



2014

Is the Class Action Really Dead? Is that Good or Bad for Class Members?

Georgene Vairo

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/elj>

Recommended Citation

Georgene Vairo, *Is the Class Action Really Dead? Is that Good or Bad for Class Members?*, 64 Emory L. J. 477 (2014).

Available at: <https://scholarlycommons.law.emory.edu/elj/vol64/iss2/16>

This Article is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory Law Journal by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

IS THE CLASS ACTION REALLY DEAD? IS THAT GOOD OR BAD FOR CLASS MEMBERS?

Georgene Vairo*

ABSTRACT

Recent Supreme Court decisions have tightened up the standards for obtaining class certification and virtually eliminate class arbitration as well. However, while the Court has made it more difficult for plaintiffs' attorneys to use class resolution of claims as a prosecutorial tool, the lower federal courts appear to relax certification standards when the parties seek to certify a settlement class. Because of the preclusive power of a class action, which binds all class members who do not opt out, the class action remains a potent settlement tool. The 2014 Randolph W. Thrower Symposium panel that served as the foundation for this paper, "Binding the Future: Global Settlements and the Death of Representative Litigation," asked, however, whether class settlements are bad for class members.

This Article begins by analyzing the Supreme Court's certification decisions and agrees with most commentators that although class actions are not dead, the device's utility as a prosecution tool has been compromised. However, the Article then shows that certification of class actions for settlement purposes is alive and well. Finally, the Article identifies possible alternatives to the use of class actions. Although much attention has been (and should be) directed at the fairness of proposed settlements, the Article suggests that it is fortunate that the lower federal courts are not applying class certification standards as stringently in the class settlement context. This is because, despite all the problems inherent in class action practice, class actions remain the best of a range of options for protecting the rights of class members, particularly in low-value claim cases.

* David P. Leonard Professor of Law, Loyola Law School, Los Angeles. I wish to thank the *Emory Law Journal* for inviting me to participate in the 2014 Randolph W. Thrower Symposium, and for the help of its editors in the preparation of this Article. I also want to thank Professor Rich Freer for being such a supportive friend and colleague over the decades we have shared in academia. He has always pushed me to be the best that I can be.

INTRODUCTION	479
I. THE TIGHTENING CLASS ACTION NOOSE	482
A. <i>General Class Action Standards</i>	482
B. <i>Securities Class Actions</i>	485
C. <i>The Arbitration Cases</i>	489
D. <i>Settlement Classes Survive Rigorous Certification Scrutiny</i>	494
II. ET TU, CLASS SETTLEMENT?	498
A. <i>The Preclusion Problem</i>	500
B. <i>Have Defendants Really Bought Peace?</i>	506
C. <i>Are Alternatives to Class Actions Better for Plaintiffs?</i>	511
1. <i>Distinguishing Between High- and Low-Value Claims</i>	512
2. <i>Public v. Private Enforcement</i>	516
3. <i>Mass Actions and Quasi-Class Actions</i>	518
4. <i>Attorney General Parens Patriae Actions</i>	520
CONCLUSION	528

INTRODUCTION

There seems to be a bit of schizophrenia in the world of class actions. On the one hand, corporate defendants hate them; on the other, they love them.¹ When a class complaint is filed against a corporate defendant, it will do all it can to prevent class certification, otherwise known as the nuclear bomb the plaintiff seeks to hang over its head.² But, when it suits their needs, corporate defendants may try to achieve a global peace by negotiating a class settlement with the plaintiff class's attorneys.³ Similarly, the 2014 Randolph W. Thrower Symposium, to which I was honored to be invited, brought together leading scholars and practitioners to discuss whether, on the one hand, class actions are really dead, but on the other, whether class settlements are a bad thing for plaintiffs.⁴

It is no secret that the United States Supreme Court has made obtaining class certification and group dispute resolution more difficult. Over the last several Terms, the Court has decided several lines of class action cases.⁵ Two

¹ See Geogrene Vairo, *What Goes Around, Comes Around: From the Rector of Barkway to Knowles*, 32 REV. LITIG. 721, 723–24 (2013).

² See *id.* at 723.

³ See *id.*

⁴ See *The 2014 Randolph W. Thrower Symposium*, EMORY L.J., <http://law.emory.edu/elj/symposium.html> (last visited Dec. 14, 2014).

⁵ In the 2010 Term, the Court decided *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Erica P. John Fund, Inc. v. Halliburton Co. (Halliburton I)*, 131 S. Ct. 2179 (2011); *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011); and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). The Court took a break in the next Term, but returned with five cases in the following Term: *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); and *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). During the most recent Term, the Court issued two opinions: *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014) and *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*, 134 S. Ct. 2398 (2014). And the Court has more in store. It granted certiorari in two more class action related cases in the current Term: *Dart Cherokee Basin Operating Co. v. Owens*, 730 F.3d 1234 (10th Cir. 2013) (petition for rehearing *en banc* denied, 4–4), *cert. granted*, 134 S. Ct. 1788 (2014) (No. 13-719) and *Gelboim v. Bank of America Corp.*, 134 S. Ct. 2876 (2014) (No. 13-1174) (granting certiorari in connection with the decision in *In re LIBOR-Based Financial Instruments Antitrust Litigation*, Nos. 13-3565(L); 13-3636(Con.), 2013 WL 9557843 (2d Cir. Oct. 30, 2013)). First, the issue in *Dart Cherokee* is the defendant's burden with respect to the amount in controversy requirement when removing under the Class Action Fairness Act of 2005 (CAFA). The Tenth Circuit allowed a remand of the case because the defendant pleaded, but did not present proof, that the \$5 million amount in controversy requirement was satisfied. See *Dart Cherokee Basin Operating, Co. v. Owens*, No. 13-603, 2013 WL 8609250, at *1 (10th Cir. June 20, 2013), *denying perm. app. from* No. 12-4157-JAR-JPO, 2013 WL 2237740, at *1 (D. Kan. May 21, 2013). Second, in *Gelboim*, the district court dismissed some individual plaintiffs' claims. The Second Circuit determined *sua sponte* that it lacked jurisdiction over plaintiffs' appeal because a final order appealable under 28 U.S.C. § 1291 had not been issued and because the orders appealed from did not dispose of all claims in the consolidated action. 2013 WL 9557843, at *1. Certiorari was granted

lines of cases that are of particular importance to the issues this Article addresses—one line pertains to class certification requirements under Federal Rules of Civil Procedure 23, and the other pertains to class arbitration—have upped the ante for plaintiffs seeking to use the power of this ultimate aggregation device to obtain a large recovery for class members who often otherwise have claims too small to justify individual actions.⁶ A subset of the class certification requirements line is a series of cases on securities class actions that has been relatively pro-class friendly.⁷ The third line parses some of the intricacies of the Class Action Fairness Act of 2005 (CAFA) and federalism issues.⁸ This line of cases has an impact on whether a particular class action is litigated in state or federal court, which, in turn, may tilt the equation in favor of or against class certification because plaintiffs' counsel tend to perceive state courts as relatively more class action friendly.⁹ Although this Article will not address this line of cases directly, it will discuss the most recent Supreme Court case, *Mississippi ex rel. Hood v. AU Optronics Corp.*¹⁰—in which the Court unanimously held that a state attorney general's

as to “[w]hether and in what circumstances is the dismissal of an action that has been consolidated with other suits immediately appealable.” Petition for a Writ of Certiorari in *i, Gelboim*, 134 S. Ct. 2876 (No. 13-1174), 2014 WL 1246714.

⁶ The most significant general class certification decisions are *Dukes*, 131 S. Ct. 2541 and *Comcast*, 133 S. Ct. 1426. *Symczyk* decided that a full offer of judgment in an FLSA collective action case moots the class claims. 133 S. Ct. at 1532. The significant class arbitration decisions are *Concepcion*, 131 S. Ct. 1740 and *Italian Colors*, 133 S. Ct. 2304.

⁷ The securities cases include: *Halliburton I*, 131 S. Ct. 2179; *Smith*, 131 S. Ct. 2368; *Amgen*, 133 S. Ct. 1184; and *Halliburton II*, 134 S. Ct. 2398.

⁸ The CAFA cases are *Knowles*, 133 S. Ct. 1345 and *Hood*, 134 S. Ct. 736. *Smith* addressed the preclusive effect of a federal court's denial of class certification on a subsequent class action brought by class members in a state court. 131 S. Ct. at 2375, 2377.

It is by no means clear that state courts are as friendly as plaintiffs' attorneys hope. California, which is listed as the number one “Judicial Hellhole,” see AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2013–2014, at 3 (2013), <http://www.judicialhellholes.org/wp-content/uploads/2013/12/JudicialHellholes-2013.pdf>, seems to be tightening up as well. In *Duran v. U.S. Bank National Ass'n*, the California Supreme Court unanimously affirmed reversal of the trial court's certification of a class. 325 P.3d 916, 934 (Cal. 2014). The trial court had relied on faulty statistical sampling as the basis for overcoming commonality issues. *Id.* at 945–46. In *Brinker Restaurant Corp. v. Superior Court*, the California Supreme Court approved class certification of one subclass, remanded for further consideration another, and affirmed a refusal to certify a third subclass in a wage and hour dispute, thereby evincing a more nuanced approach to class certification. 273 P.3d 513, 521 (Cal. 2012).

⁹ See generally GEORGENE M. VAIRO, THE COMPLETE CAFA: ANALYSIS AND DEVELOPMENTS UNDER THE CLASS ACTION FAIRNESS ACT OF 2005, at 2–5 (2011) (supplement to MOORE'S FEDERAL PRACTICE (3d ed. 1997)) (remarking on the “unprecedented degree of forum shopping” undertaken by plaintiffs' lawyers in the wake of *Amchem*, as they sought out state courts that “might be more amenable to class certifications”).

¹⁰ 134 S. Ct. 736 (2014).

parens patriae action is not removable under CAFA—because it may provide the foundation for an alternative to class actions.¹¹

The panel upon which I served dealt with the problem of class settlements: “Binding the Future: Global Settlements and the Death of Representative Litigation.” Our charge was as follows:

This panel will consider the role of settlements that purport to bind future potential members of a given class. As increasingly popular mechanisms for comprehensive dispute resolution, global settlements provide a powerful tool for corporations and other entities to bring a swift and decisive end to drawn-out complex litigation. However, these agreements foreclose litigants, whose individual causes of action may not accrue for years after the settlement is concluded, from seeking judicial or arbitral remedies.

Panelists will weigh the vast economic benefits such settlements bring to corporations with the attendant prejudice such agreements impose on unknowing and unwilling citizens with concrete and often compelling injuries.¹²

In my view, it is somewhat ironic that the focus of this panel was supposed to be on whether global settlements are fair when they purportedly bind class members. If class actions are dead, how can there be any global settlements? And are we talking about actual binding effect, such as when a court blesses a global settlement, or effective global resolution in quasi-class actions, like *Zyprexa*¹³ or in mass actions?¹⁴

This article will first review the recent United States Supreme Court cases to determine how moribund class actions actually are. The keynote speaker at the Thrower Symposium, Professor Arthur Miller, passionately argued that the Supreme Court’s decisions cutting back on class resolution are unfounded and

¹¹ *Id.* at 744–45; *see also infra* Part III.C.4.

¹² Description on file with the *Emory Law Journal*; *see also* Emory Law Journal, *Binding the Future: Global Settlements and the Death of Representative Litigation*, YOUTUBE (Feb. 10, 2014) <https://www.youtube.com/watch?v=7MX5ngi8tZI>.

¹³ *See In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp. 2d 397, 403–04 (E.D.N.Y. 2009) (“The individual Zyprexa user litigation has been administered as a quasi-class action.”). In this decision, the court highlighted that it had described these proceedings as a “quasi-class action” in previous opinions. *See id.* (citing *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 262 (E.D.N.Y. 2006); *In re Zyprexa Prods. Liab. Litig.*, 451 F. Supp. 2d 458, 477 (E.D.N.Y. 2006); *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006); *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. 122, 122 (E.D.N.Y. 2006)).

¹⁴ *See infra* Part III.C.3.

unfortunate because they choke off access to justice for large groups of persons whose small claims will now go without a remedy.¹⁵ Not surprisingly, because class actions are so controversial, the panelists on the other panels, *In a Class by Itself: Has the Roberts Court Slammed the Courthouse Door on Class Actions?*¹⁶ and *Stand Alone or Stand Down: Consumer Arbitration Agreements and the Demise of Collective Dispute Resolution*¹⁷ were divided on the merits and demerits of the Court's decisions.

My review of the Court's cases sets the stage for arguing that class actions are not dead but that their utility as a litigation prosecution device has been curtailed. Additionally, the possibility of successfully arguing that class arbitration is appropriate is close to nil. But, the courts have been less stringent post-*Dukes* when deciding whether to certify a class for settlement purposes.¹⁸ After a review of courts of appeals cases approving settlement classes, the Article returns to the central focus of our panel: whether class settlements are bad for class members.

I. THE TIGHTENING CLASS ACTION NOOSE

A. General Class Action Standards

Unquestionably, the most important case dealing with class certification standards is *Wal-Mart Stores, Inc. v. Dukes*.¹⁹ That 5–4 decision, with the majority opinion written by Justice Scalia, redefined the meaning of commonality under Rule 23(a)(2).²⁰ Previously, as Justice Ginsburg noted in her dissent, the commonality requirement was among the easiest for plaintiffs to satisfy.²¹ Now, under *Dukes*, when faced with a motion for class

¹⁵ See Arthur R. Miller, Professor, N.Y. Univ. Sch. of Law, Keynote Lecture at the Emory Law Journal 2014 Randolph W. Throver Symposium: American Dispute Resolution in 2020: The Death of Group Vindication of the Law? (Feb. 6, 2014), available at <http://www.youtube.com/watch?v=921CycQeFXc>.

¹⁶ See Emory Law Journal, *In a Class by Itself: Has the Roberts Court Slammed the Courthouse Door on Class Actions?*, YOUTUBE (Feb. 10, 2014), https://www.youtube.com/watch?v=Edpzj_1QGwg.

¹⁷ See Emory Law Journal, *Stand Alone or Stand Down: Consumer Arbitration Agreements and the Demise of Collective Dispute Resolution*, YOUTUBE (Feb. 10, 2014), <https://www.youtube.com/watch?v=ZE-vGQb2mGM>.

¹⁸ See *infra* Part II.D.

¹⁹ 131 S. Ct. 2541 (2011).

²⁰ See *id.* at 2551. The Court also unanimously ruled that the class could not be certified under Rule 23(b)(2) class because it sought monetary damages that may only be sought in Rule 23(b)(3) damages class actions. See *id.* at 2557.

²¹ See *id.* at 2565–66 (Ginsburg, J., dissenting) (“The Court blends Rule 23(a)(2)’s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no

certification, the district court must engage in a “rigorous analysis” to ensure that the plaintiff has proven all elements of Rule 23.²² The Court found that “Rule 23 does not set forth a mere pleading standard” but rather requires that “[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.”²³

Moreover, the district court must look to the merits of the case when there is an overlap between the Rule 23 commonality requirement and the plaintiffs’ merits contentions. Both the plaintiffs’ gender discrimination case and the commonality element would turn on whether Wal-Mart engaged in a pattern or practice of discrimination.²⁴ And, according to the majority, the plaintiff failed to prove a common question for certification purposes:

Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored*.²⁵

Justice Ginsburg, writing for the dissent, criticized the majority for conflating the Rule 23(b)(3) predominance of common questions requirement, applicable only in damages class actions, with the threshold Rule 23(a)(2) commonality requirement.²⁶ According to Justice Ginsburg, the majority’s approach inappropriately focused on the dissimilarities among class members rather than the similarities.²⁷

Two years later, most commentators thought that *Comcast*,²⁸ an antitrust case, would finish what Justice Scalia started in *Dukes* by tightening up the Rule 23(b)(3) predominance requirement²⁹ and by making it clear that

longer ‘easily satisfied.’ Rule 23(b)(3) certification requires, in addition to the four 23(a) findings, determinations that ‘questions of law or fact common to class members predominate over any questions affecting only individual members’ and that ‘a class action is superior to other available methods for . . . adjudicating the controversy.’” (alteration in original) (footnote and citation omitted)).

