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The Class Action Mechanism and Courts' Continued Focus on Class Certification and Settlement Requirements

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Introduction: An Overview of the Class Action Mechanism and Recent Jurisprudence

A class action is a procedural mechanism by which an individual plaintiff (or a small group of plaintiffs) prosecutes nearly any statutory or regulatory violation or common law claim on behalf of a much larger group of unnamed plaintiffs who share a common interest and are similarly situated. The individual plaintiff who brings the action is referred to as the putative "class representative" because that individual represents the interests of all members of the class in the litigation. The unnamed class members are referred to generically as the "class members" and do not usually participate in the litigation, but reap any benefits the representatives are able to win on their behalf. In cases brought in the federal court system, the class representatives must satisfy a variety of prerequisites set out in Rule 23 of the Federal Rules of Civil Procedure[1] before a case can proceed as a class action. At the highest level, these rules are designed to ensure the representatives are "part of the class and possess the same interest and suffer the same injury as the class members."[2]

Where individualized litigation seeks to adjudicate the rights of a specific plaintiff or plaintiffs vis-à-vis the defendant or defendants, the class action was developed to adjudicate the rights of an entire class of plaintiffs vis-à-vis the defendant or defendants. The concept of class actions has been a feature of the federal courts since at least the Nineteenth Century, when the Supreme Court issued Equity Rule 48,[3] which officially recognized collective actions.[4] The class action is intended to aggregate claims when the amount in controversy may be small in value for each individual at issue, and, absent a class action mechanism, the claims would likely go unadjudicated because a single plaintiff lacks the incentive to bring an

[1] Fed. R. Civ. P. 23.
[2] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550, 180 L. Ed. 2d 374, 78 Fed. R. Serv. 3d 1460 (2011) (quotes and citations omitted).
[3] Equity R. 48.
[4] *See In re Joint Eastern and Southern Dist. Asbestos Litigation*, 129 B.R. 710, 804 (E.D. N.Y. 1991), judgment vacated, 982 F.2d 721, 24 Fed. R. Serv. 3d 686 (2d Cir. 1992), *opinion modified on reh'g*, 993 F.2d 7 (2d Cir. 1993) (noting the history of former Equity Rule 48); *see also Smith v. Swormstedt*, 57 U.S. 288, 302-03, 16 How. 288, 14 L. Ed. 942, 1853 WL 7671 (1853).

individual litigation when the likely damages are small.[5] The class action mechanism gives plaintiffs a certain strength in numbers because the aggregate value of the class members' claims often can be staggering. This can be especially true in antitrust class actions, where plaintiffs allege violations that allegedly impacted tens of thousands of consumers who are typically entitled to treble damages if they are successful.[6]

Moreover, commentators and class action proponents alike have long advocated that the collective action is more efficient because it resolves a common grievance through a single judicial proceeding. In practice, however, many have questioned the efficacy of the class action, and a great deal of scholarly work has been produced criticizing the class mechanism as being inefficient and burdensome such that defendants are forced to settle for astronomical sums, even when little or no liability exists.[7] The risk of not settling class claims is often compounded by the potential for punitive damages awards (typically treble damages) that are permissible under many state and federal consumer statutes pursuant to which class actions are brought.

The basic concept of class actions has evolved from its inception, and courts increasingly are focused on ensuring the class mechanism is not used to threaten and extract settlement from defendants eager to protect their reputations in the face of potentially damaging allegations, and to avoid staggering litigation costs and potential damages. The federal courts have become more sensitive to the weighty impact of class actions on defendant-businesses, and have gradually refined class requirements in an attempt to

[5] *See, e.g., Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L. Ed. 2d 427, 29 Fed. R. Serv. 2d 1 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.").

[6] Clayton Act § 4 entitles victims of antitrust violations to sue for treble damages, which incentivizes private litigants to pursue antitrust claims. *See* 15 U.S.C.A. § 15(a) (2000). For a detailed discussion of the mechanics of class actions in the antitrust context, s*ee* Jeffrey L. Kessler and Spencer Weber Waller, *International Trade and US Antitrust Law, Enforcement activity in the United States—Civil actions and state enforcement* § 5:15 (2d ed. 2014), and A. Paul Victor and Eva W. Cole, *US Private Antitrust Treble Damages Class Actions, in Antitrust Between EC Law and National Law* 105 (Enrico A. Raffaelli, ed. 2009).

[7] *See, e.g., Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (J. Posner collecting commentary on "blackmail settlements").

ensure the mechanism is used fairly. In particular, courts have focused on the level and type of scrutiny they should apply when allowing the removal of a case under the Class Action Fairness Act (CAFA),[8] certifying a class, and considering approval of a class settlement.

The CAFA was enacted ten years ago, and it eased the jurisdictional requirements for filing a class action in federal court and expanded a defendant's ability to remove a class action from state to federal court. In particular, it has allowed removal of state antitrust actions to federal court that otherwise would not have been tried in federal court due to the Supreme Court's *Illinois Brick*[9] decision. Since its enactment, many proponents and critics have commented on its efficacy, and the jurisprudence in this area continues to evolve as a variety of procedural issues continue to arise.

Courts have also recently grappled with the requirements for certification. The Supreme Court's decisions in *Wal-Mart*[10] and *Comcast*[11] indicate that Rule 23[12] certification decisions should indeed be treated carefully and the district courts considering certification should conduct a "rigorous analysis" as opposed to rubber-stamping certification.

Moreover, federal courts have become seemingly more critical of class settlements, and are more carefully applying the "fairness" standard that traditionally has been used to analyze whether a proposed class settlement should be approved by a court. For example, the Supreme Court recently declined to hear an appeal of a case involving the fairness of the settlement mechanism called *cy pres* (under which undistributed settlement funds are disbursed to a charity or other organization), but Chief Justice Roberts, through a rare statement accompanying the denial of certiorari, explained

[8] Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C.A. §§ 1332(d), 1453, 1711 to 1715 (2012)).
[9] *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728-36, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977) (limiting claims in federal court to direct purchasers).
[10] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52, 180 L. Ed. 2d 374, 78 Fed. R. Serv. 3d 1460 (2011).
[11] *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433, 185 L. Ed. 2d 515, 85 Fed. R. Serv. 3d 118 (2013).
[12] Fed. R. Civ. P. 23.

the Court is particularly interested in hearing cases involving fairness issues, surrounding *cy pres* awards in particular, in class settlements.[13]

The first half of this chapter will cover the life cycle of a class action and the requirements for bringing a class action in federal court. The second half of the chapter will focus on recent trends and developments, and in particular with respect to:

i CAFA;
ii class certification requirements; and
iii the standards for the approval of class settlement.

In all three areas, courts seem to have become more aware of the significant burdens collective actions can impose on judicial and party resources, and that sensitivity has resulted in a refinement of the standards applied at the various stages of the class action.

The Class Action Life Cycle

The class action life cycle generally proceeds according to the following steps.

1. Putative class representatives file and serve their class-action complaint. If the case is commenced in state court, defendants assess whether removal to federal court under CAFA is possible, appropriate and/or desirable.[14]
2. Defendants evaluate whether to make a responsive pleading or dispositive motion, and also may consider moving to strike class allegations if, on the face of the complaint, it appears no class could be certified under any circumstances.[15]

[13] *Marek v. Lane*, 134 S. Ct. 8 (mem.), 187 L. Ed. 2d 392 (2013); *see also In re Baby Products Antitrust Litigation*, 708 F.3d 163, 84 Fed. R. Serv. 3d 1324 (3d Cir. 2013) (addressing some of the *cy pres* questions Chief Justice Roberts raised in his statement accompanying denial in *Marek*).

[14] *See* 28 U.S.C.A. § 1332(d) (defining jurisdictional prerequisites in the class context); 28 U.S.C.A. § 1447 (removal, generally), 28 U.S.C.A. § 1453 (removal of class actions).

[15] *See, e.g.*, Fed. R. Civ. P. 23(d)(1)(D); *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740, 34 Fed. R. Serv. 2d 371 (1982) (district courts may eliminate class allegations at any point in the proceedings); *see also Kennedy v. Unumprovident Corp.*, 50 Fed. Appx. 354, 356 (9th Cir. 2002) (striking class claims for failure to establish Rule 23(a) typicality on the pleadings); *Pilgrim v.*

3. Discovery related to class certification is often sought (and often overlaps with merits discovery). Discovery may be sought in any of the usually permissible forms (including requests for production of documents, interrogatories, requests for admission, and depositions of fact and expert witnesses).[16]
4. In many class actions, expert witnesses are critical in aiding a court's determination of whether to certify the class. Both sides often retain expert witnesses. Plaintiffs use expert witnesses to provide support for why it is appropriate for a class of putative plaintiffs to proceed on a classwide basis and defendants use their experts in support of the opposite conclusion. Thus, much of class discovery relates to the production and review of documents the experts rely upon and the subsequent depositions of expert witnesses. Depending on what is revealed in discovery, plaintiffs may amend their complaint and defendants may decide to make a dispositive motion with respect to the amended complaint.[17]
5. After class certification related discovery, the putative class representative typically files a motion to certify the class it seeks to represent and to simultaneously appoint class counsel and the named plaintiffs as the class representatives. Defendants typically oppose certification.[18]
6. Pending a decision on the class certification motion, the case may proceed in two directions, perhaps simultaneously: the case may move toward trial, and merits discovery begins (or is continued), or the parties may begin, if they have not already, discussing settlement options (defendants may want to engage in settlement negotiations because the risk of trial is often too great given the aggregate value of

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Universal Health Card, LLC, 2010 WL 1254849, *5 (N.D. Ohio 2010), *judgment aff'd*, 660 F.3d 943, 80 Fed. R. Serv. 3d 1477 (6th Cir. 2011) (striking class allegations at pleadings stage); *John v. National Sec. Fire and Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) ("Where it is facially apparent from the pleadings that there is no ascertainable class, a district court may dismiss the class allegation on the pleadings.").

