

The University of Akron
IdeaExchange@UAkron

Akron Law Review

Akron Law Journals

October 2015

The Class Abides: Class Actions and the "Roberts Court"

Elizabeth J. Cabraser

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <http://ideaexchange.uakron.edu/akronlawreview>

 Part of the [Civil Procedure Commons](#), and the [Litigation Commons](#)

Recommended Citation

Cabraser, Elizabeth J. (2015) "The Class Abides: Class Actions and the "Roberts Court"," *Akron Law Review*: Vol. 48 : Iss. 4 , Article 3.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol48/iss4/3>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

**THE CLASS ABIDES:
CLASS ACTIONS AND THE "ROBERTS COURT"**

*Elizabeth J. Cabraser**

I.	Introduction: Did the Roberts Court Kill Class Actions?..	758
II.	<i>Amgen, Comcast</i> , and Rule 23's Procedural/Merits Divide	761
III.	<i>Dukes v. Wal-mart</i> : Predominance is the New Commonality	763
IV.	The Necessity of Class Action Exceptionalism.....	765
V.	The Post- <i>Amgen/Comcast</i> Landscape	768
	A. (b)(3) or Not (b)(3): What Is Predominance?	770
	B. "Just the Facts, Ma'am": Common Answers, Common Sense, and Predominance.....	771
	C. Deepwater Dives Into Wal-Mart, Amgen, and Comcast.....	773
	D. After Amgen and Comcast Class Certification Decisions In The Seventh Circuit	775
	E. Whirlpool and Butler: Moldy Washers As the Champions of Time-of-Purchase Consumer Injury	778
VI.	Imprecations on an Implication: Courts Thwart the Attempted Merger of the "Ascertainability" Requirement and the Merits-Qualified Class	784
VII.	<i>Cy Pres</i> or not <i>Cy Pres</i> ? That is the Chief Justice's Question.....	794
VIII.	Conclusion: The Class Action Lives	800

* Elizabeth J. Cabraser is a founding partner of Lief Cabraser Heimann & Bernstein, LLP, a firm that concentrates its practice on the representation of plaintiffs, as individuals, groups, and classes, in civil litigation in the areas of antitrust, consumer protection, product liability, employee, investor and civil rights, nationally from its offices in New York, San Francisco, and Nashville. Ms. Cabraser also teaches complex litigation, class actions, and multi-district litigation as an adjunct at Columbia Law School and the University of California at Berkeley and currently serves on the federal advisory committee on rules of civil procedure. Parts of this article appeared in an earlier form in "Cloudy with a Chance of Certification," a piece written for an ALI CLE webcast last year. The views expressed in this article are the author's own.

I. INTRODUCTION: DID THE ROBERTS COURT KILL CLASS ACTIONS?

The first ten years of the Roberts Court have seen increased attention to questions arising from the prosecution and defense of actions brought as class actions under Federal Rule of Civil Procedure 23. Class actions received sporadic attention by the Supreme Court in the last decade of the 20th Century, most notably in addressing controversies generated by the attempted use of the class action mechanism to settle mass claims arising from present—and future—exposure to asbestos.¹ In contrast, the Roberts Court seems to have revisited class actions repeatedly, in a wide array of procedural and substantive contexts, ranging from interpreting the expanded federal diversity jurisdiction provisions of the Class Action Fairness Act of 2005 (CAFA),² to the interplay of Rule 23's procedural prescriptions with elements of substantive proof in securities, antitrust, employment, and consumer disputes. It is in this general category that the most noteworthy—or most notorious—Roberts Court decisions cluster. These decisions include *Wal-Mart Stores, Inc. v. Dukes*,³ *AT&T Mobility LLC v. Concepcion*,⁴ *Comcast Corp. v. Behrend*,⁵ *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*,⁶ *Halliburton Co. v. Erica P. John Fund, Inc.*,⁷ and

1. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (applying all 23(b)(3) requirements, except trial manageability, to settlement class certification and requiring structural assurances to protect against intra-class conflicts); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (limiting the availability of Rule 23(b)(1)(B)'s "limited fund" rationale for the certification of non-opt out settlement classes).

2. Class Action Fairness Act of 2005 [hereinafter CAFA], Pub. L. 109-2, 119 Stat. 4, (codified as amended at 28 U.S.C. §§ 1332(d), 1453, 1711-15, 2074). The CAFA enactment process was intensely political. As many commentators, and more than a few courts have noted, the partisan drive for CAFA's expedited passage sacrificed the niceties of coherence, and internal consistence, and dispensed with the inclusion of processes that would have assisted courts in managing the resulting influx of state law class actions into the federal courts, such as a uniform choice of law rule. See, e.g., Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553 (2008) (recording the legislative history and aftermath of CAFA); Samuel Issacharoff & Catherine M. Sharkey, *Back-door Federalization*, 53 UCLA L. REV. 1353, 1417 (2006); Linda J. Silberman, *Choice of Law in National Class Actions: Should CAFA Make a Difference?*, 14 ROGER WILLIAMS U. L. REV. 54 (2009).

3. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

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

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

6. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013).

7. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014), *vac.* 718 F.3d 423 (5th Cir. 2013) (declining to overturn *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the landmark decision establishing the fraud on the market presumption of investor reliance in publicly traded securities).

American Express Co. v. Italian Colors Restaurant.⁸

Within this cluster of cases, three cases demonstrate the significance of Roberts Court jurisprudence. *Wal-Mart* dispersed perhaps the largest nationwide employment discrimination class ever certified. *Concepcion* exalted the Federal Arbitration Act over the rights of consumers to bring their grievances, either individually or in class actions, to court.⁹ *Italian Colors* rebuffed businesses in the same way. In the eyes of many—especially those disappointed by the outcomes—*Dukes*, *Concepcion*, and *Italian Colors* are political, or at least reflective of dominantly powerful interests and ideologies at the expense of those less favored (or perhaps fortunate) regarding resonance with the hearts and minds of the necessary five justices. To the extent this is true, the amelioration of these outcomes may also be political—legislation amending or clarifying the Federal Arbitration Act (FAA),¹⁰ for example, may restore access to the civil justice system on the part of consumers and small businesses—once outcry at the loss of a long-established (and long taken for granted) right to trial is transformed into political pressure. Meanwhile, despite *Concepcion* and *Italian Colors*, consumers, employees, and businesses persist in their quest to retain, or regain, their right of access to the public fora of the federal (and state) courts; and appellate courts have kept unconscionability alive, declining to enforce mandatory arbitration and class action ban provisions in cases where case-specific facts render enforcement particularly unfair.¹¹ The Roberts Court's enthusiasm for arbitration over traditional litigation may wane as arbitration in practice fails to deliver on promised efficiency and economy. Those who overreach will be rebuffed as courts reject arbitration clauses that are inserted without notice or consent, devoid of consideration, or overly oppressive in operation. Still, it is disconcerting that the *Concepcion* consumers may have inadvertently traded their birthright of access to the courts for a not-so-free cellphone, and the deterrent and prophylactic functions of the class suit may go missing in action until some legislative or jurisprudential means are found to restore them. Hope springs eternal.

Plaintiffs' counsel and consumer advocates, not without reason, have tended to see the currently-configured Supreme Court as hostile to

8. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

9. *See also Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662 (2010).

10. Federal Arbitration Act, ch. 392, 61 Stat. 670 (1947) (codified as amended at 9 U.S.C. § 1, et seq.).

11. *See, e.g., Tina Wolfson & Bradley King, Even After Concepcion and Italian Colors, Some Arbitration Agreements Are Not Enforceable*, 62 FED. LAW. 19 (2015).

class actions. It can be difficult to disentangle the Court's skeptical scrutiny of the procedural mechanism of Rule 23 class certification from suspicion of an underlying hostility toward the claims—and claimants—themselves in the cases most frequently cited as evidence of this hostility. Cases in point: *Wal-Mart* (rejecting the class certification quest of a nationwide class of women employees alleging gender discrimination in promotion) and *Concepcion* (throwing cell phone customers out of court by enforcing mandatory arbitration clauses in the fine print of form contracts). *Wal-Mart* and *Concepcion* delivered much greater impact on employees, consumers, and their class action efforts than occurred with *Comcast*, and the effects of *Wal-Mart* and *Concepcion* as set-backs may be ameliorated over time. There have been many defeats, but some victories, in employment cases since *Wal-Mart*; and the judicial infatuation with forced arbitration clauses may be giving way to potential legislative and regulatory reform, spurred by public outrage.¹² Meanwhile, in *Amgen* and *Halliburton*, the same court upheld investors' rights and preserved presumptions that reflect realities of the securities markets and facilitate aggregate proof of liability.¹³ The Court in *Comcast*,¹⁴ like the Roman god Janus, looks both ways: it tightens up the proof of classwide import but does not change the structure of Rule 23 to require that all liability and damage questions be capable of classwide proof.

This Article does not delve deeply into the substantive issues of *Wal-Mart*, *Concepcion*, or *Italian Colors*. Others have done so, and will continue to do so, with greater expertise and insight.¹⁵ My focus is on how Rule 23 has fared, structurally and practically, in the aftermath of the “common answer” formulation of *Wal-Mart*; three other decisions of the Roberts Court, *Dukes*, *Amgen*, and *Comcast*; and three cases that the Roberts Court *did not* ultimately take in the wake of *Amgen* and *Comcast*: its denials of review in *Whirlpool*,¹⁶ *Butler*,¹⁷ and *Deepwater*.¹⁸

12. Cereal maker General Mills, for example, tried last year to activate mandatory arbitration provisions for those who “liked” it on Facebook. Like turned to anger, and on April 19, 2014, General Mills yielded to public pressure, dropped its forced arbitration clause, and apologized to consumers. See Kirstie Foster, *We've Listened – and We're Changing Our Legal Terms Back*, TASTE OF GEN. MILLS (Apr. 19, 2014), <http://www.blog.generalmills.com/2014/04/weve-listened-and-were-changing-our-legal-terms-back-to-what-they-were/>.

13. See *supra* notes 6-7.

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

15. See, e.g., Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 294 (2014); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013); Paul D. Carrington, *Protecting the Rights of Citizens to Aggregate Small Claims Against Businesses*, 46 U. MICH. J. L. REF. 537 (2013).

16. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir.

Also discussed is the newly intense debate on the use of *cy pres*, catalyzed by Chief Justice Roberts' extraordinary "Statement" accompanying the denial of *certiorari* in *Marek v. Lane*.¹⁹ This Article's brief *Wal-Mart* discussion focuses on the case as an instance—perhaps anomalous—of the Court's indifference to the structural constraints of Rule 23 itself in transporting the requirement for predominance of common issues from Rule 23(b)(3) to Rule 23(b)(2). This structural disruption at once dismayed employment rights advocates and, intentionally or not, provided a practical tool for the design and trial of class cases by plaintiffs.

II. *AMGEN*, *COMCAST*, AND RULE 23'S PROCEDURAL/MERITS DIVIDE

Amgen and *Comcast*, two decisions issued in the same term, highlight the Court's treatment of the emerging problem of reconciling the determination of whether Rule 23's class certification criteria are met, which must be done in every class action, with the ultimate adjudication on the merits, which must be avoided at the class certification stage. Courts have long recognized that the merits do matter in class certification, because the goal of the class certification exercise is to determine which of the questions of law or fact raised by a case can and should be decided on a classwide basis at trial; and whether these classwide questions are sufficiently significant, *vis-à-vis* the overall litigation, to warrant utilization of the class form to decide them.

*Amgen*²⁰ made it clear that courts need not decide any question on its merits as a prerequisite to characterizing that issue as a classwide question and granting class certification. *Comcast*, which held that the expert methodology submitted to support class certification must actually match the surviving damages theories in the case,²¹ dashed the hopes of some class action opponents because it did *not* require that damages, as well as liability questions, be answerable on a classwide basis in order to fulfill Rule 23(b)(3)'s predominance requirement.

2013), *cert. denied*, 134 S. Ct. 1277 (2014).

17. *Butler v. Sears Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014).

18. This trend is described in Miller, *supra* note 15, at 296-98.

19. "Though not expressly stated in Rule 23, many courts have read an implicit requirement of class 'definiteness and ascertainability' into the Rule." *Johnson v. Nextel Commc'ns, Inc.*, 293 F.R.D. 660, 669 (S.D.N.Y. 2013). Although some courts use the term "definitiveness" and others "ascertainability," the idea is the same. WILLIAM RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* § 3:1, n.1 (5th ed. 2014) [hereinafter *NEWBERG ON CLASS ACTIONS*].

20. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013).