²² *Id.* at 2551–52 (majority opinion).

²³ *Id.* at 2551.

²⁴ *See id.* at 2552.

²⁵ *Id.*

²⁶ *See id.* at 2566 (Ginsburg, J., dissenting).

²⁷ *See id.* at 2567.

²⁸ *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

²⁹ Rule 23(b)(3) requires the court to find “that the questions of law or fact common to class members predominate over any questions affecting only individual members.” FED. R. CIV. P. 23(b)(3).

plaintiffs' experts on certification issues must meet the *Daubert* test for the admissibility of expert evidence.³⁰ Again, the *Comcast* Court split 5–4, with Justice Scalia again writing the majority opinion and Justice Ginsburg writing a dissent.³¹ Justice Ginsburg's dissent detailed the confusing procedural history of the case in the Supreme Court and concluded that the Court should have dismissed certiorari as improvidently granted because the Court granted certiorari on an issue other than one that Comcast had presented in its petition, and then did not answer its own reformulated question presented.³² More importantly, and she has proven to be correct for the most part, the majority opinion broke no real ground.³³

According to Justice Ginsburg, the majority vacated class certification of the damages class merely because the plaintiffs' expert's theory of damages did not match the remaining theory of liability. No big deal, Justice Ginsburg suggested: "Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal."³⁴ Thus, the need to consider "individual damages calculations should not scuttle class certification under Rule 23(b)(3)."³⁵ Therefore, the majority's holding does not prevent certification of a liability class, as opposed to a damages class.³⁶ And, many courts have adopted Justice Ginsburg's view.³⁷

³⁰ See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–93 (1993).

³¹ *Comcast*, 133 S. Ct. 1426.

³² See *id.* at 1435–36 (Ginsburg, J., dissenting); see also *id.* at 1441 ("Because the parties did not fully argue the question the Court now answers, all Members of the Court may lack a complete understanding of the model or the meaning of related statements in the record. The need for focused argument is particularly strong here where, as we have said, the underlying considerations are detailed, technical, and fact-based. The Court departs from our ordinary practice, risks inaccurate judicial decisionmaking, and is unfair to respondents and the courts below. For these reasons, we would not disturb the Court of Appeals' judgment and, instead, would dismiss the writ as improvidently granted.").

³³ See *id.* at 1436.

³⁴ *Id.* at 1437.

³⁵ *Id.* (quoting 2 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 4:54, at 205 (5th ed. 2012)) (internal quotation marks omitted).

³⁶ See *id.* at 1437 ("In particular, when adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate."); see also FED. R. CIV. P. 23 advisory committee's note (1966) ("[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class.").

³⁷ See, e.g., *In re Deepwater Horizon*, 739 F.3d 790, 817 (5th Cir. 2014) (holding that predominance under Rule 23(b)(3) did not require a formula for classwide measurement of damages); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 516 (9th Cir. 2013) (reversing the district court's denial of class certification).

B. Securities Class Actions

The Supreme Court also decided a series of relatively pro-plaintiff certification cases in the context of securities class actions. All these cases revolved around the extent to which a plaintiff may invoke the fraud-on-the-market theory. To prove a securities violation under the Securities and Exchange Commission's Rule 10b-5, an investor must show that it relied on a defendant's misrepresentation when deciding whether to buy or sell a security.³⁸ In *Basic Inc. v. Levinson*,³⁹ the Supreme Court found that requiring proof of direct reliance by each plaintiff or class member "would place an unnecessarily unrealistic evidentiary burden on [a] plaintiff who has traded on an impersonal market."⁴⁰ Thus, the Court adopted a fraud-on-the-market theory, which permits securities-fraud plaintiffs to invoke a rebuttable presumption of reliance on public, material misrepresentations regarding securities traded in an efficient market.⁴¹ The fraud-on-the-market theory facilitates the certification of securities-fraud class actions.⁴² This is because this theory permits reliance to be proved on a classwide basis, rather than requiring each class member to prove reliance individually, which would, in turn, create a predominance problem for class certification purposes.⁴³

In 2011, in *Erica P. John Fund, Inc. v. Halliburton Co. (Halliburton I)*, the Supreme Court held unanimously that securities-fraud plaintiffs are not required to prove loss causation—a causal connection between the defendant's misrepresentations and the plaintiffs' economic losses—to establish that reliance was capable of resolution on a common, classwide basis.⁴⁴ Loss causation addresses an issue different from whether an investor relied on the defendant's misrepresentations.⁴⁵ Thus, proving loss causation was not a precondition for invoking *Basic*'s rebuttable presumption of reliance.⁴⁶

Two years later, in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, a 6–3 majority of the Court ruled that securities-fraud plaintiffs have no obligation to prove at the class certification stage that a defendant's

³⁸ See *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191–92 (2013).

³⁹ 485 U.S. 224 (1988).

⁴⁰ *Id.* at 245.

⁴¹ See *id.* at 241–49.

⁴² See *id.* at 242.

⁴³ *Id.*

⁴⁴ 131 S. Ct. 2179 (2011).

⁴⁵ See *id.* at 2186.

⁴⁶ See *id.*

misrepresentations and omissions were material.⁴⁷ According to the majority, proof of materiality is not needed to ensure that the questions of law or fact common to the class will “predominate over any questions affecting only individual members” as the litigation progresses.⁴⁸ This is because materiality is judged according to an objective standard and therefore can be proved through evidence common to the class.⁴⁹ Additionally, a failure of proof on the common question of materiality after class certification would not result in individual questions predominating.⁵⁰ Indeed, a failure of proof would end the case because materiality is an essential element of a securities-fraud claim.⁵¹ Requiring a plaintiff to prove materiality at the certification stage would therefore “put the cart before the horse” because it would require the plaintiffs to prove at the class certification stage that “it will win the fray.”⁵²

Thus, by the end of the 2012 Term, it appeared that the Court was solidly prepared to continue to take it easy on plaintiffs in securities class actions, in contrast to consumer, employment, antitrust, and other class actions. The *Amgen* majority provided a clue as to why. *Amgen* had contended that “policy considerations” require that proof of materiality be presented at the class certification stage.⁵³ Because the class can rely on the fraud-on-the-market theory without proving materiality, defendants fearing “ruinous liability” face substantial pressure to settle.⁵⁴ *Amgen* thus argued that materiality should be addressed at the class certification stage because it otherwise may never be addressed.⁵⁵ The majority dispensed with this public policy argument by noting that Congress has played a significant role in the securities class action area.⁵⁶ First, Congress had taken steps to curb securities-fraud class action abuses by enacting the Private Securities Litigation Reform Act of 1995 (PSLRA)⁵⁷ and the Securities Litigation Uniform Standards Act of 1998.⁵⁸ Moreover,

⁴⁷ 133 S. Ct. 1184, 1197 (2013).

⁴⁸ *Id.* at 1195 (quoting FED. R. CIV. P. 23(b)(3)).

⁴⁹ *Id.*

⁵⁰ *Id.* at 1196.

⁵¹ *See id.*

⁵² *Id.* at 1191.

⁵³ *Id.* at 1199.

⁵⁴ *See id.* at 1199–1200.

⁵⁵ *Id.* at 1200.

⁵⁶ *Id.*

⁵⁷ Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of titles 15 and 18 of the United States Code).

⁵⁸ Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in scattered sections of title 15 of the United States Code).

Congress has acknowledged the settlement pressure argument but has rejected calls to undo the fraud-on-the-market theory.⁵⁹

Recognizing that a solid majority of the Court would not engage in a judicial unwinding of securities class action jurisprudence by eviscerating the *Basic* presumption, Justice Alito, in a concurrence, as well as Justices Thomas and Scalia in their dissents, invited defendants to directly challenge *Basic* itself.⁶⁰ This attack came in *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*.⁶¹ Some commentators thought that this attack could lead to a squaring of securities class actions with those controlled by *Dukes*.⁶² But, in another 6–3 opinion written by Chief Justice Roberts, the Court refused to overrule *Basic*.⁶³ In addition, the Court rejected the defendant’s fallback argument that even if *Basic* survived, the plaintiff ought to be required to prove “price impact”—that the misrepresentations actually failed to move stock prices—at the certification stage.⁶⁴

However, the majority did provide the defendant with an important class certification procedural tool. The *Basic* theory allows the plaintiff to allege a *presumption* of reliance.⁶⁵ So, the majority ruled that the defendants may present evidence seeking to rebut that presumption at the class certification stage by demonstrating a lack of price impact, which, in turn, would show a lack of predominance.⁶⁶ This is an important tool for defendants. For example, defendants may (and indeed already are) aggressively challenge price impact.⁶⁷ But, as Justice Ginsburg said in her concurrence, the majority’s approach “should impose no heavy toll on securities-fraud plaintiffs with tenable claims.”⁶⁸ Of course, a pre-certification battle over price impact will increase

⁵⁹ See *Amgen*, 133 S. Ct. at 1200–01.

⁶⁰ See *id.* at 1204 (Alito, J., concurring); *id.* (Scalia, J., dissenting); *id.* at 1206 (Thomas, J., dissenting).

⁶¹ 134 S. Ct. 2398 (2014).

⁶² See Daniel Fisher, *Supreme Court Takes Halliburton’s Frontal Assault on Securities Class Actions*, FORBES (Nov. 16, 2013, 10:29 AM), <http://www.forbes.com/sites/danielfisher/2013/11/16/supreme-court-takes-halliburtons-frontal-assault-on-securities-class-actions/>; Melissa Lipman, *Comcast Case Gives Justices a Chance to Expand on Dukes*, LAW360 (June 26, 2012, 8:37 PM), http://www.law360.com/classaction/articles/354169?nl_pk=4eb37093-8d7c-47b5-b2f0-0554e4806cd5&utm_source=newsletter&utm_medium=email&utm_campaign=classaction.

⁶³ See *Halliburton II*, 134 S. Ct. at 2417.

⁶⁴ See *id.* at 2413, 2415.

⁶⁵ See *id.* at 2406.

⁶⁶ See *id.* at 2417.

⁶⁷ See *Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248, 1252 (11th Cir. 2014) (vacating class certification and remanding for reconsideration in light of *Halliburton II*).

⁶⁸ *Halliburton II*, 134 S. Ct. at 2417 (Ginsburg, J., concurring).

costs and delay settlements, but ironically this battle may increase the price of settlements when the defendant fails to present sufficient evidence to rebut the presumption. In any event, *Halliburton II* is good news for the economics professors who will duke out the price impact issue.

Although *Comcast* was a relative dud, and the fraud-on-the-market theory survived *Halliburton II*, it is unquestionable that *Dukes* has had a major impact. *Dukes* has been cited in 2,002 cases and 1,489 law review articles or treatises according to Shepard's.⁶⁹ However, there has been push back in some federal courts of appeals. For example, *Dukes* was cited in the dissent in twenty-eight cases.⁷⁰ Famously, the Sixth and Seventh Circuits appear to be playing a game of ping-pong with the Court in the *Front-Loading Washer Products* cases.⁷¹ But overall, as Professor Miller said in his keynote speech, most commentators agree that *Dukes* has had a far-reaching impact on class action practice and has undermined class action's utility as a prosecutorial

⁶⁹ LEXISNEXIS SHEPARD'S® REPORT: WAL-MART STORES, INC. v. DUKES, 131 S. CT. 2541 (2011) (as of Dec. 14, 2014).

⁷⁰ See *id.*

⁷¹ See *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409, 421 (6th Cir. 2012) (affirming certification of class even though some class members did not experience harm and used the machines differently), *vacated sub nom.* Whirlpool Corp. v. Glazer, 133 S. Ct. 1722 (2013) (vacating the class certification judgment and remanding on the basis of *Comcast*). On remand, the Sixth Circuit reaffirmed class certification. See *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 861 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014). The Seventh Circuit litigation followed a similar path. See *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 797–802 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014). And, the Sixth Circuit appears to be challenging the Court yet again in a banking fee case—akin to the *Front-Loading Washer Products* case, the Sixth Circuit's initial opinion was vacated. See *Arlington Video Prods., Inc. v. Fifth Third Bancorp.*, 515 F. App'x 426 (6th Cir.), *vacated*, 134 S. Ct. 212 (2013) (vacating the judgment and remanding in light of *Comcast*). But on remand, the Sixth Circuit did not command the district court to reach a different result on the issue of class certification. *Arlington Video Prods., Inc. v. Fifth Third Bancorp.*, 569 F. App'x 379, 381 (6th Cir. 2014) (“Recognizing that the GVR order does not necessarily imply that the Supreme Court has in mind a different result in this appeal We remand the case to the district court . . . [T]he district court should undertake the class certification inquiry in accordance with the contract analysis we outline in this opinion and in light of Supreme Court precedent, including but not limited to, [*Comcast*], [*Amgen*], and [*Dukes*], and further in light of this court's class certification cases, particularly those cases decided after the district court initially denied Arlington's class certification motion in September 2010.” (citations omitted)).

Ironically, after the pitched warfare, one of the Whirlpool cases went to trial and the defendant won, with the jury finding that the washing machines were not defective. *Glazer v. Whirlpool Corp.* (*In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*), No. 1:08-wp-65001-CAB, slip op. (N.D. Ohio Oct. 31, 2014). This is not the end of the story, however, since other cases within the Sixth Circuit, where the law of other states will be applied, have yet to be tried. See Perry Cooper, *Ohio Moldy Washer Verdict Goes to Whirlpool; Class Will Pursue Claims in Other States*, CLASS ACTION LITIG. REP., Oct. 30, 2014, http://news.bna.com/clsn/CLSNWB/split_display.adp?fedfid=58429124&vname=clasnotallissues&wsn=500078000&searchid=23867598&doctypeid=1&type=date&mode=doc&split=0&scm=CLSNWB&pg=0.

vehicle for vindicating rights.⁷² Indeed, of the 2,002 cases in which it was cited, *Dukes* was expressly followed in 693 cases. Even the approach the majority took in *Halliburton II* is consistent with the *Dukes* Court's emphasis on front-loading significant merits considerations at the class certification stage.⁷³

C. *The Arbitration Cases*

The second line of Supreme Court cases involves the availability of class arbitration as a substitute for class litigation. This is an increasingly important question as the Court over the years has ruled that the Federal Arbitration Act (FAA) evinces a strong Congressional preference favoring the enforcement of arbitration agreements.⁷⁴

In 2010, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Supreme Court held that a party may not be compelled to submit to class arbitration unless it has consented to do so.⁷⁵ Here, the plaintiff had brought a class action against the defendant shipping company for antitrust violations.⁷⁶ Later, the courts found, and the parties conceded, that the dispute was covered by an arbitration agreement.⁷⁷ The plaintiff sought arbitration on behalf of a class of purchasers.⁷⁸ The parties agreed to submit the question whether the arbitration agreement allowed for class arbitration to the arbitration panel that would be handling the claims.⁷⁹ The parties also stipulated that the arbitration clause in their agreement was silent with respect to whether a party could arbitrate on a class basis.⁸⁰ The arbitrators were required to follow the Class Rules developed by the American Arbitration Association.⁸¹

⁷² See Miller, *supra* note 15.

