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The Roberts Court and the End of the Entity Theory

Andrew J. Trask

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I. INTRODUCTION

Many scholars have spilled much ink bemoaning the effects of various class action opinions rendered by the Roberts Court. They have

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argued that the Roberts Court harbors a special affinity for business interests[1] and a special antipathy to the class action device.[2] Many publicly worry that the Court is bent on killing the class action.[3] (Indeed, a number of them are convinced that it has already largely succeeded.)[4]

I have argued elsewhere that these jeremiads are wrong: both plaintiffs and pro-plaintiff judges are more resilient than the academy generally recognizes.[5] But, in focusing on high-profile cases like *Wal-Mart Stores, Inc. v. Dukes*,[6] *AT&T Mobility LLC v. Concepcion*,[7] and *Comcast Corp. v. Behrend*,[8] they are also missing the larger story of the Roberts Court. The really interesting class action law has not been made in these contested 5–4 decisions. Instead, it is a series of 9–0 opinions on seemingly smaller issues that add up to a revolutionary change in how courts should view the class action.

Over the last decade, the Roberts Court has established a definitive shift away from the entity model of class actions. Largely part of a theoretical debate, the entity theory stated that a litigation class is a separate juridical entity from its members; whereas its counterpart—the joinder theory, or aggregation theory—stated that the class action was simply a device to aggregate the claims of a large number of individuals.

The debate over entity theory is important because it has real effects in federal courts. In legal practice, it becomes clear very quickly that the rhetorical devices lawyers use have concrete effects. Courts that consider a class to be a separate entity rule differently on questions before class certification: they allow more discovery for plaintiffs and

1. *See, e.g.*, Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES (Mar. 16, 2008), http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html?_r=0.

2. *See, e.g.*, Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 828 (2013) ("Cases such as *Dukes*, *Concepcion*, *American Express*, *Castano*, and *Hydrogen Peroxide* do more than adopt new rules. They suggest a suspicion about class actions generally . . . .").

3. *See, e.g.*, John Campbell, *Unprotected Class: Five Decisions, Five Justices, and Wholesale Change to Class Action Law*, 13 WYO. L. REV. 463, 463 (2013) ("Five decisions by five men have fundamentally changed the class action world. . . . And in every case, these changes made it less likely that people previously protected by class actions would be protected in the future.").

4. *See, e.g.*, George Rutherglen, Wal-Mart, AT&T Mobility, *and the Decline of the Deterrent Class Action*, 98 VA. L. REV. BRIEF 24, 25 (2012), *available at* www.virginialawreview.org/inbrief/2012/04/14/Rutherglen.pdf; Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005); Benjamin Sachs-Michaels, Note, *The Demise of Class Actions Will Not Be Televised*, 12 CARDOZO J. CONFLICT RESOL. 665, 668-70 (2011).

5. *See* Andrew J. Trask, *Reactions to* Wal-Mart v. Dukes*: Litigation Strategy & Legal Change*, 62 DEPAUL L. REV. 791 (2013).

6. Wal-Mart Stores v. Dukes, 131 S. Ct. 2541 (U.S. 2011).

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

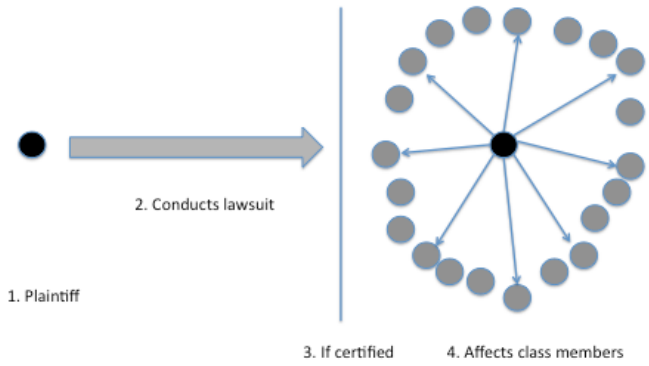
8. Comcast Corp. v. Behrend, 133 S. Ct. 1426 (U.S. 2013).

less for defendants; they are more tolerant of substitution of named plaintiffs; they are less likely to consider objections to class settlements; and they are less concerned with variations in damages at certification.

This Article traces the shift away from the entity theory. It begins with a discussion of the various academic treatments of the entity model, from its first formulation years ago to the more radical "trust device" theories advanced today. It then looks at the various ways in which implicitly adopting the entity model has affected various rulings in class action litigation. Finally, it discusses how the 9–0 opinions in *Taylor v. Sturgell*, *Bayer Corp. v. Smith*, and *Standard Fire Insurance Co. v. Knowles* (buttressed by Justice Elena Kagan's dissent in *Symczyk v. Genesis Health Co.*) have made it clear that the Supreme Court favors the aggregation model over the entity model.

II. THE ENTITY THEORY

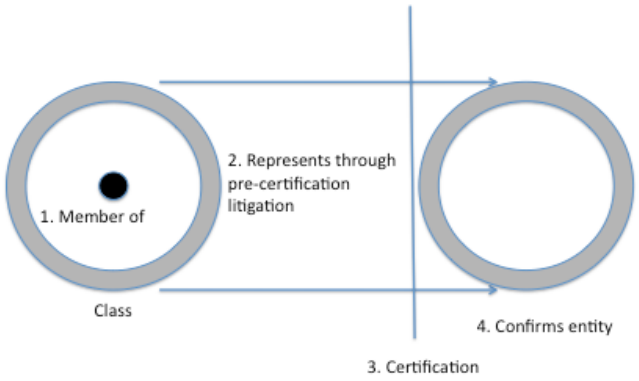
Fig. 1
Aggregation/Joinder Model



The entity model posits that a class is not simply an aggregation of the absent class members; instead, it is a separate juridical entity with its own interests. Those interests are represented by the class counsel and may or may not include input from the named plaintiff. The entity exists, in inchoate form, from the moment the class action complaint is filed. When the class is certified, it confirms the contours of the class and formalizes the representation of the named plaintiff and the class counsel. In its "weak" (and therefore less controversial) form, the model posits that the entity is formed once the class is

certified. (This is less controversial because there is little practical difference between a "class entity" and a representative joinder action; in both cases, the plaintiffs will try a single set of claims through to a verdict, and in both cases, that set of claims will be the named plaintiffs'.) The more controversial "strong" form of the model assumes that the entity is formed at the time a complaint is filed designating the case as a class action.

Fig. 2.
Entity Model



There are several implications to using the entity model of the class action. First, it de-emphasizes the role of the named plaintiff as a spokesperson for the class in favor of class counsel. After all, the named plaintiff is only one class member and is not synonymous with the class as an entity. Second, the entity model implies that when controversies arise before class certification, they should be resolved *as if* there were a pre-existing class and take the interests of that class into account. Finally, the entity model implies that courts should err in favor of certification, since that would be best for the entity. (The model also implies that courts should look favorably on classwide settlements, regardless of the relief they may afford individual class members, since the entity may still benefit in some abstract way.)

A. "Entity Theory" in the Academy

The description of the entity theory offered above is necessarily simplified, but it captures the key points that its various proponents have articulated over the years. It is worth a brief recital of the intellectual history of the entity theory because its contours have shifted over time, particularly in response to previous legal rulings.

1. The Entity as Client

The first explicit articulation of the entity theory of class actions came from University of Michigan Law School professor Edward H. Cooper in 1996.[9] Professor Cooper was primarily concerned with identifying who, exactly, is in charge of a class action.[10] In traditional litigation, a client brings a lawsuit to an attorney, who agrees to represent her. Entrepreneurial attorneys are limited by the doctrines of barratry and champerty, which restrict their ability to create a claim and then recruit a plaintiff to bring it in a court of law. In a class action, however, the lawyers usually "provide the originating genius . . . . [T]hey seek out token representatives, pursue the class claim primarily for the sake of fees, and measure success by their own fees rather than class relief."[11] Professor Cooper noted that courts could not seem to decide whether a class action was a traditional lawsuit brought by a flesh-and-blood individual or something new brought by a "token, offered up to appease memories of a superseded client-adversary model that lingers only in tradition and the formal trappings of Rule 23(a)."[12] This tension manifests itself in a number of ways: defendants will use rhetoric to call attention to it,[13] and courts will concede it exists while doing little to curtail it.[14]

To resolve this dilemma, Professor Cooper argued that class actions *should* be treated as lawsuits brought by an entity (the class) instead of by an individual (the named plaintiff).[15] According to Professor Cooper, treating the entity as the client would focus the court's attention on whether class counsel

9. Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13 (1996). Arguably, then-Professor Diane Wood Hutchinson (now Judge Wood of the Seventh Circuit Court of Appeals) set some of the terms for the debate in an earlier article, *Class Actions: Joinder or Representation Device?* 1983 S. CT. REV. 459 (1983). However, the important question she posed—whether absent class members were in fact parties who could be subjected to mandatory discovery and counterclaims—has largely been resolved. *Id.* at 482-83; *see* Heaven v. Trust Co. Bank, 118 F.3d 735, 739 n.7 (11th Cir. 1997) ("it is a proper exercise of discretion for the district court to evaluate the nature of the counterclaims and the difficulties they present and to consider the usefulness of breaking the proposed class into subclasses to avoid those difficulties"); Antoninetti v. Chipotle, Inc., No. 06cv2671-BTM, 2011 U.S. Dist. LEXIS 54854, at *3 (S.D. Cal. May 23, 2011) ("Courts do not ordinarily permit discovery from absent class members.").