[16] *See, e.g.*, Fed. R. Civ. P. 26 to 37; *see also* Newberg on Class Actions §§ 7:14-17 (discussing certification-related discovery), 9:11 (discussing discovery from absent class members). Rubenstein and Conte, Newberg on Class Actions § 9:11 (5th ed.).

[17] *See* Daniel R. Singh and Gaspard Curioni, *Effective Discovery Strategies in Class-Action Litigation*, ABA Litigation Section, Corporate Counsel, May 26, 2014, *available at* http://apps.americanbar.org/litigation/committees/corporate/articles/spring2014-0514-effective-discovery-strategies-class-action-litigation.html.

[18] *See generally*, Fed. R. Civ. P. 23(c)(1) (noting the court must determine the issue of certification "at an early practicable time"); *see also* 2003 Advisory Committee Note, Fed. R. Civ. P. 23 (discussing considerations related to timing of the motion).

the class claims and potentially crippling punitive damages awards). In addition, sometimes (but not always) merits discovery will be stayed pending resolution of the class certification motion.[19]

7. If the class is certified, the action will proceed through each stage of litigation towards trial just like any other case. However, it is more uncommon for class actions to actually be tried as compared to individual actions, rather than to be resolved by settlements or dispositive motions (such as summary judgment motions).

Bringing a Class Action to Federal Court

Rule 23 of the Federal Rules of Civil Procedure[20] governs all federal class actions, including antitrust actions. To be sure, "[t]he class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[21] Hence, under Rule 23, the putative class representative bears the burden of establishing that an action meets the requirements of Rule 23. Rule 23 "does not set forth a mere pleading standard," and the putative class representative "must affirmatively demonstrate" compliance with the Rule's strictures.[22]

Although a plaintiff may satisfy the pleading requirements (setting out allegations sufficient to commence a class action), it does not mean the plaintiff will necessarily also be able to satisfy the burden of affirmatively demonstrating Rule 23[23] is satisfied at the class certification stage. It is important to remember the class action is commenced as any other case (by filing a complaint under Federal Rule of Civil Procedure 3), but the case does not become a true class action until the court "certifies" that the putative class representative has satisfied Rule 23 pursuant to a motion for class certification.

In the motion for class certification, the class representative must establish both that the prerequisites for class certification under Rule 23(a) have been

[19] *See* Newberg §§ 10:1-8 (explaining judicial management of a class case); 13:1-4 (discussing class settlement mechanisms). Rubenstein and Conte, Newberg on Class Actions §§ 13:1 to 13:4 (5th ed.).
[20] Fed. R. Civ. P. 23.
[21] *Wal-Mart*, 131 S. Ct. at 2550 (quotations and citations omitted).
[22] *Wal-Mart*, 131 S. Ct. at 2551.
[23] Fed. R. Civ. P. 23.

satisfied, and that the action meets the additional requirements of Rule 23(b).[24] In the past, some courts have adopted a fairly liberal approach to certifying class actions, and antitrust class actions in particular, on the basis that many such cases are well-suited for aggregate treatment and in the antitrust context, play an especially important role "in the private enforcement of antitrust actions."[25] However, the Supreme Court's analysis in *Wal-Mart* and *Comcast* shows that courts have increasingly become more careful to ensure a "rigorous analysis" is conducted to ascertain whether putative representatives affirmatively satisfy their burdens under Rule 23.

Rule 23(a) Requirements

Rule 23(a) sets out four express requirements the plaintiff must prove for a case to proceed as a class action: numerosity, commonality, typicality, and adequacy.[26]

Numerosity

Under Rule 23(a)(1), a class action may be maintained only if the class is "so numerous that joinder of all members is impracticable."[27] The number of class members is a key factor in the numerosity determination, but there is no set, fixed number at which the numerosity requirement is automatically met.[28] Rather, courts consider a number of factors in their consideration of numerosity. Among other things, courts will consider whether joining all class members as individual parties to the action instead of proceeding on a classwide basis is practicable. The named plaintiff need only show that joinder would cause the litigation to be difficult and inconvenient.[29] For example, a wide "geographic dispersion of class members" would support a

[24] Fed. R. Civ. P. 23(b).
[25] *See, e.g., In re Vitamins Antitrust Litigation,* 209 F.R.D. 251, 258 (D.D.C. 2002).
[26] Fed. R. Civ. P. 23(a); *see also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613, 117 S. Ct. 2231, 138 L. Ed. 2d 689, 37 Fed. R. Serv. 3d 1017 (1997).
[27] Fed. R. Civ. P. 23(a)(1); *see also In re Nissan Radiator/Transmission Cooler Litigation,* 2013 WL 4080946, *18 (S.D. N.Y. 2013).
[28] *See, e.g., Cohen v. Chilcott*, 522 F. Supp. 2d 105, 114 (D.D.C. 2007); *In re Nissan Radiator/Transmission Cooler Litigation*, 2013 WL 4080946, *18 (S.D. N.Y. 2013) (noting, for example, courts have found the "impracticability" requirement met by a class composed of forty or more members).
[29] *See, e.g., In re Pressure Sensitive Labelstock Antitrust Litigation,* 69 Fed. R. Serv. 3d 791 (M.D. Pa. 2007).

finding that the numerosity prong has been satisfied on the basis that it would be impracticable to join such disperse class members.[30]

Courts will also consider the judicial economy of proceeding on an aggregated basis. For example, courts will consider the practical difficulties of pursuing separate trials, such as the expense and time required.[31] In addition, courts will consider whether individual actions would provide adequate recovery to the plaintiffs. Indeed, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."[32]

At bottom, however, the threshold for numerosity is relatively low and courts rarely reject certification on the basis that there are too few class members.

Commonality

A class representative must also demonstrate "there are questions of law or fact common to the class" pursuant to Rule 23(a)(2).[33] The Supreme Court in *Wal-Mart* recently explained the class members' claims "must depend upon a common contention… 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."[34] In addition, the Court explained, "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."[35]

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[30] *In re Foundry Resins Antitrust Litigation*, 242 F.R.D. 393, 404 (S.D. Ohio 2007); *see also Meijer, Inc. v. 3M*, 2006-2 Trade Cas. (CCH) ¶ 75397, 2006 WL 2382718, *5 (E.D. Pa. 2006) (noting joinder is impracticable since the class consists of "at least 143 Members who are headquartered in at least thirty-five states").
[31] *See, e.g., In re Foundry Resins Antitrust Litig.*, 242 F.R.D. at 404 .
[32] *Amchem Prods.*, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).
[33] Fed. R. Civ. P. 23(a)(2).
[34] *Wal-Mart*, 131 S. Ct. at 2551.
[35] *Wal-Mart*, 131 S. Ct. at 2551.

Notwithstanding the foregoing, the rule does not mandate that each and every question of law and fact be common to the class.[36] Rather, it has been held that a single common question may support certification on the grounds that its resolution will advance the litigation.[37] Courts have the discretion to limit class treatment to specific common issues.[38] Courts may also create subclasses to satisfy the common question requirement.[39]

Typicality

The typicality prerequisite to class certification focuses on the characteristics of the class representative instead of the characteristics of the class.[40] Specifically, Rule 23(a)(3) requires that "the claims or defenses of the representative part[y]" are "typical" of those of the entire class.[41] This means that the named plaintiff must be a member of the proposed class.[42] In a price-fixing case, for example, the named plaintiff must be a purchaser of the product allegedly price-fixed.[43]

To determine whether the named plaintiff's claims are "typical" of the proposed class, a court will consider whether the claims "arise from the same events or course of conduct and are based on the same legal or remedial theory," as those of other class members and whether there are any antagonistic interests between the representatives and the class.[44] If the

[36] ABA Section of Antitrust Law, *Antitrust Law Developments* 847 (7th ed. 2012) (emphasis added) [hereinafter *ALD*].
[37] *See, e.g.*, *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. at 404.
[38] Fed. R. Civ. P. 23(c)(4).
[39] Fed. R. Civ. P. 23(c)(5).
[40] Victor and Cole, *supra* note 4, at 110.
[41] Fed. R. Civ. P. 23(a)(3).
[42] *Amchem Prods.*, 521 U.S. at 625-26 ("[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.") (quoting *East Texas Motor Freight System Inc. v. Rodriguez,* 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453, 23 Fed. R. Serv. 2d 397 (1977)).
[43] *See ALD* at 847-48; *see also, e.g.*, Victor and Cole, *supra* note 4, at 111.
[44] *Pinkston v. Wheatland Enterprises, Inc.*, 2013 WL 1302053 (D. Kan. 2013); *see also, e.g., In re Catfish Antitrust Litigation,* 826 F. Supp. 1019, 1034, 1036 (N.D. Miss. 1993) (finding the "claims of the named plaintiffs are typical since they are based upon an identical theory of an alleged conspiracy to fix prices in the catfish industry and injury as a consequence thereof" and noting the "most prominent consideration" in the typicality analysis is whether "there is an absence of an adverse interest between the representative parties and other members of the class"); *In re Bulk (Extruded) Graphite Products Antitrust Litigation,* 2006-1 Trade Cas. (CCH) ¶ 75196, 2006 WL 891362, *6 (D.N.J.

