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Class Actions in the Year 2026: A Prognosis

Robert H. Klonoff

CLASS ACTIONS IN THE YEAR 2026: A PROGNOSIS

Robert H. Klonoff[*]

ABSTRACT

In this Article, I offer my predictions on what the class action landscape will look like a decade from now. Those predictions fall into several categories:

First, I discuss whether the basic class action framework—Federal Rule of Civil Procedure 23—is likely to be revamped in the next decade. I predict that there is little chance that the basic structure of Rule 23 will change. Calls by some scholars to rewrite Rule 23 will not make headway. The only caveat is that either Congress or the Supreme Court could repudiate so-called no injury classes—i.e., classes in which some unnamed class members suffered no harm—a result that would not change the text of Rule 23 but would adversely impact certain kinds of class actions, such as consumer cases.

Second, I examine the likely state of class action jurisprudence in the year 2026. In that regard, I make several predictions: (1) Securities class actions will continue to flourish, and significant public interest class actions seeking structural relief will continue to be certified. (2) On the other hand, consumer, employment, and personal injury class actions will continue to decline. (3) Notwithstanding the Supreme Court's decision in Tyson Foods, Inc. v. Bouaphakeo*, which upheld the use of statistical proof in a classwide suit for overtime pay, defendants will aggressively seek to limit the ability of plaintiffs*

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[*] Jordan D. Schnitzer Professor of Law, Lewis & Clark Law School; Dean of Lewis & Clark Law School, 2007–2014. The author serves as a member of the United States Judicial Conference Advisory Committee on Civil Rules (and the Subcommittee on Class Actions). He previously served as an Associate Reporter for the American Law Institute's project, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (West 2010). He is a co-author of the first casebook on class actions, originally published in 2000 and now in its third edition. As a private attorney, the author has handled more than 100 class actions. He has also served as an expert witness in numerous class action cases. The author wishes to thank Professors Ed Brunet, Brooke Coleman, Sam Issacharoff, Mary Kay Kane, Richard Marcus, Arthur Miller, and Alan Morrison, and attorneys John Barkett, James Bilsborrow, Elizabeth Cabraser, Paul Karlsgodt, Jocelyn Larkin, Matt Preusch, Meredith Price, and Joe Sellers for their very helpful comments. He also wishes to recognize his research assistants—Joe Callahan, Shantel Chapple, Dan Kubitz, and Ben Pepper—for their excellent assistance. The views expressed herein represent solely those of the author. He writes only in his personal capacity and not as a member of the Advisory Committee on Civil Rules.

to establish liability or damages through expert statistical sampling. (4) The "ascertainability" requirement imposed by the Third Circuit will be repudiated by the Supreme Court or by the Third Circuit itself. (5) Although the Supreme Court in Campbell-Ewald Co. v. Gomez *held that an unaccepted offer of judgment under Rule 68 did not moot the plaintiff's claim (and thus did not moot the putative class claims brought by the plaintiff as class representative), the Court reserved important issues for a later day. The decision thus ensures that the defense bar will continue to search for ways to pick off class representatives. (6) Defendants will advance several arguments against class certification that, until now, have had only limited success. These will include expansive applications of Rule 23's typicality, predominance, and superiority requirements. Although defendants will not be fully successful with these arguments, they will succeed in erecting some additional barriers to class certification. (7) During the next decade, courts addressing class certification and the fairness of settlements will give greater weight to allegations of unethical behavior by class counsel and by counsel representing objectors to settlements. (8) The future of class actions will ultimately rest in the hands of a small number of appellate court judges with special interest and expertise in aggregate litigation.*

Third, I focus on the administration and resolution of class actions and offer two predictions: (1) by 2026, a significantly larger number of class action cases will go to trial than at any time since 1966; and (2) technological changes will fundamentally alter the mechanics of class action practice, offering more sophisticated tools for notice, participation by class members, and distribution of settlement proceeds.

INTRODUCTION

In my 2013 article, *The Decline of Class Actions*, I explained that, starting in the mid-1990s, federal courts began to erect significant barriers to class certification.[1] Underlying that trend, I argued, was a fear among many judges that even meritless class actions had coerced defendants to agree to massive settlements.[2] I did not pronounce class actions dead, but I did express concern that they had been seriously eroded.[3] In this Article, which coincides with the

[1] Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 733, 739 (2013).
[2] *Id.* at 731–33.
[3] *Id.* at 823.

fiftieth anniversary of the modern class action rule,[4] I attempt to predict what the class action landscape will look like a decade from now. That is not an easy task; as Yogi Berra once said, "It's difficult to make predictions, especially about the future."

My predictions fall into several categories. First, I discuss whether the basic class action framework—Federal Rule of Civil Procedure 23—is likely to be overhauled in the next decade. I predict that there is little chance that the basic structure of Rule 23 will change. Calls by some scholars to rewrite Rule 23 will not make headway. The only caveat to this prediction is that either Congress or the Supreme Court could repudiate so-called no injury classes—i.e., classes in which some unnamed class members suffered no harm—a result that would not change the text of Rule 23 but would adversely impact certain kinds of class actions, such as consumer cases.

Second, I examine the likely state of class action jurisprudence in the year 2026. In that regard, I make several predictions:

- Securities class actions will continue to flourish, and public interest class actions seeking structural relief under Rule 23(b)(2) will continue at a steady pace.
- Many other types of class actions, however—such as consumer, employment discrimination, and personal injury class actions—will continue to decline.
- Notwithstanding the Supreme Court's decision in *Tyson Foods, Inc. v. Bouaphakeo*,[5] which upheld the use of statistical proof in a classwide suit for overtime pay, defendants will aggressively seek to limit the ability of plaintiffs to establish liability or damages through expert statistical sampling.
- The "ascertainability" requirement imposed by the Third Circuit will be repudiated by the Supreme Court or by the Third Circuit itself.
- The Supreme Court's decision in *Campbell-Ewald Co. v. Gomez*[6] will not deter defendants in their efforts to design strategies for picking off class representatives through offers of judgment.

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4 FED. R. CIV. P. 23 (1966).
5 136 S. Ct. 1036 (2016).
6 136 S. Ct. 663 (2016).

- Defendants will advance several arguments against class certification that, until now, have had only limited success. These will include expansive applications of Rule 23's typicality, predominance, and superiority requirements. Although defendants will not be fully successful with these arguments, they will succeed in erecting some additional barriers to class certification.

- During the next decade, courts addressing class certification and the fairness of settlements will give greater weight to allegations of unethical behavior by class counsel and by counsel representing objectors to settlements.

- The future of class actions will ultimately rest in the hands of a small number of appellate court judges with special interest and expertise in aggregate litigation.

Third, I focus on the administration and resolution of class actions and offer two predictions: (1) by 2026, a significantly larger number of class action cases will go to trial than at any time since 1966; and (2) technological changes will fundamentally alter the mechanics of class action practice, offering more sophisticated tools for notice, participation by class members, and distribution of settlement proceeds.

At bottom, the next decade will be a fascinating—but challenging—time for those involved in litigating class actions.

I. POSSIBLE RESTRUCTURING OF RULE 23

A. No Major Structural Changes to Rule 23 Will Occur in the Next Decade

Rule 23 has generated an extensive body of case law interpreting and applying it. Much of the recent case law has been controversial.[7] Nonetheless, subject to an important caveat discussed in Part I.B, I do not believe that there will be major structural changes to the class action device.

The current version of Rule 23 is largely unchanged from the 1966 version. The original version of Rule 23, from 1938, contained three categories of class actions: "true," "hybrid," and "spurious."[8] Those categories, however, proved

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[7] *See generally* Klonoff, *supra* note 1.

[8] *See, e.g.*, Charles Alan Wright, *Class Actions*, 47 F.R.D. 169, 170, 175 (1970).

to be deficient.[9] The 1966 version of Rule 23 abandoned those categories and created four new types of class actions.[10] Rule 23(b)(1)(A) applies when myriad individual actions would result in inconsistent standards of conduct for the party opposing the class.[11] Rule 23(b)(1)(B) applies when numerous separate actions would substantially impair or impede the interests of individual class members.[12] Rule 23(b)(2) applies in suits seeking primarily declaratory or injunctive relief.[13] And Rule 23(b)(3) applies when common questions of law or fact predominate over individual questions and a class action is superior to other methods of adjudication.[14] To achieve certification, a class must fall within at least one of those four categories.[15] In addition, Rule 23(a) contains four criteria that plaintiffs must satisfy in every case: numerosity, commonality, typicality, and adequacy of representation.[16]

The current rule is not without flaws. For instance, the two (b)(1) categories are confusing, and in recent years, plaintiffs have rarely utilized them.[17] Many courts have held that Rule 23(b)(1)(A) does not apply to damages suits but only to suits for declaratory or injunctive relief.[18] It is thus difficult to discern any role for (b)(1)(A) that is not already covered by (b)(2). Similarly, classes under (b)(1)(B) are difficult to maintain, especially after the Supreme Court's decision in *Ortiz v. Fibreboard Corp.*,[19] which substantially curtailed plaintiffs' ability to bring "limited fund" class actions.[20] In addition, Rule 23(b)(2) is poorly drafted, leaving courts to figure out the important question of when (if at all) it encompasses class actions that also seek monetary relief in

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9 *Id.* at 177.

10 ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL 74 (4th ed. 2012).

11 *Id.* at 78.

12 *Id.* at 84.

13 *Id.* at 106.

14 *Id.* at 113.

15 *Id.* at 74.

16 *Id.* at 30. For more information on these four criteria, see generally *id.* at 38–73. Courts have also recognized three additional, threshold requirements: (1) a clear, objective definition of the class, (2) at least one representative who is a member of the class, and (3) a live controversy. *Id.* at 30–31. For more information on the threshold requirements, see generally *id.* at 30–37.

17 Klonoff, *supra* note 1, at 746 n.92.

18 *See, e.g.*, *In re* Dennis Greenman Sec. Litig., 829 F.2d 1539, 1545 (11th Cir. 1987) (holding that "Rule 23(b)(1)(A) does not apply to actions seeking compensatory damages").

19 527 U.S. 815 (1999).

20 *Id.* at 821; KLONOFF, *supra* note 10, at 85–89.

addition to injunctive or declaratory relief.[21] And the four superiority criteria of Rule 23(b)(3)(A)–(D) are confusing and difficult to apply.[22] Similarly, it is hard to articulate a clear distinction between typicality (Rule 23(a)(3)) and adequacy of representation (Rule 23(a)(4)), both of which ultimately turn on the ability of the class representative to represent the class.[23] It is difficult to envision a situation in which a class representative has atypical claims or defenses but is nonetheless an adequate representative. Thus, Rule 23(a) and (b) could be rewritten to achieve greater simplicity and clarity. And, of course, attorneys who litigate class actions might wish to see a new rule that is either more pro-plaintiff or more pro-defendant in its overall approach to class certification.

Not surprisingly, there have been some calls for structural changes to Rule 23. For the most part, those arguments have been made not by lawyers and judges in the trenches but by law professors. To give four recent examples:

- Professor Linda Mullenix proposes to eliminate class actions for damages and to preserve class actions solely for injunctive relief.[24] In her view, "[m]any of the class action harms that have developed recently would be avoided with elimination of the damage class action from the rule."[25]

- Professor Robert Bone argues that the commonality and typicality requirements of Rule 23(a) should be eliminated.[26] In his view, there was no "convincing justification for their inclusion" in 1966.[27]

- Professor Mollie Murphy argues that "it may be time to reconstruct the [Rule 23(b)] categories, or more radically, to eliminate them."[28] She

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[21] *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011) (leaving open the question of whether Rule 23(b)(2) applies if there is *any* request for money, even if the monetary request is incidental to the injunctive or declaratory relief sought).

[22] KLONOFF, *supra* note 10, at 126–32 (explaining that some of the four criteria do not make clear whether they favor or undercut class certification).

[23] The Supreme Court has recognized on several occasions that commonality, typicality, and adequacy tend to merge. *See, e.g.*, *Dukes*, 131 S. Ct. at 2551 n.5 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982)).

[24] Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 405 (2014).

[25] *Id.* at 440.

[26] Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J. L. REFORM 1097, 1116 (2013).

[27] *Id.*

notes that the focus of Rule 23(b) on "the nature of relief requested" is "an incomplete substitute for the questions the district court must resolve—should a class be certified and, if so, what protections should be afforded absentee class members?"[29] She thus proposes that Rule 23(b) be modified to embody only those two questions.

- Professor Max Helveston proceeds in a different direction: He proposes to restructure class actions not by rewriting Rule 23(a) or Rule 23(b) but "by introducing a new actor to class action suits": the "Public Advocate."[30] That person "would represent the public's interest in class action litigation, ensuring that class-based suits are adjudicated in an expedient, just manner and that they are resolved in ways that respect the public's interest."[31]

The four proposals share a common premise: the current class action device needs to be fixed. Of course, the four scholars offer very different solutions: eliminate most class actions (Mullenix), reconfigure some of the basic elements (Bone, Murphy), or add a new layer of protection for the public (Helveston).

Given the fundamental shift in class action jurisprudence that I described in my *Decline* article,[32] one might expect that judges and practitioners would support the idea of rewriting Rule 23, even if they do not agree on how that should be done. In fact, most judges and attorneys seem to believe that, despite its flaws, the current Rule 23 works reasonably well. To my knowledge, no prominent judge or practitioner has publicly called for a major overhaul of Rule 23 or has asked the Advisory Committee on Civil Rules (the "Advisory Committee") to proceed in that direction.

Currently, the Class Action Subcommittee of the Advisory Committee (the "Subcommittee") is considering a wide array of possible changes to Rules 23. In materials prepared for the October 2014 and April 2015 Advisory Committee meetings, the Subcommittee identified possible "front burner" and

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[28] Mollie A. Murphy, *Rule 23(b) After* Wal-Mart*: (Re)Considering a "Unitary" Standard*, 64 BAYLOR L. REV. 721, 768 (2012).

[29] *Id.* at 769.

[30] Max Helveston, *Promoting Justice Through Public Interest Advocacy in Class Actions*, 60 BUFF. L. REV. 749, 753 (2012).

[31] *Id.*

[32] Klonoff, *supra* note 1, at 733–35.

"back burner" issues for class action rulemaking.[33] The list has been further culled in the November 2015, April 2016, and June 2016 materials.[34] The list does not include a fundamental overhaul of Rule 23.[35] Nor was there any such suggestion in the memorandum that was submitted in December 2015 to the Standing Committee on Rules of Practice and Procedure.[36] To the contrary, all of the possible changes that the Committee is considering can best be described as incremental.[37] Also, in the dozens of written submissions provided to the Subcommittee, virtually no one has advocated the kinds of structural changes urged by Mullenix, Bone, Murphy, and Helveston.[38]

For several reasons, I am confident that that lack of interest in overhauling Rule 23 will continue throughout the next decade.

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[33] *See* ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 500–11 (Oct. 2014); ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 243–97 (Apr. 2015) [hereinafter ADVISORY COMM. APR. 2015 AGENDA BOOK]; *see also* Memorandum from the Rule 23 Subcomm. of the Advisory Comm. on Civil Rules, Introductory Materials: Mini-Conference on Rule 23 Issues (Sept. 11, 2015) (describing issues that the Subcommittee is exploring).

[34] ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 87–91 (Nov. 2015) (November 2015 Subcommittee report and materials); ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 95–177 (Apr. 2016) (April 2016 Subcommittee report and materials, including action items and items "on hold") [hereinafter ADVISORY COMM. APR. 2016 AGENDA BOOK]; COMM. ON RULES OF PRACTICE AND PROCEDURE, AGENDA BOOK 260–61 (June 2016) (listing topics "still under study").

[35] The possibility of a "[f]undamental revision of Rule 23" was mentioned as a "[b]ack burner" issue in the Advisory Committee's March 2012 materials, *see* ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 465 (Mar. 2012), but the topic was subsequently removed even from the "back burner" list.

[36] *See* Memorandum from John D. Bates, Chair, Advisory Comm. on Civil Rules, to Jeffrey S. Sutton, Chair, Comm. on Rules of Practice and Procedure 1–27 (Dec. 11, 2015), *in* COMM. ON RULES OF PRACTICE AND PROCEDURE, AGENDA BOOK 189–215 (Jan. 2016) [hereinafter DEC. 11, 2015 REPORT OF THE ADVISORY COMM.].

[37] For example, among the issues identified in April 2015 for conceptual sketches are settlement approval criteria; settlement-class certification; *cy pres* settlements; approaches for dealing with objectors; Rule 68 offers of judgment as applied to class actions; issue classes; and class action notice. ADVISORY COMM. APR. 2015 AGENDA BOOK, *supra* note 33, at 245–97.

[38] One exception is a submission by Professors Steinman, Davis, Resnik, and Lahav. Their February 24, 2015, proposal would, among other things, eliminate the numerosity, commonality, and typicality requirements of Rule 23(a), leaving only adequacy of representation. Letter from Adam Steinman et al. to Edward H. Cooper et al. (Feb. 24, 2015). It would also add a requirement that the class action would "materially advance the resolution of multiple civil claims in a manner superior to other realistic procedural alternatives." *Id.* In addition, an August 9, 2013, submission on behalf of several organizations representing the defense bar called for an "opt-in" requirement for Rule 23(b)(3) class actions. Memorandum from Lawyers for Civil Justice et al. to Civil Rules Advisory Comm. and its Rule 23 Subcomm. 19 (Aug. 9, 2013), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_class_action_reform_080913.pdf. None of those proposals has persuaded the Advisory Committee to consider fundamentally overhauling Rule 23. In addition, there is also a submission to embody the "no injury" concept within Rule 23 through a number of amendments. Comment from Lawyers for Civil Justice to Advisory Comm. on Civil Rules & Rule 23 Subcomm. 3 (Mar. 14, 2016), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_with_shepherd_study_3-14-16.pdf; *see infra* text accompanying notes 43–79 (discussing no-injury classes).

First, there is now a substantial body of case law applying the existing Rule 23. Any major conceptual change (short of simply eliminating entire categories of Rule 23(a) or Rule 23(b), as Professors Mullenix and Bone have proposed) would mean drafting a new rule and developing case law that implements and interprets that rule. For example, under Professor Murphy's proposal to collapse the Rule 23(b) categories, cases construing the four current Rule 23(b) categories would be rendered largely irrelevant. And Professor Helveston's proposal to add a "Public Advocate" would give rise to numerous issues, including the weight courts should give to the Advocate's opinions, criteria for addressing challenges to the Advocate for bias or conflict of interest, and the standards for ex parte communications with the lawyers, parties, and the court. In my opinion, none of the proponents of major changes to Rule 23 (including the four professors described above) has made the case for substantially changing Rule 23.

Second, structural changes to Rule 23—especially those aimed at making class actions either harder or easier to bring—would be highly contentious. The class action bar would be sharply divided, and those who stood to lose would lobby hard to avoid an adverse outcome. The business community would seek to preserve the great success that it has had in convincing courts to restrict class actions under the current rule.[39] At the same time, significant class actions are still being filed, certified, settled, and (in some instances) tried.[40] Thus, while no stakeholder is entirely satisfied, the status quo is not sufficiently egregious for anyone to take on the Herculean task of pursuing a revamped class action rule. Indeed, Professor Mullenix—whose proposal to eliminate all class actions for damages would eviscerate the device—concedes that her proposal is "dead on arrival" and is nothing more than an "impractical ivory tower professorial musing[]."[41]

Third, it is revealing (as noted above) that, in the Advisory Committee's current process of examining possible changes to Rule 23, neither the plaintiffs' bar nor the defense bar has pressed for a fundamental change to Rule 23.[42] Surely, both camps understand that, after its current review, the Advisory Committee may not return to Rule 23 for many years.

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39 *See* Klonoff, *supra* note 1, at 745–823.

40 *See infra* Parts II.A.1–2, III.A.

41 Mullenix, *supra* note 24, at 449.

42 *See supra* notes 33–37 and accompanying text.

Finally, the lack of momentum for major rule change is an indication that, despite its flaws, and despite serious setbacks for plaintiffs, Rule 23 is working reasonably well even after almost fifty years. It would thus be difficult to make a case that the Rule as written is so flawed that the rulemakers should start from scratch.

B. One Possible Exception: "No-Injury" Classes May Be Eliminated

There is one serious caveat to the above prediction of no major change to the class action device: It is possible that, by 2026, "no-injury" classes will be barred. That change will come, if at all, not by a rule change but by case law or statute.

1. "No-Injury" Class Litigation

The so-called no-injury case can arise, for example, in the consumer context, where the class representative owns a product that has failed in some way, but a significant number of class members own similar products that have not failed.[43] It can also arise in the employment context—for example, where a class representative sues for overtime pay, but at least some of the unnamed class members did not work overtime or otherwise are not entitled to overtime pay. It can arise in toxic tort cases in which the remedy sought is medical monitoring.[44] It can arise in a multi-state class action based on state law when, in some states, no cause of action exists. And it can arise in data breach cases where class members sue for fear of adverse repercussions from the disclosure of personal data.[45]

In recent years, defense attorneys and the business community have devoted major effort to invalidating such "no-injury" classes, relying heavily on the "case or controversy" requirement of Article III of the U.S. Constitution.[46] Some courts have rejected that argument, holding that "a class

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[43] *See generally Fairness in Class Action Litigation Act of 2015: Hearing Before the Subcomm. on the Constitution and Civil Justice of the Comm. on the Judiciary H.R.*, 114th Cong. 85 (2015) [hereinafter *Fairness Hearing*] (testimony of Andrew Trask, Counsel, McGuireWoods LLP) (defining a no-injury class action).

[44] *See* Day v. NLO, Inc., 144 F.R.D. 330, 335–36 (S.D. Ohio 1992) (explaining the nature of a medical monitoring claim), *vacated in part on other grounds*, *In re* NLO, Inc., 5 F.3d 154, 160 (6th Cir. 1993).

[45] *See, e.g.*, *Fairness Hearing*, *supra* note 43 (describing a variety of cases that purportedly fall into the "no-injury" category).

[46] U.S. CONST. art. III.

action is permissible so long as at least one named plaintiff has standing."[47] Other courts, however, have held that all class members must have standing.[48] Defendants also argue that no-injury classes inflate the number of claims (by combining meritorious and invalid claims), thereby increasing the pressure on defendants to settle.[49]

Plaintiffs respond in a number of ways. They argue that (1) Article III only requires that the named plaintiff (and not the unnamed class members) demonstrate standing; (2) the question whether a particular class member was injured is a merits issue that is not appropriate at the class certification stage; and (3) the very notion of lack of injury is, in many cases, wrong as a factual and legal matter.

This Article III issue was litigated in two consumer class actions: *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*,[50] and *Butler v. Sears, Roebuck & Co*.[51] In both cases, purchasers of washing machines complained that the machines were defective because they were susceptible to mold growth.[52] The defendants argued that most class members had not personally experienced the mold problem, and therefore the suit violated Article III's "case or controversy" requirement.[53] Both the Sixth Circuit and the Seventh Circuit, in interlocutory appeals from class certification, rejected the defendants' arguments that certification of the purported "no-injury" classes violated Article III.[54] A leading defense firm, Mayer Brown, sought Supreme Court review in both cases. Supporting review were nine amicus briefs filed by twelve organizations, many written by prestigious law firms.[55] Clearly, the class action defense bar and the business

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[47] *See, e.g.*, Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 364 (3d Cir. 2015); Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 676 (7th Cir. 2009).

[48] *See, e.g.*, Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing.").

[49] *See, e.g.*, *Fairness Hearing*, *supra* note 43, at 56–67 (statement and testimony of Mark Behrens, Int'l Ass'n of Def. Counsel).

[50] 722 F.3d 838 (6th Cir. 2013).

[51] 702 F.3d 359 (7th Cir. 2012), *vacated*, 133 S. Ct. 2768 (2013), *judgment reinstated*, 727 F.3d 796 (7th Cir. 2013).

[52] *In re Whirlpool Corp.*, 722 F.3d at 844; *Butler*, 702 F.3d at 361.

[53] *In re Whirlpool Corp.*, 722 F.3d at 849; *Butler*, 702 F.3d at 362.

[54] *In re Whirlpool Corp.*, 722 F.3d at 857; *Butler*, 702 F.3d at 362–63.

[55] Amici included, among others, the U.S. Chamber of Commerce, the National Association of Manufacturers, the Product Liability Advisory Council, and the Washington Legal Foundation. Law firms authoring the briefs included, for example, King & Spalding; Skadden, Arps, Slate, Meagher & Flom; Gibson, Dunn & Crutcher; and Cleary, Gottlieb, Steen & Hamilton.

community were engaged in a coordinated (and expensive) strategy to convince the Supreme Court to impose yet another major barrier to class certification. In opposing certiorari, the plaintiffs argued that all purchasers were harmed under applicable state law because they alleged that all of the washers accumulated mold and that expensive measures were required to remedy the problem for every machine.[56] The Supreme Court denied certiorari in both cases.[57]

A similar issue arises in data breach class actions brought against companies that have compromised customers' personal information, whether or not that information actually led to financial injury. For example, in *Remijas v. Neiman Marcus Group, LLC*, the Seventh Circuit held that the plaintiffs—customers who had used payment cards at the defendant's stores prior to a large data breach—had Article III standing, even though only some class members alleged subsequent fraudulent charges.[58] The court reasoned that class members "should not have to wait until hackers commit identity theft or credit-card fraud in order to give the class standing, because there is an 'objectively reasonable likelihood' that such injury will occur."[59] On the other hand, the Third Circuit held in *Reilly v. Ceridian Corp.* that the plaintiffs lacked standing without a showing that the compromised data at issue was actually used to cause financial injury.[60] It concluded that "misuse [of the data was] only speculative" and that the plaintiffs "incurred expenses in anticipation of future harm, therefore, [was] not sufficient to confer standing."[61] The Supreme Court denied certiorari in *Reilly*, and no petition for certiorari was filed in *Remijas*.[62]

Recently, however, the Supreme Court took up the "no-injury" issue in two separate class actions. In *Spokeo, Inc. v. Robins*,[63] the Supreme Court granted certiorari on the question "[w]hether Congress may confer Article III standing

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[56] *See* Brief in Opposition at 1, Whirlpool Corp. v. Glazer, 134 S. Ct. 1277 (2014) (No. 13-431); Brief in Opposition at 4, Sears, Roebuck & Co. v. Butler, 134 S. Ct. 1277 (2014) (No. 12-1067).

[57] *Whirlpool Corp.*, 134 S. Ct. 1277; *Butler*, 134 S. Ct. 1277. The Supreme Court also denied certiorari in *Wells Fargo Bank, NA v. Gutierrez*, in which the Ninth Circuit affirmed a class judgment over the defendant's argument that numerous members of the class had not been injured by the conduct complained of. 589 F. App'x 824 (9th Cir. 2014), *cert. denied*, 83 U.S.L.W. 3803 (U.S. Apr. 4, 2016) (No. 14-1230).

[58] 794 F.3d 688, 696–97 (7th Cir. 2015).

[59] *Id.* at 693.

[60] 664 F.3d 38, 46 (3d Cir. 2011).

[61] *Id.* at 46.

[62] Reilly v. Ceridian Corp., 132 S. Ct. 2395 (2012) (mem.) (denying certiorari).

[63] Spokeo, Inc. v. Robins, No. 13-1339, 2016 WL 2842447 (U.S. May 16, 2016).

upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute."[64] In *Spokeo*, Robins filed a putative class action under the Fair Credit Reporting Act (FCRA),[65] claiming that the web site known as "Spokeo" posted inaccurate information about him, thereby harming his prospects for finding work.[66] The defendant argued that Robins had not suffered actual injury but was merely speculating about the potential for harm.[67] The district court dismissed the case for lack of standing, but the Ninth Circuit reversed, holding that Robins had adequately alleged that his statutory rights had been violated, and that he had a personalized interest in the handling of his credit information.

The Supreme Court handed down its opinion in *Spokeo* just as this Article was going to press. The decision turned out to be less sweeping than many had hoped (or feared). It is a narrow 6–2 opinion that, while reversing the Ninth Circuit's finding of standing, contains language useful to both plaintiffs and defendants. (Indeed, it is significant that Justice Breyer and Justice Kagan, who generally side with plaintiffs in class action cases, joined the majority.)

