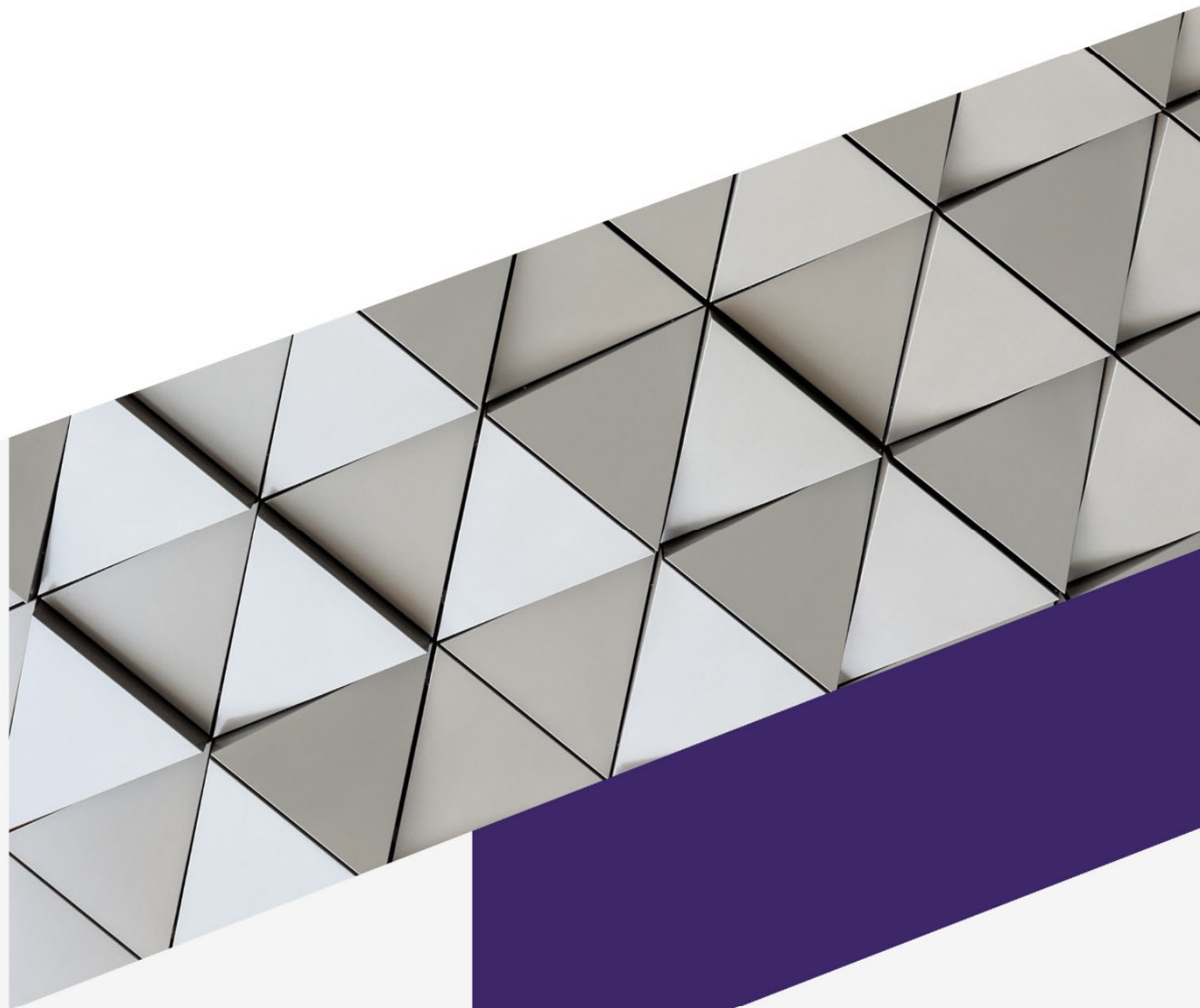


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# The Class Action Litigation Handbook



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This edition, *The Class Action Litigation Handbook*, was authored by Craig C. Martin, Chairman Americas, and Debra Bogo-Ernst, Partner and Chair of the National Class Action Litigation Practice.

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**TABLE OF CONTENTS**

Introduction to Class Certification..... 1

Part One Class Certification Elements and Potential Requirements ..... 1

    I.    Numerosity..... 1

        A.    Presumption that Numerosity Is Satisfied..... 1

        B.    Presumption that Numerosity Is not Satisfied ..... 2

        C.    Numerosity Analysis in the “Gray Area” of 20 to 40 Members..... 2

        D.    Circuit-Specific Numerosity Tests..... 2

        E.    Numerosity Outlier Cases..... 3

    II.   Commonality..... 4

        A.    Only One Common Question Is Required..... 4

        B.    Recently Heightened Commonality Requirement ..... 4

        C.    The Post-Wal-Mart Commonality Framework..... 5

    III.  Typicality ..... 6

        A.    Policy Rationale..... 6

        B.    Identical Claims Are not Required ..... 6

        C.    The Typicality Analysis..... 7

        D.    Overlap with Commonality..... 8

        E.    Typicality as a Screening Device..... 8

    IV.  Adequacy..... 9

        A.    Adequacy of the Class Representatives ..... 9

        B.    Adequacy of Class Counsel ..... 12

    V.   Manageability..... 12

    VI.  Ascertainability ..... 13

Part Two Part Two- Early Considerations ..... 17

    I.    Jurisdiction ..... 17

        A.    Personal Jurisdiction..... 17

        B.    State Court Versus Federal Court Subject Matter Jurisdiction..... 18

        C.    CAFA Jurisdiction ..... 19

        D.    Removal to Federal Court..... 20

        E.    CAFA’s “Local Controversy” Exception..... 21

        F.    CAFA’s Mandatory Home State Controversy Exception..... 25

        G.    CAFA’s Discretionary Home State Controversy Exception ..... 26

H.	CAFA’S Internal Affairs Exception .....	30
II.	Article III Standing.....	31
A.	Article III Requirements .....	31
B.	Applying Spokeo and TransUnion.....	32
C.	Timing of the Standing Inquiry.....	34
III.	Tolling.....	36
A.	General Rule .....	36
B.	Jurisdictional Differences in American Pipe Tolling.....	37
C.	Class Action Tolling Under State Law .....	38
D.	Recent Developments .....	39
IV.	Rule 23(b)(2) and 23(b)(3) Class Actions.....	39
A.	Rule 23(b)(1) Class Actions.....	40
B.	Rule 23(b)(2) Class Actions.....	40
C.	Rule 23(b)(3) Class Actions.....	42
Part Three	Motion Practice Related to Class Certification.....	46
I.	Motions to Strike Class Allegations at the Pleading Stage .....	46
A.	Standard of Review.....	46
II.	Use of <i>Daubert</i> Motions in Combatting Class Certification.....	48
A.	Full <i>Daubert</i> Analysis .....	49
B.	Limited <i>Daubert</i> Analysis .....	50
III.	Summary Judgment Motions in Connection with Class Certification.....	51
A.	Plaintiffs’ Motions: The One-Way Intervention Rule .....	51
B.	Defendants’ Motions For Summary Judgment.....	52
C.	Defendants’ Strategic Considerations in Moving for Summary Judgment .....	53
IV.	Appealing Class Certification in Federal Court.....	54
A.	Rule 23(f).....	54
B.	Standard of Review for Rule 23(f) Petitions.....	56
C.	Circuit-by-Circuit Statistics in Granting Rule 23(f) Appeals .....	57
V.	State Analogs for Class Certification Appeals.....	58
A.	California .....	58
B.	Illinois .....	59
C.	New York.....	61
D.	Texas.....	62
Part Four	Arbitration.....	64

THE CLASS ACTION LITIGATION HANDBOOK

I.	Background: The Federal Arbitration Act .....	64
II.	Class Action Waivers & Mass Arbitration.....	64
A.	Enforcement of the FAA After Conception.....	65
B.	Mass Arbitration .....	66
C.	“New Era” Programs and Bespoke Mass-Arbitration Designs.....	70
D.	Moving Forward: How Businesses Should Respond.....	70
Part Five Class Action Settlements: Procedure and Strategy .....		71
I.	Requirements for Class Action Settlement Approval .....	71
A.	Two Step Approval Process.....	71
B.	Preliminary Approval and Class Certification.....	71
C.	Class Notice .....	72
D.	CAFA Notice .....	72
E.	Final Approval .....	73
II.	Strategic Considerations in Class Action Settlements .....	73
A.	Practical Tips .....	73
B.	Judicial Involvement.....	74
Conclusion .....		77

## **INTRODUCTION TO CLASS CERTIFICATION**

This Handbook provides high-level guidance on navigating class certification and the strategic considerations that arise throughout the lifecycle of class action litigation. We provide the analytical framework and practical tools to effectively litigate class action claims in today’s demanding legal environment.

### **Part One** **Class Certification Elements and Potential Requirements**

Federal Rule of Civil Procedure (“FRCP”) 23 provides the rules for class actions in federal court. Among other things, FRCP 23 sets out elements that a party seeking class certification must be able to satisfy in order for class certification to be granted and allow the lawsuit to proceed as a class action in federal court. State court class certification rules often, but not always, mirror the federal rules.

#### **I. Numerosity**

FRCP 23(a)(1) requires that the proposed class be so numerous that joinder of all members is impracticable. In practice, there is no precise numerical threshold required to satisfy numerosity, and courts are hesitant to lay down a bright-line numerical rule.<sup>1</sup>

##### ***A. Presumption that Numerosity Is Satisfied***

Although there is no numerical threshold to satisfy numerosity, the number of plaintiffs nevertheless strongly factors into courts’ numerosity analysis. Courts generally find that a class of 40 or more members raises a strong presumption that the numerosity requirement is satisfied based on numbers alone.<sup>2</sup>

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<sup>1</sup> See 1 HERBERT B. NEWBERG, ALBA CONTE & WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, § 3.12 (6th ed. 2023).

<sup>2</sup> See *id.*; see also *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (affirming class certification and holding that, “[b]ecause numerosity is presumed at a level of 40 members,” class is sufficiently numerous whether it is 300 or 700 members); *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993) (remanding and holding that district court abused discretion when it found class that could be over 100 members did not satisfy numerosity); *Stewart v. Abraham*, 275 F.3d 220, 227 (3d Cir. 2001) (finding numerosity satisfied when plaintiff demonstrated a class of at least 41 members); *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (affirming class certification and finding numerosity satisfied by a class of between 100 and 150 members); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 542 (6th Cir. 2012) (affirming class certification and finding numerosity satisfied when lowest estimate of class size was 270 members); *Mulvania v. Sheriff of Rock Island Cnty.*, 850 F.3d 849, 860 (7th Cir. 2017) (explaining that “forty class members is a sufficiently large group” to satisfy numerosity, but finding that Plaintiffs’ estimated class size of 41 was incorrect, and Plaintiffs’ actual class size of 29 did not satisfy numerosity); *A. B. v. Hawaii State Dep’t of Educ.*, 30 F.4th 828, 836 (9th Cir. 2022) (reversing denial of class certification on numerosity grounds when district court “failed to give appropriate weight to the very large size” of an estimated 300 member class.).

### ***B. Presumption that Numerosity Is not Satisfied***

On the other hand, courts also generally presume that classes composed of fewer than twenty or 25 members do not meet the numerosity requirement, although this presumption is not as robust as the 40-member sufficiency presumption.<sup>3</sup>

### ***C. Numerosity Analysis in the “Gray Area” of 20 to 40 Members***

The numerosity analysis becomes significantly less mathematical when courts consider certification of classes between 20 and 40 members.

In these circumstances, courts rely on several factors to determine whether joinder is impracticable and, therefore, numerosity has been satisfied. These factors include: (1) judicial economy arising from avoidance of a multiplicity of actions; (2) geographic dispersion of class members; (3) size of individual claims; (4) financial resources of class members; and (5) the ability of claimants to institute individual suits.<sup>4</sup>

### ***D. Circuit-Specific Numerosity Tests***

The Second and Third Circuits have their own list of factors which largely comport with other courts but contain key differences.

#### **1. The Second Circuit’s Numerosity Test**

The Second Circuit uses a similar list of factors to determine whether a class is sufficiently numerous (as set forth in Part I(c) above) except it appears to collapse the ability to institute individual suits and the size of individual claims into a “economically feasible” analysis, and it also considers requests for prospective injunctive relief which would involve future class members.<sup>5</sup>

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<sup>3</sup> See 1 JOSEPH M. McLAUGHLIN, McLAUGHLIN ON CLASS ACTIONS, § 4:5 (20th ed. 2023); NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra* note 1, § 3.12; see also *Williams v. Henderson*, 129 F. App’x 806 (4th Cir. 2005) (affirming denial of class certification when class was composed of eight members); *Martinez v. Funsan K. Corp.*, 2018 WL 1090188, at \*3 (S.D.N.Y. Feb. 26, 2018) (denying class certification where class was between 19 and 29 members); *Wonasue v. Univ. of Maryland Alumni Ass’n*, 295 F.R.D. 104, 111 (D. Md. 2013) (finding no basis for class certification on numerosity grounds where proposed class was between 15 and 25 members); *Troncone v. Velahos*, 2012 WL 3018061, at \*5 (D.N.J. July 23, 2012) (denying class certification on numerosity grounds where proposed class was between 25 and 27 members); *Danis v. USN Commc’ns, Inc.*, 189 F.R.D. 391 (N.D. Ill. 1999) (denying class certification on numerosity grounds where proposed class was 15 members).

<sup>4</sup> See NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra* note 1, § 3.12; see also *Michaud v. Monro Muffler Brake, Inc.*, 2015 WL 1206490, at \*2 (D. Me. Mar. 17, 2015) (finding numerosity satisfied by a 23-member class where individual class members may fear retaliation by Defendant and where judicial economy is served by certification); *In re Beacon Assocs. Litig.*, 2012 WL 1569827, at \*5 (S.D.N.Y. May 3, 2012) (finding numerosity satisfied by 29-member class where the class was geographically dispersed and where the discovery burden would be large with 29 joined plaintiffs); *Crawley v. Ahmed*, 2009 WL 1384147, \*11 (E.D. Mich. May 14, 2009) (certifying class and finding numerosity satisfied where unknown class size was reasonably estimated to be at least 50 and members were geographically dispersed with few financial resources); *Ogbuehi v. Comcast of California/Colorado/Fla./Oregon, Inc.*, 303 F.R.D. 337, 345 (E.D. Cal. 2014) (certifying class and finding numerosity satisfied where trying 88 relatively small individual claims as a class served judicial efficiency).