legal theory upon which the plaintiff's claims are based differs from that upon which the claims of the other class members are based, the typicality prerequisite will not be satisfied. For example, in antitrust class actions, "typicality is generally established when the named plaintiffs and all class members allege the same antitrust violation by defendants," such as the existence of a conspiracy.[45]

Adequacy

Similar to the typicality requirement, the adequacy prerequisite focuses on the representative party and his or her ability to "fairly and adequately protect the interests of the class."[46] A district court must carefully evaluate that the named plaintiff is a proper class representative.[47] Courts typically analyze three factors as part of this evaluation: whether the representative's interests are sufficiently related to the class interests, whether the representative has standing, and whether the representative's personal characteristics support a finding of adequacy.[48]

The adequacy prong can become contentious and complicated. For example, in an antitrust class action, the Eighth Circuit upheld denial of class certification on adequacy grounds because, among other things, the named plaintiff, a small store located in the northernmost part of Minnesota:

2006) (considering whether claims of the named plaintiffs were atypical of the claims of the class members); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 2007 WL 4150666, at *10 ("Typicality is usually satisfied in a horizontal antitrust conspiracy case, even though a plaintiff may have purchased different product types or quantities or received different prices, or a plaintiff purchased from one defendant but not another."); *however, see Deiter v. Microsoft Corp.*, 436 F.3d 461, 468 (4th Cir. 2006) (holding plaintiffs did not meet the typicality requirement because there were meaningful differences between the individual purchasers' antitrust claims and the business purchasers' antitrust claims).

[45] *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. at 405 (noting "'named plaintiffs' claims are typical in that they must prove a conspiracy, its effectuation, and damages therefrom—precisely what the absent class members must prove to recover"); *see also* Victor and Cole, *supra* note 4, at 111.

[46] Fed. R. Civ. P. 23(a)(4).

[47] *In re Milk Products Antitrust Litigation,* 195 F.3d 430, 436, 45 Fed. R. Serv. 3d 931 (8th Cir. 1999).

[48] Victor and Cole, *supra* note 4, at 112.

- did not geographically represent the other class members;
- did not adequately represent the other, larger class members; and
- did not adequately represent the purchasing practices of the other class members.[49]

In addition, the question of whether a plaintiff has standing may also arise in the context of the adequacy prong analysis.[50] For example, in the antitrust context, while some courts have held that "establishing antitrust standing" is itself "a predicate for class certification,"[51] other courts have concluded that standing requirements will be assessed only after a class has been properly certified.[52] A host of additional issues arise in the standing context, such as an indirect purchaser's standing to sue under federal statutes, which implicates the *Illinois Brick* doctrine.[53]

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[49] *In re Milk Prods. Antitrust Litig.*, 195 F.3d at 436-37.

[50] *See, e.g., American Seed Co., Inc. v. Monsanto Co.*, 238 F.R.D. 394, 397 (D. Del. 2006), *order aff'd*, 271 Fed. Appx. 138 (3d Cir. 2008).

[51] *ALD* at 853; *see also, e.g., In re Lorazepam & Clorazepate Antitrust Litigation*, 202 F.R.D. 12, 22 (D.D.C. 2001).

[52] *ALD* at 853; *see also Business and Commercial Litigation in Federal Courts* § 16:33 (Robert L. Haig ed., 2d ed. 2007); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831, 119 S. Ct. 2295, 144 L. Ed. 2d 715, 43 Fed. R. Serv. 3d 691 (1999) (discussing the order in which a court may decide issues of standing and issues relating to class certification).

[53] Under *Illinois Brick* and its progeny, an indirect purchaser of a price-fixed product is barred from seeking damages under federal antitrust laws. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728-35, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977); *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 823 (7th Cir. 2015); *Delaware Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1120-21 (9th Cir. 2008). The *Illinois Brick* rule is rooted in the Supreme Court's "unwillingness to complicate treble-damages actions with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge." *Illinois Brick*, 431 U.S. at 725, 734-35; *see also Reading Industries, Inc. v. Kennecott Copper Corp.*, 631 F.2d 10, 13-14 (2d Cir. 1980) (dismissing under *Illinois Brick* due to complications of assessing effect of conspiracy in one market on another market). Accordingly, *Illinois Brick* precludes an indirect purchaser from contending it suffered damages from an overcharge that was "passed on" from the direct purchaser, with a few narrow exceptions for where calculating that overcharge is particularly straightforward—namely, where the price-fixing entity owns, controls, or is in a cost-plus contract with the direct purchaser, or is a co-conspirator. *Illinois Brick*, 431 U.S. at 736-37 n.16; *Royal Printing Co. v. Kimberly Clark Corp.*, 621 F.2d 323, 326 (9th Cir. 1980) (applying "ownership or control" exception to the *Illinois Brick* rule). Courts have narrowly construed these exceptions to *Illinois Brick*, and have refused to "undermine the rule" by "'carv[ing] out [further] exceptions . . . for particular types of markets.'" *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 216, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990) (quoting *Illinois Brick*, 431 U.S. at 744); *In re ATM Fee Antitrust Litigation*, 686 F.3d 741, 755 n.7 (9th Cir. 2012),

In addition to the aforementioned analysis, courts also consider the "honesty, conscientiousness, and other affirmative personal qualities" of the class representative to determine adequacy.[54] For example, one court held the named plaintiff was an inadequate class representative because an individual with "significant influence" on the named plaintiff's decision-making had previously been convicted of willfully filing false federal income tax returns.[55] Finally, courts require class representatives to have at least some familiarity with the litigation and to acknowledge their responsibility for the expense of pursuing the litigation.[56]

Rule 23(b) Requirements

In addition to these prerequisites, the class representative must also satisfy at least one of the subsections of Rule 23(b).[57] There are effectively four types of Rule 23(b) classes, but the majority of antitrust class actions, along with products liability, employment, and insurance disputes, are certified under Rule 23(b)(3).[58]

Although this chapter focuses on Rule 23(b)(3) classes, the other types of classes include:

- Rule 23(b)(1)(A) classes, which are permissible if "prosecuting separate actions by or against individual class members would create a risk of…inconsistent or varying adjudications with respect

cert. denied, 134 S. Ct. 257, 187 L. Ed. 2d 260 (2013) (same); *accord Motorola Mobility*, 775 F.3d at 823 (Posner, J.) (holding the plaintiff could not "wiggle out from under *Illinois Brick* by arguing that there should be an exception to the indirect-purchaser doctrine for any case in which applying the doctrine would prevent any American company from suing"); *Jewish Hospital Ass'n of Louisville, Ky., Inc. v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971, 974-75 (6th Cir. 1980) (dismissing under *Il*linois Brick and refusing to apply the "ownership or control" exception when plaintiffs did not buy the actual price-fixed product).

[54] *ALD* at 850 (quoting *In re Alcoholic Beverages Litigation*, 95 F.R.D. 321, 325-26 (E.D. N.Y. 1982)).

[55] *Pope v. Harvard Banschares, Inc.*, 240 F.R.D. 383, 390 (N.D. Ill. 2006); *see also Folding Cartons, Inc. v. American Can Co.*, 79 F.R.D. 698, 703-04, 27 Fed. R. Serv. 2d 558 (N.D. Ill. 1978)(finding named plaintiff corporation an inadequate class representative because the corporation's president participated in deceptive selling schemes in an unrelated action).

[56] *ALD* at 851; *see also, e.g.*, Victor & Cole, *supra* note 4, at 114.

[57] Fed. R. Civ. P. 23(b).

[58] Fed. R. Civ. P. 23(b)(3).

to individual class members that would establish incompatible standards of conduct for the party opposing the class."[59]

- Rule 23(b)(1)(B) classes, which are permissible if "prosecuting separate actions by or against individual class members would create a risk of…adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests."[60] The purpose of this rule is to protect absent class members.[61] Certification under Rule 23(b)(1)(B)[62] most commonly occurs when the recovery will come from a limited pool of assets that may not satisfy all class members' claims, the so-called "limited fund case."[63]
- Rule 23(b)(2) classes, which are permissible if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[64] Certification will not typically be granted under this rule if injunctive relief is not "an integral part of the relief for the proposed class."[65]

Damages Classes

A class action may be maintained under Rule 23(b)(3) if the basic prerequisites of Rule 23(a)[66] are satisfied *and* the court finds that "the questions of law or fact common to class members predominate over any questions affecting only individual members" (the so-called "predominance" requirement), and "a class action is superior to other available methods for

[59] Fed. R. Civ. P. 23(b)(1)(A); *see also, e.g., Amchem Prods.*, 521 U.S. at 614 (explaining the contours of the Fed. R. Civ. P. 23(b)(1)(a) (class).
[60] Fed. R. Civ. P. 23(b)(1)(B).
[61] *ALD* at 853.
[62] Fed. R. Civ. P. (b)(1)(B).
[63] James Wm. Moore et al., *Moore's Federal Practice* § 23.42[2][a] (3d ed. 1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. at 834; *see also, e.g.*, Victor & Cole, supra note 4, at 115.
[64] Fed. R. Civ. P. 23(b)(2).
[65] *In re Catfish Antitrust Litig.*, 826 F. Supp. at 1045.
[66] Fed. R. Civ. P. 23(a).

fairly and efficiently adjudicating the controversy" (the so-called "superiority" requirement).[67] Rule 23(b)(3) classes are typical in the antitrust context and also in products liability,[68] employment,[69] and insurance disputes.[70]

