] In response, the dissenting Members who signed the "Dissenting Views" portion of

[338] *Id*. at 230.

[339] *See generally* REDISH, *supra* note 319. *See also* Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859 (2016).

[340] *See generally* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 203-06 (1992). *See also* Taylor v. Sturgell, 553 U.S. 880, 892-93 (2008) (in preclusion context, observing that there is a "deep-rooted historic tradition that everyone should have his own day in court").

[341] *See e.g.*, REDISH, *supra* note 319, at 147-59.

[342] *See generally id*. *Cf.* Allen v. Wright, 468 U.S. 737, 751 (1984) (standing doctrine encompasses, among other things, the doctrine that "adjudication of generalized grievances [is] more appropriately addressed in the representative branches").

[343] *See* REDISH, *supra* note 319, at 42-43.

[344] *See supra* "Ascertainability."

[345] FICALA § 102.

[346] *See supra* "Ascertainability."

[347] H.R. REP. NO. 115-25, at 19 (2017) (citing *In re* Nexium Antitrust Litig., 777 F.3d 9, 32-33 (1st Cir. 2015) (Kayatta,

the Committee Report argue that the ascertainability requirement has been "rejected by most courts for good reason."[348] The dissenters argue that the practical effect would be that many small claim consumer class actions would allow defendants to escape liability because the class is not ascertainable by this standard.[349]

These statements echo the debate in the federal courts on ascertainability.[350] "Defendants in class actions" have "invok[ed] the ascertainability requirement with increasing frequency" in recent years "in order to defeat class certification."[351] Some commentators have therefore called the ascertainability doctrine "one of the most contentious issues in class action litigation these days."[352] Supporters of a rigorous ascertainability requirement—such as that adopted by the Third and Eleventh Circuits—maintain that requiring the proposed class representative to demonstrate an administratively feasible mechanism for determining whether putative class members fall within the class definition "serves several important policy objectives," such as

- eliminating administrative burdens "by insisting on the easy identification of class members";
- "protect[ing] absent class members by facilitating" notice to the class; and
- "protect[ing] defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable."[353]

Critics, by contrast, argue that a rigorous ascertainability requirement inappropriately "scuttle[s] small-claim class actions, especially consumer class actions involving low-priced items."[354] In such cases, consumers typically "do not have documentary proof of purchases," but this, by itself, should, in the view of critics, not bar their ability to recover.[355]

Divergent Incentives for Class Members and Class Counsel

Some commentators also claim that the existing class action framework results in a mismatch between the incentives of class members and those of class counsel, especially with respect to settlement. The adequacy requirement of Rule 23(a) presently seeks to constrain the ability of counsel with conflicts or competence issues to represent the class, and Rule 23(e) requires the court to find that settlements are "fair, reasonable and adequate."[356] However, the standards

J., dissenting)).

[348] *Id*. at 55 (dissenting view).

[349] *Id*.

[350] *See generally* Lewis, *How Hard Should It Be*, *supra* note 69.

[351] Byrd v. Aaron's Inc., 784 F.3d 154, 162 (3d Cir. 2015).

[352] Shaw, *supra* note 65, at 2360.

[353] *E.g.*, Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012).

[354] Bone, *Class Action Limits*, *supra* note 33, at 914. *Accord*, *e.g.*, Astiana v. Kashi Co., 291 F.R.D. 493, 500 (S.D. Cal. 2013) ("If class actions could be defeated because membership was difficult to ascertain at the class certification stage, 'there would be no such thing as a consumer class action.'") (quoting Ries v. Ariz. Beverages USA LLC, 287 F.R.D. 523, 536 (N.D. Cal. 2012)); Shaw, *supra* note 65, at 2378 ("Ascertainability has mainly been used to block small dollar consumer claims—exactly the sort of case one would probably not bring on one's own.")

[355] Mullins v. Direct Digital, LLC, 795 F.3d 654, 662 (7th Cir. 2015).