The majority reasoned that the Ninth Circuit erred in focusing solely on particularity and not on concreteness, since both are elements of Article III standing. According to the Supreme Court, in assessing whether alleged injury is concrete, a court may consider both tangible and intangible injuries. But the fact that Congress has "identif[ied] and elevat[ed]" intangible interests "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."[68] At the same time, even a "risk of harm" can satisfy the concreteness requirement.[69] As the Court noted by way of example, "the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure."[70]

Turning to Robins's particular situation, the Court noted that a credit reporting agency's consumer information "may be entirely accurate," or it may

64 Brief for Petitioner at i, *Spokeo*, 2016 WL 2842447 (No. 13-1339).
65 15 U.S.C. § 1681(a) (2012).
66 *Spokeo*, 2016 WL 2842447, at *2–4.
67 Reply Brief for the Petitioner at 1, *Spokeo*, 2016 WL 2842447 (No. 13-1339).
68 *Spokeo*, 2016 WL 2842447, at *7.
69 *Id.* at *8.
70 *Id*.

be inaccurate in an immaterial way, such as "an incorrect zip code."[71] The Court thus remanded the case to the Ninth Circuit to consider, in the first instance, whether the alleged injury was sufficiently concrete.[72]

Justice Ginsburg, joined by Justice Sotomayor, dissented. According to the dissent, there was no need for a remand because Robins had alleged not an incorrect zip code but "misinformation about his education, family situation, and economic status, inaccurate representations that could affect his fortune in the job market."[73]

To some extent, the decision was a victory for the defendant; the Court rejected the argument that a statutory injury is automatically sufficient for Article III purposes, and thus it remanded the case to the Ninth Circuit. At the same time, however, the Court's opinion provides significant room to find that Article III was satisfied. The opinion arguably paves the way for the Ninth Circuit, on remand, to find (as Justice Ginsburg noted) that Robins's allegations about misinformation regarding "his education, family situation, and economic status" were sufficient for Article III purposes.[74]

In all events, the focus of *Spokeo* is on statutory damages. The Court did not use the case as a vehicle to make sweeping new pronouncements about standing in class actions. Indeed, *Spokeo* does not even purport to address the question of whether, in a class action, *all* or most class members must allege Article III injury (or whether it is sufficient, for purposes of class certification, that at least one class representative has alleged particularity and concreteness).[75]

The second case in which the Court granted certiorari to consider Article III standing in the class action context was *Tyson Foods, Inc. v. Bouaphakeo*.[76] In *Tyson Foods*, a wage-and-hour suit claiming unpaid overtime, the petitioner raised (as one of two questions presented) the issue of "[w]hether a class action may be certified or maintained under Rule 23(b)(3), or a collective action

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[71] *Id.*

[72] Justice Thomas joined the majority, but wrote separately to elaborate on how standing requirements apply to different types of rights.

[73] *Id.* at *16 (Ginsburg, J., dissenting).

[74] *Id.*

[75] Rather, the Court merely quoted prior case law for the uncontroversial proposition that, even though a case is a class action, the named plaintiffs must show that *they* were injured, not just that other unnamed class members suffered injury. *Id.* at *5 n.6.

[76] 136 S. Ct. 1036 (2016).

certified or maintained under the Fair Labor Standards Act [FLSA], when the class contains hundreds of members who were not injured and have no legal right to any damages."[77] Although the Court did address a separate question of whether statistical evidence was properly admitted in the case,[78] it did not address the Article III question. Instead, the Court concluded that "the question whether uninjured class members may recover is one of great importance," but it was not "a question yet fairly presented [in *Tyson Foods*], because the damages award has not yet been disbursed, nor does the record indicate how it will be disbursed."[79]

In short, as *Tyson Foods* indicated, and as *Spokeo* confirms, the Supreme Court has not provided the last word regarding how Article III applies in the context of a class action.

2. *Legislative Attempts to Limit "No-Injury" Classes*

The defense bar's attack on "no-injury" classes has focused not only on the courts. With strong urging from the business community, Congressmen Bob Goodlatte and Trent Franks introduced H.R. 1927, the "Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016."[80]

The proposed Act contains controversial language requiring proof of common injury of "the same type and scope" as that suffered by the class representatives:

> No Federal court shall certify any proposed class seeking monetary relief for personal injury or economic loss unless the party seeking to maintain such a class action affirmatively demonstrates that each proposed class member suffered the same type and scope of injury as the named class representative or representatives.[81]

Read literally to require "the same type and scope of injury" by every class member, the legislation could have far-reaching consequences. As Professor Alexandra Lahav testified before the Judiciary Committee in commenting on a prior version of H.R. 1927 (which required "the same type and extent of injury" by every class member),

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77 Petition for Writ of Certiorari at i, *Tyson Foods, Inc.*, 136 S. Ct. 1036.
78 *See infra* text accompanying notes 184–93.
79 *Tyson Foods, Inc.*, 136 S. Ct. at 1050.
80 H.R. 1927, 114th Cong. § 1 (2016).
81 H.R. 1927 § 2(a).

> [S]uppose a bank charges an illegal fee of $2 to every customer when he or she withdraws funds with a debit card. During the class period, James engaged in 15 transactions and Sarah engaged in 20. Accordingly, James's loss is $30 and Sarah's is $40. Assuming that the court would interpret the loss of funds as an "impact" on their "property," under this bill the court would still not be permitted to certify this case as a class action because the extent of their losses is different: Sarah has lost $10 more than James and H.R. 1927 requires that the *extent* of their injury be the same.[82]

Even if the "same type and scope of injury" language is not taken literally, but instead is simply interpreted to require *some* injury by each class member, the bill could have major consequences. For example, the law could be used to foreclose class certification in many consumer product cases. It is frequently the case that a product with a propensity to fail works fine for some consumers but not for others. Indeed, wholly apart from consumer cases, there are many kinds of cases in which a class could include members who arguably have not suffered injury. As one consumer advocate blogger noted, the bill "would preclude numerous class actions over predatory lending practices, anti-trust violations, employment law violations, unfair bank overdraft policies, denial of insurance benefits, and more."[83]

Thus, it is not surprising that H.R. 1927 has generated significant controversy and debate. Liberal groups have condemned H.R. 1927. The American Association for Justice, for example, argues that the proposal "stacks the deck against Americans who seek to hold corporations accountable in court if they break consumer protection laws."[84] A columnist for the *Los Angeles Times* described the Fairness in Class Action Litigation Act as unfair and thus "shamelessly titled."[85] Public Citizen, an advocacy group, has said that "'[t]he aim [of the bill] is to wipe out class-action lawsuits.'"[86] The American Bar Association, in addition to accusing Congress of circumventing the Judicial

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[82] *Fairness Hearing*, *supra* note 43, at 76 (statement of Alexandra D. Lahav, Professor, Univ. of Conn. Sch. of Law).

[83] *House Judiciary Committee: Not Such a Class Act*, THEPOPTORT.COM (Apr. 28, 2015), http://www.thepoptort.com/2015/04/house-judiciary-committee-not-such-a-class-act.html.

[84] *AAJ Statement on the Fairness in Class Action Litigation Act of 2015 Markup in the House Judiciary Committee*, AM. ASS'N FOR JUSTICE (June 24, 2015), https://www.justice.org/news/aaj-statement-fairness-class-action-litigation-act-2015-markup-house-judiciary-committee.

[85] David Lazarus, *Orwellian-Named Fairness in Class Action Bill Aims to Restrict Consumers' Access to Court*, L.A. TIMES (June 30, 2015, 4:00 AM), http://www.latimes.com/business/la-fi-lazarus-20150630-column.html.

[86] *Id.*

Conference's process for amending rules of civil procedure, asserted that "the proposed legislation would severely limit the ability of victims who have suffered a legitimate harm to collectively seek justice in a class action lawsuit."[87] By contrast, a letter by the Chamber of Commerce and more than two dozen other entities—addressed to Chairman of the House Judiciary Committee Bob Goodlatte (and to Congressman John Conyers, the ranking Democrat on the Committee)—stated that the "bill is very modest legislation."[88] In testimony at a hearing on the bill, John Beisner, on behalf of the Chamber of Commerce, asserted that "[a]doption of the proposed legislation would not mark a radical change in federal class action law."[89]

H.R. 1927 came before the full House for a vote on January 8, 2016, passing by a vote of 211–188 (predominantly along party lines).[90] The bill, however, is likely to face significant opposition in the Senate.[91] Moreover, shortly before the House vote, the White House released a statement opposing the bill and signaling a likely veto should it reach the President.[92] Nonetheless, even though it is not likely that the bill will become law any time soon, the prospect of such a law has the plaintiffs' bar very nervous.

In sum, the impact of such "fairness" legislation—or of a definitive Supreme Court ruling barring no-injury classes—would be enormous.

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[87] Letter from Thomas M. Susman, Dir., Am. Bar Ass'n Governmental Affairs Office, to Bob Goodlatte, Chairman, House Judiciary Comm. (June 23, 2015), http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2015jun23_classaction.authcheckdam.pdf.

[88] Letter from The Indoor Environment & Energy Efficiency Association et al., to Bob Goodlatte, Chairman, House Judiciary Comm. & John Conyers, Ranking Member, House Judiciary Comm. (June 23, 2015), https://www.uschamber.com/sites/default/files/150623_coalition_hr1927_fairnessinclassactionlitigation_goodlatte_conyers.pdf.

[89] *Fairness Hearing*, *supra* note 43, at 54 (statement of John H. Beisner, U.S. Chamber of Commerce). Additionally, before recommending the bill to the full House, the House Judiciary Committee added language limiting the Act to classes "seeking monetary relief for personal injury or economic loss," thus excluding classes seeking only injunctive relief, such as some civil rights suits. H.R. REP. NO. 114-328, at 2 (2015). That added language does little to limit the sweep of the bill, which still covers all class actions for money in which the statutory test is met. *Id.*

[90] *H.R. 1927—Fairness in Class Action Litigation & Furthering Asbestos Claim Transparency Act of 2016*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/1927/actions (last visited Jan. 10, 2016).

[91] Peter Hayes, Perry Cooper & Stephanie Cumings, *Asbestos, Class Action Bill Faces Steep Senate Hurdle*, BLOOMBERG BNA (Jan. 8, 2016), http://www.bna.com/asbestos-class-action-n57982065906/.

[92] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 1927—FAIRNESS IN CLASS ACTION LITIGATION AND FURTHERING ASBESTOS CLAIM TRANSPARENCY ACT OF 2015 (2016), https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr1927r20160106.pdf.

II. STATE OF CLASS ACTION JURISPRUDENCE IN 2026

As noted, I do not believe that Rule 23 itself will be fundamentally altered—although I do believe that there is a serious possibility that either the Supreme Court or Congress could repudiate "no-injury" classes. But even if the basic structure of Rule 23 remains intact, and even if "no-injury" classes survive, I believe that the courts will continue to chip away at the class action device.

To begin with, as I explain below, the next decade is likely to witness a continuing decline in certain kinds of class actions, including consumer, employment, and mass tort cases. On the other hand, some courts will resist some of the most troublesome trends. Defendants will push too hard in relying on pro-defendant precedents and will suffer setbacks. Consequently, defendants will search for new and creative rationales for challenging class certification. As I explain, defendants are likely to look to typicality, predominance, and superiority in fashioning such arguments.

Another important trend is that courts are now giving greater scrutiny than ever to allegations of ethical improprieties by class counsel and objectors. Until recently, attorneys in class actions were reluctant to make personal attacks on other attorneys, and courts were uncomfortable relying on alleged misconduct in adjudicating Rule 23 issues. That situation is changing. Lawyers in class actions are no longer shy about leveling ethical charges against other lawyers. In class settlements, objectors are frequently claiming misconduct by class counsel, and courts are becoming more receptive to such arguments. Correspondingly, I believe that plaintiffs' counsel will increasingly challenge the ethical conduct of attorneys who seek to derail class action settlements on behalf of objecting class members.

Finally, I explain that, in recent years, the class action jurisprudence has been authored largely by a handful of appellate judges, and I offer my prediction that that trend will continue (although the faces are likely to change as some of those judges retire from the bench). This is an important trend: Because such judges are inclined to form strong views either for or against class actions, and because their leadership in the field gives them great clout among their colleagues, the future of class actions will rest in the hands of that small subset of judges and will take shape in large part based on their approaches to aggregate litigation.

A. Predictions by Class Action Types[93]

1. Securities Class Actions Will Remain Common

In *Decline*, I describe how federal appellate courts have cut back on various kinds of class actions.[94] One exception that I discussed, however, was securities fraud class actions.[95] I explained that, notwithstanding the enactment of the Private Securities Litigation Reform Act of 1995 (PSLRA),[96] which was designed to rein in securities fraud class actions, such actions continued to thrive.[97] I believe that securities fraud suits will remain frequent in the next decade.

The U.S. Supreme Court has had several opportunities to shut down many securities fraud class actions but in each case has declined to do so. I discussed two of those cases in my *Decline* article[98]:

- In *Erica P. John Fund, Inc. v. Halliburton Co.* (*Halliburton I*), the Court unanimously held that a securities fraud plaintiff need not prove that the defendant's misconduct caused the economic loss at issue (a concept known as "loss causation") to certify a class.[99]

- In *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, the Court held that proof of the materiality of the alleged misrepresentations was not a prerequisite to class certification.[100]

After the publication of my *Decline* article, the Court handed down another pro-plaintiff securities decision—perhaps the most important of the three. In *Halliburton v. Erica P. John Fund* (*Halliburton II*), the Court addressed the question whether it should overrule the "fraud on the market" principle of *Basic, Inc. v. Levinson*.[101] That principle presumes that investors rely on public

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93 Class action lawsuits cover a wide spectrum of federal and state law. Because of space limitations, I cannot offer predictions for all kinds of class actions. I have chosen to focus in this Article on four areas—securities, consumer, employment, and mass tort—but many of the topics in this piece (such as the attacks on "no-injury" classes) could impact a wide variety of class actions.

94 *See generally* Klonoff, *supra* note 1.

95 *Id.* at 824–26.

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

97 Klonoff, *supra* note 1, at 825.

98 *See id.*

99 131 S. Ct. 2179, 2183 (2011).

100 133 S. Ct. 1184, 1191 (2013).

101 134 S. Ct. 2398, 2405 (2014) (discussing the principle of Basic, Inc. v. Levinson, 485 U.S. 224 (1988)).

information, including material misrepresentations, when the stock trades on a well-developed market.[102] *Basic* enables plaintiffs in class actions to avoid the argument that individual reliance issues defeat class certification.[103] The Court, in a portion of the opinion in which six Justices joined, refused to overrule *Basic*, rejecting a litany of arguments by Halliburton as to why the case was wrongly decided.[104]

To be sure, the *Halliburton II* Court did hold that "defendants must be afforded an opportunity before class certification to defeat the [fraud on the market] presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock."[105] The evidentiary opportunity afforded to defendants prevents the case from being characterized as a complete victory for plaintiffs. Nonetheless, I do not believe that that aspect of the case will have a major impact on the prosecution of securities fraud class actions. Although it was partially helpful to Halliburton itself,[106] and helpful to Best Buy and three of its executives in an Eighth Circuit case,[107] several other courts have been unpersuaded by defendants' efforts to rebut the *Basic* presumption with evidence presented at the class certification stage.[108] Moreover, as one defense firm noted, the opportunity to submit evidence afforded by *Halliburton II* is not novel or new; rather, it "has been a common approach to defending security fraud claims in the past."[109] In my opinion, the

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[102] *Id.* at 2408.

[103] *Id.*

[104] *Id.* at 2411–12, 2417.

[105] *Id.* at 2417. Because of that holding, the Court reversed the judgment, and thus Justices Thomas, Scalia, and Alito concurred in the judgment. *Id.* at 2425 (Thomas, J., concurring).

[106] Erica P. John Fund, Inc. v. Halliburton Co., 309 F.R.D. 251, 270–80 (N.D. Tex. 2015) (finding that defendant successfully rebutted *Basic* presumption for five of the six communications at issue, and certifying class as to one communication only).

[107] In *IBEW Local 98 Pension Fund v. Best Buy Co.*, No. 14-3178, 2016 WL 1425807 (8th Cir. Apr. 12, 2016), the court held in a split decision that Best Buy had presented strong evidence (from the plaintiffs' own expert) that the allegedly fraudulent statements had no impact on the price of Best Buy's stock. *Id.* at *6. The dissent maintained that the majority "misapplied the presumption of reliance standard at [the] class certification stage," because the plaintiffs had argued that the statements at issue "prevented the stock price from declining." *Id.* at *7–8 (Murphy, J., dissenting).

[108] *See, e.g.*, Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Fin. Corp., No. CV-10-J-2847-S, 2014 WL 6661918, at *1, *9–10 (N.D. Ala. Nov. 19, 2014); Aranaz v. Catalyst Pharm. Partners Inc., 302 F.R.D. 657, 670–73 (S.D. Fla. 2014); IBEW Local 98 Pension Fund v. Best Buy Co., Inc., No. 11-429, 2014 WL 4746195, at *6 (D. Minn. Aug. 6, 2014); McIntire v. China MediaExpress Holdings, Inc., 38 F. Supp. 3d 415, 434–35 (S.D.N.Y 2014); Wallace v. IntraLinks, 302 F.R.D. 310, 317–18 (S.D.N.Y. 2014) (all holding that the defendants failed to rebut the *Basic* presumption at the class certification stage).

[109] Thomas O. Gorman & Katherine Arnold, Halliburton*: Assessing Its Impact on Securities Class Actions*, DORSEY & WHITNEY (June 26, 2014), http://www.dorsey.com/eu-halliburton-impact-on-securities-class-actions/.

most important impact of *Halliburton II* is that the "fraud on the market" presumption will still be available in most securities fraud cases.

Recent statistics confirm that securities suits are still thriving two decades after the adoption of the PSLRA. A January 2015 report found that the "[n]umber of 10b-5 filings rebounded 14% after the *Halliburton II* decision was issued compared to when it was pending."[110] Another study found that 170 federal securities class actions were filed in 2014 (as compared with 166 in 2013),[111] rising to a seven-year high of 189 filings in 2015.[112] And yet another study noted that 2015 saw a seven-year high in securities class action settlements.[113]

There is a simple reason why securities fraud class actions have not been severely impacted by the overall decline in class actions: They are highly suitable for class certification. With the availability of the *Basic* presumption of reliance, individual issues are relatively rare. In virtually all securities fraud class actions, the common issues will resolve the case for everyone in the class; the classes are usually large and easily identifiable; and in most instances damages can be mathematically calculated based on the number of shares held during a specific time frame. Because of the suitability of securities fraud cases for aggregate adjudication, they have been able to weather such newly established requirements as more stringent commonality (*Dukes*), attacks on numerosity, and challenges to "trial by formula."[114] I predict that in the year 2026, securities fraud class actions will still be among the most frequently litigated class actions.

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[110] RENZO COMOLLI & SVETLANA STARYKH, NERA ECON. CONSULTING, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2014 FULL-YEAR REVIEW 1 (2015), http://www.nera.com/content/dam/nera/publications/2015/Full_Year_Trends_2014_0115.pdf.

[111] CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2013 YEAR IN REVIEW 1 (2014), https://www.cornerstone.com/getattachment/d88bd527-25b5-4c54-8d40-2b13da0d0779/Securities-Class-Action-Filings—2013-Year-in-Revie.aspx; CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2014 YEAR IN REVIEW 1 (2015), https://www.cornerstone.com/GetAttachment/52bfaa16-ff84-43b9-b7e7-8b2c7ab6df43/Securities-Class-Action-Filings-2014-Year-in-Review.pdf. The average number of new cases per year between 1997 and 2013 was 189. *Id.*

[112] Jonathan Stempel, *U.S. Securities Class Actions Rebound to 7-Year High*, REUTERS (Jan. 26, 2016, 12:01 AM), http://www.reuters.com/article/stocks-classaction-idUSL2N1591XM.

[113] Stephanie Forshee, *2015 Sees 5-Year High in Securities Class Action Settlements*, INSIDE COUNS. (Mar. 31, 2016), http://www.insidecounsel.com/2016/03/31/2015-sees-5-year-high-in-securities-class-action-s.

[114] *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011). At least one scholar, however, is concerned that the Supreme Court's recent arbitration case law could adversely affect securities class actions. *See infra* text accompanying notes 158–53.

2. *Public Interest Class Actions Seeking Structural Relief Will Remain Viable*

Another surprising area of strength, particularly in the wake of *Dukes* and other recent decisions eroding the class action device, involves public interest class action cases seeking structural relief. Juveniles, prisoners, immigrants, and disabled people have fared surprisingly well in recent years in seeking class certification.

For instance, in *D.G. ex rel. Strickland v. Yarbrough*, the district court refused to decertify—in light of *Dukes*—a class of foster children seeking declaratory and injunctive relief under Rule 23(b)(2) related to the state's alleged failure to adequately monitor their foster placements.[115] The court largely confined *Dukes* to the employment discrimination context, and noted that it was "not convinced [that] 'significant proof' [of a policy or practice of failing to monitor the safety of foster placements] is required for plaintiffs to resist defendants' motion to decertify, or whether some lesser standard is required outside of employment discrimination cases."[116] Likewise, in *Reid v. Donelan*, the district court certified a class of non-citizens who had been held in Massachusetts immigration detention facilities for more than six months without individualized bond hearings.[117] The defendant had allegedly applied a statute authorizing detention without opportunity for bond identically to each member of the class, and the court therefore found commonality satisfied because, under *Dukes*, "the answer to a single, legal question disposes of the claims of the entire class."[118] The court ultimately concluded that the class—which sought a single injunction or declaratory judgment—"fit[] neatly into Rule 23(b)(2)," and noted that the case was "precisely the type of case that *should* move forward as a class action."[119] And in *Lane v. Kitzhaber*, the district court certified a class of mentally and developmentally disabled persons alleging a systemic practice of employment discrimination, noting that under *Dukes* a challenge to a systemic policy or practice would continue to satisfy the commonality requirement.[120] It further reviewed the post-*Dukes* case law and concluded that the class was appropriate for certification under

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115 278 F.R.D. 635, 636, 646 (N.D. Okla. 2011).
116 *Id.* at 639.
117 297 F.R.D. 185, 187 (D. Mass. 2014).
118 *Id.* at 190–91.
119 *Id.* at 193–94.
120 283 F.R.D. 587, 594–98 (D. Or. 2012).

23(b)(2) because the class members sought a single injunction to enforce a state employment policy as opposed to individualized job placements.[121]

To be sure, *Dukes* has had some impact in the area of structural reform. For example, in *Jaime S. v. Milwaukee Public Schools*, the Seventh Circuit decertified a class of special education students alleging violations of the Individuals with Disabilities Education Act (IDEA) and seeking structural reform of the district's special education programs.[122] Citing *Dukes*, the court held that the commonality requirement was not satisfied because the plaintiffs failed to demonstrate a "question of law or fact that can be answered *all at once* and that the *single answer* to that question will resolve a central issue in all class members' claims."[123] The court also held that the district court erred in certifying the class for injunctive relief under 23(b)(2), finding that "highly individualized" injunctive relief would have been required in the case at hand, whereas, under *Dukes*, "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class."[124] Similarly, in *M.D. ex rel. Stukenberg v. Perry*, the Fifth Circuit overturned the district court's certification of a class of foster children seeking declaratory and injunctive relief under (b)(2), and remanded the case for "a rigorous analysis" of the commonality requirement under 23(a)(2) in light of *Dukes*.[125] Likewise, in *DL v. District of Columbia*, the D.C. Circuit overturned certification of a class of disabled children based on the commonality requirement articulated in *Dukes*.[126] The court stated that *Dukes* "instructs that holding that the [defendant school district] has violated the IDEA as to each class member is not enough to establish Rule 23(a) commonality, . . . in the absence of a uniform policy or practice that affects all class members."[127]

Overall, despite some setbacks, the cases give reason for some optimism. *Dukes*, no doubt, will pose obstacles in some cases, but the fact that important cases seeking structural relief continue to be certified is encouraging.

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121 *Id.* at 601–02.

122 668 F.3d 481, 486 (7th Cir. 2012).

123 *Id.* at 497.

124 *Id.* at 498–99 (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2015)).

125 675 F.3d 832, 838 (5th Cir. 2012).

126 713 F.3d 120, 121 (D.C. Cir.), *remanded*, 302 F.R.D. 1 (D.D.C. 2013). On remand, however, the district court certified four subclasses divided by the specific IDEA violation alleged and found the commonality requirement satisfied for each. 302 F.R.D. at 11–14.

127 713 F.3d at 128 (citation omitted).

3. *Consumer and Employment Class Actions Will Become Less Frequent Because of Arbitration Clauses*

Even if the business community's opposition to "no-injury" classes does not succeed, I believe that consumer and employment class actions will decline in the next decade.

In recent years, many companies have inserted arbitration clauses into a variety of contracts with the aim of prohibiting class action suits in court or arbitration.[128] In a number of cases, those clauses have been challenged on unconscionability and other grounds.[129] In two significant cases discussed in *Decline*[130]*—AT&T Mobility LLC v. Concepcion*,[131] and *American Express Co. v. Italian Colors Restaurant*[132]—the Supreme Court upheld such arbitration clauses. In *Concepcion,* the Court held that the Federal Arbitration Act (FAA)[133] preempted arguments that such arbitration clauses were unconscionable under state law.[134] In *American Express*, the Court rejected the argument that such clauses should be unenforceable if the effect is to preclude plaintiffs from vindicating their rights (in that case under the antitrust laws) because of the high costs of litigating the claims individually.[135]

On December 14, 2015, the Supreme Court decided *DIRECTV, Inc. v. Imburgia*, in which DIRECTV challenged the refusal of California's state appellate courts to enforce an arbitration clause with a class action waiver.[136] The state intermediate court had refused to require enforcement of that clause in the context of two class actions filed in state court, and the California Supreme Court denied review.[137] The intermediate court found that the issue was governed entirely by state law, and thus it did not address preemption under the FAA.[138] Under the arbitration agreement at issue, the clause was unenforceable if the "law of your state" made the waiver of class arbitration unenforceable.[139] Such a clause, according to the Supreme Court, was

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128 Klonoff, *supra* note 1, at 816.
129 *See, e.g.*, *id.* at 818.
130 *Id.* at 817–23.
131 131 S. Ct. 1740 (2011).
132 133 S. Ct. 2304 (2013).
133 9 U.S.C. § 2 (2012).
134 *Concepcion*, 131 S. Ct. at 1756.
135 *American Express*, 133 S. Ct. at 2307.
136 136 S. Ct. 463, 466–68 (2015).
137 Imburgia v. DIRECTV, Inc., 225 Cal. App. 4th 338, 347 (Cal. Ct. App. 2014).
138 *Id.* at 344, 346–47.
139 *DIRECTV*, 136 S. Ct. at 466.

unenforceable in 2005 based on a California Supreme Court decision, but that approach was preempted by the FAA.[140]

In a decision written by Justice Breyer, the Court emphasized that *Concepcion* was binding on all courts even though "it was a closely divided case, resulting in a decision from which four Justices dissented."[141] In her dissent, Justice Ginsburg opined that the phrase "law of your state" could reasonably be read not to include the preemptive effect of federal law and thus DIRECTV was bound by the terms of its contract—which gave consumers a defense for state law rendering the clause unenforceable.[142] She noted that *Concepcion* and its progeny (including *DIRECTV*) had "resulted in the deprivation of consumers' rights to seek redress for losses, and, turning the coin, . . . insulated powerful economic interests from liability for violations of consumer-protection laws."[143] Disturbingly, Justice Ginsburg's dissent attracted only one other vote (Justice Sotomayor).[144] Both Justice Breyer (who wrote the dissent in *Concepcion*[145]) and Justice Kagan (who wrote the dissent in *American Express*[146]) joined the majority in *DIRECTV*, with Justice Breyer going so far as to write the opinion for the majority.[147] The fact that Justices Breyer and Kagan have refused to read *Concepcion* narrowly is a particularly troubling feature of *DIRECTV*, since Justice Ginsburg offered a very credible and principled rationale for deciding the case the other way.[148]

At least one commentator, defense attorney and blogger Andrew Trask, believes that *Concepcion* and its progeny will not have a drastic impact on class actions, and that those who argue otherwise are engaging in

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140 *Id.*

141 *Id.* at 468.

142 *Id.* at 473–75 (Ginsburg, J., dissenting).

143 *Id.* at 477.

144 *Id.* at 471.

145 131 S. Ct. 1740, 1756 (2011) (Breyer, J. dissenting).

146 133 S. Ct. 2303, 2313 (2013) (Kagan, J. dissenting).

147 *DIRECTV*, 136 S. Ct. at 465. Justice Thomas dissented, but did so on the ground that, in his view, the FAA did not apply to proceedings in state court. *Id.* at 471 (Thomas, J., dissenting).

148 The Supreme Court granted certiorari in another FAA preemption case, *MHN Government Services, Inc. v. Zaborowski*. 136 S. Ct. 27 (2015). That case, a collective action under the Fair Labor Standards Act (FLSA) rather than a class action, involved the severability and enforceability of arbitration provisions in an employment contract where only some of those provisions were held unconscionable under state law. The defendant argued that, based on the FAA's preference for enforcement of arbitration agreements, the Ninth Circuit erred in affirming the district court's refusal to sever the unconscionable provisions and enforce the remainder of the arbitration clause. *See* Petition for a Writ of Certiorari at 1–2, 10, *MHN Gov't Servs., Inc.*, 136 S. Ct. 27 (No. 14-1458). The case was later removed from the Court's calendar, however, after the parties reached a settlement.

"hyperbole."[149] Trask argues that, in many instances, plaintiffs still have potentially viable legal arguments for challenging arbitration clauses notwithstanding *Concepcion*.[150]

Most commentators, however, predict that this line of cases will result in major cutbacks in class actions, especially in the consumer and employment contexts.[151] Professor Brian Fitzpatrick is one such commentator.[152] In a recent article, he explained that both consumers and employees "are in transactional relationships with the businesses that they sue."[153] He noted that, even if consumers do not sign contracts with arbitration clauses (as they do, for example, for cell phones), companies can put binding language on the packaging of products.[154] And in the case of employment contracts, "businesses can (and often do) ask their employees to sign contractual agreements, including clauses to arbitrate suits that might arise."[155]

Although Fitzpatrick does acknowledge that "the empirical evidence does not yet bear out a flight to class action waivers in the consumer and employment context," he still argues that "it is only a matter of time" before businesses adopt arbitration clauses more broadly in the consumer and employment contexts.[156] Similarly, Professor Einer Elhauge argues that "it is

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149 *See* Klonoff, *supra* note 1, at 821 & n.546 (discussing Andrew J. Trask, *Arbitration Strategy After* AT&T Mobility v. Concepcion, 40 PROD. SAFETY & LIAB. REP. (BNA) 110 (2012), which characterizes dire predictions as "hyperbole").