Predominance Requirement

As part of demonstrating predominance, plaintiffs must "make a threshold showing that each element…may be proven through common, class-wide evidence, rather than through evidence particular to each member of the class."[71] A court performing a predominance inquiry may consider both the evidence to be "presented in the plaintiff's case-in-chief" and "the defendant's likely rebuttal evidence;"[72] however, in analyzing predominance, courts must take care not to pass judgment on the merits of the case.[73]

The predominance requirement, particularly with respect to damages, was addressed in the Supreme Court's recent *Comcast* decision.[74] The court explained the "predominance criterion is even more demanding than [the commonality requirement of] Rule 23(a),"[75] and explained that, at least in the antitrust context, plaintiffs must show the common issue of damages can be proven through a uniform model equally applicable to class members; in other words, the common issue of damages must predominate over the individual variations among class members.[76] The Court's analysis highlighted that the district courts are required to perform a "rigorous

[67] Fed. R. Civ. P. 23(b)(3).
[68] See, e.g., 51 F.3d 1293.
[69] See, e.g., *Heffelfinger v. Electronic Data Systems Corp.*, 2008 WL 8128621, *28 (C.D. Cal. 2008), *aff'd and remanded*, 492 Fed. Appx. 710 (9th Cir. 2012).
[70] *See, e.g., Brooks v. Educators Mut. Life Ins. Co.*, 206 F.R.D. 96, 108 (E.D. Pa. 2002).
[71] *In re Plastics Additives Antitrust Litigation*, 2006 WL 6172035, *5 (E.D. Pa. 2006).
[72] *Rodney v. Northwest Airlines, Inc.*, 146 Fed. Appx. 783, 787, 2005 FED App. 0734N (6th Cir. 2005).
[73] *Rodney*, 146 F. App'x at 786 (quoting *Robinson v. Texas Auto. Dealers Ass'n*, 387 F.3d 416, 421, 59 Fed. R. Serv. 3d 957 (5th Cir. 2004)); *see also In re Sulfuric Acid Antitrust Litigation*, 2007 WL 898600, *8 (N.D. Ill. 2007) (noting consideration of a motion for class certification is not the proper "time to launch into an extensive analysis of the facts or weighing of the merits").
[74] *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 185 L. Ed. 2d 515, 85 Fed. R. Serv. 3d 118 (2013).
[75] 133 S. Ct. at 1432.
[76] *See* 133 S. Ct. at 1433.

analysis" to make this determination, "even when that requires inquiry into the merits of the claim."[77]

A case that might not satisfy the predominance test with respect to the entire proposed class may be limited to selected issues and then certified or divided into subclasses pursuant to Rules 23(c)(4) or 23(c)(5).[78] In addition, it is possible for a court to sever issues of liability from damages issues to avoid the predominance hurdle, though this is not typical in the antitrust context.[79]

Superiority Requirement

Although superiority under Rule 23(b)(3) has traditionally presented a low hurdle to class certification, the Supreme Court in *Amchem* emphasized that "superiority can act as a real limit on class certification and settlement."[80] A plaintiff must demonstrate "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" under the superiority requirement and Rule 23(b)(3) identifies four factors a court must consider in undertaking this analysis.[81]

First, a court must consider "the class members' interests in individually controlling the prosecution or defense of separate actions."[82] Courts will consider the size of the individual members' damages claims and the types of issues involved in the action in considering this factor.[83] In addition,

[77] 133 S. Ct. at 1433.

[78] Fed. R. Civ. P. 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues."); Fed. R. Civ. P. 23(c)(5) ("When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.").

[79] *In re Urethane Antitrust Litigation*, 237 F.R.D. 440, 452 (D. Kan. 2006) ("Even if individualized issues . . . were to predominate the damage inquiry, the more appropriate course of action would be to bifurcate a damages phase and/or decertify the class as to individualized damages determinations."); *see also, e.g.,* Victor & Cole, *supra* note 4, at 118.

[80] *ALD* at 859 (citing *Amchem Prods.*, 521 U.S. at 614-16). And, indeed, courts since *Amchem* have focused on superiority where appropriate. *See, e.g., Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192-93, 50 Fed. R. Serv. 3d 1205 (3d Cir. 2001), *as amended*, (Oct. 16, 2001) ("District Court was clearly within its sound discretion to hold this case failed to satisfy the superiority requirement.").

[81] Fed. R. Civ. P. 23(b)(3).

[82] Fed. R. Civ. P. 23(b)(3)(A).

[83] *See In re Carbon Black Antitrust Litigation*, 2005-1 Trade Cas. (CCH) ¶ 74695, 2005 WL 102966, *22 (D. Mass. 2005) ("Antitrust class actions are expensive endeavors and joining forces with other similarly situated plaintiffs is often the only way to effectuate a case.").

some courts have found the right of 23(b)(3) class members to opt out of the class safeguards them and protects their individual interests.[84]

Second, a court must consider "the extent and nature of any litigation concerning the controversy already begun by or against class members."[85] The presence of already-pending litigation on the same subject weighs against a finding that a class action would be "superior."

Third, a court must consider "the desirability or undesirability of concentrating the litigation of the claims in the particular forum."[86] In this connection, "courts generally consider the convenience to the parties of litigating in the forum" and the location of the evidence, the documentary proof, and the witnesses.[87]

Fourth, a court must consider "the likely difficulties in managing a class action."[88] A court may deem an action "unmanageable" when the size of the class makes proper notice to class members infeasible.[89] Complexities involved in proving several individual injuries may also cause a court to conclude that an action as "unmanageable."[90] The existence of numerous counterclaims against the plaintiff may also make a class action unmanageable.[91] In short, when considering manageability issues, courts are charged with considering the practical problems that may render a class action an inappropriate mechanism for a particular case.[92]

Class Discovery and Certification

Courts must decide whether to certify an action as a class action at "an early practicable time after a person sues or is sued as a class

[84] *ALD* at 859; *see also, e.g.*, Victor & Cole, *supra* note 4, at 119.
[85] Fed. R. Civ. P. 23(b)(3)(B).
[86] Fed. R. Civ. P. 23(b)(3)(C).
[87] 8-166 *Antitrust Laws and Trade Regulation* § 166.03[4][c][iii] (2d ed. 2007).
[88] Fed. R. Civ. P. 23(b)(3)(D).
[89] *ALD* at 862-63.
[90] *ALD* at 863.
[91] *ALD* at 863.
[92] *See, e.g., Ludke v. Philip Morris Companies, Inc.*, 2001-2 Trade Cas. (CCH) ¶ 73504, 2001 WL 1673791, *3-4 (Minn. Dist. Ct. 2001) (finding unmanageability because proof of damages would be required to be "established on an individual basis for thousands of class members."); *see also, e.g.*, Victor & Cole, supra note 4, at 119 .

representative" pursuant to the explicit edict of Rule 23(c)(1).[93] However, "[i]nitial certifications of class actions are not set in stone, and the rules fully contemplate that as discovery progresses and the parties exchange knowledge within their possession, some tailoring may be necessary."[94] In fact, Rule 23(c)(1)(C) itself recognizes that an "order that grants or denies class certification may be altered or amended before final judgment."[95]

The decision to certify turns on the court's analysis of the factors of Rule 23(a) and (b),[96] discussed above. That analysis, in turn, is inevitably tied to precertification discovery on issues related to the propriety of class certification.[97] For example, discovery relating to whether there are common questions to the class and whether the class representative is typical or adequate is appropriate. Moreover, in Rule 23(b)(3)[98] cases, the parties will focus much of their discovery efforts on whether common issues predominate. And, as previously discussed, in the antitrust context, this involves the question of whether the common issue of damages can be proven through a uniform damages model equally applicable to class members, which is typically debated through expert witnesses. Plaintiffs' experts try to show that a common methodology can be employed to prove

[93] Fed. R. Civ. P. 23(c)(1)(A).
[94] *In re Catfish Antitrust Litig.*, 826 F. Supp. at 1045.
[95] Fed. R. Civ. P. 23(c)(1)(C); *see also, e.g.*, Victor & Cole, *supra* note 4, at 122.
[96] Fed. R. Civ. P. 23(a), (b).
[97] *ALD* at 864; *see also, e.g., In re Urethane Antitrust Litig.*, 237 F.R.D. 454, 459 (D. Kan. 2006) (explaining "discovery on class certification is not a matter of ascertaining whether Plaintiffs will prevail on the merits, but whether the moving party can establish that the discovery is pertinent to [] Fed. R. Civ. P. 23 class certification requirements."); *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 316 (3d Cir. 2008), as amended, (Jan. 16, 2009). Since *Comcast* and *Wal-Mart*, some courts have been more reluctant to bifurcate discovery as some merits questions are now intertwined with class certification. *See, e.g., Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 300 (S.D. N.Y. 2012) ("[B]ecause of the "rigorous analysis" required by *Dukes*, courts are reluctant to bifurcate class-related discovery from discovery on the merits."); *Johnson v. Flakeboard America Ltd.*, 2012 WL 2237004, *6 (D.S.C. 2012), *report and recommendation adopted*, 2012 WL 2260917 (D.S.C. 2012) ("The Supreme Court's decision in *Dukes* supports Plaintiffs' contention that discovery into the merits of the claim is necessary before entering findings of fact on whether Rule 23 standards have been met."). On the other hand, some courts have bifurcated discovery where it is efficient to do so. *Reid v. Unilever U.S., Inc.*, 964 F. Supp. 2d 893, 933, 81 U.C.C. Rep. Serv. 2d 305 (N.D. Ill. 2013) ("While the Court recognizes that the class certification and merits issues may overlap in some respects, this alone is not enough to overcome the efficiency benefits to be gained from bifurcated discovery.").
[98] Fed. R. Civ. P. 23(b)(3).

damages on a classwide basis. Defendants utilize experts to discredit plaintiffs' proposed methodologies and to show that economically, damages cannot be proven without individualized inquiries.