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

Anti-class action forces have been pushing, increasingly hard, on two concepts to defeat class certification: (1) the so-called implied requirement of “ascertainability”²² and (2) Article III standing, sometimes expressed as an attack on the “no injury class.” The defendants’ petitions for certiorari in the “*Whirlpool*” cases (*Whirlpool* and *Butler*) and in *Deepwater* raised these issues, as discussed more thoroughly below. Although the existence of a circuit split was urged in each petition, recent appellate decisions, both before and after the circuit opinions in *Whirlpool*, *Butler*, and *Deepwater*, have consistently reaffirmed two principles. First, ascertainability is satisfied by the utilization of a specific and objective class definition. Second, Article III standing requirements are, and must be, the same for class actions as they are for individual suits, such that absent class members, like individual plaintiffs, need not prove the merits of their claims, or the existence or quantum of damages, as a predicate of standing at the pre-trial stage or as a prerequisite to class certification.²³

In a trend that began prior to the Roberts Court regime, the early practice of addressing class certification at the pleading stage, based solely on the allegations of the complaint, had evolved to encompass an ever-greater examination of the underlying claims and issues as they would actually be presented at trial.²⁴ Such an examination typically requires some discovery, occurs after other challenges to the pleadings are resolved, and pushes class certification from the beginning of the sequence of pretrial motions, closer and closer to the point of trial, such that class certification may occur at, or even after, the summary judgment stage. This ongoing shift was ultimately reflected in the 2003 amendments to Rule 23, which changed the original 1966 prescription that class certification be determined “as early as practicable” in the action, to the contemporary requirement that class certification be determined “at an early practicable time.”²⁵

This temporal shift both accommodated the need and facilitated the practice of considering the merits—to the extent these were relevant to whether Rule 23’s criteria were met—but also enabled some mischief, in the nature of what could be called “merits creep,” and resulted in increasing confusion regarding just how to differentiate a merits review for the sole purpose of determining whether class action criteria are met,

22. See NEWBERG ON CLASS ACTIONS, *supra* note 19, §§ 3:1-3:7, 7:27-7:28 (on “ascertainability” or “definiteness” as an “implicit” request of Rule 23(a)).

23. See, specifically, the discussions of *Deepwater* and *Nexium*, *infra*, Part II.

24. This trend is described in Miller, *supra* note 15, at 296-98.

25. See FED. R. CIV. P. 23(c)(1)(A).

from deciding the merits for the merits' sake (and, not incidentally, from encroaching upon the factfinder's role at trial).

It was perhaps inevitable that class action opponents would attempt to use the judge-created ascertainability requirement and distort Article III standing concepts to promote the notion that Rule 23 (or perhaps due process) did not permit the inclusion, within a class definition, of absent class members who could not prove their individual damages claims. At their extremes, these arguments completely upend the natural sequence of events in any case, beginning to appear much like the trial presided over by the Red Queen in chapter 11 of Lewis Carroll's *Alice in Wonderland*, at which the jury was repeatedly urged to consider its verdict before and during the presentation of evidence.²⁶

These arguments also represent a conflation of the distinct concepts of class membership and entitlement to damages. The purpose of defining a class with precision is to guarantee its preclusive effect: questions of law and fact decided on a classwide basis bind the class members, thus eliminating sequential, piecemeal litigation and the potential for inconsistent outcomes on the same questions.²⁷ In most class actions, class members who win on liability must then, in some individualized fashion, prove up their own damages.²⁸ The ascertainability doctrine, as derived from the express Rule 23(c) requirement of a definite (or defined) class,²⁹ enables this stage of individualized proof to be administratively feasible to administer.³⁰ But nothing in Rule 23 contemplates that this final stage must precede class certification itself. Indeed, the near-inevitable³¹ inclusion of "uninjured" members within a class benefits defendants, because it precludes a second bite at the apple by plaintiffs excluded or expelled from the class. As discussed in Parts V and VI of this article, attempts to enlist *Comcast*, in particular, in the cause of imposing a pre-determination-of-injury requirement upon class certification have been unavailing.

III. *DUKES V. WAL-MART*: PREDOMINANCE IS THE NEW COMMONALITY

The *Wal-Mart* majority declared:

26. LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* ch. 11 (1865).

27. See NEWBERG ON CLASS ACTIONS, *supra* note 19, § 3:6.

28. See, e.g., *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014) (post-liability individualized proof of damages remains "routine" in class actions).

29. FED. R. CIV. P. 23(c)(1)(B).

30. See *supra* note 19.

31. See *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015).

The crux of this case is commonality—the rule requiring a plaintiff to show that ‘there are questions of law or fact common to the class.’ Rule 23(a)(2). That language is easy to misread, since ‘[a]ny competently crafted class complaint literally raises common questions.’ [quoting Richard A. Nagareda], Reciting these questions is not sufficient to obtain class certification . . . Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. ‘What matters to class certification . . . is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.’ [quoting Nagareda].³²

The *Wal-Mart* majority emphasized that “for purposes of Rule 23(a)(2) ‘[e]ven a single [common] question’ will do,” again quoting Richard Nagareda³³ However, a funny thing happened on the way to the reversal of Rule 23(b)(2) class certification in *Dukes*. The majority opinion mixed Nagareda’s insights on Rule 23(b)(2) prerequisites with the crucial insight made, by Nagareda himself, in the specific context of addressing Rule 23(b)(3) predominance. In its immediate context, the critical passage from Nagareda’s article, *Class Certification in the Age of Aggregate Proof*, cited by the majority in *Wal-Mart*, reads as follows:

Formulation of Rule 23 in terms of predominant common “questions” and generally applicable misconduct obscures the crucial line between dissimilarity and similarity within the class. The existence of a common “question” does not form the crux of the class certification inquiry, at least not literally, or else the first-generation case law would have been correct to regard the bare allegations of the class complaint as dispositive on the certification question. Any competently crafted class complaint literally raises common “questions.” What matters to class certification, however, is not the raising of common “questions”—even in droves—but, rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the

32. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550-51 (2011) (emphasis in original).

33. *Id.* at 2556; Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149 (2003).

potential to impede the generation of common answers.³⁴

Wal-Mart thus arguably elided predominance and commonality, imposing upon the commonality requirement of Rule 23(a)(2)—one that it reaffirms may be satisfied by “even a single common question”—with the more exacting “predominance” requirements of Rule 23(b)(3). Rule 23(a)(3) requirements traditionally, and structurally, have not applied to Rule 23(b)(2) class actions, including the claims presented in the *Wal-Mart* case. Importation of what is functionally a “predominance” requirement into all class actions, has been the source of much of the dismay engendered by *Wal-Mart*. It has also served as a springboard for the recurring argument (which ultimately failed to win the day in *Comcast*) that “predominance,” in turn, must mean totality: *all* questions of law and fact in a case must be susceptible of classwide treatment in order to obtain class certification.

Perhaps it was the structural move by the majority in *Wal-Mart* that led the petitioners in *Comcast*, and those who looked forward to a Supreme Court decision in *Comcast* as authority, to advocate for a new standard of class certification that would trump the formal structure and express provisions of Rule 23 itself,³⁵ but it was not to be.

IV. THE NECESSITY OF CLASS ACTION EXCEPTIONALISM

As restated in the majority opinion in *Wal-Mart*, “the class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’”³⁶ A class action is not simply the mass joinder of numerous individuals. If it were, it would be an unnecessary redundancy in the Federal Civil Rules. Rules 18, 19, and 20 already provide for such joinders. Rule 23’s exceptionalism lies not only in its availability when the individual joinder of all interested is “impracticable” due to sheer numbers, but in its essential nature as a representative suit. Earlier iterations of a class action rule, such as

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

35. Rule 23(c)(1)(B) provides that an order “that certifies a class action must define the class and the class claims, issues, or defenses . . .,” and Rule 23(c)(4) provides that, “[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues.” FED. R. CIV. P. 23. These provisions, among others, contemplate that some claims or questions within a class action will remain for individualized determination once the common questions have been decided. Nothing in Rule 23 requires or suggests that all questions within a class action must be common ones.

36. *Wal-Mart*, 131 S. Ct. at 2550 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).

Federal Equity Rule 38, articulate this exceptional nature starkly, providing: “When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.”³⁷

The Roberts Court has displayed a seeming preference for the 1930 FAA over the decades of legal scholarship and jurisprudence that actually applied a bitter lesson of the Great Depression. The market, unconstrained by regulation, will not deter itself, and the function of the class suit is not only, or not all, about compensation. Thanks to the endorsement of such use by *Concepcion* and *Italian Colors*, mandatory solo arbitration precludes court and collective action by consumers and small businesses. For them, the enforcement/deterrent function of the class suit is down, but not out. In the field of securities litigation, where it arose, and in what remains of consumer litigation, where courts readily adopted it, the endurance of the class action as a deterrent force is intact, unthreatened by *Comcast* and *Halliburton*, and affirmatively assisted by *Amgen*.

Chastised by the crash of a free-ranging stock market, some of the law and economics’ founding fathers called upon the nascent class action to enforce new market regulations and prevent repeat financial disputes. Kalven and Rosenfield, in their seminal *Function of the Class Suit* article,³⁸ presented the class action as the solution to the problem of unconstrained mass economies that “modern society” exposes us to “group injuries” for which we cannot effectively seek redress, either because we “do not know enough or because such redress is disproportionately expensive.”³⁹ Seeking compensation for oneself alone does not work, even if our individual stake is high enough. Effective deterrence does not come from the bottom up.

“If each is left to assert his rights if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all.”⁴⁰ The class solution for the deliverance gap has evolved, endured, and thrived in shareholder litigation, and *Amgen* and *Halliburton* safeguard its continuing health. A generation after Kalven and Rosenfield wrote,

37. NEWBERG ON CLASS ACTIONS, *supra* note 19, § 1:13 (quoting Equity Rule 38) (citation omitted).

38. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941).

39. *Id.*

40. *Id.*

the courts adopted their deterrent rationale to consumer class actions.⁴¹ California wrote this purpose into—and inserted Rule 23's provisions verbatim in—the substantive provisions of its Civil Code to create the Consumer Legal Remedies Act.⁴² Today's law and economic commentators continue to recognize the essential deterrent function of Rule 23(b)(3) consumer suits, beyond their compensatory function.⁴³

To make a representative action work, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members."⁴⁴ From these elementary propositions, ironically, class certification opponents have been emboldened to thwart class treatment by front-loading proof of damages by class members (which is not the same as certification, for determination at trial, of a classwide injury) and/or to extend Article III standing requirements, through a class-actions-only requirement that absent class members prove injury, by proving damages, as a prerequisite to standing.⁴⁵ The former ignores the representative nature of a class suit by treating it as just another bottoms-up aggregation of individual claims.

As the Roberts Court, like its predecessors, has noted, the class action is "an exception" to individual litigation, either singly or en masse. This exception exists because it is necessary. In our mass society, it serves functions of preclusion, efficiency, and deterrence, where significant common questions are present, that individual actions cannot perform at all; and that even mass joinders of individual claims (under Federal Rules 18-20 or through centralization as multi-district litigation under 28 U.S.C. 1407) cannot always perform as well. The fact that class actions are not the same as other joinder mechanisms is demonstrated by Rule 23 itself, through Rule 23(b)(3)'s "superiority" requirement. To

41. See, e.g., *Vasquez v. Superior Court*, 4 Cal.3d 800, 807-08 (Cal. 1971) (en banc).

42. CAL. CIV. CODE §§ 1750, et seq (West, Westlaw through Ch.2 of the 2015 Reg. Sess.). The act specifies certain unfair or deceptive practices and provides that a damages class action may be filed for practices effecting consumers similarly situated. *Id.* §§ 1770; 1781.

43. See, e.g., Brant T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2046-47 (2010) (positing provocatively that deterrence is the true function of small damages consumer class actions and that compensation could be dispensed with). The Roberts Court-era class action decisions of the Seventh Circuit, the birthplace of law and economics, are noteworthy for their recognition of the efficiency and deterrence advantages of the class mechanism. See *infra* Part V.D.E.

44. *E. Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (quoting *Schlesinger v. Reservists Comm. To Stop The War*, 418 U.S. 208, 216 (1974)). Both of these are quoted in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011).

45. As noted in *Nexium*, the latter argument would violate due process (and, incidentally, the Rules Enabling Act) by placing higher standards on plaintiffs as members of a class than they would face as named litigants. *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015).

certify a Rule 23(b)(3) damages class, the court must find “that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”⁴⁶ Sometimes, as *Wal-Mart* itself acknowledges, it is better to utilize a representative action to decide the important questions of law or fact shared by the class constituency—usually questions that relate to liability (that is, to the defendant’s conduct)—before proceeding (if necessary) to questions of damages.⁴⁷

Requiring, essentially, that all absent class members prove their damages before any class can be certified—a completely inefficient type of reverse bifurcation—is unnecessary to a proper class certification exercise, would nullify the deterrence function of the class suit, and would eliminate the efficiencies and economies that justify the representative action in the first place. Such insistence has gained no traction with the Roberts Court, possibly because it is a non sequitur in the Rule 23 context: it simply would not let Rule 23 be Rule 23.