⁷³ See *Halliburton II*, 134 S. Ct. at 2417.

⁷⁴ See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (“To overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16. Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts . . .”).

⁷⁵ 559 U.S. 662 (2010).

⁷⁶ See *id.* at 667.

⁷⁷ See *id.* at 667–68.

⁷⁸ *Id.* at 668.

⁷⁹ *Id.*

⁸⁰ *Id.* at 668–69.

⁸¹ *Id.* at 668.

The panel determined that the arbitration clause allowed class arbitration.⁸² The district court vacated the award as being in manifest disregard of the law, but the Second Circuit reversed, finding that the defendant had not cited any applicable rule against class certification.⁸³ The Supreme Court reversed, holding that imposing class arbitration on parties who have not agreed to it is inconsistent with the FAA.⁸⁴

In the wake of *Stolt-Nielsen*, anti-class arbitration provisions were routinely added to arbitration agreements. The Court then significantly tightened up the noose around class arbitration in a case involving such a clause. In *AT&T Mobility LLC v. Concepcion*, another 5–4 opinion, a cell phone agreement between consumers and the provider provided for arbitration of all disputes, but expressly prohibited class arbitration.⁸⁵ The Ninth Circuit had held the class arbitration waiver to be unconscionable under otherwise applicable state law precedent,⁸⁶ the California Supreme Court’s opinion in *Discover Bank v. Superior Court*.⁸⁷ In *Discover Bank*, the court found that under California law a consumer arbitration waiver is unconscionable (1) when small amounts of damages are involved, (2) when the contract is adhesive in nature, and (3) when the plaintiff has alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.⁸⁸

At issue in *Concepcion* was the extent to which the “saving clause” of § 2 of the FAA could be invoked to argue that the waiver was unenforceable because “a ground . . . exist[ed] at law or in equity for the revocation of any contract.”⁸⁹ The *Concepcion* majority ruled: “Although § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”⁹⁰ In this case, the Court held that the California Supreme Court’s rule that struck down *any* consumer class arbitration waiver frustrated the FAA’s purpose because class arbitration was at odds with the FAA’s purpose of allowing the parties to design a streamlined

⁸² *Id.* at 669.

⁸³ *Id.* at 669–70.

⁸⁴ *See id.* at 684–87.

⁸⁵ 131 S. Ct. 1740, 1744 (2011).

⁸⁶ *Id.* at 1745.

⁸⁷ 113 P.3d 1100 (Cal. 2005).

⁸⁸ *Id.* at 1110.

⁸⁹ *Concepcion*, 131 S. Ct. at 1746 (internal quotation marks omitted).

⁹⁰ *Id.* at 1748.

and efficient process: “the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”⁹¹

The dissent argued that California law was not an attempt to attack class waivers in the consumer context generally but rather simply an application of state law unconscionability principles.⁹² Additionally, the dissent pointed out that in the consumer context as a practical matter, the choice is not between class arbitration and bilateral arbitration; it is between class arbitration or no arbitration because the stakes are so small.⁹³

Most commentators agreed that *Concepcion* would have a major negative impact on consumer class actions.⁹⁴ And, as happened after *Dukes*, most federal courts fell in line.⁹⁵ Yet, as discussed below, there was a question whether state courts historically hostile to arbitration waivers, specifically the California Supreme Court, the home of *Discover Bank*,⁹⁶ would fall in line. In addition, in the wake of *Concepcion*, some federal courts held that a class waiver was unenforceable pursuant to the “effective vindication” exception.⁹⁷ But in its next important arbitration case, *American Express Co. v. Italian Colors Restaurant*,⁹⁸ the Supreme Court shot down this exception.

There, a small business brought a class action against American Express for alleged antitrust violations.⁹⁹ American Express invoked a clause in its agreement with Italian Colors requiring individual, and not classwide, arbitration.¹⁰⁰ Italian Colors argued that it would be too costly to pursue its claim unless it was allowed to pursue it with other small businesses’ claims on

⁹¹ *Id.* at 1751.

⁹² *See id.* at 1757 (Breyer, J., dissenting).

⁹³ *See id.* at 1761.

⁹⁴ *See* Paul Karlsgodt, *Concepcion a Year Later, Are Consumer Class Actions Dead Yet?*, CLASSACTIONBLAWG.COM (May 10, 2012), <http://classactionblawg.com/2012/05/10/concepcion-a-year-later-are-consumer-class-actions-dead-yet/>.

⁹⁵ *See, e.g.*, Andrew Pincus, *Arbitration Three Years After Concepcion*, LITIG. DAILY (May 13, 2014), <http://www.litigationdaily.com/id=1202655163488/Guest-Column-Arbitration-Three-Years-After-Concepcion?slreturn=20140923004108>.

⁹⁶ *See infra* notes 108–15 and accompanying text.

⁹⁷ *See, e.g.*, *Kristian v. Comcast Corp.*, 446 F.3d 25, 47–48 (1st Cir. 2006) (severing as unenforceable a provision of an arbitration agreement limiting the availability of treble under an antitrust statute).

⁹⁸ 133 S. Ct. 2304 (2013).

⁹⁹ *Id.* at 2308.

¹⁰⁰ *See id.*

a class basis.¹⁰¹ Successfully prosecuting an antitrust violation would cost hundreds of thousands, if not millions, of dollars, but the maximum recovery for Italian Colors' claim under antitrust law would be limited to about \$39,000.¹⁰² The Court, in another 5–4 opinion written by Justice Scalia, ruled that the FAA required that the arbitration clause be strictly enforced, even if it meant that the antitrust claims otherwise would not be brought.¹⁰³ Consistent with what it did in *Concepcion*, the Court's majority enforced the class waiver clause even though it would likely completely immunize the defendant from liability for the alleged illegal conduct.¹⁰⁴ Indeed, the Court conceded this result and said that *Concepcion* "all but resolves this case."¹⁰⁵ Justice Scalia put it bluntly:

Truth to tell, our decision in *AT&T Mobility* all but resolves this case. There we invalidated a law conditioning enforcement of arbitration on the availability of class procedure because that law "interfere[d] with fundamental attributes of arbitration." "[T]he switch from bilateral to class arbitration," we said, "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." We specifically rejected the argument that class arbitration was necessary to prosecute claims "that might otherwise slip through the legal system."¹⁰⁶

In other words, Justice Scalia says, "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."¹⁰⁷ With the effective vindication doctrine dead, the question was whether state courts, most prominently California's, would fall in line with *Concepcion*. It appears that they have. In *Iskanian v. CLS Transportation Los Angeles, LLC*,¹⁰⁸ the California Supreme Court overruled its prior authority, *Gentry v. Superior Court*, (relied on by that Court in *Discover Bank*) that allowed California courts to strike down class arbitration waivers as unconscionable if class arbitration of employment claims would be a "significantly more effective practical means of vindicating the

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See id.* at 2309, 2311.

¹⁰⁴ *See id.* at 2312.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (alterations in original) (citations omitted).

¹⁰⁷ *Id.* at 2311.

¹⁰⁸ 327 P.3d 129 (Cal. 2014).

rights of the affected employees than individual litigation or arbitration.”¹⁰⁹ The *Iskanian* Court held that *Gentry* could not stand in the face of *Concepcion*; thus, the FAA preempted state rules that disfavored arbitration, including uniform public policy rationales that otherwise would render class waiver clauses unconscionable under state law.¹¹⁰

The California Supreme Court, however, did leave open the possibility that other forms of collective pursuit of claims survive *Concepcion* and *Italian Colors*:

Moreover, the arbitration agreement in the present case, apart from the class waiver, still permits a broad range of collective activity to vindicate wage claims. CLS points out that the agreement here is less restrictive than the one considered in *Horton*: The arbitration agreement does not prohibit employees from filing joint claims in arbitration, does not preclude the arbitrator from consolidating the claims of multiple employees, and does not prohibit the arbitrator from awarding relief to a group of employees. The agreement does not restrict the capacity of employees to “discuss their claims with one another, pool their resources to hire a lawyer, seek advice and litigation support from a union, solicit support from other employees, and file similar or coordinated individual claims.”¹¹¹

Additionally, the California Supreme Court ruled that the plaintiffs could proceed with their claim under California’s Labor Code Private Attorneys General Act of 2004 (PAGA).¹¹² Although the arbitration agreement in *Iskanian* covered waiver of “representative actions,” the Court ruled that a waiver of the right to bring a PAGA claim could not be enforced.¹¹³ Under PAGA, “an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations.”¹¹⁴ Even though an employee may bring a PAGA action on behalf of other employees, a PAGA action is not considered to be a class action but rather an action brought on behalf of the state.¹¹⁵ The Court characterized PAGA actions as different than class actions because they are not

¹⁰⁹ 165 P.3d 556, 568 (Cal. 2007).

¹¹⁰ See *Iskanian*, 327 P.3d at 135–36.

¹¹¹ *Iskanian*, 327 P.3d at 142 (quoting *In re D.R. Horton Inc.*, 357 N.L.R.B. No. 184, 2012 WL 36274, at *8 (Jan. 3, 2012), *rev’d in part*, 737 F.3d 344 (5th Cir. 2013)).

¹¹² See Labor Code Private Attorneys General Act of 2004, ch. 906, 2003 Cal. Stat. 6628 (codified as amended at CAL. LAB. CODE §§ 2698–2699.5 (West 2011)).

¹¹³ See *Iskanian*, 327 P.3d at 149.

¹¹⁴ *Id.* at 146 (internal quotation marks omitted).

¹¹⁵ *Id.* at 147.

purely private prosecutions and are within the state's police power.¹¹⁶ Thus, the Court equated PAGA actions with *qui tam* actions that, according to the Court, have never been thought to be subject to waiver and are not subject to preemption under the FAA.¹¹⁷

Obviously, given the ubiquity of consumer class arbitration waivers and even small business-to-business class arbitration waivers, the combination of *Concepcion*, *Italian Colors*, and the capitulation of the California Supreme Court in *Iskanian* means that the arbitral forum generally will be unavailable for class prosecution. And, of course, *Dukes* makes it difficult to have a class action certified in federal court. Therefore, the United States Supreme Court, and even the California Supreme Court, have made class prosecution of consumer and other types of claims, especially outside of the securities context, difficult to achieve. But, as the *Front-Loading Washer Products* cases show, there has been some pushback in the courts of appeals that provide arguments for obtaining class certification.¹¹⁸ And, as discussed above, the *Iskanian* Court leaves the door open to other forms of collective action in state fora and in arbitration. Most importantly for the purpose of this paper, courts of appeals post-*Dukes* are certifying settlement classes.¹¹⁹ Before turning to whether these developments are good or bad for claimants, this Article now turns to recent settlement class cases to show their continuing viability, in contrast to the litigation prosecution cases discussed above.

D. Settlement Classes Survive Rigorous Certification Scrutiny

While there is continuing controversy over the fairness of some settlements under Rule 23(e), and awards of attorneys' fees under Rule 23(h),¹²⁰ even post-*Dukes*, courts of appeals are approving class certification in the settlement context even when such classes would not be certified for prosecution purposes. For example, in *Sullivan v. DB Investments, Inc.*, the Third Circuit affirmed certification of a settlement class on class objector's appeal even though there were variations in applicable state law, which otherwise would have rendered the class uncertifiable for lack of commonality or predominance

¹¹⁶ See *id.* at 152–53.

¹¹⁷ See *id.* at 148, 151.

¹¹⁸ See *supra* note 71 for a discussion of the *Front-Loading Washer Products* cases.

¹¹⁹ See *infra* Part II.D.

¹²⁰ See, e.g., *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014) (Posner, J.). Judge Posner's opinion sets forth a guide to what *not* to do if the parties seek to persuade a court to approve a class settlement.

of common questions.¹²¹ The majority ruled that concerns regarding variations in state law largely dissipate when considering certification of a settlement class: “The correct outcome is even clearer for certification of a settlement class because the concern for manageability that is a central tenet in the certification of a litigation class is removed from the equation.”¹²² The majority also dealt with a strong dissent that relied on *Dukes*:

In this regard, we note the dissent’s misreading of the Supreme Court’s recent opinion in *Wal-Mart Stores Inc. v. Dukes* as supporting its thesis that an inquiry into the existence or validity of each class member’s claim is required at the class certification stage. To the contrary, *Dukes* actually bolsters our position, making clear that the focus is on whether the defendant’s conduct was common as to all of the class members, not on whether each plaintiff has a “colorable” claim. In *Dukes*, the Court held that commonality and predominance are defeated when it cannot be said that there was a common course of conduct in which the defendant engaged with respect to each individual. But commonality is satisfied where common questions generate common answers “apt to drive the resolution of the litigation.” That is exactly what is presented here, for the answers to questions about De Beers’s alleged misconduct and the harm it caused would be common as to all of the class members, and would thus inform the resolution of the litigation if it were not being settled.¹²³

Moreover, the Third Circuit rejected the argument that all class members must state a valid claim as a prerequisite to class certification.¹²⁴ *Sullivan* was brought as a nationwide class action alleging state and federal antitrust, unfair competition, and other claims.¹²⁵ Under the law of some states, as under federal antitrust law, indirect purchasers lack standing to pursue antitrust claims.¹²⁶ The settlement, however, provided for indirect as well as direct purchasers.¹²⁷ The Third Circuit parried this thrust by noting that the question upon class certification “is not what valid claims can plaintiffs assert; rather, it is simply whether common issues of fact or law predominate.”¹²⁸ There is no “‘claims’ or ‘merits’ litmus test” that must be imported into the predominance

¹²¹ 667 F.3d 273, 302–03 (3d Cir. 2011) (en banc).

¹²² *Id.* at 302.

¹²³ *Id.* at 299–300 (citing and quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)).

¹²⁴ *Id.* at 306.

¹²⁵ *Id.* at 286.

¹²⁶ *See id.* at 304–05.

¹²⁷ *Id.* at 301.

¹²⁸ *Id.* at 305.

inquiry except when “necessary to determine preliminarily whether certain elements will necessitate individual or common proof.”¹²⁹ Such inquiry is otherwise not appropriate under Rule 23; rather, “the legal viability of asserted claims is properly considered through a motion to dismiss under Rule 12(b) or for summary judgment pursuant to Rule 56.”¹³⁰

The Second Circuit relied in part on the Third Circuit’s *Sullivan* approach in *In re American International Group, Inc. Securities Litigation (AIG)*.¹³¹ There, the court emphasized the United States Supreme Court’s decision in *Amchem Products, Inc. v. Windsor*,¹³² and essentially paid only lip service to *Dukes*.¹³³ In *Amchem*, the United States Supreme Court decertified a settlement class.¹³⁴ However, the Court recognized that the use of settlement classes had become routine in class action practice and held that settlement is a relevant consideration when determining whether to certify a class. It noted that a district court “[c]onfronted with a request for settlement-only class certification . . . need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial.”¹³⁵

Quoting *Amchem*, the *AIG* court found that a class’s identity as a settlement class is relevant to the class certification question.¹³⁶ Further, the court in *AIG* found that the plaintiffs’ inability to use the fraud-on-the-market doctrine, thus triggering the need to prove reliance on an individual basis, did not raise a predominance problem in the settlement context; as the court put it, “In the context of a settlement class, concerns about whether individual issues would create ‘intractable management problems’ at trial drop out of the predominance analysis because ‘the proposal is that there be no trial.’”¹³⁷ However, as both the *Amchem* Court and the Third Circuit in *Sullivan* warned, the *AIG* court made clear that the district court “must still determine whether the ‘the legal or factual questions that qualify each class member’s case as a genuine controversy’ are sufficiently similar as to yield a cohesive class,” and must

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ 689 F.3d 229, 239 (2d Cir. 2012).