<sup>5</sup> *Robidoux*, 987 F.2d at 936.

Of note is the Second Circuit’s recognition that “requests for prospective injunctive relief which would involve future class members” is a factor that cuts in favor of numerosity being satisfied. The reasoning is that “fluid” classes which may involve the addition of class members in the future necessarily make joinder impracticable because the identity of future plaintiffs is not yet known.<sup>6</sup>

## 2. The Third Circuit’s Numerosity Test

The Third Circuit also considers a list of factors to determine whether numerosity is satisfied: (1) judicial economy; (2) the claimants’ ability and motivation to litigate as joined plaintiffs; (3) the financial resources of class members; (4) the geographic dispersion of class members; (5) the ability to identify future claimants; and (6) whether the claims are for injunctive relief or damages.<sup>7</sup> Of the six factors, “both judicial economy and the ability to litigate as joined parties are of primary importance.”<sup>8</sup>

Notably, while many courts consider whether plaintiffs can institute *individual* suits,<sup>9</sup> the Third Circuit *Modafinil* test considers “the claimants’ ability and motivation to litigate as *joined* plaintiffs.”<sup>10</sup> The Third Circuit deliberately chooses not to “consider the possibility that plaintiffs may bring individual suits” because “the text of Rule 23(a)(1) refers to whether “the class is so numerous that *joinder* of all members is impracticable,’ not whether the class is so numerous that failing to certify presents the risk of many separate lawsuits.”<sup>11</sup>

While no other circuit has explicitly adopted the *Modafinil* test, the Fourth Circuit has applied the *Modafinil* factors to assess numerosity and specifically noted that the impracticability of joinder—not individual suits—is the appropriate consideration.<sup>12</sup> District courts in the First, Sixth, and Ninth Circuits also have applied the *Modafinil* factors, though not necessarily adopting the test, when determining whether a putative class meets the numerosity requirement.<sup>13</sup>

### **E. Numerosity Outlier Cases**

While the numerosity requirement may, in most instances, be a predictable inquiry based on the size of the putative class, exceptions do exist based on individual case circumstances.<sup>14</sup>

<sup>6</sup> See *Grant v. New York Times Co.*, 329 F.R.D. 27, 35 (S.D.N.Y. 2018).

<sup>7</sup> *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 253 (3d Cir. 2016).

<sup>8</sup> *Id.*

<sup>9</sup> See NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra* note 1, § 3.12.

<sup>10</sup> *In re Modafinil Antitrust Litig.*, 837 F.3d at 253 (emphasis added).

<sup>11</sup> *Id.* (emphasis in original).

<sup>12</sup> *In re Zetia (Ezetimibe) Antitrust Litig.*, 7 F.4th 227, 234–236 (4th Cir. 2021).

<sup>13</sup> See *In re Solodyn (minocycline Hydrochloride) Antitrust Litig.*, 2017 WL 4621777, at \*5, \*6 (D. Mass. Oct. 16, 2017); *Wilson v. Anthem Health Plans of Ky., Inc.*, 2017 WL 56064, at\*5–7 (W.D. Ky. Jan. 3, 2017); *Anderson v. Cent. Refrigerated Serv., LLC*, 2017 WL 11635450, at \*3–4 (C.D. Cal. July 6, 2017).

<sup>14</sup> See *Jackson v. Danberg*, 240 F.R.D. 145, 148 (D. Del. 2007) (certifying class and finding that 16-member death row inmate class satisfied numerosity where it sought injunctive and declaratory relief and where class had potential to increase); *Bublitz v. E.I. du Pont de Nemours & Co.*, 202 F.R.D. 251, 256 (S.D. Iowa 2001) (certifying injunctive class of 17 former-employee members because of the “natural fear that comes with suing ones employer.”); *Gaspar*

## II. Commonality

FRCP 23(a)(2) requires that a class action present questions of law or fact common to the class. To satisfy the commonality requirement, the plaintiffs must present evidence to demonstrate that there is at least one question of law or fact that is central to their claims and that can be shown to have the same answer for every member of the class.<sup>15</sup>

### A. Only One Common Question Is Required

Despite FRCP 23(a)(2) requiring common “questions,” only a single common question of law or fact is necessary to satisfy the commonality requirement.<sup>16</sup>

### B. Recently Heightened Commonality Requirement

Historically, the commonality requirement was not often litigated, and courts routinely found commonality satisfied.<sup>17</sup>

The commonality requirement gained new prominence after the Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*.<sup>18</sup> By way of background, a district court certified, and an appellate court affirmed, a class of one and a half million current and former female employees alleging that the discretion exercised by their local supervisors over pay and promotion matters constituted discrimination against women under Title VII.<sup>19</sup> The Supreme Court reversed, holding that plaintiffs did not establish the existence of any common question of law or fact.<sup>20</sup>

In reversing, the Supreme Court explained that “commonality requires that plaintiffs have suffered the same injury,” which means that “[t]heir claims must depend upon a common contention” and that “common contention, moreover, must be of 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.”<sup>21</sup> To the Supreme Court, the plaintiffs establishing nothing more than a general policy of “allowing discretion by local

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*v. Linvatec Corp.*, 167 F.R.D. 51, 56–57 (N.D. Ill. 1996) (certifying 18-member class where class was geographically dispersed and where judicial economy was served by certifying class); *Jaynes v. United States*, 69 Fed. Cl. 450, 455–56 (2006) (denying class certification of 258-member class on numerosity grounds where class was not geographically dispersed and members were easily identifiable).

<sup>15</sup> *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 359 (2011).

<sup>16</sup> *Id.* at 359 (“We quite agree that for the purposes of Rule 23(a)(2) ‘even a single common question’ will do.”); *Adickes v. Hellerstedt*, 753 F. App’x 236, 245 (5th Cir. 2018) (“[A] single common question of law or fact is sufficient if it meets the foregoing criteria.”); *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 479 (8th Cir. 2016) (“[A] single common question ‘will do’ for the purposes of Rule 23(a)(2).”); *Wang v. Chinese Daily News*, 737 F.3d 538, 544 (9th Cir. 2013) (“So long as there is ‘even a single common question,’ a would-be class can satisfy the commonality requirement of Rule 23(a)(2).”); *Harrel’s LLC v. Chaparral Energy, LLC (Naylor Farms, Inc.)*, 923 F.3d 779, 789 n.10 (10th Cir. 2019) (“[W]hen it comes to satisfying Rule 23(a)(2)’s commonality requirement, the existence of [Plaintiffs’] single common question ‘will do.’”); *Carriuolo v. GM Co.*, 823 F.3d 977, 984 (11th Cir. 2016) (“For purposes of Rule 23(a)(2) even a single common question will do.”); *J.D. v. Azar*, 925 F.3d 1291, 1321 (D.C. Cir. 2019) (“The presence of a single such common question can suffice to satisfy Rule 23(a)(2).”).

<sup>17</sup> 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1763 (4th ed. 2023).

<sup>18</sup> *Dukes*, 564 U.S. at 338.

<sup>19</sup> *Id.* at 342.

<sup>20</sup> *Id.* at 359.

<sup>21</sup> *Id.* at 350.

supervisors over employment matters” was not an allegation the truth or falsity of which could resolve the validity of each claim in one stroke.<sup>22</sup> The Supreme Court reasoned that, in resolving a Title VII claim, the crux of the inquiry is ““the reason for a particular employment decision”” and so the existence of a general policy of discretion had little bearing on whether each instance of discretion exercised by each supervisor violated Title VII.<sup>23</sup>

In other words, the Supreme Court reframed the commonality analysis to ask whether class litigation will produce class-wide *answers*, not just address class-wide *questions*.<sup>24</sup> Plaintiffs have two avenues to establish this commonality. First, they could show that the same evidence would be used to prove each plaintiff’s claims.<sup>25</sup> Or, as the plaintiffs in *Dukes* tried and failed to do, they could show generalized proof, applicable to the entire class, of a common nexus causing their injuries.<sup>26</sup>

### C. The Post-Wal-Mart Commonality Framework

Post-*Dukes*, all federal circuit courts have used the new “common answer” framework to assess commonality and have done so in a variety of class action contexts.<sup>27</sup>

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<sup>22</sup> *Id.* at 355 (emphasis omitted).

<sup>23</sup> *Id.* at 352.

<sup>24</sup> *See id.* at 350.

<sup>25</sup> *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). The Court explains in *Tyson Foods* why plaintiffs in that case showed commonality while plaintiffs in *Dukes* did not. Plaintiffs in *Dukes* pointed to a policy of manager discretion as the common nexus of their discrimination, but evidence of how one manager exercised discretion would not be probative of how another manager did so. In *Tyson*, by contrast, all the plaintiffs did similar work in the same facility and were subject to the same policy, which made their individual experiences probative of the experiences of the whole. As discussed in Part IV(c) satisfying commonality does not necessarily mean common questions predominate over individual questions.

<sup>26</sup> *Id.* at 453–58.

<sup>27</sup> *See Parent/Pro. Advoc. League v. City of Springfield, Massachusetts*, 934 F.3d 13, 31 (1st Cir. 2019) (affirming denial of certification on commonality grounds where the question “does the failure to provide [school-based behavior services] violate the ADA?” was more likely to yield individualized rather than common answers); *Elisa W. v. City of New York*, 82 F.4th 115, 124 (2d Cir. 2023) (vacating district court’s denial of class certification for failing to consider whether an agency had a practice of departing from its stated policy in a manner that exhibited deliberate indifference to a known risk “may be a common question that can be answered on a class-wide basis.”); *Allen v. Ollie’s Bargain Outlet, Inc.*, 37 F.4th 890, 901 (3d Cir. 2022) (reversing class certification where plaintiff provided no evidence that class litigation would likely “produce a common answer.”); *Brown v. Nucor Corp.*, 785 F.3d 895, 898, 909 (4th Cir. 2015) (reversing denial of class certification on commonality grounds because whether Defendant engaged in a pattern or practice of unlawful discrimination against black workers in promotion decisions was capable of generating “class-wide answers under Title VII.”); *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 548 (5th Cir. 2020) (reversing class certification where district court failed “to consider asserted differences among class members that could prevent the suit from generating ‘common answers apt to drive the resolution of the litigation.’”); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 506 (6th Cir. 2015) (affirming class certification because whether defendant’s product was ‘snake oil’ will “yield a common answer for the entire class” and “if true, will make [Defendant] liable to the entire class.”); *Ross v. Gossett*, 33 F.4th 433, 439 (7th Cir. 2022) (affirming class certification of inmate class where the question of “the constitutionality of the [Defendants’ shakedown policy] is capable of a common answer.”); *Powers v. Credit Mgmt. Servs., Inc.*, 776 F.3d 567, 575 (8th Cir. 2015) (reversing consumer class certification on commonality grounds where question of whether debt collector’s standard discovery requests were irrelevant and misleading was not capable

### III. Typicality

FRCP 23(a)(3) requires that the claims or defenses of the representative parties are typical of the claims or defenses of the proposed class.

#### A. Policy Rationale

The logic behind the typicality requirement derives from the requirement that the class representative adequately represent the class. More specifically, the typicality requirement ensures that the class representatives' interests are aligned with the unnamed plaintiffs' interests such that the class representative's pursuit of their own claims will benefit the unnamed plaintiffs<sup>28</sup> or, conversely, that absent class members will not suffer "if their representative is preoccupied with defenses unique to it."<sup>29</sup>

#### B. Identical Claims Are not Required

FRCP 23(a)(3)'s requirement that the class representative's claims or defenses be typical of the putative class's claims or defenses does not require that the claims be identical.<sup>30</sup>

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of generating common answers because it "required knowing the factual context in which those requests were made in a particular case."); *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1154 (9th Cir. 2016) (affirming class certification where a "common contention" that easily "[was] capable of classwide resolution" was whether Defendant employer illegally paid employees a commission for work that was not "directly involved in selling" in contravention of California law) (internal citations omitted); *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 916-17 (10th Cir. 2018) (affirming certification of civil detainee class where a common question was whether Defendant detention facility's sanitation policy violated the TVPA because it was a "crucial question[] with [a] common answer[.]"); *Brown v. Electrolux Home Prod., Inc.*, 817 F.3d 1225, 1238 (11th Cir. 2016) ("A question is common when 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.") (internal citations omitted); *Brown v. D.C.*, 928 F.3d 1070, 1082 (D.C. Cir. 2019) ("There is no commonality problem here because common proof will lead to common answers to each of the five questions on which resolution of Plaintiffs' claims turns."); *Monk v. Wilkie*, 978 F.3d 1273, 1277 (Fed. Cir. 2020) ("[T]he rule of commonality requires that a proposed class action presents a common question that is capable of a common legal answer.").

<sup>28</sup> See NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra* note 1, § 3.29; see also *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994) ("Typicality asks whether the named plaintiffs' claims are typical, in common-sense terms, of the class, thus suggesting that the incentives of the plaintiffs are aligned with those of the class."); *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) ("The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class.") (internal citations omitted); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000) ("[O]ne of the core purposes of conducting typicality review is to ensure that the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented.") (internal citations omitted).

<sup>29</sup> *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 902 F.2d 176, 180 (2d Cir. 1990)).

<sup>30</sup> See *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999), *overruled on other grounds by In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 32 (2d Cir. 2006); *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 598 (3d Cir. 2009); *Deiter v. Microsoft Corp.*, 436 F.3d 461, 467 (4th Cir. 2006); *Angell v. GEICO Advantage Ins. Co.*, 67 F.4th 727, 736 (5th Cir. 2023); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996); *Scott v. Dart*, 99 F.4th 1076, 1091–92 (7th Cir. 2024); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1195 (10th Cir. 2010); *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984).