V. THE POST-*AMGEN/COMCAST* LANDSCAPE

The big news of 2013 for class action practitioners and pundits was the Supreme Court’s decision in *Comcast Corp. v. Behrend*,⁴⁸ which rejected class certification in an antitrust action. *Comcast* floundered on the mismatch between the plaintiffs’ damages expert’s report and the surviving damages theory of the case. *Comcast*, both before and immediately after the actual decision was issued, was forecast (especially on the defense side) to have widespread implications for the future of class certification across substantive lines. This prediction has not materialized, for reasons articulated in the First, Fifth, Seventh, and Ninth Circuit decisions discussed below, consistent with the overwhelming majority of courts that have applied it in the antitrust context and beyond.

Concepcion clearly promoted arbitration at the expense of civil litigation, and *Wal-Mart* arguably changed class action law by essentially borrowing an influential articulation of Rule 23(b)(3) predominance and applying it as the test of Rule 23(a)(2) commonality.⁴⁹

46. FED. R. CIV. P. 23(b)(3).

47. *Wal-Mart*, 131 S. Ct. at 2561.

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

49. As noted above, the famous, and practical, admonition of *Wal-Mart* is that “[w]hat matters to class certification . . . is not the raising of common ‘questions’—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.” *Wal-Mart*, 131 S. Ct. at 2551 (quoting Nagareda,

However, *Comcast* did not purport, and has not been interpreted by appellate or district courts, to change the structure or functions of Rule 23 or to alter class certification standards.⁵⁰ Instead, *Comcast* was an interpretation of Rule 23 as it applied to classwide proof in the anti-trust context. It is fair to say that class certification is more difficult, more expensive, and less predictable, across substantive lines, than it was before *Wal-Mart* and *Comcast*, but this is primarily because of the increasing emphasis, in these decisions and others, on an extensive factual record and expert reports as predicates to the class certification decision.

This cumulative emphasis on evidentiary bases for every element of class certification "proof" has been driving the Rule 23 determination farther and farther away from the filing of the complaint, divorcing it from other procedural and pleadings disputes, and pushing it ever-closer to trial. As a result, class actions are more protracted and costly, and the class certification is ever more fact-specific. While courts, including the Supreme Court, continue the mantra that merits determination and class certification are distinct, certification is more and more merits-inflected, and the class/merits divide is increasingly fuzzy.⁵¹

supra note 34, at 132). The quoted section of this seminal article, authored by the late Professor Richard Nagareda (one of the Reporters for the ALI's *Aggregate Litigation* project), specifically addressed the predominance of common questions under Rule 23(b)(3), not the less rigorous commonality standard involved in the *Wal-Mart* case itself, a Rule 23(b)(2) class action. No matter: for practical purposes, commonality and predominance have merged.

50. While *Comcast* would logically be expected to have the greatest impact on class certification in antitrust cases, courts deciding class certification in such actions have continued to see the class certification process as straightforward. As observed by one seasoned jurist, Judge Samuel Conti, in certifying the class in *Cathode Ray Tube (CRT) Antitrust Litigation*, the court's job at the antitrust class certification stage is simple: determine whether the putative class showed that there is a reasonable method for determining, on a classwide basis, the antitrust impact's effects on the class members. *In re Cathode Ray Tube Antitrust Litig.*, No. 07-5944 SC, 2013 U.S. Dist. LEXIS 137946 (N.D. Cal. Feb. 13, 2013). This is a question of methodology, not merit. As the *CRT* court noted, "defendants continually argue . . . that the standard is somehow changed drastically under [*Wal-Mart*], *Comcast*, or *Amgen*, but the Court does not find that this is true. None of those cases changed the standard It is true that the Court's analysis overlaps with the merits . . . and requires that the [plaintiffs] make an evidentiary case for predominance, but the defendants are trying to push the . . . Court toward a full-blown merits analysis, which is forbidden and unnecessary at this point." *Id.* at *79 (internal citations omitted).

51. The circuit courts have struggled to stake the boundary between evaluating the merits for class certification purposes and determining the merits themselves. *See, e.g.*, *Szabo v. Bridgeport Mach.*, 249 F.3d 672 (7th Cir. 2001); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 27 (2d Cir. 2006). Commentators have debated the appropriate divide and the extent to which any merit scrutiny is appropriate at all. *See, e.g.*, Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, 33 HOFSTRA L. REV. 51, 84-88 (2004); Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 349 (2011); Sterg D. Olson, "Chipping Away": *The Misguided Trend Toward Resolving*

The eve-of-trial class certification phenomenon is the result of a series of decisions, none of which announced any express intent to make class actions more expensive, time-consuming, or merits-dependent, but which have, collectively and synergistically, had exactly that effect. In this era of rising concern over widening income disparity, it is dubious that making class actions, which are frequently consumers' only avenue to an enforceable determination of their claims, a more expensive and less certain enterprise is sound policy. Nonetheless (outside the Seventh Circuit, at least), that is often the present reality. The good news for plaintiffs is that courts, when they do reach the merits of the issues before them on the class certification inquiry, have been able to parse *Comcast* accurately, enabling class certification to proceed. This Article surveys some of the key post-*Comcast* decisions in the circuit and district courts.

A. *(b)(3) or Not (b)(3): What Is Predominance?*

The touchstone of class certification under Rule 23(b)(3)—the issue that remains when Rule 23's other pertinent requirements (typicality, commonality, adequacy of representation, and impracticability of joinder) have been met—is whether “the court finds that the 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 fairly and efficiently adjudicating the controversy.”⁵² Rule 23(b)(3) considerably supplies a list of factors, listed at 23(b)(3)(A)—(D), which may be consulted to determine whether a class action is “superior” to other available procedures. However, maddeningly perhaps, Rule 23(b)(3) leaves the concept of predominance undefined. Courts have striven for decades to reach a workable definition. Post-*Comcast*, courts, including the influential Seventh Circuit, tended to address predominance in practical, functional terms. Judge Lucy Koh, no stranger to sophisticated high-tech and intellectual property cases that characterize civil litigation in the Northern District of California, took a cue from the Seventh Circuit's post-*Comcast* *Butler* decision and the Supreme Court's 2013 *Amgen* decision, and expressly defined the predominance inquiry as holistic, qualitative, and pragmatic in her decision denying class certification in *In re Google Inc. Gmail Litigation*:

Merits Disputes as Part of the Class Certification Calculus, 43 U.S. F. L. REV. 935 (2009).

52. FED. R. CIV. P. 23(b)(3).

Importantly, the predominance inquiry is a pragmatic one, in which the Court does more than just count up common issues and individual issues. As the Seventh Circuit recently stated [in *Butler*], "predominance requires a qualitative assessment too; it is not bean counting." The Court's inquiry is not whether common questions predominate with respect to individual elements or affirmative defenses; rather, the inquiry is a holistic one, in which the Court considers whether overall, considering the issues to be litigated, common issues will predominate.⁵³

Judge Koh's *Gmail* decision does not rely entirely on post-*Comcast* authority for its predominance analysis. Rather, it examines and augments the unbroken line of legal development regarding the judicial view of predominance as a practical inquiry, which focuses on the utility and superiority of the preclusive classwide trial of important common questions. This is a trend that *Wal-Mart*, *Comcast*, and *Amgen* have punctuated, but did not interrupt. As Judge Koh further summarized in *Gmail*:

The Court's predominance analysis "entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class, a process that ultimately prevents the class from degenerating into a series of individual trials."⁵⁴ To meet the predominance requirement, "common questions must be a significant aspect of the case that can be resolved for all members of the class in a single adjudication."⁵⁵

B. "Just the Facts, Ma'am": Common Answers, Common Sense, and Predominance

Post-*Comcast* courts remain practical cats: facts matter. The facts of a specific case and the expertise that can be mustered to support them arguably matter more than anything, including the philosophy or

53. *In re Google Inc. Gmail Litig.*, No. 13-MD-02430-LHK, 2014 WL 1102660, at *12 (N.D. Cal. Mar. 18, 2014) (quoting *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013)) (citing *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013); CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., 7AA FEDERAL PRACTICE & PROCEDURE: CIVIL PROCEDURE § 1778 (3d ed. 2005)).

54. *Id.* (quoting *Gene & Gene LLC v. BioPay, LLC*, 541 F.3d 318 326 (5th Cir. 2008)) (citing *In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008) ("Under the predominance inquiry, a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case."); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (finding predominance "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class a single adjudication")).

55. *Id.* (quoting *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1068 (9th Cir. 2014) (internal quotation marks and alterations omitted)).

ideology of a particular judge. While the *Gmail* class was denied under Judge Koh's rigorous analysis, the same analysis, by the same judge, applying the same case law, yielded a grant of class certification in *In re High-Tech Employee Antitrust Litigation*,⁵⁶ where multiple rounds of briefing and hearings were required to satisfy the court that, in this antitrust action, common questions indeed predominated. In her *High-Tech* decision, Judge Koh discussed, at length, the class certification standards emerging from *Wal-Mart*, *Comcast*, and *Amgen*, together with the Ninth Circuit's own post-*Comcast* decision, *Levy v. Medline Industries, Inc.*,⁵⁷ which reversed the denial of class certification in a labor law case. Likewise deployed were the Seventh Circuit's post-*Comcast Butler* decision and its decision in *Messner v. North Shore University HealthSystem*,⁵⁸ which had also reversed a denial of class certification.

Adding tartness to this mix was the D.C. Circuit's post-*Comcast* decision in *In re Rail Freight Fuel Surcharge Antitrust Litigation*,⁵⁹ in which the D.C. Circuit held that common questions of fact "cannot predominate where there exists no reliable means of proving classwide injury in fact" in the antitrust context. Moreover, it is now "indisputably the role of the district court to scrutinize the evidence before granting certification."⁶⁰ The *High-Tech* court combined the qualitative predominance assessment articulated by the Sixth and Seventh Circuits in the "washer" cases with the "show me" skepticism of *Fuel Surcharge*, which "requires district courts to closely scrutinize factual evidence and expert reports that demonstrate impact can be proven on a classwide basis."⁶¹ In both *High-Tech* and *Gmail*, Judge Koh took the opportunity to distill, from the Supreme Court and subsequent appellate decisions, a holistic predominance analysis to apply in the antitrust context:

Certain principles regarding the legal standard that this Court must apply in determining whether the Technical Class should be certified emerge from *Wal-Mart*, *Amgen*, *Comcast*, and the circuit court cases applying this Supreme Court authority. First, and most importantly, the critical question that this Court must answer is whether common questions predominate over individual questions. In essence, this Court must determine whether common evidence and common methodology

56. *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167 (N.D. Cal. 2013).

57. *Levy v. Medline Indus., Inc.*, 716 F.3d 510 (9th Cir. 2013).

58. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802 (7th Cir. 2012).

59. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252-53 (D.C. Cir. 2013).

60. *Id.* at 253.

61. *See High-Tech*, 985 F. Supp. 2d at 1186.

could be used to prove the elements of the underlying cause of action. Second, in answering this question, this Court must conduct a "rigorous" analysis. This analysis may overlap with the merits, but the inquiry cannot require Plaintiffs to prove elements of their substantive case at the class certification stage. Third, this Court must determine not only the [admissibility], of expert evidence that forms the basis of the methodology that demonstrates whether common questions predominate. Rather, this Court must also determine whether that expert evidence is persuasive, which may require the Court to resolve methodological disputes. Fourth, the predominance inquiry is not a mechanical inquiry of "bean counting" to determine whether there are more individual questions than common questions. Instead, the inquiry contemplates a qualitative assessment, which includes a hard look at the soundness of statistical models. Fifth, Plaintiffs are not required to show that each element of the underlying cause of action is susceptible to classwide proof. Rather, they need only show that common questions will predominate with respect to their case as a whole.⁶²

C. *Deepwater Dives Into Wal-Mart, Amgen, and Comcast*

In affirming the Rule 23(e) final approval of a comprehensive economic loss class action settlement to compensate claims arising from the April 20, 2010 explosion, fire, and resulting catastrophic oil spill from the drilling rig *Deepwater Horizon*, the Fifth Circuit had occasion to discuss the reach of *Comcast*, which, among other decisions, was mustered as authority by a handful of settlement objectors against settlement approval.⁶³

Writing for the majority, Judge W. Eugene Davis first rejected the necessity or propriety of an evidentiary inquiry into the Article III standing of absent class members, essentially holding that standing was a matter of allegation, that is, of pleading rather than proof.⁶⁴ This analysis and its conclusion forecast the observations of Justice Antonin Scalia, writing for a unanimous court in *Lexmark Int'l v. Static Control*

62. *Id.* at 1187 (citing *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191, 1194, 1196 (2013); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011); *Fuel Surcharge*, 725 F.3d at 255; *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013)).