10. Cooper, *supra* note 9, at 27.

11. *Id*.

12. *Id.* at 26.

13. *See, e.g.*, Lloyd v. Gen. Motors Corp., 266 F.R.D. 98, 104 (D. Md. 2010) (defendant argued "that the litigation is entirely driven by lawyer-entrepreneurs looking for a fat class action payday").

14. *See, e.g.*, Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 n.9 (3d Cir.1973) ("Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions."); Culver v. City of Milwaukee, 277 F.3d 908, 913 (7th Cir. 2002) ("Realistically, functionally, practically, [counsel] is the class representative, not [the plaintiff].").

15. Cooper, *supra* note 9, at 28.

(rather than the plaintiff) would provide adequate representation and sharpen the court's understanding of its fiduciary duty to absent class members; it would also make it clearer that counsel could not represent individuals pursuing related claims as well as the class.[16] He also believed that treating the class as an entity (instead of an aggregation of individuals) would simplify several controversies that, at the time, plagued courts and litigators alike.[17] Those included:

- *The application of diversity jurisdiction*. At the time that Professor Cooper was writing, many class actions wound up in state court because the claims of the named plaintiff did not exceed the required amount in controversy. He argued that treating the class as a formal entity would allow a federal court to evaluate the defendant's stake, which would be a more accurate measure of whether the case belonged in federal court.[18]

- *Choice of law*. According to Professor Cooper, "it is very difficult to understand why different people should win or lose, or win more or less, because different sources of law are chosen to govern the self-same conduct."[19] He argued that adopting the entity model would lead to "a more rational approach to choice of law."[20] He did not, however, clarify how courts would choose law for the class entity.

- *The proper scope of preclusion*. Professor Cooper was also concerned with the implications of what is now referred to as "claim-splitting," where a certified class presents a narrower issue than what an individual would bring in a lawsuit.[21] He argued that the entity model would help clarify the issues that were presented and therefore should be precluded in subsequent cases.[22]

In short, Professor Cooper was *not* arguing that a class was *in fact* a separate juridical entity; he was advocating that treating a class as an entity (and doing away with the named plaintiff in the process) would be one way of resolving a number of disputes about whether to certify a proposed class. Professor Cooper did acknowledge that this "entity" view would not fit perfectly within established law: in his view, the entity model would work best for larger cases involving smaller value claims.[23] He also recognized that

16. *Id*.
17. *Id*. at 29-30.
18. *Id*. at 28.
19. *Id*. at 29.
20. *Id*.
21. *Id*. at 29-30.
22. *Id*. at 30.
23. *Id*. at 32.

treating a litigation class as a distinct entity "might have symbolic disadvantages."[24] Most obviously, it would eliminate the agreed fiction that a class action was something other than lawyer-driven litigation.[25] As Professor Cooper noted, pretending that an abstract entity like a "class" is an actual client that can govern attorneys would prove extremely difficult.[26] As a result, class action litigators would likely see heavy resistance from those who disapprove of treating lawsuits as products to be manufactured or sold.[27]

Many of the issues with which Professor Cooper wrestled have been resolved, either by statute, amendment to Rule 23, or subsequent case law. Questions about whether class actions qualified for federal jurisdiction, for example, were answered in 2005 when Congress enacted the Class Action Fairness Act.[28] Courts have largely agreed that choice-of-law issues must be decided on an individualized basis.[29] And various courts have addressed the questions about when preclusion was appropriate in subsequent cases.[30] Nonetheless, the argument that a class could (and should) be treated as a separate juridical entity captured something in the academic imagination.

2. The Entity as Litigant

The next articulation of the entity theory came from Professor David Shapiro in 1998[31] Professor Shapiro had participated in two seminal class-action cases: *In re Rhone Poulenc-Rorer, Inc.*[32] (brought on behalf of hemophiliacs who tragically had contracted HIV from contaminated blood transfusions) and *Castano v. American Tobacco Co.*[33] (which sought to hold tobacco companies liable for knowingly addicting their customers to nicotine). In both cases, Professor Shapiro supported the plaintiffs.[34]

> As he described the entity theory, it meant that the class action should be viewed as not involving the claimants as a number of individuals, or

24. *Id*. at 31.
25. *Id*.
26. *Id*.
27. *Id*.
28. 28 U.S.C. § 1332 (2012). As renowned class action scholar Robert H. Klonoff has noted, "CAFA has in fact had an enormous impact in shifting most class actions to federal court." Klonoff, *supra* note 2, at 744.
29. *See, e.g.*, *In re* Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 288 F.3d 1012, 1017-18 (7th Cir. 2002).
30. *See, e.g.*, Epstein v. MCA, Inc., 179 F.3d 641, 648 (9th Cir. 1999).
31. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917 (1998).
32. *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995).
33. Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996).
34. Shapiro, *supra* note 31, at 913 n.a1.

> even as an "aggregation" of individuals, but rather *as an entity in itself* for the critical purposes of determining the nature of the lawsuit, the role of the lawyer and the judge, and the significance of the disposition.[35]

Professor Shapiro focused on the effect the model would have on the prosecution of mass tort class actions, which were the primary challenge to class action scholars in the mid to late 1990s.[36] According to Professor Shapiro, the entity model was the "more appropriate" description of how class actions should operate.[37] He conceded that, if a class was of a certain size, only "certain aspects of a dispute" would be "suitable for class treatment"[38]—a concession that undercuts the idea of a pre-existing juridical entity.[39]

That said, Professor Shapiro believed that the entity model would help to resolve several important controversies involving mass tort class actions. Among them:

- *The problem of "immature torts."* One of the questions courts struggled with at the time was the extent to which a court could certify a class action involving a previously-untested tort theory, such as the *Castano* plaintiffs' "addiction" theory and the *Rhone-Poulenc Rorer* plaintiffs' "serendipity" theory.[40] While both appellate opinions ultimately reversed certification based on the plaintiffs' failure to demonstrate compliance with Rule 23(b)(3), each spent time discussing the problems posed by allowing a single piece of all-or-nothing litigation to test a new theory of liability.[41] Professor Shapiro argued that viewing the class as an entity would reveal the benefits of certifying even novel liability claims.[42]

- *The "right" to notice.* Due process requires that the absent class members be notified of any certified class action that might affect

35. *Id*. at 917 (emphasis added).
36. *Id*. at 920.
37. *Id*. at 921.
38. *Id*. at 922.
39. *Id*.
40. *See* Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) ("The gravamen of [plaintiffs'] complaint is the novel and wholly untested theory that the defendants fraudulently failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in cigarettes to sustain their addictive nature."); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1296 (7th Cir. 1995) ("Had the defendants not been negligent, the plaintiffs further argue, hemophiliacs would have been protected not only against Hepatitis B but also, albeit fortuitously or as the plaintiffs put it 'serendipitously,' against HIV.").
41. *See In re Rhone-Poulenc Rorer*, 51 F.3d at 1300-01; *Castano*, 84 F.3d at 748 (quoting *In re Rhone-Poulenc Rorer*).
42. Shapiro, *supra* note 31, at 935.

them.[43] As one might imagine, however, notice costs money, and the larger the class, the larger the cost.[44] Professor Shapiro argued that viewing the class as an entity would facilitate shifting the cost of notice to the defendant, which would make class actions more cost-effective for plaintiffs.[45]

- *Opt outs.* Professor Shapiro also worried that allowing class members to opt out of Rule 23(b)(3) class actions would undermine the effectiveness of the device.[46]

According to Professor Shapiro, the entity model would necessarily transform substantive law.[47] Specifically, the entity model would make more sense when viewed "in light of the goals of effective deterrence and reasonable compensation" rather than "in terms either of the traditional view of tort law or the aims of the tort system."[48] Professor Shapiro conceded that this view would likely violate the Rules Enabling Act[49] (which dictates that federal procedural rules may not change the substantive rights parties enjoy) and that "using [Rule 23] to compel movement toward an entity model would be even more problematic."[50] Nonetheless, he believed that this was the direction in which the law was headed[51] and that arguing for an entity model would, in the long run, become a self-fulfilling prophecy: the more scholars adopted the entity model, the clearer it would become how to change the law to enable class litigation that did not require named plaintiffs.[52]

Like Professor Cooper before him, Professor Shapiro's version of the entity theory has been superseded by subsequent events. The Supreme Court disagreed with him that Rule 23 needed modification to accommodate more "adventuresome" litigants.[53] And, while the Court had always held that the plaintiff bore the cost of notice,[54] an additional fifteen years of litigation has

43. *See generally* BRIAN ANDERSON & ANDREW TRASK, THE CLASS ACTION PLAYBOOK § 6.03[2] (2015 ed.).