150 *See* Trask, *supra* note 149; *accord, e.g.*, Richard Frankel, Concepcion *and Mis*-Concepcion*: Why Unconscionability Survives the Supreme Court's Arbitration Jurisprudence*, 2014 J. DISP. RESOL. 225.

151 *See, e.g.*, Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 467 (2011) ("[T]he Court appears to have placed an insurmountable obstacle in the path of consumer efforts to vindicate low-value claims."); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 623 (2012) ("[M]ost class cases will not survive the impending tsunami of class action waivers."); Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 716–17 (2012) ("*Concepcion* is giving companies far greater power than they previously had to use arbitral class action waivers to protect themselves from class actions."); *cf.* Andrew J. Pincus & Archis A. Parasharami, *Supreme Court Rejects Challenge to Arbitration Agreements*, MAYER BROWN: CLASS DEF. BLOG (June 20, 2013), https://www.classdefenseblog.com/2013/06/supreme-court-rejects-challenge-to-arbitration-agreements/ (opining that *American Express* "eliminated the last significant obstacle" to widespread arbitration and "sen[t] a clear message that . . . courts cannot refuse to enforce arbitration agreements simply because they bar class actions").

152 *See* Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 163 (2015).

153 *Id.* at 176.

154 *Id.* at 176–77.

155 *Id.* at 176.

156 *Id.* at 193.

hard to see why all businesses would not . . . insert arbitration clauses into their contracts that preclude class arbitration."[157]

When Fitzpatrick wrote his piece, he could find no empirical studies in the employment area.[158] Since then, survey evidence has supported his pessimistic predictions regarding the impact of *Concepcion* and *American Express* in the employment context. In April 2015, the *Wall Street Journal* reported on a study conducted by the defense firm of Carlton Fields Jorden Burt LLP (surveying 350 companies), which found that in 2014, 43% of companies used arbitration clauses (precluding class action claims) in the employment context, up from 16% in 2012, the year after *Concepcion*.[159] It is all but certain that this trend will continue. Why would employers risk class action discrimination suits when there is an easy solution that has the imprimatur of the U.S. Supreme Court?

Were it not for the impact of *Concepcion*, there might have been reason for some optimism about the future of employment class actions notwithstanding *Dukes*. Although *Dukes* has been fatal to a number of employment discrimination class actions,[160] plaintiffs have been attentive to the dictates of *Dukes* and in many instances have brought less expansive claims.[161] Thus, the

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[157] Einer Elhauge, *How* Italian Colors *Guts Private Antitrust Enforcement by Replacing It with Ineffective Forms of Arbitration*, 38 FORDHAM INT'L L.J. 771, 775 (2015).

[158] Fitzpatrick, *supra* note 152, at 191.

[159] Lauren Weber, *More Companies Block Employees from Filing Suits*, WALL ST. J. (Mar. 31, 2015, 1:51 PM), http://www.wsj.com/articles/more-companies-block-staff-from-suing-1427824287. The National Labor Relations Board (NLRB), however, has resisted that trend, repeatedly ruling that employers cannot require employees to waive class action rights. *See* Aaron Vehling, *Only High Court Can Settle NLRB's Fight Over Class Waivers*, LAW360 (Jan. 7, 2016, 12:36 AM), http://www.law360.com/articles/742780/only-high-court-can-settle-nlrb-s-fight-over-class-waivers.

[160] *See, e.g.*, Davis v. Cintas Corp., 717 F.3d 476, 484–89 (6th Cir. 2013) (holding that putative class of female employees alleging gender discrimination failed to satisfy the standard for commonality set forth in *Dukes*); Bolden v. Walsh Constr. Co., 688 F.3d 893, 896–97 (7th Cir. 2012) (relying on *Dukes* in overturning certification of class of African American construction workers alleging racial discrimination); Bell v. Lockheed Martin Corp., No. 08-6292 (RBK/AMD), 2011 WL 6256978, at *4–5 (D.N.J. Dec. 14, 2011) (relying on *Dukes* in refusing to certify class of female employees alleging gender discrimination and retaliation).

[161] *See, e.g.*, Chi. Teachers Union, Local No. 1 v. Bd. of Educ. of Chi., 797 F.3d 426, 439–40 (7th Cir. 2015) (commonality satisfied under facts "worlds away from [those] in *Wal-Mart*," because the employment decisions at issue were made by "one decision-making body, exercising discretion as one unit" rather than several lower-level managers individually exercising discretion); Brown v. Nucor Corp., 785 F.3d 895, 909–22 (4th Cir. 2015) (workplace was in a single location, stronger evidence of bias was presented, and class was affected in a uniform manner by the employer's exercise of discretion); *In re* Johnson, 760 F.3d 66, 72–73 (D.C. Cir. 2014) (applicants for employment were promoted using the same criteria and numeric systems, and all promotion decisions were made by the same manager); Jimenez v. Allstate Ins., 765 F.3d 1161, 1167–69 (9th Cir. 2014) (case presented "none of the problems identified by *Dukes*," and the certification order

plaintiffs' employment bar has been able to adjust to *Dukes* to some extent. But the main impediment to employment discrimination class actions in the next decade is likely to be *Concepcion*, not *Dukes.*

Early statistics following *Concepcion* do not yet reflect a sea of change. One possible reason why is that many companies have "a great deal of inertia (or 'stickiness') that must be overcome before even sophisticated businesses change their standard-form contractual language."[162] But Fitzpatrick, like Elhauge, predicts that "businesses will eventually flock to arbitration clauses with class action waivers."[163] I agree with that prediction (assuming that *Concepcion*, *American Express*, and *DIRECTV* remain good law). By 2026, arbitration clauses barring class actions (either in litigation or in arbitration) are likely to be common in both the consumer and employment areas. And it is unreasonable to believe that companies will voluntarily allow class actions to proceed when they possess signed arbitration agreements. Moreover, after *Concepcion*, *American Express*, and *DIRECTV*, plaintiffs would appear to have few legal arguments to circumvent such agreements absent egregious facts or drafting flaws in the arbitration agreements.[164]

In the consumer finance area (e.g., consumer finance agreements for credit cards, checking accounts, and loans), a March 2015 report of the Consumer Financial Protection Bureau (CFPB) found some increase (but not a dramatic one) in arbitration clauses in credit card and checking account contracts.[165] Significantly, the report found that it was common for companies to invoke

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preserved the defendant's right to present individualized defenses to damages claims); McReynolds v. Merrill Lynch, 672 F.3d 482, 487–92 (7th Cir. 2012) (company-wide policies enabled managers to adversely impact African American employees).

[162] Fitzpatrick, *supra* note 152, at 192 (discussing theories of various commentators).

[163] *Id.* at 193.

[164] In one recently filed class action against Fitbit alleging defective heart-rate monitors, in which the author serves as co-counsel for the plaintiffs, the putative class is seeking to invalidate an arbitration agreement that consumers were forced to accept online in order to use the product after purchase. *See* Alison Frankel, *How Fitbit Heart-Rate Class Action Intends to Bust Arbitration Agreement*, REUTERS (Jan. 6, 2016), http://blogs.reuters.com/alison-frankel/2016/01/06/how-fitbit-heart-rate-class-action-intends-to-bust-arbitration-agreement/.

[165] CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS PURSUANT TO DODD–FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), at 11–12 (2015), http://www.consumerfinance.gov/reports/arbitration-study-report-to-congress-2015/ [hereinafter ARBITRATION STUDY]. That report was mandated by the Dodd–Frank legislation. *Id.* at 2. The CFPB describes itself as "a 21st century agency that helps consumer finance markets work by making rules more effective, by consistently and fairly enforcing those rules, and by empowering consumers to take more control over their economic lives." *About Us*, CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/the-bureau/ (last visited Mar. 20, 2016).

arbitration clauses as a way of blocking class actions, but relatively rare for companies to invoke such clauses to block individual lawsuits.[166] Under the Dodd–Frank Wall Street Reform and Consumer Protection Act, the CFPB has authority to prohibit or limit arbitration clauses in consumer financial contracts if doing so would be in the public interest.[167] More than fifty members of Congress have written to the CFPB urging it to prohibit the use of forced arbitration clauses in financial agreements.[168] As this Article was going to press, the CFPB announced that it was proposing a regulation prohibiting certain providers of financial products and services from using arbitration agreements that bar consumers from "filing or participating in a class action with respect to the covered consumer financial product or service."[169] The proposed regulation does not, however, ban all arbitration agreements; rather, it only bans those that prohibit class actions.

If it were to take effect, the CFPB's regulation could impact a wide variety of consumer finance agreements, including "credit cards, checking accounts, general purpose reloadable prepaid accounts ('GPR prepaid cards'), private student loans, storefront payday loans, and mobile wireless third-party billing."[170] Many types of controversies would be unaffected, however, including (among others) various consumer product, antitrust, employment discrimination, and wage-and-hour claims. In addition, even with respect to consumer finance agreements, those who previously signed arbitration clauses would be "grandfathered in," negating the impact of any potential CFPB action with respect to a large number of people.[171]

Moreover, any regulations issued by the CFPB to ban arbitration clauses that prohibit class actions would almost certainly be challenged as contrary to the FAA's broad policy favoring arbitration. As one defense firm noted in its analysis of the CFPB's report, "Whether the CFPB can be delegated the power

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166 ARBITRATION STUDY, *supra* note 165, at 14–15.

167 *Id.* at 5 n.7; *see* 12 U.S.C. § 5518(b) (2012).

168 Letter from Al Franken et al., U.S. Senator, to Richard Cordray, Dir., Consumer Fin. Prot. Bureau (May 21, 2015), http://www.cfpbmonitor.com/files/2015/05/150521CFPBarbitrationLetter.pdf.

169 Arbitration Agreements, 12 C.F.R. § 1040 (2016).

170 ARBITRATION STUDY, *supra* note 165, at 7; *see also* Jessica Karmasek, *CFPB Explains Proposal to Prohibit Anti-Class Action Language in Arbitration Clauses*, LEGAL NEWSLINE (Dec. 1, 2015, 10:23 AM), http://legalnewsline.com/stories/510648987-cfpb-explains-proposal-to-prohibit-anti-class-action-language-in-arbitration-clauses (describing potential effect of CFPB action).

171 *See* Gilles & Friedman, *supra* note 151, at 658 (noting that a CFPB rule "will apply, under a grandfather clause, only to contracts entered into more than 180 days after that rule is issued," likely resulting in a "dash to insert waivers [after] any rulemaking" and proving problematic "especially . . . in the credit card arena, where consumers enter into 'evergreen' contracts that remain in place for many years").

to unilaterally restrict the provisions of a U.S. law such as the FAA will be a substantial hurdle for the CFPB to overcome."[172] Indeed, the CFPB as an agency is already controversial, and the issuance of regulations barring mandatory arbitration in consumer finance agreements could increase calls by some members of Congress to defund the agency.[173]

Thus, while the CFPB could take regulatory steps to address class action bans in arbitration clauses, its actions would be subject to a potentially strong legal attack, and in any event, its actions would not cover the waterfront of offending arbitration clauses. And while Congress could step in, the current climate (with Republicans controlling both Houses) suggests that broad legislation overruling *Concepcion*, *American Express*, and *DIRECTV* is unlikely to be passed any time soon. To be sure, several members of Congress have offered legislation that would prohibit pre-dispute arbitration clauses in a variety of contexts, including agreements for consumer, employment, and antitrust disputes.[174] Thus far, however, those efforts have made no headway,[175] although that could change if Democrats regain control of the Senate and the House in the 2016 election.

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172 Will Routt, *CFPB Report Likely Precursor to Regulatory Limits on Mandatory Arbitration Provisions*, BAKER DONELSON (June 15, 2015), http://www.bakerdonelson.com/cfpb-report-likely-precursor-to-regulatory-limits-on-mandatory-arbitration-provisions-06-15-2015/.

173 Lauren Guth Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9 HARV. L. & POL'Y REV. 329, 352 (2015). Moreover, in a case that was argued but not decided at the time this Article went to press, two members of a D.C. Circuit panel raised serious concerns about the constitutionality of the governance structure of the CFPB. Nicholas M. Gess & Chris Cox, *D.C. Circuit Questions Constitutionality of CFPB Structure*, NAT'L L. REV. (Apr. 13, 2016), http://www.natlawreview.com/article/dc-circuit-questions-constitutionality-cfpb-structure. A decision declaring the CFPB unconstitutional in its current structure would further complicate the agency's effort to weigh in on class action bans in arbitration clauses.

174 *Id.* at 353; *see, e.g.*, S. 2506, 114th Cong. (introduced Feb. 4, 2016); H.R. 4899, 114th Cong. (introduced Apr. 12, 2016) (identical bills designed to overrule *Concepcion* and make it much more difficult for companies to force individuals to agree to mandatory arbitration); *see* Stan Karas, *Restoring Statutory Rights Act (S. 2506): Bill Against Mandatory Arbitration*, IMPACT LITIG. J. (Mar. 4, 2016), http://www.impactlitigation.com/2016/03/04/restoring-statutory-rights-act-s-2506-bill-against-mandatory-arbitration/ (summarizing S. 2506); Press Release, Rep. Hank Johnson, Conyers and Johnson Introduce Legislation to Equalize Women's Pay, End Forced Arbitration (Apr. 12, 2016), http://hankjohnson.house.gov/press-release/conyers-and-johnson-introduce-legislation-equalize-women%E2%80%99s-pay-end-forced-arbitration (press release on introduction of H.R. 4899).

175 *See id.* (discussing proposals that have been offered several times since 2011 and noting that all of the proposals have "died in Congress"). Arbitration clauses have been barred in a few contexts since *Concepcion*, but those instances constitute a relatively small proportion of circumstances in which arbitration clauses are used. *See, e.g.*, Exec. Order No. 13,673, 79 Fed. Reg. 45,309 (July 31, 2014) (prohibiting mandatory arbitration of Title VII claims under certain federal contracts); 48 C.F.R. 222.7402 (2011) (prohibiting mandatory arbitration of Title VII and some tort claims under certain federal defense contracts).

In short, it is certainly possible that the CFPB will act to block arbitration clauses within its purview and that its action will be upheld. It is also possible that *Concepcion*, *American Express*, and *DIRECTV* could be judicially or legislatively overruled in the next decade as a result of changes in the composition of the Supreme Court or in the makeup of Congress. Indeed, Justice Scalia was the author of both *Concepcion* (5–4) and *American Express* (also 5–4), and his death in February 2016 could result in an appointment to the Court that shifts the balance on the Court's approach to arbitration clauses. I am certainly not as pessimistic as Fitzpatrick, who predicts "a world without class actions."[176] At least in the short term, however, *Concepcion*, *American Express*, and *DIRECTV* will have an increasingly wide impact as more businesses require and enforce mandatory "no class action" arbitration clauses in a variety of contexts.

4. Personal Injury Class Actions Will Remain Infrequent

The judicial trend against certifying personal injury class actions is well known.[177] In a series of cases dating back to the late 1960s (with a temporary retreat in the 1980s), courts ruled that personal injury class actions usually failed to satisfy the predominance and manageability requirements of Rule 23(b)(3).[178] Unable to pursue class actions in most mass tort cases, plaintiffs have looked to other aggregation devices,[179] including coordination under the Multidistrict Litigation Act (MDL Act).[180] I do not see that situation changing in the next decade. Courts are now entrenched in ruling that, in most personal

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[176] Fitzpatrick, *supra* note 152, at 199.

[177] *See, e.g.*, ROBERT H. KLONOFF, EDWARD K. BILICH & SUZETTE M. MALVEAUX, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS 732–35, 745–54 (West 3d ed. 2012) (providing historical overview).

[178] *See id.* at 732–35 (noting skepticism from late 1960s through early 1980s, surge in mid-1980s, and skepticism again thereafter); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 677–82 (1979) (describing that history).

[179] *See* Klonoff, *supra* note 1, at 803 n.432 (citing examples of mass tort cases treated as "quasi-class actions").

[180] 28 U.S.C. §1407 (2012). There are many examples of mass tort cases being consolidated under the MDL Act, even though the cases are not brought as class actions. *See, e.g.*, *In re* Fluoroquinolone Prods. Liab. Litig., 122 F. Supp. 3d 1378 (J.P.M.L. 2015); *In re* Bard IVC Filters Prods. Liab. Litig., 122 F. Supp. 3d 1375, at *1 (J.P.M.L. 2015); *In re* Lumber Liquidators Chinese-Mfd. Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig., 109 F. Supp. 3d 1382, at *1 (J.P.M.L. 2015); *In re* Benicar (Olmesartan) Prods. Liab. Litig., 96 F. Supp. 3d 1381, 1381–82 (J.P.M.L. 2015); *In re* Takata Airbag Prods. Liab. Litig., 84 F. Supp. 3d 1371, 1371–72 (J.P.M.L. 2015); *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., 65 F. Supp. 3d 1402, 1402 (J.P.M.L. 2014).

injury class actions, individual issues outweigh common issues, thus disqualifying such actions on predominance and manageability grounds.[181]

The one possible countertrend is in the settlement context. A few courts have been willing to certify personal injury class actions for settlement purposes. Examples include the National Football League concussion litigation and the *Deepwater Horizon* case.[182] For the most part, however, personal injury mass torts continue to be adjudicated outside of the class action arena.[183] I believe that this trend will continue in the next decade.

5. *Defendants Will Oppose Efforts by Plaintiffs to Establish Liability or Damages Through "Trial by Formula"*

In its March 2016 decision in *Tyson Foods*, the Supreme Court addressed the propriety of plaintiffs' use of statistical evidence.[184] *Tyson Foods* was brought as a class action (for state law claims) and as a collective action for claims under the FLSA.[185] The members of the class and collective action were workers at a pork-processing facility who alleged entitlement to overtime

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[181] *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 622 (1997) (overturning class settlement in asbestos case, in part because of lack of predominance); Castano v. Am. Tobacco Co., 84 F.3d 734, 752 (5th Cir. 1996) (overturning class certification in tobacco litigation because of myriad individualized issues); *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1090 (6th Cir. 1996) (class action not appropriate for people claiming injuries from penile implants). Recent cases have reaffirmed that approach. *See, e.g.*, Nola v. Exxon Mobil Corp., No. 13-439-JJB, 2015 WL 2338336, at *6–7 (M.D. La. May 13, 2015) (refusing, on predominance grounds, to certify putative class of individuals alleging harm due to proximity to defendant's oil refinery, and noting that "certification is not favored in mass tort cases"); Cannon v. BP Prods. N. Am., Inc., No. 3:10-CV-00622, 2013 WL 5514284, at *14 (S.D. Tex. Sept. 30, 2013) ("As a general rule, a 'mass accident' is 'not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways,' thus necessitating multiple, separately-tried lawsuits." (quoting FED. R. CIV. P. 23(b)(3) advisory committee's note)); Brandner v. Abbott Labs., Inc., No. 10-3242, 2012 WL 195540, at *4–5 (E.D. La. Jan. 23, 2012) (holding that putative class alleging injury due to recalled baby formula failed to meet predominance requirement).

[182] *In re* Nat'l Football League Players' Concussion Injury Litig., No. 15-2234, 2016 WL 1552205 (3d. Cir. Apr. 18, 2016) (upholding class certification and approving, on fairness grounds, classwide settlement of claims of retired National Football League players involving a variety of neuro-cognitive injuries from concussions and sub-concussive events); *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex. on Apr. 20, 2010, 910 F. Supp. 2d 891, 903, 913 (E.D. La. 2012) (class of individuals suffering personal injuries from oil spill certified for settlement purposes).

[183] *See* Sullivan v. DB Invs., Inc., 667 F.3d 273, 334 (3d Cir. 2011) (en banc) (Scirica, J., concurring) (noting trend in personal injury claims shifting from class actions to aggregate non-class settlements); Klonoff, *supra* note 1, at 802.

[184] 136 S. Ct. 1036 (2016).

[185] *Id.* at 1041–42; *see* 29 U.S.C. §§ 207(a), 216(b) (2012); KLONOFF, *supra* note 10, at 352–56 (explaining differences between Rule 23 class actions and FLSA collective actions).

based upon the time involved in "donning" and "doffing" protective gear and walking to and from their work areas.[186] To prove their case, given Tyson Foods' failure to preserve relevant records, the plaintiffs relied on an expert study that purported to calculate the average donning and doffing time based on a sample of employees.[187] At trial, the expert admitted that there was significant variation among class members because employees performed different jobs, used different equipment, and put on different quantities of protective gear depending on the specific work performed.[188] The expert also admitted that the sample was not random.[189] Another expert for the plaintiffs used the average to calculate classwide damages but conceded that more than 212 of the approximately 1,300 employees did not suffer injury because, even including the estimated average time, they did not work more than forty hours per week.[190] The jury found for the plaintiffs and awarded damages, but in an amount that was significantly less than that calculated by the plaintiffs' expert.[191] A divided Eighth Circuit panel affirmed.[192]

In the Supreme Court, as in the lower courts, Tyson Foods argued that the trial methodology used in the case conflicted with the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*.[193] In *Dukes*, the Supreme Court described as follows the statistical technique proposed by the Ninth Circuit to calculate damages for a class of women alleging sex discrimination:

> A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings.[194]

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186 *Tyson Foods*, 136 S. Ct. at 1041–43.
187 *Id.* at 1043–44.
188 Petition for Writ of Certiorari, *supra* note 77, at 8–9.
189 *Id.* at 10.
190 *Id.* at 10–11.
191 *Tyson Foods*, 765 F.3d at 796.
192 *Id.* at 800.
193 Brief of Petitioner at 2, *Tyson Foods*, 136 S. Ct. 1036 (discussing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011)).
194 131 S. Ct. at 2561.

The Supreme Court called the statistical model "Trial by Formula" and stated that "[w]e disapprove [of] that novel project."[195]

Like *Dukes*, *Tyson Foods* involved statistical proof. The defendant in *Tyson Foods* framed the issue as follows:

> Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.[196]

Because the Court had seriously eroded class actions in a number of areas,[197] there was reason for concern in the plaintiffs' bar that the Court might use the case as a vehicle to limit—or eliminate entirely—the use of statistical proof in class actions. Instead, the Court, in an opinion by Justice Kennedy, ruled 6–2 in favor of the plaintiffs.[198]

At the outset, the Court rejected the argument by Tyson Foods and several of its amici that "the Court should announce a broad rule against the use in class actions of what the parties call representative evidence."[199] The Court concluded that "[a] categorical exclusion of that sort . . . would make little sense."[200] Put another way, "the Court would reach too far were it to establish general rules governing the use of statistical evidence, or so-called representative evidence, in all class-action cases."[201] The Court noted that statistical proof "is used in various substantive realms of the law."[202] The Court further noted that such evidence is sometimes "'the only practical means to collect and present relevant data' establishing a defendant's liability."[203] According to the Court, "[I]n a case where representative evidence is relevant

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195 *Id.*; *cf.* Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013) (rejecting statistical model of expert not as "trial by formula" but on the ground that "the model failed to measure damages resulting from the particular antitrust injury on which [the defendant's] liability in [the] action [was] premised").

196 Brief of Petitioner, *supra* note 193, at i.

197 *See* Klonoff, *supra* note 1, at 734–35.

198 Chief Justice Roberts, who provided the sixth vote, wrote a separate concurrence but "join[ed] the Court's opinion in full." *Tyson Foods*, 136 S. Ct. at 1050 (Roberts, C.J., concurring).

199 *Id.* at 1046 (majority opinion).

200 *Id.*

201 *Id.*

202 *Id.* (citing Brief of Complex Litig. Law Professors as Amicus Curiae 5–9; Brief of Economists et al. as Amici Curiae in Support of Respondents 8–10).

203 *Id.* (quoting MANUAL FOR COMPLEX LITIGATION § 11.493 (4th ed. 2004)).

in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class."[204] Such a disparate treatment of class actions would, according to the Court, "ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any substantive right.'"[205] Applying those principles, the Court found that, because Tyson Foods had failed to keep proper records, statistical proof would have been admissible in an individual case under the Court's decision in *Anderson v. Mt. Clemens Pottery Co.*[206] The Court emphasized that the methodology of the statistical expert in *Tyson Foods* had not been challenged under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[207] Thus, the Court ruled that such evidence was properly admitted in a suit seeking collective relief under the FLSA and classwide relief under Iowa overtime law. The Court distinguished the statistical evidence rejected in *Dukes* on the ground that, in *Dukes*, the putative class members were not similarly situated and, thus, "[p]ermitting the use of that sample in a class action . . . would have violated the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action."[208]

Tyson Foods has by no means put an end to defense challenges to the use of statistical evidence in class actions. I predict that defendants will now argue, whenever possible, that (1) the statistical evidence in question would not have been admissible in an individualized trial, (2) the circumstances are more like *Dukes* (where class members were not similarly situated), and (3) the evidence is unreliable or unsound under *Daubert*. More broadly, defendants will continue to press for due process limits on the use of statistical evidence in class actions. Indeed, the day after the *Tyson Foods* decision, defendants who were seeking certiorari in another wage-and-hour case (denied April 4, 2016) filed a supplemental brief with the Supreme Court arguing as follows:

> The Court's decision in [*Tyson Foods*] does not explicitly address the question presented in this case. In *Tyson Foods*, the Court reviewed the certification of a class action under Federal Rule of

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204 *Id.*

205 *Id.* (quoting 28 U.S.C. § 2072(b) (2012)).

206 *Id.*; Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946) (holding that where an employer fails to keep proper records, "an employee has carried out his burden [of proof in seeking overtime pay] if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference").

207 *Tyson Foods*, 136 S. Ct. at 1044, 1049 (citing Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993)).

208 *Id.* at 1048.

> Civil Procedure 23, as well as the certification of a Fair Labor Standards Act ("FLSA") collective action under 29 U.S.C. § 216, and affirmed certification and the ensuing classwide judgment based on the evidentiary inference available to FLSA plaintiffs under *Anderson v. Mt. Clemens Pottery Co*. The Court's opinion was limited to those questions of federal law and did not expressly consider the due process limits on "Trial by Formula." Because that question will continue to divide lower courts in the absence of this Court's review, the Court should grant plenary review in this case.[209]

Those defendants also argued that the context was different than in *Tyson Foods* because the statistical evidence would not have been admissible in an individual case:

> If plaintiffs "had brought . . . individual suits, there would be little or no role for representative evidence" because, like the 7 employees in *Dukes*, "the experiences of the employees in [this case] bore little relationship to one another." They worked at more than a hundred different stores over distinct portions of an eight-year period and could have made myriad individualized decisions, such as voluntarily working through paid rest breaks, that provide legitimate explanations for alleged wage-and-hour violations.
>
> In *Dukes*, "[p]ermitting the use of . . . sampl[ing] in a class action . . . would have violated the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." In this case, plaintiffs' reliance on "[r]epresentative evidence" that was both "statistically inadequate" and "based on implausible assumptions" violated Wal-Mart's due process rights by permitting plaintiffs to recover without proving the same individualized elements and confronting the same individualized defenses as plaintiffs pursuing individual claims.[210]

As this supplemental brief reveals, defendants will continue—post-*Tyson Foods*—to press hard in challenging the use of statistical evidence in class actions. *Tyson Foods* is by no means the end of the battle.

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209 Supplemental Brief for Petitioners at 1, Wal-Mart Stores, Inc. v. Braun, 106 A.3d 656 (Pa. 2014).

210 *Id.* at 6–7 (alterations in original) (citations omitted).