### C. *The Typicality Analysis*

The most common method by which courts assess typicality is through the following framework:

A class representative’s claim is typical if it: (1) arises from the same event, practice, or course of conduct that gives rise to the claims of the unnamed class members; and (2) is based on the same legal theory.<sup>31</sup>

The following examples illustrate the operation of this framework:

In *Barrows v. Becerra*, the court affirmed certification of an injunctive class composed of Medicare recipients who alleged that the lack of an administrative review process before reclassification from in-patient to out-patient status violated their due process rights.<sup>32</sup> Despite the class representatives being only those who were *previously* classified as outpatients—in contrast to unnamed plaintiffs who faced that classification in the future, and thus had a greater interest in the litigation—the court found typicality met because both sets of claims arose “from the same conduct.”<sup>33</sup>

In *Boley v. Universal Health Servs., Inc.*, the court affirmed certification of an ERISA plan participant class alleging breach of fiduciary duty against the plan sponsor on typicality grounds.<sup>34</sup> The class representatives were composed of plan participants who invested in only seven of the plan’s thirty-seven investment options whereas unnamed plaintiffs invested in the other thirty.<sup>35</sup> The court nevertheless found that claims were typical because “the class representatives allege actions or a course of conduct by [the plan sponsor] that affected multiple funds in the same way.”<sup>36</sup>

Conversely, the Eleventh Circuit in *Vega v. T-Mobile USA, Inc.*, reversed class certification for a lack of typicality.<sup>37</sup> There, a sales representative sued T-Mobile for clawing back commission payments on deactivated phone plans.<sup>38</sup> While the district court certified a class of T-Mobile “employees ‘who received commissions for the sale of T-Mobile prepaid cellular telephone plans, but were charged back by T-Mobile for those commissions,’” the Eleventh Circuit reversed, finding that the named plaintiff’s claims could not be typical of a class that implicitly included employees in different business units or under different contracts whose compensation scheme was not identical to the named plaintiff’s.<sup>39</sup> The court also credited affidavit evidence that some class members understood that their commissions were subject to claw-back, which created

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<sup>31</sup> See FEDERAL PRACTICE AND PROCEDURE, *supra* note 17, § 1764; see also *Barrows v. Becerra*, 24 F.4th 116, 131-32 (2d Cir. 2022); *Boley v. Universal Health Servs., Inc.*, 36 F.4th 124, 133 (3d Cir. 2022); *Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002); *Doster v. Kendall*, 54 F.4th 398, 438 (6th Cir. 2022); *Lacy v. Cook Cnty., Illinois*, 897 F.3d 847 (7th Cir. 2018); *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992); *In re Checking Account Overdraft Litig.*, 2022 WL 472057, at \*3 (11th Cir. 2022); *Azar*, 925 F.3d at 1322.

<sup>32</sup> *Barrows*, 24 F.4th at 122, 131–32.

<sup>33</sup> *Id.* at 131-32.

<sup>34</sup> 36 F.4th at 135.

<sup>35</sup> *Id.* at 129.

<sup>36</sup> *Id.* at 128.

<sup>37</sup> 564 F.3d 1256 (11th Cir. 2009).

<sup>38</sup> *Id.* at 1262.

<sup>39</sup> *Id.* at 1277.

substantial differences with the named plaintiff where the complaint alleged breach of contract and unjust enrichment.<sup>40</sup>

#### ***D. Overlap with Commonality***

Because the framework for assessing typicality involves whether the asserted claims stem from a single event or unitary course of action and advance similar legal theories, the typicality requirement significantly overlaps with the commonality requirement. Courts have recognized this overlap.<sup>41</sup>

#### ***E. Typicality as a Screening Device***

Despite its overlap with commonality, typicality is occasionally used in a more stand-alone capacity. This normally occurs where courts use the typicality requirement as a screening device to ensure that the class representatives' legal or factual positions are not too divergent from the unnamed plaintiffs' positions—even if there are common questions of law or fact across the class.<sup>42</sup>

These examples showcase typicality as a screening device:

*Howard v. Cook Cnty. Sheriff's Office*, The Seventh Circuit reversed certification of a class of female jailhouse employees alleging claims of Title VII hostile work environment based on sexual harassment by male inmates on typicality grounds.<sup>43</sup> The court found that the class representatives' claims alleged *direct* harassment whereas many unnamed plaintiffs alleged *ambient* harassment, and therefore “[e]ven if the named plaintiffs were to rely on ambient harassment to buttress their evidence of direct harassment, they would have no reason to place it front and center.”<sup>44</sup>

*Duncan v. Governor of Virgin Islands*, 48 F.4th 195 (3d Cir. 2022). The Third Circuit affirmed denial of class certification of a class of taxpayers alleging that the Government of the Virgin Islands had a practice of delaying income tax refund checks to most taxpayers while expediting refunds to favored taxpayers.<sup>45</sup> During the lawsuit, the class representative received her refund

<sup>40</sup> *Id.*

<sup>41</sup> See *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (“The commonality and typicality requirements of Rule 23(a) tend to merge.”); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 19 (1st Cir. 2008) (“[T]here is some overlap among the certification criteria of commonality, Rule 23(a)(2), typicality, Rule 23(a)(3), and predominance, Rule 23(b)(3).”); *Elisa W. v. City of New York*, 82 F.4th 115, 128 (2d Cir. 2023) (“[W]here the claims of a class stem from a single course of conduct, the commonality and typicality requirements of Rule 23(a) tend to merge.”) (internal citations omitted). *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 311 (3d Cir. 1998) (“The concepts of commonality and typicality are broadly defined and tend to merge”) (internal citations omitted); *Deiter*, 436 F.3d at 466 (“The typicality requirement...tends to merge with the commonality and adequacy-of-representation requirements.”); *Priddy v. Health Care Serv. Corp.*, 870 F.3d 657, 660 (7th Cir. 2017) (“[C]ommonality and typicality tend to merge.”) (internal citations omitted); *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1141 n.11 (9th Cir. 2016) (“As the [Supreme] Court noted, the commonality and typicality requirements of Rule 23(a) tend to merge.”) (internal citations omitted).

<sup>42</sup> See FEDERAL PRACTICE AND PROCEDURE, *supra* note 17, § 1764 (4th ed. 2023); see also *Duncan v. Governor of Virgin Islands*, 48 F.4th 195, 207 (3d Cir. 2022); *Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002); *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 728 (7th Cir. 2011).

<sup>43</sup> 989 F.3d 587, 592 (7th Cir. 2021).

<sup>44</sup> *Id.* at 606.

<sup>45</sup> *Duncan*, 48 F.4th at 199.

check from the defendant, though it was allegedly in the incorrect amount.<sup>46</sup> This change in the position of the class representative caused the court to conclude that her claims were atypical of the unnamed class members' claims.<sup>47</sup> Specifically, it found that the class representative's claims no longer had anything "to do with the rest of the class's refund claims, which ostensibly rely only on the factual premise that the class members are entitled to refund checks but haven't yet received them."<sup>48</sup> Thus, although all class members' claims stemmed from the same course of conduct by the defendant, the change in the class representative's factual position rendered her claims atypical.

#### IV. Adequacy

The adequacy requirement under FRCP 23(a)(4) requires that the representative parties will fairly and adequately represent the interests of the class. Although the rule applies to representative "parties," courts have long used FRCP 23(a)(4) to assess the adequacy of class counsel in addition to the class representatives.<sup>49</sup>

##### A. Adequacy of the Class Representatives

While a determination of whether a class representative can adequately represent a class is fact-specific, courts generally find a class representative to be adequate when (1) the representative's interests are otherwise aligned with, and not antagonistic to, those of unnamed class members; and (2) the representative is able to advocate vigorously and competently for the interests of the putative class through supervision of qualified counsel.<sup>50</sup>

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<sup>46</sup> *Id.* at 208.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra* note 1, § 3.52.

<sup>50</sup> See McLAUGHLIN ON CLASS ACTIONS, *supra* note 3, § 4:27; *see also* *Cohen v. Brown Univ.*, 16 F.4th 935, 947 (1st Cir. 2021) (stating that, to determine adequacy, "we must ask whether the representatives' interests meaningfully conflict with those of the class and whether the representatives are competent champions of the cause."); *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 171 (2d Cir. 2001) ("Two factors generally inform whether class representatives satisfy the [adequacy] requirement: (1) absence of conflict and (2) assurance of vigorous prosecution.") (internal citations omitted); *In re Cmty. Bank of N. Va. & Guaranty Nat'l Bank of Tallahassee Second Mortg. Loan Litig.*, 622 F.3d 275, 291 (3d Cir. 2010) ("The inquiry that a court should make regarding the adequacy of representation requisite of Rule 23(a)(4) is to determine that the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously...and that there is no conflict between the individual's claims and those asserted on behalf of the class.") (internal citations omitted); *Deiter*, 436 F.3d at 466 (stating that, to satisfy adequacy, "the named plaintiff's claim and the class claims must be so interrelated that the interests of the class members will be fairly and adequately protected in their absence.") (internal citations omitted); *Sharp Farms v. Speaks*, 917 F.3d 276, 295 (4th Cir. 2019) ("The adequacy inquiry serves to uncover conflicts of interest between named parties and the class they seek to represent.") (internal citations omitted); *Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973) (stating that adequacy is determined by two criteria, "(1) the representative must have common interests with the unnamed members of the class; and (2) it must appear that the representative will vigorously prosecute the interests of the class through qualified counsel."); *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 757 (6th Cir. 2013) (to satisfy adequacy, "(1) [t]he representative must have common interests with unnamed members of the class, and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel.") (internal citations omitted); *Santiago v. City of Chicago*, 19 F.4th 1010, 1018 (7th Cir. 2021) ("Conflicts

## 1. Adequacy of the Class Representatives: Conflicts of Interest

The United States Supreme Court has recognized that the “adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.”<sup>51</sup> Not every conflict, however, is sufficient to destroy adequacy. Only conflicts that are “fundamental” or go “to the heart of the litigation” are deemed to be serious enough to destroy adequacy.<sup>52</sup>

These “fundamental” conflicts can take a variety of forms. Typically, courts find a fundamental conflict where the class representative seeks a different form of relief from the unnamed

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of interest, as distinct from differences in entitlements, create an issue of adequacy of representation by requiring the class representative to choose between competing class members.” (internal citations omitted); *Conrad v. Boiron, Inc.*, 869 F.3d 536, 539 (7th Cir. 2017) (stating that, to satisfy adequacy, “the court must be satisfied that the plaintiff will keep the interests of the entire class at the forefront.”); *Paxton v. Union Nat. Bank*, 688 F.2d 552, 562–63 (8th Cir. 1982) (“The focus of [the adequacy analysis] is whether: (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel.”); *Drimmer v. WD-40 Co.*, 343 F. App’x 219, 221 (9th Cir. 2009) (to determine whether adequacy is satisfied “we ask two questions: (1) Do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?”) (internal citations omitted); *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187–88 (10th Cir. 2002) (“Resolution of two questions determines [] adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?”) (internal citations omitted); *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1346 (11th Cir. 2001) (“Adequacy of representation’ means that the class representative has common interests with unnamed class members and will vigorously prosecute the interests of the class through qualified counsel.”) (internal citations omitted).

<sup>51</sup> *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

<sup>52</sup> *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009) (“In order to defeat a motion for certification, however, the conflict must be fundamental.”) (internal citations omitted); *In re Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig.*, 967 F.3d 264, 272 (3d Cir. 2020) (“Only fundamental conflicts will defeat the adequacy requirement.”) (internal citations omitted); *Sharp Farms*, 917 F.3d at 295 (“For a conflict of interest to defeat the adequacy requirement, that conflict must be fundamental.”) (internal citations omitted); *In re Deepwater Horizon*, 739 F.3d 790, 813 (5th Cir. 2014) (“Although the creation of subclasses is sometimes necessary under Rule 23(a)(4) to avoid a fundamental conflict, there is no need to create subclasses to accommodate every instance of differently weighted interests.”) (internal citations omitted); *Gooch v. Life Invs. Ins. Co. of Am.*, 672 F.3d 402, 429 (6th Cir. 2012) (“Although significant conflicts make a plaintiff an inadequate class representative, differently weighted interests are not detrimental.”); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 942 (9th Cir. 2015) (“Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement.”) (internal citations omitted); *Tennille v. W. Union Co.*, 785 F.3d 422, 430 (10th Cir. 2015) (“Only a conflict that goes to the very subject matter of the litigation will defeat a party’s claim of representative status.”) (internal citations omitted).

plaintiffs,<sup>53</sup> where theories of law or fact may benefit some class members while harming others,<sup>54</sup> or where some members of the class receive a benefit from the actions of the defendant that alleged to have harmed other members of the proposed class.<sup>55</sup>

## 2. Adequacy of the Class Representatives: Vigorous Representation

The second component of the adequacy analysis, vigorous representation, is largely concerned with whether the class representative has the proper motivation, desire, and credibility to pursue the interests of the unnamed class members.<sup>56</sup> Although it is rare for a class representative to be found inadequate based on her personal characteristics, vigorous representation is typically at-issue when a class representative's conduct as an individual casts doubt on her ability to lead the putative class.<sup>57</sup>

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<sup>53</sup> See *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 233 (2d Cir. 2016) (reversing class certification of a merchant class with “unitary representation” of plaintiffs seeking an injunction and plaintiffs seeking damages. In finding adequacy was not satisfied, the court explained that “[t]he conflict is clear between merchants of the (b)(3) class, which are pursuing solely monetary relief, and merchants in the (b)(2) class, defined as those seeking only injunctive relief. The former would want to maximize cash compensation for past harm, and the latter would want to maximize restraints on network rules to prevent harm in the future.”); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 986 (9th Cir. 2011) (holding that former employee class representatives of a class of current and former employees could not “adequately protect the interest of the class” because they did “not share an interest with the [current employee] class members whose primary goal is to obtain injunctive relief.”).

<sup>54</sup> See *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 246 (2d Cir. 2007) (finding class representatives did not satisfy adequacy in a class of employee welfare benefit plans where certain “self-funded” plans advanced a distinct theory of recovery and where no class representative was part of such a self-funded plan).

<sup>55</sup> See NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra* note 1, § 3.54; see also *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280–81 (11th Cir. 2000) (reversing class certification of “all cattle producers who had sold fed cattle directly to [defendant]” where plaintiffs alleged that Defendant entered into forward contracts for cattle with certain producers to artificially lower prices other producers could receive because class would necessarily include the producers who benefitted alongside those who did not); *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 315 (5th Cir. 2007) (reversing class certification of 401(k) participants where some participants, including a named plaintiff, continued investing in company's stock after being warned about risk).