44. *See generally id.* § 6.03[6].

45. Shapiro, *supra* note 31, at 936-37.

46. *Id*. at 938.

47. *Id*. at 941-42.

48. *Id*. at 931.

49. 28 U.S.C. 2072 (2012).

50. *Shapiro*, *supra* note 31, at 953.

51. *Id*. at 960 ("For some time, we have been moving—both out of necessity and out of a sense of what is sound policy—toward the idea that the class action device is both important and different.").

52. *Id*. at 961 ("If we can accept the notion that in a proper context, the class itself is—or at least should be—the claimant, and the represented litigant, we will be in a far better position to talk about the changes that are needed to realize this goal . . . .").

53. Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 617-18 (1997).

54. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 179 (1974) ("the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit"); Oppenheimer Fund, Inc.

demonstrated that notice costs do not appear to deter class action filings.[55] Finally, far from undermining the legitimacy of Rule 23(b)(3) class actions, opt outs are now accepted as one of the key sources of the device's legitimacy.[56] Despite these subsequent developments, however, scholars have continued to use the entity model, if not as a description of how courts *do* treat class actions, then certainly as a prescription for how courts *should* treat them,

3. Scholarly Acceptance of the Entity Theory

After Professor Shapiro's article, the entity theory of class actions was adopted without much objection by a number of prominent class action scholars. For example, only a few years later, in arguing that the preclusive effect of class actions should be "tailored" to the specific nature of the lawsuit (as opposed to claims that could or should have been brought), Professor Samuel Issacharoff noted that scholars exhibited "increasing skepticism over the view that a class action is simply an unaltered aggregation of individual claims."[57] He also felt comfortable asserting that "[c]lasses do take on the form of an 'entity,' to borrow Professor Shapiro's term."[58] Professor Issacharoff has further clarified his view over time. In a 2013 article, he wrote that "recent scholarship has begun to gnaw at the underdeveloped concept of representative actions and has instead begun to view the class action as an 'entity' once it has been certified . . . ."[59] To the extent one might treat a class action as an entity after certification, there are only subtle differences between the entity model, the aggregation model, and the representative model. (Most of these have to do with reducing the emphasis on the named plaintiff after certification; some

v. Sanders, 437 U.S. 340, 356 (1978) ("The general rule must be that the representative plaintiff should perform the tasks [necessary to send class notice], for it is he who seeks to maintain the suit as a class action and to represent other members of his class.").

55. Furthermore, the Rules Advisory Committee is currently considering proposals to reduce the cost of notice by employing either email or web publication where appropriate. FEDERAL RULES ADVISORY COMMITTEE, RULE 23 SUBCOMMITTEE REPORT 5 (2014) ("It is now clear that methods of notice not imagined in 1974 exist and might significantly facilitate the giving of effective, rapid, and much cheaper notice of class certification in 23(b)(3) actions.").

56. *See* Wal-Mart Stores v. Dukes, 131 S. Ct. 2541, 2558 (U.S. 2011) ("The procedural protections attending the (b)(3) class – predominance, superiority, mandatory notice, and the right to opt out – are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary to a (b)(2) class."). This portion of the Court's opinion was unanimous. *Id.* at 2561 (Ginsburg, J., concurring in part, dissenting in part) (concurring with Rule 23(b)(2) ruling).

57. Samuel Issacharoff, *Preclusion, Due Process, & the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1060 (2002).

58. *Id.*

59. Samuel Issacharoff, *Assembling Class Actions*, 90 WASH. U. L. REV. 699, 704 (2013); *see also* Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165 (2013).

might also reduce the emphasis on individual class members.) However, a number of scholars have gone further than Professor Issacharoff, arguing that one should treat a class action as an entity even *before* it has been certified.

In her 2011 article, Professor Alexandra Lahav also divided discussion of class actions into "[t]he two dominant schools of thought on the structure of the class action[, which] consider it to be either an advanced joinder device, merely aggregating individual cases, or a transformative procedural rule that creates an entity out of a dispersed population of claimants."[60] According to Professor Lahav, the courts could not answer the question of whether to treat a class as a separate juridical entity because "[c]lass action doctrine offers little help in choosing between the aggregation and entity views."[61] As evidence of the persistence of entity theory, she offers the facts that class members cannot terminate their counsel and that courts may approve class settlements over the objections of some class members.[62] (Professor Lahav has backed away from an earlier, pre-Roberts Court observation that "some doctrinal developments . . . seem to move closer to the entity model."[63])

She also observes that, despite the courts' ambivalence about the model, "[m]any of the leading scholars of class actions have espoused, either explicitly or implicitly, the entity view."[64] Others have also argued for plaintiff—or claimant—free class actions, albeit without explicitly invoking the entity model. Professor Brian Fitzpatrick, for example, argues that class members should not receive damages at all; instead, the benefits should flow solely toward the class counsel.[65] Similarly, former class action plaintiffs' lawyer Joshua Davis argues that treating class actions as entities for purposes of determining compensation would allow courts (and presumably plaintiffs) to sidestep those difficulties that arise when not all members of a proposed class have actually been injured.[66]

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60. Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1941 (2011).

61. *Id.* at 1943.

62. *Id*.

63. Alexandra D. Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 109 (2003).

64. Lahav, *supra* note 60, at 1946.

65. Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2070 (2010) (arguing that class action lawyers should receive 100% of damages awards in small-stakes class actions).

66. Joshua P. Davis, *Classwide Recoveries*, 82 GEO. WASH. L. REV. 890, 915 (2014) ("Allowing classwide recoveries . . . would greatly decrease the complexity of the class certification decision, and similarly decrease the amount of time and money courts and parties dedicate to the issue."). Professor Davis does discuss the entity model earlier in his article, but claims that most class actions exist on a "continuum" between aggregation and entity. *Id.* at 911. Nonetheless, his advocating that courts look only at the possible recovery for the class as a whole is completely consistent with the entity model.

Most of these scholars have noted that the entity view of the class action may require an understanding that the identification or certification of a class will change the underlying substantive law.[67]

4. The Class Action as Trust

Most recently, two professors on different sides of the class action debate have advocated treating class actions as separate litigation entities, specifically as beneficial trusts. Professor Sergio Campos has long viewed the class action as a "trust device" and argues that treating it as such would enhance the benefits of the class action.[68] Under his ideal version of the entity theory, there would be no named plaintiff at all. Instead, the class action would be operated as a trust for the benefit of absent class members, much as bankrupt corporations are treated as trusts.[69] Class counsel would serve as the trustee.[70]

Much like his predecessors, Professor Campos believes that treating the class action as a trust entity better reflects the reality of how class actions are litigated.[71] And, like his predecessors, he also argues that viewing the class action as an entity would allow for easier certification of classes and thus not allow "defendants to escape some or all of their liability."[72] But Professor Campos is also candid that "the trust view of the class action has little to no explicit support in the law on federal class actions."[73]

Professor Campos is joined, on the defense-oriented side, by Professor Martin Redish (assisted by then-law student Megan Kiernan). Professor Redish and Ms. Kiernan also argue that class actions ought to be treated as trusts, but their reason for doing so is to enhance preclusion by placing the preclusive focus on the attorney (the real party in interest in the lawsuit) rather than on the named plaintiff.[74] According to Redish and Kiernan, this "guardianship model" is an accurate description of the class action in practice and therefore ought to receive recognition by the courts.[75] As they argue: "Viewing class attorneys as

67. Lahav, *supra* note 60, at 1942 ("By contrast, the [*Shady Grove*] dissent saw this class action as an entity, a creation that transformed the substantive law.").