63. While the class action settlement itself has been affirmed, disputes over settlement interpretation remain before the Fifth Circuit. Notwithstanding this activity, over \$3 billion thus far has been distributed to class members. For a detailed description of the economic settlement's terms, see Samuel Issacharoff and D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 L. L. REV. 397 (2014).

64. *In re Deepwater Horizon*, 739 F.3d 790, 805-06 (5th Cir. 2014), *reh'g en banc denied*, 756 F.3d 320 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 754 (2014).

Components, Inc.,⁶⁵ a non-class action:

[P]roximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct [L]ike any other element of a cause of action, it must be adequately alleged at the pleading stage in order for the case to proceed If a plaintiff's allegations, taken as true, are insufficient to establish proximate causation, then the complaint must be dismissed; if they are sufficient, then the plaintiff is entitled to an opportunity to prove them.⁶⁶

Judge Davis rejected the standing challenge as necessitating a merits inquiry, synthesizing the Supreme Court's holdings in *Amgen* and *Wal-Mart* as follows:

BP has cited no authority—and we are aware of none—that would permit an evidentiary inquiry into the Article III standing of absent class members during class certification and settlement approval under *Rule 23*. It is true that a district court may “probe behind the pleadings” when examining whether a specific case meets the requirements of *Rule 23*, such as numerosity, commonality, typicality, and adequacy [citing *Wal-Mart*, 131 S. Ct. at 2551]. But the Supreme Court cautioned in [*Amgen*] that “*Rule 23* grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the *Rule 23* prerequisites for class certification are satisfied.”⁶⁷

Deepwater settlement objectors had argued that *Comcast* (decided three months after the district court's class certification and settlement approval orders) “precludes certification under *Rule 23(b)(3)* in any case where the class members' damages are not susceptible to a formula for classwide measurement.”⁶⁸ As the *Deepwater* majority explained, this is “a misreading of *Comcast* *Comcast* held that a district court errs by premising its *Rule 23(b)(3)* decision on a formula for classwide measurement of damages whenever the damages measured by that formula are incompatible with the class action's theory of liability.”⁶⁹ The *Deepwater* decision sharpens this point: while the *Comcast* rule “may reveal an important defect in many formulas for classwide

65. *Lexmark Int'l v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

66. *Id.* at 1391 n.6.

67. *Deepwater*, 739 F.3d at 805 (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011); *Amgen*, 133 S. Ct. at 1194-95).

68. *Id.* at 815.

69. *Id.*

measurement of damages,” nothing in *Comcast* mandates a formula for classwide measurement of damages in all cases.⁷⁰ The *Comcast* formula (damages evidence = damages theory) “has no impact on cases . . . in which predominance was based not on common issues of damages but on the numerous common issues of liability.”⁷¹

Thus, in the *Deepwater* economic settlement,

the district court did not include a formula for classwide measurement of damages among its extensive listing of the “common issues” that weighed in favor of certification. The district court always recognized that the class members’ damages “would have to be decided on an individual basis were the cases not being settled,” as would “the extent to which the *Deepwater Horizon* incident versus other factors caused a decline in the income of an individual or business.”⁷²

The *Deepwater* settlement class is thus analogous to the defective washer classes certified in *Butler* and *Whirlpool* (both of which were certified for the classwide determination of common liability issues) rather than to the antitrust decision in *Comcast*, in which the plaintiffs sought an aggregate classwide damages figure, which is the norm in antitrust cases but unusual in other class actions.⁷³

D. *After Amgen and Comcast Class Certification Decisions In The Seventh Circuit*

Perhaps surprisingly to those who recollect the Seventh Circuit’s earlier withering critiques of class actions in decisions such as *In re Rhone-Poulenc Rorer, Inc.*⁷⁴ and *In re Bridgestone/Firestone Inc.*,⁷⁵ the Seventh Circuit has emerged in recent years, both pre- and post-*Wal-Mart* and *Comcast*, as a leading class action court, most notably in decisions authored by Judge Richard Posner, the author of *Rhone-Poulenc*, and Chief Judge Diane Wood (joined by Judges Cudahy and Rovner), author of *Suchanek v. Sturm Foods, Inc.*, a significant recent

70. *Id.*

71. *Id.*

72. *Id.*

73. See *Butler v. Sears Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013).

74. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (Posner, J.) (reversing class certification of nationwide personal injury class of hemophiliacs alleging negligent HIV contamination of blood products under multiple states laws).

75. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002) (Easterbrook, J.) (reversing class certification of nationwide consumer fraud class).

consumer class decision.⁷⁶ Both *Butler* decisions (pre- and post-*Comcast*) were authored by Judge Posner, and recent months have seen an additional series of class certification decisions, constituting a Seventh Circuit, 21st Century jurisprudence of class certification, that promote the efficiency and utility of the class action mechanism, particularly with respect to consumer claims. These decisions are not limited to the consumer arena, however. In the immediate wake of *Wal-Mart*, Judge Posner authored the affirmation of employment class certification in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, an employment discrimination case involving a smaller-scale class of African American stockbrokers.⁷⁷

Other post-*Wal-Mart*, post-*Comcast* recent Judge Posner class certification decisions include: *Chapman v. Wagener Equities, Inc.*,⁷⁸ *Parko v. Shell Oil Co.*,⁷⁹ *Driver v. AppleIllinois, LLC*,⁸⁰ *Phillips v. Asset Acceptance, LLC*,⁸¹ *Hughes v. Kore of Indiana Enterprise, Inc.*,⁸² *Pearson v. NBTY*,⁸³ and *Redman v. Radioshack Corp.*⁸⁴ In *Hughes*, Judge Posner promotes the use of *cy pres* as an effective remedy in small-damages suits—bucking a trend of judicial skepticism toward *cy pres*:

In a class action, the reason for a remedy modeled on *cy pres* is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement (or of the judgment, in the rare case in which a class action not dismissed pretrial goes to trial rather than being settled) to the class mem-

76. *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750 (7th Cir. 2014).

77. *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012).

78. *Chapman v. Wagener Equities, Inc.*, 747 F.3d 489 (7th Cir. 2014) (certifying a class of junk fax recipients in an action brought under the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(C), for statutory damages).

79. *Parko v. Shell Oil Co.*, 739 F.3d 1083 (7th Cir. 2014) (an opinion rejecting defendants' "numerosity" challenge, but reversing class certification for plaintiffs' failure to satisfy predominance in a benzene exposure case).

80. *Driver v. AppleIllinois, LLC*, 739 F.3d 1073 (7th Cir. 2014) (denying Rule 23(f) petition from denial of motion to decertify class).

81. *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1083 (7th Cir. 2013) (reversing denial of class certification in Fair Debt Collection Practices case, articulating a practical standard for adequacy, and reaffirming that "proof of injury is not required when the only damages sought are statutory").

82. *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672 (7th Cir. 2013) (reversing decertification order).

83. *Pearson v. NBTY*, 772 F.3d 778, 787 (7th Cir. 2014) (reversing class settlement).

84. *Redman v. Radioshack Corp.*, 768 F.3d 622 (7th Cir. 2014), *cert. denied sub nom. Nicaaj v. Shoe Carnival, Inc.*, 135 S. Ct. 1429 (2015) (reversing "coupon" class settlement).

bers.⁸⁵

For contrast, see Chief Justice Roberts' unusual dissent from the denial of certiorari in *Marek v. Lane*,⁸⁶ discussed below,⁸⁷ targeting *cy pres* for future Supreme Court scrutiny.

The Seventh Circuit's contemporary jurisprudence continues to emphasize the clarifying role of the Supreme Court's common question/common answer insight in *Wal-Mart*, and the proper meaning of post-*Comcast* predominance. An example of this integration of Roberts Court holdings into the enduring Rule 23 infrastructure is found in a consumer class action "about coffee." Not just any coffee—but cheap instant coffee deceptively portrayed and promoted as a competitor of the popular, and premium-priced, "K-cup" coffee.⁸⁸

As the Seventh Circuit discerned in *Suchanek*, the district court, in denying class certification, erred when it "failed to recognize the question common to the claims of all putative class members: whether [the product's] packaging was likely to mislead a reasonable consumer."⁸⁹ In the consumer context, where "the same conduct or practice by the same defendant gives rise to the same kind of claim from all class members, there is a common question."⁹⁰

The second error requiring reversal of the denial of certification was the district court's misreading of *Comcast*. The district court took predominance too far. "Neither Rule 23 nor any gloss that decided cases have added to it requires that *every* question be common."⁹¹ The damages themselves, for example, may vary, and "it is routine in class actions to have a final phase in which individualized proof must be submitted."⁹²

85. *Hughes*, 731 F.3d at 676.

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

87. *See infra* Part VII.

88. *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 752 (7th Cir. 2014).

89. *Id.* at 755 (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) and *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014) (a Lanham Act case regarding misleading packaging)).

90. *Id.* at 756 (citing *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010); *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 601-02 (7th Cir. 2014); and *Butler v. Sears Roebuck & Co.*, 727 F.3d 796, 798 (7th Cir. 2013)).

91. *Id.* at 756 (emphasis in original).

92. *Id.* (citing Judge Easterbrook's decision in *IKO Roofing*, reiterating the *Comcast* rule: theories of damages must match theories of liability, but predominance does not depend on common damages, and damages may be determined by individualized proof).

E. *Whirlpool and Butler: Moldy Washers As the Champions of Time-of-Purchase Consumer Injury*

What Happened to the Washers? The class certification decisions of the Sixth and Seventh Circuits in the “moldy washer” cases, *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*⁹³ and *Butler v. Sears, Roebuck & Co.*,⁹⁴ spent a year in the Supreme Court on “GVR” (Grant-Vacate-Remand) and were then sent back to their respective circuits for further consideration in light of *Comcast*.⁹⁵ After reconsidering the matter in light of *Comcast*, the Sixth Circuit affirmed the order of the district court certifying a liability class.⁹⁶ Similarly, on remand from the Supreme Court, the Seventh Circuit reconsidered its prior ruling in light of *Comcast* and denied the defendant’s quest for further remand to the district court, “for a fresh ruling on certification in light of *Comcast*,” while the plaintiffs requested the court to reinstate its prior judgment, granting class certification.⁹⁷ The Seventh Circuit reaffirmed its earlier grant of class certification.⁹⁸

In a nutshell, both “moldy washer” cases involved Whirlpool-manufactured front-loading washing machines (branded as “Kenmore” when sold by Sears) that allegedly were designed in such a way that they trapped mold and did not adequately self-clean. As a result, consumers were required to undertake expensive and extraordinary maintenance to ameliorate the development of mold and resulting noxious odors: a situation undisclosed by the defendants at the time of sale. As summarized in the plaintiffs’ initial brief in opposition to the second round (post-*Comcast*) of certiorari petitions, the plaintiffs summarized a problem revealed in pre-certification discovery as follows:

Whirlpool’s own engineers have conceded that the FLWs [front-loading washing machines] are the “ideal environment for bacteria and mold to flourish” because of their “lower water levels, high moisture, and reduced ventilation.” Whirlpool, moreover, concluded that odor, a common end result of mold contamination, had developed in 35% of the FLWs within just a few years, and estimated that 50% of “current front-load washer owners might be looking for a solution to an odor

93. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409 (6th Cir. 2012).

94. *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012).

95. *See Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013).

96. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 845 (6th Cir. 2013).

97. *See Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 798 (7th Cir. 2013).

98. *Id.* at 802.

problem with their machines.”