6. *The Next Several Years Will See the Demise of the "Ascertainability" Requirement Adopted by Some Courts*

Although the term "ascertainability" had been mentioned previously with regard to the class definition requirement, in *Marcus v. BMW of North America, LLC*, the Third Circuit transformed it into a sweeping new independent requirement for class certification in Rule 23(b)(3) actions—a requirement mentioned nowhere in Rule 23.[211] As the court explained, "If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate."[212] In that case, the court reversed and remanded because of "serious ascertainability issues."[213] The class consisted of putative class members who alleged that BMW and Bridgestone failed to disclose that the Bridgestone run-flat tires used on BMWs were defective.[214] According to the Third Circuit, plaintiffs had not identified a feasible way to identify class members whose tires had gone flat and were replaced.[215]

The Third Circuit has since reaffirmed *Marcus* on several occasions. In *Hayes v. Wal-Mart Stores, Inc.*, the class alleged that Wal-Mart improperly sold extended warranties for "as-is" merchandise.[216] The court found an ascertainability problem because the business records did not disclose which items were in fact sold "as-is."[217] And in *Carrera v. Bayer Corp.*,[218] which involved allegations by a putative class that Bayer falsely advertised certain health effects of its One-A-Day WeightSmart, the court found an ascertainability problem because class members were unlikely to have receipts for their purchases, and Bayer had no records of its purchasers.[219] In *Byrd v. Aaron's Inc.*, the Third Circuit arguably retreated from its prior trilogy, calling the ascertainability requirement a "narrow" one and stating that it is "neither designed nor intended to force all potential plaintiffs who may have been harmed in different ways by a particular defendant to be included in the class

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211 687 F.3d 583, 592–94 (3d Cir. 2012).
212 *Id.* at 593.
213 *Id.* at 593, 612.
214 *Id.* at 588.
215 *Id.* at 594.
216 725 F.3d 349, 353 (3d Cir. 2013).
217 *Id.* at 355–56.
218 727 F.3d 300 (3d Cir. 2013).
219 727 F.3d at 304, 308. Because the classes in *Hayes* and *Carrera* were certified before the Third Circuit's *Marcus* decision, the Third Circuit in *Hayes* and *Carrera* held that plaintiffs should have another chance to satisfy ascertainability. *Id.* at 312; *Hayes*, 725 F.3d at 361–62.

in order for the class to be certified."[220] Nonetheless, as a panel bound by the earlier *Carrera* and *Marcus* decisions, the *Byrd* court could not repudiate the Third Circuit's prior cases altogether. Judge Rendell, however, concurred in *Byrd* and urged the Third Circuit to do away with the ascertainability requirement.[221]

The defense bar has highlighted the new ascertainability law in numerous blogs,[222] and it has attempted to convince courts outside the Third Circuit to adopt the Third Circuit's approach.[223] A few other circuits have cited the Third Circuit's ascertainability case law with approval.[224]

Recently, the Seventh Circuit, in *Mullins v. Direct Digital, LLC*, emphatically rejected the Third Circuit's ascertainability jurisprudence.[225] Agreeing with Judge Rendell in *Byrd*, the court ruled that ascertainability was not a valid prerequisite to class certification.[226] The court reasoned that the requirement was not contained in Rule 23 and that the concerns animating the

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220 784 F.3d 154, 165, 167 (3d Cir. 2015).

221 *Id.* at 172 (Rendell, J., concurring).

222 *See, e.g.*, Ryan Ethridge & Frank Hirsch, *Rule 23's Ascertainability Requirement: A Powerful Defense to Class Certification*, INT'L ASS'N OF DEF. COUNSEL COMM. NEWSLETTER, Oct. 2014, at 1, 2, 7, http://www.iadclaw.org/assets/1/19/Class_Actions__Oct_2014.pdf; John H. Beisner, Jessica D. Miller & Nina R. Rose, *The Implicit Ascertainability Requirement for Class Actions*, PRAC. L. (Feb. 27, 2014), http://www.skadden.com/sites/default/files/publications/The%20Implicit%20Ascertainability%20Requirement%20for%20Class%20Actions.pdf; David C. Kistler & Rachel Gallagher, *Class Ascertainability Continues to Become More Concrete*, BLANK ROME LLP (Sept. 16, 2014), http://www.blankrome.com/index.cfm?contentID=37&itemID=3400; Kevin Ranlett, *Third Circuit Rulings Give Teeth to Ascertainability Requirement for Class Certification*, MAYER BROWN: CLASS DEF. BLOG (Sept. 23, 2013), https://www.classdefenseblog.com/2013/09/third-circuit-rulings-give-teeth-to-ascertainability-requirement-for-class-certification/; Nicole Skolout, Carrera v. Bayer Corporation*: Third Circuit Vacates Class Certification Order on Ascertainability Grounds in Consumer False Advertising Case*, BAKERHOSTETLER: CLASS ACTION LAWSUIT DEF. (Aug. 26, 2013), http://www.classactionlawsuitdefense.com/2013/08/26/carrera-v-bayer-corporation-third-circuit-vacates-class-certification-order-on-ascertainability-grounds-in-consumer-false-advertising-case/.

223 *See, e.g.*, Rikos v. Proctor & Gamble Co., 799 F.3d 497, 524–25 (6th Cir. 2015) (rejecting defendant's ascertainability argument because more than half of the class could be ascertained from defendant's direct marketing records).

224 *See, e.g.*, Brecher v. Republic of Argentina, 806 F.3d 22, 23–24, 27 (2d Cir. 2015) (citing *Marcus*) (vacating summary judgment for a class of bondholders on ascertainability grounds and noting an "implied requirement of ascertainability"); Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 946, 948, 950 (11th Cir. 2015) (citing *Marcus* and *Carrera*) (relying in part on the "implicit ascertainability requirement" to uphold a district court's refusal to certify a class of consumers claiming false advertising in connection with dietary supplements); EQT Prod. Co. v. Adair, 764 F.3d 347, 358–60 (4th Cir. 2014) (overturning class certification on ascertainability grounds after analyzing the ascertainability requirements described in *Marcus*).

225 795 F.3d 654, 657 (7th Cir. 2015).

226 *Id.* at 661–63.

doctrine were best addressed by Rule 23(b)(3)'s superiority requirement (and its mandate that a class action must be manageable).[227] That approach was not merely a shift in terminology: The court made clear that the denial of class certification on manageability grounds "should be the last resort," and that the district court's judgment should be given deference.[228] In my view, the Seventh Circuit's refutation of the Third Circuit's ascertainability rule is convincing.

The Advisory Committee has been considering whether ascertainability should be an independent threshold requirement for class certification.[229] At this stage, however, it is unclear whether the Advisory Committee will address ascertainability and, if it does, whether it will reject the Third Circuit's approach. At present, the Committee has put the topic of ascertainability on hold and is not moving forward on a possible rule change to address the subject.[230]

Wholly apart from the rulemaking process, the case law could sort itself out. The Third Circuit could reverse itself en banc in some future case; *Byrd* already signaled a retreat, and Judge Rendell made a powerful case for repudiating the requirement altogether. Moreover, *Mullins* provides a compelling, well-reasoned analysis for the Third Circuit to reject the requirement, and it demonstrates that the concerns underlying the requirement can be dealt with under the current rule structure.

The defendant in *Mullins* unsuccessfully sought review by the Supreme Court.[231] Assuming that the Advisory Committee does not address the issue and that the Third Circuit itself does not repudiate the requirement, I think that the Supreme Court is likely to grant review to resolve the conflict between the Third and Seventh Circuits. If the Court does grant review, it is my prediction that it will reject the ascertainability requirement.[232] I think the Court will be sympathetic to the argument that the requirement was invented out of whole cloth and that the better way to address issues involving the identification of

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227 *Id.* at 663.

228 *Id.* at 664–65 (offering a myriad of grounds for rejecting an ascertainability requirement) (citing Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 YALE L.J. 2354, 2396–99 (2015)).

229 *See generally* ADVISORY COMM. APR. 2015 AGENDA BOOK, *supra* note 33, at 74, 77, 254 (discussing both the Third Circuit's approach and the Seventh Circuit's approach to whether ascertainability is a criterion of class membership).

230 *See* ADVISORY COMM. APR. 2016 AGENDA BOOK, *supra* note 34, at 112; COMM. ON RULES OF PRACTICE AND PROCEDURE, *supra* note 34, at 260–61.

231 136 S. Ct. 1161 (2016) (mem.) (denying certiorari).

232 This is especially likely if a liberal-leaning Justice is appointed to replace Justice Scalia.

class members is through the superiority requirement, as *Mullins* reasoned. In analogous situations, the Supreme Court in *Halliburton I*[233] and *Amgen*[234] rejected the defendants' arguments that the Court should require plaintiffs to establish "loss causation" and "materiality" at the class certification stage. *Halliburton I* and *Amgen* provide strong authority for plaintiffs in arguing that the Court should not adopt certification requirements that do not appear in Rule 23.

7. *The Supreme Court's Decision in* Campbell-Ewald Co. v. Gomez *Will Not Deter Defendants in Their Efforts to Design Strategies for Picking off Class Representatives Through Offers of Judgment*

A tactic that has become popular in some jurisdictions in recent years is for a defendant to attempt to "pick off" a class representative under Federal Rule of Civil Procedure 68[235] by offering the full judgment sought by the representative. The goal is to moot not only the representative's own claim but also the putative class action complaint. The hope is that new representatives will not emerge and that the threat of a class action will disappear. In 2013, Justice Kagan addressed the issue in her dissenting opinion in *Genesis Healthcare Corp. v. Symczyk*.[236] Writing for herself and three other Justices, she stated that "an unaccepted offer of judgment cannot moot a case. . . . however good the terms."[237] She noted that, by its terms, Rule 68 provides that "[a]n unaccepted offer is considered withdrawn."[238] No Justice in the majority disagreed with Justice Kagan; rather, the majority believed that the issue was not properly preserved.[239]

In *Campbell-Ewald Co. v. Gomez*, the Supreme Court took up the issue discussed by Justice Kagan in *Genesis Healthcare* but not reached by the majority.[240] Gomez was the class representative in a putative class action alleging that Campbell-Ewald violated the Telephone Consumer Protection

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233 Erica P. John Fund, Inc. v. Halliburton Co. (*Halliburton I*), 131 S. Ct. 2179, 2187 (2011), *vacated*, 134 S. Ct. 2398 (2014).

234 Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 133 S. Ct. 1184, 1191 (2013).

235 Rule 68(a) provides that "a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued." FED. R. CIV. P. 68(a). Rule 68(b) states that "[a]n unaccepted offer is considered withdrawn." FED. R. CIV. P. 68(b).

236 133 S. Ct. 1523, 1526 (2013).

237 *Id.* at 1533 (Kagan, J., dissenting).

238 *Id.* at 1534 (alteration in original) (quoting FED. R. CIV. P. 68(b)).

239 *Id.* at 1529 & n.4.

240 136 S. Ct. 663, 666 (2016).

Act (TCPA),[241] which bars "using any automatic dialing system" to send a text message to a cell phone without the recipient's consent.[242] Prior to the deadline for the motion for class certification, Campbell-Ewald proposed to settle Gomez's individual claims, pursuant to Rule 68, for the full value of the claims (including costs but excluding attorneys' fees).[243] Gomez did not accept the offer, and it thus lapsed under the fourteen-day period specified in Rule 68.[244] Campbell-Ewald thereafter argued that the unaccepted offer mooted Gomez's individual claims (as well as mooting the putative class, which had not yet been certified).[245] The district court rejected that argument, and the Ninth Circuit agreed that the unaccepted offer did not moot Gomez's claim (or the putative class).[246] In a 6–3 decision, the Supreme Court agreed that the unaccepted offer of judgment did not moot the case.[247] Importantly, however, the Court rendered a narrow decision, noting, "We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount."[248]

Chief Justice Roberts authored a dissenting opinion, joined by Justices Scalia and Alito, arguing that, because of the tender of payment, Gomez's case was moot (and Gomez therefore lacked standing to represent the putative class).[249] In his dissent, the Chief Justice seized upon the above-quoted language in Justice Ginsburg's majority opinion:

> The good news is that this case is limited to its facts. The majority holds that an *offer* of complete relief is insufficient to moot a case. The majority does not say that *payment* of complete relief leads to the same result. For aught that appears, the majority's analysis may have come out differently if Campbell had deposited the offered funds with the District Court.[250]

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241 *Id.* at 667.

242 *Id.* at 666–67 (citing 47 U.S.C. § 227(b)(1)(A)(iii) (2012)).

243 *Id.* at 667–68 (citing FED. R. CIV. P. 68).

244 *Id.* at 668.

245 *Id.*

246 *Id.*

247 *Id.* at 672. Justice Ginsburg wrote a decision for five justices; Justice Thomas concurred on a separate rationale. *Id.* at 666.

248 *Id.* at 672.

249 *Id.* at 679–82, 679 & n.1 (Roberts, C.J., dissenting).

250 *Id.* at 683.

Some press reports following *Campbell-Ewald* have characterized the decision as an important victory for plaintiffs in class actions.[251] But it is not clear that a majority of the Court will find *Campbell-Ewald* dispositive in the scenario highlighted by both the majority and the Chief Justice's dissent. At the time this Article went to press, only one circuit had squarely ruled on the issue post-*Campbell-Ewald*. In *Chen v. Allstate Insurance*, the Ninth Circuit held that the deposit of funds into an escrow account pursuant to Rule 68 did not moot the plaintiff's case or prevent the plaintiff from seeking class certification.[252] The case, also filed under the TCPA,[253] alleged that Allstate violated the Act by making unsolicited, automated calls to class members' cellular phones. After *Campbell-Ewald*, Allstate deposited $20,000—purportedly in full settlement of the claims of the class representative, Florencio Pacleb—into an escrow account pending an order of the district court directing the escrow agent to pay the funds to Pacleb, requiring Allstate to refrain from making non-emergency calls to Pacleb in the future, and dismissing the case as moot. The Ninth Circuit held that the tactic did not moot the class claims for two reasons. First, even if the district court had entered judgment on Pacleb's individual claims, Pacleb would still be allowed under Ninth Circuit precedent to seek class certification.[254] Second, even if such a ploy could moot the entire action, the Ninth Circuit held that it would not direct that the money be paid to Pacleb before Pacleb had had a full opportunity to move for class certification. According to the court, mootness does not occur until full relief has been "received," not merely when it has been "offered."[255] The court relied on language in *Campbell-Ewald* that "*a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted*."[256] The court noted that its approach was also consistent with other cases and treatises discussing mootness, and with two district court cases post-*Campbell-Ewald* that had

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[251] *See, e.g.*, Cristian Farias, *Justice Ginsburg Leads Supreme Court Majority to Deliver Blow to Big Business*, HUFFINGTON POST (Jan. 20, 2016, 3:55 PM), http://www.huffingtonpost.com/entry/ruth-bader-ginsburg-supreme-court-big-business_us_569fb4d2e4b0fca 5ba762275; Adam Liptak, *Supreme Court Ruling Bolsters Ability to Build Class Actions*, N.Y. TIMES (Jan. 20, 2016), http://www.nytimes.com/2016/01/21/business/supreme-court-favors-class-action-plaintiff.html; Ian Millhiser, *Justice Ginsburg Hands Surprise Victory to Consumers over Big Business*, THINKPROGRESS (Jan. 20, 2016, 11:10 AM), http://thinkprogress.org/justice/2016/01/20/3741056/justice-ginsburg-hands-surprise-victory-to-consumers-over-big-business/.

[252] No. 13-16816, 2016 WL 1425869 (9th Cir. Apr. 12, 2016).

[253] 47 U.S.C. § 227 (2012).

[254] *Chen*, 2016 WL 1425869, at *5–6.

[255] *Id.* at *1.

[256] *Id.* at *9 (emphasis added) (quoting *Campbell-Ewald*, 136 S. Ct. at 672).

likewise refused to moot a case before the class representative had had a fair opportunity to litigate class certification.[257] The issue is virtually certain to return to the Supreme Court. If the Court holds that depositing funds with the court is sufficient to moot the case, the results will be devastating—especially in small claims class actions, where the cost of picking off representatives seriatim is low when compared with the potential exposure of a class action.

It is hard to predict how the Supreme Court will rule in the context of money actually deposited with the court—as opposed to only being tendered and rejected. Several in the *Campbell-Ewald* majority could conclude that actual payment of funds and entry of judgment *would* moot the case. But if the four liberal Justices (Ginsburg, Sotomayor, Breyer, and Kagan) took the view that the case is not moot even if the money is actually paid into the court, and if the Justice appointed to replace Justice Scalia agreed with that approach, there would be a majority for definitively rejecting the pick-off ploy. It is also possible that a majority would coalesce around Justice Thomas's approach in his concurring opinion in *Campbell-Ewald*. Justice Thomas suggests that a tender capable of mooting a case may require not only payment of the funds, but also an *admission of liability*.[258] If that view were adopted by a majority of the Court, I suspect that few defendants would be willing to undertake the pick-off strategy.[259] An admission of liability could encourage many other class members to seek relief based on that admission. It is also possible that a majority of the Court will embrace the view of the Ninth Circuit in *Chen* and hold that a class representative cannot be forced to accept an offer of judgment without first being given a full and fair opportunity to litigate the issue of class certification.

While it is not clear how the Supreme Court will ultimately rule, it is clear that defendants will continue to press the Rule 68 approach at the district court level, and will raise the mootness issue as a ground for appeal. Certainly, well before 2026, the Supreme Court will have considered and decided the issue left open in *Campbell-Ewald*.

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[257] *See id.* at *10 (citing Bais Yaakov of Spring Valley v. Graduation Source, No. 14-cv-3232 (NSR), 2016 WL 872914, at *1 (S.D.N.Y. Mar. 7, 2016); Brady v. Basic Research, LLC, 312 F.R.D. 304, 306 (E.D.N.Y. 2016)).

[258] 136 S. Ct. at 674–75 (Thomas, J., concurring in the judgment) (noting that, at common law, "a tender of the amount due was deemed 'an admission of liability' on the cause of action to which the tender related, so any would-be defendant who tried to deny liability could not effectuate a tender" (citations omitted)).

[259] The appointment of a liberal-leaning Justice to replace Justice Scalia would also reduce the likelihood of a majority willing to hold that the payment of funds to a class representative and the entry of judgment moot a putative class action.

The Subcommittee of the Advisory Committee is also looking at Rule 68 and the issue of picking off class representatives. At one point, it highlighted various options in sketches, including one that would amend Rule 68 to make clear that the rule "does not apply to class or derivative actions."[260] Like ascertainability, the Advisory Committee is not presently moving forward with proposed rule-change language to address the pick-off issue.[261]

a. Likely Trends in Defense Arguments for Defeating Class Certification

As I explained in my *Decline* article, starting in the mid-1990s, many federal judges began to take a skeptical view of class actions.[262] Capitalizing on that sentiment, class action defense counsel began mounting aggressive and novel arguments for defeating class certification, and thus far they have achieved great success. Twenty years ago, no one would have predicted that the longstanding interpretation of commonality under Rule 23(a)(2) would be set aside;[263] that federal appellate courts would impose serious new obstacles to establishing numerosity;[264] that "ascertainability" would become an important device in some circuits for shutting down many class actions;[265] that Rule 23(b)(2) would be interpreted to exclude virtually all cases in which damages are sought;[266] that courts would demand substantial evidentiary proof at the class certification stage;[267] or that defendants could avoid class actions by relying on well-constructed arbitration clauses.[268] Defendants are now armed with powerful arguments that in the past would have been considered weak, and class certification has become a far greater challenge for plaintiffs than ever before.

Nonetheless, the assault on class actions has not been a complete one; numerous class actions continue to be certified.[269] In some instances, federal

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260 ADVISORY COMM. APR. 2015 AGENDA BOOK, *supra* note 33, at 278.

261 ADVISORY COMM. APR. 2016 AGENDA BOOK, *supra* note 34, at 108–11; COMM. ON RULES OF PRACTICE AND PROCEDURE, *supra* note 34, at 260.

262 Klonoff, *supra* note 1, at 733–34, 739–45.

263 *Id.* at 773–80.

264 *Id.* at 768–73.

265 *See supra* notes 212–28.

266 Klonoff, *supra* note 1, at 788–92.

267 *Id.* at 747–61.

268 *Id.* at 815–23.

269 A perusal of Bloomberg/BNA's Class Action Litigation Report and Class Action Law 360 for just the past three years reveals scores of cases in which courts have certified class actions, and many in which those decisions have been affirmed on appeal. As just a small example, see, for example, Spann v. J.C. Penney Corp., 307 F.R.D. 508 (C.D. Cal. 2015); *In re* Scotts EZ Seed Litig., 304 F.R.D. 397 (S.D.N.Y. 2015); *In re*

circuits have rejected broad readings of Supreme Court precedents.[270] In other instances, some circuits have rejected extreme positions taken by their sister circuits.[271] Accordingly, defense attorneys and the business community must continue to search for new arguments where the current ones are insufficient. I am certain that, during the next decade, class action defense attorneys will continue to push the envelope, advancing novel grounds for defeating class certification. I discuss below several arguments that I believe defense counsel

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Nat'l Football League Players' Concussion Injury Litig., 307 F.R.D. 351 (E.D. Pa. 2015), *aff'd* No. 15-2206, 2016 WL 1552205 (3d Cir. April 18, 2016); Wilkins v. Just Energy Grp., Inc., 308 F.R.D. 170 (E.D. Ill. 2015); Thorpe v. District of Columbia, 303 F.R.D. 120 (D.D.C. 2014), *appeal denied sub nom. In re* District of Columbia, 792 F.3d 96 (D.C. Cir. 2015); Starr v. Chi. Cut Steakhouse, LLC, 75 F. Supp. 3d 859 (N.D. Ill. 2014); Sharf v. Fin. Asset Resolution, LLC, 295 F.R.D. 664 (S.D. Fla. 2014); Bellinghausen v. Tractor Supply Co., 303 F.R.D. 611 (N.D. Cal. 2014); Scott v. Clarke, 61 F. Supp. 3d 569 (W.D. Va. 2014); Ramirez v. Riverbay Corp., 39 F. Supp. 3d 354 (S.D.N.Y. 2014); Kingery v. Quicken Loans, Inc., 300 F.R.D. 258 (S.D. W. Va. 2014); Montgomery Cty. *ex rel.* Becker v. MERSCORP, Inc., 298 F.R.D. 202 (E.D. Pa. 2014); Otero v. Dart, 306 F.R.D. 197 (N.D. Ill. 2014); Kristensen v. Credit Payment Servs., 12 F. Supp. 3d 1292 (D. Nev. 2014); Fort Worth Emps. Ret. Fund v. J.P. Morgan Chase & Co., 301 F.R.D. 116 (S.D.N.Y. 2014); Muzuco v. Re$ubmitit, LLC, 297 F.R.D. 504 (S.D. Fla. 2013); Jacob v. Duane Reade, Inc., 289 F.R.D. 408 (S.D.N.Y. 2013), *aff'd*, 602 F. App'x 3 (2d Cir. 2015); Haddock v. Nationwide Fin. Svcs., Inc., 293 F.R.D. 272 (D. Conn. 2013); Cox v. Sherman Capital LLC, 295 F.R.D. 207 (S.D. Ind. 2013); Lace v. Fortis Plastics, LLC, 295 F.R.D. 192 (N.D. Ind. 2013); *In re* Nexium (Esomeprazole) Antitrust Litig., 297 F.R.D. 168 (D. Mass. 2013), *aff'd*, 777 F.3d 9 (1st Cir. 2015); Mahon v. Chi. Title Ins., 296 F.R.D. 63 (D. Conn. 2013); Sykes v. Mel Harris & Assocs., 285 F.R.D. 279 (S.D.N.Y. 2012), *aff'd*, 780 F.3d 70 (2d Cir. 2015); *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex. on Apr. 20, 2010, 910 F. Supp. 2d 891 (E.D. La. 2012), *aff'd sub nom. In re* Deepwater Horizon, 739 F.3d 790 (5th Cir. 2014). Moreover, despite setbacks in achieving class certification, the number of class action suits filed by plaintiffs has recently bounced back from a dip between 2010 and 2014. *See* Lisa Ryan, *GCs Expect Big Jump in Class Action Spending*, LAW360 (Sept. 1, 2015), http://www.law360.com/articles/705219/gcs-expect-big-jump-in-class-action-spending (noting recent uptick in class actions and spending by defense counsel, with the number of companies facing class actions rising from 53.8% in 2014 to 60.6% in 2015).

[270] *See infra* notes 298–301 and accompanying text (discussing restrictive reading of *Comcast* by various courts). Notably, while *Dukes* has clearly had an impact, *see, e.g.*, Gerald L. Maatman Jr., Ada Dolph & Annette Tyman, Wal-Mart Stores Inc. v. Dukes*: Has It Lived Up to the Hype?*, WORKPLACE CLASS ACTION BLOG (Jan. 25, 2014), http://www.workplaceclassaction.com/files/2014/01/2014-01-24-Wal-Mart-Stores-Inc.-v.-Dukes-Has-It-Lived-Up-Tp-The-Hype.pdf, several circuits have distinguished *Dukes* in other employment cases based on the specific facts and evidence. *See supra* note 160. Courts have sometimes distinguished *Dukes* in other contexts as well. *See, e.g.*, Reyes v. Netdeposit, LLC, 802 F.3d 469, 488 (3d Cir. 2015) (distinguishing *Dukes* in Racketeer Influenced and Corrupt Organizations Act (RICO) class action, stating, "it is clear that we are not faced with the individual circumstances that were fatal to certification in *Wal-Mart*"); Suchanek v. Sturm Foods, Inc. 764 F.3d 750, 755–58 (7th Cir. 2014) (distinguishing *Dukes* in consumer protection case and reversing district court decision denying class certification on commonality grounds); Parsons v. Ryan, 754 F.3d 657, 681–89 (9th Cir. 2014) (distinguishing *Dukes* in case alleging Eighth Amendment prison violations on the ground that the prison case involved "systemic policies and practices").

[271] *See, e.g.*, Mullins v. Direct Digital, LLC, 795 F.3d 654, 662 (7th Cir. 2015) (rejecting Third Circuit's ascertainability requirement); *supra* notes 225–28 and accompanying text; *cf.* Klonoff, *supra* note 1, at 761–68 (discussing several circuits that, contrary to various district courts, have refused to strike down alleged "fail-safe" classes).

are likely to press in the years ahead. I base my assessments on amicus briefs filed by the business community, articles by prominent class action defense lawyers, and defense-oriented blogs.[272]

i. Increased Reliance on Typicality

As I explained in my *Decline* article, defendants in class actions have been successful in convincing federal appellate courts to breathe new life into the previously lax requirements of numerosity, commonality, and class definition.[273] Another class certification requirement—the "typicality" requirement[274]—has not yielded the same payoff for defendants. Although cases can be found rejecting class certification on typicality grounds,[275] many more can be found in which the typicality requirement was satisfied.[276] And many of the cases finding a lack of typicality also rejected class certification on other grounds, so the lack of typicality was not essential to the outcome.[277] The

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[272] To be sure, some defense blogs publish advocacy pieces that may be hyperbolic. Nonetheless, such blogs remain a useful barometer in gauging where the defense bar is focusing its attention. (The same points can be made about some plaintiffs' blogs.)

[273] Klonoff, *supra* note 1, at 761–80.

[274] *See* FED. R. CIV. P. 23(a)(3) (mandating that "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class").

[275] *See, e.g.*, Kress v. CCA of Tenn., LLC, 694 F.3d 890, 893 (7th Cir. 2012) (district court did not abuse its discretion in denying class certification on typicality grounds); Rodriguez v. Nat'l City Bank, 726 F.3d 372, 386 (3d Cir. 2013) (similar); Williams v. Oberon Media, Inc., 468 F. App'x 768, 771 (9th Cir. 2012) (similar); DWFII Corp. v. State Farm Mut. Auto. Ins., 469 F. App'x 762, 765 (11th Cir. 2012) (similar); Spano v. The Boeing Co., 633 F.3d 574, 590–91 (7th Cir. 2011) (reversing class certification in part on typicality grounds); McDonald v. Franklin Cnty., 306 F.R.D. 548, 562–63 (S.D. Ohio 2015) (denying class certification in part on typicality grounds); Callari v. Blackman Plumbing Supply, Inc., 307 F.R.D. 67, 78, 83 (E.D.N.Y. 2015) (similar); *In re* Navy Chaplaincy, 306 F.R.D. 33, 53, 57 (D.D.C. 2014) (similar); Turcios v. Carma Labs., Inc., 296 F.R.D. 638, 648–49 (C.D. Cal. 2014) (similar).

[276] For examples of cases finding that typicality was satisfied, see Golan v. Veritas Entm't, LLC, 788 F.3d 814, 821 (8th Cir. 2015); Sykes v. Mel S. Harris & Assocs. LLC, 780 F.3d 70, 84 (2d Cir. 2015); Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co., 765 F.3d 1205, 1216 (10th Cir. 2014); Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp., 762 F.3d 1248, 1259–61 (11th Cir. 2014); Stephens v. Pension Benefit Guar. Corp., 755 F.3d 959, 964 (D.C. Cir. 2014); Parsons v. Ryan, 754 F.3d 657, 685 (9th Cir. 2014); Abbott v. Lockheed Martin Corp., 725 F.3d 803, 815 (7th Cir. 2013); Britt Green Trucking, Inc. v. FedEx Nat'l LTL, Inc., 511 F. App'x 848 (11th Cir. 2013); Meyer v. Portfolio Recovery Assocs., LLC, 707 F.3d 1036, 1041 (9th Cir. 2012); Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015 (9th Cir. 2012); Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 599 (3d Cir. 2012); Young v. Nationwide Mut. Ins. , 693 F.3d 532, 543 (6th Cir. 2012); Shahriar v. Smith & Wollensky Rest. Grp., Inc., 659 F.3d 234, 252 (2d Cir. 2011); Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1175 (9th Cir. 2010).

[277] *See, e.g.*, Adkins v. Morgan Stanley, 307 F.R.D. 119, 141–47 (S.D.N.Y. 2015) (predominance, superiority), *appeal docketed*, No. 15-2398 (2d Cir. July 30, 2015); *McDonald*, 306 F.R.D. 548 (commonality); *Callari*, 307 F.R.D. at 75–82 (commonality, predominance, adequacy of representation); Pa. Pub. Sch. Emps. Ret. Sys. v. Morgan Stanley & Co., Inc., 772 F.3d 111, 120–21 (2d Cir. 2014) (commonality, numerosity); *Turcios*, 296 F.R.D. at 645–46, 648–49 (commonality, adequacy of

cases also tend to be very fact-specific, and it has thus been hard for defendants to argue lack of typicality based on prior decisions.