68. *See* Sergio J. Campos, *Proof of Classwide Injury*, 37 BROOKLYN J. INT'L L. 751 (2012).

69. Sergio J. Campos, *Class Actions & Justiciability*, 66 FLA. L. REV. 553, 558 (2014).

70. *Id.* at 565.

71. *Id*. at 570.

72. Campos, *supra* note 68, at 785.

73. Campos, *supra* note 69, at 565.

74. *See* Martin H. Redish & Megan B. Kiernan, *Avoiding Death by a Thousand Cuts: The Relitigation of Class Certification and the Realities of the Modern Class Action*, 99 IOWA L. REV. 1659, 1662 (2014) ("For all practical purposes, class attorneys function as far more than class members' legal representative. Instead, they act as quasi-guardians or trustees on behalf of the absent class members.").

75. *Id.* at 1676.

profit-driven guardians of absent class members enables the court in the second action to accurately view the attorneys who brought the first action as the real parties in interest for purposes of direct estoppel on the issue of class certifiability."[76]

In general, academic advocates of the entity theory usually seek to accomplish one of two goals: (1) prod the law into reflecting the empirical reality that the plaintiff does not control the class action lawsuit or (2) make it easier to certify a class. It is interesting that, despite the fact that almost no courts have quoted these articles and many have rendered explicit rulings that contradict the intellectual premises of each formulation of the theory, the entity model has proved surprisingly persistent in the academy over the last two decades. Moreover, as discussed in greater detail in the next section, while courts have not *explicitly* adopted the entity model, it serves as an *implicit* premise for a number of rulings at various stages of class action litigation.

B. The Entity Theory in Practice

The entity theory was far more accepted in the academy than in the courts, at least explicitly. However, that does not mean that the courts have ignored the theory entirely.

Instead, much as Professor Lahav observed, courts have implicitly adopted the theory at various points. The Rule 23 Subcommittee for the Rules Advisory Committee has similarly observed that, prior to the 2003 amendments to the Federal Rules of Civil Procedure, many courts assumed that an uncertified class should still be treated as a separate litigation entity.[77] These various adoptions of the entity theory are most apparent when one looks at pre-certification motion practice. If courts exclusively relied on the aggregation model, one would expect that before certification, class actions would look largely like individual lawsuits, since the model predicts there is no practical difference between a class action and an individual lawsuit. On the other hand, if courts relied on the entity model, one would expect them to carve out exceptions for class actions in early litigation on the grounds that the entity comprised of absent class members would require them.

The real debate over the propriety of the entity theory occurs when one looks at what happens (or should happen) to a proposed class either before or during certification. Does a class plaintiff (or, more realistically, her lawyer) create some kind of juridical entity simply by designating her complaint a class

76. *Id*.

77. FEDERAL RULES ADVISORY COMMITTEE, RULE 23 SUBCOMMITTEE REPORT 8 (2014) (referring to "the pre-2003 notion that a proposed class action was to be treated as such until the court rejected class certification").

action complaint? Should a class action be treated differently simply because of its designation in the pleadings? Does the view of a class as an entity justify a less searching inquiry into adequacy or typicality?

1. Pre-Certification Rulings

a. Rule 68 offers of judgment

Rule 68 offers of judgment are extremely controversial in class action litigation. Defendants love them because they have the potential to eliminate or at least limit the cost of meritless class actions. Plaintiffs dislike them because they allow defendants to "pick off" difficult-to-recruit class representatives. Courts are split on whether to entertain motions based on them.

The most common Rule 68 tactic is to offer judgment to the named plaintiff and, when he inevitably refuses the offer, file a motion to dismiss the case on the grounds that his claim is moot. The majority of courts have rejected this practice, usually on policy grounds. As a result, when allowing the class action to continue, these courts often speak in terms that explicitly embrace the entity model.

One of the earliest (and best known) of these cases is *Weiss v. Regal Collections* from the Third Circuit Court of Appeals.[78] In *Weiss*, the plaintiff had sued the defendant for violating the Federal Debt Collection Practices Act (FDCPA), a statute that provided for specific damages in a class action.[79] In response, before the plaintiff had a chance to move for certification, the defendant made an offer of judgment consisting of the individual statutory maximum, plus attorneys' fees and costs.[80] The plaintiff refused. The defendant then moved to dismiss the case, a motion the trial court granted.[81] The plaintiff appealed, and the Third Circuit reversed.[82]

The Third Circuit's opinion was primarily concerned with the policy effects of allowing offers of judgment to moot class actions.[83] But, in the course of reasoning through the various possible outcomes, the court also pointed out that "[t]he mootness exception recognizes that, in certain circumstances, to give effect to the purposes of Rule 23, *it is necessary to conceive of the named plaintiff as part of an indivisible class and not merely a single adverse party even before the class certification question has been decided*."[84] Since the

78. Weiss v. Regal Collections, 385 F.3d 337 (3d Cir. 2004).
79. *Id.* at 339.
80. *Id.*
81. *Id.* at 340.
82. *Id.* at 339.
83. *Id.* at 342-44.
84. *Id.* at 347 (emphasis added).

opinion in *Weiss*, the Ninth and Tenth Circuits have explicitly adopted this holding,[85] joined by numerous lower courts.[86]

By contrast, the Seventh Circuit allows dismissal of class actions where there has been a Rule 68 offer so long as there is no certification motion pending.[87] As the court reasoned, "[t]o allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III."[88] The Seventh Circuit specifically found that the designation of the case as a class action was not enough to merit special treatment. "That the complaint identifies the suit as a class action is not enough by itself to keep the case in federal court."[89] In other words, the Seventh Circuit specifically rejected the logic behind the entity model in making this ruling.

b. Discovery.

The question of whether a class is a separate juridical entity also influences the question of when (and what kind of) discovery is appropriate.

For example, class action discovery may include communications with absent class members who have similar claims. Under certain circumstances, that means the plaintiffs may seek class members' contact information from the defendant.[90] In other circumstances, the plaintiffs may seek to limit the defendants' contact with putative class members on the grounds that it would do harm to the proposed class. A court that implicitly accepts the entity theory may accept the plaintiffs' argument. A court that views the class action as an

85. *See* Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948, 949 (9th Cir. 2013) ("an unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot"); Lucero v. Bureau of Collection Recovery, 639 F.3d 1239, 1249 (10th Cir. 2011) ("the federal court's Article III jurisdiction to hear the motion for class certification is not extinguished by the Rule 68 offer of judgment to an individual plaintiff."). The Eleventh Circuit has also declined to allow a dismissal of a class action after a Rule 68 offer of judgment, but did not explicitly adopt *Weiss*'s reasoning. Stein v. Buccaneers LP, 772 F.3d 698, 702 (11th Cir. 2014).

86. *See, e.g.*, Kensington Phys. Therapy, Inc. v. Jackson Therapy Partners, Inc., 974 F. Supp. 2d 856, 865 (D. Md. 2013) (denying motion to dismiss after offer of judgment); Gregory v. Preferred Fin. Solutions, No. 5:11-CV-422(MTT), 2014 U.S. Dist. LEXIS 30371, at *2 (M.D. Ga. Mar. 10, 2014) (strikes offer of judgment on policy grounds; defendant should not be allowed to undermine class action device).

87. Damasco v. Clearwire Corp., 662 F.3d 891, 896 (7th Cir. 2011).

88. *Id.* at 896.

89. *Id*.

90. *See, e.g.*, Wellens v. Daiichi Sankyo Inc., No. C-13-00581-WHO, 2014 U.S. Dist. LEXIS 29794, at *13 (N.D. Cal. Mar. 5, 2014) (compelling discovery of contact information for absent class members); Kingery v. Quicken Loans, Inc., No. 2:12-cv-01353, 2014 U.S. Dist. LEXIS 33216, at *18 (S.D. W. Va. Mar. 14, 2014) (requiring Rule 30(b)(6) deponent to testify about absent class members because testimony would be relevant to typicality requirement).

individual lawsuit until the time of certification is more likely to reject unnecessary limitations on communications.[91]

The assumptions underlying the entity theory also influence the type of discovery the plaintiff may seek from the defendant. In the Second and Ninth Circuits, plaintiffs must make a prima facie showing that class discovery is worth the effort before it allows for wide-ranging discovery into certification-related issues.[92] (Otherwise, discovery would focus solely on the named plaintiff's claim.)