While plaintiffs seeking to certify a class action "are entitled to discover information relating to the requisites for class status," they are also entitled to discover information "regarding the merits of the underlying claim."[99] Indeed, "proof of liability is usually intertwined with proofs for certification."[100] This is especially true in the post-*Wal-Mart* and *Comcast* era since the Supreme Court has made clear that "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question, and that certification is proper only if the trial court is satisfied, after a rigorous analysis that the prerequisites of [Rule 23] have been satisfied."[101]

Nonetheless, it may be possible to bifurcate so-called merits discovery and discovery related to what is at least arguably the more narrow certification question.[102] Such bifurcation can create major efficiencies and will limit what are typically massive discovery burdens on defendants at least temporarily.[103] Even if a court does not formally bifurcate discovery, the parties often engage in a discussion about prioritizing discovery bearing on certification issues.[104]

After class certification discovery is deemed completed, plaintiffs will file a motion for class certification, which defendants will oppose. A court may then conduct an evidentiary hearing on the class certification issue, but may

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[99] Anne M. Payne & Arlene Zalayet, *Modern New York Discovery* § 22:27 (2d Ed. 2004).
[100] Timothy E. Eble, *The Federal Class Action Practice Manual* § 47 (1999), available at http://www.classactionlitigation.com/fcapmanual/chapter8.html.
[101] *See Comcast Corp. v. Behrend,* 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515, 85 Fed. R. Serv. 3d 118 (2013) (internal quotation marks omitted).
[102] David F. Herr, *Annotated Manual For Complex Litigation* § 21.14 (4th ed. 2007) (explaining "discovery into certification issues pertains to the requirements of Rule 23 and tests whether the claims and defenses are susceptible to class-wide proof," while discovery related to the merits "pertains to the strength or weaknesses of the claims or defenses and tests whether they are likely to succeed"); *see also* Note 86 supra.
[103] Daniel R. Singh & Gaspard Curioni, *Effective Discovery Strategies in Class-Action Litigation*, Corporate Counsel, May 26, 2014.
[104] *See, e.g., In re Cathode Ray Tube Antitrust Litig.*, R&R, No. 07-5944, ECF No. 882, at 2-3 (N.D. Cal. Mar. 28, 2011) (signed by Conti, J) (approving prioritization of discovery from particular custodians); Joint Discovery Letter at 9, Joint Discovery Letter at 3-4 (asking the court to prioritize 30(b)(6) depositions with certification-related witnesses to be taken first); *Wixon v. Wyndham Resort Development Corp.*, 2009 WL 3075649 (N.D. Cal. 2009).

make the decision without such a hearing.[105] If such a hearing does take place, expert testimony is often a critical centerpiece. If a court decides to certify the class, the certification order must "define the class and the class claims, issues, or defenses."[106] The court may divide the class into subclasses that each will be treated as an individual class.[107] Moreover, when appropriate, "an action may be brought or maintained as a class action with respect to particular issues."[108]

CAFA Jurisprudence Continues to Evolve

In 2005, Congress enacted CAFA, which was designed to expand federal diversity jurisdiction for class actions.[109] CAFA expands federal jurisdiction over class actions in two significant ways. First, CAFA makes it easier to file class actions in federal court in the first instance.[110] Under prior law, federal courts typically required that at least one named class member allege damages in an amount greater than or equal to $75,000 (the "amount in controversy" or "AIC" requirement), and that each named class member be diverse from each defendant (so-called "complete diversity"). Under CAFA, federal courts have original diversity jurisdiction over class actions, even if they are based entirely on state law claims, as long as: "any plaintiff resides in a different state from any defendant" (so-called "minimal diversity"); "less than one-third of the plaintiffs reside in the forum state;" "there are at least 100 plaintiff class members;" and "the total amount in controversy exceeds $5 million."[111]

Second, CAFA expands removal rights. Before CAFA, only out-of-state defendants could remove an action, but now any defendant can remove an action from state court to federal court as long as the requirements for federal diversity jurisdiction are met.[112] Moreover, a defendant need not

[105] *ALD* at 863-64.
[106] Fed. R. Civ. P. 23(c)(1)(B).
[107] Fed. R. Civ. P. 23(c)(5).
[108] Fed. R. Civ. P. 23(c)(4); *see also, e.g.*, Victor & Cole, *supra* note 4, at 122.
[109] *See* Pub. L. No. 109-2, § 2(b) ("Purposes").
[110] 28 U.S.C.A. § 1332(d)(2).
[111] *See* 28 U.S.C.A. § 1332(d); Stephen V. Bomse et al., *Procedural Aspects of Private Antitrust Litigation*, 47th Annual Advanced Antitrust Seminar—Distribution and Marketing, at 765 (PLI Corporate Law & Practice, Course Handbook Series No. 1648, 2008).
[112] 28 U.S.C.A. § 1453(b).

obtain the consent of all other defendants prior to removing an action.[113] Additionally, the traditional one-year timeframe in which a case must be removed pursuant to 28 United States Code, Section 1446[114] does not apply to large nation-wide class actions.[115] Rather, a defendant has thirty days to file for removal from whatever pleading makes clear that removal is a viable option.

CAFA's enactment has spurred many battles over the nuances and precise meaning of the statute. For example, commentators have suggested that defendants may more frequently remove antitrust indirect purchaser suits from state to federal court in the hope that fewer indirect purchaser classes will be certified because federal courts might be reluctant to address issues of state law.[116] A number of recent federal decisions, albeit in cases originating in federal court, suggest, however, the battle for certification in indirect purchaser antitrust cases in federal courts will be whether indirect purchaser plaintiffs can demonstrate antitrust impact on

[113] 28 U.S.C.A. § 1453(b).
[114] 28 U.S.C.A. § 1446.
[115] See 28 U.S.C.A. § 1453(b). *Id.* Practically, a defendant may remove within thirty days of the pleading that makes it clear that removal is appropriate. 28 U.S.C.A. § 1446(b)(3). If, however, removal jurisdiction is based on 28 U.S.C.A. § 1332 (diversity), then removal must occur within one year from commencement (unless the district court finds the plaintiff acted in bad faith to prevent removal) (28 U.S.C.A. §1446(c)). CAFA eliminates that one-year outside limit, (28 U.S.C.A. § 1453(b)), meaning any defendant may remove the case within thirty days of a pleading that makes clear removal is appropriate. CAFA's relief from the one-year outside limit should not be conflated with the requirement that notice of removal is required within thirty days from service of the "paper from which [removal] may first be ascertained." *See, e.g., Cutrone v. Mortgage Electronic Registration Systems, Inc.*, 749 F.3d 137, 142, 146-48 (2d Cir. 2014) (discussing time limits for removal and what triggers the thirty-day notice period).
[116] Andrew I. Gavil, *Thinking Outside the Illinois Brick Box: A Proposal for Reform*, 76 Antitrust L.J. 167, at 168 n.5 (2009). *See also* Bruce V. Spiva & Jonathan K. Tycko, *Indirect Purchaser Litigation on Behalf of Consumers after CAFA*, 20-FALL Antitrust 12 (2005). CAFA is particularly important to purported indirect purchaser classes in light of the Supreme Court's landmark *Illinois Brick* decision, in which the court held an indirect purchaser—one who is not the immediate buyer from the alleged antitrust violator—is generally not permitted to sue for damages under the federal antitrust laws (although such a purchaser may sue for injunctive relief), which meant plaintiffs were forced to look to state law for relief. *See* 431 U.S. at 728-36. Many states have determined, however, that plaintiffs may pursue damages claims under state antitrust statutes. *See California v. ARC America Corp.*, 490 U.S. 93, 101, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989) (holding that indirect purchasers are not precluded from recovering under state antitrust statutes). Hence, prior to CAFA, defendants were generally unable to remove such state indirect purchaser cases to federal court.

a classwide basis, rather than the mere existence of state law issues. This is especially true in light of the Supreme Court's decision in *Comcast*, in which the Supreme Court held that plaintiffs seeking certification must demonstrate a damages theory that links to their liability theory and applies across the class membership.

The jurisprudence surrounding CAFA will surely continue to evolve. Recently, a congressional hearing was held to discuss the efficacy of CAFA ten years after its enactment. While the commentary seemed split across party lines, several issues arose, including standing among class members, settlement value to class members, and the deterrent effect of class actions on illegal practices. One definitive proposal for legislative change was offered—that the statute should include a specific requirement that all class members have suffered the same type of injury as the named plaintiff. Proponents of this change suggest it would strengthen Rule 23's typicality requirement, and help curb "no injury" class actions. Irrespective of the legislative efforts, litigation will certainly continue to further delineate the contours of the statute.

Recent Decisions Emphasize Class Certification and Settlement Requirements

Although there are numerous cases of legal import in the class arena, several recent cases have impacted the class-action landscape. These cases address two categories of class action jurisprudence—certification and settlement requirements.