Most importantly, typicality has not been pivotal in many cases because most courts have applied an easily satisfied test. For instance, the Ninth Circuit has stated that typicality is a "permissive" standard under which "representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical."[278]

Lately, defendants have sharpened their typicality arguments and have had some notable success. For instance, in *Spano v. The Boeing Co.*, the Seventh Circuit—relying heavily on typicality—reversed the district court's class certification order in an Employee Retirement Income Security Act of 1974 (ERISA) case alleging a breach of fiduciary duty in connection with 401(k) plan fees, expenses, and investment options.[279] The court noted that "there must be enough congruence between the named representative's claim and that of the unnamed members of the class to justify allowing the named party to litigate on behalf of the group."[280] Under that standard, which the district court did not apply, a class representative "would at a minimum need to have invested in the same [investment] funds as the class members."[281]

One interesting decision from 2013 is *Major v. Ocean Spray Cranberries, Inc.*[282] There, plaintiffs claimed that labels on a number of Ocean Spray juice and drink products were deceptive (for example, "No Sugar Added" and "Healthy").[283] The defendant argued—and the court agreed—that typicality was not satisfied because multiple products were encompassed by the class definition, and the class representative did not personally purchase all of those

representation, predominance, superiority); Ealy v. Pinkerton Gov't Servs., Inc., 514 F. App'x 299 (4th Cir. 2013) (commonality, predominance); *Rodriguez*, 726 F.3d at 379 (commonality); *Williams*, 468 F. App'x at 770–71 (adequacy of representation, predominance); *DWFII Corp.*, 469 F. App'x at 765 (predominance); *Spano*, 633 F.3d at 584 (adequacy of representation, Rule 23(b)(1)).

278 *Parsons*, 754 F.3d at 685 (quoting Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998)); *see also, e.g.*, Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp., 762 F.3d 1248, 1259–61 (11th Cir. 2014) ("The typicality requirement may be satisfied despite substantial factual differences . . . where there is a strong similarity of legal theories." (quoting Williams v. Mohawk Indus., 568 F.3d 1350, 1357 (11th Cir. 2009))); Ouellette v. Int'l Paper Co., 86 F.R.D. 476, 480 (D. Vt. 1980) ("Differences in the degree of harm suffered, or even in the ability to prove damages, do not vitiate the typicality of a representative's claims." (citation omitted)).

279 *Spano*, 633 F.3d at 583–91.

280 *Id.* at 586.

281 *Id.*

282 No. 5:12-CV-03067, 2013 WL 2558125 (N.D. Cal. June 10, 2013).

283 *Id.* at *1.

products herself.[284] The court found that a lack of typicality under such facts is not unprecedented, and on the facts of the case the district court may have been correct in refusing to lump together a variety of different products.[285] Nonetheless, the *Major* court's "typicality" definition is troublesome because it provides that "a class representative must . . . suffer *the same injury* as the class members."[286] If applied literally as the test for typicality, it is subject to the same criticism that Professor Lahav leveled against H.R. 1927[287]: It prevents certification whenever there are *any* differences between the injuries alleged by the representative and the unnamed class members, even when those differences do not conceivably bear on the ability of the representative to represent the class.[288]

Major received extensive coverage when it was decided. A number of prominent defense firms featured the case on their blogs.[289] The case received scholarly attention as well. For instance, Georgetown Law Professor Rebecca

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284 *Id.* at *3–5.

285 *See, e.g.*, Wiener v. Dannon Co., Inc., 255 F.R.D. 658, 665–67 (C.D. Cal. 2009) (finding lack of typicality because the class representative did not personally purchase all of the Dannon products encompassed by the lawsuit).

286 *Major*, 2013 WL 2558125, at *3 (emphasis added) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982)). *Contra, e.g.*, Ouellette v. Int'l Paper Co., 86 F.R.D. 476, 480 (D. Vt. 1980) ("Differences in the degree of harm suffered . . . do not vitiate the typicality of a representative's claims." (citation omitted)). Although the *Major* court was quoting from *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982), which in turn was quoting from earlier Supreme Court cases, the Court in *Falcon* was merely articulating the principle that a class representative must be a member of the class that he or she represents, not that typicality required the complete absence of factual variations.

287 *See supra* note 82 and accompanying text.

288 Such an approach would radically alter the traditional application of the typicality requirement. *See supra* note 278 and accompanying text.

289 Jay Connolly & Joe Orzano, Major v. Ocean Spray*: Court Denies Certification of Putative Classes that Include Products Not Purchased by Plaintiff in Food Labeling Case*, CONSUMER CLASS DEF. BLOG (June 25, 2013), http://www.consumerclassdefense.com/2013/06/major-v-ocean-spray-court-denies-certification-of-putative-classes-that-include-products-not-purchased-by-plaintiff-in-food-labeling-case/ (Seyfarth Shaw); Claudia Maria Vetesi, *Ocean Spray Defeats Class Certification in Food Misbranding Action*, PRIV. SURGEON GEN. CLASS ACTION DEFENDER (June 20, 2013), http://www.privatesurgeongeneral.com/2013/06/20/ocean-spray-defeats-class-certification-in-food-misbranding-action/ (Morrison Foerster); Sean Wajert, *Another Plaintiff Fails to Obtain Class Certification for Claims About Products Not Actually Purchased*, MASS TORT DEF. (June 18, 2013), http://www.masstortdefense.com/2013/06/articles/another-plaintiff-fails-to-obtain-class-certification-for-claims-about-products-not-actually-purchased/ (Shook, Hardy & Bacon); *Class Certification Denied in Ocean Spray False Labeling Suit*, FOOD LITIG. NEWSL. (June 24, 2013), https://www.perkinscoie.com/images/content/6/5/65010.pdf (Perkins Coie); *Where the (Class) Action Is: You Can't Sue About Things that You Didn't Buy*, CLASS ACTION ROUND-UP, Summer 2013, at 5, http://www.alston.com/Files/Publication/73737165-f112-4947-ba87-bf60dbaf0d81/Presentation/PublicationAttachment/558120a6-a7c1-4aac-8711-6ec0c922dc1d/Class-Action-Newsletter-Summer-2013.pdf (Alston & Bird).

Tushnet's well-respected blog highlighted *Major* in a feature story devoted solely to the case.[290] It is unusual for a district court class certification decision to generate headline stories in multiple blogs. But the case is noteworthy because it shows that typicality may indeed have teeth as an independent Rule 23(a) requirement.

In my opinion, the *Major* court's definition of typicality is incorrect. It allows typicality to derail class actions even when the differences among class members do not affect the class representative's ability to prosecute a case on a classwide basis and ensure that all segments of the class are adequately represented. Indeed, the *Major* court's definition—which requires that the representative allege *the same* injury as all class members—makes typicality more demanding than predominance, since the latter requirement balances the similarities against the differences.[291] Ultimately, I do not believe that the strict definition of typicality articulated in *Major* will be widely adopted. At the same time, depending on the composition of the Supreme Court in the next several years, I cannot rule out the possibility that the Court will breathe new life into typicality, just as it did for commonality (in *Dukes*).[292]

ii. Damages and Predominance

Prior to *Comcast Corp. v. Behrend*,[293] courts had almost universally held that individualized damages did *not*, standing alone, preclude class certification.[294] In *Comcast*, the Supreme Court ruled that Rule 23(b)(3)'s predominance requirement was not satisfied because "respondents' [damages] model [fell] far short of establishing that damages are capable of measurement on a classwide basis."[295] After *Comcast*, defendants began to argue that the existence of individualized damages *automatically* defeated class certification. The problem was that *Comcast* was very fact specific and arguably did not represent a shift in the way courts had approached predominance when analyzing individualized damages. As the dissent pointed out, the plaintiffs in *Comcast* did not dispute that, under the specific facts of the case, class

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290 Rebecca Tushnet, *Typicality Defeats a Food Class Action*, REBECCA TUSHNET'S 43(B)LOG (June 14, 2013), http://tushnet.blogspot.com/2013/06/typicality-defeats-food-class-action.html.

291 *See* FED. R. CIV. P. 23(b)(3) (requiring that the court "find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members").

292 Justice Scalia's death makes it less likely that there will be a solid majority willing to transform typicality into a strong barrier to class certification.

293 133 S. Ct. 1426 (2013).

294 *Id.* at 1436–37 (Ginsburg & Breyer, JJ., dissenting) (discussing case law).

295 *Id.* at 1433.

certification would be inappropriate if individualized damages existed.[296] According to the dissent, the defendant's concession meant that the Court did not need to address the "well nigh universal" rule that "individualized damages calculations do not preclude class certification."[297]

Thus far, defendants have had little success in selling their interpretation of *Comcast*. The Second Circuit, in *Roach v. T.L. Cannon Corp.*, squarely rejected it, concluding that *Comcast* "did not hold that proponents of class certification must rely upon a classwide damages model to demonstrate predominance."[298] The court cited several decisions, including cases from the Fifth, Seventh, and Ninth Circuits, in support of its construction of *Comcast*.[299] The Third Circuit has weighed in on that side as well.[300] The district court in *Roach* embraced the defendant's reading of *Comcast*, but, as noted, that interpretation was rejected by the Second Circuit.[301]

Most importantly, the Supreme Court's decision in *Tyson Foods* significantly undercuts the argument. There, the Court—in discussing the general concept of predominance—noted that

> [w]hen "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."[302]

This language cannot be dismissed as stray or careless dictum. The Court knew exactly what it was doing. Justice Thomas, in dissent, specifically noted that the majority's language was directly contrary to *Comcast*, where, according to Justice Thomas, the Court "deemed a lack of a common

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296 *Id.* at 1437 (Ginsburg & Breyer, JJ., dissenting) (citing plaintiffs' brief); *see* Klonoff, *supra* note 1, at 755.

297 *Comcast*, 133 S. Ct. at 1437 (Ginsburg & Breyer, JJ., dissenting) (citing authority).

298 778 F.3d 401, 407 (2d Cir. 2015) (citations omitted).

299 *Id.* (citing *In re* Deepwater Horizon, 739 F.3d 790, 817 (5th Cir. 2014); Butler v. Sears, Roebuck & Co., 727 F.3d 796, 799 (7th Cir. 2013); and Leyva v. Medline Indus. Inc., 716 F.3d 510, 514 (9th Cir. 2013)).

300 Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 374–75 (3d Cir. 2015).

301 Roach v. T.L. Cannon Corp., No. 3:10-CV-0591, 2013 WL 1316452, at *3 (N.D.N.Y. Mar. 29, 2013) (refusing to certify putative class of restaurant employees in wage-and-hour class action on the ground that damages were not "capable of measurement on a classwide basis" (citing Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013))), *vacated*, 778 F.3d 401, 409 (2015) ("[B]ecause we do not read *Comcast* as precluding class certification where damages are not capable of measurement on a classwide basis, we reject the district court's sole reason for denying Plaintiffs' motion for class certification.").

302 136 S. Ct. 1036, 1045 (citation omitted) (emphasis added).

methodology for proving damages fatal to predominance."[303] Thus, the majority was well aware of the implications of its discussion of predominance on the question of damages.

That is not to say that defendants will throw in the towel on their focus on damages. Instead, within the parameters of the predominance definition in *Tyson Foods*, they will now argue not for a per se rule, but instead for a case-by-case assessment as to whether individualized damages outweigh any common questions. This approach is far less helpful to defendants; the per se approach relieved them of any need to balance the liability questions against the damages questions. Under the post-*Tyson Foods* approach, however, where there are significant common questions, damages will not defeat predominance except perhaps in the most unusual cases, in which the calculation of damages is extremely complicated, difficult, and time-intensive.

iii. Arguments Against Certification Based on "Superiority"

Another aspect of Rule 23 that I believe will be a focus of the defense bar and the business community is "superiority," which is a required element of all class actions under Rule 23(b)(3).[304] Like typicality, superiority has not heretofore been a potent weapon in the defendant's arsenal for opposing class certification. Because a component of superiority is manageability,[305] the superiority requirement is often invoked when individualized issues outweigh common issues, thus leading to an unmanageable situation.[306] In such cases, superiority adds nothing to the equation because the identical argument is already a reason to deny certification on predominance grounds.

I believe, however, that in the coming decade, defendants will press superiority beyond the traditional manageability argument. Indeed, there are indications that defendants are already heading in that direction.

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303 *Id*. at 1056–57 (Thomas, J., dissenting) (citation omitted).

304 Most class actions are brought under 23(b)(3). *See, e.g.*, Saby Ghoshray, *Hijacked by Statistics, Rescued by* Wal-Mart v. Dukes, 44 LOY. U. CHI. L.J. 467, 478 n.54 (2012) ("Today, most class actions are certified under Rule 23(b)(3)."); Thomas Kays, *An Ounce of Prevention: Early Motions Attacking Class Certification*, 80 DEF. COUNS. J. 164, 176 n.62 (2013) (noting that "most class actions fall under" 23(b)(3)).

305 FED. R. CIV. P. 23(b)(3)(D).

306 *See, e.g.*, Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich., 654 F.3d 618, 621, 631 (6th Cir. 2011) (reversing class certification on superiority in part because individual fact determinations would have to be made for each class member, and noting that "[g]iven the necessary number of individual inquiries, a class action cannot be a superior form of adjudication"); Madison v. Chalmette Refining, L.L.C., 637 F.3d 551, 554–57 (5th Cir. 2011) (using both "predominance" and "superiority" in remanding order certifying class because district court did not adequately analyze whether common issues predominated).

First, a number of recent articles have advised defendants to focus on administrative alternatives to a class action in challenging superiority. For example, a 2005 law review article urged the following: "Courts considering requests for class certification should . . . take a close look at pending or completed government law enforcement actions and investigations to determine their effect, if any, on [a] proposed class action."[307] The authors note that "[c]lass actions can . . . be inefficient, costly, and unnecessary, particularly if government law enforcement has solved or is likely to solve the problem."[308] That approach could be sensible in some circumstances. If the government is in the process of resolving a problem administratively, and if the resolution looks promising for the injured parties, perhaps a private lawsuit is not a superior mechanism. The same reasoning applies *a fortiori* if an administrative proceeding has already afforded adequate relief to aggrieved individuals. Superiority is surely flexible enough to permit an examination of alternative vehicles outside of private litigation to resolve a problem.[309]

My concern, however, is that commentators have taken the argument well beyond the situation of a pending (or completed) administrative action. As a 2010 article by two antitrust defense lawyers stated: "One effective argument for avoiding class certification could be whether a government action has already, is currently, or *could potentially* address the same issues raised in the class action complaint."[310] The authors cite a few cases where courts have refused to certify class actions on superiority grounds when there has been a prior settlement between the defendant and a government agency.[311] They also

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[307] D. Bruce Hoffman, *To Certify or Not: A Modest Proposal for Evaluating the "Superiority" of a Class Action in the Presence of Government Enforcement*, 18 GEO. J. LEGAL ETHICS 1383, 1393 (2005); *see also* Andrew Trask, *Agencies as Gatekeepers—Implications for Superiority*, CLASS ACTION COUNTERMEASURES (Feb. 27, 2014), http://www.classactioncountermeasures.com/2014/02/articles/scholarship/agencies-as-gatekeepers-implications-for-superiority/ ("[A]llowing one-shot class actions to go forward may compromise the optimal public level of regulation." (citing David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 636 (2013))).

[308] Hoffman, *supra* note 307, at 1392–93.

[309] *See, e.g.*, Brown v. Blue Cross & Blue Shield of Mich., 167 F.R.D. 40, 44 (E.D. Mich. 1996). After the State of Michigan reached a settlement in which defendant Blue Cross agreed to refund overpayments of co-pays for hospital visits, the court denied class certification in a related case, noting that "the interests of the class [are] adequately served by the agreement between defendant and the State of Michigan rendering a class action unnecessary." *Id.*

[310] Steven Malech & Seth Huttner, *What Is Superiority? The Role of Completed, Pending, and Anticipated Government Activity in Certifying a Class Action*, ANTITRUST SOURCE, Apr. 2010, at 11 (emphasis added), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Apr10_Malech4_14f.authcheckdam.pdf.

[311] *Id.* at 4–6.

cite a few cases relying on the superiority of a *pending* government action.[312] They acknowledge, however, that there is authority to the contrary.[313] And they concede that "no case has yet held that an anticipated or potential suit should be a dispositive factor in precluding certification," although they claim that "a number of courts have considered the government's ability to enter the fray as one of the factors influencing the overall class certification decision."[314]

A finding of lack of superiority because of the mere *possibility* of a government enforcement action, if adopted, could severely impact the ability of plaintiffs to certify a wide variety of cases, including many consumer, employment, and securities cases. The deterrent effect of private enforcement would be severely crippled. Yet, while the argument seems extreme, I think it is likely that defendants will try to press it as they look for new ways to challenge class certification.

Second, I believe that there will be a push by defendants to revive the substance—if not the terminology—of the "it just ain't worth it" rule proposed by the Advisory Committee in 1996, but later tabled.[315] Under that proposal, a court would look at whether the amount of potential recovery by individual class members would be large enough to justify the expense of a class action lawsuit.[316] Presumably, small claims class actions, including many consumer cases, would fail under such an analysis. Although there is nothing to suggest that the Advisory Committee plans to take up that issue any time soon, it is quite possible that defendants will begin to press the argument even without a rule change. The argument would be that *no* action is superior to one in which class members recover little, if anything. The argument would dovetail

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312 *Id.* at 7–9.

313 *Id.* at 5–7.

314 *Id.* at 9.

315 PROPOSED AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL, AND CRIMINAL PROCEDURE, 167 F.R.D. 523, 559 (1996).

316 In 2013, the state of Arizona considered a similar proposal, under which a court would have been required to consider "whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify maintaining the case as a class action." S.B. 1452, 51st Leg., 1st Reg. Sess. (Ariz. 2013), http://www.azleg.gov/legtext/51leg/1r/bills/sb1452p.pdf; *see also* Paul Karlsgodt, *Arizona Considers Significant Class Action Reform Bill*, CLASSACTIONBLAWG.COM (Feb. 4, 2013), http://classactionblawg.com/2013/02/04/arizona-considers-significant-class-action-reform-bill/. That proposal, however, was ultimately rejected. *See* ARIZ. REV. STAT. ANN. § 12-1871 (2015) (omitting "it just ain't worth it" language).

concerns raised by some courts about *cy pres* settlements: Class actions are questionable if little or no recovery is received by class members.[317]

Third, and related to "it just ain't worth it" arguments, when damages are inconsequential on a per-class-member basis but large in the aggregate, I expect to see defendants argue—as some already have—that a class action is not the superior mechanism. As one defense attorney specializing in class actions recently asserted with respect to consumer class actions:

> [T]he aggregation of statutory damages through the class action mechanism can create potential damage awards that are ruinous to small businesses and, in some cases, large corporations, and grossly disproportionate to any actual harm caused by the technical violations of the consumer protection statutes giving rise to the statutory damage claims.[318]

Although some district courts have embraced the argument,[319] two recent federal appellate decisions have rejected it, reasoning that denying class certification on that ground would not be consistent with congressional intent to compensate victims and deter misconduct.[320] As one court explained: "To the extent that statutory damages . . . serve a deterrent purpose, a court undermines that purpose in denying class certification on the basis of the proportionality of actual harm and statutory liability."[321] Those decisions leave open the possibility that, on the merits, damages could be reduced as unconstitutionally excessive,[322] but they make clear that denial of class certification on that basis is not appropriate. Nonetheless, despite the recent appellate decisions rejecting the proportionality argument, defendants are likely to continue to press it in the years ahead.

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317 *See, e.g.*, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013) ("[D]irect distributions to the class are preferred over *cy pres* distributions."); Nachshin v. AOL, LLC, 663 F.3d 1034, 1038 (9th Cir. 2011) ("[T]he *cy pres* doctrine . . . poses many nascent dangers to the fairness of the distribution process.").

318 James Michael Walls, *Rule 23(b)(3) and the Superiority of Class Actions for Statutory Damage Claims Involving Technical Violations Resulting in No Actual Damages*, BLOOMBERG BNA (Jan. 29, 2013), http://www.bna.com/rule-23b3-and-the-superiority-of-class-actions-for-statutory-damage-claims-involving-technical-violations-resulting-in-no-actual-damages/.

319 *See, e.g.*, Ratner v. Chem. Bank N.Y. Tr. Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972) (concluding that superiority not satisfied where "the proposed recovery of $100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act"); Shields v. First Nat'l Bank of Ariz., 56 F.R.D. 442, 446–47 (D. Ariz. 1972) (citing *Ratner* and similar cases).

320 *See, e.g.*, Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708 (9th Cir. 2010); Murray v. GMAC Mortg. Corp., 434 F.3d 948 (7th Cir. 2006).

321 *Bateman*, 623 F.3d at 719.

322 *Id.* at 723; *Murray*, 434 F.3d at 954.

One final point on superiority: Although the Seventh Circuit's *Mullins* decision (rejecting ascertainability as a separate requirement for class certification[323]) is largely a victory for plaintiffs, defendants can also make use of the case. In rejecting ascertainability, the court made clear that the superiority requirement can perform some heavy lifting: "If faced with what appear to be unusually difficult manageability problems at the certification stage, district courts have discretion to insist on details of the plaintiff's plan for notifying the class and managing the action."[324] And the court emphasized that "[a] plaintiff's failure to address the district court's concerns adequately may well cause the plaintiff to flunk the superiority requirement of Rule 23(b)(3)."[325] Thus, *Mullins* gives defendants an important roadmap for placing greater reliance on superiority.

b. Courts Will Focus More Heavily than in the Past on Asserted Ethical Violations by Class Counsel and Counsel for Objectors

As noted in *Decline*,[326] one major reason for the myriad recent cases cutting back on class actions is a concern that even cases with questionable merit place defendants under "intense pressure to settle."[327] As one court put it, "[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low."[328] The unstated assumption is that plaintiffs' lawyers are prone to file baseless lawsuits to coerce the settlement of marginal cases.

In part to reduce the pressure on defendants to settle, Rule 23(f) was adopted in 1998. That rule, which authorizes interlocutory appeals of decisions certifying class actions (at the discretion of the federal appellate court), is designed to give defendants the opportunity to challenge class certification immediately after the district court's ruling, instead of waiting until the end of the case (or succumbing to the pressure to settle).[329] Rule 23(f) has enabled the

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323 Mullins v. Direct Dig., LLC, 795 F.3d 654 (7th Cir. 2015); *see supra* 225–28 and accompanying text.

324 *Mullins*, 795 F.3d at 664.

325 *Id.* at 672.

326 *See* Klonoff, *supra* note 1, at 733.

327 *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir. 1995).

328 Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citing *In re Rhone-Poulenc*, 51 F.3d at 1298).

329 *See* FED. R. CIV. P. 23(f). Rule 23(f) also authorizes interlocutory review of an order *denying* class certification, but that Rule has disproportionately benefitted defendants who wish to challenge a district court's order certifying a class. *See* Klonoff, *supra* note 1, at 741 (concluding, based on the author's empirical study, that Rule 23(f) "has served primarily as a device to protect defendants").

federal appellate courts to address myriad issues relating to class certification. The result is that the federal appellate courts have erected significant roadblocks to class certification.[330] Many of the cases adopting those stringent new standards have specifically referenced the pressure on defendants to settle meritless class actions.[331] In other words, tightening the requirements for class certification is seen by some judges as necessary to combat unscrupulous plaintiffs' attorneys who bring baseless claims, even if the impact of that approach is to curtail legitimate class actions.

Although arguable ethical misconduct has lurked in the background in some cases, courts have traditionally been unwilling to hold class counsel accountable for improper behavior. In 2004, I concluded, based on empirical research, that "[c]ourts . . . ha[d] almost universally refused to disqualify class counsel [on adequacy of representation grounds] based on ethical misconduct."[332] My research of all published class action decisions since the adoption of modern Rule 23 in 1966 (including those found only on Lexis or Westlaw) revealed only *three* instances in thirty-eight years in which courts had found class counsel inadequate under Rule 23(a)(4) based on ethical misconduct.[333] I was highly critical of the judiciary's refusal to give weight even to egregious attorney misconduct.[334] I was not arguing that ethical abuse was widespread. Indeed, I believe—based on decades of personal experience representing clients in class actions—that most class action attorneys are ethical and conscientious. But egregious situations do arise, and courts have traditionally been reluctant to exercise appropriate oversight even in those situations.

The landscape has changed significantly in recent years. As discussed below, ethical misconduct is now front and center in many cases.[335] Surprisingly, that important trend has gone virtually unnoticed by commentators. Part of the reason for the recent spate of cases is that, with many courts already expressing concern about the legitimacy of the class action device, attorneys have felt emboldened to make direct accusations of misconduct against other attorneys in their cases. (I saw relatively few such

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330 Klonoff, *supra* note 1, at 747–51.

331 *See id.* at 753, 818 (citing examples).

332 Robert H. Klonoff, *The Judiciary's Flawed Application of Rule 23's "Adequacy of Representation" Requirement*, 2004 MICH. ST. L. REV. 671, 692.

333 *Id.* at 692 & n.134 (citing cases).

334 *Id.* at 692, 697.

335 *See infra* notes 337–67 and accompanying text.

attacks during my many years as a class action practitioner.) And appellate judges are now reviewing more class actions in light of Rule 23(f),[336] and thus are seeing more cases involving allegations of ethical misconduct.

The recent precedents are worth examining because they provide insight into what the future is likely to hold. Judge Posner alone has written *four* important opinions for the Seventh Circuit scrutinizing misconduct of class counsel. In one of those cases, *Creative Montessori Learning Centers v. Ashford Gear LLC*, the court criticized the lax approach of the district court and adopted a new, onerous test whereby class counsel who has engaged in ethical violations has a heavy burden to show that he or she is nonetheless adequate to represent the class.[337] Based on that test and on defendant's allegations of serious misconduct by class counsel—including obtaining material by falsely promising to maintain confidentiality—the court vacated and remanded the district court's class certification order. In three other opinions for the court overturning class settlements, Judge Posner also relied heavily on misconduct of class counsel. In *Eubank v. Pella Corp.*, the court invalidated a class settlement based on numerous ethical violations by class counsel.[338] The violations included a conflict of interest of lead counsel, who was the lead class representative's son-in-law; the fact that class counsel was facing other disciplinary charges; and the fact that the settlement awarded only modest recoveries (but substantial attorneys' fees) and required class members to fill out burdensome claim forms. In *Redman v. RadioShack Corp.*, the court found that a one million dollar fee award to counsel was improper because it was disproportionate to the $10 "coupons" received by class members for future purchases at RadioShack.[339] And in *Pearson v. NBTY, Inc.*, the court again overturned a class settlement where class members received meager recoveries and had to complete onerous claim forms.[340] *Eubank*, *Redman*, and *Pearson* were all premised on the concern that class counsel favored their financial interests over those of the class and thus did not zealously represent their clients.

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336 *See supra* note 329 and accompanying text.

337 662 F.3d 913, 918–19 (7th Cir. 2011) (rejecting the district court's test that "only the most egregious misconduct 'could *ever arguably* justify denial of class status,'" instead holding that "[m]isconduct by class counsel that creates a serious doubt that counsel will represent the class loyally requires denial of class certification," and further noting that "[a] serious or, equivalently, a 'major' ethical violation . . . should place on class counsel a heavy burden of showing that they are adequate representatives of the class" (citations omitted)).

338 753 F.3d 718, 728–29 (7th Cir. 2014).

339 768 F.3d 622, 639 (7th Cir. 2014).

340 772 F.3d 778, 787 (7th Cir. 2014).

Most recently, in *In re Southwest Airlines Voucher Litigation*, the Seventh Circuit (in an opinion authored by Judge Hamilton) addressed a conflict-of-interest objection that was raised for the first time on appeal.[341] Objectors argued that class counsel was not adequate under Rule 23(a)(4) because lead class counsel was co-counsel in another case with one of the two class representatives.[342] Initially, the court noted that "[t]he conflict of interest issue . . . presents a rare instance where it makes sense for us to consider an issue not raised in the district court," and it thus rejected the argument that the objection was waived.[343] The court concluded that there was at least a potential for a conflict of interest, and that the relationship should have been disclosed to the court.[344] Although the court declined to overturn the settlement (concluding that the class had not been prejudiced), it did eliminate a $15,000 incentive award to the class representative, and also reduced the attorneys' fees to the offending class counsel by $15,000.[345] Most importantly, the court used strong language in stating that both class counsel and the representative were "fiduciaries for the class" and thus "should have known to disclose their relationship and the potential conflict it posed."[346]

The Ninth Circuit has similarly imposed significant consequences on class counsel for ethical violations. In *Rodriguez v. West Publishing Corp.* (*Rodriguez I*), a settlement provided five of seven class representatives with "incentive payments" based on the amount recovered by the class.[347] Although the court approved the settlement (because there were two class representatives who were not entitled to such payments), it found that the conflicts of the five representatives "implicate[d] California ethics rules that prohibit representation of clients with conflicting interests."[348] As a result, the court held that the ability of counsel to recover fees was "implicated."[349] On remand, the district court held that counsel were not entitled to any attorneys' fees in light of the conflict of interest.[350] In the second appeal, with the case now styled *Rodriguez*

341 799 F.3d 701 (7th Cir. 2015).
342 *Id.* at 713–14.
343 *Id.* at 714.
344 *Id.* at 715.
345 *Id.* at 716.
346 *Id.* at 715.
347 563 F.3d 948, 957 (9th Cir. 2009).
348 *Id.* at 960.
349 *Id.* at 968.
350 Rodriguez v. West Publ'g Corp., No. CV 05-3222 R, 2010 WL 682096, at *3–4 (C.D. Cal. Feb. 3, 2010).

v. Disner (*Rodriguez II*),[351] the court of appeals affirmed the district court, reasoning that "[a] court has broad equitable power to deny attorneys' fees (or to require an attorney to disgorge fees already received) when an attorney represents clients with conflicting interests."[352]

The following year, in *Radcliffe v. Experian Information Solutions Inc.*, the Ninth Circuit held that class counsel were inadequate to represent a class under Rule 23(a)(4) because their agreement with class representatives provided for incentive payments only if the representatives supported the settlement that class counsel entered into with the defendant.[353] The court again noted that counsel are prohibited from representing clients "with actual or potential conflicts of interest absent an express waiver."[354] The court thus reversed the settlement as well as the award of attorneys' fees to counsel.