<sup>56</sup> See NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra* note 1, § 3.54.

<sup>57</sup> See *Culver v. City of Milwaukee*, 277 F.3d 908, 912 (7th Cir. 2002) (affirming decertification of class on adequacy grounds where class representative “has pursued the suit in a most lackadaisical manner” and “has done nothing to move the class forward except file a flurry of frivolous motions to recuse [] various district judges”); *Dodson v. Hillcrest Sec. Corp.*, 1996 WL 459772, at \*6 (5th Cir. 1996) (affirming denial of class certification on adequacy grounds where class representative admitted he “did not want to be heavily involved” in the case, admitted that he “had no understanding of what it [meant] to be a class representative,” and had little knowledge of the facts of the case); *Bieneman v. City of Chicago*, 864 F.2d 463, 465 (7th Cir. 1988) (affirming denial of class certification where putative class representative litigated the suit in ways most favorable to his individual claims at expense of class's claims); *Villare v. ABIOMED, Inc.*, 2020 WL 3497285, at \*7 (S.D.N.Y. June 29, 2020) (denying motion from plaintiff to serve as class representative where plaintiff's “criminal fraud conviction ten years ago remains extremely concerning for an individual seeking to serve as a fiduciary for absent class members asserting they are the victims of a fraudulent scheme”); *Pagan v. The New Wilson's Meats, Inc.*, 2011 WL 1876027, at \*7 n.10 (E.D. Pa. May 17, 2011) (denying class certification where proposed class representative's “most recent conviction for robbery may be used against him ‘for the purpose of attacking his character for truthfulness’” and where his “ability to be available to counsel, this Court, and the purported ‘class’ throughout this litigation [has been] quite questionable”); *Jamison v.*

### ***B. Adequacy of Class Counsel***

The adequacy analysis also requires courts to consider whether the counsel representing the class will fairly and adequately represent the class.<sup>58</sup> For class counsel, courts generally consider whether counsel are “qualified, experienced, and generally able to conduct the litigation.”<sup>59</sup> Specific examples of courts finding class counsel to be inadequate typically involve counsel’s lack of experience or lack of resources necessary to represent the proposed class.<sup>60</sup>

### **V. Manageability**

The manageability requirement stems from FRCP 23(b)(3)(D), which allows a class action to be maintained if (1) the prerequisites under FRCP 23(a) are met; (2) the common questions of law or fact predominate over individualized questions; and (3) a class action is the superior method to adjudicate the controversy. The Federal Rules of Civil Procedure provide that the “likely difficulties of managing a class action” should be a consideration in assessing whether these requirements are met. While this consideration applies only to class actions certified under FRCP 23(b)(3), these class actions are the most common type of class action, as discussed in Part Two.

The manageability inquiry does not simply ask whether a class action will create manageability problems, but rather whether it will create “more management problems than any of the

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*First Credit Servs., Inc.*, 290 F.R.D. 92, 105 (N.D. Ill. 2013) (denying class certification where putative class representative was convicted of fraud because “there is a strong likelihood that the jury will focus on [the representative’s] credibility and not the claims of a potential class”); *but see Chupa v. Armstrong Flooring, Inc.*, 2020 WL 1032420, at \*4 (C.D. Cal. Mar. 2, 2020) (finding that a proposed class representative could represent a class where proposed representative was convicted of bank robbery because “bank robbery is not per se a crime of dishonesty”); *Williams v. Pressler & Pressler*, 2013 WL 5435068, at \*8 (D.N.J. Sept. 27, 2013) (granting class certification where putative class representatives had only shallow knowledge of their claims because Plaintiffs need only possess a “minimal degree of knowledge” to be adequate representatives).

<sup>58</sup> FED. R. CIV. P. 23(g).

<sup>59</sup> See NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra* note 1, § 3.72; see generally *Wayside Church v. Van Buren Cnty.*, 2025 WL 2829601, at \*4–5 (6th Cir. Oct. 6, 2025); *Riggleman v. Clarke*, 2019 WL 1903795, at \*4 (W.D. Va. Apr. 29, 2019) (collecting cases).

<sup>60</sup> See *Gomez v. St. Vincent Health, Inc.*, 649 F.3d 583, 592–93 (7th Cir. 2011) (affirming denial of class certification where counsel, in a previous class action, counsel “was not diligent in prosecuting his proposed class action, had engaged in faulty discovery efforts, had been subjected to orders to compel and awards of cost, and had failed to develop a full record for summary judgment consideration.”); *Van v. Ford Motor Co.*, 2018 WL 4635649, at \*4 (N.D. Ill. Sept. 27, 2018) (denying class certification and finding class counsel inadequate where counsel “has been approved as class counsel in just one federal class action, which resulted in disciplinary sanctions ... and malpractice suits by his clients.”); *Viveros v. VPP Grp., LLC*, 2013 WL 3733388, at \*10 (W.D. Wis. July 15, 2013) (denying class certification where class counsel’s “performance at previous stages of this case” raised concerns, including, among other things, filing “an amended complaint a month after the deadline for doing so without filing a motion for leave to amend or acknowledging that their complaint was untimely.”); *Healey v. Murphy*, 2009 WL 6613209, at \*10 (D. Mass. Jan. 14, 2009) (recommending denial of class certification where class counsel was “well-versed in the relevant issues of substantive law” but counsel’s lack of experience with class actions rendered him inadequate as class counsel); *Walter v. Palisades Collection, LLC*, 2010 WL 308978, at \*10 (E.D. Pa. Jan. 26, 2010) (denying class certification where class counsel was inadequate, in part, due to the lack of “resources available” to class counsel because the putative class could include over 4,000 members and class counsel were two principals of a two-person law firm); *Ademihuyi v. PennyMac Mortg. Inv. Trust Holdings*, 2015 WL 575362, at \*8 (D. Md. Feb. 10, 2015) (denying class certification where class counsel was inadequate because “[t]he Court has no information about what resources counsel may call upon, financial or otherwise, to aid and support plaintiff’s continued prosecution of this case” and where counsel was a solo practitioner).

alternatives,” relatively speaking.<sup>61</sup> This requires the district court to consider any manageability concerns against other considerations.<sup>62</sup> Consequently, “administrative difficulties—whether in class-member identification or otherwise—do not alone doom a motion for certification. Indeed, ...manageability problems will ‘rarely, if ever, be in [themselves] sufficient to prevent certification.’”<sup>63</sup>

A district court judge may also wait to see how serious manageability issues turn out to be when more is known about available records.<sup>64</sup> If a class is certified and revealed to be unmanageable later in the litigation, the district court may also decertify the class at that point.<sup>65</sup>

## VI. Ascertainability

Although ascertainability is not a FRCP 23 requirement, some courts have often found it implicitly necessary for class certification.<sup>66</sup> A class definition thus must be sufficiently clear and objective to allow a determination of the identity of the proposed class.<sup>67</sup>

What it means for a class definition to be “clear and objective” is best explained by examples of definitions that are vague or subjective. In *Conigliaro v. Norwegian Cruise Line*, a proposed class of passengers who “suffered...emotional injury” or “had their cruise ruined” when a cruise ship sailed into rough waters was not ascertainable because subjective fact-finding unique to each putative class member was necessary to identify the class.<sup>68</sup> While all passengers were subjected to the same violent experience on the ship, Norwegian introduced affidavits of passengers who either slept through the experience or who enjoyed watching the waves rock the ship.<sup>69</sup> Again, because individual fact-finding would be required to identify passengers with standing, the court denied certification.<sup>70</sup>

The Seventh Circuit similarly rejected a proposed class on ascertainability grounds in *Oshana*. There, a plaintiff sought class certification for a class of people who purchased soda fountain Diet Coke from 1999 onwards.<sup>71</sup> She alleged that Diet Coke violated Illinois’s consumer fraud and deceptive business practices statute by advertising that Diet Coke was flavored with aspartame but

<sup>61</sup> *Klay v. Humana, Inc.*, 382 F.3d 1241, 1273 (11th Cir. 2004), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). *See also Mullins v. Direct Digital, LLC*, 795 F.3d 654, 664 (7th Cir. 2015).

<sup>62</sup> *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1304 (11th Cir. 2021); *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (“But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative...to no litigation at all.”).

<sup>63</sup> *Id.* (citing *Klay*, 382 F.3d at 1272).

<sup>64</sup> *Mullins*, 795 F.3d at 664.

<sup>65</sup> *See, e.g., Carnegie*, 376 F.3d at 661, 661 (7th Cir. 2004).

<sup>66</sup> *See Cherry*, 986 F.3d at 1302; *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 654-55 (4th Cir. 2019); *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 995 (8th Cir. 2016) (collecting cases); *see also Mullins*, 795 F.3d at 659.

<sup>67</sup> *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006); *see also Little v. T-Mobile, USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012); *John v. Nat’l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007).

<sup>68</sup> 2006 WL 7346844, at \*3 (S.D. Fla. Sep. 1, 2006).

<sup>69</sup> *Id.* at \*5.

<sup>70</sup> *Id.* at \*6.

<sup>71</sup> *Oshana*, 472 F.3d at 514.

used saccharin in its fountain beverages.<sup>72</sup> The *Oshana* court affirmed the denial of certification because the class would necessarily include people who knew about the saccharin and purchased Diet Coke anyway or even people who bought Diet Coke *because* they liked the taste of saccharin.<sup>73</sup>

Circuits disagree on the contours of ascertainability’s role in the class certification analysis. The Third Circuit has interpreted the *ease* of ascertainability to be an intrinsic requirement of evaluating certification in 23(b)(3) actions.<sup>74</sup> However, other circuits reject such a requirement for class certification under Rule 23, as part of ascertainability or otherwise.<sup>75</sup>

The United States Circuit Courts for the First, Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have rejected a heightened standard for establishing that a proposed class definition satisfies the ascertainability requirement.<sup>76</sup> These courts have rejected the additional inquiry into ascertainability and explained that the appropriate analysis into the explicit requirement of Rule 23 will yield the correct “balance of interests that [the Rule] is designed to protect.”<sup>77</sup> Rather than require a plaintiff to demonstrate that it is easy to ascertain the proposed class, courts have held that “membership can be capable of determination without being capable of *convenient* determination. Administrative feasibility is not an inherent aspect of ascertainability.”<sup>78</sup>

United States Circuit Court of Appeals	Position on Ascertainability
First Circuit	Ascertainability is an implicit requirement for class certification because a proposed class must be clearly and objectively defined, but ascertainability is only a bar to certification when no feasible mechanism could identify class members prior to the liability stage. <sup>79</sup>
Second Circuit	Ascertainability is an implied prerequisite for class certification because a clear and

<sup>72</sup> *Id.* at 509.

<sup>73</sup> *Id.* at 514.

<sup>74</sup> See *City Select Auto Sales v. BMW Bank of North America*, 867 F.3d 434, 439 (3d Cir. 2017). The Third Circuit ascertainability requirement is discussed in more detail in Part Two Section IV below.

<sup>75</sup> See, e.g., *Cherry*, 986 F.3d at 1302.

<sup>76</sup> See, e.g., *In re Petrobras Sec.*, 862 F.3d 250, 264 (2d Cir. 2017); *Seeligson v. Devon Energy Prod. Co.*, 761 F. App’x 329, 334 (5th Cir. 2019); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015); *Sandusky Wellness v. Medtox*, 821 F.3d at 996; *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 929 (9th Cir. 2018) (citing *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017)).

<sup>77</sup> *Mullins*, 795 F.3d at 658.

<sup>78</sup> *Cherry*, 986 F.3d at 1303.

<sup>79</sup> See *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19–21 (1st Cir. 2015).

	objective class definition is required. <sup>80</sup> However, there is not an independent administrative feasibility requirement. <sup>81</sup>
Third Circuit	The proposed class must be “readily ascertainable based on objective criteria” <u>and</u> the means of ascertaining class members must be reliable and administratively feasible without “much, if any, individual factual inquiry.” <sup>82</sup>
Fourth Circuit	There is an ascertainability requirement. A class may not be certified unless a court can readily identify the class members in reference to objective criteria in an administratively feasible way. <sup>83</sup>
Fifth Circuit	Ascertainability only requires that a class be “adequately defined and clearly ascertainable.” <sup>84</sup> The inability of some class members to prove their claims does not defeat ascertainability. <sup>85</sup>
Sixth Circuit	Ascertainability is an implied requirement. <sup>86</sup> A class must be sufficiently defined for a court to ascertain the class members with reasonable accuracy, but this only requires that the criteria for class membership be clear and objective. <sup>87</sup>
Seventh Circuit	Ascertainability does not constitute its own stringent requirement but rather is relevant to

<sup>80</sup> *Leyse v. Lifetime Entertainment Services, LLC*, 679 F. App’x 44, 47 (2d Cir. 2017) (“Our precedent identifies ascertainability as an implied requirement for class certification under Fed. R. Civ. P. 23”) (internal citations omitted); see also *Brecher v. Republic of Argentina*, 806 F.3d 22, 25 n.2 (2d Cir. 2015).

<sup>81</sup> *In re Petrobras Sec.*, 862 F.3d at 267–69.

<sup>82</sup> *Carrera*, 727 F.3d at 307-08. See also *Hayes v. Wal-Mart Stores*, 725 F.3d 349, 355 (3d Cir. 2013), *Byrd v. Aaron’s Inc.*, 784 F.3d 154, 164 (3d Cir. 2015).

<sup>83</sup> *EQT Production Co. v. Adair*, 764 F.3d 347, 358-60 (4th Cir. 2014).

<sup>84</sup> *Seeligson*, 761 F. App’x at 334.

<sup>85</sup> *Id.* at 334 n.22.

<sup>86</sup> *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 466 (6th Cir. 2016).