¹³² 521 U.S. 591 (1997).

¹³³ See *AIG*, 689 F.3d at 237–38.

¹³⁴ *Amchem*, 521 U.S. at 611–12.

¹³⁵ *Id.* at 620 (citation omitted).

¹³⁶ See *AIG*, 689 F.3d at 238–39.

¹³⁷ *Id.* at 240 (quoting *Amchem*, 521 U.S. at 620).

protect the interests of the class.¹³⁸ And the focus of the district court should be “on ‘questions that preexist any settlement,’ and not on whether all class members have ‘a common interest in a fair compromise’ of their claims.”¹³⁹

Moreover, the *AIG* court wholeheartedly endorsed what Judge Scirica stated in his concurrence in *Sullivan*:

[S]ome inquiries essential to litigation class certification are no longer problematic in the settlement context. A key question in a litigation class action is manageability—how the case will or can be tried, and whether there are questions of fact or law that are capable of common proof. But the settlement class presents no management problems because the case will not be tried. Conversely, other inquiries assume heightened importance and heightened scrutiny because of the danger of conflicts of interest, collusion, and unfair allocation.¹⁴⁰

Thus, the Second Circuit noted in *AIG* that the predominance requirement may be easier to satisfy in the settlement context, but that other Rule 23 requirements aimed at protecting class members, “such as the Rule 23(a)(4) requirement of adequate representation, will ‘demand undiluted, even heightened, attention.’”¹⁴¹

Most recently, apart from Rule 23’s certification requirements, the Fifth Circuit ruled in the BP oil spill litigation that Article III does not prevent certification of a settlement class that includes members who may not have suffered injury.¹⁴² With respect to Rule 23’s certification requirements, the Fifth Circuit was equally supportive of the certification of a settlement class.¹⁴³ Addressing the objectors’ argument that *Dukes*’s analysis of commonality dictated reversal of the class settlement certification, the court rejected the idea that class members had to suffer the “same injury.”¹⁴⁴ Rather, the court found that *Dukes* specified that the “same injury” requirement could be met by an instance of a defendant’s injurious conduct—here, the conduct related to the oil spill.¹⁴⁵ Thus, the commonality requirement of Rule 23(a)(2) was met.¹⁴⁶

¹³⁸ *Id.* (quoting *Amchem*, 521 U.S. at 623).

¹³⁹ *Id.* (quoting *Amchem*, 521 U.S. at 623).

¹⁴⁰ *Id.* at 239 (alterations in original) (quoting *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 335 (3d Cir. 2011) (Scirica, J., concurring)).

¹⁴¹ *Id.* at 240 (quoting *Amchem*, 521 U.S. at 620).

¹⁴² *See In re Deepwater Horizon*, 739 F.3d 790, 821 (5th Cir. 2014).

¹⁴³ *See id.*

¹⁴⁴ *See id.* at 810–11.

¹⁴⁵ *See id.*

Moving on to the adequacy of representation prong of Rule 23, which assumes even greater importance after *Amchem*, the court in *In re Deepwater Horizon* considered the argument of some objectors to the settlement that class members from Texas, Louisiana, Alabama, Florida, and Mississippi should have been divided into their own subclasses and that some class members would have been “better off under the GCCF claims process” established by BP to compensate victims of the oil spill.¹⁴⁷

The Fifth Circuit recognized that the creation of subclasses is sometimes necessary under Rule 23(a)(4) to avoid an intra-class conflict, but it ruled that there is no need to create subclasses to accommodate every instance of difference.¹⁴⁸ Here, “because the class members’ claims [arose] under federal law rather than state law, [the court was] not persuaded that there [was] any fundamental conflict between the ‘differently weighted interests’ of class members from different geographical regions.”¹⁴⁹ Indeed, geographical criteria were incorporated into the Settlement Agreement, which provided that “causation becomes more difficult” for a claimant to show “the further one moves from the coast.”¹⁵⁰ Thus, “the differences between the formulas applicable in the different geographic zones were ‘rationally related to the relative strengths and merits of similarly situated claims.’”¹⁵¹

The Fifth Circuit dealt with *Comcast* by essentially adopting Justice Ginsburg’s *Comcast* dissent. Damages, according to the court, need not be susceptible to a formula for classwide purposes, and the fact that class members’ damages need to be determined on an individual basis does not doom a settlement class.¹⁵²

II. ET TU, CLASS SETTLEMENT?

The analysis above shows that although the United States Supreme Court has tightened the noose around class certification approval of litigation prosecution class actions during the last few Terms, one of its older opinions, *Amchem*, ironically one in which a class settlement was vacated, has been cited

¹⁴⁶ See *id.* at 811.

¹⁴⁷ See *id.* at 813–14.

¹⁴⁸ *Id.* at 813.

¹⁴⁹ *Id.* at 813–14.

¹⁵⁰ *Id.* at 814 (internal quotation marks omitted).

¹⁵¹ *Id.* (quoting *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, 910 F. Supp. 2d 891, 917–18 (E.D. La. 2012)).

¹⁵² See *id.* at 815–17.

to support certification of settlement classes in cases that probably would not have been certified as litigation classes otherwise. The defendants' nightmare about having to confront a litigation class thus has abated, yet the ability of defendants to obtain a global peace through a class settlement seems quite alive and well. Of course, as mentioned above, the settlement must pass muster under Rules 23(e) and (h), in terms of fairness and attorneys' fees. And courts must remain mindful of adequacy of representation requirements under Rule 23(a)(4) to ensure that class members' interests are adequately represented. But class certification requirements such as commonality and typicality under Rule 23(a) and predominance and manageability under Rule 23(b) for damages class actions appear to be somewhat relaxed when the parties seek approval of a deal struck between class counsel and the defendants. Therefore, it is time to turn to the question whether class settlements bargained for under this regime are good or bad for class members. In addition, the question whether class settlements are good or bad for defendants ought to be analyzed as well.

The charge to our Panel assumes that global settlements are always good for defendants and never good for class members.¹⁵³ This is a rather debatable assumption. First of all, defendants may not be obtaining the lasting peace that they thought they had bargained for because, although the power of the preclusive effect of an approved class settlement remains strong, there are chinks in the preclusion armor.¹⁵⁴ Below, this Article will address the *Stephenson* case, which demonstrates that global settlements may not always provide the peace that defendants seem to think they will.¹⁵⁵

Second, although the discussion above shows that settlement classes are somewhat immune from *Dukes*'s strict approach to class certification, undeniable abuses exist in class settlement practice. Judge Posner's recent description of a parade of horrors in *Eubank v. Pella Corp.* is illustrative.¹⁵⁶

¹⁵³ See *supra* text accompanying note 12.

¹⁵⁴ See *infra* Part III.A.

¹⁵⁵ See *infra* Part III.B.

¹⁵⁶ 753 F.3d 718 (7th Cir. 2014). Among other things, Judge Posner suggested that the class counsel and class representative should not be related, quick pay provisions for class counsel should be avoided, any reduction in attorneys' fees reverting to the defendant is "questionable," approval orders must show that court carefully scrutinized that the class counsel acted as fiduciaries for the entire class, courts should be wary of approving settlements before deadline for filing claims, courts should be wary of approving settlements that do not quantify benefits to the class, "ethical embroilment" of class counsel is reason to remove counsel because potential financial difficulties could create a conflict of interest with the class, claims forms should be short and easy to fill out, and class notice should be clear and brief. See *id.*

At the settlement stage, class interests are no longer necessarily aligned with those of its counsel. Rather, the interest of class counsel in obtaining the biggest bang for its buck is more aligned with the interests of the defendant in obtaining peace at the lowest possible price. Knowing that courts are likely to rule that a settlement class is certifiable under the more relaxed standards for commonality, predominance, manageability, etc., means that the problem of how to protect class members not only appears front and center but also bears directly on the Panel's focus on whether class settlements are ultimately good or bad for class members.

A. *The Preclusion Problem*

In another article, I traced the history of class actions from 1199 to the present to show that the essence of the controversy about class actions is the power of preclusion.¹⁵⁷ Defendants have little to fear if an individual plaintiff sues on a \$30 claim.¹⁵⁸ And, as Judge Posner once put it: “The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, *as only a lunatic or a fanatic sues for \$30.*”¹⁵⁹

Aggregating thousands or millions of \$30 claims, on the other hand, presents defendants with a real problem. If the plaintiff class wins, because of the power of preclusion, all class members will be entitled to their \$30.¹⁶⁰ This puts pressure on the defendants to settle for less than \$30 per claim multiplied by the number of class members to avoid a “betting the company” scenario.¹⁶¹ But, the defendant also may gain by settling, because the same preclusion principles would in turn bind the class members, and the defendant gains global peace.

The history of class actions shows a deep ambivalence over the degree of preclusive effect of class actions. Professor Hazard describes eighteenth and early nineteenth century English and American decisions that “oscillated between saying that absent members of a class were bound by a decree and

¹⁵⁷ See Vairo, *supra* note 1, at 723–24.

¹⁵⁸ See *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). Of course, it is highly unlikely that someone would sue for \$30 because the cost of doing so would be prohibitive.

¹⁵⁹ *Id.* (second emphasis added); see also *Hughes v. Kore of Ind. Enter. Inc.*, 731 F.3d 672, 674, 677–78 (7th Cir. 2013) (explaining how class actions are needed for small-value claims).

¹⁶⁰ See *Taylor v. Sturgell*, 553 U.S. 880, 884–85 (2008) (noting the class action judgments' exception to the general rule that only parties or their privies are bound); *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940) (assuming a class member is adequately represented, the class member is bound by a class action judgment).

¹⁶¹ See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

that they were not.”¹⁶² He recognized that “[t]he same pattern of equivocation persisted over the next century and into the modern era.”¹⁶³ This pattern is due to the “curious paradox” created, on the one hand, by the confluence of the Necessary and Indispensable Party rules, which originated in the Chancery courts and are now essentially codified in Federal Rule of Civil Procedure 19, and, on the other hand, the Representative Party rule, which also originated in the Chancery courts and is now essentially codified in Rule 23.¹⁶⁴ As Professor Hazard put it:

The Indispensable Party Rule stated that when the absentees were few in number the action could not proceed without them, lest they be bound by the decree, while the Representative Suit Rule stated that if the absentees were numerous, the action could proceed without them because they would be bound.¹⁶⁵

Thus, the “curious paradox.” But, as another early Chancery case illustrates, the curious paradox arose because of an important need. *Chancey v. May*¹⁶⁶ detailed London’s stock market crash of 1718, which led to lawsuits that resemble today’s damage class action.¹⁶⁷ The defendants objected to the representative form of the action.¹⁶⁸ In a brief, two-paragraph opinion, the chancellor dispatched the defendants’ objection while setting the table for the continuing class action debate:

[First], [b]ecause it was in behalf of themselves, and all others the proprietors of the same undertaking, except the defendants, and *so all the rest were in effect parties.*

[Second], [b]ecause it would be impracticable to make them all parties by name, and there would be continual abatements by death

¹⁶² Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Soble, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1849 (1998) (“This essay is a history of the doctrine of res judicata in class suits. It reveals that the condition of precedent on this issue was from the beginning equivocal and confused, and that it remains somewhat so today.”).

¹⁶³ *Id.*

¹⁶⁴ *See id.* at 1861 n.50.

¹⁶⁵ *Id.* In support of this proposition, Professor Hazard compared the Court’s decision in *Shields v. Barrow*, 58 U.S. (17 How.) 129 (1854), where the Court refused “to uphold the rescission of a contract where four of the six parties in the contract were not within the jurisdiction of the lower court,” with the Court’s decision in *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853), where the Court stated “[f]or convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court.” *Id.* (citing *Shields*, 58 U.S. (17 How.) at 141 and *Smith*, 57 U.S. (16 How.) at 302).

¹⁶⁶ (1722) 24 Eng. Rep. 265 (Ch.); Prec. Ch. 592.

¹⁶⁷ Vairo, *supra* note 1, at 728.

¹⁶⁸ *Chancey*, 24 Eng. Rep. at 265.

and otherwise, and *no coming at justice*, if all were to be made parties.¹⁶⁹

Here, the Chancery Court picks up on the ideas of efficiency—the need to bind all concerned—with the idea of justice. Without a representative form of action, there could be “no coming at justice.”¹⁷⁰ For present purposes, this describes the state of so-called negative-value class actions where there would be no vindication of rights because the cost of suit would be prohibitive—“*only a lunatic or a fanatic sues for \$30.*”¹⁷¹

Moving briskly on to the present, the curious paradox perplexed the first Federal Rules of Civil Procedure Advisory Committee. “Professor James Moore, Rule 23’s chief draftsman and member of the original Advisory Committee, knew there was a continuing need for a class action device because of the ‘too numerous’ to join problem.”¹⁷² But, he was concerned about the confused state of the case law on the binding effect of class judgments.¹⁷³ Professor Moore borrowed Justice Story’s schema for the three types of class actions he crafted in the original Rule 23.¹⁷⁴

Moore’s third category of class actions, which continues to this day in the form of a Rule 23(b)(3) damage class action, is the most controversial. These are the cases involving several rights or common questions in cases in which there is a lack of “privity” which otherwise might justify preclusive effect under general preclusion rules.¹⁷⁵ The problem for Professor Moore in this sort of case is the question whether class members in such cases should be bound by the class judgment.¹⁷⁶ It was generally understood in the other categories that class members would be bound because of their indivisible interests in the subject matter of the suit, but especially when several rights were in issue—where the class members sought their own individual recovery—preclusion

¹⁶⁹ *Id.* (emphasis added).

¹⁷⁰ *Id.*

¹⁷¹ See *supra* note 159 and accompanying text.

¹⁷² Vairo, *supra* note 1, at 736.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 737; see also Hazard, Gedid & Sowle, *supra* note 162, at 1881.

¹⁷⁵ Hazard, Gedid & Sowle, *supra* note 162, at 1880–90; see *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) (explaining the class action judgments exception to the general rule that only parties or their privies are bound).