The majority of courts in the remaining appellate circuits allow wider-ranging discovery simply based on the fact that the plaintiff has pled the lawsuit as a class action, so long as the discovery is at least nominally related to the certification inquiry.[93] In doing so, they are implicitly endorsing the view that a class action—even before certification—is qualitatively different from an individual lawsuit.

c. Substitution of named plaintiffs

Courts also implicitly rely on the entity theory when they allow the complete substitution of named plaintiffs before a class has been certified.[94] For example, in the food-labeling class action *Aguilar v. Boulder Brands, Inc.*, a trial court in the Southern District of California granted a named plaintiff's motion to amend her class complaint to remove herself and substitute in a new named plaintiff.[95] The defendant objected to the substitution, arguing that once the named plaintiff resolved to withdraw from the case, there was no live case or controversy before the court.[96] The court, however, refused to "focus strictly on the temporary void on the plaintiff's side of the 'v.'"[97]

91. *See, e.g.*, Bobryk v. Durand Glass Mfg. Co., No. 12-cv-536, 2013 U.S. Dist. LEXIS 145758, at *4 n.1 (D.N.J. Oct. 9, 2013) (denies motion to limit defendant's communication with class members, in part because, since "the Rule 23 class has not been certified, plaintiffs' counsel does not represent the putative class").

92. *See, e.g.*, Mantolete v. Bolger, 767 F.2d 1416, 1424 (9th Cir. 1985); Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 234 (2d Cir. 2006); Nelson v. Avon Prods., Inc., No. 13-cv-02276-BLF, 2014 U.S. Dist. LEXIS 123315, at *4-5 (N.D. Cal. Sep. 3, 2014) (allowing discovery for plaintiffs who showed, pursuant to *Mantolete*, that discovery could substantiate their class allegations).

93. *See, e.g.*, Kingery, 2014 U.S. Dist. LEXIS 33216, at *18.

94. There is little debate that substitution is possible *after* a proper class has been certified, although the new named plaintiff must demonstrate that she will be an adequate class representative. *See, e.g.*, Velasco v. Sogro, Inc., No. 08-C-0244, 2014 U.S. Dist. LEXIS 104047, at *9 (E.D. Wis. Jul. 30, 2014).

95. Aguilar v. Boulder Brands, Inc., No. 3:12-cv-08162-BTA-BGS, 2014 U.S. Dist. LEXIS 122822, at *23 (S.D. Cal. Sep. 2, 2014).

96. *Id.* at *15.

97. *Id.* at *18.

2. Settlement

Courts may also adopt the entity model when evaluating class settlements. Class settlements are often reached before a class has been certified in the case,[98] leading the plaintiffs and defendants to seek certification at the same time they ask the court to approve settlement. As a result, some courts will reach results about the terms of the settlement, or about questions that arise in the settlement process, that are best explained by their adherence to the entity model.

Professor Lahav identified one of these cases in her discussion of *Lazy Oil Co. v. Witco Corp*.[99] *Lazy Oil* involved one of the rare cases where a proposed class action was litigated by a sophisticated named plaintiff who conceived of the case and brought it to the lawyers.[100] After a class had been certified, the lawyers entered into negotiations with the defendants and reached an agreement for a settlement.[101] The named plaintiff's principal (who, remember, had been the driving force behind this litigation) did not approve of the settlement, so he formally objected to the agreement and moved to disqualify class counsel.[102]

The *Lazy Oil* court was thus faced with the question: Who really represented this class, the named plaintiff or the attorneys?[103] The trial court decided in favor of the lawyers: it refused to disqualify or remove the class attorneys from the case and proceeded to approve the settlement as meeting the various tests the Third Circuit required the court to apply.[104]

Lazy Oil is a case that concerns a class that had already been certified in the litigation, at a time when the named plaintiff and counsel were working together and the defendant was their common adversary.[105] As a result, the division between class representative and class counsel, while not insignificant, was easier to reconcile than it might be in other cases. From a doctrinal standpoint, if the court has certified a class with a specific definition, bound by identified common issues, then it is conceivable that it could find the represented group is better served by its lawyers than by its appointed representative.

As more recent case law has shown, however, the lawyer is not always the preferable representative. In *Eubank v. Pella Corp.*, the Seventh Circuit (in an

98. *See generally* ANDERSON & TRASK, *supra* note 43, § 8.04 (discussing timing and procedures for class action settlements).

99. Lahav, *supra* note 60, at 1945-46 (discussing Lazy Oil Co. v. Witco Corp., 166 F.3d 581 (3d Cir. 1999)).

100. *Lazy Oil*, 166 F.3d at 583.

101. *Id.*

102. *Id.* at 583-84.

103. *Id.* at 588.

104. *Id.* at 589.

105. *Id.* at 584.

opinion by Judge Richard Posner) reversed approval of a settlement where several of the named plaintiffs had objected and the class attorney had responded by replacing them with more compliant representatives.[106]

But the truly murky issues arise when one considers class actions that are only certified for purposes of settlement. In other words, before the settlement agreement, there is no finally defined class with a certified common objective; there is only the named plaintiff and the lawyers. As a result, various aspects of the proposed class, such as the definition of the class, the claims it has advanced, or the relief it seeks, can change based solely on what the class counsel—as opposed to any of the putative class members—believe will secure a settlement.[107]

One also can view *cy pres* distributions in settlements (that is, distributions to charities that would benefit those in a similar position to class members) as relying at least partially on the entity theory. To the extent courts have authorized *cy pres* distributions when further compensation to class members was possible, they tend to rely on the idea that the class as an entity will benefit, regardless of whether identifiable class members do.[108]

3. Certification

The entity model also has subtle effects on the certification argument. Technically, certification is the process by which a court determines whether there should be a class in the first place. As discussed in greater detail above, numerous scholars, including Professors Cooper and Shapiro, specifically advocated the entity model of the class action because they believed it would allow the court to elide difficult questions—such as choice of law—that serve as obstacles to certification.

However, a number of courts certifying class actions have adopted reasoning that indicates they believe the class is a pre-existing entity, and

106. Eubank v. Pella Corp., 2014 U.S. App. LEXIS 10332, at *14 (7th Cir. Jun. 2, 2014) (noting that counsel "removed the original four class members who had opposed the settlement; naturally their replacements joined Saltzman in supporting it").

107. *See, e.g.*, Arellano v. T-Mobile USA, Inc., No. C 10-05663, 2011 U.S. Dist. LEXIS 21441, at *4-5 (N.D. Cal. Mar. 3, 2011) (Alsup, J.) (standing order warning against expanding class for settlement purposes).

108. *See, e.g.*, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013) ("*Cy pres* distributions imperfectly serve that purpose by substituting for that direct compensation an indirect benefit that is at best attenuated and at worse illusory."); Pearson v. NBTY, Inc., Nos. 14-1198, 2014 U.S. App. LEXIS 21874, at *17-20 (7th Cir. Nov. 19, 2014) (criticizing proposed *cy pres* and injunctive relief as not benefiting actual class members); *see also* Marek v. Lane, 134 S. Ct. 8, 8 (U.S. 2013) (Roberts, C.J.) (statement accompanying denial of certiorari of class action settlement, noting: "The unnamed class members, by contrast, received no damages from the remaining $6.5 million. Instead, the parties earmarked that sum for a '*cy pres*' remedy . . . .").

preserving its separate rights often provides a reason for their certification rulings. The most prevalent entity-based argument is that individualized damages should not serve as a barrier to certification because inquiring into individualized damages distracts from the damage done to the class as a whole.[109] (This is distinct from the argument that individualized damages will prove too complicated or unmanageable to justify certification.)

C. The Entity Theory Contrasted with the Aggregation Theory

The entity theory is most often contrasted with the "aggregation" or "joinder" theory of class actions. The aggregation model states that a class action is a form of joinder that allows for representative litigation. In other words, instead of joining hundreds of other claims into a lawsuit, a plaintiff bringing a class action prosecutes her individual claims. If she meets the requirements of Rule 23, then the court certifies her lawsuit as a class action, meaning the verdict will bind all members of the class as defined. Individuals retain the right to opt out of the class action where they could have received individualized relief, a situation usually covered under Rule 23(b)(3).[110]

The aggregation model is not without its flaws. For one thing, it relies on the legal fiction (undermined by empirical research)[111] that the named plaintiff actually drives the litigation. In fact, as courts and commentators have both recognized, class actions are usually conceived and controlled by entrepreneurial attorneys who recruit token representatives.[112]

III. THE ROBERTS COURT REVOLUTION

Despite Professor Lahav's protestations that courts have provided little guidance on the viability of the entity theory,[113] the Roberts Court, in a series of unanimous decisions, has provided a clear answer that excludes the strong version of the entity model and seems to embrace the aggregation model.