<sup>87</sup> *Rikos*, 799 F.3d at 524-27.

	the requirement that classes are clearly defined with reference to objective criteria. <sup>88</sup>
Eighth Circuit	It is implicitly required that a class be “adequately defined and clearly ascertainable.” <sup>89</sup>
Ninth Circuit	An independent administrative feasibility requirement is unnecessary because FRCP adequately protects the interests that are promoted by such a requirement. <sup>90</sup>
Tenth Circuit	Ascertainability is a “sub-requirement” of numerosity. The Tenth Circuit “has not explicitly adopted [the Third or Seventh Circuit standards].” <sup>91</sup>
Eleventh Circuit	Ascertainability is relevant to class certification because a clear and objective class definition is required to assess whether a proposed class meets the requirements of FRCP 23, but administrative feasibility is not a requirement. <sup>92</sup>

Given the variance in ascertainability standards, it is important to check the jurisdiction at issue to determine whether ascertainability plays a central role in the class certification decision.

<sup>88</sup> *Mullins*, 795 F.3d at 661–72.

<sup>89</sup> *Sandusky Wellness v. Medtox*, 821 F.3d at 996.

<sup>90</sup> *Briseno*, 844 F.3d at 1126–27.

<sup>91</sup> *Evans v. Brigham Young University*, 2023 WL 3262012, \*8–9 (10th Cir. 2023).

<sup>92</sup> *Cherry*, 986 F.3d at 1301-05.

## **Part Two**

### **Part Two- Early Considerations**

#### **I. Jurisdiction**

For a class action to proceed, the court must have jurisdiction over the matter. Like any other action, the court must generally: (1) have subject matter jurisdiction over the case; (2) have personal jurisdiction over the parties; and (3) be a proper venue to litigate the dispute.<sup>93</sup>

While many aspects of a court’s jurisdiction to hear a class action are similar to typical, non-class disputes, other aspects are dissimilar and contain issues specific to class actions. These differences will be covered below.

##### ***A. Personal Jurisdiction***

###### **1. Personal Jurisdiction, Generally**

In any lawsuit, a court must have personal jurisdiction over the parties to an action. Personal jurisdiction may be consented to by the parties and is a waivable right.<sup>94</sup> Without a waiver or consent, personal jurisdiction typically requires some connection between the forum state and the parties.<sup>95</sup> Because personal jurisdiction is almost always implicitly consented to by the plaintiff (the party that initiates a suit and, thus, chooses the forum), it is usually only the defendant that raises personal jurisdiction as an issue.

Personal jurisdiction may be established in one of two ways. The first is “general” personal jurisdiction, which arises when a party is considered “at-home” within the forum (for a corporation, this is the corporation’s principal place of business or state of incorporation).<sup>96</sup> When a court has general personal jurisdiction over a defendant, it may hear any claim against that defendant, regardless of where the events giving rise to the claim occurred.<sup>97</sup> The second is “specific” personal jurisdiction, which a court must have if a defendant is at-home somewhere other than the forum.<sup>98</sup> For a court to have specific personal jurisdiction over a defendant, there must be a connection between (1) the plaintiffs’ claims; (2) the forum; and (3) the defendant.<sup>99</sup>

###### **2. Recently Heightened Personal Jurisdiction Requirement**

In 2017, the U.S. Supreme Court potentially made it more difficult to maintain certain types of class actions in its *Bristol-Myers Squibb* decision.<sup>100</sup> Specifically, it made dismissal more likely for multi-state class actions where the defendant is not subject to general personal jurisdiction.

<sup>93</sup> See 2 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra* note 1, § 6.1.

<sup>94</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985).

<sup>95</sup> *Int’l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945).

<sup>96</sup> *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cnty.*, 582 U.S. 255, 262 (2017).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 265.

<sup>100</sup> *Id.*

In that case, Bristol-Myers Squibb (“BMS”) was sued in California state court by a group of plaintiffs from several different states alleging claims in connection with the advertising of a pharmaceutical product, Plavix.<sup>101</sup> The lower California courts initially held that California had general jurisdiction over BMS based on the company’s business relationships with California. The Supreme Court reversed, holding that the California state courts did not have personal jurisdiction over the non-California plaintiffs’ claims.<sup>102</sup>

BMS was not subject to general jurisdiction in California because it was not “at-home” there.<sup>103</sup> Furthermore, the Supreme Court held that the California state courts had no specific personal jurisdiction over the non-California plaintiffs’ claims because “the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California.”<sup>104</sup> In other words, there was not a sufficient connection between (1) the non-California plaintiffs’ claims; (2) the forum (California); and (3) BMS to sustain a finding of personal jurisdiction over BMS by the California courts.

While *Bristol-Myers Squibb* was not itself a class action, it has clear implications for courts exercising personal jurisdiction over unnamed class members’ claims.<sup>105</sup> The law is currently developing. So far, the Third, Sixth, and Seventh Circuits have explicitly declined to extend *Bristol-Meyers Squibb* to the class action context and do not require personal jurisdiction over unnamed class members’ claims.<sup>106</sup> Some federal district courts, on the other hand, have used *Bristol-Myers Squibb* to dismiss claims by unnamed class members for lack of personal jurisdiction.<sup>107</sup>

### ***B. State Court Versus Federal Court Subject Matter Jurisdiction***

Additional jurisdictional considerations come into play during a class action when considering subject matter jurisdiction in state and federal court.

#### **1. State Court Subject Matter Jurisdiction**

As courts of general jurisdiction, state courts have the subject matter jurisdiction over almost any claim. Certain types of actions, however, have been deemed by Congress to be with the exclusive jurisdiction of federal courts.<sup>108</sup> These actions include, among others: (1) certain class actions

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<sup>101</sup> *Id.* at 258.

<sup>102</sup> *Id.* at 268.

<sup>103</sup> *Id.* at 258.

<sup>104</sup> *Id.* at 264.

<sup>105</sup> See 2 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra* note 1, § 6.30.

<sup>106</sup> *Fischer v. Fed. Express Corp.*, 42 F.4th 366, 375 (3d Cir. 2022); *Lyngaas v. Curaden Ag*, 992 F.3d 412, 435 (6th Cir. 2021); *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447 (7th Cir. 2020).

<sup>107</sup> *Smith v. Apple, Inc.*, 583 F. Supp. 3d 554, 565 (S.D.N.Y. 2022) (dismissing because putative class of South Carolina residents failed “to plead a nexus” with defendant’s contacts in forum state); *In re Dicamba Herbicides Litig.*, 359 F. Supp. 3d 711, 723 (E.D. Mo. 2019) (“There is a split of authority among the courts, but this Court agrees...that *BMS* applies with equal force in the class action context.”); *Carpenter v. PetSmart, Inc.*, 441 F. Supp. 3d 1028, 1035 (S.D. Cal. 2020) (“This Court agrees with these latter cases finding that *Bristol-Myers Squibb* applies in the nationwide class action context.”).

<sup>108</sup> See 2 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra* note 1, § 6.3.

alleging securities fraud;<sup>109</sup> (2) title 11 bankruptcy matters;<sup>110</sup> and (3) patent and copyright matters.<sup>111</sup>

## 2. Federal Court Subject Matter Jurisdiction

Federal subject matter jurisdiction is much more limited. A federal court may generally have subject matter jurisdiction over a dispute in three distinct circumstances:

- first, if the claims by a plaintiff in a case arise under federal law (federal question jurisdiction);<sup>112</sup>
- second, if all named plaintiffs are citizens of different states from all defendants and the amount in controversy of each of the named and unnamed plaintiffs' claims exceed \$75,000 (diversity jurisdiction);<sup>113</sup> and
- third, if a court has diversity or federal question jurisdiction over a claim, it may choose to exercise supplemental jurisdiction over related claims (from other parties or the same plaintiff) that form part of the "same case or controversy."<sup>114</sup>

Importantly, courts may exercise supplemental jurisdiction over unnamed plaintiffs' claims in diversity cases that do not total over \$75,000, as long as one named plaintiff's claims exceed \$75,000.<sup>115</sup>

As will be discussed below, the Class Action Fairness Act of 2005 significantly relaxes the federal jurisdictional requirements for certain types of class actions.

### ***C. CAFA Jurisdiction***

Class Action Fairness Act of 2005 (CAFA) provides another avenue by which a class action may be maintained in federal court. CAFA gives federal district courts original jurisdiction over a class action if it meets three criteria: (1) there are at least 100 class members; (2) the amount in controversy exceeds \$5 million; and (3) the parties are minimally diverse.<sup>116</sup> Requiring 100 class members is a relatively straightforward requirement.<sup>117</sup> However, the subsequent two requirements have had nuances exposed through litigation.

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<sup>109</sup> 15 U.S.C. § 77p(b)

<sup>110</sup> 28 U.S.C. § 1334(a).

<sup>111</sup> 28 U.S.C. § 1338(a).

<sup>112</sup> 28 U.S.C. § 1331.

<sup>113</sup> 28 U.S.C. § 1332; *Snyder v. Harris*, 394 U.S. 332, 340 (1969).

<sup>114</sup> 28 U.S.C. § 1367.

<sup>115</sup> *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558–59 (2005).

<sup>116</sup> 28 U.S.C. § 1332(d); *see also Home Depot U. S. A., Inc. v. Jackson*, 587 U.S. 435, 438 (2019); *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 165–66 (2014).

<sup>117</sup> In CAFA mass actions, the "100 or more persons" requirement cannot be satisfied by claiming there are enough unnamed but real parties with interest in the claim, who are not currently before the court, to reach the threshold. *Mississippi ex rel. Hood*, 571 U.S. at 169. "Persons" for the purposes of a CAFA mass action include only named and already identified "individuals who are proposing to join as plaintiffs in a single action." *Id.* at 170.

For purposes of establishing CAFA jurisdiction, the amount in controversy is the aggregate value of all class members' claims.<sup>118</sup> This value is established in pleadings by plausible allegations alone or, if the allegations are not clear enough, through a declaration supporting the notice of removal. Direct evidence of the amount-in-controversy requirement may be required when "the plaintiff contests, or the court questions, the defendant's allegation."<sup>119</sup> Interestingly, even if parties stipulate to an amount in controversy less than \$5 million, the case may still be removable to federal court.<sup>120</sup>

Minimal diversity requires that at least one named or unnamed plaintiff is a citizen of a different state than at least one defendant, or at least one plaintiff or defendant is a citizen of foreign country where at least one of the other parties is a citizen of a U.S. state.<sup>121</sup>

#### ***D. Removal to Federal Court***

In many instances, an action may properly be brought in either state court or federal court. In such circumstances, a defendant sued in state court may generally remove the case to the federal district court that embraces the state court in which the action was initiated.<sup>122</sup>

The standard removal rules require that only out-of-state defendants may remove a case from state to federal court when federal jurisdiction would be based on diversity and that all defendants must consent to removal.<sup>123</sup>

CAFA, in addition to relaxing federal jurisdictional requirements for certain class actions, also relaxed removal requirements for class actions. Under CAFA, any class action defendant, regardless of whether they are in state or out of state, may remove; and any defendant may remove even without the consent of other defendants.<sup>124</sup>

Of course, defendants must still establish a basis for federal court jurisdiction to remove, but the expanded jurisdiction granted to federal courts by CAFA (discussed above) can serve to establish federal court jurisdiction for removal purposes.<sup>125</sup> It is important to note, however, that the ability to remove exists with original defendants alone—third-party defendants are not able to remove counterclaims brought against them to federal court.<sup>126</sup>

Courts have generally treated CAFA's removal power (and its corresponding exceptions) as a form of mandatory abstention rather than a limitation on federal jurisdiction.<sup>127</sup> Because abstention is neither a "defect" nor a lack of subject matter jurisdiction, the normal 30-day time limit imposed

<sup>118</sup> 28 U.S.C. § 1332(d)(6).

<sup>119</sup> *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 89 (2014).

<sup>120</sup> This results from the timing of the class certification process. CAFA removal happens *before* the class is certified. Stipulations, as a function of litigation, must be binding. However, a stipulation made before class certification cannot be binding—the class has yet to be selected, and therefore cannot legally agree to the stipulated amount. *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593 (2013).

<sup>121</sup> 28 U.S.C. § 1332(d)(2).

<sup>122</sup> 28 U.S.C. § 1441(a).

<sup>123</sup> 28 U.S.C. § 1441(b).

<sup>124</sup> 28 U.S.C. § 1453(b).

<sup>125</sup> 28 U.S.C. § 1332(d)(2).

<sup>126</sup> *Home Depot*, 587 U.S. at 441.

<sup>127</sup> See *Banks v. E.I. du Pont Nemours & Co.*, 2021 WL 7209361, at \*3 (D. Del. Dec. 2, 2021) (collecting cases).

on requesting remand to state court by 28 USCS § 1447(c) likely does not apply.<sup>128</sup> However, any right to remand may be waived if not raised within a reasonable time.<sup>129</sup> What constitutes a reasonable time may vary based on the specific facts of a case.<sup>130</sup>

### ***E. CAFA’s “Local Controversy” Exception***

While CAFA makes it easier for a federal court to obtain subject matter jurisdiction over a class action, it is also subject to a narrow exception: the “local controversy” exception. The local controversy exception provides that a federal court *shall decline* to exercise jurisdiction under CAFA when:

- (1) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the state in which the action was originally filed;
- (2) at least one defendant is a defendant: (a) from whom significant relief is sought by members of the plaintiff class, (b) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class, and (c) who is a citizen of the state in which the action was originally filed;
- (3) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the state in which the action was originally filed; and
- (4) during the three-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.<sup>131</sup>

These four criteria are discussed separately below.

#### **1. Class Citizenship**

The requirement that more than two-thirds of the members of the proposed class be citizens of the state where the action was filed is fairly straightforward. Critical to note, though, is that the local controversy exception turns on “citizenship,” not residence. Citizenship refers to where individuals intend to remain, not merely where they live.<sup>132</sup> Because of this, parties may not simply point to proof of residency (such as addresses or area codes) to allege class member citizenship.<sup>133</sup> The easiest way to prove citizenship is to limit the proposed class to only citizens of one state. Some, but not all, courts allow a “common sense presumption” of citizenship where a class is discretely

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<sup>128</sup> *Watson v. City of Allen*, 821 F.3d 634, 640 (5th Cir. 2016)

<sup>129</sup> *Id.* (collecting cases).