¹⁷⁶ See John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 329–30 (2005) (noting that, although one of the purposes of establishing class categories was to “clarify the binding effect of a judgment in a class action,” the committee declined to do so for fear of imposing on substantive rights outside its jurisdiction).

was problematic.¹⁷⁷ Therefore, “[c]orrectly labeling an action under one of Professor Moore’s three new categories would become important, because its categorization could determine the judgment’s binding effect on absent class members.”¹⁷⁸

Professor Moore wanted preclusion to be covered in some way in the Rule or Advisory Committee Note.¹⁷⁹ But, the Advisory Committee rejected Professor Moore’s proposal to deal with preclusion “due to the feeling that such a matter was one of substance and not one of procedure.”¹⁸⁰ After failing to persuade the Advisory Committee that a class action judgment’s binding effect should be addressed in the rule or Advisory Committee Note, Moore described what the effects of a judgment should be.¹⁸¹ He wrote in his treatise¹⁸² describing the newly adopted Federal Rules of Civil Procedure that a judgment in a “true” class action was conclusive on the class, that a judgment in a “hybrid” class action was conclusive on persons having claims affecting specific property, but that a judgment in a “spurious” class action involving

¹⁷⁷ See Hazard, Gedid & Soble, *supra* note 162, at 1881–82 (“[Story’s] analytical system consists of categories that overlap, or, in terminology now fashionable, are ‘overinclusive.’ . . . [C]ases involving ‘associations’ (his second category) also involve questions of ‘common or general interest’ (his first category), and typically involve ‘parties too numerous’ to be joined (his third category). Questions of ‘common or general interest’ (his first category) often involve ‘parties too numerous’ (his third category). Furthermore, ‘parties too numerous’ can be distinguished from mankind at large only by reference to some kind of interest or question that is ‘common or general’ to them but not to others. In any event, Story clearly did not assert that, within his system of classification, the type of suit determined the res judicata effects of the judgment. The best he could make of the precedents was that judgments involving members of associations were sometimes binding on absentees, and that the same was true of creditors’ bills and bills of peace.”)

¹⁷⁸ Vairo, *supra* note 1, at 727.

¹⁷⁹ See James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 570–76 (1937).

¹⁸⁰ James Wm. Moore & Marcus Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 556 (1938). For further discussion of this problem, see Edward J. Ross, *Rule 23(b) Class Actions—A Matter of “Practice and Procedure” or “Substantive Right”?*, 27 EMORY L.J. 247, 251–52, 256–61 (1978) (discussing how, because of Rule 23’s binding effect on class members, it is not merely a rule of procedure permitted by the Rules Enabling Act, but it “drastically affects a substantive right” (internal quotation marks omitted)); Donald W. Fyr, *On Classifying Class Suits: A Reply to Mr. Ross*, 27 EMORY L.J. 267, 270–71 (1978) (arguing classification of suits may influence the outcome of a case, but that it is incidental to the Rule’s application and does not equate with the violation of a substantive right).

¹⁸¹ See 3B JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE ¶23.60 (2d ed. 1996) (explaining the considerations and practical steps counsel and plaintiffs may take before filing a class action); see also ZECHARIAH CHAFFEE, JR., SOME PROBLEMS OF EQUITY, 251 (1950) (“So great is the deserved respect for his treatise, that his scheme about binding outsiders has had almost as much influence upon judges as if it had been embodied in Rule 23.”).

¹⁸² See Vairo, *supra* note 1, at 739 & n.80.

common questions was conclusive only on parties and privies to the proceedings.¹⁸³

Most courts followed Moore's guidelines,¹⁸⁴ but not all of them.¹⁸⁵ For example, in *Union Carbide & Carbon Corp. v. Nisely*, the court allowed "one-way intervention," which was particularly troubling to defendants who lost.¹⁸⁶ While class members would not be bound if the defendant won, decisions such as *Union Carbide* made it possible for potential plaintiffs to sit back and wait.¹⁸⁷ If the plaintiff class won, they would then be allowed to intervene rather than have to sue again on their own.¹⁸⁸

This led the Advisory Committee to get back to work on Rule 23 in the 1960's, prompting an epic battle between John P. Frank, who would constrict the growing use of class actions, and Benjamin Kaplan, who believed that they were becoming an ever more important tool for vindicating individual rights.¹⁸⁹ Frank opposed class treatment, especially in mass tort cases for two key reasons that resonate to this day.¹⁹⁰ First, he argued that individual class members should have the right to bring their own cases.¹⁹¹ Second, anticipating an *Amchem*¹⁹² situation, where class counsel and the defendant agree to a settlement at the expense of absent class members, Frank worried that plaintiffs' counsel might sell out the class members.¹⁹³ This concern was particularly important in cases in which the absent class members may have large personal injury claims because such claimants would have both the

¹⁸³ See Rabiej, *supra* note 176, at 330–31.

¹⁸⁴ See *id.* at 331.

¹⁸⁵ See, e.g., *Union Carbide & Carbon Corp. v. Nisely*, 300 F.2d 561, 588 n.13 (10th Cir. 1961) (noting that Moore's argument was not accepted by the original Rules Committee and implying the rejection was the basis for Moore's reasoning in his treatise).

¹⁸⁶ See *id.* at 589 ("[O]ne is not precluded from claiming the benefits of a favorable judgment to which he was not a named party, simply because he would not have been bound by an unfavorable judgment rendered against named parties who did not adequately represent his interests.").

¹⁸⁷ See Rabiej, *supra* note 176, at 332–33.

¹⁸⁸ See *id.*

¹⁸⁹ Vairo, *supra* note 1, at 740–42.

¹⁹⁰ Rabiej, *supra* note 176, at 335.

¹⁹¹ *Id.* ("[Frank] championed the principle that each person has a right to litigate his or her own case . . .").

¹⁹² See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619–21 (1997) (discussing the "role settlement may play . . . in determining the propriety of class certification"); Rabiej, *supra* note 176, at 335 ("In [Frank's] view, defendant companies would 'sell' a settlement to the lowest bidder willing to settle a class action."); see also *infra* Part III.A.3 for further discussion of *Amchem*.

¹⁹³ See Rabiej, *supra* note 176, at 335 ("Unscrupulous lawyers would barter away absent class members' rights in exchange for substantial attorney[s'] fees . . .").

incentive and the ability to sue individually.¹⁹⁴ Accordingly, Frank believed that Rule 23(b)(3), the provision Kaplan would concede allowed for the “most adventuresome” type of class action, ought to be reined in, if not eliminated, but certainly not expanded.¹⁹⁵

Kaplan opposed Frank’s recommendation to delete (b)(3) class actions.¹⁹⁶ “The law is already headed in this direction, and there is excellent reason for encouraging this growth under proper safeguards.”¹⁹⁷ Responding to Frank’s contention regarding the individual’s right to litigate, Kaplan pointed out that class actions are often the only way for indigent clients to hire an attorney.¹⁹⁸ Finally, Kaplan responded to Frank’s fear of attorney misconduct in damages class actions by insisting that providing notice to class members would serve as an adequate safeguard because disaffected class members can opt out.¹⁹⁹

This exchange is at the heart of the charge for our panel. Does the current Rule 23 regime do a good enough job of protecting class members in general or future claimants? Do opt-out rights do the work that Kaplan hoped they would? Is the rise of objectors the answer? On the one hand, as Judge Posner pointed out in *Pella*, objectors do a great job of smelling out a rat.²⁰⁰ On the other hand, as Judge Colleen McMahon admonished, objectors may be even less altruistic than the plaintiff’s lawyers who brought the class action.²⁰¹

But before addressing whether class settlements are good or bad for plaintiffs, the Article will turn first to whether class settlements are always good for defendants. Do they get the peace they think they bought? As the next part shows, probably yes. But there are risks. The courts are not immune to due process arguments when they have the effect of denying injured parties who were not adequately represented their rights. Second, with respect to class members, assuming there are systemic problems with class action practice that

¹⁹⁴ See Vairo, *supra* note 1, at 741.

¹⁹⁵ See Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

¹⁹⁶ See Rabiej, *supra* note 176, at 335–36.

¹⁹⁷ Memorandum from Reporter Professor Benjamin Kaplan to Chairman and Members of Advisory Committee on Civil Rules, Additional Points on Preliminary Draft of Proposed Amendments of March 15, 1963, at 5 (Sept. 12, 1963).

¹⁹⁸ See Rabiej, *supra* note 176, at 335–36.

¹⁹⁹ See *id.* at 335.

²⁰⁰ *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (Posner, J.) (“Enter the objectors. Members of the class who smell a rat can object to approval of the settlement.”).

²⁰¹ See *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132(CM)(GWG), 2014 WL 1883494, at *1 (S.D.N.Y. May 9, 2014) (providing a textbook example of how to obtain settlement approval); *id.* at *3 (featuring a judge not happy with an objector).

may make it unlikely that class members are protected as well as they should be, the Article will ask: what are the alternatives?

B. Have Defendants Really Bought Peace?

The *Amchem* decision implicated the preclusion problem discussed above that has dominated the debate over class actions. There, the Court refused to approve a class settlement largely because it believed class members could not be bound because they were not adequately represented.²⁰² Indeed, the Supreme Court's vision of the contours of due process in mass claims litigation, including the components of proper notice, appears to be evolving with a greater emphasis on the rights of claimants. For example, Justice Ginsberg, the author of the majority opinion in *Amchem*, suggests that it may not be possible to provide sufficient notice to unknown and future claimants.²⁰³

It also must be recalled that a key reason why the Supreme Court vacated the class action settlement in *Amchem* was because of its suspicions that class counsel and the defendants had become a bit too cozy. In some respects, the *Amchem* defendants were lucky—the question of whether the class would be certified and the settlement approved was decided on appeal. Thus, the defendants knew they would not get the global peace for which they had bargained. But what if the settlement had been approved, and future claimants collaterally attacked the settlement on the ground that they were not adequately represented by class counsel?

An important, but relatively ignored, case suggests that a “caveat emptor” sticker ought to be placed on a class settlement, even after it has gone through the appellate process. In *Stephenson v. Dow Chemical Co.*, plaintiffs filed claims against Dow Chemical and other chemical manufacturers alleging that they had been exposed to Agent Orange during the Vietnam War but that their injuries did not manifest themselves until after the \$180 million fund, established in 1984 through a class action settlement in the *Agent Orange* case, had been depleted.²⁰⁴

²⁰² See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997) (disapproving of class certification because class members did not possess similar injuries or have similarly aligned interests); see also, e.g., *Hansberry v. Lee*, 311 U.S. 32, 44–45 (1940) (noting that selection of representatives whose substantial interests do not align with those they are deemed to represent does not give absent parties the due process to which they are entitled).

²⁰³ See *Amchem*, 521 U.S. at 628 (“[W]e recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.”).

²⁰⁴ 273 F.3d 249, 252, 255 (2d Cir. 2001).

Plaintiff Stephenson served in Vietnam from 1965 to 1970, both on the ground and as a helicopter pilot.²⁰⁵ He claimed that he was in regular contact with Agent Orange during the War, and on February 19, 1998, he was diagnosed with multiple myeloma, a bone marrow cancer.²⁰⁶ Plaintiff Isaacson served in Vietnam from 1968 to 1969 as a crew chief in the Air Force and worked at a base for airplanes that sprayed various herbicides, including Agent Orange, and in 1996 Isaacson was diagnosed with non-Hodgkins lymphoma.²⁰⁷ Dow Chemical and the other defendants produced and sold the herbicide Agent Orange and similar agents to the United States Government during the Vietnam War.²⁰⁸

Stephenson filed his suit in the Western District of Louisiana in February 1999.²⁰⁹ Isaacson filed suit in New Jersey state court in August 1998.²¹⁰ Defendants removed the *Isaacson* case to federal court, and Isaacson's subsequent motion to remand was denied by the New Jersey federal district court.²¹¹ Thereafter, both cases were transferred to the Eastern District of New York by the Multidistrict Litigation Panel and consolidated before Judge Jack B. Weinstein, who had approved the *Agent Orange* settlement in 1984.²¹²

The defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), asserting that the plaintiffs' claims were barred by the 1984 class action settlement and subsequent final judgment.²¹³ Judge Weinstein granted the motion, rejecting plaintiffs' argument that the class action settlement could not bind them, as a class action settlement ordinarily would, because they had been denied due process due to inadequate representation.²¹⁴ Thus, concluded Judge Weinstein, the plaintiffs' suits were "an impermissible collateral attack on the prior settlement."²¹⁵ The Second Circuit agreed with the plaintiffs' position, however, and reversed on the issue of adequacy of representation.²¹⁶ In order to understand the importance of the Second Circuit's decision in *Stephenson*, it is important to review some of the history of the *Agent Orange* settlement.

²⁰⁵ *Id.* at 255.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 256.

²¹⁰ *Id.* at 255.

²¹¹ *Id.*

²¹² *Id.* at 256.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *See id.* at 256, 261.

The *Agent Orange* settlement class consisted of veterans (and their spouses, parents, or children) who “at any time from 1961 to 1972 . . . were injured while in or near Vietnam by exposure to” Agent Orange or other specified similar substances.²¹⁷ Payments were to be made for ten years, ending in December 31, 1994.²¹⁸ In 1987, the Second Circuit approved the settlement and much of the distribution plan, rejecting claims that the class had not been adequately represented and that notice was not proper.²¹⁹ A few years later, two class actions were filed in Texas state courts on behalf of Vietnam veterans exposed to Agent Orange against the same defendants in the settled suit.²²⁰ The plaintiffs alleged that they were not bound by the *Agent Orange* settlement because their injuries did not manifest themselves until after the settlement.²²¹ The cases were removed to federal court and were transferred to Judge Weinstein’s court by the MDL Panel.²²² The Second Circuit affirmed the dismissal of the cases, rejecting the plaintiffs’ argument that they were not “injured” for the purposes of *Agent Orange* class membership because their claims had not manifested until after the settlement date.²²³ Rather, the Second Circuit ruled that because they were exposed to Agent Orange prior to the settlement date, they were “injured” for the purpose of class membership.²²⁴ Further, the Second Circuit rejected the plaintiffs’ due process arguments, ruling that actual notice was not a constitutional requirement and that they were adequately represented, even though there was no separate representative for future claimants, because the settlement was structured to provide for such claimants.²²⁵

One would have thought that the Second Circuit would have used similar reasoning to reject the due process objections of Stephenson and Isaacson. However, it did not. Here, the Second Circuit agreed with the defendants that a collateral attack on a class action judgment is impermissible if the due process rights of the class members have been determined in prior litigation.²²⁶ And, it also agreed with the defendants that the Second Circuit had decided in its 1993 decision that there had been “adequate representation of all class members in the original

²¹⁷ *Id.* at 252.

²¹⁸ *Id.* at 253.

²¹⁹ *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 151, 167, 169 (2d Cir. 1987).

²²⁰ *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1430 (2d Cir. 1993).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 1434.

²²⁴ *Id.*

²²⁵ *Id.* at 1435.

²²⁶ *See Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 257–58 (2d Cir. 2001).

Agent Orange settlement.”²²⁷ Splitting a significant hair, however, the Second Circuit then noted that “neither this Court nor the district court has addressed specifically the adequacy of representation for those members of the class whose injuries manifested *after* depletion of the settlement funds.”²²⁸

Quoting *Hansberry v. Lee*, the Second Circuit stated, “[C]lass action judgments can only bind absent class members where ‘the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation.’”²²⁹ Accordingly, the court held that the collateral attack vehicle was available to contest the validity of the res judicata effect of the *Agent Orange* settlement and to test whether, in fact, the interests of those class members whose claims manifested after the depletion of the fund were considered and protected.²³⁰

In other words, the court accepted the defendants’ contention that the plaintiffs were members of the *Agent Orange* class but rejected their contention that the plaintiffs could not collaterally attack the judgment. The plaintiffs relied on the Supreme Court’s decisions in *Amchem*²³¹ and *Ortiz*²³² to make the argument that they were not parties bound by the original settlement.²³³ In *Stephenson*, the Second Circuit held that none of the parties to the original *Agent Orange* settlement adequately represented the interests of those who had been exposed to allegedly harmful agents but whose injuries would not manifest themselves until after the termination of the trust, ten years down the line.²³⁴

One way of fixing the *Stephenson* problem would be to structure all deals to provide for an “evergreen fund,” such as those used to resolve cases under § 524(g) of the Bankruptcy Code.²³⁵ This would help ensure that a settlement fund would not run out of money before all eligible claimants were compensated. For example, the *National Gypsum* plan of reorganization specifically left open the possibility of allowing future claimants to file suit if the settlement trust set up

²²⁷ *Id.* at 257.