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109. *See, e.g.*, Hughes v. Kore of Ind. Enter., Inc., 731 F.3d 672, 675 (7th Cir. 2013) (Posner, J.) (suggesting class relief be distributed to charitable foundation rather than class members); Beck-Ellman v. Kaz, 283 F.R.D. 558, 569 (S.D. Cal. 2012) (certifying class; finding predominance despite variations in damages because "Plaintiff Beck-Ellman seeks no remedy that would require an award of damages unique to any particular class member or subclass of class members."). *See also* Davis, *supra* note 66, at 917-18 ("In addressing class actions, courts make decisions – often implicitly – about whether they will calculate recoveries on an individual or classwide basis.").

110. *See* FED. R. CIV. P. 23(b)(3).

111. *See, e.g.*, Stephen Meili, *Collective Justice or Personal Gain? An Empirical Analysis of Class Action Lawyers and Named Plaintiffs*, 44 AKRON L. REV. 67, 111 (2011).

112. *See* Culver v. City of Milwaukee, 277 F.3d 908, 910 (7th Cir. 2002) ("Often the class representative has a merely nominal stake . . . and the real plaintiff in interest is then the lawyer for the class, who may have interests that diverge from those of the class members.").

113. Lahav, *supra* note 60, at 1943.

A. Taylor v. Sturgell

The Roberts Court laid the foundation for this quiet revolution in *Taylor v. Sturgell*,[114] a case that was not even a class action. *Taylor* involved a dispute over whether an individual bringing a Freedom of Information Act (FOIA) suit could be precluded under the doctrine of "virtual representation."[115] Plaintiff Brent Taylor had brought a lawsuit under FOIA seeking records from the Federal Aviation Administration.[116] Previously, his friend Greg Herrick had sought the same records in a similar lawsuit.[117] The primary difference between the two suits was that Taylor filed in a different jurisdiction (the District of the District of Columbia instead of the District of Wyoming) and raised two arguments that Herrick had neglected.[118] The District of the District of Columbia held that Taylor's lawsuit was barred by claim preclusion because his friend Herrick had served as a "virtual representative."[119] The D.C. Circuit affirmed.[120]

The Supreme Court reversed.[121] Writing for a unanimous Court, Justice Ruth Bader Ginsburg began by restating the general rule that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."[122] Justice Ginsburg did note several exceptions to this general rule: for example, "in certain limited circumstances, a party may be bound by a judgment because she was adequately represented by someone with the same interests who was a party to the suit. Representative suits with preclusive effect on nonparties include properly conducted class actions[.]"[123]

It is significant that Justice Ginsburg focused on "adequate" representation. It is also significant that she specified the class action must be "properly conducted." These emphases line up with the aggregation model for class actions, where one of the key questions at certification is whether the named plaintiff can adequately represent the class, and where certification is the turning point between individual lawsuits and classwide litigation.

114. Taylor v. Sturgell, 553 U.S. 880 (2008).
115. *Id.* at 884.
116. *Id.* at 885.
117. *Id.*
118. *Id*. at 886.
119. *Id.* at 888.
120. *Id.* at 889.
121. *Id.* at 885.
122. *Id.* at 893.
123. *Id.* at 894 (internal quotations & citations omitted).

B. Smith v. Bayer Corp.

The next case, *Smith v. Bayer Corp.*,[124] answered the question: Does denying certification to one proposed class action have any preclusive effect on other, identical class actions?

This was a question of real and compelling importance to both sides of the class-action bar. As already discussed in greater detail, the open secret about class action practice is that the lawsuits are lawyer-driven rather than client-driven.[125] As a result, defeating class certification in one case often does not mean victory in the litigation; class counsel can just re-file the same complaint with a different named plaintiff in front of a different judge. As Judge Easterbrook of the Seventh Circuit Court of Appeals has observed, this "[r]elitigation can turn even an unlikely outcome into a reality."[126] Assuming enough named plaintiffs, class counsel will eventually find a judge who will certify the proposed class.[127]

That was exactly the circumstance that faced Bayer Corporation. It defended (and defeated certification) against a class action alleging that the company had violated various consumer-protection statutes by selling a cholesterol drug called Baycol, which allegedly caused rhabdomylosis, a muscle disorder that could lead to heart attacks.[128]

After this victory, Bayer asked the federal court to issue an injunction barring the prosecution of a related class action in a West Virginia state court.[129] (That case had been filed in state court before the enactment of the Class Action Fairness Act's expansion of diversity jurisdiction[130] and so could not be removed to federal court.) Bayer argued that the injunction would pass muster under the Anti-Injunction Act's regulation exception[131] because the certification decision in federal court precluded certification of an identical class in state court.[132] The trial court issued the injunction.[133] And, when the state-court plaintiff appealed, the Eighth Circuit upheld the injunction.[134]

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124. Smith v. Bayer Corp., 131 S. Ct. 2368 (U.S. 2011).

125. *See* Culver v. City of Milwaukee, 277 F.3d 908, 910 (7th Cir. 2002) (Posner, J.) ("the real plaintiff in interest is the lawyer for the class"); John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 297 (2010) (noting entrepreneurial nature of plaintiffs' lawyers); *see also* ANDERSON & TRASK, *supra* note 43, § 3.02[1], at 78.

126. *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 768-69 (7th Cir. 2003) (Easterbrook, J.).

127. *Id.* at 766-67.

128. *Bayer Corp.*, 131 S. Ct. at 2373-74. The class action had originated in West Virginia, but after removal and transfer to a multi-district litigation (MDL) court, it wound up in the District of Minnesota. *Id.* at 2373.

129. *Id*. at 2374.

130. Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d) (2012).

131. Anti-Injunction Act, 28 U.S.C. § 2283 (2012).

132. *Bayer Corp.*, 131 S. Ct. at 2374.

The Supreme Court granted certiorari to determine two issues: "The first involves the requirement of preclusion law that a subsequent suit raise the 'same issue' as a previous case. The second concerns the scope of the rule that a court's judgment cannot bind nonparties."[135] In a unanimous opinion authored by Justice Kagan, the Court reversed the Eighth Circuit's decision, holding that a federal court cannot enjoin a state court from re-litigating a class action that had been denied certification in federal court. In doing so, the Court held that the plaintiff was not precluded from asserting his claim because the two cases involved some different issues (i.e., the differing standards for certification),[136] and more relevant to the discussion here, because he was not a party to the previous action. By the time the second case had been filed, it was clear that Smith was not a party to the first case—only former named plaintiff George McCollins was.

> In these circumstances, we cannot say that a properly conducted class action existed at any time in the litigation. Federal Rule 23 determines what is and is not a class action in federal court, where McCollins brought his suit. So in the absence of a certification under that Rule, the precondition for binding Smith was not met. Neither a proposed class action nor a rejected class action may bind nonparties.[137]

In fact, however, Justice Kagan's opinion had gone even further and explicitly stated that, until the lawsuit was certified as a class action, it was simply an individual lawsuit.

> If we know one thing about the *McCollins* suit, we know that it was *not* a class action. Indeed, the very ruling that Bayer argues ought to be given preclusive effect is the District Court's decision that a class could not properly be certified. So Bayer wants to bind Smith as a member of a class action (because it is only as such that a nonparty in Smith's situation can be bound) to a determination that there could not be a class action. And if the logic of that position is not immediately transparent, here is Bayer's attempt to clarify: "Until the moment when class certification was denied, the *McCollins* case was a properly conducted class action." That is true, according to Bayer, because McCollins' interests were aligned with the members of the class he

133. *Id.*

134. *Id.*

135. *Id.* at 2374-75 (internal footnotes omitted).

136. *Id.* at 2375-79.

137. *Id.* at 2380. Richard Freer has argued that this holding is only dicta, since the Court had already reversed the Eighth Circuit decision based on the non-mutuality of issues in the litigation. Richard D. Freer, *Preclusion & the Denial of Class Certification: Avoiding the "Death by a Thousand Cuts*,*"* 99 IOWA L. REV. BULL. 85, 93 (2014). Given its grant of certiorari to decide both issues, it is unlikely the Court would agree.