[356] *See supra* "Settlement."

applied to these rules are largely court-made, and some have argued that they are inadequate to the task of protecting class members.[357]

FICALA would add two relevant provisions to the U.S. Code. The first, 28 U.S.C. § 1717, would require class action complaints to state whether any proposed class representative "is a relative of, is a present or former employee of, is a present or former client of . . . or has any contractual relationship . . . with class counsel."[358] Further, this section would forbid a federal court from granting class certification to any proposed class action in which the class representative is a "relative or employee of class counsel."[359] Second, proposed 28 U.S.C. § 1718(2)-(3) would forbid class counsel from collecting fees until "the distribution of any monetary recovery to class members has been completed" and would limit the fees that class counsel could obtain in cases involving monetary recovery to "a reasonable percentage of any payments directly distributed to and received by class members . . . [not to] exceed the total amount of money directly distributed to and received by class members."[360]

Proposed Section 1717 would effectuate, at least relative to other provisions in FICALA, a minor change in the law.[361] It would require additional disclosure of conflicts to the court and would codify the requirement, already accepted by many courts, that class counsel should not have certain conflicts of interest.[362] It would also largely codify the words of the Seventh Circuit in *Levitt v. Southwest Airlines Co.*: "Our message to the class action bar is short and simple: when in doubt, disclose [potential conflicts]."[363]

Proposed Section 1718, on the other hand, proposes significant limitations on the fees that class counsel would be able to obtain. This provision would work a major change. Currently, Rule 23(h) provides that a court may award "reasonable" attorney's fees following a motion under Federal Rule of Civil Procedure 54(d)(2), which provides that the motion for fees must be made within 14 days after judgment.[364] Class counsel is ordinarily entitled to fees only in cases involving either a common-fund created by the attorney's effort[365] or in cases where substantive law provides for fee shifting.[366] Case law states that a "reasonable" fee is determined by a number of factors, which include the benefits obtained by the class.[367] Where the fee is based on a common fund created by the litigation, generally, a reasonable fee extends to a percentage of the

[357] Mullenix, *supra* note 11, at 405-06.

[358] FICALA § 102.

[359] The statute makes an exception for any class actions brought under section 27(a) of the Securities Act of 1933 or 21D(a) of the Securities Exchange Act of 1934. *Id.* The likely reason for this exception is that the Private Securities Litigation Reform Act (PSLRA) applies to such suits, and places limitations on the selection of the class representative and counsel. 15 U.S.C. § 78u-4.

[360] FICALA § 102.

[361] Earlier versions of this bill went further in terms of banning specific conflicts. *See, e.g.*, John C. Coffee, Jr., *How Not to Write a Class Action "Reform" Bill*, CLS BLUE SKY BLOG (Feb. 21, 2017), http://clsbluesky.law.columbia.edu/2017/02/21/how-not-to-write-a-class-action-reform-bill/ (commenting on this section in previous version of the bill).

[362] London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1255 (11th Cir. 2003); Susman v. Lincoln Am. Corp., 561 F.2d 86, 90, 95 (7th Cir. 1977); Shroder v. Suburban Coastal Corp., 729 F.2d 1371, 1375 (11th Cir. 1984).

[363] 799 F.3d 701, 716 (7th Cir. 2015).

[364] FED. R. CIV. P. 23(h)(1); 54(d)(2)(B)(i).

[365] *See, e.g.*, Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980).

[366] *See, e.g.*, 42 U.S.C. § 1988 (prevailing plaintiffs in actions brought for damages under civil rights laws generally may recover reasonable fees).

[367] For a full analysis, see 5-23 MOORE'S FEDERAL PRACTICE – CIVIL § 23.124 (2018). *See also supra* "Settlement."

fund that is created, including any unclaimed portion.[368] Proposed Section 1718 would change that rule, insofar as percentage recoveries would have to be based on only the recovered portion of the funds actually received, rather than the total fund including any unclaimed portion.[369]

Further, this section apparently ensures that class counsel cannot collect fees until monetary recovery has been completed. This provision, if enacted, could raise issues in cases where fee awards would potentially be difficult to administer or in class actions where funds are created but the potential beneficiaries are unknown or their injuries are uncertain. An example of such a case is the National Football League's (NFL's) concussion settlement.[370] In that case, the court approved a settlement covering 20,000 retired NFL players, even though the injuries sustained by some of the claimants are not likely to become apparent for some time (if ever), meaning the payment owed to those claimants is unknown.[371] The FICALA provision prohibiting the collection of fees until recovery has been completed raises the question of whether attorneys in such a case would be effectively unable to receive payment from the fund, because it would likely never be known when the distribution to class members is completed. A court may interpret the language in the section—"until the distribution of monetary recovery to class members"—in such cases to mean "until the fund is created," but this interpretation is not necessarily obvious.