Certification Requirements

The Supreme Court's decisions in *Comcast Corporation v. Behrend*[117] and *Wal-Mart Stores, Inc. v. Dukes*[118] have been the headline cases with respect to developments in connection with certification standards in recent years. Most critically, these decisions support the notion that Rule 23 certification must be

[117] *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 185 L. Ed. 2d 515, 85 Fed. R. Serv. 3d 118 (2013).
[118] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 180 L. Ed. 2d 374, 78 Fed. R. Serv. 3d 1460 (2011).

treated with special care, and courts are required to conduct a "rigorous analysis" of all of the issues presented by the various prerequisites of Rule 23.

Wal-Mart Stores, Inc. v. Dukes

The *Wal-Mart* Court reversed class certification of a proposed Rule 23(b)(2)[119] class (an injunctive relief class) of over 1.5 million current and former female employees of the big box store.[120]

The *Wal-Mart* plaintiffs had alleged that, in spite of Wal-Mart's formal non-discrimination policy, the company allowed its local managers to exercise discretion over such issues as pay and promotions, which resulted in employment decisions that disproportionately favored men.[121] Plaintiffs alleged these practices adversely affected female employees, and Wal-Mart tolerated the practices in violation of Title VII.[122] Plaintiffs moved for certification of a nationwide class under Rule 23(b)(2) that was defined as all women subjected to Wal-Mart's alleged discriminatory practices, and sought injunctive relief, punitive damages, and back pay potentially adding up to billions of dollars in damages.[123]

The opinion was authored by Justice Scalia, and held that: the plaintiffs did not satisfy the commonality requirement for certification under Rule 23(a); and the plaintiffs' back pay claims were too individualized to be certified under Rule 23(b)(2).[124] Rule 23(b)(2) cannot be used to certify a claim for monetary relief unless it is incidental to the declaratory or injunctive relief sought.

Regarding the commonality element of Rule 23(a), the Court explained plaintiffs must prove that their claims rely on a common contention "of such a nature that….determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke."[125] The

[119] Fed. R. Civ. P. 23(b)(2).
[120] 131 S. Ct. at 2547, 2561.
[121] 131 S. Ct. at 2548.
[122] See 131 S. Ct. at 2548.
[123] 131 S. Ct. at 2548 to 2549.
[124] 131 S. Ct. at 2556-57, 2559.
[125] 131 S. Ct. at 2551.

inquiry under the commonality requirement is whether plaintiffs have demonstrated the harm suffered resulted from some common conduct that is dispositive of the issue of liability.

The Court made clear the requirements for certification under Rule 23 are not merely pleading standards, and held that the plaintiffs must affirmatively demonstrate their compliance through the presentation of evidence. The Court explained this meant plaintiffs must be "prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.," and the district courts may need to "probe behind the pleadings" to assess whether the plaintiffs satisfied Rule 23's requirements.[126] Indeed, with respect to a court's standard of review, the majority's opinion explains that it is incumbent upon the courts to employ a "rigorous analysis" to determine whether plaintiffs have satisfied Rule 23.[127] Equally important was the Court's analysis of the requested Rule 23(b)(2)[128] relief. The court clarified there is no room within a (b)(2) class for any individualized or specific relief (including any equitable relief).[129] Specifically, the Court explained that claims for any individualized relief must generally meet the requirements of 23(b)(3),[130] which allows for opt-outs and provides for the procedural protections necessary to protect individual, putative class members' rights.[131]

The key significance of this case is its application of the "rigorous analysis" standard. *Wal-Mart* signals that courts considering Rule 23 may not rubber-stamp certification decisions, but must carefully ascertain whether plaintiffs have demonstrated, utilizing actual evidence, that the class mechanism is appropriate to resolve the specific claims being pursued.

Comcast Corporation v. Behrend

Nearly two years after *Wal-Mart*, the Court decided *Comcast*, and in continuing to focus on the "rigorous analysis" required at the class

[126] 131 S. Ct. at 2551.
[127] 131 S. Ct. at 2551.
[128] Fed. R. Civ. P. 23(b)(2).
[129] 131 S. Ct. at 2559.
[130] Fed. R. Civ. P. 23(b)(3).
[131] See 131 S. Ct. at 2558.

certification stage, the Court effectively decertified a class of customer-plaintiffs alleging Comcast had monopolized certain regional television markets in Pennsylvania.[132] In particular, the Court held a class cannot be certified under Rule 23(b)(3) if the "[q]uestions of individual damages calculations will inevitably overwhelm questions common to the class."[133]

In another opinion authored by Justice Scalia, the Court started its analysis with Wal-Mart and held that the "rigorous analysis" required under Rule 23(a) in that case is equally applicable to Rule 23(b)'s requirements.[134] It explained that courts evaluating class certification must determine, based on "evidentiary proof," that common questions will predominate, and reiterated the "unremarkable premise" that there must be consistency between the theory of liability and the damages theory throughout the litigation, from class certification through to damages.[135] Accordingly, a plaintiff seeking class certification must show that individualized inquiries will not predominate at any stage of the case, including during the damages phase even in highly complex antitrust cases that require extensive economic analysis and damages modeling.[136]

The dissent's critique of the holding recognized its significance, explaining that, in its view, the decision effectively overturned "[l]egions of appellate opinions" expressing the "universal" view that some "individual damages calculations do not preclude class certification under Rule 23(b)(3)."[137]

The Court also acknowledged that conducting the class certification analysis will often "overlap with the merits of the plaintiff's underlying claim,"[138] and while the notion of a rigorous analysis at the certification stage has infused Supreme Court jurisprudence since approximately 1982, when the Supreme Court first used the phrase in connection with class actions,[139] it was not entirely clear how it should apply. *Comcast* puts teeth on the

[132] 133 S. Ct. at 1435.
[133] 133 S. Ct. at 1433.
[134] 133 S. Ct. at 1432.
[135] 133 S. Ct. at 1432-33.
[136] See 133 S. Ct. at 1432 to 1433.
[137] 133 S. Ct. at 1437.
[138] 133 S. Ct. at 1432.
[139] See *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740, 34 Fed. R. Serv. 2d 371 (1982).

concept: plaintiffs bear the burden to establish a uniform and plausible damages theory at the certification stage that will carry through to a disposition on the merits. Although, it remains to be seen how much of an impact *Comcast* will actually have on courts' certification decisions.

Comcast presents an opportunity for defendants to argue against class certification on the basis that there can be no uniform damages theory to adequately measure class members' damages across a population of disparate purchasers. To be sure, in the antitrust context, variations in contractual pricing, bargaining power, and even cheating behavior may now present more significant obstacles to certification;[140] however, at least some district courts continue to find ways to ensure plaintiffs have an opportunity to pursue their class claims. For example, some courts have relied on Rule 23(c)(4),[141] which permits a court to certify a class "with respect to particular issues," to bifurcate certification such that liability classes are certified while damages classes are deemed inappropriate for certification, leaving individual damages inquiries.[142] It is too early to hypothesize how *Comcast* might influence such approaches.[143]

[140] Edmund W. Searby, Esq, *United States: Private Antitrust Litigation—Class Actions*, in *The Antitrust Review of the Americas 2015*, at 45, 46 (Global Competition Review ed. 2015).
[141] Fed. R. Civ. P. 23(c)(4).
[142] *See, e.g., Fort Worth Employees' Retirement Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 89 Fed. R. Serv. 3d 1134 (S.D. N.Y. 2014); *Lilly v. Jamba Juice Company*, 2014 WL 4652283 (N.D. Cal. 2014); *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578 (S.D. N.Y. 2013); *Wallace v. Powell*, 2013 WL 2042369 (M.D. Pa. 2013); *see also In re Deepwater Horizon*, 739 F.3d 790, 817, 102 A.L.R.6th 695 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 754, 190 L. Ed. 2d 641 (2014) ("As our three fellow circuits have already concluded, we agree that the rule of *Comcast* is largely irrelevant '[w]here determinations on liability and damages have been bifurcated" in accordance with Rule 23(c)(4) and the district court has "reserved all issues concerning damages for individual determination.'") (quoting *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838, 860, 86 Fed. R. Serv. 3d 242, 104 A.L.R.6th 611 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277, 188 L. Ed. 2d 298 (2014)) (citing *Butler v. Sears, Roebuck and Co.*, 727 F.3d 796, 86 Fed. R. Serv. 3d 528 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277, 188 L. Ed. 2d 298 (2014); *Leyva v. Medline Industries Inc.*, 716 F.3d 510, 85 Fed. R. Serv. 3d 1179 (9th Cir. 2013)).
[143] *See, e.g., In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838, 86 Fed. R. Serv. 3d 242, 104 A.L.R.6th 611 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277, 188 L. Ed. 2d 298 (2014) (holding *Comcast* was inapplicable because the district court certified only a liability class, not a damages class).

Notable Decisions Applying Wal-Mart and Comcast

District and circuit courts alike have since attempted to apply the "rigorous analysis" as defined by *Wal-Mart* and *Comcast*. Commentators were quick to speculate that *Comcast* would have sweeping implications in antitrust actions (including a higher bar for certification), but the decisions flowing from the district and circuit courts since *Comcast* have narrowed, and perhaps explained more clearly, what analysis is required under *Comcast*. Several circuit courts, including the First,[144] Sixth,[145] Seventh,[146] Ninth,[147] and Tenth Circuits,[148] have weighed in after *Comcast*, and the impact on various district courts' certification decisions varies greatly based on the factual circumstances.