While Sears and Whirlpool denied warranty coverage for this problem, Whirlpool developed and sells a product to *all* purchasers of the FLWs that it touts as addressing the problem. Sears and Whirlpool, moreover, eventually instructed *all* purchasers to follow elaborate procedures to forestall the mold problem, including running extra cycles with bleach, wiping and cleaning the machine after each use, and leaving the washer door open at all times.⁹⁹

In *Butler*, on remand from the Supreme Court, the Seventh Circuit reiterated its previous holding that it was the district court that had erred, by failing to conduct a rigorous class certification analysis of the claims, and reiterated its reversal of the district court’s denial of mold class certification. In applying the *Comcast* decision to the facts as developed in the case, and to the claims asserted, Judge Posner summarized the holding of *Comcast* as follows:

Comcast holds that a damages suit cannot be certified to proceed as a class action unless the damages sought are the result of the class-wide *injury* that the suit alleges. *Comcast* was an antitrust suit, and the Court said that “if [the plaintiffs] prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder competition, since that is the only theory of antitrust impact accepted for class-action treatment by the District Court. It follows that a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3).” “[A] methodology that identifies damages that are not the result of the wrong” is an impermissible basis for calculating class-wide damages. “For all we know, cable subscribers in Gloucester County may have been overcharged because of petitioners’ alleged elimination of satellite competition (*a theory of liability that is not capable of classwide proof*).” And on the next page of its opinion the Court quotes approvingly from Federal Judicial Center, *Reference Manual on Scientific Evidence* 432 (3d ed. 2011), that “the first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact of that event.” None of the parties had even challenged the district court’s ruling that class certification required “that the damages resulting from . . . [the antitrust violation] were measurable ‘on a class-wide basis’ through use of a

99. Respondents’ Brief in Opposition, *Butler*, 727 F.3d 796 (No. 12-1067), 2013 WL 1836534, at *4-5 (internal citations omitted).

‘common methodology.’”¹⁰⁰

The situation in *Comcast* was then contrasted to the claims presented in *Butler*:

Unlike the situation in *Comcast*, there is no possibility in this case that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis; all members of the mold class attribute their damages to mold and all members of the control-unit class to a defect in the control unit.

. . .

Sears compares the design changes that may have affected the severity of the mold problem to the different antitrust liability theories in *Comcast*. But it was not the existence of multiple theories in that case that precluded class certification; it was the plaintiffs’ failure to base all the damages they sought on the antitrust impact—the injury—of which the plaintiffs were complaining. In contrast, any buyer of a Kenmore washing machine who experienced a mold problem was harmed by a breach of warranty alleged in the complaint.

Furthermore and fundamentally, the district court in our case, unlike *Comcast*, neither was asked to decide nor did decide whether to determine the damages on a class-wide basis.¹⁰¹

Butler, consistent with the Seventh Circuit’s earlier, post-*Wal-Mart* decision in *McReynolds*,¹⁰² explained that when the class action is “limited to determining liability on a class-wide basis, [] separate hearings to determine—if liability is established—the damages of individual class members, or homogenous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed.”¹⁰³

In *Butler*, the Seventh Circuit further takes the opportunity to emphasize a key holding of *Wal-Mart*: that an “issue ‘central to the validity of each one of the claims’ in a class action, if it can be resolved

100. *Butler*, 727 F.3d at 799 (internal citations omitted).

101. *Id.* at 800 (internal citations omitted).

102. *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012).

103. *Butler*, 727 F.3d at 800. Rule 23(c)(4) has an established history in the Seventh Circuit as a practical, efficient, and rule-based mechanism to sort common questions from individual ones; the former are provided class treatment, while the latter are reserved for individual determination. *See, e.g., Pella Corp. v. Saltzman*, 606 F.3d 391, 393-94 (7th Cir. 2010) (*per curiam*); *McReynolds*, 672 F.3d 482, *cert. denied*, 133 S. Ct. 338 (2012); *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076 (7th Cir. 2013).

'in one stroke' can justify class treatment."¹⁰⁴ *Butler* recognizes that *Wal-Mart* was speaking of Rule 23(a)(2) commonality (although, as this Article notes, it borrowed from Nagareda's predominance articulation to do so). But *Butler* goes on to observe that "predominance requires a qualitative assessment too; it is not bean counting."¹⁰⁵ Moreover, as *Butler* notes, damages is *not* one of those questions that must be placed on the "common" side of the ledger in order for predominance to be met. To do so would render Rule 23 dysfunctional:

It would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages. If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits. As we noted in *Carnegie v. Household Int'l, 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 17 million suits each seeking damages of \$15 to \$30 The realistic alternative to a class action is not individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30." The present case is less extreme: tens of thousands of class members, each seeking damages of a few hundred dollars. But few members of such a class, considering the costs and distraction of litigation, would think so meager a prospect made suing worthwhile.¹⁰⁶

The *Butler* decision, on remand, reaffirmed a single, central, unifying, and predominating common question, which it described as follows:

There is a single, central, common issue of liability: whether the Sears washing machine was defective. Two separate defects are alleged, but remember that this class action is really two class actions. In one the defect alleged involves mold, in the other the control unit. Each defect

104. *Butler*, 727 F.3d at 801 (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)).

105. *Id.* at 801 (citing *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623 (1997); and its own *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 819 (7th Cir. 2012)).

106. *Id.* (citing *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

is central to liability. Complications arise from the design changes and from separate state warranty laws, but can be handled by the creation of subclasses. These are matters for the district judge to consider in the first instance, and Sears will be able to present to her the evidence it's obtained since the district judge ruled on certification almost two years ago.¹⁰⁷

On its post-*Comcast* remand, the Sixth Circuit also reaffirmed *Whirlpool's* class treatment, in a decision dissimilar in style, but not in substance, to that in *Butler*. Addressing the meaning of a Supreme Court GVR order, the *Whirlpool* decision observed that such is not equivalent to reversal on the merits, nor is it an "invitation to reverse"; rather, it directs a simple determination of whether the original decision to affirm the class certification order was correct or "whether *Comcast Corp.* compels a different resolution."¹⁰⁸

Reviewing the facts developed in the case again, including Whirlpool's clever transformation of a warranty liability to a profit center (the development and sale of "Affresh" tablets to their customers to battle the mold problem), the court had no difficulty in determining common questions of defect, nondisclosure, breach of warranty, and economic harm.¹⁰⁹ The *Whirlpool* court applied both *Comcast* and *Amgen* to its re-analysis, addressing *Amgen* as follows:

Following *Amgen's* lead, we uphold the district court's determination that liability questions common to the Ohio class—whether the alleged design defects in the Duets proximately caused mold to grow in the machines and whether Whirlpool adequately warned consumers about the propensity for mold growth—predominate over any individual questions. As in *Amgen*, the certified liability class "will prevail or fail in unison," for all of the same reasons we discussed above in conjunction with the Rule 23(a) prerequisites of commonality and typicality. Rule 23(b)(3) does not mandate that a plaintiff seeking class certification prove that each element of the claim is susceptible to classwide proof. Evidence will either prove or disprove as to all class members whether the alleged design defects caused the collection of biofilm, promoting mold growth, and whether Whirlpool failed to warn consumers adequately of the propensity for mold growth in the Duets.¹¹⁰

107. *Id.* at 801-02 (citing *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 365 (7th Cir. 2012)).

108. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 845 (6th Cir. 2013).

109. *Id.* at 848-49.

110. *Id.* at 859 (quoting and citing *Amgen*, 133 S. Ct. at 1191, 1196).

Turning to an analysis of *Comcast*, and a comparison of the *Comcast* claims and facts with those presented by the washer litigation, the *Whirlpool* court concluded:

This case is different from *Comcast Corp.* Here the district court certified only a liability class and reserved all issues concerning damages for individual determination; in *Comcast Corp.* the court certified a class to determine both liability and damages. Where determinations on liability and damages have been bifurcated, *see* Fed. R. Civ. P. 23(c)(4), the decision in *Comcast*—to reject certification of a liability and damages class because plaintiffs failed to establish that damages could be measured on a classwide basis—has limited application. To the extent that *Comcast Corp.* reaffirms the settled rule that liability issues relating to injury must be susceptible of proof on a classwide basis to meet the predominance standard, our opinion thoroughly demonstrates why that requirement is met in this case.¹¹¹

The *Whirlpool* decision also considered the overall impact of both *Amgen* and *Comcast* on Rule 23 class certification criteria. It noted that both cases “are premised on existing class-action jurisprudence. The majority in *Comcast* concludes that the case ‘turns on the straightforward application of class certification principles,’ and the dissent concurs that ‘the opinion breaks no new ground on the standard for certifying a class action . . .’”¹¹² *Whirlpool* thus concluded that “in ‘the mine run’ of cases it remains the ‘black letter rule’ that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.”¹¹³

As to the sequence and methodology for adjudication of common and individual questions, *Whirlpool* is succinct:

Once the district court resolves under Ohio law the common liability questions that are likely to generate common answers in this case, the court will either enter judgment for Whirlpool or proceed to the question of plaintiffs’ damages. In the latter event, the court may exercise its discretion in line with *Amgen*, *Comcast Corp.*, and other cases cited in this opinion to resolve the damages issues.¹¹⁴

As it turned out, the jury rendered a defense verdict in the *Whirlpool* trial

111. *Id.* at 860 (citing *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013)) (“observing after *Comcast* that class ‘must be able to show that their damages stemmed from the defendant’s actions that created the legal liability’”).

112. *Id.* at 861 (quoting *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433, 1436 (2013)).

113. *Id.* at 860-61.

114. *Id.*

on October 30, 2014.¹¹⁵ At the time of this writing, an appeal is underway. The *Whirlpool* experience, including the trial, demonstrates that class actions are not theoretical. Properly designed, they serve their intended precise function at trial as well as in settlement. Legal commentary in the immediate wake of the *Whirlpool* verdict confirmed the trial as an example of class action efficacy.¹¹⁶

In the washer cases, did both the Sixth and Seventh Circuits defy *Comcast* in reconsidering, and reaffirming, their previous class certification decisions? The defendants certainly thought so and promptly filed petitions for certiorari in both actions, sending the “moldy washer” cases on a return trip (a second rinse cycle, if you will) back to the Supreme Court. Surprisingly or not, certiorari was denied in both actions.¹¹⁷ The *Butler* case is proceeding toward trial in their respective district courts at this writing. *Comcast*, thus, did not cast its shadow across these consumer warranty cases. The simplest explanation is that the holding and rationale of *Comcast* simply did not reach them. Neither washer case sought an aggregate classwide damages amount. Rather, class certification in each was sought for the preclusive determination of liability-related common questions only.

VI. IMPRECATIONS ON AN IMPLICATION: COURTS THWART THE ATTEMPTED MERGER OF THE “ASCERTAINABILITY” REQUIREMENT AND THE MERITS-QUALIFIED CLASS

To assure that class action notices fulfill their due process functions of informing recipients as to whether they were within the class, and thus to assure the class judgments would have their intended preclusive affect, courts began to impose an implicit pre-condition to class certification, holding that “the identity of class members must be

115. Gibson Dunn & Crutcher LLP, *2014 Year-End Update on Class Actions*, GIBSON DUNN (Jan. 30, 2015), <http://www.gibsondunn.com/publications/pages/2014-Year-End-Update—Class-Actions.aspx>.

116. See, e.g., Alison Frankel, *Why Whirlpool’s Win in Moldy Washer Trial Vindicates Consumer Class Actions*, REUTERS (Oct. 30, 2014), <http://blogs.reuters.com/alison-frankel/2014/10/30/why-whirlpools-win-in-moldy-washer-trial-vindicates-consumer-class-actions/>; Paul Karlsgodt, *Why Whirlpool’s Class Action Trial Victory May Be Bad News For Class Action Defendants*, CLASS ACTION BLAWG (Oct. 31, 2014); <http://classactionblawg.com/category/rule-23/>; Melody Akhavan, *Despite Whirlpool’s Victory At Trial, Earlier Order Denying Decertification Raises Questions About Dukes/Comcast Impact*, PROD. LIAB. MONITOR (Oct. 31, 2014), <http://product-liability.weil.com/class-action-law-suits/despite-whirlpools-victory-at-trial-earlier-order-denying-decertification-raises-questions-about-dukescomcast-impact/>.

117. See *Sears, Roebuck & Co. v. Butler*, 134 S. Ct. 1277 (2014); *Whirlpool Corp. v. Glazer*, 134 S. Ct. 1277 (2014).

reasonably ascertainable by reference to objective criteria.”¹¹⁸ In its usual articulation, this “ascertainability” requirement means that “the class description is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.”¹¹⁹ The rationale is described in the Federal Judicial Center’s *Manual for Complex Litigation Fourth*, as follows:

21.222. Definition of Class.

Defining the class is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled under Rule 23(c)(2) to the “best notice practicable” in a Rule 23(b)(3) action. The definition must be precise, objective, and presently ascertainable. For example, the class may consist of those persons and companies that purchased specified products or securities from the defendants during a specified period, or it may consist of all persons who sought employment or who were employed by the defendant during a fixed period.