> proposed and he "acted in a representative capacity when he sought class certification." But wishing does not make it so.[138]

The Court did recognize the policy issue raised by its opinion: more than other lawsuits, class actions are subject to a "re-litigation" problem.[139] For the specific case before it, the Court noted that it was unlikely the situation would recur because CAFA would now allow the defendant to remove such a case to federal court.[140] More worrying, however, was the prospect that plaintiffs' counsel might file a subsequent lawsuit in another *federal* court. The Court pointed out that this particular difficulty could be handled by either multidistrict consolidation (if the subsequent cases were filed before certification was denied) or by asking the new federal court to exercise "principles of comity" when evaluating subsequent class actions.[141]

The request for comity has, so far, not proven itself an effective solution to the problem of re-litigation. The Seventh Circuit, for example, has specifically held that, since comity between federal district courts is only discretionary, it does not provide grounds for striking class allegations in a copycat class action.[142] (In other words, the defendant would have to re-litigate the case—engaging in costly discovery and motions practice—up to at least class certification even though it had already defeated certification once in another federal court.) Federal district courts have split in such a way that it is difficult to tell whether the exercise of comity has proven to be a new doctrinal tool or simply a means of enforcing their old inclinations to either let the case proceed or stop it in its tracks.[143] Regardless, the continuing debate over comity reinforces the impact of Justice Kagan's opinion: until a class action has been certified, it has not been "properly conducted," and cannot bind anyone other than the named plaintiff.

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138. *Bayer Corp.*, 131 S. Ct. at 2380.

139. *Id*. at 2381-82.

140. *Id*. at 2382.

141. *Id*.

142. Smentek v. Dart, 683 F.3d 373, 376 (7th Cir. 2012) (Posner, J.).

143. *Compare* Murray v. Sears, Roebuck & Co., No. C 09-5744, 2014 U.S. Dist. LEXIS 18082, at *18 (N.D. Cal. Feb. 12, 2014) (denying certification of copycat class action; while previous denial of certification did not "compel a denial," it provided "strong guidance"); *and* Baker v. Home Depot USA, Inc., No. 11 C 6768, 2013 U.S. Dist. LEXIS 9377, at *14-16 (N.D. Ill. Jan. 24, 2013) (striking class allegations based on "respectful attention" to denial of certification in previous case); *with* Cleary v. Am. Capital, Ltd., No. 13-12652-RGS, 2014 U.S. Dist. LEXIS 25990, at *8-9 (D. Mass. Feb. 28, 2014) (refusing to strike class allegations based on comity).

C. *Standard Fire Ins. Co. v. Knowles*

Standard Fire Insurance Co. v. Knowles[144] was a case that involved interpretation of the Class Action Fairness Act (CAFA).[145] Congress passed CAFA in 2005 to address a number of perceived abuses in class action litigation. The most notable of these was jurisdictional: plaintiffs would often bring multi-million dollar, nationwide class actions in state court, believing that "local" state judges and less developed class-action case law would give hometown plaintiffs an edge over corporate defendants.[146] CAFA minimized that problem by loosening the requirements for federal jurisdiction. Leaving aside a few statutory exceptions, it stated that, for a class action, the removing party needed to establish only minimal diversity (any one plaintiff hails from a different state than any one defendant), rather than complete diversity (no plaintiff and defendant share a common state of residence), and would need to establish an aggregated amount in controversy of $5 million rather than demonstrating that the named plaintiff by herself had placed $75,000 in controversy.[147]

The passage of CAFA fundamentally changed class action litigation. Plaintiffs found themselves in federal court far more frequently.[148] As a result, plaintiffs began experimenting with new tactics that would allow them to remain in state court. Some plaintiffs reduced the scope of their complaints, hoping to take advantage of the "local controversy" and "home state" exceptions in the statute.[149] Others tried to reduce the amount in controversy, either by bringing smaller cases or—more relevant to this discussion—by disclaiming any damages greater than $5 million.[150]

144. Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (U.S. 2013).

145. 28 U.S.C. §§ 1332(d), 1453(b) (2012).

146. *Knowles*, 133 S. Ct. at 1350; *see also* John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . in State Court*, 25 HARV. J. L. & PUB. POL'Y 43 (2001) (making pre-CAFA case for jurisdictional reform).

147. 28 U.S.C. §§ 1332(d), 1453(b). One could argue CAFA's treatment of the class action is consistent with the entity model. CAFA directs courts to look at the amount brought into controversy by the entire class, rather than just the named plaintiff's claim. That said, a number of courts interpreting CAFA have pointed out that the amount-in-controversy analysis looks at the maximum recovery, which would necessarily require the court to assume that the named plaintiff would prevail at class certification, as well as assuming that she would prevail at verdict. *See, e.g.*, Lewis v. Verizon Commc'ns, Inc., 627 F.3d 395, 398 (9th Cir. 2010) (estimate of total billings was appropriate for CAFA amount in controversy). Explicitly making these assumptions for the purposes of determining whether the case meets a statutory requirement is still consistent with the aggregation model as well.

148. Klonoff, *supra* note 2, at 744 ("CAFA has in fact had an enormous impact in shifting most class actions to federal court.").

149. *See generally* ANDERSON & TRASK, *supra* note 43, §4.03[3][b] (discussing tactics involving CAFA jurisdiction).

150. *Id.*

That was the tactic Greg Knowles and his attorneys used. The *Knowles* case involved allegations that the defendant insurance company had illegally failed to reimburse homeowners who had made claims under its policies for general contractors' fees.[151] According to the plaintiff, the case involved "hundreds, and possibly thousands" of class members.[152] To avoid federal jurisdiction, the plaintiff stipulated that he would not seek damages of more than $5 million on behalf of the class.[153] Standard Fire Insurance still removed the case, arguing that such a stipulation was not valid.[154] A trial court in the Western District of Arkansas agreed with the plaintiff: the court found that the damages would have amounted to slightly more than $5 million, but with the stipulation, the amount in controversy had not been met.[155] Standard Fire Insurance appealed to the Eighth Circuit, to no avail.[156]

The Supreme Court, however, in a unanimous opinion authored by Justice Stephen Breyer, agreed with the insurance company's argument. As Justice Breyer wrote:

> As applied here, the statute tells the District Court to determine whether it has jurisdiction by adding up the value of the claim of each person who falls within the definition of Knowles' proposed class and determine whether the resulting sum exceeds $5 million. If so, there is jurisdiction and the court may proceed with the case. The District Court in this case found that resulting sum would have exceeded $5 million but for the stipulation. And we must decide whether the stipulation makes a critical difference.
>
> In our view, it does not. Our reason is a simple one: Stipulations must be binding. . . . The stipulation Knowles proffered to the District Court, however, does not speak for those he purports to represent.
>
> That is because a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified.[157]

In other words, until a class is certified, a named plaintiff is merely an individual plaintiff. The class has no legal standing before certification, therefore class members could not be bound by what the named plaintiff did in

151. *Knowles*, 133 S. Ct. at 1347.
152. *Id.*
153. *Id.*
154. *Id*. at 1348.
155. *Id.*
156. *Id.*
157. *Id*. at 1348-49 (emphasis added).

their name. The named plaintiff is not acting on behalf of class members until such time as the case has been certified by the court.

Since the opinion was unanimous, lower courts have largely followed it without distinguishing or modifying it in any way.[158] (For contrast, one need only look at the various ways in which lower courts have both applied and distinguished the more controversial *Dukes* and *Behrend* opinions.[159])

D. Genesis Healthcare Corp. v. Symczyk

A final case that illuminates the same principle, but was not decided unanimously, is *Genesis Healthcare Corp. v. Symczyk*.[160] *Symczyk* addressed whether a defendant could use a Rule 68 offer of judgment to moot the claims of a plaintiff in a collective action under the Fair Labor Standards Act. (The FLSA collective action is a close cousin to the Rule 23 class action, but it is not the same device. Most importantly, FLSA collective actions create opt-*in* aggregated litigation, rather than the mandatory or opt-*out* lawsuits created under Rule 23.[161])

As discussed in greater detail above, Rule 68 offers of judgment are a common defense tactic for certain class actions. Those courts that decline to apply them largely do so on the grounds that allowing the defendant to moot the named plaintiff's claims would somehow compromise the interests of the prospective class.[162] Indeed, even those courts that *do* allow Rule 68 offers of judgment (like the Court of Appeals for the Seventh Circuit) tend to compromise by only allowing an offer of judgment to moot a class action where there is no motion for certification pending.[163]

In *Symczyk*, the plaintiff was a nurse who had brought an FLSA collective action complaint against her employers, seeking statutory damages for an alleged violation of the statute.[164] (According to the complaint, the defendant had improperly deducted 30-minute breaks from its employees' shifts.[165]) When

158. *See, e.g.*, Johnson v. Pushpin Holdings, 748 F.3d 769, 772-73 (7th Cir. 2014) (Posner, J.) (criticizing the logic of *Knowles*, but reversing the remand order because "the Court has spoken and we are bound").