The fact that, in just the past few years, *eight* U.S. Court of Appeals class action opinions (five from the Seventh Circuit and three from the Ninth) have turned in whole or in part on ethical violations is highly significant. As noted,[355] for most of the period since the adoption of modern Rule 23, ethical violations of counsel almost never impacted the outcome of class certification or settlement approval.

Notably, the recent intense focus on ethical violations is not limited to federal appellate courts. A number of federal district courts have also condemned ethical lapses by class counsel (and, in at least one instance, by class action defense counsel).[356]

For instance, in August 2015, Judge Nicholas Garaufis (E.D.N.Y.) rejected a $75 million class settlement in an antitrust suit by various merchants against American Express.[357] The court found that class counsel (Gary B. Friedman of the Friedman Law Group) had engaged in "egregious conduct" by sharing privileged, highly material information about the case with a class action defense attorney (Keila Ravelo, formerly of the Wilkie Farr law firm and now

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351 688 F.3d 645 (9th Cir. 2012).

352 *Id.* at 653.

353 715 F.3d 1157, 1167 (9th Cir. 2013).

354 *Id.* at 1167 (citing *Rodriguez I* and *Rodriguez II*).

355 *See supra* notes 332–34 and accompanying text.

356 In the following discussion, I am not passing judgment on the particular individuals or conduct at issue; rather, I am simply reporting information discussed in public sources.

357 *In re* Am. Express Anti-Steering Rules Antitrust Litig., No. 11-MD-2221, 2015 WL 4645240, at *21 (E.D.N.Y. Aug. 4, 2015).

under federal indictment for unrelated matters), who was counsel in a similar case involving MasterCard.[358] The conduct of defense counsel, of course, was equally egregious in accepting that privileged and confidential information. In an affidavit submitted in the case, Professor Roy Simon, Jr., a legal ethics expert, stated that he could not "recall ever seeing such repeated and serious violations of professional duties" by class counsel and defense counsel.[359] Judge Garaufis's lengthy opinion emphatically rejected class counsel's argument that the conduct did not justify invalidating the settlement. Indeed, the court dismissed Friedman as class counsel.[360] Significantly, the ethical misconduct could also put in jeopardy a 2013 class settlement of close to $6 billion in a similar case involving Visa and MasterCard.[361]

In another 2015 case, *Johnson v. Smithkline Beecham Corp.*, Judge Paul Diamond (E.D. Pa.) sanctioned one of the country's premier mass torts plaintiffs' firms, Hagens Berman, imposing substantial fees and costs.[362] Similarly, in *Viveros v. VPP Group, LLC*, the court sua sponte found class counsel inadequate under Rule 23(a)(4) based on counsel's poor performance in the case at issue and in two prior class actions (all labor law cases) before the same judge.[363] The court was also troubled by class counsel's "disciplinary

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358 *See id.* at *13.

359 Jonathan Stempel, *Merchants Seek to Void $6 Bln Visa, MasterCard, AmEx Settlements*, REUTERS (July 29, 2015), http://www.reuters.com/article/2015/07/29/retail-financing-antitrust-idUSL1N1093D220150729.

360 *In re Am. Express*, 2015 WL 4645240, at *21. Friedman has posted an "Open Letter" on a personal web site to explain his position, asserting that Judge Garaufis based his ruling on an unrebutted "elaborate conspiracy theory" constructed by objectors in the case. He states that "Judge Garaufis foreclosed me from responding to these incredible allegations" and that "every material factual assumption or conclusion that underlies [Judge Garaufis's opinion] is false." Gary Friedman, *Open Letter Responding to Judge Garaufis's Aug. 4 Opinion*, GARYFRIEDMAN.TYPEPAD.COM (Sept. 29, 2015), http://garyfriedman.typepad.com/openletter/2015/09/29.html.

361 Rachel Abrams, *Judge Rejects Settlement in American Express Case*, N.Y. TIMES (Aug. 4, 2015), http://www.nytimes.com/2015/08/05/business/dealbook/judge-rejects-settlement-in-american-express-case.html.

362 No. Civ. 11-5782, 2015 WL 1004308 (E.D. Pa. Mar. 9, 2015). The claim in the *Johnson* litigation was that the drug thalidomide caused birth defects in plaintiffs about fifty years ago. *Id.* at *1. The case was not technically a class action but instead involved fifty-two individual plaintiffs represented by Hagens Berman. *Id.* Defendants (manufacturers and distributors of the drug) alleged that the claims were barred by the statute of limitations. *Id.* In the face of plaintiffs' arguments of fraudulent concealment and equitable tolling, defendants produced evidence from discovery indicating that some plaintiffs had known for decades that thalidomide had caused their birth defects and that other plaintiffs had no evidence that their mothers had taken the drug during pregnancy. *Id.* at *2–11. The court found that sanctions were justified, stating that the law firm's conduct was "not zealous" but "dishonest." *Id.* at *14.

363 No. 12-CV-129, 2013 WL 3733388, at *10–11 (W.D. Wis. July 15, 2013).

history," including both public and private reprimands by the Wisconsin Supreme Court.[364]

In another significant development, albeit in a different context, the Kentucky Supreme Court entered an order in 2013 disbarring Stanley Chesley, one of the country's premier class action plaintiffs' lawyers.[365] The court found that Chesley had violated multiple provisions of the Kentucky Rules of Professional Conduct.[366]

To be sure, courts have correctly recognized that not every ethical violation renders class counsel inadequate under Rule 23(a)(4).[367] Nonetheless, the flurry of recent cases holding class counsel accountable for ethical violations represents a sea change. The question, of course, is why there has been this recent focus on ethical violations of class counsel. In my view, there are at least three reasons.

First, I believe that some judges have come to recognize that it is far more sensible to punish the offending lawyers than to rewrite the criteria that govern all class actions. The opinions by Judge Posner, in particular, appear to reflect a keen understanding that, in many cases, the problem is not lax Rule 23 criteria but the failure to hold counsel responsible for egregious misconduct.

Second, in light of Federal Rule 23(f), federal appellate courts are now reviewing more class actions.[368] It is thus not surprising that, in exercising discretionary review, appellate courts have been influenced by allegations of

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364 *Id.* at *11. The court did, however, give counsel one last chance to show that his conduct was not sufficiently egregious to warrant a finding of inadequacy under Rule 23(a)(4). *Id.* at *11–12.

365 Ky. Bar Ass'n v. Chesley, 393 S.W.3d 584, 601 (Ky. 2013).

366 Among other things, Chesley accepted exorbitant attorneys' fees after agreeing to decertification of a class (involving persons who claimed injury from use of the diet drug, "fen-phen") and entering into a settlement that included only his own clients. *See id.* at 592. Although Chesley's contingent-fee agreement limited him to $14 million based on the recovery he had negotiated, he actually received $22 million in fees. *Id.* Indeed, in seeking a fee award, he failed to inform the trial court of the limits imposed by the contingency fee agreements. *Id.* at 598–99. Subsequently, in a civil action filed by his former clients, Chesley was held jointly and severally liable with his co-counsel for $42 million. Abbott v. Chesley, No. 05-CI-00436 (Cir. Ct. Ky. July 29, 2014).

367 *See, e.g.*, Radcliffe v. Hernandez, No. 14-56101 (9th Cir. Mar. 28, 2016) (upholding district court's refusal to disqualify class counsel for a conflict of interest); Reliable Money Order, Inc. v. McKnight Sales Co., 704 F.3d 489, 498–99 (7th Cir. 2013) (holding that, although class counsel's conduct, including breaching promises of confidentiality, violated certain Wisconsin ethical rules, defendant "[did] not identify any conflict of interest or prejudice to the class arising from the misconduct"); *In re* Pfizer Inc. Sec. Litig., 282 F.R.D. 38, 47–48 (S.D.N.Y. 2012) (ethical lapses did not render class counsel inadequate, because those lapses did not prejudice the class).

368 *See* Klonoff, *supra* note 1, at 739–43.

misconduct by plaintiffs' counsel. Prior to 1998, when Rule 23(f) was adopted, the federal circuits rarely had the opportunity to scrutinize class counsel's handling of class actions. Thus, the focus on ethics represents a logical by-product of Rule 23(f).

Third, in the settlement context, collusive settlements are now less likely to escape attention than in the past. In contrast to the typical non-adversarial context of a class settlement,[369] aggressive objections by public interest organizations have brought to light some serious ethical abuses. Concerns have been raised, for example, about coupon settlements,[370] *cy pres* settlements,[371] and excessive attorneys' fees.[372] Objectors with an institutional interest in class actions have become more common, and those objectors are pursuing appeals when district judges pay insufficient attention to alleged ethical violations. Indeed, in some of the cases (especially those by Judge Posner), the district court judges were sharply criticized for their lax treatment of ethical misconduct.[373]

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369 *See* Eubank v. Pella Corp., 753 F.3d 718, 720 (7th Cir. 2014) (noting that objectors can prove helpful in the non-adversarial settlement context, because "when a judge is being urged by both adversaries to approve the class-action settlement that they've negotiated, he's at a disadvantage in evaluating the fairness of the settlement to the class"); *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 789–90 (3d Cir. 1995) (noting that, in the settlement context, "the judge never receives the benefit of the adversarial process that provides the information needed to review the propriety of the class and the adequacy of settlement").

370 *See, e.g.*, *In re* Online DVD-Rental Antitrust Litig., 779 F.3d 934, 949–50 (9th Cir. 2015) ("[The Class Action Fairness Act (CAFA)] directs courts to apply heightened scrutiny to coupon settlements." (citations omitted)); Redman v. RadioShack Corp., 768 F.3d 622, 635–37 (7th Cir. 2014) ("[T]he district court should be alert to the many possible pitfalls in coupon settlements . . . ."); *In re* HP Inkjet Printer Litig., 716 F.3d 1173, 1177–78 (9th Cir. 2013) ("[C]oupon settlements may incentivize lawyers to negotiate settlements under which class members receive nothing but essentially valueless coupons, while the class counsel receive substantial attorney's fees." (citations omitted)).

371 *See supra* note 317 and accompanying text.

372 *See, e.g.*, *In re HP Inkjet Printer Litig.*, 716 F.3d at 1198 ("[T]he problem of excessive attorney's fees is not limited to coupon settlements . . . the risk is also present in settlements providing a small cash award to each class member."); Thorogood v. Sears, Roebuck & Co., 547 F.3d 742, 744–45 (7th Cir. 2008) ("The defendants in class actions are interested in minimizing the sum of the damages they pay the class and the fees they pay the class counsel, and so they are willing to trade small damages for high attorneys' fees."); *In re* Rite Aid Corp. Sec. Litig., 396 F.3d 294, 307 (3d Cir. 2005) ("The determination of attorneys' fees in class action settlements is fraught with the potential for a conflict of interest between the class and class counsel."); Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 282 (7th Cir. 2002) ("The ineffectual lawyers are happy to sell out a class they anyway can't do much for in exchange for generous attorneys' fees, and the defendants are happy to pay generous attorneys' fees since all they care about is the bottom line . . . ."); *In re* Cendant Corp. PRIDES Litig., 243 F.3d 722, 732 (3d Cir. 2001) ("[T]he integrity and fairness of class settlements is threatened by excessive attorneys' fee awards . . . .").

373 *See, e.g.*, *Eubank*, 753 F.3d at 723–24, 728–29 ("In sum, almost every danger sign in a class action settlement that our court and other courts have warned district judges to be on the lookout for was present in

One objector with an institutional interest in class actions is Ted Frank of The Center for Class Action Fairness (established in 2009).[374] Frank, a former director and fellow of the American Enterprise Institute (and former law clerk to Seventh Circuit Judge Frank Easterbrook), has successfully challenged numerous class action settlements.[375] His work has garnered him significant media attention,[376] with one commentator describing him as "the new Robin Hood of the litigation system."[377] He has been especially vigorous in challenging *cy pres* and coupon settlements.[378] Notably, Frank was the appellate counsel who successfully challenged the settlements in *Eubank v. Pella Corp.*[379] and *Pearson v. NBTY, Inc.*[380]

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this case. Most were not even mentioned by the district judge, and those that were received a brush-off." (citations omitted)); *Redman*, 768 F.3d at 633–38 (criticizing the district court judge for, *inter alia*, "[making] no effort to assess" the value of coupons included in a settlement, and stating, with regard to the court's handling of class counsel's motion for attorneys' fees, that "[t]here was no excuse for permitting so irregular, indeed unlawful, a procedure").

374 On October 1, 2015, Frank's Center for Class Action Fairness merged with the Competitive Enterprise Institute, a nonprofit organization with an existing litigation program that has been active in challenging various government regulatory programs. *Competitive Enterprise Institute and Center for Class Action Fairness Announce Merger*, COMPETITIVE ENTER. INST. (Oct. 1, 2015), https://cei.org/content/competitive-enterprise-institute-and-center-class-action-fairness-announce-merger.

375 *See, e.g.*, *In re* Dry Max Pampers Litig., 724 F.3d 713 (6th Cir. 2013) (overturning settlement on ground that it "provide[d] the unnamed class members with nothing but nearly worthless injunctive relief"); *In re* Baby Prods. Antitrust Litig., 708 F.3d 163 (3d Cir. 2013) (overturning *cy pres* settlement); Robert F. Booth Tr. v. Crowley, 687 F.3d 314 (7th Cir. 2012) (mandating that Frank be given leave to intervene and rejecting settlement in shareholder derivative action); Dewey v. Volkswagen Aktiengesellschaft, 681 F.3d 170 (3d Cir. 2012) (overturning settlement on adequacy of representation grounds); *In re* Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935 (9th Cir. 2011) (overturning *cy pres* settlement).

376 *See, e.g.*, *Press*, TEDFRANK.COM, https://sites.google.com/site/tedfrank/press (last visited Aug. 27, 2015) (compiling media coverage); Susan Beck, *Posner Slams 'Selfish' Class Settlement in Latest Coup for Ted Frank*, AM. LAW.: LITIG. DAILY (Nov. 24, 2014), http://www.litigationdaily.com/id=1202677331660/Posner-Slams-Selfish-Class-Settlement-in-Latest-Coup-for-Ted-Frank (discussing Frank's successful challenge to class settlement in nutritional supplement litigation, and noting that as of November 2014 Frank had persuaded courts to wipe out $271 million in attorneys' fees in the course of challenging class settlements); Walter Olson, *Eighth Circuit Limits Cy Pres*, OVERLAWYERED (Feb. 11, 2015), http://overlawyered.com/2015/02/eighth-circuit-limits-cy-pres/ (discussing Frank's challenges to *cy pres* settlement provisions); Michael P. Tremoglie, *Does Cy Pres Have a Future?*, LEGALNEWSLINE.COM (July 1, 2011), http://legalnewsline.com/stories/510524989-does-cy-pres-have-a-future ("Ted Frank is one of the leaders in the *cy pres* reform movement.").

377 *Attorney Ted Frank: Modern Day Robin Hood Fights for the Class*, LAWYERSANDSETTLEMENTS.COM (Nov. 16, 2010), http://www.lawyersandsettlements.com/blog/attorney-ted-frank-modern-day-robin-hood-fights-for-the-class.html.

378 *See, e.g.*, *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (*cy pres*); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (*cy pres*); True v. Am. Honda Motor Co., 749 F. Supp. 2d 1052 (C.D. Cal. 2010) (coupon).

379 753 F.3d 718 (7th Cir. 2014); *see supra* note 338.

380 772 F.3d 778 (7th Cir. 2014); *see supra* note 340.

I believe that the three factors cited above will continue to exist during the next decade (and will be reinforced by the precedents discussed above). Accordingly, I believe that the next decade will witness an even greater focus on the ethical misconduct of class counsel.

Importantly, I do not believe that the focus of courts will be limited solely to the ethical conduct of class counsel. As objectors become more aggressive in accusing class counsel of unethical conduct, class counsel will inevitably respond in kind.

Indeed, plaintiffs' attorneys have already begun to do so—striking back at serial objectors, i.e., attorneys who file baseless objections on behalf of class members for the purpose of extracting payments from class counsel to drop their objections. As an article co-authored by a sitting Third Circuit judge has explained, the hallmark of "professional objectors" is that they make "insubstantial objections to class settlements" that are tantamount to "extortion," because the objector "threaten[s] to appeal the judgment approving the settlement unless paid to desist."[381] Absent such payments, counsel for objectors can hold up a settlement for years, until the appeal has been resolved.[382]

In one recent case, *Dennings v. Clearwire Corp.*, plaintiffs successfully moved for summary affirmance of the district court's settlement approval, highlighting the unethical conduct of counsel for the objectors.[383] In that case, the district court had approved a settlement of three class actions against Clearwire involving alleged misrepresentations about the speed of Clearwire's Internet service and alleged wrongful charging of early termination fees.[384] The settlement, which impacted about 2.7 million class members, included both

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[381] John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What to Do About Them?*, 39 FLA. ST. U. L. REV. 865, 929 (2012).

[382] Although Rule 23 was amended in 2003 to require district court approval to withdraw an objection, no similar rule exists at the appellate level. Thus, objector "blackmail" can continue during the objector's appeal. FED. R. CIV. P. 23(e)(5). *See generally* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623, 1664 (2009) (noting that the rule change was designed "to prevent class members from withdrawing their objections in the district court before the court rules on approval of the settlement" (citing FED. R. CIV. P. 23(e)(4)(b) advisory committee's notes)). The Advisory Committee is currently looking at possible rule changes to address serial objectors. *See* ADVISORY COMM. APR. 2016 AGENDA BOOK, *supra* note 34, at 95–106.

[383] No. C10-1859, 2013 WL 1858797, at *1 (W.D. Wash. May 3, 2013), *aff'd*, No. 13-35491 (9th Cir. Sept. 9, 2013).

[384] *Id.*

monetary and non-monetary relief.[385] Only eight objections were filed, including one filed by attorney Christopher Bandas, who represented two class members.[386] The district court had found, after allowing discovery, that neither of Bandas's clients had read the settlement and that both had prior affiliations with Bandas in other cases.[387] The Ninth Circuit summarily affirmed the settlement.[388]

In several recent cases, plaintiffs' counsel have secured sanctions against objecting counsel, or at least harsh condemnations. In *Dennings* itself, the district court barred attorney Bandas from practicing in its court (the Western District of Washington).[389] In another case, the district court noted that "Bandas routinely represents objectors purporting to challenge class action settlements, and does not do so to effectuate changes to settlement, but does so for his own personal financial gain; he has been excoriated by courts for this conduct."[390] And in yet another case, the district court noted that "Mr. Bandas was attempting to pressure the parties to give him $400,000 as payment to withdraw the objections and go away. Mr. Bandas was using the threat of questionable litigation to tie up the settlement unless payment was made."[391]

Of course, Mr. Bandas is not the only attorney for objectors who has been accused of ethical misconduct. One court noted that John Pentz, Edward Siegel, and Jeffrey Weinstein, among others, have been recognized as "serial objectors" and are often required to post appeal bonds.[392] Another court noted that Darrell Palmer "has been widely and repeatedly criticized as a serial,

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385 *Id.* at *2.

386 *Id.*

387 Dennings v. Clearwire Corp., 928 F. Supp. 2d 1270, 1271 (W.D. Wash. 2013) ("[N]either of [the Bandas objectors] had read the settlement agreement or their own objections to it, and both have worked with [Bandas] on other class action cases.").

388 Order, Dennings v. Clearwire Corp., No. 13-35038 (9th Cir. Apr. 22, 2013).

389 Minute Entry, Dennings v. Clearwire Corp., No. C10-1859 (W.D. Wash. Aug. 20, 2013), https://dockets.justia.com/docket/washington/wawdce/2:2010cv01859/171685.

390 *In re* Cathode Ray Tube (CRT) Antitrust Litig., 281 F.R.D. 531, 533 (N.D. Cal. 2012).

391 *In re* Hydroxycut Mktg. & Sales Practices Litig., No. 09md2087 BTM (KSC), 2013 WL 5275618, at *5 (S.D. Cal. Sept. 17, 2013). Other courts have also criticized Mr. Bandas for filing frivolous objections. *See, e.g.*, *In re* Gen. Elec. Sec. Litig., 998 F. Supp. 2d 145, 156 (S.D.N.Y. 2014) (describing Mr. Bandas as "a known vexatious appellant"); *In re* Wal-Mart Wage & Hour Emp't Practices Litig., No. 2:06-CV-00225, 2010 WL 786513, at *1–2 (D. Nev. Mar. 8, 2010) (similar); *In re* LivingSocial Mktg. & Sales Practice Litig., 298 F.R.D. 1, 19 (D.D.C. 2013) ("The objections to the settlement terms are largely meritless."); *In re* Certainteed Fiber Cement Siding Litig., No. 2270, 2014 WL 2194513, at *1 n.2 (E.D. Pa. May 27, 2014) (requiring appeal bond).

392 *In re* Initial Pub. Offering Sec. Litig., 728 F. Supp. 2d 289, 294 (S.D.N.Y. 2010).

professional, or otherwise vexatious objector."[393] Recently, "onetime California lawyer turned serial class action objector" Michael Narkin was fined $10,000 by a federal district court in Ohio for falsely claiming to be a member of a class in an antitrust suit and bringing a frivolous objection on his own behalf to "extort money" from class counsel.[394]

To facilitate such attacks, one law firm (Anderson & Wanca) has created a website—serialobjectors.com—that monitors and tracks professional objectors, including Bandas and several others.[395] Such information will enable plaintiffs' counsel to share specific information to support sanctions motions.

Recently an ethical attack was leveled against Ted Frank, an objector who, as noted, had been viewed by many as acting on principle and serving the administration of justice.[396] In June 2015, the Seventh Circuit dismissed an appeal filed by Frank of a $75.5 million settlement.[397] Frank's client had agreed to dismiss his appeal in exchange for a payment by class counsel. The deal was negotiated with serial objector Christopher Bandas.[398] Frank accused class counsel—from a prominent plaintiffs' firm, Lieff Cabraser—of engaging in unethical conduct by making such a payment.[399] Lieff Cabraser filed a brief in the Seventh Circuit defending its conduct.[400] But the brief did more than that: It also challenged Frank's public persona as a selfless advocate who fights

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393 Dennis v. Kellogg Co., No. 09-CV-1786-L, 2013 WL 6055326, at *4 n.2 (S.D. Cal. Nov. 14, 2013).

394 Alison Frankel, *Serial Class Action Objector Smacked with Serious Sanctions*, REUTERS (Nov. 23, 2015), http://blogs.reuters.com/alison-frankel/2015/11/23/serial-class-action-objector-smacked-with-serious-sanctions/.

395 *See* Alison Frankel, *A New Way for Class Action Firms to Combat Serial Objectors*, REUTERS (June 29, 2015), http://blogs.reuters.com/alison-frankel/2015/06/29/a-new-way-for-class-action-firms-to-combat-serial-objectors/.

396 *See, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients out of the Deal*, N.Y. TIMES (Aug. 12, 2013), http://www.nytimes.com/2013/08/13/us/supreme-court-may-hear-novel-class-action-case.html (describing Mr. Frank as "[t]he leading critic of abusive class-action settlements"); Rachel M. Zahorsky, *Unsettling Advocate*, ABA J. (Apr. 1, 2010), http://www.abajournal.com/magazine/article/unsettling_advocate/ (quoting perspectives on Mr. Frank's efforts).

397 *In re* Capital One Tel. Consumer Prot. Act Litig., 80 F. Supp. 3d 781 (N.D. Ill. 2015).

398 Alison Frankel, *The Ted Frank Interview*, REUTERS (June 25, 2015), http://blogs.reuters.com/alison-frankel/2015/06/25/the-ted-frank-interview-i-was-doing-it-for-the-greater-good/.

399 *Id.*

400 Plaintiffs-Appellees Response to Motion of Ctr. for Class Action Fairness to Withdraw from Representation of Jeffrey Collins in Appeal No. 15-1546, to Intervene in Appeal Nos. 15-1400 and 15-1490 as Guardian Ad Litem for the Class, for an Order to Disclose Settlement Terms if Helpful to the Court, and, in the Alternative, an Order Issuing New Notice to the Class, and Opposition of Center for Class Action Fairness to Rule 42 Motion to Dismiss at 2, *In re* Capital One Tel. Consumer Prot. Act Litig., Nos. 15-1400 & 15-1490, (7th Cir. 2015).

for principle, not money.[401] It noted (as Frank himself had admitted in an earlier filing in the case) that Frank had "been 'moonlight[ing]' for several years for Bandas—working on appeals of class action settlements—to the tune of more than $220,000."[402] Thus, Lieff Cabraser turned the tables on Frank for his financially lucrative association with a serial objector.[403]

In the coming decade, I expect to see many more attacks on the ethical conduct of objectors, even those with seemingly favorable reputations among courts.

c. The Class Action Appellate Bench Will Continue to Be Dominated by a Small Number of Judges

Class action law and practice is highly specialized and complicated. In law schools, it is usually covered in courses entitled "Complex Litigation." It is the organic chemistry of the law school curriculum. Today, the case law governing class actions is vast, and expertise on how class actions work in the real world is essential to informed decision-making.

It is, therefore, not surprising that most of the seminal class action decisions have been written by a small number of appellate court judges. Those judges either volunteer or are recruited to write opinions in class action appeals in their courts.[404] Few other areas of substance or procedure can be cited in which the bulk of landmark cases have been generated by only a handful of judges.[405] Although the players have changed since 1966, a number of current judges fitting that role are relatively easy to identify.[406]

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401 *Id.*

402 *Id. See generally In re* Capital One Tel. Consumer Prot. Act Litig., 80 F. Supp. 3d 781 (N.D. Ill. 2015).

403 Frank has since explained his association with Bandas, noting that he "felt [he] was doing it for the greater good." *See* Frankel, *supra* note 398 (including text of Frank's Declaration filed with the Seventh Circuit, in which he details his relationship with Bandas).

404 In some instances, a Rule 23(f) motions panel will choose to retain a class action case after granting leave for interlocutory appeal. *See, e.g.*, Margaret V. Sachs, *Superstar Judges as Entrepreneurs: The Untold Story of Fraud-on-the-Market*, 48 U.C. DAVIS L. REV. 1207, 1208 (2015) (discussing that practice within the Seventh Circuit).

405 Examples include Justice Kennedy's landmark opinions regarding gay rights, *see* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); United States v. Windsor, 133 S. Ct. 2675 (2013); Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996); Sam Baker, *Anthony Kennedy's Long History of Protecting Gay Rights*, NAT'L J. (June 26, 2015), http://www.nationaljournal.com/politics/anthony-kennedy-supreme-court-gay-marriage-19691231, and Justice Scalia's Confrontation Clause jurisprudence, *see* Michigan v. Bryant, 562 U.S. 344 (2011) (dissenting); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Davis v. Washington, 547 U.S. 813 (2006); Crawford v. Washington, 541 U.S. 36 (2004); Joelle Anne Moreno, *Finding*

At the Supreme Court level, in light of Justice Scalia's death in February 2016, Justice Ginsburg stands alone in the class action field. Justices Ginsburg and Scalia have written the vast majority of pathbreaking class action majority opinions and dissents in recent years.[407] Typically, depending on the case, one of them has written for the majority and the other has written for the dissent. No other recent Justice has had an impact on class actions comparable to that of Justices Scalia and Ginsburg, and Justice Ginsburg now stands out as the Court's preeminent class action Justice.

At the Court of Appeals level, an astonishingly small number of judges have dominated the field. Out of approximately 175 federal appellate judges, *four* judges have written most of the seminal decisions. Judge Richard Posner alone has written more than a dozen important decisions.[408] His colleague,

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Nino: Justice Scalia's Confrontation Clause Legacy from Its (Glorious) Beginning to (Bitter) End, 44 AKRON L. REV. 1211 (2011).