²²⁸ *Id.* at 257–58 (emphasis added).

²²⁹ *Id.* at 258 (quoting *Hansberry v. Lee*, 311 U.S. 32, 41 (1940)).

²³⁰ *See id.* at 257–58.

²³¹ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

²³² *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

²³³ *See Stephenson*, 273 F.3d at 259.

²³⁴ *Id.* at 261.

²³⁵ To obtain a discharge of debts, a corporation seeking reorganization as a result of its asbestos liability is required to make current and future contributions to a trust set to compensate asbestos claimants. *See* 11 U.S.C. § 524(g)(2)(B)(i)(II) (2012).

by the plan ran out of funds.²³⁶ Additionally, in a significant case rejecting a bankruptcy plan of reorganization under § 524(g), the Third Circuit reminded us that due process extends to bankruptcy proceedings.²³⁷ Thus, it is important to grapple with what minimal due process means and try to predict what the Supreme Court is likely to do in future cases. Our first clue that there is an important battle over the meaning of due process appears in the *Stephenson* litigation itself. The Supreme Court granted certiorari and, in an unsigned per curiam, 4–4 opinion (Justice Stevens did not participate), affirmed the Second Circuit’s opinion, which allowed the claims of the plaintiffs to proceed.²³⁸

There are two further problems: (1) the Second Circuit, borrowing from the *Amchem* and *Ortiz* decisions, questioned whether future claimants can ever be adequately represented,²³⁹ and (2) the Second Circuit, again relying on *Amchem*, stated that it may well be impossible to provide adequate notice to exposure-only plaintiffs.²⁴⁰ The use of subclasses may be a way of trying to deal with internal class conflicts to prevent inadequate representation problems. But, how is it possible for the parties to settlement discussions today to anticipate, and then provide separate representation to, a sufficient number of subclasses to ensure that the interests of all class members are protected? Take a product like Zyprexa²⁴¹ or even the more recent NFL concussion case.²⁴² Unless a class is defined very carefully to avoid future claims that may go uncompensated, a class settlement may be subject to a collateral attack. This is contrary to what defendants tend to want. In seeking global peace, defendants will tend to want a more inclusive class, but that could invite future claimants to collaterally attack the class settlement if the settlement fund runs out of assets.

The practical problem that confronts parties using a class settlement to put litigation involving a product or service behind them is to determine and consider the possible interests of any potential claimant. First, *Stephenson* allows a collateral attack where one might have thought there would have been a rubber stamping of

²³⁶ *In re Nat’l Gypsum Co.*, 219 F.3d 478, 480 (5th Cir. 2000) (affirming plan channeling claims to settlement vehicle and enjoining suits against successor entity only if settlement vehicle retained sufficient funds to pay all claims).

²³⁷ *See In re Combustion Eng’g, Inc.*, 391 F.3d 190, 245 & n.64 (3d Cir. 2004); *see also Jones v. Chemetron Corp.*, 212 F.3d 199, 209 (3d Cir. 2000) (holding that minimal due process rights extend to bankruptcy proceedings); *Fogel v. Zell*, 221 F.3d 955, 962 (7th Cir. 2000) (same).

²³⁸ *See Dow Chem. Co. v. Stephenson*, 539 U.S. 111, 112 (2003) (per curiam).

²³⁹ *See Stephenson*, 273 F.3d at 261 & n.9.

²⁴⁰ *See id.* at 260, 261 n.8.

²⁴¹ *See supra* note 13.

²⁴² *In re NFL Players’ Concussion Injury Litig.*, 301 F.R.D. 191 (E.D. Pa. 2014) (granting preliminary approval of class settlement because NFL agreed to remove cap on its obligation to pay future claims).

the original judgment.²⁴³ Second, the settling parties, most significantly parties who may end up the target of future litigation, will then have the burden of demonstrating that the interests of all class members were adequately represented. As *Stephenson* demonstrated, drawing that line is very difficult. While as a matter of due process, perhaps the Second Circuit may have been correct to open the door to the collateral attack, the determination on the merits on a question of adequacy of representation will be quite tricky, and the court's resolution of the issue years or decades after the original settlement appears to be more of an exercise of Monday-morning quarterbacking.

There are, however, two caveats to this alarming caveat alluded to above. First, *Stephenson* involved a scenario where the settlement fund was exhausted before the class members' claims arose.²⁴⁴ Accordingly, parties to a settlement may want to agree to mechanisms for funding a settlement claims facility that will prevent exhaustion of the fund.²⁴⁵ Moreover, it may well be that the problem, in terms of numbers of non-bound class members, will not be significant in many cases. For example, when *Stephenson's* companion case was remanded, the district court judge dismissed the case on the merits.²⁴⁶ Nonetheless, defendants must consider the implications of *Stephenson*. Ironically, and this provides a nice segue to the next section, settlements that would pass muster under *Stephenson* will, by definition, provide a better level of justice for class members, those known and those unknown. Class definitions will be tighter, and adequate funding assured.

C. *Are Alternatives to Class Actions Better for Plaintiffs?*

The previous section shows that class action settlements will not always be good for defendants. This section assumes, as the Panel's charge does, and as discussed above, that class settlements can be bad for class members.²⁴⁷ Moreover, as discussed below with respect to the growing use of cy pres remedies,²⁴⁸ it is undeniable that class members usually are not fully compensated through class action settlements. But the question is whether this means that, as John Frank argued, damages class actions ought to be eliminated. And, if so, what are the alternatives?

²⁴³ See *Stephenson*, 273 F.3d at 259.

²⁴⁴ See *id.* at 258.

²⁴⁵ See, e.g., *In re NFL Players'*, 301 F.R.D. at 198, 201 (granting preliminary approval of class settlement because NFL agreed to remove cap on its obligation to pay future claims).

²⁴⁶ *In re Agent Orange Prod. Liab. Litig.*, 344 F. Supp. 2d 873, 875 (E.D.N.Y. 2004).

²⁴⁷ See discussion *supra* notes 12, 153.

²⁴⁸ See *infra* notes 265–70, discussing cy pres doctrine.

This section argues that we ought not throw the baby out with the bath water. Class settlements may have their problems, but in some cases, they may be the only, or most effective, way to vindicate claims or at least the essence of the rights underlying the class claims. Therefore, courts ought to continue to relax certification standards with respect to commonality, typicality, and predominance of common questions but, to protect class members, ought to rigorously enforce adequacy of representation requirements and scrutinize the fairness and reasonableness of class settlements and attorneys' fees. In other cases, however, alternatives to class settlements should be considered.

1. Distinguishing Between High- and Low-Value Claims

First, it may well be that John Frank was right, at least in some cases. As discussed above, Frank opposed damage class actions, especially in mass tort cases.²⁴⁹ He was a champion of “individual autonomy,”²⁵⁰ meaning that he believed that class treatment deprived individuals of the right to bring and prosecute their own cases.²⁵¹ Second, anticipating an *Amchem* situation,²⁵² and the topic of our panel, he worried that plaintiffs' counsel, in a rush to collect fees, might sell out the class members to a defendant wanting to get a matter behind it.²⁵³

Although I have argued in the past that mass resolution of personal injury claims can result in efficiency and fairness,²⁵⁴ I have recanted a bit.²⁵⁵ First, it is this type of case—where plaintiffs have allegedly suffered personal injuries—in which Benjamin Kaplan's protections—notice and the right to opt out—would appear to be the most helpful.²⁵⁶ Second, as the experience of the asbestos litigation ultimately shows, disaggregation—and not aggregation via class action settlements—may be the key to resolving large numbers of personal injury claims, or other high-value claims, involving the same substance or product.

²⁴⁹ See discussion *supra* notes 189–95.

²⁵⁰ See, e.g., Georgene M. Vairo, *Georgine, the Dalkon Shield Claimants Trust, and the Rhetoric of Mass Torts Claims Resolution*, 31 LOY. L.A. L. REV. 79, 81–83 (1997).

²⁵¹ See *supra* note 191 and accompanying text.

²⁵² See *supra* note 192 and accompanying text.

²⁵³ See *supra* note 193 and accompanying text.

²⁵⁴ See, e.g., Vairo, *supra* note 250; Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617 (1992).

²⁵⁵ See Georgene Vairo, *Lessons Learned by the Reporter: Is Disaggregation the Answer to the Asbestos Mess?*, 88 TUL. L. REV. 1039, 1066–68 (2014).

²⁵⁶ See discussion *supra* notes 196–99.

Judge Eduardo Robreno, who presides over the federal asbestos multidistrict litigation, MDL 875, and Judge Mark Davidson, who presides over the Texas state courts asbestos litigation, both testified at the hearings of the ABA TIPS Task Force on Asbestos Litigation hearings in Los Angeles in October 2013.²⁵⁷ Both judges expressed the strong view that disaggregation was the key to dealing with the huge caseloads that they both had initially confronted:

The testimony of Judge Robreno and Judge Davidson shows that letting traditional tort law and lawyers do their jobs, with the help of an administrative infrastructure that moves cases to trial readiness, has been more effective in resolving asbestos cases than efforts at global or mass settlements have been. Of course, most cases do, or are likely, to settle. But when settlement bargaining takes place in the real shadow of the law and thus the parties must assess the range of possible outcomes at a trial based on a complete discovery record, there is less likelihood that a particular plaintiff will be undercompensated as happens in aggregated settlements or that the defendants will be overpaying.²⁵⁸

Judge Robreno's testimony also suggested that attempts at aggregated resolution of the asbestos litigation were all failures, except for the MDL itself.²⁵⁹ In his view, the disaggregation of asbestos claims to prepare them for individual trial purposes, after the MDL discovery process is completed, allowed asbestos cases to be tried or settled more expeditiously than attempts at group settlements.²⁶⁰

After *Amchem*, it has been rare for a personal injury mass tort case to be certified. And, the Frank view generally ought to be extended to all high-value claims because the incentive to pursue a case individually is just as strong. Likewise, courts have a tool that enables them to justify refusing to certify class actions in which the class members have high-value claims: Rule 23(b)(3)(A) itself states that one criterion for deciding whether to certify a damages class is "the class members' interests in individually controlling the prosecution or defense of separate actions."²⁶¹

²⁵⁷ Vairo, *supra* note 254, at 1056.

²⁵⁸ *Id.* at 1068 (footnote omitted).

²⁵⁹ *Id.* at 1069.

²⁶⁰ *Id.*

²⁶¹ FED. R. CIV. P. 23(b)(3)(A).

In low- or negative-value situations, on the other hand, notice and the opportunity to opt out are of little value—who would opt out of a \$30 per class member class? As Judge Richard Posner wrote in *Carnegie v. Household International, Inc.*:

The more claimants there are, the more likely a class action is to yield substantial economies in litigation. It would hardly be an improvement to have in lieu of this single class action 17 million suits each seeking damages of \$15 to \$30 The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, *as only a lunatic or a fanatic sues for \$30.*²⁶²

In other words, these cases would not be prosecuted without the class action device. So, the debate really ought not be about whether the class members are being treated unfairly; rather it ought to be about whether class actions are the best of a number of possibly worse alternatives.

However, the assertion that class actions may be the lesser of other evils has become increasingly controversial. It is axiomatic that a key purpose of the Rule 23(b)(3) class action was to allow large numbers of claimants to aggregate their claims so that a lawyer would have an incentive to prosecute those claims.²⁶³ Actual class action settlement practice has opened the door to serious charges about the validity or legality of class actions in negative-value cases. First, in such cases, generally only a small percentage of a settlement is actually distributed to class members,²⁶⁴ and, instead, increasingly the entire settlement or the residual is awarded to a charity under the *cy pres* doctrine.²⁶⁵

²⁶² 376 F.3d 656, 661 (7th Cir. 2004) (second emphasis added).

²⁶³ See discussion *supra* notes 196–99; see also *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338–40 (1980) (Burger, C.J.) (“The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.”); *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 674, 677–78 (7th Cir. 2013) (explaining how classes actions are needed for small-value claims).

²⁶⁴ See Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105 (2010); see also *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 171 (3d Cir. 2013).

²⁶⁵ A *cy pres* remedy is an equitable doctrine imported into the class action context from trusts and estates law. It is French for “as near as possible.” Settlement agreements may provide for *cy pres* distribution of residual unclaimed funds. See *Class Actions Seven Years After the Class Action Fairness Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 42–44 (2012) [hereinafter *Hearing*] (statement of Martin H. Redish, Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University School of Law) (explaining the doctrine and decrying the use of *cy pres* in class actions); see also, e.g., *In re Baby Prods.*, 708 F.3d at 171–73, 178 (approving a limited use of *cy pres* distributions and questioning (in non-CAFA context) whether fees could be based on *cy pres* distribution); *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (discussing relationship between attorneys’ fees and

Professor Redish argues that class actions are essentially a method for redistributing wealth from corporations to lawyers and, increasingly, charities, with only minimal amounts going to actually injured class members.²⁶⁶ He claims that it is a perversion of the substantive law to enable Rule 23, a procedural tool, to enhance remedies in this way.²⁶⁷ In his view, class actions are too often “faux class action[s]” because there are no real benefits to class members.²⁶⁸ Professor Redish’s arguments may well be taken up by the United States Supreme Court in the near future. The Court denied the petition for a writ of certiorari arising from *Lane v. Facebook, Inc.*,²⁶⁹ but Chief Justice Roberts, citing Professor Redish, wrote a statement respecting the denial of certiorari in which he invited a proper case:

I agree with this Court’s decision to deny the petition for certiorari. [Petitioner]’s challenge is focused on the particular features of the specific *cy pres* settlement at issue. Granting review of this case might not have afforded the Court an opportunity to address more fundamental concerns surrounding the use of such remedies in class action litigation, including when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on. This Court has not previously addressed any of these issues. *Cy pres* remedies, however, are a growing feature of class action settlements. In a suitable case, this Court may need to clarify the limits on the use of such remedies.²⁷⁰

cy pres award in doomed settlement). *But see Lane v. Facebook, Inc.*, 696 F.3d 811, 825–26 (9th Cir. 2012) (affirming *cy pres* settlement over objection that newly minted charity had ties to defendant); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 36–39 (1st Cir. 2012) (upholding *cy pres* distribution but criticizing district court for over involvement in picking charity).

²⁶⁶ See Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 117–18 (noting the willingness of plaintiffs’ attorneys in class actions to “subordinate the interests of class members” to attorneys’ self-interests (quoting John C. Coffee, Jr. *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 371–72 (2000)) (internal quotation marks omitted)).

²⁶⁷ See *Hearing*, *supra* note 265, at 39–40.

²⁶⁸ *Id.* at 40.

²⁶⁹ See *Marek v. Lane*, 134 S. Ct. 8 (2013).

²⁷⁰ *Id.* at 8 (Roberts, C.J., statement respecting the denial of certiorari) (citing Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 653–56 (2010)).

Perhaps, though, technology will save small-value class action cases and help avoid the cy pres problem. Increasingly, in our “Big Brother” world, companies know more and more about their consumers. Thus, it should be easier for corporations to provide information about the members of the class and to get any recovery from a settlement to the class. In fact, recently, I received two checks, each for about \$35. I was not aware I was a member of a class involving a bank from which I had obtained funding for a house. And, even if I had any awareness whatsoever that the bank had violated some statute, I am not the sort of “lunatic” that would have sued on my own or opted out of a class. Yet, thanks to a class action and the lawyers who brought it, a bit of dinner money came streaming my way.