159. *See, e.g.*, Trask, *supra* note 5, at 797-804 (detailing methods courts have employed to distinguish *Dukes*); Glazer v. Whirlpool Corp., 722 F.3d 838, 859-60 (6th Cir. 2013) (distinguishing *Behrend* after remand from the Supreme Court); Butler v. Sears, Roebuck & Co., 727 F.3d 796, 800 (7th Cir. 2013) (Posner, J.) (same).

160. Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (U.S. 2013).

161. *See generally* ANDERSON & TRASK, *supra* note 43, § 3.02[3] (discussing distinctions between FLSA collective action and Rule 23 class action).

162. *See supra* notes 78-86.

163. Damasco v. Clearwire Corp., 662 F.3d 891, 896 (7th Cir. 2011).

164. *Symczyk*, 133 S. Ct. at 1527.

165. *Id*.

the defendants responded to the complaint, they also made an offer of judgment under Rule 68 for the full amount of the plaintiff's statutory damages, plus attorneys' fees.[166] They then moved to dismiss the complaint on the grounds that the plaintiff's claim was moot.[167]

The plaintiff responded with an entity-theory based argument: that the Rule 68 offer of judgment had been an impermissible attempt to "pick off" the sole named plaintiff in the collective action.[168] The trial court held that the offer of judgment had mooted plaintiff's claim and dismissed the case.[169] (It was persuaded, in part, by the fact that no other individuals had opted in to plaintiff's lawsuit.[170]) On appeal, the Third Circuit reversed, citing concerns that the defendants were attempting to (as the Supreme Court characterized it) "short circuit the process."[171]

The Supreme Court granted certiorari to decide the mootness question. The Court split 5–4, with the conservative Justices (Alito, Kennedy, Roberts, Scalia, and Thomas) in the majority and the liberal justices (Breyer, Ginsburg, Kagan, and Sotomayor) dissenting.

Writing for the majority, Justice Thomas held that "[i]n the absence of any claimant's opting in [to the proposed collective action], respondent's suit became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action.[172] Justice Thomas also rejected any attempt to use Rule 23 precedent (which had been offered by the defendants) to support a wider ruling that might also apply to class actions, calling the cases "inapposite" because class actions under Rule 23 were "fundamentally different from collective actions under the FLSA."[173]

The "fundamental difference" Justice Thomas cited was that, in FLSA collective actions, absent employees only join the litigation by "filing written consent with the court."[174] By contrast, under Rule 23, "when a district court certifies a class, 'the class of unnamed persons described in the certification *acquires a legal status separate from the interest asserted by the named plaintiff*.'"[175] He repeated this point only a few paragraphs later: "a putative class *acquires an independent legal status once it is certified under Rule 23*."[176]

166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 1527-28.
172. *Id.* at 1529.
173. *Id*. (internal citation omitted).
174. *Id*. at 1530.
175. *Id*. (quoting Sosna v. Iowa, 419 U.S. 393, 399 (1975)) (emphasis added).
176. *Id*. (citing Sosna, United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980)) (emphasis added).

In other words, the Court explicitly identified the moment of certification as the moment when a case expands from an individual lawsuit to one that represents the interests of the class.

Of course, this logic would argue *for* allowing an offer of judgment to moot a putative class action. Justice Thomas left the door open for that ruling by pointing out that settling a collective action early does not deprive additional claimants of any rights to bring lawsuits: "While settlement may have the collateral effect of foreclosing unjoined claimants from having their rights vindicated in respondent's suit, such putative plaintiffs remain free to vindicate their rights in their own suits."[177] Moreover, he responded to Symczyk's argument that "picking off" a named plaintiff in a collective action would frustrate the efficiency justifications for a collective action, as articulated for class actions in *Deposit Guaranty National Bank v. Roper*.[178] While he rejected the argument on its logic, he included a footnote that implied *Roper* may no longer be good law: "Because *Roper* is distinguishable on the facts, we need not consider its continuing validity in light of our subsequent decision in *Lewis v. Continental Bank Corp*., 494 U. S. 472, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990)."[179]

But the truly interesting part of *Symczyk*, as it applies to the entity theory, is not Justice Thomas's majority opinion, but the dissent authored by Justice Kagan and joined by Justices Breyer, Ginsburg, and Sotomayor. If the dissenters were concerned about the same policy questions that had animated some of the lower courts' rulings on offers of judgment (that is, that allowing an offer of judgment was not in the interest of the putative class), then one would expect them to at least mention those concerns. Instead, Justice Kagan's dissent focused entirely on the nature of the plaintiff's *individual* FLSA claim. As she wrote:

> The Court today resolves an imaginary question, based on a mistake the courts below made about this case and others like it. The issue here, the majority tells us, is whether a "collective action" brought under the Fair Labor Standards Act of 1938 "is justiciable when the lone plaintiff's individual claim becomes moot." Embedded within that question is a crucial premise: that the individual claim has become moot, as the lower courts held and the majority assumes without deciding. But what if that premise is bogus?[180]

And, as she continued:

177. *Id*. at 1531.
178. *Id*. at 1532.
179. *Id*. at 1532 n.5.
180. *Id*. at 1532 (Kagan, J. dissenting) (internal citations omitted).

> We made clear earlier this Term that "as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." By those measures, an unaccepted offer of judgment cannot moot a case. When a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect. As every first-year law student learns, the recipient's rejection of an offer "leaves the matter as if no offer had ever been made." Nothing in Rule 68 alters that basic principle; to the contrary, that rule specifies that "[a]n unaccepted offer is considered withdrawn." Fed. Rule Civ. Proc. 68(b). So assuming the case was live before—because the plaintiff had a stake and the court could grant relief—the litigation carries on, unmooted.[181]

In other words, the problem with the majority's opinion was *not* that it held that the plaintiffs' assertion of a collective action could not save her individual claim from being mooted, it was that her *individual* claim could not be mooted by her rejection of an offer of judgment. The effect of the ruling would still eliminate the defense tactic of offering judgment and then moving to dismiss a claim, but it would do so without ever looking at whether the claim itself was individual or collective. In other words, it did not consider the class to be an entity worthy of consideration before certification.[182]

Taken together, these four rulings indicate that the entity model—at least to the extent that it dictated treating an uncertified class like a litigation entity—is a dead letter. The Supreme Court has ruled, definitively, unanimously, and on multiple occasions, that until the moment a class action is certified under Rule 23, it is nothing more than an individual lawsuit.

IV. CONCLUSION

The entity model has enjoyed scholarly support for more than two decades, despite the fact that such support has rarely translated into legal opinions that adopt its logic. Nonetheless, while courts have not expressly

181. *Id*. at 1533-34 (internal citations omitted). I have cited this passage at length because it is important to how the Roberts Court treats the entity model. In this case, while Justice Thomas had overtly challenged the entity-based justifications for not mooting class actions, Justice Kagan's response ignored them entirely.

182. The Eleventh Circuit has since adopted Justice Kagan's reasoning. Stein v. Buccaneers LP, 772 F.3d 698, 703 (11th Cir. 2014). However, it did not ignore the fact that the case was a class action; instead it held in dicta that the named plaintiff's claim could also relate back to the original class action complaint should it become moot. *Id.* at 707.

invoked the entity model, it is clear that some courts have ruled in ways that are consistent with their assuming the model is either (1) an accurate description of a litigation class or (2) is reflected in other legal rulings.

In the four opinions discussed above, the Supreme Court has definitively held that a class action is nothing more than an individual lawsuit until the time that a court certifies it as a class action. The implications of these rulings will affect pre-certification motion practice, settlement, and even the certification debate itself. Of course, trial courts have not necessarily recognized these implications yet. And, to the extent these were not the immediate holdings of each case, those courts inclined to certify a class may still find ways to slip past the logical implications. Nonetheless, the Supreme Court has handed academics a clearer understanding of the nature of the class action as it is litigated and defendants a powerful tool for opposing attempts to read too much into Rule 23.