For example, in *In re Nexium Antitrust Litigation*,[149] the First Circuit upheld the district court's decision to certify a class against a variety of drug manufacturers, insurers, and other defendants alleged to have violated antitrust laws by entering into reverse payment agreements to keep generic versions of Nexium, a heartburn medication, off the shelves. Critically, the court addressed "whether a class can include uninjured members," and held it could contain uninjured members as long as "prior to judgment, it will be possible to establish a mechanism for distinguishing the injured from the uninjured class members."[150] This is a critical point in antitrust cases because defendants are liable only for antitrust impact, and failing to distinguish between the injured and uninjured may impose liability where none exists. In upholding certification, the court explained that, unlike in *Comcast*, the "plaintiffs' theory of liability is appropriately limited…[so it] would only require that the defendants pay aggregate damages equivalent to

[144] *In re Nexium Antitrust Litigation,* 777 F.3d 9, 90 Fed. R. Serv. 3d 1100 (1st Cir. 2015).
[145] *See, e.g., In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation,* 722 F.3d 838, 86 Fed. R. Serv. 3d 242, 104 A.L.R.6th 611 (6th Cir. 2013), *cert. denied,* 134 S. Ct. 1277, 188 L. Ed. 2d 298 (2014) (*Whirlpool*).
[146] *In re IKO Roofing Shingle Products Liability Litigation,* 757 F.3d 599, 88 Fed. R. Serv. 3d 1528 (7th Cir. 2014).
[147] *See, e.g., Jimenez v. Allstate Ins. Co.,* 765 F.3d 1161, 89 Fed. R. Serv. 3d 718 (9th Cir. 2014).
[148] *In re Urethane Antitrust Litigation,* 768 F.3d 1245 (10th Cir. 2014).
[149] *In re Nexium Antitrust Litigation,* 777 F.3d 9, 90 Fed. R. Serv. 3d 1100 (1st Cir. 2015).
[150] *In re Nexium Antitrust Litigation,* 777 F.3d at 18-19.

the injury that they caused."[151] Thus, even if the damages model is over-inclusive, certification will not be precluded as long as there is "no reason to think [individualized] questions will overwhelm common ones and render class certification inappropriate."[152]

The Sixth Circuit, in *In re Whirlpool Corporation Front-Loading Washer Products Liability Litigation*,[153] found that *Comcast* does not require that every member of the class suffer the exact same type of damages. There, a class of consumers brought a products liability action against a manufacturer of front-loading washers. In discussing *Comcast*, the court emphasized *Comcast* was not a departure from settled jurisprudence and distinguished it because the district court in *Whirlpool* certified a liability-only class, and recognized the damages inquiry could be conducted only on an individual basis. Hence, the court determined that *Comcast* applies only to cases in which both liability and damages classes are certified, and requires only that the theories of liability and damages are linked.[154]

The Tenth Circuit, in *In re Urethane Antitrust Litigation*,[155] rejected defendant's arguments that the antitrust impact model of damages must be perfectly suited for each class member. The *Urethane* litigation involved a class of industrial purchasers who sued a urethane manufacturer, alleging a conspiracy to fix the price of various polyurethane chemical products. Notably, the defendant challenged the district court's denial of a decertification motion following trial—an interesting twist. While this case does not directly address the issues related to a damages class (more specifically, whether to certify one in the face of some uninjured members), it draws an important distinction between the certification stage and trial stage—namely, if individualized issues of damages did not actually predominate at the trial, then decertification is unwarranted. The difference

[151] *In re Nexium Antitrust Litigation*, 777 F.3d at 19.
[152] *In re Nexium Antitrust Litigation*, 777 F.3d at 23 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412, 189 L. Ed. 2d 339, 88 Fed. R. Serv. 3d 1472 (2014)).
[153] *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838, 86 Fed. R. Serv. 3d 242, 104 A.L.R.6th 611 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277, 188 L. Ed. 2d 298 (2014).
[154] *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d at 860-61.
[155] *In re Urethane Antitrust Litigation*, 768 F.3d 1245 (10th Cir. 2014).

in analysis between certification and trial stage was succinctly stated by the court: "The district court did not need to predict what would predominate at trial because by the time [the defendant] raised the issue, the trial had already taken place. And because [the defendant] did not request individualized determinations on damages, the plaintiffs presented only class-wide evidence of damages. As a result, the district court knew from the actual trial that common issues of damages had predominated."[156]

To highlight just how important the issue of classwide damages is, we need look only to a petition for *certiorari* the Supreme Court recently denied. The case is captioned *Carpenter Co. v. Ace Foam, Inc.*[157] There, plaintiff consumers brought an antitrust action alleging manufacturers of flexible polyurethane foam and foam products were engaged in a decade-long price-fixing conspiracy. The questions presented for review were: whether every class member must be able to satisfy Article III standing requirements, and whether plaintiffs may "rely exclusively on aggregate damages models that calculate damages…incurred by the class as a whole, rather than by individual class members."[158] Hence, the petition seems to seek review of similar questions raised by the dissent in *Comcast*, but the Court clearly did not think this was the right case in which to answer the *Comcast* dissent's concerns.

Prior to these recent cases, the *In re Hydrogen Peroxide Antitrust Litigation* decision from the Third Circuit held that an in-depth "rigorous analysis" is required before a class can be certified, and the court described the type of analysis considered sufficient in the antitrust context. [159] The decision was considered a victory by the antitrust defense bar because it seemingly made classes more difficult to certify. In *Hydrogen Peroxide*, plaintiffs brought an action under the antitrust laws alleging an eleven-year conspiracy to fix prices in the market for hydrogen peroxide and persalts.[160] The district court certified a class based, in part, on the plaintiffs' expert testimony, which showed several potential models with sufficient data available to

[156] *In re Urethane Antitrust Litigation,* 768 F.3d at 1259.
[157] *Carpenter, Co. v. Ace Foam, Inc.,* 135 S. Ct. 1493 (2015).
[158] Petition for a Writ of Certiorari, *Carpenter,* 2015 WL 852426.
[159] *In re Hydrogen Peroxide Antitrust Litigation,* 552 F.3d 305 (3d Cir. 2008), *as amended,* (Jan. 16, 2009).
[160] *In re Hydrogen Peroxide Antitrust Litigation* 552 F.3d at 307-08.

demonstrate classwide injury from the alleged price-fixing conspiracy.[161] The Third Circuit reversed, finding the district court employed too lenient a standard in certifying the class,[162] and remanded for further analysis under a new, comprehensive, analytical framework.[163]

In particular, the Court held that a proper decision to certify a class must include findings by the court, beyond a mere "threshold showing" by a party that the putative class meets the requirements of Rule 23 by a preponderance of the evidence. The court must also consider resolution of factual and legal disputes relevant to class certification regardless of whether they implicate the merits of the action, and consider all evidence offered, including expert testimony by the opposing party.[164] The Court further rejected the liberal use of certain presumptions to permit plaintiffs in antitrust actions to circumvent their proof obligations under Rule 23.[165] Finally, the Court disavowed the idea that a district court should err on the side of certification when in doubt.[166]

While the antitrust cases applying *Hydrogen Peroxide* are too numerous to discuss here, many courts have endorsed the Third Circuit's more critical approach to certification in the antitrust context. Given the level of consistency between *Comcast* and *Hydrogen Peroxide*, it seems we will see continuing vitality to the strictures announced in both cases.

Settlement Requirements

Rule 23(e)(2)[167] sets the standard for approving settlements. Under the Rule, a proposed settlement may be approved only if it is "fair, reasonable, and adequate."[168] In making the determination, "the court must examine whether the interests of the class are better served by the settlement than by

[161] *See In re Hydrogen Peroxide Antitrust Litigation* 552 F.3d at 315.
[162] *See In re Hydrogen Peroxide Antitrust Litigation* 552 F.3d at 320-21.
[163] *In re Hydrogen Peroxide Antitrust Litigation* 552 F.3d at 307.
[164] See *In re Hydrogen Peroxide Antitrust Litigation* 552 F.3d at 324.
[165] Fed. R. Civ. P. 23; *In re Hydrogen Peroxide Antitrust Litigation* 552 F.3d at 324-26.
[166] *In re Hydrogen Peroxide Antitrust Litigation* 552 F.3d at 321.
[167] Fed. R. Civ. P. 23(e)(2).
[168] *See also* Class Action Fairness Act (CAFA), 28 U.S.C.A. § 1712(e) (2012) (requiring hearing and written finding to determine that coupon settlement is fair, reasonable, and adequate for class members); Victor & Cole, *supra* note 4, at 134.

further litigation."[169] In addition to that broad standard, courts will apply a variety of factors to determine whether a settlement is fair, reasonable, and adequate, including: "the stage of the proceedings at which the settlement was achieved and the amount of discovery completed;" "the likelihood of success at trial;" "the range of possible recover[ies];" "the complexity, expense, and duration of the litigation;" and "the substance and amount of opposition to the settlement."[170] Courts also consider the reasonableness of the notice procedures that will be used to notify absent class members of the settlement.[171]

Notably, it is well within the court's discretion to approve or disapprove of a class-action settlement.[172] "[T]he judicial role," however, is "limited to approving the proposed settlement, disapproving it, or imposing conditions on it."[173] A court may not "re-write" the settlement agreement.[174] The court is also required to prepare findings and conclusions that "demonstrate to a reviewing court that the judge has made the requisite inquiry and has considered the diverse interests and the requisite factors in determining the settlement's fairness, reasonableness, and adequacy."[175]

The settlement agreement will typically set forth the type of settlement, the settlement amount, and how the settlement amount will be paid. Settlement proceeds generally fall into one or more of three categories: cash, noncash monetary benefits (such as coupons or credits), or nonmonetary compensation.[176] Settlement proceeds may be paid in a lump sum or