2. *Public v. Private Enforcement*

The debate about cy pres awards, and the idea that class actions in negative-value cases violate the Rules Enabling Act because they are substantive in nature, raises the question whether the rights involved in such cases ought to be vindicated via public, rather than private, enforcement.²⁷¹ However good this may sound in the abstract, it is not practical for several reasons. First, Professor Arthur Miller has observed that the United States has always looked to private enforcement since its founding.²⁷² Even former Chief Justice Warren Burger understood that regulatory actions were insufficient to protect rights and that class actions may be necessary to remedy injuries in certain kinds of cases.²⁷³

It seems that distrust of government led us from the founding of the United States through the New Deal and even now to rely on private enforcement rather than public enforcement. Moreover, even if public enforcement is more desirable from a democratic perspective, can we afford it? During these lean times and times of partisan government, it is unimaginable that taxpayers or legislators would devote the resources necessary to accomplish regulatory aims. As discussed below, something like *qui tam* actions, where the government essentially deputizes a private citizen to pursue vindication of

²⁷¹ See Redish, *supra* note 266, at 73 (stating that class action practice transforms the underlying substantive law).

²⁷² Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What's Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH L. REV. 587, 599 (2011).

²⁷³ See *supra* note 263.

statutory rights, may hold some promise.²⁷⁴ But, expecting regulatory agencies themselves to take on the work done by the private bar is not at all realistic.

In addition, there is a question whether private or public enforcement does a better job of deterring future wrongdoing. For example, *The New York Times* business section published a story entitled “Surprise, Surprise: The Banks Win.”²⁷⁵ The article describes a potential settlement between federal regulators and various banks involved in the mortgage foreclosures arising out of the economic meltdown in 2008.²⁷⁶ Individuals whose homes were improperly foreclosed upon would receive a total of \$3.75 billion in cash.²⁷⁷ The settlement provided that another \$6.25 billion would go towards principal reduction for homeowners in distress.²⁷⁸ A “back-of-the-envelope” analysis, however, suggested that if half of the 4.4 million homeowners involved in the foreclosure process were subjected to abuses, then each homeowner would receive an average payment of less than \$2,000.²⁷⁹ If only 10% were subject to abuses, each would receive an average payment of \$8,500.²⁸⁰ Thus, as the title of the article suggests, this is a better deal for the banks than it is for the consumers.

This Article suggests that governmental enforcement does not do a great job of vindicating rights and raises an important question: Would the private plaintiffs’ class action bar have negotiated a better deal for a class of homeowners? Indeed, with fees at stake that are generally tied to the amount of the recovery,²⁸¹ class attorneys have an incentive to do a better job.

²⁷⁴ See *infra* at Part III.C.4.

²⁷⁵ Gretchen Morgenson, *Surprise, Surprise: The Banks Win*, N.Y. TIMES, Jan. 6, 2013, at BU1, available at <http://www.nytimes.com/2013/01/06/business/bank-settlement-may-leave-tiny-slices-of-a-smaller-pie.html>.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ CAFA includes a “Consumer Bill of Rights” that, among other things, regulates attorneys’ fees in coupon settlements. See 28 U.S.C. § 1712 (2012). Class actions, in which individual damages may be minimal but in the aggregate huge, were of particular concern to CAFA’s drafters. Historically, these types of actions have been one of the principal justifications for enabling class litigation, making it financially worthwhile to pursue small, but widespread, abuse of consumers. Consumers have not always benefitted from the results obtained in these types of class actions, however. In numerous cases, the result of massive class actions was that consumers received a coupon of minimal value, while the class attorneys received millions of dollars in fees. CAFA provides regulation of such coupon settlements. See *id.* at § 1712(a)–(c). The idea that attorneys’ fees ought to be tied to the actual recovery by the class was picked up in a non-CAFA context in *In re Baby Products Antitrust Litigation*. 706 F.3d 217, 171–73, 178 (3d Cir. 2013) (approving limited use of cy pres distributions and questioning whether fees could be based on cy pres distribution).

Additionally, a recent study shows that private enforcement can be more effective than governmental enforcement in deterring future misconduct.²⁸²

3. *Mass Actions and Quasi-Class Actions*

Other alternatives to class actions are “mass actions” or “quasi-class actions.” Indeed, as one of my co-panelists, Professor Linda Mullenix, has written, mass actions and quasi-class actions are the future of aggregate litigation.²⁸³ Plaintiffs’ lawyers, knowing that it was becoming more difficult to get classes certified in federal courts, brought them in state courts.²⁸⁴ Congress responded in 2005 with CAFA, which allowed most class actions of a national scope to be removed from state to federal court.²⁸⁵ Because plaintiffs also sought to keep large cases out of federal court by filing complaints with huge numbers of plaintiffs, Congress thus added the “mass action” provision to CAFA.²⁸⁶ Because a mass action cannot be removed unless there are more than 100 named plaintiffs, plaintiffs’ attorneys began to file numerous complaints involving subject matter naming fewer than 100 plaintiffs.²⁸⁷ And, the courts have endorsed this tactic to avoid CAFA removal.²⁸⁸ Accordingly, many of these litigations will remain in state court. But the vast majority of cases of national scope will find their way to federal court one way or the other.

Although some cases will remain in state courts, the federal courts continue to be confronted with products liability cases that have a national impact in which claimants are pursuing damages under state consumer protection laws.

²⁸² See Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 BYU L. REV. 315, 316–17 (concluding that, despite the lack of respect for private antitrust enforcement, quantitative analysis demonstrates that private antitrust enforcement “probably deters more anticompetitive conduct than the DOJ’s anti-cartel program”); see also Joshua P. Davis & Robert H. Lande, *Summaries of Twenty Cases of Successful Private Antitrust Enforcement* (Univ. of S.F. Law Research Paper No. 2013-01, 2011), available at <http://ssrn.com/abstract=1961669>.

²⁸³ See Linda S. Mullenix, *Class Actions Shrugged: Mass Actions and the Future of Aggregate Litigation*, 32 REV. LITIG. 591, 645–47 (2013) (discussing the increasing importance of mass actions as an alternative class actions).

²⁸⁴ See VAIRO, *supra* note 9, at 2–3 (remarking on the “unprecedented degree of forum shopping” in the wake of *Amchem* undertaken by plaintiffs’ lawyers as they sought out state courts that “might be more amenable to class certifications”).

²⁸⁵ See generally *id.* at 5–6 (highlighting the stated purposes of CAFA).

²⁸⁶ A “mass action” is defined as “any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact” and where the claims in the mass action satisfy the \$5 million jurisdictionally required amount. 28 U.S.C. § 1332(d)(4), (11)(B)(i) (2012).

²⁸⁷ See, e.g., *Tanoh v. Dow Chem. Co.*, 561 F.3d 945 (9th Cir. 2009).

²⁸⁸ See *id.* at 950; see also *Scimone v. Carnival Corp.*, 720 F.3d 876, 878–79, 885–86 (11th Cir. 2013); *Anderson v. Bayer Corp.*, 610 F.3d 390, 392–93 (7th Cir. 2010).

The recent *Toyota*²⁸⁹ and *NFL Players' Concussion*²⁹⁰ multidistrict litigations (MDLs) are recent examples. These “litigations” may be a combination of class actions filed in federal court, or removed from state court, and individual actions filed in various jurisdictions. In such cases, the Judicial Panel on Multidistrict Litigation is likely to transfer such federal cases to one federal court for pretrial proceedings.²⁹¹ And once there, enormous pressure to settle exists even before any class is certified for prosecution purposes.

And deals are struck. Attorneys on the MDL Steering Committee negotiate a deal. Even though individual plaintiffs are free to refuse to take what the Steering Committee has negotiated because only class settlements are binding, there is great risk in doing so. If most plaintiffs take the deal, the defendant can then use their resources to litigate aggressively against the remaining holdouts.²⁹² While this is true as well for opt-outs in class actions, class action members at least have the protections of Rule 23(e), which requires the district court to approve the settlement as fair; Rule 23(g), which requires the court to ensure that the class attorneys are going to adequately represent the class members; and Rule 23(h), which requires the court to pass on the reasonableness of class counsel’s attorneys’ fees.²⁹³ Thus, class members who object can press their objections at the fairness hearing. No such protections exist in a “quasi-class action,” although some judges at least have used their inherent power to oversee fees.²⁹⁴

²⁸⁹ See *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 704 F. Supp. 2d 1379 (J.P.M.L. 2010).

²⁹⁰ *In re NFL Players' Concussion Injury Litig.*, 842 F. Supp. 2d 1378 (J.P.M.L. 2012).

²⁹¹ See, e.g., *In re Toyota*, 704 F. Supp. 2d at 1382 (transferring cases to the Central District of California).

²⁹² Class action and MDL settlements often contain a “right to withdraw” clause pursuant to which a defendant will walk away from a settlement if too many claimants refuse to participate in the settlement fund. See Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 217–18 (2003). Typically, the defendant will walk away unless over 90% of the plaintiffs will participate. Sometimes the parties keep the number confidential. See, e.g., *In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 2d 519, 521 (D. Md. 2002) (“[Class members] would have a right to opt out, and, if there were a certain number of opt-outs . . . Microsoft would have the right to withdraw from the settlement.”). But, the point is to ensure that the settlement effectively ends the litigation with the exception possibly of a manageable number of individual cases remaining.

²⁹³ See FED. R. CIV. P. 23(e), (g), (h).

²⁹⁴ See *supra* note 13.

4. *Attorney General Parens Patriae Actions*

As mentioned above, CAFA was designed to ensure that cases of nationwide impact be litigated in federal, and not state, courts.²⁹⁵ Assuming, as many plaintiffs' lawyers do, that federal courts are less likely to certify a class than state courts, and further assuming that state courts are more amenable to group litigation, is there a mechanism for aggregating claims that is not a class action or a mass action?

The State of Louisiana came up with a solution: suits filed by the state attorney general in a *parens patriae* capacity. State attorneys general frequently pursue litigation on behalf of their citizens in state courts. Is a case filed by an attorney general removable under CAFA? The answer now is no, as long as the attorney general files the right complaint. It took the Louisiana and Mississippi Attorneys General three shots between to the two of them to get it right, but in 2014, the Mississippi Attorney General hit the target.²⁹⁶

The first and second cases arose out of the Hurricane Katrina disaster.²⁹⁷ In *In re Katrina Canal Litigation Breaches*, the Fifth Circuit held that a class action filed by the Attorney General of Louisiana against over 200 insurance companies for allegedly failing to pay covered insurance claims was properly removed to federal court under CAFA.²⁹⁸ The suit had been filed in state court on behalf of the State of Louisiana, together with a proposed class consisting of certain citizens of Louisiana to whom insurance proceeds were due.²⁹⁹ The defendants removed the case to federal court, and the district court denied the attorney general's motion to remand.³⁰⁰ The Fifth Circuit affirmed, holding that although the State of Louisiana, as the named plaintiff, could not be considered a citizen, the citizenship of the state-citizen class members could be counted to determine whether CAFA's *minimal* diversity existed.³⁰¹

In re Katrina thus raised the possibility that a state could avoid removal by suing in a *parens patriae* capacity on behalf of its citizens, instead of in a class action. Under CAFA, only class actions and mass actions (where more than

²⁹⁵ See *supra* notes 284–86.

²⁹⁶ See *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014) (holding that case brought by state attorney general in *parens patriae* capacity is not subject to CAFA jurisdiction).

²⁹⁷ See *In re Katrina Canal Litig. Breaches*, 524 F.3d 700 (5th Cir. 2008); *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008).

²⁹⁸ See 524 F.3d at 702.

²⁹⁹ See *id.*

³⁰⁰ *Id.*

³⁰¹ See *id.* at 706.

100 plaintiffs join together in an action) are removable. The Fifth Circuit, however, put the kibosh on that approach as well, holding that CAFA jurisdiction may exist over a state attorney general's suit seeking recovery on behalf of a group of individual citizens even if the suit is filed as a *parens patriae* suit rather than as a class action.

In *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, the Fifth Circuit held that a state attorney general's *parens patriae* action against a number of insurers for alleged violation of Louisiana's antitrust laws was a mass action within CAFA jurisdiction because the individual policyholders were the real parties in interest, at least with respect to treble damages sought by the attorney general.³⁰² However, the strong dissenting opinion presented the argument that the case should be remanded because it did not qualify as a class action or a mass action.³⁰³ And, all other courts of appeals that confronted the issue disagreed with the Fifth Circuit majority.³⁰⁴ Given the split in the circuits, it was simply a matter of time before the U.S. Supreme Court would resolve matters, and it did so in 2014.

In *Mississippi ex rel. Hood v. AU Optronics Corp.*, the Court adopted the majority approach and held that a case in which the attorney general is the lone plaintiff is not a mass action, even though the suit is brought for the benefit of state citizens who far exceed the 100-person jurisdictional amount for CAFA purposes.³⁰⁵ The issue of whether to allow removal of state attorney general actions under CAFA has become increasingly important because these actions can serve as a replacement, of sorts, for consumer class actions. As discussed above, it is more difficult to certify litigation classes after the decisions in *Dukes*, *Comcast*, and *Concepcion* have essentially eviscerated classwide arbitration.³⁰⁶

In *Hood*, in a unanimous opinion written by Justice Sotomayor, the Court held that only actual "plaintiffs" are to be considered in determining whether the numerosity requirement for a mass action is satisfied.³⁰⁷ Therefore, a suit filed by a state attorney general, with the state as the sole plaintiff, does not

³⁰² 536 F.3d 418, 429–30 (5th Cir. 2008).

³⁰³ *Id.* at 432–36 (Southwick, J., dissenting).

³⁰⁴ See Michael Jaeger, Note, *Should They Stay or Should They Go: Can State Attorneys General Avoid Removal of Parens Patriae Suits to Federal Court Under the Class Action Fairness Act?*, 46 LOY. L.A. L. REV. 327 (2012) (surveying cases and concluding that the Fifth Circuit approach is incorrect).

³⁰⁵ 134 S. Ct. 736, 739 (2014).

³⁰⁶ See *supra* Part II.

³⁰⁷ See *Hood*, 134 S. Ct. at 742.

constitute a removable mass action.³⁰⁸ This is true even if relief is sought on behalf of 100 or more of the state's citizens, the mass action threshold under 28 U.S.C. § 1332(d)(11)(B)(i).³⁰⁹

In *Hood*, the Attorney General for the State of Mississippi sued manufacturers of liquid crystal displays (LCDs) in state court alleging that they had formed an international cartel to restrict competition and raise prices in the LCD market in violation of Mississippi law.³¹⁰ The State sought injunctive relief and civil penalties under state law, punitive damages, costs, attorneys' fees, and restitution for purchases of LCD products by the state and its citizens.³¹¹ The defendants removed the case to federal court.³¹² The district court and the Fifth Circuit held that the case was removable under CAFA as a mass action because 100 or more unidentified Mississippi consumers had bought LCD screens and were therefore real parties in interest to the State's restitution claim.³¹³ The Supreme Court reversed, holding that the case was not a mass action because the State was the only plaintiff.³¹⁴

Prior to the Court's decision in *Hood*, the federal courts of appeals had applied a real-party-in-interest analysis to determine whether a suit filed by a state attorney general as a *parens patriae* action qualified as a mass action.³¹⁵ However, the courts took two approaches in making this determination: the "whole case" approach, which looks to the face of the complaint, and the "claim-by-claim" approach, which looks to the actual real parties in interest.³¹⁶ The whole case approach had become the majority rule, with the Fifth Circuit the only real adherent to the claim-by-claim approach; *Hood* came out of the Fifth Circuit.³¹⁷

The Supreme Court in *Hood* rejected the claim-by-claim approach to the real-party-in-interest analysis, holding instead that the "100 or more persons" whose claims "are proposed to be tried jointly" must be actual plaintiffs, not merely real parties in interest.³¹⁸ The Court noted that "the statute says '100 or

³⁰⁸ See *id.* at 744–45.