The problem that these provisions seek to resolve is a mismatch between the incentives possessed by class counsel and class representatives, particularly with respect to settlements. Once the class is certified, class counsel and defendants could be united in the desire to obtain a quick settlement that resolves all of the claims and pays class counsel.[372] The defendant wants finality and class counsel wants its fees; neither the defendant nor class counsel particularly has an incentive to care if absent class members, at the end of the day, receive any benefit from the funds that are being distributed on their behalf.[373] Unlike in a traditional lawsuit where the client is an active participant, class members are usually absent and unavailable to check class counsel for the same reason that class actions are needed—class members often have a negligible individual stake in the recovery.[374] Sponsors of FICALA assert that consumer class members take the offered compensation in only .023 percent of cases and that class counsel nonetheless frequently obtains seemingly large fee awards.[375] It is this mismatch between the reward obtainable by the attorney and that which flows to his ostensible client which creates the problem.

Critics of FICALA, however, argue that this mismatch of incentives is an issue that courts have already recognized and attempted to curtail. Current law, as noted above, requires courts to scrutinize class action settlements for fairness to class members. As the Seventh Circuit has explained, courts are aware that "[t]he structure of class actions under Rule 23 of the federal rules gives class action lawyers an incentive to negotiate settlements that enrich themselves but give

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[368] *See, e.g.*, Boeing Co. v. Van Gemert, 444 U.S. 472, 480-81 (1980).

[369] This provision of FICALA does not explicitly specify whether it would have any effect on attorney's fee awards that are not based on the percentage of the fund.

[370] *In re* NFL Players Concussion Injury Litig., 821 F.3d 410, 426 (3d Cir. 2016).

[371] *Id*. at 424-25.

[372] *See* Erichson, *supra* note 339, at 860 ("[I]n too many instances, collective litigation has become a tool for disempowering claimants . . . . Too often, class settlements include terms . . . that [] served the aligned interests of the defendant and class counsel."). *See also* Lewis, *Subway*, *supra* note 30.

[373] *E.g.*, Pearson v. NBTY, Inc., 772 F.3d 778, 787 (7th Cir. 2014); Eubank v. Pella Corp., 753 F.3d 718, 720 (7th Cir. 2014); Thorogood v. Sears, Roebuck & Co., 627 F.3d 289, 293 (7th Cir. 2010).

[374] *See supra* "The Purpose of the Class Action Device"; "Risks of Class Actions."

[375] H.R. REP. NO. 115-25, at 21 (2017).

scant reward to class members."[376] Courts therefore attempt to ensure "that the settlement secures an adequate advantage for the class in return for" absent class members giving up their "litigation rights against the defendants."[377] As the Seventh Circuit has colorfully explained, "a class settlement that results in fees for class counsel but yields no meaningful relief for the class 'is no better than a racket.'"[378]

Following this case law, courts have struck down the occasional settlement as unfair.[379] However, some commentators argue that district courts are too lenient and too inclined to approve unfair settlements that pay the attorneys but leave little to nothing for the class.[380] Whether courts have struck the right balance on this question is an open debate,[381] but there is no question that courts are aware of these issues and do scrutinize class action settlements for fairness.[382]

[376] *E.g.*, *Thorogood*, 627 F.3d at 293.

[377] *In re* Katrina Canal Breaches Litig., 628 F.3d 185, 195 (5th Cir. 2010). *Accord*, *e.g.*, *In re* NFL Players Concussion Injury Litig., 821 F.3d 410, 436 (3d Cir. 2016) (explaining that the court must "assur[e] that the settlement represents adequate compensation for the release of the class claims"); Koby v. ARS Nat'l Servs., Inc., 846 F.3d 1071, 1076, 1079 (9th Cir. 2017) (holding that lower court "abused [its] discretion by approving" a class action settlement that gave class members "nothing of value" in exchange for "their right to assert damages claims against the defendant").

[378] *In re* Subway Footlong Sandwich Mktg. & Sales Practices Litig., 869 F.3d 551, 556 (7th Cir. 2017).