Although the identity of individual class members need not be ascertained before class certification, the membership of the class must be ascertainable. Because individual class members must receive the best notice practicable and have an opportunity to opt out, and because individual damage claims are likely, Rule 23(b)(3) actions require a class definition that will permit identification of individual class members, while Rule 23(b)(1) or (b)(2) actions may not. An identifiable class exists if its members can be ascertained by reference to objective criteria. The order defining the class should avoid subjective standards (*e.g.*, a plaintiff’s state of mind) or terms that depend on resolution of the merits (*e.g.*, persons who were discriminated against)¹²⁰

As noted above, defendants now frequently contend that class

118. *Ebin v. Cangadis Food, Inc.*, 297 F.R.D. 561, 566-67 (S.D.N.Y. 2014). The engrafting of ascertainability onto Rule 23(a) has early roots. As stated in *DeBremacker v. Short*, “It is elementary that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable.” *DeBremacker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970).

119. *See, e.g., Ebin*, 297 F.R.D. at 567; *see* NEWBERG ON CLASS ACTIONS, *supra* note 19, § 3:1.

120. FEDERAL JUDICIAL CENTER, 2 MANUAL FOR COMPLEX LITIGATION 270 (4th ed. 2004). A recent decision affirming certification of a settlement class excused a class definition that included common stock investors who bought defendant’s stock “and were damaged thereby,” rejecting the attacks, by settlement objectors, on the definition as “not precise, objective or presently ascertainable.” *Union Asset Mgm’t v. Dell*, 669 F.3d 632, 639 (5th Cir. 2012). The “damaged” language was “superfluous,” merely conveying a basic standing requirement—an allegation of damage; and one which, however, was resolved in the settlement, with claims paid based on trading records, rather than merits minitrials. *Id.*

certification is improper because the class includes members who were not injured by the conduct or product at issue. This challenge includes several lines of attack. Defendants may contend that the presence of any uninjured class members (even a minuscule number) defeats Rule 23(b)(3)'s predominance requirement because the existence of any uninjured class members precludes the use of common proof at trial. This attack is most frequently seen in antitrust cases where, unlike other substantive areas of law, liability and damages merge, at least partially, in the element of classwide impact of the anticompetitive conduct. Hence the *Comcast* holding that the damages methodology upon which class certification is based—and upon which classwide proof at trial will depend—must match the actual claim or theory on which class certification is sought and granted. As articulated, most recently, by the First Circuit in *In re Nexium Antitrust Litigation*:¹²¹

Relevant to the question of whether a class can include uninjured members, three principles are established. First, a class action is improper unless the theory of liability is limited to the injury caused by the defendants. In other words the defendants cannot be held liable for damages beyond the injury they caused. The Supreme Court emphasized this principle in *Comcast*.¹²²

The *Nexium* decision builds upon other circuits' applications of *Comcast*, including *Deepwater*, *Butler*, the Ninth Circuit's *Leyva v. Medline Industries, Inc.* decision, and the Tenth Circuit's *In re Urethane Antitrust Litigation* decision.¹²³

121. *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015).

122. *Id.* at 18. As *Nexium* explains, the *Comcast* plaintiffs had initially relied on four theories of liability and had calculated their aggregate damages based on all four. When the district court certified the class based on only one theory, and plaintiffs did not provide a damages calculation for that theory standing alone, they failed to establish that “damages are capable of measurement on a classwide basis” and hence flunked Rule 23(b)(3) predominance. *Id.* (quoting *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1434 (2013)). In affirming class certification in the case before it, the *Nexium* court found the plaintiffs' theory of liability to be appropriately limited to the damages addressed in their expert methodology.

123. *Id.* at *17-18 n.15.

Other circuits have also adopted this understanding of *Comcast*. See *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1258-59 (10th Cir. 2014) (explaining the expert's benchmarks in *Comcast* became ‘useless’ upon a ruling that three of the liability theories could not be used); *In re Deepwater Horizon*, 739 F.3d 790, 815 (5th Cir. 2014), (explaining that *Comcast* stands for the proposition that formulas for classwide measurement of damages should not be ‘incompatible’ with liability theories); *Butler v. Sears*, 727 F.3d 796, 799 (7th Cir. 2013) (A damages model must ‘measure only those damages attributable to [the liability] theory. If the model does not even attempt to do that, it cannot’ meet the requirements of Rule 23(b)(3), (citing *Comcast*, 133 S. Ct. at 1433)), *cert. denied*, 134 S. Ct. 1277, 188 L. Ed. 2d 298 (2014); *Leyva v. Medline Indus. Inc.*, 716 F.3d

The second principle identified in *Nexium* as relevant to whether a class may include uninjured members is the implied class certification prerequisite of "definiteness" or "ascertainability." As *Nexium* explains, "second, the definition of the class must be 'definite,' that is, the standards must allow the class members to be ascertainable."¹²⁴ *Nexium* also cites the Third Circuit's decision in *Carrera v. Bayer Corp.*,¹²⁵ which required as an "essential prerequisite of a class action" that plaintiffs "show, by a preponderance of the evidence, the class is currently and readily ascertainable based on objective criteria."¹²⁶ Note that although *Carrera* uses the term "readily ascertainable," this is not itself a departure from the standard formulation of ascertainability, which relies upon an objective definition of the class to enable identification of its members at a later time, typically after the determination of liability questions or at the notice or claim stage of a class action settlement when the purpose of identifying the members is to assure their meaningful participation in a claims process. "Readily ascertainable" does not, or should not, mean "immediately identifiable." The *Carrera* court, unlike the *Nexium* majority, was skeptical of the proposed affidavit-based claims process; by contrast, the Seventh Circuit has endorsed and recommended such streamlined procedures for small claims settlements.¹²⁷ The *Nexium* decision itself holds to the standard view: that the class certification satisfies these standards "by being defined in terms of purchasers of Nexium during the class period"¹²⁸

510, 514 (9th Cir. 2013) ('[P]laintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability.') (citing *Comcast*, 133 S. Ct. at 1435)).

124. See NEWBERG ON CLASS ACTIONS, *supra* note 19, §§ 3:1, 3:3 (explaining that an "implied" requirement for certification is that a "putative class [is] ascertainable with reference to objective criteria").

125. *Carrera v. Bayer Corp.*, 727 F.3d 300, 306 (3d Cir. 2013), *reh'g and reh'g. en banc denied*, No. 12 -2621, 2014 U.S. App. LEXIS 1553 (3d Cir. May 2, 2014).

126. *Id.* An earlier Third Circuit decision declared ascertainability "an essential prerequisite of a class action, at least with respect to class actions under Rule 23(b)(3)." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-93 (3d Cir. 2012).

127. Compare *Carrera*, 727 F.3d at 307-08 (rejecting plaintiff's proposal to allow proof-of-purchase by affidavit in the adversary context of a trial-purposes class), with *Pearson v. NBTY, Inc.*, 772 F.3d 778, 783 (7th Cir. 2014) (rejecting a class settlement in which the settling parties proposed a disproportionately onerous claims process; as the court saw it, simple sworn statements—or the distribution of no questions asked checks, were better for the class, but defendant "was trying to minimize the number of claims" and "probably all that class counsel really care about is their fees.").

128. *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015). Note also that the Third Circuit itself has subsequently clarified *Carrera* in *Byrd v. Aaron's, Inc.*, 784 F.3d 154 (3d Cir. 2015). The *Byrd* exegesis of ascertainability reaffirms that there is no requirement to identify class

The third principle identified in *Nexium* is that “where an individual claims process is conducted at the liability and damages stage of the litigation, the payout of the amount for which the defendants were held liable must be limited to injured parties.”¹²⁹ As the *Nexium* court clarifies, at the class certification stage “the court must be satisfied that, prior to judgment, it will be possible to establish a mechanism for distinguishing the injured from the uninjured class members. The court may proceed with certification so long as this mechanism will be ‘administratively feasible,’” a proposition with which *Carrera* agrees.¹³⁰ Notably, the *Nexium* court does not apply this principle to situations “where the distribution of the recovery is not based on an individual claims process: for example, where the amount of recovery for each individual class member is so small that it is not practical to engage in an individual claims process.”¹³¹ In such circumstances, the *Nexium* court acknowledges the propriety of *cy pres*.¹³²

In *Nexium*, the defendants argued that there were uninjured members within the class; that is, brand-loyal Nexium customers who would continue to buy the drug even if lower-priced generics became available. The *Nexium* class claimed that the manufacturer of Nexium and would-be manufacturers of competing generics had agreed instead to delay the entry of these generics into the market, thus creating an anticompetitive situation in which consumers continued to pay higher prescription prices for Nexium because there were no generic alternatives. The defendants essentially argued that there were brand loyalists in that bunch, that these Nexium-at-any-cost loyalists could not be identified at the time of class certification (although they existed), and, moreover, that any mechanism that was conducted, post-certification, to determine their existence through individualized claim procedures was improper in light of *Comcast*.

The *Nexium* court examined and rejected each of these arguments in turn, holding to the well-established principle, reaffirmed by the Roberts Court in its *Amgen* decision, that the need for some

members at the certification stage and that a class definition need not include *all* potentially injured persons, or *only* injured persons, to be ascertainable. *Id.* at 170. Under *Byrd*, the traditional tenets of ascertainability remain: (1) a class defined with reference to objective criteria; and (2) a reliable and administratively feasible mechanism to determine (post-liability or in settlement) whether putative class members fall within the class definition. *Id.* (citing *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013)).

129. *Nexium*, 777 F.3d at 19.

130. *Id.* (citing *Carrera*, 727 F.3d at 307).

131. *Id.* at 19 n.16.

132. *Id.*

individualized determinations at both the liability and damages stages does not defeat class certification because Rule 23(b)(3) "does not require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof."¹³³ Rather, the question is whether there is "reason to think that [individualized] questions will overwhelm common ones and render class certification inappropriate"¹³⁴ In short, the black letter rule, that "individual damage calculations generally do not defeat a finding that common issues predominate," is alive and well.¹³⁵ Having identified these three principles or requirements—(1) ensuring the class is definite; (2) limiting aggregate recovery to the amount of the injury; and (3) ensuring recovery by only injured parties—the *Nexium* decision states, "it is difficult to understand why the presence of uninjured class members at the preliminary stage should defeat class certification."¹³⁶ After all, the defendant ultimately will not pay, and the class members will not recover, amounts attributable to uninjured class members because judgment will not be entered in favor of such members.

While some number of uninjured class members will receive a class notice, and while such a notice is in some respects like the promotion that trumpets "you may already be a winner," no class member actually wins a share of the recovery unless she proves damages in the manner specified by the court as appropriate. The proof may be simple (an attestation of fact), or it may, depending upon the amount involved and the complexity of the case, be a more demanding process including documentation of investment, proof of purchase, or other records. Courts possess the authority and discretion to tailor the proof to the nature and amount at stake, as the Seventh Circuit has recently and abundantly made clear in its *Hughes* and *Pearson* decisions.¹³⁷ As *Nexium* observes, "at worst the inclusion of some uninjured class members is inefficient, but this is counterbalanced by the overall efficiency of the class action mechanism. Moreover, excluding all uninjured members at the certification stage is almost impossible in many cases, given the inappropriateness of certifying what is known as a single 'fail-safe class'—class defined in terms of the legal injury."¹³⁸

133. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013).

134. *Nexium*, 777 F.3d at 23 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014)).

135. NEWBERG ON CLASS ACTIONS, *supra* note 19, §4:54.

136. *Nexium*, 777 F.3d at 21.

137. *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 675-76 (7th Cir. 2013); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 783 (7th Cir. 2014).

138. *Nexium*, 777 F.3d at 22.

What is a fail-safe class? In the earlier decades of class certification, class definitions were often ambiguous, couched in subjective terms such as “all those injured by defendant’s conduct.” A fail-safe class is one in which it is virtually impossible for a defendant to ever win the case, with the intended class preclusive effects, because it would allow putative class members to seek a remedy but not be bound by an adverse judgment: if the class members win, they are in the class; if they lose, they are not in the class, are not bound, and can engage in subsequent litigation.¹³⁹

Newberg on Class Actions describes a number of problems with merits-dependent class definitions, sometimes called “fail-safe classes,” primarily because they flunk the definiteness/ascertainability request.¹⁴⁰ Defendants who make both arguments—and increasingly many do—that the class is not ascertainable *and* that it must only include “injured” members—are advancing internally inconsistent positions strategically aimed toward a vanishing point: no class can exist. The fail-safe class is often viewed as a “heads I win, tails you lose” prospect. Such classes may “allow putative class members to seek a remedy but not be bound by an adverse judgment,” a scenario that fails “to provide the final resolution of the claims of all class members that is envisioned in class action litigation.”¹⁴¹

Courts sometimes struggle to achieve the perfect balance between minimizing the number of potentially uninjured members in the class definition and including all injured parties. As Judge Posner observed, “defining a class so as to avoid, on one hand, being over-inclusive and, on the other hand, the failsafe problem is more of an art than a science.”¹⁴² To make the problem even more severe, attempting to entirely separate the injured from the uninjured at the class certification stage constitutes a leap ahead to the ultimate merits of the individual class members’ claims: it accelerates these individual questions ahead of the common liability questions for which class certification is designed.