[169] Herr, § 21.61.
[170] *See, e.g., In re Domestic Air Transp. Antitrust Litigation,* 148 F.R.D. 297, 312 (N.D. Ga. 1993); *see also In re Warfarin Sodium Antitrust Litigation,* 391 F.3d 516, 534-35 (3d Cir. 2004).
[171] *In re Stock Exchanges Options Trading Antitrust Litigation,* 2006 WL 3498590, *6 (S.D. N.Y. 2006).
[172] *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d at 535; *see also* Victor & Cole, *supra* note 4, at 135.
[173] Herr, § 21.61.
[174] Herr, § 21.61.
[175] Herr, § 21.635.
[176] Conte, Newberg on Class Actions § 12:5 (4th ed.); *see also* Victor & Cole, *supra* note 4, at 140.

pursuant to a prearranged formula.[177] It may be necessary to apportion a settlement fund among different claims or different classes.[178]

What will happen to undistributed settlement funds may also be addressed in the settlement, as well. Generally, unclaimed settlement funds may be "distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated."[179] Often, unclaimed funds will be distributed to one or more charitable organizations selected by the parties. This type of arrangement is typically referred to as a "*cy pres*" arrangement.[180] Alternatively, the parties to the settlement may agree that any unclaimed funds will be "recaptured" by the defendants, although this is relatively uncommon at least in the antitrust class-action context.[181]

Recently, the Third Circuit, in *In re Baby Products Antitrust Litigation*, addressed the "fairness" inquiry in *cy pres* settlements in an antitrust action, in which the class settlement provided for any undistributed funds to be paid out to charities of the parties' choosing and court's approval.[182] The court stated: "direct distributions to the class are preferred over *cy pres* distributions. The private causes of action…were created by Congress to allow plaintiffs to recover compensatory damages for their injuries."[183] Importantly, the court went on, however, to discuss the fairness inquiry under which *cy pres* settlements should be analyzed. It endorsed the existing methods already articulated,[184] and added an additional inquiry. The new inquiry under the Third Circuit's fairness analysis of *cy pres* awards is "the

[177] Conte, Newberg on Class Actions §§ 12:6, 12:7 (4th ed.).
[178] Conte, Newberg on Class Actions § 12:9 (4th ed.).
[179] *In re Airline Ticket Com'n Antitrust Litigation*, 307 F.3d 679, 682 (8th Cir. 2002); *see also* Conte, Newberg on Class Actions § 11:20 (4th ed.); Victor & Cole, *supra* note 4, at 140.
[180] *See, e.g., Diamond Chemical Co., Inc. v. Akzo Nobel Chemicals B.V.*, 517 F. Supp. 2d 212, 219-20 (D.D.C. 2007), *subsequent determination*, 2007 WL 2007447 (D.D.C. 2007).
[181] Conte, Newberg on Class Actions § 12:11 (4th ed.).
[182] *In re Baby Products Antitrust Litigation*, 708 F.3d 163, 84 Fed. R. Serv. 3d 1324 (3d Cir. 2013).
[183] *In re Baby Products Antitrust Litigation*, 708 F.3d at 173.
[184] *In re Baby Products Antitrust Litigation*, 708 F.3d at 174 (citing *Girsh v. Jepson*, 521 F.2d 153, 20 Fed. R. Serv. 2d 1062 (3d Cir. 1975); *In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 41 Fed. R. Serv. 3d 596 (3d Cir. 1998)).

degree of direct benefit provided to the class." Expounding on the idea, the court explained:

> [A] district court may consider, among other things, the number of individual awards compared to both the number of claims and the estimated number of class members, the size of the individual awards compared to claimants' estimated damages, and the claims process used to determine individual awards. *Barring sufficient justification,* cy pres *awards should generally represent a small percentage of total settlement funds.*[185]

The Third Circuit's guidance is useful to those crafting significant settlements in which the individual claim value is low, and it is difficult to ascertain class membership. Moreover, the decision may represent a significant new hurdle in the approval process, because the proponents of any settlement with a *cy pres* feature may be required to demonstrate why indirect compensation is more appropriate than directly compensating class members.

Furthermore, Chief Justice Roberts expressed his interest in taking questions related to the applicability of the *cy pres* remedies in a rare statement appended to the denial of certiorari in *Marek v. Lane*.[186] There, Chief Justice Roberts explained he would be interested in hearing a *cy pres* case so that the Court could consider the following questions:

> When, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on.[187]

[185] *In re Baby Products Antitrust Litigation,* 708 F.3d at 174 (emphasis added).
[186] *Marek v. Lane,* 134 S. Ct. 8, 187 L. Ed. 2d 392 (2013).
[187] JE: *Marek,* 134 S. Ct. at 9.

These and many other cases suggest settlements will continue to attract greater scrutiny to ensure class members receive as much direct benefit as possible from any proposed settlements.

Another development in the realm of settlement approval is the Ninth Circuit's decision in *In re HP Inkjet Printer Litigation*,[188] in which a divided Ninth Circuit interpreted the settlement provisions in CAFA. This was a Circuit first, and provides practitioners with the first statement on the relationship between coupon settlements and attorneys' fee awards under CAFA.

CAFA was, in part, designed to clean up the use of coupon settlements, and ensure plaintiffs did not receive "valueless coupons," while "class counsel receive[d] substantial attorneys' fees."[189] The Ninth Circuit recognized, however, "comparing the value of the fees with the value of the recovery [(namely, coupons)] is substantially more difficult."[190] Adopting a plain meaning approach, the court held that the attorneys' fees recovered must be "attributable to" the coupon award, which means the fee award must be based on the actual redemption value of the coupons, rather than the more amorphous expected or estimated value of the coupon award. The decision also endorses the lodestar method to compensate class counsel for any "non-coupon relief they obtain."[191]

In addition to the issues raised by the coupon settlement discussion, many courts are becoming increasingly critical of class counsel fee awards.[192]

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[188] *In re HP Inkjet Printer Litigation*, 716 F.3d 1173 (9th Cir. 2013).

[189] *In re HP Inkjet Printer Litigation*, 716 F.3d at 1178 (quoting S. Rep. No. 109-14, at 29-30 (2005)).

[190] *In re HP Inkjet Printer Litigation*, 716 F.3d at 1179.

[191] *In re HP Inkjet Printer Litigation*, 716 F.3d at 1184-85, 1187. "Awards of attorneys' fees in class settlements are generally calculated through the use of one of two methods; the 'Lodestar' method, or the 'Percentage of the Award' method. Under the lodestar method, the court must multiply the number of hours reasonably billed by the reasonable hourly rate. Once that amount (the 'lodestar' amount) is calculated, the court may then exercise its discretion to adjust the figure (and apply a multiplier to the lodestar) after considering such factors as the quality of counsel's work, the probability of success of the litigation and the complexity of the issues." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 188 (W.D. N.Y. 2005) (internal citations omitted).

[192] *See, e.g., In re Dry Max Pampers Litigation*, 724 F.3d 713, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013) (identifying signals that "class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations")(quoting *Dennis v. Kellogg Co.*, 697 F.3d 858, 864, 83 Fed. R. Serv. 3d 461 (9th Cir. 2012));

While all of these developments are presumably positive developments for class members, the downward pressure it may place on class counsel fees may diminish the willingness of the plaintiffs' bar to pursue certain actions that would be hard fought, but minimally lucrative.

Conclusion

The foregoing discussion demonstrates that courts are becoming more cognizant of the significant resources necessary to pursue and defend class actions. As a result, the contours of Rule 23 are becoming better defined, and reviewing courts are more critical of its strictures. Simply stated, the trend is toward a more "rigorous analysis" and that is likely to impact the bar, plaintiffs and defendants alike. Under these evolving standards, the plaintiffs' bar will be challenged to more carefully define classes and investigate allegations before bringing a putative class action. The defendants' bar, on the other hand, will be challenged in defending against these more carefully crafted classes. Perhaps needless to say, this area of the law will continue to present new and evolving issues.

Attorneys interested in entering the class arena should immerse themselves in the case law, and take the time to understand all of the various steps in the class action life-cycle. Doing so will give the practitioner a better understanding of how each step influences the others. That understanding, and appreciation for how the mechanism works, will better prepare the practitioner for giving reasoned and strategic advice to her clients.

Key Takeaways

- The federal courts have become more sensitive to the weighty impact of class actions on defendant-businesses, and have been focusing on the level and type of scrutiny they should apply when removing a case under the CAFA, certifying a class, and considering approval of a class settlement.

Eubank v. Pella Corp., 753 F.3d 718, 88 Fed. R. Serv. 3d 920 (7th Cir. 2014) (criticizing the fairness analysis conducted by the district court); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (noting a class settlement is dissimilar to an arms-length transaction and requires the court to engage in more scrutiny beyond determining it was a fairly negotiated settlement).

- Be aware of the difficulty involved with satisfying the four prongs for class certification. While the thresholds for numerosity and commonality have traditionally been relatively low, particularly in antitrust class actions, practitioners should not give them short rift and should be especially cognizant of commonality in light of *Walmart*. The typicality and adequacy prongs should also not be ignored.
- While courts may decide to bifurcate merits discovery and discovery related to the certification question, the two are likely to overlap (especially in light of *Comcast*) and the practitioner may want to engage in a discussion with the opposing party about prioritizing discovery bearing on certification issues.
- Recent Supreme Court decisions signal that courts considering Rule 23 may not rubber-stamp certification decisions, and also suggest settlements will continue to attract greater scrutiny to ensure class members receive as much direct benefit as possible from any proposed settlements.

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