<sup>130</sup> *Compare Gold v. N.Y. Life Ins. Co.*, 730 F.3d 137, 143 (2d Cir. 2013) (District court did not abuse its discretion by granting remand three years after filing), *with Calingo v. Meridian Res. Co. LLC*, 2011 WL 3611319, at \*6 (S.D.N.Y. Aug. 16, 2011) (87 days was unreasonable delay in requesting remand).

<sup>131</sup> 28 U.S.C. § 1332(d)(4)(A).

<sup>132</sup> *See, e.g., Myrick v. Wellpoint, Inc.*, 764 F.3d 662, 664 (7th Cir. 2014).

<sup>133</sup> *In re Spring Nextel Corp.*, 593 F.3d 669, 674 (7th Cir. 2010); *Hood v. Gilster-Mary Lee Corp.*, 785 F.3d 263, 266 (8th Cir. 2015); *Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383, 389 (6th Cir. 2016).

defined (e.g., “individuals who own homes in Louisiana” or “Texas residents”).<sup>134</sup> However, even those courts will not accept pure speculation. For example, in *Fields v. Sony Corp. of America*, the Southern District of New York refused to accept that students interning in New York must intend to return to New York after graduating.<sup>135</sup>

Where parties invoking the local controversy exception cannot rely on a presumption of citizenship, they must generally provide statistical evidence, usually through random sampling, to support their allegation that the citizenship prong is met.<sup>136</sup>

## 2. Defendant From Whom Significant Relief Is Sought

CAFA does not define “a defendant from whom significant relief is sought.” The legislative history of CAFA suggests that such a defendant cannot be merely a local agent of a larger defendant or a “peripheral” defendant against whom only a small subset of the class would have claims.<sup>137</sup> This is borne out in *Kearns v. Ford Motor Co.*, where the Central District of California held that the local controversy exception did not apply.<sup>138</sup> Because the putative class included all persons who purchased certain vehicles from Ford dealerships in California, the court held that significant relief was not sought from individual dealerships because only a fraction of the class would have purchased a vehicle from any one dealership.<sup>139</sup> Similarly, in *Robinson v. Cheetah Transportation*, the Western District of Louisiana also held that the local controversy exception did not apply.<sup>140</sup> There, the court held that the truck driver who was the proximate cause of the putative class’s injuries was not a defendant from whom significant relief was sought because he was “small change” compared to the other, out-of-state defendants (including his employer) who were all large, national corporations.<sup>141</sup> It reasoned that, with a minimum of \$5,000,000 in damages, the large corporate defendants were the parties from whom the class truly expected to collect relief.<sup>142</sup> That said, several courts have distinguished the facts in *Robinson* and clarified that a defendant’s ability to pay the requested relief is not relevant to whether “significant relief” is sought from that defendant.<sup>143</sup>

<sup>134</sup> *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 573 (5th Cir. 2011); see also *Mattera v. Clear Channel Commc’ns., Inc.*, 239 F.R.D. 70, 80 (S.D.N.Y. 2006); *Mason*, 842 F.3d at 392. Other courts are more restrictive. See *Mondragon v. Capital One Auto Fin.*, 736 F.3d 880, 884 (9th Cir. 2013) (“A jurisdictional finding of fact should be based on more than guesswork.”); *Smith v. Marcus & Millichap, Inc.*, 991 F.3d 1145, 1157 (11th Cir. 2021) (stating inferences must be based on specific facts).

<sup>135</sup> *Fields v. Sony Corp. of Am.*, No. 13 CIV. 6520 GBD, 2014 WL 3877431, at \*3 (S.D.N.Y. Aug. 4, 2014).

<sup>136</sup> See *Hood*, 785 F.3d at 266; *Hostetler v. Johnson Controls, Inc.*, No. 3:15-CV-226 JD, 2016 WL 3662263, at \*11 (N.D. Ind. July 11, 2016); *Mondragon*, 736 F.3d 884–85.

<sup>137</sup> S. REPT. NO. 109-14, AT 40 (2005).

<sup>138</sup> 2005 WL 3967998, at \*10 (C.D. Cal. Nov. 21, 2005).

<sup>139</sup> *Id.*

<sup>140</sup> 2006 WL 468820, at \*3–4 (W.D. La. Feb. 27, 2006).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See, e.g., *Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1245 (10th Cir. 2009) (“There is nothing in the language of the statute that indicates Congress intended district courts to wade into the factual swamp of assessing the financial viability of a defendant....”); *Powell v. Tosh*, 2009 WL 348064, at \*14 (W.D. Ky. Oct. 22, 2009) (holding that “significant relief” was satisfied by liability for one potential claim to every member of class regardless of ability to pay).

In determining whether a local defendant’s conduct is a “significant basis” of the claims, courts have generally compared the conduct of the local defendant to that of the other defendants. In *Kaufman v. Allstate N.J. Ins. Co.*, the Third Circuit concluded that the language of the statute requires that the local defendant’s conduct form a significant basis of all claims alleged, rather than that each plaintiff necessarily be able to assert a claim against the local defendant.<sup>144</sup> The Third Circuit held that the appropriate standard was whether the local defendant’s conduct “reflect[s] the alleged conduct of all defendants.”<sup>145</sup> The Fifth and Ninth Circuits have both adopted this approach.<sup>146</sup> The Seventh Circuit extended this analysis to require that a local defendant’s conduct have harmed “a significant portion of the plaintiff class.”<sup>147</sup> For example, in *Roppo*, the Seventh Circuit held that a named plaintiff could not show that local defendants’ conduct formed a “significant basis” of the claims, even if two-thirds of proposed class members were local, because she did not allege that local defendants had harmed other proposed class members in the same way they had harmed her.<sup>148</sup>

Courts have differed in whether they may look to extrinsic evidence beyond the complaint in determining whether claimed relief or basis is significant. In *Coleman v. Estes Express Lines, Inc.*, the Ninth Circuit rejected the use of extrinsic evidence based on the statute’s reference to only “alleged” conduct.<sup>149</sup> There, the court rejected a declaration from the local defendant’s human resources director that its conduct was completely controlled by (and thus attributable to) the out-of-state defendant which owned it.<sup>150</sup> The Ninth Circuit held that the declaration was “irrelevant” because the complaint attributed the conduct to both defendants.<sup>151</sup> Conversely, other courts have looked to extrinsic evidence when evaluating the significance of relief or basis.<sup>152</sup> For example, the Northern District of Indiana relied on affidavits from engineers and meteorologists in holding that two defendants’ conduct in a nuisance claim for pollution was less significant than other defendants.<sup>153</sup> Similarly, the Fifth Circuit in *Opelousas* appears to have assumed without expressly holding that extrinsic evidence was permissible in this analysis, stating that plaintiffs needed “more detailed allegations or extrinsic evidence...to establish [the local controversy] exception.”<sup>154</sup>

### 3. Principal Injury

A recent Fifth Circuit case, *Cheapside Minerals., Ltd. v. Devon Energy Production Co., L.P.*,<sup>155</sup> sheds light on how the principal injury prong applies. There, 214 plaintiffs sued Devon Energy (“Devon”) in Texas state court, alleging that Devon had underpaid them in oil-and-gas royalties.<sup>156</sup>

<sup>144</sup> 561 F.3d 144, 155 (3d Cir. 2009).

<sup>145</sup> *Id.* at 156.

<sup>146</sup> *Opelousas Gen. Hosp. Auth. v. FairPay Sols., Inc.*, 655 F.3d 358, 361 (5th Cir. 2011) (citing *Kaufman* as correct standard); *accord Benko v. Quality Loan Serv. Corp.*, 7887 F.3d 1111, 1118 (9th Cir. 2015).

<sup>147</sup> *Roppo v. Travelers Commer. Ins. Co.*, 869 F.3d 568, 585 (7th Cir. 2017).

<sup>148</sup> *Id.*

<sup>149</sup> 631 F.3d 1010, 1016–1017 (9th Cir. 2011).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1020.

<sup>152</sup> *See, e.g., Atwood v. Peterson*, 936 F.3d 835, 840 (8th Cir. 2019) (courts can consider extrinsic evidence because local controversy exception is a question of jurisdiction, not merits); *Evans v. Walter Indus.*, 449 F.3d 1159, 1167 (11th Cir. 2006) (evaluating plaintiffs’ extrinsic evidence).

<sup>153</sup> *Kurth v. ArcelorMittal USA, Inc.*, 2009 WL 3346588, at \*10–13 (N.D. Ind. Oct. 14, 2009).

<sup>154</sup> 655 F.3d at 363.

<sup>155</sup> 94 F.4th 492 (5th Cir. 2024).

<sup>156</sup> *Id.* at 495.

Under CAFA, Devon removed the case to federal court.<sup>157</sup> Plaintiffs then moved to remand the case back to state court under the local controversy exception, which the district court granted.<sup>158</sup> Devon appealed.<sup>159</sup>

The Fifth Circuit reversed, holding that the local controversy exception did not apply.<sup>160</sup> Specifically, the court found that the “principal injuries” incurred by the plaintiffs were not incurred in the state in which the action was originally filed, Texas, as is required by prong three of the local controversy exception.<sup>161</sup> Crucially, while the court found that “most Plaintiffs sustained injury in Texas,” it also interpreted the “principal injuries” prong to require that “all plaintiffs sustain their principal injuries in the forum state and nowhere else.”<sup>162</sup> While it is possible that other circuits will not follow the Fifth Circuit, *Cheapside Minerals* will prevent plaintiffs from taking advantage of the local controversy exception if any class member is injured outside of where the lawsuit was originally filed.

#### 4. No Similar Action Filed

The fourth prong of the local controversy exception, that no other class action be filed within the preceding three years asserting “the same or similar factual allegations,” poses a line-drawing issue for courts. To start, courts have interpreted the word “filed” literally.<sup>163</sup> This includes cases where a previous class was not certified<sup>164</sup> or where the suit was voluntarily dismissed before defendants had been served.<sup>165</sup>

In evaluating whether a previous class action asserted “the same or similar” allegations, the Tenth Circuit held in *Dutcher v. Matheson* that factual allegations are insufficiently different if both suits would require “identical factual showings” on at least one “crucial” aspect.<sup>166</sup> The Tenth Circuit was not persuaded by arguments that two class actions had been brought under different Utah laws, explaining that both the previous and pending litigation would have required plaintiffs to show that the defendant lacked the ability to foreclose on plaintiffs’ property in order to prevail.<sup>167</sup> The Seventh Circuit adopted the same rule in *Schutte v. Ciox Health, LLC* and held that the local controversy exception was barred in a class action brought for violations of Wisconsin law because a class action had been brought against the same defendant in Montana the previous year for nearly identical violations of Montana law.<sup>168</sup>

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 502.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 501.

<sup>163</sup> See, e.g., *Williams v. Steward Health Care Sys., LLC*, 2021 WL 7629734, at \*25 (E.D. Tex. Dec. 16, 2021) (“When the words of a statute are unambiguous, then...judicial inquiry is complete.”) (internal citations omitted).

<sup>164</sup> *Dutcher v. Matheson*, 840 F.3d 1183, 1192–1193 (10th Cir. 2016).

<sup>165</sup> *Levine v. Entrust Grp., Inc.*, 2013 WL 1120695, at \*4–5 (N.D. Cal. Mar. 18, 2013).

<sup>166</sup> 840 F.3d at 1192.

<sup>167</sup> *Id.*

<sup>168</sup> 28 F.4th 850, 859–860 (7th Cir. 2022).

### F. CAFA’s Mandatory Home State Controversy Exception

Federal courts are **required to decline** a request for removal under CAFA when:

- (1) Two-thirds or more of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed; and
- (2) The primary defendants are also citizens of the state in which the action was originally filed.<sup>169</sup>

Plainly, this mandatory directive to remand exists to express Congress’s desire to keep class actions centered primarily within one state within that state’s court system.

The Seventh Circuit case *Sudholt v. Country Mutual Insurance Company* provides an illustrative example of the mandatory home state controversy exception. In *Sudholt*, the plaintiff class consisted entirely of Illinois residents suing a group of individual director and officer defendants for unjust enrichment in Illinois state court.<sup>170</sup> Of the 46 named defendants, 45 were Illinois residents.<sup>171</sup> Defendant removed the action pursuant to CAFA, claiming that the “size of the putative class, the amount in controversy, and the minimal diversity created [by the 46<sup>th</sup> defendant’s non-Illinois citizenship]” qualified the case for removal to federal court.<sup>172</sup> The district court agreed with defendants, and rejected a motion from plaintiffs to remand.<sup>173</sup> On interlocutory appeal, the Seventh Circuit reversed.<sup>174</sup> In reversing, the Seventh Circuit held that the single defendant—Country Mutual’s former CFO—who was not a resident of Illinois (and thus the only source of diversity), was not a primary defendant for the purposes of CAFA because he was “one of 46 undifferentiated directors and officers” in the complaint and plaintiffs did not allege that he played a “particular or significant” role in the underlying facts.<sup>175</sup> The court explained that the “spotlight of the plaintiff’s complaint” was shining on Country Mutual and that, when considering the gravamen of the complaint, none of the individually named officers stood as equal defendants to Country Mutual.<sup>176</sup>

As the *Sudholt* court noted, the plain language of CAFA allows for multiple defendants to be “primary.”<sup>177</sup> Courts have employed several tests for determining primacy.<sup>178</sup> One approach is to look to causation: a defendant is only a primary defendant if they are directly liable rather than vicariously liable or liable through indemnification.<sup>179</sup> Another approach is to look to a particular defendant’s financial exposure. Under this approach, a primary defendant is one who “has

<sup>169</sup> 28 U.S.C. § 1332(d)(4)(B)

<sup>170</sup> 83 F.4th 621, 624 (7th Cir. 2023).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 625.

<sup>174</sup> *Id.* at 629.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> See *Vodenichar v. Halcon Energy Props.*, 733 F.3d 497, 505 (3d Cir. 2013) (identifying the purpose of these tests as being to determine who is the “‘real target’ of the plaintiff’s accusations.”).