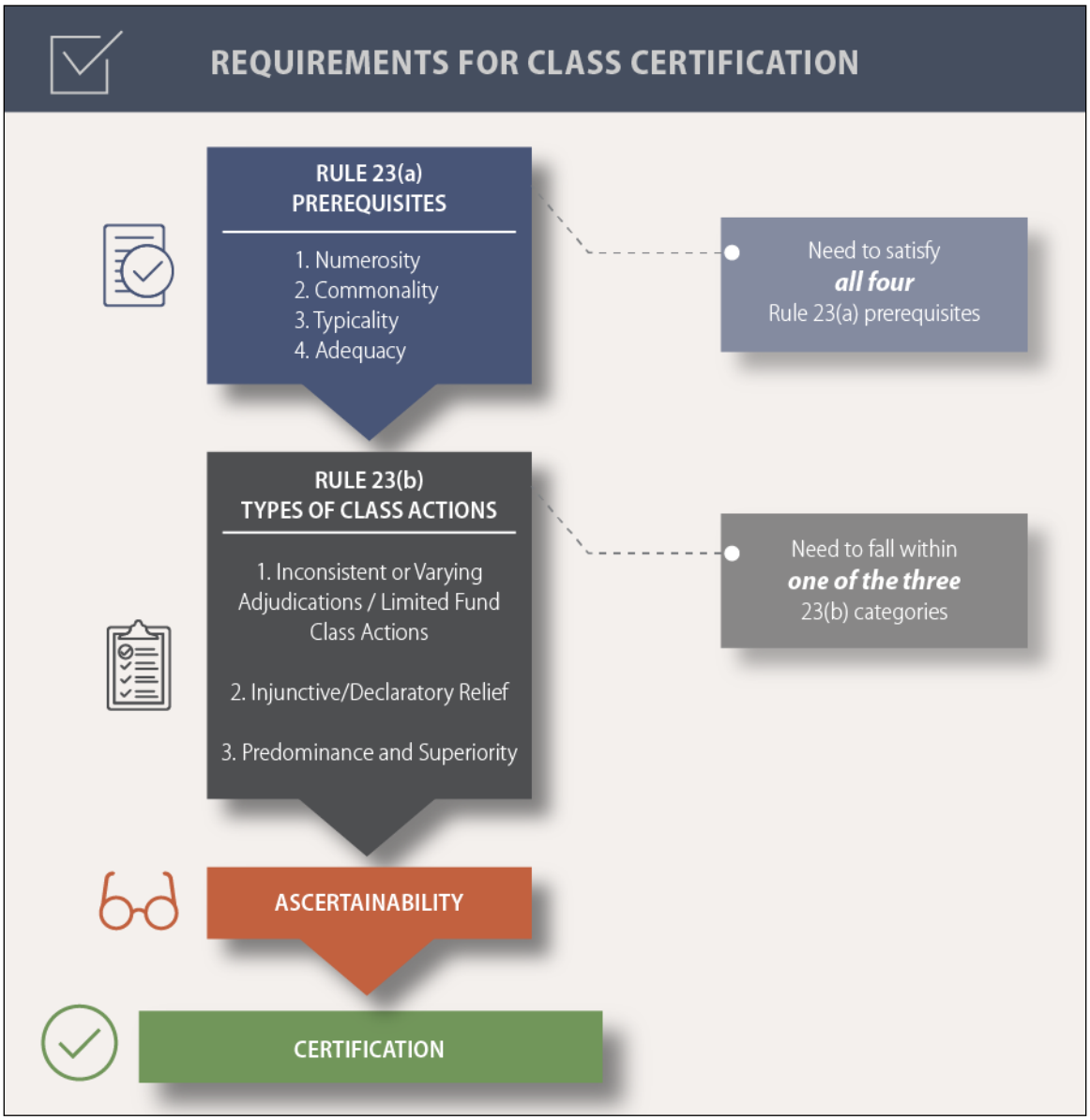
[379] *See*, *e.g.*, *Subway*, 869 F.3d at 556 (striking down settlement with Subway over "12-inch" sandwiches which obtained "no meaningful relief for the class"); *Katrina*, 628 F.3d at 196 (holding that district court erred in approving settlement "without any assurance that attorneys' costs and administrative costs will not cannibalize the entire $21 million settlement").

[380] *E.g.*, Sheryl J. Willert, *To Reform or Not to Reform . . . That is the Question*, 45 NO. 6 DRI FOR DEF. 1 (2003) ("Too often, judges approve settlements that primarily benefit the class counsel, rather than the class members.").

[381] *Compare id*. ("Too often, judges approve settlements that primarily benefit the class counsel, rather than the class members."), *with* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2044 (2010) ("In many cases, class action lawyers not only do not make too much, but actually make too little. Indeed, I argue that in the most common class action—the so-called 'small stakes' class action—it is hard to see, as a theoretical matter, why the lawyers should not receive everything and leave nothing for class members at all.").

[382] *See* FED. R. CIV. P. 23(e) (requiring courts to scrutinize any proposed settlement of a certified class action).

Appendix. Requirements for Class Certification



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