406 A case could, however, be made for others not listed here.

407 For example, Justice Ginsburg authored majority opinions in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016) (unaccepted offer of judgment to putative class representative under Rule 68 did not moot the case); *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014) (removal notice under the Class Action Fairness Act (CAFA) need only plausibly allege—rather than prove—that the amount in controversy exceeds the jurisdictional threshold); *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013) (putative class asserting fraud-on-the-market theory in securities fraud class action need not prove materiality at the class certification stage); and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (overturning settlement class in asbestos case for failure to comply with requirements of Rule 23(a) and (b)). She authored dissents in *Spokeo, Inc. v. Robins*, No. 13-1339, 2016 WL 2842447 (May 16, 2016) (dissenting from the majority's decision to remand for a determination as to whether the plaintiff had alleged sufficient concrete injury for purposes of Article III standing); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (objecting to the majority's decision to enforce an arbitration clause pursuant to *Concepcion* and the FAA); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (dissenting, along with Justice Breyer, from Court's holding that class certification in an antitrust case was improper because plaintiffs could not show that damages could be proved on a classwide basis); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (dissenting from Court's adoption of heightened test for commonality); and *Shady Grove Orthopedic Associates. v. Allstate Insurance*, 559 U.S. 393 (2010) (disagreeing with Court's holding that federal court could certify a federal class action asserting claims under New York law even though New York law barred class actions for such claims). Justice Scalia wrote the majority opinions in *Dukes*, 131 S. Ct. 2541 (adopting heightened test for commonality and severely restricting classes under Rule 23(b)(2)); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (upholding arbitration clause that barred class action litigation and class action arbitration); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (same); *Shady Grove*, 559 U.S. 393; and *Comcast Corp.*, 133 S. Ct. 1426. He wrote dissenting opinions in *Amgen*, 133 S. Ct. 1184, and *Dart Cherokee Basin*, 135 S. Ct. 547.

408 *See, e.g.*, Eubank v. Pella Corp., 753 F.3d 718 (7th Cir. 2014) (overturning class settlement; discussed *supra* note 338 and accompanying text); Redman v. RadioShack Corp., 768 F.3d 622 (7th Cir. 2014) (overturning class settlement; discussed *supra* note 339 and accompanying text); Pearson v. NBTY, Inc., 772 F.3d 778 (7th Cir. 2014) (overturning class settlement; discussed *supra* note 340 and accompanying text); McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012) (reversing order denying class certification in race discrimination case); Butler v. Sears, Roebuck & Co., 702 F.3d 359 (7th Cir.

Frank Easterbrook, has likewise authored a number of major decisions.[409] In the Third Circuit, Judge Anthony Scirica has likewise had a significant impact, writing several landmark opinions.[410] In the Eleventh Circuit, Judge Gerald Tjoflat has likewise written a number of major decisions.[411] In my opinion,

2012) (reversed denial of class certification for claim regarding design defect in washing machines causing mold), *vacated*, 133 S. Ct. 2768 (2013), *judgment reinstated*, 727 F3d 796 (7th Cir.); Johnson v. Meriter Health Servs. Emp. Ret. Plan, 702 F.3d 364 (7th Cir. 2012) (affirming certification of ten subclasses in suit under Employee Retirement Income Security Act (ERISA)); Creative Montessori v. Ashford Gear, 662 F.3d 913 (7th Cir. 2011) (overturning certification of class due to misconduct by class counsel; discussed *supra* note 337 and accompanying text); Thorogood v. Sears, Roebuck & Co., 547 F.3d 742 (7th Cir. 2008) (reversing class certification in consumer case on predominance grounds); Phillips v. Ford Motor Co., 435 F.3d 785 (7th Cir. 2006) (substitution of plaintiffs did not permit removal under CAFA); *In re* Allstate Ins., 400 F.3d 505 (7th Cir. 2005) (reversing certification of class of former employees in ERISA case); Carnegie v. Household Int'l, Inc., 376 F.3d 656 (7th Cir. 2004) (upholding class certification in RICO case); Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910 (7th Cir. 2003) (upholding class certification in pollution case on issue of whether defendant caused the contamination at issue); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995) (reversing class certification in mass tort case). There are numerous other examples as well. *See also* Elizabeth J. Cabraser, *The Rational Class: Richard Posner and Efficiency as Due Process*, 82 GEO. WASH. L. REV. ARGUENDO 82 (2014) (discussing Judge Posner's class action jurisprudence).

409 *See, e.g.*, Silverman v. Motorola Sols., Inc., 739 F.3d 956 (7th Cir. 2013) (upholding award of attorneys' fees in class action settlement); *In re* IKO Roofing Shingle Prods. Liab. Litig., 757 F.3d 599 (7th Cir. 2013) (reversing district court's refusal to certify as a class action a suit alleging false statements by defendants about roofing shingles); Bolden v. Walsh Constr. Co., 688 F.3d 893 (7th Cir. 2012) (reversing class certification in race discrimination case); *In re* Matter of Bridgestone/Firestone, Inc. 288 F.3d 1012 (7th Cir. 2002) (reversing class certification in products liability suit involving Firestone tires on Ford Explorer SUVs); Blair v. Equifax Check Svcs., Inc., 181 F.3d 832, 834–37 (7th Cir. 1999) (articulating criteria for discretionary review under Rule 23(f)); Premier Elec. Constr. Co. v. Nat'l Elec. Contracts Ass'n, 814 F.2d 358 (7th Cir. 1987) (opt out class members not entitled to invoke non-mutual offensive collateral estoppel).

410 *See, e.g.*, Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2012) (vacating class certification in consumer fraud case because plaintiff failed to show that the class was ascertainable; because of intervening decision, court gave plaintiff another chance to establish ascertainability); Sullivan v. DB Invs., Inc., 667 F.3d 273, 333–39 (3d Cir. 2011) (Scirica, J., concurring) (agreeing with majority opinion upholding class settlement and noting concerns about settlements in mass tort cases without the protections of Rule 23); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008) (vacating order certifying antitrust class action and holding that court must resolve factual issues relevant to class certification, even if such issues overlap with the merits); *In re* AT&T Corp., 455 F.3d 160 (3d Cir. 2006) (affirming district court's approval of settlement in securities fraud class action); *In re* Diet Drugs, 282 F.3d 220 (3d Cir. 2002) (upholding injunction of state class action where class actions overlapped); *In re* Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283 (3d Cir. 1998) (upholding class settlement).

411 *See, e.g.*, Graham v. R.J. Reynolds Tobacco Co., 782 F.3d 1261 (11th Cir. 2015) (holding that federal law preempted jury's finding of strict liability where jury based findings on earlier findings by jury in a state-court class action), *vacated* No. 13-14590, 2016 WL 399081 (11th Cir. 2016); Vega v. T-Mobile USA, Inc., 564 F.3d 1256 (11th Cir. 2009) (reversing class certification in suit by former T-Mobile employees regarding company's commissions policy on sales of prepaid cellular telephone accounts); Klay v. Humana, Inc. 382 F.3d 1241 (11th Cir. 2004) (affirming class certification in lawsuit alleging RICO violations); Rutstein v. Avis Rent-A-Car Sys., 211 F.3d 1228 (11th Cir. 2000) (reversing class certification in case alleging discrimination on the basis of religion), *cert. denied*, 532 U.S. 919 (2001); Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997) (holding that race discrimination class action was improperly certified).

those four judges have been the intellectual leaders among circuit judges in the class action field.[412]

Obviously, it is not possible to identify precisely who the leading class action jurists will be ten years from now. Some of those individuals may not even be serving on the bench today. But a few predictions can be made with a high degree of confidence.

First, by 2026, the main players at the Supreme Court level will change. As noted, Justice Scalia passed away in February 2016,[413] and as of the date this Article went to press no replacement had been confirmed. And it is doubtful that Justice Ginsburg will still be on the Court in ten years; in 2026, she will be 93 years old.[414] Among the more recent appointments, two have shown a particular aptitude and interest in class actions. On the liberal side, Justice Kagan has authored some very thoughtful opinions on class actions.[415] The fact that she joined the dissents in *Dukes*, *Comcast*, and *Concepcion*, and wrote a

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412 In addition to the influential appellate judges discussed herein, one district court judge, Jack Weinstein of the Eastern District of New York, has also had a major impact on the jurisprudence of aggregate litigation. Judge Weinstein has overseen mass actions involving Agent Orange, tobacco, pharmaceuticals, consumer financing agreements, civil rights, and more. *See, e.g.*, Belfiore v. Procter & Gamble Co., No. 14-CV-4090, 2015 WL 1402313 (E.D.N.Y. Mar. 25, 2015) (denying defendant's motions to dismiss and strike class allegations in putative consumer class action regarding toiletry products); Haynes v. Planet Automall, Inc., 276 F.R.D. 65 (E.D.N.Y. 2011) (refusing to certify class of automobile purchasers alleging that dealer-assisted financing violated Truth in Lending Act and state law); D.S. *ex rel.* S.S. v. N.Y. City Dept. of Educ., 255 F.R.D. 59 (E.D.N.Y. 2008) (certifying class of minority students and parents alleging civil rights violations); *In re* Zyprexa Prods. Liab. Litig., 467 F. Supp. 2d 256, 262 (E.D.N.Y. 2006) (pharmaceutical mass tort (non-class action) administered by Judge Weinstein as a "quasi-class action"); Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992 (E.D.N.Y. 2006) (certifying class of millions of smokers of light cigarettes), *rev'd sub nom.* McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008); *In re* Simon II Litig., 211 F.R.D. 86 (E.D.N.Y. 2002) (certifying nationwide class action involving smokers), *vacated*, 407 F.3d 125 (2d Cir. 2005). No other district judge has had the same impact.

413 *E.g.*, Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html.

414 2 *Ruth Bader Ginsburg*, ALMANAC OF THE FEDERAL JUDICIARY, 2016 WL 1410967 (2016). Although John Paul Stevens and Oliver Wendell Holmes, Jr. each served to age 90, the average age of retirement from the Supreme Court (since 1970) has been 79. *See* Steven G. Calabresi & James Lindgren, *Supreme Gerontocracy*, WALL ST. J. (Apr. 8, 2005), http://www.wsj.com/articles/SB111292087188301557.

415 *See, e.g.*, Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2066 (2013) (affirming arbitrator's decision to construe arbitration clause to allow for class arbitration); Smith v. Bayer Corp., 131 S. Ct. 2368, 2373 (2011) (reversing district court's issuance of injunction to prevent relitigation in state court of class certification issue); Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1532 (2013) (Kagan, J., dissenting) (dissenting from opinion that case is non-justiciable when class representative's individual case becomes moot; discussed *supra* notes 236–38 and accompanying text); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (Kagan, J., dissenting) (dissenting from opinion upholding contractual waiver of class arbitration; discussed *supra* notes 132–48 and accompanying text).

strong dissent herself in *American Express*,[416] suggests that she will oppose significant cutbacks on the ability of plaintiffs to bring class actions. She may well take over for Justice Ginsburg as the Supreme Court's leading liberal voice on class actions. On the conservative end of the spectrum, Chief Justice Roberts has also shown interest in class actions (although nothing close to that shown by Justice Scalia); he has authored two opinions in the securities fraud class action area[417] and also recently weighed in on the subject of *cy pres* class settlements.[418] Although he has been sympathetic to plaintiffs in securities class actions, and concurred in the pro-plaintiff *Tyson Foods* opinion,[419] he joined the majority opinions in *Dukes*, *Comcast*, *Concepcion*, *American Express*, and *DIRECTV*, and wrote the dissent in *Campbell-Ewald*.[420] Thus, in light of Justice Scalia's death, Chief Justice Roberts may well take over as the Court's conservative voice for reining in class actions. Both Justice Kagan (currently age 56[421]) and Chief Justice Roberts (currently age 61[422]) are young by Supreme Court standards.

At the circuit level, Judges Posner and Scirica are in their seventies (ages 77[423] and 74,[424] respectively), and Judge Tjoflat is 85.[425] It is unlikely that those three judges will still be playing a leadership role in class action jurisprudence in 2026. Of the four circuit judges mentioned above, only Judge Easterbrook is under 70 (age 67[426]). But there are other circuit judges under 70 who are emerging as class action experts—for instance, Judge David Hamilton

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416 *See supra* note 415.

417 *See, e.g.*, Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2408–09 (2014) (*Halliburton II*) (refusing to overturn "fraud-on-the-market" presumption); Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2186 (2011) (*Halliburton I*) (securities fraud plaintiff need not prove at the class certification stage that defendant's misconduct caused the economic loss at issue).

418 Marek v. Lane, 134 S. Ct. 8, 9 (2013) (memorandum of Roberts, C.J. respecting denial of certiorari) (noting "fundamental concerns surrounding the use of [*cy pres*] remedies in class action litigation").

419 Tyson Foods, Inc. v. Bouaphakeo, No. 14-1146 (Mar. 22, 2016). In his concurrence, Chief Justice Roberts "join[ed] the Court's opinion in full," *id.* (Roberts. J., concurring), but he expressed skepticism over whether the district court would "be able to fashion a method for awarding damages only to those class members who suffered an actual injury," *id.*

420 *See* Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 677 (2016); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015); Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013); *In re* Am. Express Anti-Steering Rules Antitrust Litig., Nos. 11-MD-2221 & 13-CV-7355, 2015 WL 4645240 (E.D.N.Y. Aug. 4, 2015); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

421 2 *Elena Kagan*, ALMANAC OF THE FEDERAL JUDICIARY, 2016 WL 1410968 (2016).

422 2 *John G. Roberts, Jr.*, ALMANAC OF THE FEDERAL JUDICIARY, 2016 WL 1410964 (2016).

423 2 *Richard A Posner*, ALMANAC OF THE FEDERAL JUDICIARY, 2016 WL 1411123 (2016).

424 2 *Anthony J. Scirica*, ALMANAC OF THE FEDERAL JUDICIARY, 2016 WL 1411047 (2016).

425 2 *Gerald Bard Tjoflat*, ALMANAC OF THE FEDERAL JUDICIARY, 2016 WL 1411226 (2016).

426 2 *Frank H. Easterbrook*, ALMANAC OF THE FEDERAL JUDICIARY, 2016 WL 1411119 (2016).

(Seventh Circuit, age 58[427]), Judge Kent Jordan (Third Circuit, age 58[428]), Judge Gerard Lynch (Second Circuit, age 64[429]), Judge D. Brooks Smith (Third Circuit, age 64[430]), and Chief Judge Diane Wood (Seventh Circuit, age

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427 *See, e.g.*, Mullins v. Direct Digital, LLC, 795 F.3d 654, 657 (7th Cir. 2015) (rejecting independent ascertainability requirement; discussed *supra* notes 225–28 and accompanying text); *In re* Sw. Airlines Voucher Litig., 799 F.3d 701, 704 (7th Cir. 2015) (admonishing class counsel and reducing fee award for failure to disclose conflict of interest; discussed *supra* notes 341–46 and accompanying text); *In re* Trans Union Corp. Privacy Litig., 741 F.3d 811, 812, 819 (7th Cir. 2014) (affirming distribution of class settlement in class action alleging violations of Fair Credit Reporting Act); Addison Automatics, Inc. v. Hartford Cas. Ins., 731 F.3d 740, 741 (7th Cir. 2013) (holding that individual follow-up action by class representative was removable under CAFA); Messner v. Northshore Univ. Healthsystem, 669 F.3d 802, 808, 810 (7th Cir. 2012) (vacating district court's refusal to certify class of patients alleging that health care provider's merger violated Sherman Act and Clayton Act).

428 2 *Kent A. Jordan*, ALMANAC OF THE FEDERAL JUDICIARY, 2016 WL 1411034 (2016); *see, e.g.*, *In re* Cmty. Bank of N. Va. Mortg. Lending Practices Litig., 795 F.3d 380 (3d Cir. 2015); Rodriguez v. Nat'l City Bank, 726 F.3d 372 (3d Cir. 2013) (affirming district court's refusal to certify settlement class); Behrend v. Comcast Corp., 655 F.3d 182, 208–209 (3d Cir. 2011) (concurring in part and dissenting in part from opinion allowing classwide proof of damages and antitrust impact), *rev'd*, 133 S. Ct. 1426 (2013); Litman v. Cellco P'ship, 381 F. App'x 140, 143 (3d Cir. 2010) (holding that Federal Arbitration Act did not preempt state-law unconscionability determination as to class arbitration prohibition), *vacated*, 131 S. Ct. 2873 (2011); Sullivan v. DB Invs., Inc., 613 F.3d 134, 138 (3d Cir. 2010) (vacating certification of settlement class in antitrust and consumer protection class action against diamond cartel), *vacated on reh'g en banc*, 667 F.3d 273, 340 (3d Cir. 2011) (Jordan, J., dissenting) (dissenting from opinion upholding class settlement); Ward v. Avaya Inc., 299 F. App'x 196, 202 (3d Cir. 2008) (holding that prior class settlement barred subsequent ERISA class action).

429 2 *Gerard E. Lynch*, ALMANAC OF THE FEDERAL JUDICIARY, 2016 WL 1411013 (2016); *see, e.g.*, Gallego v. Northland Grp. Inc., No. 15-1666-CV, 2016 WL 697383 (2d Cir. Feb. 22, 2016); Johnson v. Nextel Commc'ns Inc., 780 F.3d 128, 148 (2d Cir. 2015) (holding that predominance was not satisfied in putative class action against law firm because of choice-of-law concerns); Charron v. Wiener, 731 F.3d 241, 244 (2d Cir. 2013) (upholding class settlement in RICO class action involving rent violations); *In re* Am. Int'l Grp., Inc. Sec. Litig., 689 F.3d 229, 232 (2d Cir. 2012) (overturning district court's refusal to certify securities fraud class action for settlement purposes); UFCW Local 1776 v. Eli Lilly & Co., 620 F.3d 121, 134 (2d Cir. 2010) (reversing certification of pharmaceutical class action on predominance grounds because putative class members' claims required individualized proof); Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp., 603 F.3d 23, 24 (2d Cir. 2010) (dismissing putative securities class action as within exception to CAFA jurisdiction).

430 2 *D. Brooks Smith*, ALMANAC OF THE FEDERAL JUDICIARY, 2016 WL 1411038 (2016); *see, e.g.*, Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 362, 372 (3d Cir. 2015) (vacating and remanding certification of consumer class action in part on predominance grounds, and holding that class action was proper under Article III standing requirement; discussed *supra* notes 47, 300 and accompanying text); Byrd v. Aaron's Inc., 784 F.3d 154, 158–159 (3d Cir. 2015) (holding that district court erred in applying ascertainability standard); *In re* Nat'l Football League Players' Concussion Injury Litig., 775 F.3d 570, 584 (3d Cir. 2014) (denying discretionary review of order preliminarily approving proposed class settlement, and conditionally certifying class); Judon v. Travelers Prop. Cas. Co. of Am., 773 F.3d 495, 498 (3d Cir. 2014) (remanding for determination as to whether amount-in-controversy requirement was satisfied for removal under CAFA); Dewey v. Volkswagen Aktiengesellschaft, 681 F.3d 170, 173 (3d Cir. 2012) (reversing certification of settlement class on ground that class representatives did not adequately represent class subgroup).

65[431]). I expect Judges Hamilton, Jordan, Lynch, Smith, and Wood—along with Judge Easterbrook—to be prominent class action judges in the coming decade. Judges Hamilton, Lynch, and Wood tend to be supportive of class actions; Judge Easterbrook and Judge Jordan tend to be skeptical of class actions; and Judge Smith is difficult to pigeonhole. Other judges (some not yet appointed) are likely to emerge as leaders in the field as well. Of course, the viewpoints of future appointees will depend in part on which party occupies the White House. Indeed, in terms of impact on class actions, the importance of the Presidential elections in 2016, 2020, and 2024 cannot be overstated.

Although it is ultimately anyone's guess who the leading class action jurists will be in 2026, the larger point is that, as is true today, the group is almost certain to be a small one. The dynamics that have led to the emergence of a small number of appellate judges as authors of major class action decisions are unlikely to change during the next decade. The class action field will remain complex, and appellate courts will look to those judges with expertise and interest to write the major opinions. How those particular judges view the class action (as a salutary device or as a tool that merely enriches plaintiffs' attorneys) will determine whether class actions will continue to decline or will experience a rebound.

III. COURTROOM SETTING

In this Part, I make predictions relating to the actual litigation and management of class actions.

A. Far More Class Actions Will Go to Trial

When my co-author and I published the first edition of our class action casebook in 2000, we had a hard time finding more than a handful of class

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[431] 2 *Diane P. Wood*, ALMANAC OF THE FEDERAL JUDICIARY, 2016 WL 1411118 (2016); *see, e.g.*, Martin v. Reid, No. 14-3009, 2016 WL 1169134 (7th Cir. Mar. 25, 2016) (upholding class settlement in breach of warranty and consumer fraud class action); Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 690 (7th Cir. 2015) (holding that putative class members met standing requirement in data breach class action); Suchanek v. Sturm Foods, Inc., 764 F.3d 750, 752 (7th Cir. 2014) (reversing denial of motion to certify class of consumers alleging that food manufacturer violated consumer protection statutes); Abbott v. Lockheed Martin Corp., 725 F.3d 803, 805 (7th Cir. 2013) (reversing denial of class certification in ERISA class action); Ervin v. OS Rest. Servs., 632 F.3d 971, 973–74 (7th Cir. 2011) (permitting certification of state-law class action in proceeding including collective action under Fair Labor Standards Act); *In re* Copper Antitrust Litig., 436 F.3d 782, 784 (7th Cir. 2006) (statute of limitations on federal antitrust claims not tolled during pendancy of state class action raising similar claims); Williams v. Gen. Elec. Capital Auto Lease, Inc., 159 F.3d 266, 275 (7th Cir. 1998) (affirming injunction against overlapping state-court class action).

actions that had gone to trial in the thirty-four years since the adoption of modern Rule 23 in 1966.[432] Presumably, both sides viewed the risks as too high to bear in most cases. Defendants faced the possibility of bankrupting verdicts, and plaintiffs risked receiving nothing after spending considerable time and money on a case. Indeed, it has become conventional wisdom that class actions always (or virtually always) settle.[433]

That pattern has changed dramatically in recent years. Although settlement is still the norm, in the past several years numerous class action trials have occurred in a wide variety of areas.

First, there have been a number of significant defense verdicts (or hung juries). For example:

- In April 2015, a jury found for Philip Morris in a class action trial seeking approximately $1.5 billion for deceptive advertising in connection with light cigarettes.[434]
- In October 2014, a federal jury in Cleveland found for the defense in a class action against Whirlpool alleging that the company's front-loading washing machines had a design defect that caused a moldy smell.[435]
- In December 2014, a federal jury found for the defense in an antitrust class action against Apple in which plaintiffs sought $350 million (along with treble damages) on the theory that Apple created a

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[432] *See* ROBERT KLONOFF & EDWARD BILICH, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS 362 (WestGroup 1st ed. 2000) (noting paucity of class action trials and citing authority for proposition that, as of 1982, there had been *no* recorded class action that had gone to jury verdict).

[433] *See, e.g.*, Richard Frankel, *The Disappearing Opt-Out Right in Punitive-Damages Class Actions*, 2011 WIS. L. REV. 563, 568 ("[I]n reality most class actions settle."); Joshua Levy, *When the Stars Align: Narrowing the Scope of Appellate Reversals of Judicially Approved Class Action Settlements*, 44 SETON HALL L. REV. 631, 632 (2014) (noting study of over 250 class actions finding that, "in every case where a putative class was certified, a settlement was eventually negotiated and approved" (citation omitted)); Vince Morabito & Jane Caruana, *Can Class Action Regimes Operate Satisfactorily Without a Certification Device? Empirical Insights from the Federal Court of Australia*, 61 AM. J. COMP. L. 579, 605 (2013) ("The various empirical studies conducted in the United States have revealed unambiguously that 'cases with a certified class invariably lead to class settlements . . . .'" (citation omitted)); Jay Tidmarsh, *Resurrecting Trial by Statistics*, 99 MINN. L. REV. 1459, 1460 (2015) ("Virtually every civil case settles, and class actions or other aggregate litigation are not exceptions to the rule.").

[434] *St. Louis Jury Sides with Philip Morris in Tobacco Suit*, ASSOCIATED PRESS (Apr. 8, 2016), http://townhall.com/news/us/2016/04/08/st-louis-jury-sides-with-philip-morris-in-tobacco-suit-n2145375.

[435] *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., No. 1:08-wp-65000 (N.D. Ohio Oct. 31, 2014) (order entering judgment on jury verdict), *appeal docketed*, No. 15-3159 (6th Cir. Feb. 26, 2015).

monopoly in the digital music market by updating its iTunes software.[436]

- In December 2014, a jury found that AstraZeneca's agreement with another pharmaceutical company to postpone the generic version of AstraZenica's drug Nexium did not violate the antitrust laws.[437] At issue in the six-week class action trial was a claim for damages of $10 billion.[438]

- In April 2014, a Louisiana state-court jury found that a class of voters in three Louisiana parishes was not overtaxed to fund a canal diversion.[439]

- In 2010, a judge conducting a bench trial entered a verdict for defendant ADT Security Services in a class action suit seeking close to $400 million for breach of contract.[440]

- In a September 2015 class action trial against Hyland's Inc. for false advertising of purportedly medicinal homeopathic products, a federal jury in California found for the defendant. The class members had sought $255 million in damages.[441]

Second, there have been numerous plaintiffs' trial victories. For example:

- In a 2013 trial in a class action antitrust price fixing case (in a federal district court in Kansas), Dow Chemical Company was found liable for more than $400 million (an amount increased by the court to more than

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436 *In re* Apple iPod iTunes Antitrust Litig., No. 05-CV-0037 (N.D. Cal. Dec. 16, 2014) (jury verdict); *see also* Brian X. Chen, *Apple Wins Decade-Old Suit over iTunes Updates*, N.Y. TIMES (Dec. 16, 2014), http://www.nytimes.com/2014/12/17/technology/apple-antitrust-suit-ipod-music.html.

437 *In re* Nexium (Esomeprazole) Antitrust Litig., No. 1:12-md-02409-wgy (D. Mass. Dec. 5, 2014) (jury verdict).

438 Janelle Lawrence & Erik Larson, *AstraZeneca Dodges $10 Billion Threat as Nexium Deal Cleared by Jury*, 15 CLASS ACTION LITIG. REPORT (BNA) NO. 23, at 1386 (Dec. 12, 2014).

439 Campbell v. Bd. of Comm'rs for Amite River Basin Drainage & Water Conservation Dist., No. 597072, 2014 WL 3406596 (La. Dist. Ct. Apr. 22, 2014) (order entering judgment on jury verdict); *see also Jury: Voters Not Overtaxed for Diversion Canal*, WASH. TIMES (Apr. 3, 2014), http://www.washingtontimes.com/news/2014/apr/3/jury-voters-not-overtaxed-for-diversion-canal/.

440 Advantek Pro, Inc. v. ADT Sec. Svcs., Inc., No. 04-CV-587, 2010 WL 6634427 (Colo. Dist. Ct. Aug. 31, 2010) (order entering final judgment), *aff'd*, No. 10CA0707, 2011 WL 4837298 (Colo. App. Oct. 13, 2011).

441 Allen v. Hyland's, Inc., No. 2:12-cv-01150 (C.D. Cal. Sept. 18, 2015) (jury verdict form, finding for defendants on all questions).

$1 billion).[442] The Tenth Circuit affirmed, and Dow Chemical agreed to settle the case for $835 million after Justice Scalia's death in February 2016.[443]

- In 2014, a state court jury in Oregon found British Petroleum liable for $593 million in a class action for wrongfully charging $0.35 extra per transaction for customers who paid with debit cards.[444]
- In February 2015, a federal jury in Missouri found various electric utilities and related entities liable in a class action for more than $79 million for using electric utility easements for fiber optics without the landowners' consent.[445]
- In October 2014, a Silicon Valley jury awarded $16.5 million to class members with sexually transmitted diseases after finding that the class members' profiles were shared with affiliated dating sites despite promises of privacy.[446]
- In December 2012, an Ohio trial court awarded $859 million in restitution to a class of businesses who had been overcharged for workers' compensation premiums.[447] The award was later reduced to $651 million based on the ruling of the Ohio Court of Appeals.[448]

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[442] *In re* Urethane Antitrust Litig., No. 04-1616, 2013 WL 4496757 (D. Kan. Feb. 20, 2013) (jury verdict form finding for plaintiffs); *see also* Andrew Longstreth, *Jury Orders Dow Chemical to Pay $400 Million in Price-Fixing Case*, REUTERS (Feb. 20, 2013), http://www.reuters.com/article/2013/02/21/us-dowchemical-urethane-idUSBRE91K00C20130221.

[443] *In re* Urethane Antitrust Litig., 768 F.3d 1245, 1269 (10th Cir. 2014); *see, e.g.*, Jef Feeley, *Scalia's Death Prompts Dow to Settle Suits for $835 Million*, BLOOMBERG BUSINESS (Feb. 26, 2016), http://www.bloomberg.com/news/articles/2016-02-26/dow-cites-scalia-s-death-in-settling-urethanes-case-for-835m.

[444] Scharfstein v. BP W. Coast Prods. LLC, No. 1112-17046 (Or. Cir. Ct. Feb. 5, 2014) (jury verdict for plaintiff); *see also* Laura Gunderson, *Multnomah County Jury Finds BP Gas Stations Wrongly Charged 35 Cents Extra for Debit Purchases*, OR. LIVE (Jan. 31, 2014), http://www.oregonlive.com/business/index.ssf/2014/01/multnomah_county_jury_finds_bp.html.