<sup>179</sup> See, e.g., *id.* at 506 (Despite being the subject of fewer claims than other primary defendants, a company was also considered a primary defendant because it breached a contract with at least 1000 class members.).

substantial exposure to damages if liability is found” relative to any other defendants.<sup>180</sup> Unlike the local controversy exception where a defendant’s ability to pay is often irrelevant to whether they are considered a party from whom significant relief is sought, some courts have expressly considered a party’s ability to satisfy a judgment in ascertaining whether they are a “primary defendant.”<sup>181</sup>

The mandatory home state controversy exception may become a source of litigation in the near future. A recent Supreme Court decision in a non-class action setting held that improper removal is grounds for vacating a federal trial court judgment and remanding to state court.<sup>182</sup> In *Hain Celestial Group v. Palmquist*, the district court had found that removal to federal court under diversity jurisdiction was appropriate even though complete diversity did not exist.<sup>183</sup> To do so, the district court dismissed the non-diverse defendant after finding that the non-diverse defendant was improperly joined because the plaintiffs failed to state a plausible claim against it; the court then went on to enter judgment in favor of the remaining defendant at trial.<sup>184</sup> The Supreme Court held that the non-diverse party was erroneously dismissed, which thus deprived the district court of jurisdiction at the time of removal, necessitating remand to state court.<sup>185</sup>

While putative class action defendants do not need to satisfy complete diversity to remove suits to federal court, the applicability of the home state controversy exception—as illustrated in *Sudholt*—poses potential complications for defendants. If *Hain* is applied to the class action context, a court’s finding that a diverse defendant is a “primary defendant” could be subject to re-examination on appeal, possibly even resulting in (1) the reversal of a favorable verdict and/or (2) remand to state court to begin the litigation anew. However, class action defendants may be shielded by § 1332(d)(4)’s instruction that federal courts “shall *decline to exercise* jurisdiction” over local and home state controversies, which suggests that the CAFA exceptions do not deprive courts of subject-matter jurisdiction.<sup>186</sup>

### ***G. CAFA’s Discretionary Home State Controversy Exception***

As outlined above, the Home State Controversy Exception must be applied by the courts under certain circumstances. However, there also exists a non-mandatory pathway for the rejection of CAFA removal: the “discretionary exception.”<sup>187</sup> Here, if (1) more than one-third of the proposed plaintiff class and (2) all primary defendants are citizens of the state in which the action was originally filed, a court *may choose* to decline jurisdiction.<sup>188</sup> CAFA instructs the court to balance six factors when considering whether remanding to state court is proper “in the interests of justice”:

<sup>180</sup> *Hunter v. City of Montgomery*, 859 F.3d 1329, 1336 (11th Cir. 2017).

<sup>181</sup> *See, e.g., Brook v. UnitedHealth Grp., Inc.*, 2007 WL 2827808, at \*5 (S.D.N.Y. Sept. 27, 2007) (collecting sources).

<sup>182</sup> *Hain Celestial Grp., Inc. v. Palmquist*, 146 S. Ct. 724 (2026).

<sup>183</sup> *Id.* at 729.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 732. Because dismissal of the non-diverse defendant could be (and was) reversed on appeal, the Supreme Court noted that the defendant’s absence from the case was only temporary. The Court distinguished this from a situation where a non-diverse defendant is removed with finality, e.g., through settlement. *Id.* at 730–31.

<sup>186</sup> *See Watson*, 821 F.3d at 639–40 (emphasis added).

<sup>187</sup> 28 U.S.C. § 1332(d)(3).

<sup>188</sup> *Id.*

- (1) whether the claims asserted involve matters of national or interstate interest;
- (2) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;
- (3) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
- (4) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
- (5) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and
- (6) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.”<sup>189</sup>

The six factors are not dispositive and each does not need to be met for a court to decline jurisdiction.<sup>190</sup> Because of its similar requirements, the discretionary exception is often referred to as the “discretionary home state exception.”<sup>191</sup> This exception is designed to give courts the flexibility to carry out Congress’s intent to exclude “truly localized controversies” from CAFA jurisdiction.<sup>192</sup>

### 1. National or Interstate Interest

The first factor considers whether exercising federal jurisdiction in a particular class action serves Congress’s intent to federalize all but local class actions.<sup>193</sup> In *Speed v. JMA Energy Co., LLC*, the Tenth Circuit rejected arguments from a defendant oil company in Oklahoma that the importance of gas and oil to the national economy implicated a national interest that should not be decided in state court.<sup>194</sup> The court reasoned that other states did not need to be “protect[ed]” from Oklahoma courts and that other states are free to create and enforce their own laws around energy as they see fit.<sup>195</sup> Even though more than half of the plaintiff class of property owners lived outside of Oklahoma, the *Speed* court emphasized that the properties at issue were all located in Oklahoma

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<sup>189</sup> 28 U.S.C. § 1332(d)(3)(A-F).

<sup>190</sup> *Adams v. West Marine Products, Inc.*, 958 F.3d 1216, 1224 (9th Cir. 2020)

<sup>191</sup> *Id.* at 1221

<sup>192</sup> *Preston v. Tenet Healthsystems Mem. Med. Ctr., Inc.*, 485 F.3d 804, 823 (5th Cir. 2007) (A class action stemming from injuries received by patients at a New Orleans hospital during Hurricane Katrina should be heard in Louisiana state court, not federal court.).

<sup>193</sup> See *Speed v. JMA Energy Co., LLC*, 872 F.3d 1122, 1129 (10th Cir. 2017).

<sup>194</sup> *Id.* at 1130.

<sup>195</sup> *Id.*

and that the defendant corporation was located in Oklahoma and was accused of violating Oklahoma law.<sup>196</sup>

## 2. Governing Law

The *Speed* court also elaborated on the second factor: whether the law of the home state would govern.<sup>197</sup> There, the court considered whether Oklahoma’s choice-of-law principles would result in laws of a state other than Oklahoma governing one of the lesser claims.<sup>198</sup> The Tenth Circuit held that the second factor leans in favor of remand if the “principal claim” would be decided under state law.<sup>199</sup> Finding that to be the case in *Speed*, the court found that the second factor favored remand because “everything about this case is suffused with the distinct aroma of Oklahoma.”<sup>200</sup>

## 3. Attempts to Avoid Federal Jurisdiction

The third factor considers whether plaintiffs have structured their action to avoid federal court. Legislative history suggests that the test is whether the proposed class seems “natural,” that is, whether a class “encompasses all of the people and claims that one would expect to include in a class action.”<sup>201</sup> The Sixth Circuit provided an illustration of this factor in *Freeman v. Blue Ridge Paper Prods.*<sup>202</sup> There, plaintiffs had divided up their claims into five distinct time periods, filed five class actions, and limited each suit’s claimed damages to \$4.9 million (just below the statutory minimum to trigger CAFA).<sup>203</sup> The Sixth Circuit held that the damages sought must be aggregated in these suits because there was no colorable reason for splintering the cases besides avoiding federal jurisdiction.<sup>204</sup> Similarly, the Northern District of Alabama has found that this factor weighs in favor of federal jurisdiction when a plaintiff seeks to file a new or amended complaint for the purpose of adding facts to trigger a CAFA exception.<sup>205</sup>

## 4. Nexus to Class, Harms, or Defendants

The fourth factor is intended to limit abuse of “magnet” courts, utilized because they are believed to be favorable to plaintiffs.<sup>206</sup> CAFA’s legislative history shows that the key consideration is not whether the chosen forum is connected to the class, the harm, or the defendants, but whether the chosen forum is *better* connected than alternative fora.<sup>207</sup> For example, the Middle District of Florida ruled that this factor favored remand to Florida state court, even though Georgia and Texas

<sup>196</sup> *Id.* (“The only thing ‘national’ or ‘interstate’ about this case is that some of the owners...who are basing their claims on alleged violations of an Oklahoma law happen to live in other States and receive their royalty checks there.”)

<sup>197</sup> *Id.* at 1132.

<sup>198</sup> *Id.* at 1130.

<sup>199</sup> *Id.* at 1131.

<sup>200</sup> *Id.* at 1132.

<sup>201</sup> S. REPT. NO. 109-14, at 37 (2005); *see also Phillips v. Kaiser Found. Health Plan, Inc.*, 953 F. Supp. 2d 1078, 1086 (N.D. Cal. 2011) (“Congress did not intend for plaintiffs to defeat federal jurisdiction by filing essentially national or regional class actions limited to plaintiffs from one state.”).

<sup>202</sup> 551 F.3d 405 (6th Cir. 2008).

<sup>203</sup> *Id.* at 406.

<sup>204</sup> *Id.* at 408–409.

<sup>205</sup> *Loper v. Lifeguard Ambulance Serv., LLC*, 2020 WL 8617215, at \*9–10 (N.D. Ala. Jan. 10, 2020).

<sup>206</sup> S. REPT. NO. 109-14, at 37; *see Speed*, 872 F.3d at 1134.

<sup>207</sup> S. REPT. NO. 109-14, at 37.

courts both had a “strong interest” in hearing a class action because a class consisted of former patients of a Florida clinic and all alleged harms originated in Florida.<sup>208</sup> In *Speed*, the Tenth Circuit rejected arguments that plaintiffs’ chosen venue in Oklahoma was not a distinct nexus because plaintiffs were widely dispersed across Oklahoma.<sup>209</sup> Because the only options CAFA gives judges are federal court or state court (and because a federal judge cannot order states to hear cases in a particular venue), the Tenth Circuit found it implausible that Congress intended courts to retain jurisdiction over intrastate controversies because one in-state venue was less appropriate than another in-state venue.<sup>210</sup>

### 5. Citizenship of Proposed Class

Much like with the local controversy exception above, a party can establish the citizenship of the proposed class through statistical evidence.<sup>211</sup> Unlike the local controversy exception, however, this factor looks not just at the proportion of class members in one state, but at the dispersion of the proposed class across states. The Senate Report on CAFA provides the example that, where no other state accounts for more than five percent of proposed class members, the forum state has preeminent interest in hearing the case.<sup>212</sup> This five percent calculation is a guideline, not a mandate, however. In *Speed*, for example, 20% of proposed class members were citizens of Texas, but the Tenth Circuit emphasized that no state other than Oklahoma, where nearly half of the class lived, had a significant interest in hearing the case based on the other factors.<sup>213</sup> Similarly, in *Conley v. Fordham University*, the Southern District of New York remanded a student-initiated lawsuit against Fordham University to New York state court where 50% of proposed class members were citizens of New York.<sup>214</sup> Even though 12% of the proposed class members were citizens of New Jersey, the court found that allowing a “New York state court to apply New York law to a New York defendant,” where the majority of the class members were New Yorkers, best served the interests of justice.<sup>215</sup>

### 6. Similar Filed Actions

The final factor addresses the judicial inefficiencies created by multiple pending class actions.<sup>216</sup> Exercising federal jurisdiction would ease the way for parallel class actions to be consolidated either under Rule 42 or under the multidistrict litigation process.<sup>217</sup> This factor thus favors remand where there are no other class actions pending either in federal court or in state court.<sup>218</sup>

<sup>208</sup> *Rivero v. Lung Inst., LLC*, 2018 WL 6526682, at \*4 (M.D. Fla. July 23, 2018).

<sup>209</sup> *Speed*, 872 F.3d at 1135.

<sup>210</sup> *Id.*

<sup>211</sup> *See id.* at 1136.

<sup>212</sup> S. REPT. NO. 109-14, at 37–38.

<sup>213</sup> *Speed*, 872 F.3d at 1136.

<sup>214</sup> 2025 WL 1380683, at \*4 (S.D.N.Y. May 12, 2025).

<sup>215</sup> *Id.* at \*10.

<sup>216</sup> *See Gaska v. Darcars of R.R. Ave., Inc.*, 673 F.Supp.3d 157, 173 (D. Conn. 2023).

<sup>217</sup> *See Speed*, 872 F.3d at 1137. Because state court class actions could presumably be removed to federal court, retaining federal jurisdiction would keep the door open for consolidation, avoiding duplication of judicial resources.

<sup>218</sup> *Thomas v. Trs. of Ind. Univ.*, 2018 WL 6566339, at \*7–8 (S.D. Ind. Dec. 13, 2018).

### H. CAFA'S Internal Affairs Exception

CAFA precludes jurisdiction where the claim “relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized.”<sup>219</sup>

The Seventh Circuit, in *Sudholt*, interpreted this provision.<sup>220</sup> The term “internal affairs” is somewhat ambiguous on its face and is not defined within the provision.<sup>221</sup> However, reading this provision in conjunction with other provisions within CAFA, and with reference to the definition of “internal affairs” within choice-of-law doctrine, the Seventh Circuit understood the internal affairs exception as standing for the principle that “only one state should have the authority to regulate a corporation’s internal affairs—the state of incorporation.”<sup>222</sup>

Ultimately, the internal affairs exception “tells us that Congress wanted to leave in state court (and withhold federal jurisdiction over) class actions concentrated on matters of corporate governance, where uniform and definitive interpretations of the legal duties governing management of the enterprise facilitate commercial activity.”<sup>223</sup> In *Sudholt*, that meant that the Seventh Circuit had to determine whether the claims at issue related to the internal affairs of a company.<sup>224</sup> There, plaintiff alleged both breaches of fiduciary duty and breach of contract. Importantly, the court held that it is the substance of the claims alleged, not the title of the claims themselves, that determines whether the internal affairs exception applies.<sup>225</sup> A court must look to the underlying legal argument that runs through the claims alleged, not merely the title of the claims, in order to determine whether the allegations are related entirely to matters of internal corporate governance. In *Sudholt*, the Seventh Circuit determined that all of the plaintiff’s claims turned on how the defendant’s directors and officers exercised their discretion, which is innately about business judgment, which accordingly warranted remand to state court.<sup>226</sup>

The district courts have been applying *Sudholt* consistently with this view, even outside of the Seventh Circuit. For example, in *Benes v. de la Aguilera*, the Southern District of Florida stated that Congress could not have intended for employment status to serve as “the gating mechanism for applying CAFA’s internal-affairs exception...” This would be an untenable outcome.<sup>227</sup> There, CAFA removal was rejected under the internal affairs exception in a claim against former directors, despite the defendants arguing that their departure from the company negated the exception.<sup>228</sup> Even claims centered around entirely former employees or officers can still be internal to a company, so long as the gravamen of the underlying issue happened within the company while they were employees.<sup>229</sup>

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<sup>219</sup> 28 U.S.C. § 1332(d)(9)(B).

<sup>220</sup> *Sudholt*, 83 F.4th at 625.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 626 (quoting *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005)).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 627.