139. *Id.* at 22 n.19.

140. NEWBERG ON CLASS ACTIONS, *supra* note 19, § 2:6. As defined in *Rodriguez*, “a fail-safe class is a class whose membership can only be ascertained by a determination of the merits of the case because the class is defined in terms of the ultimate question of liability.” *In re Rodriguez*, 695 F.3d 360, 369 (5th Cir. 2012). Most circuits have criticized, or categorically rejected, fail-safe classes. See NEWBERG ON CLASS ACTIONS, *supra* note 19, § 3:6.

141. NEWBERG ON CLASS ACTIONS, *supra* note 19, § 3:6 (quoting *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012)).

142. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (vacating class certification denial despite presence of potentially uninjured class members). See also *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1254 (10th Cir. 2014) (affirming class certification despite the fact that some of the plaintiffs avoided injury altogether).

It frustrates all of the efficiencies and economies class actions are intended to deliver, and even worse, it is that very thing the Roberts Court continues to caution courts to avoid. As the Supreme Court lectured in *Amgen*, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage."¹⁴³

Because the Roberts Court has not changed the fundamental rule that the damages phase of a class action may present individualized issues and require individualized proofs, without defeating Rule 23(b)(3) predominance (which may be satisfied by significant common questions relating to liability), and because a fundamental purpose of class actions remains preclusive, the added expense and delay involved in pre-proving damages in order to rid a proposed class of any possibly "uninjured" members would so burden the class action mechanism that it could not serve what the Supreme Court has repeatedly recognized as its core purpose: "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents to court at all."¹⁴⁴

The *Nexium* decision echoes the proportionality and practicality principles articulated in 21st century Seventh Circuit decisions, and earlier decisions of the First Circuit itself.¹⁴⁵ *Nexium* exposes the disproportionality of a defense argument, in an antitrust, consumer, or similar economic loss class action, where the defendant posits the existence of contrarians or "loyalists" within the class who run counter to the majority. Where, as in the publicly traded securities and antitrust contexts, for example, it is markets that matter, and tests such as reliance depend upon objective, reasonable person standards, such forays are not only disproportionate to the individual stakes involved, but contrary to common sense. In *Nexium*, for example, paying an overcharge caused by the alleged anticompetitive conduct on even a single purchase would suffice to show, as a legal and factual matter, impact or fact of damage.¹⁴⁶ That an "atypical" purchaser might be happy to do so, or unmotivated to seek individual redress and reimbursement, is

143. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013).

144. *Nexium*, 777 F.3d at 22 (quoting *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617 (1997)) (citing FED. R. CIV. P. 23 advisory committee's note).

145. *Nexium* cites, *inter alia*, *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not seventeen million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30."); and *In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 8 (1st Cir. 2008) ("An erroneous failure to certify a class where individual claims are small may deprive plaintiffs of the only realistic mechanism to vindicate meritorious claims.").

146. *Nexium*, 777 F.3d at 27.

irrelevant.¹⁴⁷

As preeminent commentators—deeply implicated in the creation of modern-day Rule 23 and deeply invested in the continuing utility of the class form in promoting judicial economy, access to courts, and citizen confidence in the rule of law—remind us, economic reality has long since moved on from individualized transactions.¹⁴⁸ Sellers of goods and services market generally and categorically. They may target specific demographics (age groups, social class, urban v. rural, and even race), but the law of big numbers works in their favor on the sales and marketing side. Their messages are calculated to generate “buy” responses by the many.¹⁴⁹ By contrast, when defending against those who come at them in big numbers when a product goes awry or a trusted service cheats, these same entities, as defendants, focus on the few, the anomalies, to defeat class certification. Their thought is, “not *everyone* can have been fooled by our lies; someone must have seen through our scheme; there are folks in the class who really didn’t expect our product to perform. Either a class cannot exist because they are in it, or they must be expelled prior to certification.” Such arguments, although advanced in the guise of ascertainability, or even standing, impose upon the class a different (and now non-exempt) social and economic reality than the operative one in which defendant has actually conducted its business. Some commentators have urged courts to see through this double-standard, and some courts have in fact seen through it.¹⁵⁰

The persistent attack that a class may not include the uninjured not only attempts to conflate Article III standing—which is properly based upon allegations at the pre-trial (including class certification) stages, rather than ultimate proof on the merits—it also misapprehends, or

147. *Id.* at 28.

148. See Miller, *supra* note 15, at 313 (“Let’s be realistic: the era of disputes over custom-crafted oxcarts and the like is over. Significant products are mass produced and sold on a national or global marketplace basis, and a multitude of transactions take place, often anonymously, on the internet, manufacturers, financial institutions, and service providers benefit from these geographically unbounded marketplaces, distribution systems, and information networks.”).

149. See, for example, the description of defendant’s mass marketing strategies and research in *Suchanek v. Strum Foods*, 764 F.3d 750, 752-55 (7th Cir. 2014) (vacating denial of class certification and reversing summary judgment in an eight-state consumer class action).

150. See, e.g., Samuel Issacharoff, *The Vexing Problem of Reliance in Consumer Class Actions*, 74 TUL. L. REV. 1633 (2000); Miller, *supra* note 15, at 313 (“Because these entities reap the rewards of national or global commerce, plaintiffs similarly should be entitled to seek rectification on a correspondingly . . . aggregate basis when there is a commonality of claims. Recognition of the characteristics of today’s commercial world and the value of efficient dispute resolution might motivate courts to allow the aggregate litigation pendulum to retrace its arc.”); *Nexium*, 777 F.3d at 29-30 (debating the “brand loyalist” argument).

misrepresents, the nature of many antitrust and consumer claims. For example, "antitrust injury occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset."¹⁵¹ In consumer claims based upon breach of warranty or violation of consumer protection statutes (as in the *Whirlpool* cases, for example) injury occurred at the time of the sale.

When a consumer purchases a product for service whose qualities, common nature, and characteristics have been misrepresented or whose faults (such as a design flaw that might manifest in damage or injury years later) are concealed, awaiting manifestation of a defect not only frustrates the class certification process, but is incompatible with the substantive theories of liability and damages in the case. Defendants keep arguing that every defect must manifest before a consumer or warranty claim may be stated, or certified, and they do so because courts continue in some confusion on this point as well. The *Whirlpool* and *Butler* courts had no such difficulty, and the survival of these decisions, after two cycles of Supreme Court review, demonstrates that the Supreme Court does not share such confusion.¹⁵²

Courts have found that the standard of ascertainability is "not demanding," being "designed only to prevent the certification of a class whose membership is truly indeterminable."¹⁵³ Nonetheless,

151. *Nexium*, 777 F.3d at 27 (citing *Adams v. Mills*, 286 U.S. 397, 407 (1932)).

152. A very recent column by "The Ethicist" in the *New York Times* magazine illustrates, in pellucid lay person's terms, the concept of consumer injury at the point of sale in the following question and answer exchange:

[Q] I received an unsolicited check in the mail. The accompanying notice explained that it was my part of a class-action settlement relating to a latent defect in the automobiles made by my car's manufacturer. I have never had any issues with my car; it has been reliable and has performed well. I consider it to be worth the money I paid for it. Can I cash the check? JOHN ANDERSON, SANTA FE, N.M.

[A] The class-action settlement represents an automaker's concession that its product is defective. Because this defect doesn't affect you, it seems as though you're getting something for nothing. But you didn't angle for this money in any way; the car company simply acknowledged—or was compelled to acknowledge—that the vehicles it sold had an inherent weakness. The fact that the deficiency didn't affect you doesn't mean that it won't come into play later, or that you did not unknowingly take on the risk of driving a car that did not perform to the company's own standard.

Chuck Klosterman, *Two Cents, Too Late*, N.Y. TIMES MAG. (Jan. 23, 2015), http://www.nytimes.com/2015/01/25/magazine/two-cents-too-late.html?_r=0. Imagine if this transaction happened at the time of purchase. While you're buying the car, the dealer says: "We have reason to believe there's a 2 percent chance this vehicle will have an irreversible defect. As a result, we are proactively reducing the sticker price by 2 percent." No reasonable person would expect you to embargo that rebate until something actually went wrong.

153. *Ebin v. Cangadis Food, Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y. 2014) (quoting *Gortat v. Capala Bros., Inc.*, No. 07-CV-3629 (ILG), 2010 WL 1423018, at *2 (E.D.N.Y. Apr. 9, 2010).

defendants have, with intermittent success, attempted to transform the judge-made ascertainability criterion into a weapon against class certification by arguing, ultimately, that all class members must not only be ascertainable, or identifiable, at the class certification stage, but that they must be identified (and by further extension, that all such identified class members have provable injuries—or proven damages) at the class certification stage—the reverse bifurcation effect noted in this Article. This extension of ascertainability seems to contradict the essential nature of a class suit as representative action, as well as its utility, in providing preclusive judgments in situations where class membership is fluid. Somewhat akin to the religious doctrine of predestination and the concept of a pre-identified elect of a certain number who will, to the exclusion of all others, be admitted into heaven, extreme ascertainability would require the court to identify all class members who will receive damages at the outset, before threshold liability questions that would entitle *any* of them to damages have been certified or tried. This would, as the Supreme Court noted in a somewhat different context in *Amgen*, put “the cart before the horse.”¹⁵⁴

The “identification first” school of ascertainability supposedly got a boost from the Third Circuit’s decision in *Carrera*, which simply required better proof at the class certification stage that the class members could readily be identified later. The Third Circuit’s subsequent *Byrd* decision clarified *Carrera* in ways that move it into the mainstream. Subsequent appellate decisions from other circuits have, in other factual circumstances, restored a balance and moved the ascertainability concept closer to its original meaning and function, as exemplified in the First Circuit decision affirming class certification in *Nexium*.¹⁵⁵

VII. *CY PRES* OR NOT *CY PRES*? THAT IS THE CHIEF JUSTICE’S QUESTION

Cy pres comme possible (a French term meaning “as near as possible”), shortened to *cy pres*,¹⁵⁶ refers to the practice, well-established

154. In the *Amgen* majority’s view, the argument that to gain certification a plaintiff “must first establish that it will win the day” is to “put the cart before the horse.” *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1211 (2013). “But the offer of a Rule 23(b)(3) certification is not to adjudicate the case; rather, it is to select the ‘metho[d]’ best-suited to adjudication of the controversy ‘fairly and efficiently.’” *Id.* at 1191.

155. See also *Steering Comm. v. BP Exploration & Prod. (In re Horizon)*, 785 F.3d 1003 (5th Cir. 2015).

156. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 783 (7th Cir. 2014); *Oetting v. Green Jacobson, P.C.*, 775 F.3d 1060, 1063 n.2 (8th Cir. 2015) (quoting *Travel Network Ltd. v. United Airlines, Inc. (In re Airline Ticket Comm’n AntiTrust Litig.)*, 268 F.3d 619, 625 (8th Cir. 2001)) (*Cy pres*

in class action settlement practice, of distributing the unclaimed residue of a settlement fund to a worthy recipient, whose mission is sufficiently related to the claims and issues in the law suit; or if distribution to claimants, on a direct or claims-made basis, is impractical (for example, if the amount of individual payments to claimants would be swamped by the administrative costs of so doing),¹⁵⁷ the court may approve a worthy recipient to receive the money instead. Problems have emerged either where courts determine that insufficiently diligent efforts have been made to pay class members or where undue influence or conflict of interest, real or apparent, may be involved in the selection of the recipients. To address these emerging issues, the American Law Institute reviewed the jurisprudence and provided black-letter guidance in § 3.07 of its *Principles of the Law of Aggregate Litigation*.¹⁵⁸ This provision was among the less controversial sections of the *Aggregate Litigation* project, and many were surprised when it became among the first, and most frequently, cited of its sections. Courts increasingly looked for guidance regarding settlement structures including *cy pres* provisions as *cy pres* became a favorite target of class action settlement objectors.

The poster child of *cy pres* attacks is the *Facebook* litigation. In *Lane v. Facebook*, the plaintiffs had sued Facebook, alleging its new "beacon" program violated class members' privacy rights by gathering

"originated as a rule of construction to save a testamentary charitable gift that would otherwise fail, allowing 'the next best use of the funds to satisfy the testator's intent as near as possible.'")