[445] Barfield v. Sho-Me Power Elec. Coop., No. 11-cv-04321, 2015 WL 852239 (W.D. Mo. Feb. 6, 2015) (jury verdict); *see also* Thomas J. Dougherty, Chase Barfield v. Sho-Me Power Electric Cooperative*: Major Verdict in Electric Utility Easement Case*, NAT'L L. REV. (Feb. 14, 2015), http://www.natlawreview.com/article/chase-barfield-v-sho-me-power-electric-cooperative-major-verdict-electric-utility-ea.

[446] Joyce E. Cutler, *Dating Website for Singles with STDs Must Pay $16.5M for Sharing Profiles*, 15 CLASS ACTION LITIG. REPORT (BNA) No. 21, at 1269 (Nov. 14, 2014).

[447] San Allen, Inc. v. Buehrer, No. CV-07-644950 (Ohio Ct. Com. Pl. Dec. 28, 2012) (partial order and opinion), *aff'd in part and rev'd in part*, 11 N.E.3d 739 (Ohio Ct. App. 2014).

[448] San Allen, Inc. v. Buehrer, 11 N.E.3d 739, 795–96 (Ohio Ct. App. 2014).

- In October 2015, a New Jersey jury found an occupational school liable for $2.9 million (later subject to trebling for a total award of nearly $9 million) in a fraud class action brought by current and former students who had sought certification as surgical technicians.[449]

- In October 2015, a federal jury in Oklahoma awarded a class of cable subscribers $6.31 million in an antitrust class action against Cox Communications.[450] The district judge, however, later overturned the verdict for lack of evidence.[451]

Third, in a number of instances, class actions have settled during or after trial. Presumably, one side or the other felt pressure to settle in light of what had occurred at trial (or on appeal).[452]

As those examples show—and many others could be cited—the scope and sheer number of recent class action trials constitutes an important new trend. In my opinion, there are several explanations for this trend, and all of them suggest that the trend will only accelerate.

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[449] Polanco v. Star Career Acad., No. L-000415-13 (N.J. Super. Ct. Oct. 29, 2015) (jury verdict).

[450] *In re* Cox Enters., Inc. Set-Top Cable Television Box Antitrust Litig., No. 5:12-ML-2048-C (W.D. Okla. Oct. 29, 2015) (jury verdict).

[451] *Id.* (order granting defendant's renewed motion for judgment as a matter of law); *see also* Cara Salvatore, *Cox Gets $6M Verdict Overturned in Cable Box Bellwether*, LAW360 (Nov. 12, 2015), http://www.law360.com/articles/726235/cox-gets-6m-verdict-overturned-in-cable-box-bellwether.

[452] For example, on its website, one defense firm publicized a case from 2007 in which it represented Ford Motor Company in a California consumer fraud class action that sought more than $2 billion. On the day scheduled for closing arguments (after a four-month bench trial), "the plaintiffs agreed to a no-cash, coupon-based settlement not only for the California class, but for classes in three other states in which parallel actions were pending." *WTO Successfully Defends Ford In Four-Month, Certified Class Action Trial*, WHEELER TRIGG O'DONNELL LLP, http://wtotrial.com/tried-a-12-week-certified-california-class-action-case-against-ford-that-settled-just-before-closing-arguments-with-no-cash-payout-by-defendant (last visited Mar. 20, 2016). As another example, in 2008, during a jury trial alleging unlawful termination fees for cell phone contracts, the parties settled for $21 million. Roger Cheng & Fawn Johnson, *Verizon Wireless to Pay $21 Million in Settlement Over Termination Fees*, WALL ST. J. (July 10, 2008), http://www.wsj.com/articles/SB121562983731640019. Also in 2008, plaintiffs achieved a verdict of more than $104 million in a class action alleging that class members were charged illegal fees in connection with second mortgages issued by a predecessor company. Mitchell v. Residential Funding Corp., 334 S.W.3d 477, 477 (Mo. App. W.D. 2010). The appellate court vacated the punitive damages portion of the verdict and remanded for a new trial on damages. *Id.* at 484. At that point, the parties settled. Mitchell v. Residential Funding Corp., No. 03-CV-220489, 2008 WL 310998 (Mo. Cir. Ct. Jan. 14, 2008) (jury verdict), *aff'd in part, rev'd in part*, 334 S.W.3d 477 (Mo. App. W.D. 2010). More recently, in *San Allen, Inc. v. Buehrer*, No. CV-07-644950 (Ohio Ct. Com. Pl. Dec. 28, 2012)—listed above, *see supra* note 448—the parties settled for $420 million while the defendant's appeal was pending before the Ohio Supreme Court. *See* Juan Carlos Rodriguez, *Ohio Pays $420M to Settle Workers' Comp. Premium Case*, LAW360 (July 24, 2014, 5:03 PM), http://www.law360.com/articles/560657/ohio-pays-420m-to-settle-workers-comp-premium-case.

One factor explaining the uptick in trials—at least in federal court—is the availability of interlocutory review in federal cases under Rule 23(f). Prior to Rule 23(f)'s adoption in 1998, there was rarely an opportunity for interlocutory appellate review of a decision certifying or refusing to certify a class.[453] As a result, the decision to certify (or not certify) was the "death knell," and most cases settled without any trial or appellate review of class certification.[454] Now, the parties are frequently able to obtain appellate guidance on whether a case is suitable for certification. An appellate decision finding class certification appropriate increases plaintiffs' leverage in settlement negotiations, but it may also lead plaintiffs to make settlement demands that defendants view as unreasonable. When that occurs, the likelihood of trial increases. Even the denial of Rule 23(f) review can increase the likelihood of trial. For instance, an unsuccessful attempt by a defendant to obtain reversal of class certification might embolden class counsel to demand a larger settlement, thereby making it more difficult for the parties to reach mutually acceptable terms.

Another factor explaining the uptick in trials is that, in recent years, both plaintiffs' and defense firms have been showcasing their heretofore-limited class action trial experience (and presumably encouraging clients to consider trial as a real option). Such marketing, and actual success stories, have undoubtedly persuaded clients—both plaintiffs and defendants—to roll the dice at trial more frequently than in the past.

Importantly, the websites of many plaintiffs' and defense firms now tout actual class action trial experience. Such extensive marketing of class action trial experience did not exist a decade ago. The following are illustrative, but many others can be found:

- "We try big class action cases, with life-changing results. The trial attorneys at Walters Bender Strohbehn & Vaughan, P.C., have a proven track record in class action litigation, both locally and nationally, for plaintiffs and defendants."[455]
- "Gordon & Rees's class action work is . . . differentiated by the fact that we are trial lawyers with an extensive track record of actual and

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453 *See* Klonoff, *supra* note 1, at 738 (explaining the limited options for interlocutory review prior to Rule 23(f)).

454 *Id.* at 738–40.

455 WALTERS BENDER STROHBEHN & VAUGHAN, P.C., www.wbsvlaw.com/practice-areas/class-actions/ (last visited Aug. 27, 2015).

frequent jury trial experience that few class action defense firms offer."[456]

- "O'Melveny [& Myers] is one of the only firms in the country that has successfully tried multiple class actions."[457]
- "Gibson, Dunn & Crutcher has an unparalleled track record of trying—and winning—class action cases . . . . We have handled dozens of jury trials of complex and class action litigation in state and federal courtrooms throughout the country, and we have obtained numerous complete defense verdicts in nationwide 'test' cases."[458]
- "We [Carlton Fields Jorden Burt] help clients achieve their business objectives and litigation goals whether that means defeating class certification or winning at trial or on appeal."[459] Examples of class action trials are cited.
- "Unlike most firms our attorneys [Callahan Thompson Sherman & Caudill] have class action trial experience."[460]

Yet another explanation for the increase in the number of trials is that courts have become more rigorous in reviewing class action settlements, especially when there is concern that collusion has resulted in large fees for counsel, but little recovery for class members.[461] Because courts in recent years

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456 GORDON & REES, www.gordonrees.com/practices/class-action (last visited Aug. 27, 2015).

457 O'MELVENY & MYERS LLP, www.omm.com/classactions/ (last visited Aug. 27, 2015).

458 GIBSON DUNN, www.gibsondunn.com/practices/Pages/cca_detail.aspx (last visited Aug. 27, 2015).

459 CARLTON FIELDS JORDEN BURT, www.cfjblaw.com/class-actions/ (last visited Aug. 27, 2015).

460 CALLAHAN THOMPSON SHERMAN & CAUDILL LLP, www.ctsclaw.com/class-act-collective-actions.html (last visited Aug. 27, 2015).

461 *See, e.g.*, Eubank v. Pella Corp., 753 F.3d 718 (7th Cir. 2014) (discussed *supra* note 338 and accompanying text); Redman v. RadioShack Corp., 768 F.3d 622 (7th Cir. 2014) (discussed *supra* note 339 and accompanying text); Pearson v. NBTY, Inc., 772 F.3d 778 (7th Cir. 2014) (discussed *supra* note 340 and accompanying text). In the last few years alone, appellate courts have overturned numerous class settlements. *See, e.g.*, Allen v. Bedolla, 787 F.3d 1218 (9th Cir. 2015) (excessive attorney fee award); *In re* Groupon Mktg. & Sales Practices Litig., 593 F. App'x 699 (9th Cir. 2015) (district court's findings insufficient to permit review of proposed settlement); *Pearson*, 772 F.3d 778 (needlessly complicated claims process, inappropriate *cy pres* award, inappropriate reversion clause, and excessive attorneys' fees); *In re* Magsafe Apple Power Adapter Litig., 571 F. App'x 560 (9th Cir. 2014) (district court failed to properly assess reasonableness of attorneys' fees and implied reversion clauses for possible self-dealing); *Eubank*, 753 F.3d 718 (ethical misconduct by class counsel, confusing claims process, and excessive attorney fee award compared with insufficient relief for unnamed class members); *Redman*, 768 F.3d 622 (excessive fees for class counsel relative to benefit to class, district court insufficiently assessed "clear sailing" clause, and untimely motion for attorneys' fees); Radcliffe v. Experian Info. Sols. Inc., 715 F.3d 1157 (9th Cir. 2013) (adequacy of representation destroyed by incentive awards to class representatives who supported settlement); *In re* Baby

are much more inclined to reject settlements that do not significantly benefit class members, it is now more expensive for defendants to achieve a settlement that can withstand appeal. As the cost of settlement increases, trial becomes a more viable alternative for a defendant.

In addition, it is undoubtedly the case that judges are becoming more comfortable trying class actions.[462] The examples cited above provide concrete assurance to judges that, in many instances, complex class actions can be tried efficiently and effectively. In that regard, a recent decision by Judge William Young (D. Mass.) is instructive. In *In re Nexium Antitrust (Esomeprazole) Litigation*, Judge Young wrote a lengthy opinion after conducting a class action antitrust trial that resulted in a defense verdict.[463] Plaintiffs filed various motions for a new trial, which Judge Young denied in his written opinion.[464] In the course of his decision, Judge Young entreated fellow judges to try more cases, including class actions.[465] In particular, part VIII of the court's opinion—"WAS IT WORTH IT?—YES, TRIALS MATTER"—contains a passionate plea to judges (as well as the bar) to try more cases.[466] Judge Young notes that "[y]ear by year, federal district judges spend less and less time out on the bench."[467] Although settlement certainly plays a critical role in our civil justice system,[468] Judge Young makes a powerful point that our system benefits when class actions (and other civil matters) go to trial. Decisions like

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Prods. Antitrust Litig., 708 F.3d 163, 174 (3d Cir. 2013) (settlement contained "*cy pres* provision that permits the distribution of funds to a third party without first fully compensating all claimants"); *In re* HP Inkjet Printer Litig., 716 F.3d 1173 (9th Cir. 2013) (district court improperly evaluated reasonableness of class counsel's attorneys' fees, because redemptive value of coupon settlement was not first calculated); Day v. Persels & Assocs., 729 F.3d 1309 (11th Cir. 2013) (settlement was not "fair, adequate, and reasonable" where class members received no monetary recovery and district court erred in finding that defendants were unable to pay a meaningful award); *In re* Dry Max Pampers Litig., 724 F.3d 713 (6th Cir. 2013) (insufficient relief for class members and excessive attorneys' fees); Vassale v. Midland Funding LLC, 708 F.3d 747 (6th Cir. 2013) (improper disparity in relief allocated between class representatives and unnamed class members, insufficient notice of proposed settlement, and adequacy and superiority defects); Dennis v. Kellogg Co., 697 F.3d 858 (9th Cir. 2012) (improper *cy pres* distributions).

462 *See* Joshua H. Haffner, *When The Class-Action Case Does Not Settle*, PLAINTIFF MAG., Jan. 2015, at 2, http://plaintiffmagazine.com/Jan15/Haffner_When-the-class-action-case-does-not-settle_Plaintiff-magazine.pdf ("[T]he courts are becoming more receptive to class-action trials.").

463 309 F.R.D. 107, 107 (D. Mass. 2015).

464 *Id.*

465 *Id.* at 144.

466 *Id.* at 143–49.

467 *Id.* at 143 (citing Jordan M. Singer & Hon. William G. Young, *Bench Presence 2014: An Updated Look at Federal District Court Productivity*, 48 NEW ENG. L. REV. 565 (2014)).

468 *See, e.g.*, Samuel Issacharoff & Robert Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177 (2009).

that of Judge Young almost certainly will encourage other judges to be more confident in trying even complicated class actions.

Finally, some trials can be explained by the fact that defendants have strong appellate issues if they lose at trial. For instance, *Tyson Foods*[469] is a case that went to trial. There, the trial lasted nine days and the jury returned a verdict for more than $2.8 million.[470] Tyson Foods no doubt understood, in refusing to settle, that if it lost at trial it still had various appellate issues. Indeed, it convinced the U.S. Supreme Court to review the case, although it ultimately lost the appeal.[471] As another example, a two-month trial in a Colorado federal court involving alleged contamination of class members' land by plutonium resulted in a verdict against Dow Chemical of more than $554 million ($926 million after interest).[472] On appeal, the Tenth Circuit overturned the judgment, holding that the claims (arising under state law) were preempted by the Price–Anderson Act, and the Supreme Court denied certiorari.[473] Dow Chemical surely knew, going into the trial, that it was still preserving a strong preemption argument. Likewise, in a 2010 class action bench trial in federal district court in California, Wells Fargo Bank was found liable for $203 million in restitution for charging customers excessive overdraft fees.[474] As in *Tyson Foods*, Wells Fargo pursued its appeal all the way to the U.S. Supreme Court, although the Court ultimately denied review.[475] Again, Wells Fargo's belief that it had strong appellate arguments may well have factored into its willingness to proceed to trial.

As these examples illustrate, if defendants believe that they have strong appellate issues that are not waived or weakened by going to trial, they may be more willing to risk an adverse verdict. Of course, defendants have always had strong arguments (in some cases) that would have been preserved even after an adverse trial verdict; yet, until the last few years, they still settled virtually

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469 *See supra* notes 184–210 and accompanying text.

470 *See* Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791, 796 (8th Cir. 2014).

471 136 S. Ct. 1036 (2016).

472 Cook v. Rockwell Int'l Corp., 564 F. Supp. 2d 1189, 1230–31 (D. Colo. 2008), *rev'd*, 618 F.3d 1127 (10th Cir. 2010).

473 *Cook*, 618 F.3d 1127.

474 Gutierrez v. Wells Fargo Bank, N.A., 730 F. Supp. 2d 1080 (N.D. Cal. 2010), *vacated*, 704 F.3d 712 (9th Cir. 2012), *judgment reinstated*, 944 F. Supp. 2d 819 (N.D. Cal. 2013), *aff'd*, 589 F. App'x 824 (9th Cir. 2014); *see also* Eileen Connelly, *Wells Fargo Overdraft Lawsuit: Bank Ordered to Pay $203 MILLION in Fees over 'Unfair' Charges*, HUFFINGTON POST (Aug. 31, 2015), http://www.huffingtonpost.com/2010/08/11/wells-fargo-overdraft-law_n_679178.html.

475 Wells Fargo Bank, N.A. v. Gutierrez, 136 S. Ct. 1512 (2016) (mem.) (denying certiorari).

every class action and almost never went to trial. So this factor only makes sense when combined with the other factors discussed above.

All of the above explanations suggest that the trend of class actions going to trial will only increase in the next decade. As major companies become accustomed to going to trial in large class actions, a class certification order will not have the same *in terrorem* effect that it once had. Similarly, as plaintiffs' lawyers try and win more cases, they will develop the confidence to try other cases if they cannot achieve favorable settlements. And as judges become more confident in trying class actions, they will put less pressure on parties to settle.

B. Changes in Technology Will Fundamentally Alter the Administration of Class Action Lawsuits

In 2008, I co-authored an article discussing the "untapped potential" of the Internet to transform class action practice.[476] As the title of the article reflected, in 2008 the use of the Internet in class actions was just emerging. Although the article cited several examples of the Internet's role in facilitating the administration of class actions, it noted that "[t]he current [2008] use of the internet in the class-action realm falls well short of the internet's ultimate capabilities."[477]

In the past several years, the use of the Internet in class actions has mushroomed, and I predict that such use will continue to expand in ways we cannot even imagine today. As the following discussion reveals, the Internet has already begun to transform class action practice.[478]

1. Use of Social Media and Other Electronic Sources for Notice

Courts have increasingly utilized social media, including Facebook, to notify class members of certification, settlement, or other developments.[479]

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[476] Robert H. Klonoff, Mark Herrmann & Bradley W. Harrison, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727 (2008).

[477] *Id.* at 748.

[478] *See generally* Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J.L. & SOC. PROBS. 451 (2012).

[479] Mark v. Gawker Media LLC, No. 13–cv–4347, 2015 WL 2330274 (S.D.N.Y. Apr. 10, 2015) (order approving plaintiffs' social media plan); Evans v. Linden Research, Inc., No. C-11-01078, 2013 WL 5781284, at *3 (N.D. Cal. Oct. 25, 2013) ("[N]otice will appear on Facebook targeting [possible class members]."); Kelly v. Phiten USA Inc., 277 F.R.D. 564, 569–70 (S.D. Iowa 2011) (permitting notice via Facebook); Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*,

That development is very significant; class members who may not read a notice sent by mail or a notice reprinted in a newspaper might well study a notice on a social media site. Thus, use of social media helps to ensure that notice is more widely disseminated and absorbed, allowing more class members to actually participate in the fruits of any successful class action. Use of e-mail as a vehicle for class notice has also greatly expanded. Several recent cases have approved class notice proposals relying primarily on e-mail to provide direct notice to class members.[480] E-mail is also often used in conjunction with standard mailings and publication.[481]

2. Use of the Internet to Locate Class Members

Locating class members can be a difficult task. As I noted in my 2008 article, according to the U.S. Census Bureau, in 2004 alone about 14% of the U.S. population moved.[482] Such moves can be local, national, and even international. Thus, of the persons who moved in 2004, 20% of them left their prior state, and 4.6% of such individuals moved abroad.[483]

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59 FLA. L. REV. 71, 126 (2007) (discussing growing prevalence of online and digital notification dating back to early 1990s); Josh Eidelson, *Hey, Can You 'Like' My Lawsuit?*, BLOOMBERG (Mar. 5, 2015), http://www.bloomberg.com/news/articles/2015-03-05/gawker-lawsuit-plaintiffs-plan-social-media-class-action-quest (detailing use of social media to find possible class members); Kashmir Hill, *Yes, That Legal Notice You Got from Facebook Is Real*, FORBES.COM (Jan. 26, 2013), http://www.forbes.com/sites/kashmirhill/2013/01/26/yes-that-legal-notice-you-got-from-facebook-is-real/ (article about case against Facebook, in which notice of settlement was sent via e-mail to Facebook users); Kathy Kreps, *Why Can't We Be Friends? Gawker Class Action Raises Specter of Notification Via Social Media*, EMP'R L. REP. (Feb. 27, 2015), http://www.employerlawreport.com/2015/02/articles/uncategorized/why-cant-we-be-friends-gawker-class-action-raises-specter-of-notification-via-social-media/ (describing plaintiffs' proposed use of social media in *Mark*, 2015 WL 2330274).

480 *See, e.g.*, Flynn v. Sony Elecs., Inc., No. 09-cv-2109, 2015 WL 128039, at *4 (S.D. Cal. Jan. 7, 2015) (approving class notice proposal relying on e-mail for direct notice); Boyd v. Avanquest N. Am. Inc., No. 12-cv-04391, 2015 WL 4396137, at *6 (N.D. Cal. July 17, 2015) (similar); *In re* Magsafe Apple Power Adapter Litig., No. 5:091-CV-01911, 2015 WL 428105, at *9–10 (N.D. Cal. Jan. 30, 2015) (approving class settlement where e-mail was used as primary means of notifying class members); Chaikin v. Lululemon USA Inc., No. 3:12-CV-02481, 2014 WL 1245461, at *2 (S.D. Cal. Mar. 14, 2014) (similar); *Evans*, 2013 WL 5781284, at* 3 (similar). The Advisory Committee has proposed language to clarify that electronic notice is often an effective form of notice. COMM. ON RULES OF PRACTICE AND PROCEDURE, *supra* note 34, at 252 (proposing that Rule 23(c)(2)(B) be amended to state that "[t]he notice may be by United States mail, electronic means, or other appropriate means").

481 *See, e.g.*, *In re* Online DVD-Rental Antitrust Litig., 779 F.3d 934, 946 (9th Cir. 2015) (notice provided "in both mail and email form" sufficient under due process and Rule 23); Lee v. Enter. Leasing Co.-W., No. 3:10-CV-00326, 2014 WL 4801828, at *2 (D. Nev. Sept. 22, 2014) ("[T]he Court finds that *both* email and first-class mail is the best notice practicable under the circumstances here.").

482 Klonoff et al., *supra* note 476, at 731 (citing U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, 2005 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT tbl.30 (2005)).

483 *Id.*

Lawyers are increasingly using social media, such as Twitter and Reddit, to locate class members.[484] Again, I believe that that trend will continue during the coming decade. The ability to locate class members—thus expanding the pool of people who will be compensated in the event of a trial or settlement—will decrease the likelihood of unclaimed funds and thereby decrease the need for *cy pres* settlements.

3. *Use of Web Sites to Allow Class Members to Observe Live Court Proceedings*

Broadcasts of court proceedings on the Internet are now fairly common, especially at the appellate level.[485] To my knowledge, however, live streaming of class action trial-level proceedings has seldom occurred in the United States.[486] That will surely happen, however; indeed, as one commentator notes, a class action trial in Australia was live streamed over the Internet, and class members were given passwords to log in and view the proceedings.[487] Live streaming will allow "absent" class members to observe, scrutinize, and react to the performance of class counsel and the class representatives at the certification stage and other critical junctures. For instance, class members will have the opportunity to watch fairness hearings over the Internet, and through interactive techniques they may even be allowed to raise objections and

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484 *See* Casie Collignon & Paul Karlsgodt, *Class Actions 101: A New "Viral" Class Action?*, AM. BAR ASS'N (Nov. 20, 2012), http://apps.americanbar.org/litigation/committees/classactions/articles/fall2012-1112-class-actions-101-new-viral-class-action.html; Linton Weeks, *Tweet Suits: Social Media and the Law*, NPR (Apr. 24, 2014), http://www.npr.org/sections/theprotojournalist/2014/04/24/306419892/tweet-suits-social-media-and-the-law.

485 *See, e.g.*, *Court Offers Live Audio Streaming of All Proceedings*, U.S. CTS. FOR THE NINTH CIR., http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000717 (last visited Mar. 21, 2016) ("As of January 6, 2014, the United States Court of Appeals for the Ninth Circuit will provide live audio streaming of all of its proceedings."); *Live Streaming of Oral Arguments*, MICH. CTS., http://courts.mi.gov/courts/michigansupremecourt/oral-arguments/live-streaming/pages/live-streaming.aspx (last visited Mar. 21, 2016) ("As part of its commitment to making courts accessible to the public, the Michigan Supreme Court broadcasts its oral arguments and other hearings live on the Internet via streaming video technology."); *Argument Audio*, SUP. CT., http://www.supremecourt.gov/oral_arguments/argument_audio.aspx (last visited Mar. 21, 2016) (audio recordings of oral arguments before the Supreme Court available online to the public).

486 One exception occurred in 2013, when Judge Weinstein of the Eastern District of New York ordered live audio broadcast, and, "[i]f practicable, video live-streaming," of a summary judgment hearing in a class action by former residents of an assisted living facility. Boykin v. 1 Prospect Park ALF, LLC, 292 F.R.D. 161, 161 (E.D.N.Y. 2013). Judge Weinstein noted in his order that the putative class members were primarily elderly and infirm, and that "[t]he internet and social networking tools are means of creating more efficient communication among lawyers, clients and the court." *Id.* at 161–62.

487 *See, e.g.*, *Bushfires Class Action Trial to Stream Live for Victims*, MAURICE BLACKBURN LAWS., https://www.mauriceblackburn.com.au/about/media-centre/media-statements/2013/bushfires-class-action-trial-to-stream-live-for-victims/ (last visited Aug. 29, 2015).

otherwise provide input without leaving their homes. I do not expect that many class members will be glued to their computer screens to watch routine, small claims class action proceedings. But I do believe that some class members will participate in live streaming in certain high-profile, large-dollar class actions.[488]

4. Use of Websites to Administer Payment of Claims

A growing number of claims administrators are using websites to administer claim payments, thus avoiding the expense of mailing checks.[489] This is an extremely important development, especially in small claims cases. In the past, if a class member's recovery was (for example) $5, it was hard to justify the postage and handling costs of distributing checks. But if the money can be electronically transmitted to class members at little or no expense, direct distribution to class members makes far more sense, thus reducing the need for *cy pres* awards to third parties.[490] Computer distributions of settlements will, I predict, become much more common in the next decade.

5. Use of Chat Rooms and Other Social Media to Facilitate Discussion by Class Members

Chat rooms allow class members to coordinate strategy, discuss issues of concern, and share knowledge about the case.[491] They are especially valuable when there is some prior relationship between class members—for example, members of a sports franchise or employees at a single company. Thus far, however, chat rooms have not been widely used in class actions. One article

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[488] The highly publicized National Football League concussion class action is an example of the type of case that class members almost certainly would watch over the Internet. *See In re* Nat'l Football League Players' Concussion Injury Litig., 307 F.R.D. 351 (E.D. Pa. 2015), *aff'd*, No. 15-2206, 2016 WL 1552205 (3d Cir. Apr. 18, 2016).

[489] *See, e.g.*, AM. LEGAL CLAIM SERVS. LLC, https://www.americanlegal.com/page/class-action-service-description (last visited Aug. 31, 2015) (provides direct electronic payment to class members as part of its administrative services for class actions); GARDEN CITY GROUP, LLC, http://www.gardencitygroup.com/expertise (last visited Aug. 31, 2015) (similar); *see also* Tice O'Sullivan, *The Best Class Action Payment Process*, EPIQ SYS. (Mar. 7, 2014), http://www.epiqsystems.com/Mass-Tort/Best-Class-Action-Payment-Process/05-22-2014/ (discussing pros and cons of different payment methods to class members, including direct electronic payments).

[490] *See generally* Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & BUS. 767, 788–92 (2015) (discussing difficulties with the use of checks and expressing optimism that technology will improve the payment of consumer class action claims).

[491] *See, e.g.*, EPIQ SYS., http://www.epiqsystems.com/class-action/client-services-and-project-management/ (last visited Aug. 31, 2015) (describing website where class counsel can interact and share information with class members).

attributes that fact to a concern among class counsel that class members, if organized, might rebel or otherwise make representation of the class difficult.[492] I believe that, notwithstanding those concerns, the use of chat rooms in class actions will expand significantly in the next decade.

In addition to chat rooms, social media can facilitate other kinds of interaction among class members. For instance, in some cases class members have set up Facebook pages that allow people to join a specific group that provides information and commentary about a specific case.[493] Such use of social media, I believe, will also increase.

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It is inevitable that, in 2026, technology will play a far greater role in class actions than it does today—just as it plays a far greater role today than it did in 2008, when I wrote my article on the "untapped potential" of the Internet.[494] As devices such as chat rooms and interactive proceedings gain traction, ethical issues—such as privilege concerns—are likely to emerge, and courts will need to address those issues.

CONCLUSION

In 2026, the class action device will still be an integral part of our civil justice system, and Rule 23 will still exist largely in its current form. Plaintiffs will continue to identify acts of alleged wrongdoing that, in their view, are worthy of resolution on an aggregate basis. And defendants will continue to press every conceivable argument to scale back class actions. Although many factors will control the progress of the case law (including the results of the presidential and congressional elections, and the composition of the Supreme Court), I fear that, overall, the climate for class actions will remain difficult for plaintiffs. At the same time, large and significant class actions will continue to be brought and certified, and trials will become even more common. Vigorous

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492 Collignon & Karlsgodt, *supra* note 484.

493 *See, e.g.*, Mark v. Gawker Media LLC, No. 13-cv-4347, 2015 WL 2330274 (S.D.N.Y. Apr. 10, 2015) (approving plaintiffs' plan to disseminate notice and provide information about the case via social media, including Twitter and Facebook).

494 Klonoff et al., *supra* note 476.

ethical attacks on attorneys will continue (and in some cases succeed), with the salutary result that unethical tactics will be deterred. Technology will make the class action device more transparent and democratic, so that unnamed class members will be able to play an active part in the process. In short, class actions will remain vibrant, challenging, and fascinating.