³⁰⁹ See *id.* at 739.

³¹⁰ *Id.* at 740.

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.* at 740–41.

³¹⁴ *Id.* at 739.

³¹⁵ See *AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 390–91 (4th Cir. 2012).

³¹⁶ See *id.* at 391–92 (describing and discussing these two approaches).

³¹⁷ See Jaeger, *supra* note 304, at 330 & nn.7–8.

³¹⁸ See *Hood*, 134 S. Ct. at 739.

more persons,’ not ‘100 or more named or unnamed real parties in interest.’”³¹⁹ Moreover, the “100 or more persons” referred to in the statute are the “very ‘plaintiffs’ referred to later in the sentence—the parties who are proposing to join their claims in a single trial.”³²⁰

The Court also analyzed the term “plaintiffs.” The commonly accepted meaning of the term, the Court explained, is the party who brings the suit.³²¹ If “plaintiff,” as used in CAFA’s mass action definition, includes all unnamed individuals with an interest in the suit, this would create “an administrative nightmare that Congress could not possibly have intended.”³²² This is because the mass action provision also contains a jurisdictional limitation to “plaintiffs” whose claims exceed \$75,000.³²³ How would a district court know which unnamed parties in interest met the jurisdictional threshold?³²⁴ Similarly, it would be difficult for a court to decide whether transfer of a removed mass action was permissible because such transfer is prohibited unless a majority of the “plaintiffs” in the action request transfer.³²⁵

The Court also relied on the context in which CAFA was enacted. The Court reasoned that “Congress’ overriding concern in enacting CAFA was with class actions.”³²⁶ The mass action provision was included to act “as a backstop to ensure that CAFA’s relaxed jurisdictional rules for class actions” could not be evaded by naming 100 or more plaintiffs rather than filing suit as a class action.³²⁷ If Congress had wanted to make representative actions brought by a state as sole plaintiff removable under CAFA, it would have done so directly through the class action provision, not indirectly through the provision governing mass actions.³²⁸ In other words, the “if it walks like a duck, it is a duck” argument did not fly.

The Court refused to infer a congressional intent that courts look behind the pleadings to determine whether the numerosity requirement for a mass action is satisfied.³²⁹ The Court acknowledged that courts are required to look behind

³¹⁹ *Id.* at 742.

³²⁰ *Id.*

³²¹ *See id.* at 743.

³²² *Id.*

³²³ *See id.*

³²⁴ *See id.*

³²⁵ *See id.* at 744 (citing 28 U.S.C. § 1332(d)(11)(C)(i) (2012)).

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *See id.* at 744–45.

³²⁹ *See id.* at 745.

the pleadings in some circumstances to determine what parties' citizenship should be considered in determining diversity.³³⁰ However, this does not mean that Congress intended to incorporate that background principle into the quite different context of counting the number of parties in an action to determine if the action is a mass action.³³¹

Although the Court seemed agnostic in terms of the policies underlying CAFA, and who may win or lose, the decision in *Hood* is very important for many reasons. Claimants, not defendants, are likely to be the clear winner overall. This is because of the potential of *parens patriae* actions to protect consumer rights. Indeed, attorneys general often hire the same private plaintiff's lawyers who had been bringing class actions or mass actions in state courts to prosecute these cases.³³² The elephant in the room, which came up during oral argument in *Hood*, is that private plaintiff class action lawyers usually are hired by the attorneys general to litigate these cases.³³³ This fact riles up defense counsel. *Parens patriae* actions to vindicate consumer rights are a relatively new development, but the practice has been increasing over the years, and *Hood* is likely to encourage more *parens patriae* actions.

Stakeholders understood the ramifications of *Hood*, and they weighed in before the Supreme Court in force. For example, four amicus curiae briefs were filed on behalf of Mississippi and five on behalf of the defendant LCD manufacturers. The most notable amicus brief was that filed by forty-six states in support of Mississippi.³³⁴ The state attorneys general argued that the Fifth Circuit's approach "upends entrenched principles of federal-state comity" and forces states to litigate in federal court cases "they bring in their own courts, under their own laws, for conduct occurring in their own borders."³³⁵ The AARP, Public Citizen, Inc., and the Center for State Enforcement of Antitrust

³³⁰ See *id.*

³³¹ See *id.* at 745–46.

³³² See, e.g., Ashley L. Taylor, Jr., *Walking a Tightrope: The Tension Between Attorneys General Enforcement Authority and Contingency Fee Arrangements with Private Counsel*, ST. & LOC. L. NEWS, Spring 2013, at 8, 8; Mark Schleifstein, *Private Attorneys Working for Louisiana Attorney General Can Do So with Contingency Fee Contracts, Judge Rules*, TIMES-PICAYUNE (New Orleans) (Mar. 10, 2014, 2:01 PM), http://www.nola.com/environment/index.ssf/2014/03/private_attorneys_working_for.html; Alison Frankel, *Should State AGs Be Allowed to Use Contingency Fee Lawyers?*, ON THE CASE BLOG (Dec. 20, 2012), <http://blogs.reuters.com/alison-frankel/2012/12/20/should-state-ags-be-allowed-to-use-contingency-fee-lawyers/>.

³³³ Transcript of Oral Argument at 48, *Hood*, 134 S. Ct. 736 (No. 12-1036), available at <http://op.bna.com/class.nsf/r?Open=jkas-9d7t7f>.

³³⁴ Brief of Amici Curiae State of Illinois and 45 Other States in Support of Petitioner, *Hood*, 134 S. Ct. 736 (No. 12-1036), 2013 WL 3935881.

³³⁵ *Id.* at 1.

and Consumer Protection Laws Inc. also filed amicus curiae briefs in support of Mississippi.³³⁶

On the other hand, the Washington Legal Foundation (WLF) argued that CAFA was enacted to expand the ability of defendants to remove interstate mass actions to federal court.³³⁷ The WLF argued that upending the Fifth Circuit's approach would allow attorneys general to evade Congress's intent by bringing *parens patriae* actions that seek monetary damages on behalf of its citizens: "By strategically omitting the real parties in interest as named plaintiffs in their complaints, state attorneys general (and their outside counsel) have been able to obtain large jury awards against foreign defendants in local courts."³³⁸ The Defense Research Institute, Access to Courts Initiative, Inc. and National Association of Manufacturers, Allstate Insurance Company, and Pharmaceutical Research and Manufacturers of America also filed amicus curiae briefs in support of the defendants.³³⁹

Hood is a potential nightmare for defendants. The decision enhances the incentive for state attorneys general to hire private, contingency-fee counsel to bring *parens patriae* actions in state courts. If multiple state attorneys general decide to attack the same product or practice, a defendant could be presented with the prospect of defending potentially fifty state court *parens patriae* actions.³⁴⁰

Hood also could provide an alternative to private class actions that would otherwise be barred by *Dukes*, *Comcast*, or *Concepcion*. The decisions in *Dukes* and *Comcast* lead to increased scrutiny of all aspects of Rule 23(a) and 23(b) class certification requirements, making it more difficult for plaintiffs to

³³⁶ Brief Amicus Curiae of AARP in Support of Petitioner, *Hood*, 134 S. Ct. 736 (No. 12-1036); Brief of Amicus Curiae Public Citizen, Inc. in Support of Petitioner, *Hood*, 134 S. Ct. 736 (No. 12-1036); Brief of the Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc. as Amicus Curiae in Support of Petitioner, *Hood*, 134 S. Ct. 736 (No. 12-1036).

³³⁷ Brief of Washington Legal Foundation as Amicus Curiae in Support of Respondents at 4, *Hood*, 134 S. Ct. 736 (No. 12-1036), 2013 WL 4855077.

³³⁸ *Id.* at 4–5.

³³⁹ Brief of DRI – The Voice of the Defense Bar as Amicus Curiae in Support of Respondents, *Hood*, 134 S. Ct. 736 (No. 12-1036), 2013 WL 4829338; Brief of Amici Curiae Access to Courts Initiative, Inc. et al. in Support of Respondents, *Hood*, 134 S. Ct. 736 (No. 12-1036), 2013 WL 4829339; Brief of Amicus Curiae Allstate Insurance Co. in Support of Respondents, *Hood*, 134 S. Ct. 736 (No. 12-1036), 2013 WL 4855076; Brief for Amici Curiae Pharmaceutical Research and Manufacturers of America et al. in Support of Respondents, *Hood*, 134 S. Ct. 736 (No. 12-1036), 2013 WL 4875113.

³⁴⁰ Indeed, General Motors now faces the prospect of such a scenario. See Rebecca R. Ruiz, *General Motors Is Sued by Arizona for \$3 Billion over Recalls*, N.Y. TIMES, Nov. 20, 2014, at B1, available at <http://www.nytimes.com/2014/11/20/business/arizona-sues-gm-for-3-billion-over-recalls.html>.

show commonality and predominance of common questions.³⁴¹ A *parens patriae* proceeding will not only be litigated in state court but also will not be subject to these federal court class action trends.

The Supreme Court virtually eliminated class arbitration in *Concepcion*, which prevented consumers with form-agreements with banks, telephone companies, and the like from pursuing group vindication of low-value claims.³⁴² Here again, the *Hood* decision provides consumers with an end run: the attorney general simply sues for them.

This in turn creates even more problems for defendants. A cable company, for example, could face both class actions and *parens patriae* actions for the same alleged conduct in different courts. Or, there could be follow-up class actions after a successful attorney general action, if the judge in such follow-up litigation applied offensive non-mutual collateral estoppel. Indeed, Chief Justice Roberts explored these and similar scenarios at oral argument in *Hood*. He wondered whether an attorney general could file a *parens patriae* action immediately following a class action settlement for the same alleged conduct.³⁴³ Counsel for Mississippi responded by pointing out (among other things) that the state's interest in *parens patriae* actions is broader than those of a class seeking damages to individual consumers as it includes, for example, indirect harms.³⁴⁴ The concern about multiple actions was also reflected in questions by Justices Scalia and Kennedy.³⁴⁵

It is also possible that *Hood* may lead to even more direct actions by citizens on behalf of their counterparts. For example, California adopted a novel approach to enforcing the Labor Code of California when it enacted the PAGA.³⁴⁶ This law allows a private citizen to pursue civil penalties on behalf of the State of California Labor and Workforce Development Agency (LWDA).³⁴⁷ In essence, an aggrieved employee is deputized to act as a Private Attorney General if he or she first informs the LWDA of the alleged violations, and the LWDA does not pursue the allegations or does not issue a citation within certain time periods.³⁴⁸ As a Private Attorney General, the aggrieved

³⁴¹ See *supra* Part II.

³⁴² See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

³⁴³ Transcript of Oral Argument, *supra* note 333, at 21.

³⁴⁴ *Id.* at 21–22.

³⁴⁵ *Id.* at 19–20, 35.

³⁴⁶ See *supra* note 112.

³⁴⁷ CAL. LAB. CODE § 2699(a) (West 2011).

³⁴⁸ *Id.* § 2699.3.

employee is allowed to seek civil penalties not only for violations that he or she personally suffered but also for violations of “other current or former employees.”³⁴⁹ Unlike some private attorney general suits that usually refer to some type of unfair competition claim, PAGA actually gives a private citizen the right to pursue fines that would normally only be available to the State of California. Thus, PAGA appears to allow a private citizen to act as an attorney general. Any resulting civil penalties are split between the LWDA and the employee with the LWDA receiving 75% of the penalties and the employee receiving 25%.³⁵⁰

A defendant can argue that if it looks like a duck (class action), a PAGA action is a duck (class action). A PAGA plaintiff, however, will argue that *Hood* forecloses this argument because there is only one plaintiff named in the complaint.

The bottom line of *Hood* is that, as a practical matter, it enhances the incentive for private, contingency-fee counsel to pair with state attorneys general and bring *parens patriae* actions in state court on behalf of state citizens in tandem with or immediately following private class actions. This is not what one would think defendants would want to see happen. Depending on state attorneys general’s inclinations and the state legislation, it is quite possible that defendants will be presented with something almost worse than class actions. Instead of a bet-your-company scenario with respect to one action, there could be fifty bet-your-company scenarios. Which attorney general should the defendant settle with first? Settlement dynamics could be even more complex than usual.

Clearly, therefore, state attorney general actions appear to be effective vehicles for vindicating their citizens’ small claims and a potent and viable alternative to class actions. However, returning to our Panel’s theme, is this actually better for the “classes” represented by the state’s attorney general than class actions would be? Will a state’s attorney general provide a check on their private retained counsel that is more effective than that of the courts? As with quasi-class actions, there is less judicial authority for intervention to protect class members. There is no Rule 23(e), (g), or (h), for example.³⁵¹ As Professor

³⁴⁹ *Id.* § 2699(a).

³⁵⁰ *Id.* § 2699(i).

³⁵¹ See Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389 (2011) (criticizing use of nonclass aggregate settlements because they fail to provide adequate protection for claimants such as those contained in Rule 23).

Adam Zimmerman has written, nonclass aggregate settlements often lack transparency and accountability.³⁵²

CONCLUSION

While class actions for prosecution purposes have taken a huge hit, thanks to *Dukes* and *Concepcion*, and while courts of appeals are reviewing class settlements with a more skeptical eye, settlement classes continue to be certified. Thus, there is a question whether these settlements are good or bad for class members. In my view, distinctions need to be made between high-value and low-value claims and class members. When individual or groups of individuals have the incentive to go it alone, they ought to be able to do that, and courts ought not routinely certify such classes. The use of MDL may result in efficiencies with respect to discovery. However, class actions are not designed to enable the fine brush of treating claimants with the individualized justice they have a right to obtain.

In low-value claim cases, on the other hand, either a class action or some substitute is necessary to vindicate whatever rights are at stake. Society cannot wait for “lunatics” to preserve their rights. There needs to be a check on conduct that nicks away at \$5 or \$30 per claimant. Class actions may not be an optimal solution, but a quick review of some alternatives leads to the conclusion that they are the lesser of a number of evils. Public enforcement is not a promising alternative. On the other hand, *parens patriae* actions do hold a great deal of promise on a state-by-state basis. However, from the defense perspective, such actions may provide more problems than class actions: they will not have support of the decisions in *Dukes* and *Concepcion* to help them avoid group litigation, which ups the settlement ante. And, from the claimants’ perspective, it is also possible that the state citizens will be subject to the vagaries of state politics when an elected official is calling the shots.

The bottom line is that there can be “*no coming at justice*” without representative actions of some kind. So, choose your poison: Rule 23(b)(3), quasi-class actions, attorney general *parens patriae* actions, or public enforcement? I am of the view that Benjamin Kaplan had it right. Class actions

³⁵² See Michael D. Sant’Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992 (2012); Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500 (2011); Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV. 1385 (2011); see also Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012).

are needed to protect the rights of plaintiffs with minor damage claims resulting from a defendant's conduct. Let courts focus on the fairness of settlements under Rule 23(e) and continue to make clear to class and defense counsel what is fair and what is not, rather than questioning whether we ought to have class actions at all.