157. See, e.g., *In re Vitamin Cases*, 132 Cal. Rptr.2d 425 (Cal. App. 2013) (distributing \$38 million consumer settlement entirely to food and health-related charities; distribution of fund among as many as 30 million class members was impracticable; only four class members objected).

158. PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.07(2010). A court may approve a settlement that proposes a *cy pres* remedy even if such a remedy could not be ordered in a contested case. The court must apply the following criteria in determining whether a *cy pres* award is appropriate:

- (a) If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members.
- (b) If the settlement involves individual distributions to class members and funds remain after distributions (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.
- (c) If the court finds that individual distributions are not viable based upon the criteria set forth in subsections (a) and (b), the settlement may utilize a *cy pres* approach. The court, when feasible, should require the parties to identify a recipient whose interests reasonably approximate those being pursued by the class. If, and only if, no recipient whose interests reasonably approximate those being pursued by the class can be identified after thorough investigation and analysis, a court may approve a recipient that does not reasonably approximate the interests being pursued by the class.

and disseminating information about their online activities to other social media without express permission. The parties entered into a \$9.5 million settlement, which was approved by the district court and affirmed by the Ninth Circuit.¹⁵⁹ The settlement was, to say the least, an unusual one, and understandably so. Privacy rights violation litigation is in its pioneering stages. Where class members' privacy rights have allegedly been violated, the right to privacy may be priceless, but is difficult to monetize. The Federal Wiretap Act and analogous state statutes may provide for penalties in some instances, but these statutes do not necessarily cover all activity that occurs online. The *Facebook* settlement was, in classical terms, a "*cy pres* only" settlement. Injunctive relief was, to be sure, a major element: Facebook agreed to discontinue the "beacon" program itself. It did not, however, promise to refrain from instituting a similar, allegedly privacy-infringing program in the future.

After the payment of court-awarded fees, costs, and modest compensation to the named plaintiffs, the remaining \$6.5 million of the *Facebook* settlement was used to establish a new charitable foundation to help fund organizations dedicated to educating the public about online privacy. The settlement agreement provided for a Facebook representative to serve as one of three members of the new foundation's board.¹⁶⁰ These features drew objections, notably that of Megan Marek, one of the four unnamed class members who raised objections. Ms. Marek took hers all the way to the Supreme Court after the Ninth Circuit had affirmed the settlement. The Supreme Court denied the petition for certiorari. However, the one sentence disposition: "The petition for writ for *certiorari* is denied," was immediately followed by a four page "Statement" of Chief Justice Roberts respecting the denial of certiorari.¹⁶¹ This was not a dissent from the denial of *certiorari*, but a warning shot on the *cy pres* issue. After describing the claims in the suit, the structure of the settlement, and the history of objections and opinions below, Chief Justice Roberts closed as follows:

I agree with this Court's decision to deny the petition for certiorari. Marek'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 as-

159. *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012), *reh'g denied* 709 F.3d 791 (9th Cir. 2013), *cert. denied sub nom. Marek v. Lane*, 134 S. Ct. 8 (2013).

160. *Id.* at 821.

161. *Marek*, 134 S. Ct. 8.

sess 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.¹⁶²

Chief Justice Roberts' Statement in *Marek* officially certified *cy pres* as a hot button issue. Over-reaction followed immediately, as settlements-in-process were scoured of their now suspect *cy pres* provisions; often, arguably, where such provisions would have been entirely proper, and perhaps superior, to other remedies. We will never know how many settlements lost their *cy pres* provisions or how many charities or other worthy endeavors were thus denied significant funding to advance class member interests, particularly in the consumer law field. *Cy pres* had simply become branded as a vulnerability to be avoided if at all possible.

It is, of course, entirely possible to design a *cy pres* provision that does not raise any of the caution flags described by Chief Justice Roberts in the conclusion of his Statement; in its major outlines after all, the *Marek* Statement corresponds closely to § 3.07 of the *Principles of the Law of Aggregate Litigation* on the same subject.

One circuit, at least, has remained champion of *cy pres*, in small-recovery consumer class settlements. The Seventh Circuit, per Judge Posner in *Hughes v. Kore of Indiana Enterprise, Inc.*, reversed the district court's decertification of the class.¹⁶³ The class grievance was that the defendant's ATM machines failed to post a notice regarding the fees charged for their use. This omission violates the Electronic Funds Transfer Act.¹⁶⁴ Plaintiffs who prove violation of the Act are entitled to actual damages, if any, or to statutory damages of at least \$100 but not more than \$1,000. In the class action context, the amount of damages is capped at the lesser of \$500,000 or 1% of the defendant's net worth.¹⁶⁵ No minimum amount of damages, that is, no floor, is provided in class

162. *Id.* at 8, 9 (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)).

163. *Hughes v. Kore of Indiana Enter., Inc.*, 731 F. 3d 672, 678 (7th Cir. 2013).

164. 15 U.S.C. § 1693b(b)(3) (2012).

165. *Id.* § 1693m(a)(2)(B)(ii).

actions. Here, unfortunately, the defendant's net worth was low: the parties stipulated that the limit to damages would be \$10,000, equaling 1% of Kore's net worth.¹⁶⁶ Thus, *Hughes* was a low-value class action with minuscule individual damages; just the sort of case, in Judge Posner's recent view, that compels class action treatment.¹⁶⁷ Faced with a worthy class action, but an utterly impractical individual damages distribution scenario, Judge Posner concluded:

[Because] distribution of damages to the class members would provide no meaningful relief, the best solution may be what is called (with some imprecision) a single '*cy pres*' decree. Such a decree awards to charity the money that would otherwise go to the members of the class as damages, if distribution to the class members is infeasible.¹⁶⁸

After conducting a succinct primer on the history and purposes of the *cy pres* doctrine, Judge Posner went on to opine that:

[p]ayment of the \$10,000 to a charity whose mission coincided with, or at least overlapped, the interest of the class (such as the foundation concerned with consumer protection) would amplify the effect of the modest damages in protecting consumers. A foundation that receives \$10,000 can use the money to do something to minimize violations of the Electronic Funds Transfer Act; as a practical matter, class members each given \$3.57 cannot.¹⁶⁹

166. *Hughes*, 731 F. 3d at 674.

167. *See id.* at 675. *See also* Chapman v. Wagener Equities, Inc., 747 F.3d 489 (7th Cir. 2014); Parko v. Shell Oil Co., 739 F.3d 1083 (7th Cir. 2014); Driver v. Applellinois, LLC, 739 F.3d 1073 (7th Cir. 2014); Phillips v. Asset Acceptance, LLC, 736 F.3d 1076, 1083 (7th Cir. 2013); Pearson v. NBTY, 772 F.3d 778, 787 (7th Cir. 2014); Redman v. Radioshack Corp., 768 F.3d 622 (7th Cir. 2014).

168. *Hughes*, 731 F. 3d at 675.

169. *Id.* at 676 (citing, *inter alia*, NEWBERG ON CLASS ACTIONS, *supra* note 19, § 10:17, and Redish, Julian & Zyontz, *supra* note 162 (the *cy pres* critical article cited two months later by Chief Justice Roberts)):

As explained in *Mirfasihi v. Fleet Mortgage Corp.*, "*cy pres*" is the name of a doctrine of trust law that allows the funds in a charitable trust, if they can no longer be devoted to the purpose for which the trust was created, to be diverted to a related purpose; and so when the polio vaccine was developed the March of Dimes Foundation was permitted to redirect its resources from combating polio to combating other childhood diseases. The trust doctrine is based on the idea that the settlor would have preferred a modest alteration in the terms of the trust to having the corpus revert to his residuary legatees because the trust's original aim could no longer be achieved. In a class action the reason for a remedy modeled on *cy pres* is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement to the class members. When there's not even an indirect benefit to the class from the defendant's payment of damages, the "*cy pres*" remedy (misnamed, but the alternative term found in some cases – "Fluid Recovery" – is misleading too) is purely punitive. But we

So much for the "good" *cy pres* class action settlement. More recently, the Seventh Circuit, in a decision written by the same jurist, disapproved a settlement featuring *cy pres* provisions.¹⁷⁰ In *Pearson*, a settlement involving over-the-counter Glucosamine pills, a \$1.13 million *cy pres* award was slated to go to an orthopedic foundation. As Judge Posner observed, since the joint problems that Glucosamine is supposed to alleviate are the domain of orthopedic medicine, the choice of an orthopedic institute as a recipient of money left over after all approved class members' claims are paid is indeed consistent with *cy pres*. But there was "no validity to the \$1.13 million *cy pres* award in this case."¹⁷¹ Why?

A *cy pres* award is supposed to be limited to money that can't feasibly be awarded to the intended beneficiaries, here consisting of the class members. Notice costing \$1.5 million reached 4.72 million class members. Granted, doubling the expenditure would not have doubled the number of class members notified . . . [b]ut the claims process could have been simplified. Or, knowing that 4.72 million people had bought at least 1 bottle of its pills, Rexall could have mailed \$3 checks to all 4.72 million post card recipients. The Orthopedic Research and Education Foundation seems perfectly reputable, but it is entitled to receive money intended to compensate victims of the consumer fraud only if it's infeasible to provide that compensation to the victims—which has not been demonstrated.¹⁷²

A superficial irony emerges from the juxtaposition of *Hughes* and *Pearson*. While a potential individual recovery in the \$3 range was so small as to catalyze Judge Posner's affirmative recommendation of *cy pres* in *Hughes*, the same level of individual compensation was posited as superior to the *cy pres* remedy provided by the settlement in *Pearson*. This apparent contradiction is resolved when analyzing the two cases' very different contexts, and the Seventh Circuit's consistent concern with fairness, efficiency, and practicality applied to both. It was simply inefficient to distribute small amounts of money in *Hughes*, whereas

said in *Marfasihi* that the punitive character of the remedy would not invalidate it. Other courts, disagreeing, require the charity or other recipient to have an interest parallel to that of the class. No matter; it should be possible in this case to find a charity concerned with consumer protection issues of the general character presented by the case.

Id. (citing *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784-85 (7th Cir. 2004); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 33 (1st Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038-39 (9th Cir. 2011)).

170. *Pearson v. NBTY, INC.*, 772 F. 3d 778 (7th Cir. 2014).

171. *Id.* at 784.

172. *Id.*

aggregating that same sum could have delivered more powerful, albeit indirect, benefit to consumers through *cy pres*. In *Pearson*, which involved a far larger class action settlement, Judge Posner saw practical alternatives to simplify, expedite, and render more efficient the delivery of more of the settlement fund to class members, by a simplified claims process or by dispensing with the claims process entirely and directly mailing checks to all Rexall's identifiable claimants. This suggestion resonates with true consumer advocacy, since a direct relationship between low claims rates (and unpaid class benefits) and cumbersome, complex, or restrictive claims procedures, has long been observed.

In *Pearson*, Judge Posner both makes the observation and proposes the solution. In *Pearson*, *cy pres* was not inherently wrong, nor was its proposed beneficiary unworthy: there was simply a better approach (direct payment to class members) which had not been fully explored.

VIII. CONCLUSION: THE CLASS ACTION LIVES

The Roberts Court has subjected the class action to more frequent and searching scrutiny than has occurred during any other decade since the modern class action was created by the 1966 amendments to Rule 23. As a result, the process of class certification has become more rigorous, more protracted, more expensive, and more uncertain. Those dedicated to the preservation of the class mechanism as a form uniquely suited to serve the necessary functions of compensation and deterrence, in the context of our mass production, mass communication, and mass transaction society, justly decry these additional burdens and urge a roll-back to simpler times. The First, Fifth, and Seventh Circuits, most notably of late, have shown that the straightforward application of enduring Rule 23 principles to produce the fair and efficient adjudication—or resolution—of core questions is not only still available, but may again be on the rise.¹⁷³ The good news is thus that the class action has survived and that its core functions, as well as its fundamental structure, are largely intact, to be invoked—where litigation itself is still allowed—for the benefit of those who cannot afford to incur the high cost and expend the sustained effort of modern litigation on their own. In the words of Arthur Miller, present at the birth of the modern class action, aggregate litigation is “an idea that is ‘too big to fail.’”¹⁷⁴ Having run and re-run the gauntlet of Supreme Court scrutiny for nearly 50 years, in sickness and in health, the class form yet lives. May it yet

173. See Miller, *supra* note 15, at 325-27.

174. *Id.* at 326.

abide, improved as need be, to serve the good of the many in our uniquely challenging time; and to preserve for adjudication those trespasses to our economic and personal rights and interests that our individual resources, or those of the courts themselves, do not permit us to effectively pursue alone.