<sup>226</sup> *Id.*

<sup>227</sup> 2023 WL 6985498, at \*5 (S.D. Fla. Oct. 24, 2023) (quoting *Sudholt*, 83 F.4th at 628).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at \*13–14.

## II. Article III Standing

Standing in a class action lawsuit is typically measured by the putative class representative’s individual standing to pursue relief.<sup>230</sup> To bring a class action lawsuit in federal court, as with any other federal lawsuit, plaintiffs must show that they have standing under Article III.<sup>231</sup> Standing doctrine has developed to maintain the boundaries of federal courts’ authority and “serves to prevent the judicial process from being used to usurp the powers of the political branches.”<sup>232</sup> The doctrine places requirements on potential litigants to limit the category of litigants empowered to maintain a lawsuit in federal court. The Supreme Court has applied a three-part test to determine whether plaintiffs meet the requirements of Article III. Plaintiffs must show that (1) they suffered an injury in fact; (2) that is fairly traceable to the challenged conduct of the defendant; and (3) that is likely to be redressed by a favorable judicial decision.<sup>233</sup>

In class action litigation, the standing inquiry is focused on the putative class representatives, who must individually have standing in order to move forward with the lawsuit.<sup>234</sup> If a class representative would not have standing to sue as an individual, they cannot sue on behalf of a class.<sup>235</sup> Though each class representative must have standing to sue, the same is not true for the putative class members. Once the class representatives show that they have standing to sue, courts have generally held that there is no separate class action standing requirement for absent class members.<sup>236</sup>

### A. Article III Requirements

As discussed above, the Supreme Court articulated the constitutional floor for Article III standing in *Lujan v. Defenders of Wildlife*. Of these three foundational requirements, the first—injury in

<sup>230</sup> NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra* note 1, § 2:1.

<sup>231</sup> The party invoking federal jurisdiction bears the burden of establishing these elements. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Standing requirements in state court are highly varied. While some states track Article III requirements, others adhere to less stringent requirements. *Compare Alons v. Iowa Dist. Court for Woodbury Cnty.*, 698 N.W.2d 858, 869 (Iowa 2005) (noting that “while our rule on standing is self-imposed ... the federal test for standing is not dissimilar from our own test ....”) (citations omitted) *with Salorio v. Glaser*, 414 A.2d 943, 947 (N.J. 1980) (noting that “New Jersey State courts are not bound by the ‘case or controversy’ requirement” and that “[t]his Court remains free to fashion its own law of standing consistent with notions of substantial justice and sound judicial administration”).

<sup>232</sup> *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013).

<sup>233</sup> *Lujan*, 504 U.S. 555, 560-61 (1992); *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

<sup>234</sup> NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra* note 1, § 2:3.

<sup>235</sup> *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974) (holding that “if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.”). *See also Liberian Cmty. Ass’n of Conn. v. Lamont*, 970 F.3d 174, 185 n.14 (2d Cir. 2020); *Bahamas Surgery Center, LLC v. Kimberly-Clark Corporation*, 820 F. App’x 563, 565–66 (9th Cir. 2020); *Rector v. City and County of Denver*, 348 F.3d 935, 950 (10th Cir. 2003).

<sup>236</sup> *Alig v. Quicken Loans Inc.*, 2017 WL 5054287, \*11 (N.D. W. Va. 2017) (“[I]t is well settled that if a class representative has standing, the case is justiciable and the proponent of the class suit need not demonstrate that each class member has standing.”) (quoting Newberg on Class Actions, *supra* note 1, § 2:3); *see also Hyland v. Navient Corp.*, 48 F.4th 110, 118 (2d Cir. 2022). Similarly, once a class is certified, a named plaintiff may generally continue to represent the class even if their own claim is mooted. *See Sosna v. Iowa*, 419 U.S. 393 (1975); *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388 (1980).

fact—is a common obstacle to standing. However, courts have and will dismiss class actions for lack of standing if the injury is not fairly traceable to the defendant’s conduct or on redressability grounds.<sup>237</sup>

An injury in fact requires “an invasion of a legally protected interest” that is (1) “concrete and particularized” and (2) “actual or imminent, not conjectural or hypothetical.”<sup>238</sup> In *Spokeo v. Robbins*, the Supreme Court clarified the first requirement: “particularized” means that the harm must “affect the plaintiff in a personal and individual way,” while “concrete” means that the invasion must give rise to cognizable harm.<sup>239</sup>

In *Spokeo*, the Supreme Court considered whether claims of harm premised on violation of the Fair Credit Reporting Act rise to the level of case or controversy required by Article III. The Ninth Circuit had ruled that the named plaintiff had standing because he alleged a violation of his statutory rights and that he had an individualized interest in vindicating those rights.<sup>240</sup> In considering whether the alleged harm was “concrete,” the Supreme Court acknowledged, among other things, that a concrete harm can be intangible, that Congress may create new legally cognizable injuries, and that risk of harm alone can be concrete.<sup>241</sup> The Supreme Court ultimately reversed because the Ninth Circuit failed to adequately consider whether the plaintiff alleged that a concrete harm resulted from the defendant’s violation of the statute.

Thereafter, in 2021, the Supreme Court appeared to narrow the boundaries for concreteness as laid out in *Spokeo*. In *TransUnion v. Ramirez*, the Court indicated that Congress may be limited in its capacity to define new legally cognizable injuries to only those that are analogous to harms at common law.<sup>242</sup> The Court’s decision also appears to curtail the availability of monetary relief for claims where plaintiffs’ sole injury is the risk of future harm.<sup>243</sup>

### **B. Applying *Spokeo* and *TransUnion***

In practice, there has been limited consensus regarding the precise bounds of “actual injury” following the Court’s decisions in *Spokeo* and *TransUnion*. Courts have dismissed class actions for lack of “actual injury” where the alleged harm is not analogous to a harm at common law, the

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<sup>237</sup> *Winsor v. Sequoia Benefits & Ins. Servs., LLC*, 62 F.4th 517, 523–24 (9th Cir. 2023) (affirming dismissal of complaint because the plaintiffs failed to allege that any injuries would be fairly traceable to the defendant’s alleged conduct); *Rivera v. Wyeth-Ayerst Laboratories*, 283 F.3d 315, 321 (5th Cir. 2002) (holding that plaintiffs lacked standing both for lack of injury and where “[t]o find causation, we would have to infer the absurd—for example, that an extra warning, though inapplicable to [the named plaintiff], might have scared her and her doctor from [the medication]. Such reasoning is too speculative to establish Article III standing.”).

<sup>238</sup> *Lujan*, 504 U.S. 555, 560 (1992).

<sup>239</sup> 578 U.S. 330, 339–41 (2016).

<sup>240</sup> *Id.* at 333–34.

<sup>241</sup> *Id.*

<sup>242</sup> *TransUnion v. Ramirez*, 594 U.S. 413, 426–29 (2021).

<sup>243</sup> *TransUnion*, 594 U.S. at 435–39.

named plaintiff(s) allege(s) only speculative harm or the challenged conduct did not cause any real harm.<sup>244</sup>

Courts have found actual injury even where the alleged harm stemmed from a statutory violation, where there was congressional intent to create a cognizable injury or where the violation is analogous to a common law tort. This has included putative class actions alleging violations of the Telephone Consumer Protection Act<sup>245</sup> and privacy statutes,<sup>246</sup> among others.

In the identity theft context, there is a circuit split on the question of whether increased risk of identity theft alone constitutes “actual injury” under Article III in a case seeking monetary damages. While the Sixth, Seventh, Ninth, and DC Circuits have found increased risk of identity theft adequate to satisfy the “actual injury” requirement, at least in cases where data breaches were caused by bad actors;<sup>247</sup> the First, Second, Third, Fourth, Eighth, and Eleventh Circuits have found that allegations of increased risk of identity theft, without more, are insufficient to support standing.<sup>248</sup>

A wave of recent Federal Debt Collection Practices Act (FDCPA) cases has underscored the varying approaches to the injury-in-fact inquiry across the circuits in the wake of the Supreme

<sup>244</sup> See, e.g., *Martin v. Brooklyn Bagel & Coffee Co.*, 2024 WL 4827737, at \*3–6 (E.D. N.Y. Nov. 18, 2024) (dismissing claim under Americans with Disabilities Act because blind named plaintiff failed to identify how a website’s barriers to accessibility impeded his ability to locate the information he sought); *Budet v. Rutgers Bus. Sch.*, 2024 WL 3371408, at \*5 (D. N.J. July 11, 2024) (dismissing unjust enrichment claim where, even if a school artificially inflated its employment rate in marketing materials, student plaintiff did not allege any objective diminution of present or future value of his degree).

<sup>245</sup> See, e.g., *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1042–43 (9th Cir. 2017) (receiving unwanted telemarketing messages alone are a concrete harm in TCPA claims because Congress enacted the TCPA precisely to protect against “nuisance” telemarketing); *Melito v. Experian Marketing Solutions, Inc.*, 923 F.3d 85, 93 (2d Cir. 2019); *Dolemba v. Illinois Farmers Ins. Co.*, 213 F. Supp. 3d 988, 993–94 (N.D. Ill. 2016).

<sup>246</sup> See, e.g., *In re Nickelodeon Consumer Privacy Litigation*, 827 F.3d 262, 274 (3d Cir. 2016) (disclosure of protected information is concrete injury); *Bryant v. Compass Group USA, Inc.*, 958 F.3d 617, 626–27 (7th Cir. 2020) (Because Illinois’ Biometric Information Privacy Act requires informed consent before collecting biometric data, defendant’s failure to make mandatory disclosures was a concrete injury because the purpose of the act was to empower consumers to make informed decisions about their data.); *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1117 (9th Cir. 2020) (There are concrete injuries when substantive, not just procedural, statutory rights are violated.).

<sup>247</sup> See, e.g., *Galaria v. Nationwide Mutual Ins. Co.*, 663 F. App’x 384, 388 (6th Cir. 2016) (“There is no need for speculation where Plaintiffs allege that their data has already been stolen and is now in the hands of ill-intentioned criminals.”); *Pisciotta v. Old Nat. Bancorp.*, 499 F.3d 629, 634 (7th Cir. 2007); *In re Zappos.com, Inc.*, 888 F.3d 1020, 1029 (9th Cir. 2018) (holding that the plaintiffs had standing where they “sufficiently alleged an injury in fact based on a substantial risk that the Zappos hackers will commit identity fraud or identity theft”); *Attias v. Carefirst, Inc.*, 865 F.3d 620, 626–27 (D.C. Cir. 2017).

<sup>248</sup> See, e.g., *Katz v. Pershing, LLC*, 672 F.3d 64, 79–80 (1st Cir. 2012) (affirming dismissal for lack of standing where plaintiff’s case was “readily distinguishable from cases in which confidential data actually has been accessed through a security breach and persons involved in that breach have acted on the ill-gotten information”); *McMorris v. Carlos Lopez & Associates, LLC*, 995 F.3d 295, 303 (2d Cir. 2021) (applying a three-factor test assessing (1) whether data was exposed as a result of a targeted invasion, (2) whether any data have been misused, and (3) whether the type of data creates high risk of identity theft); *Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011) (“Unless and until these conjectures come true, Appellants have not suffered any injury; there has been no misuse of the information, and thus, no harm.”); *Beck v. McDonald*, 848 F.3d 262, 273–74 (4th Cir. 2017) (increased risk of harm too speculative absent allegations of actual misuse of personal information); *In re SuperValu, Inc.*, 870 F.3d 763, 770–72 (8th Cir. 2017) (allegations that fraudsters are selling plaintiffs’ stolen data are too speculative to create standing without actual misuse of personal information); *Tsao v. Captiva MVP Restaurant Partners, LLC*, 986 F.3d 1332, 1343 (11th Cir. 2021) (stolen credit card information alone did not create standing without allegation of actual misuse).

Court’s decision in *TransUnion*.<sup>249</sup> For example, in *Hunstein v. Preferred Collection & Management*, the Eleventh Circuit focused on elements. Under an element-based approach, if an alleged harm is missing an essential element of a comparative tort, it is not a concrete injury under Article III.<sup>250</sup> Shortly after *Hunstein*, the Tenth Circuit adopted a kind-of-harm approach in *Shields v. Professional Bureau of Collections of Maryland, Inc.*<sup>251</sup> Though generally agreeing with *Hunstein*, this approach rejects the requirement that a plaintiff plead the elements of the analogous common law tort, and instead focuses on whether the harm that the plaintiff alleges is similar to the harm that analogous tort seeks to remedy.<sup>252</sup> In *Nabozny v. Optio Solutions LLC*, the Seventh Circuit extended this approach and concluded that the plaintiff’s alleged injury fell short looking at both the *elements* of the purportedly analogous tort and the *kind* of harm contemplated by that tort.<sup>253</sup>

### C. Timing of the Standing Inquiry

An individual litigant must establish Article III standing at the outset of the case, as it is a jurisdictional issue. If a plaintiff lacks standing, the court lacks jurisdiction and should immediately dismiss the matter.<sup>254</sup> In the class action context, courts have diverged as to whether the putative class’s standing should be decided at the outset of the case or be deferred until class certification has been decided.<sup>255</sup> There are three general schools of thought on the issue:

1. Class certification issues are rarely “logically antecedent” and a certification decision should rarely precede a decision on the issue of standing under Article III.<sup>256</sup>

<sup>249</sup> Nick Agnello, *Devil’s In The Details On FDCPA, Article III Standing*, LAW360 (May 15, 2024 5:38 PM), <https://www.law360.com/illinois/articles/1832133>

<sup>250</sup> 48 F.4th 1236, 1242 (11th Cir. 2022) (en banc). The dissent took issue with the “element-for-element” approach; it would instead require a plaintiff suing on a statutory cause of action show that their alleged injury is of a similar kind to the analogous tort. *Id.* at 1261–64 (Newsom, J., dissenting).

<sup>251</sup> 55 F.4th 823, 828–29 (10th Cir. 2022). The Third Circuit applied the same analysis in a similar case. *Barclift v. Keystone Credit Servs., LLC*, 93 F.4th 136 (3d Cir. 2024).

<sup>252</sup> *Id.* at 829.

<sup>253</sup> 84 F.4th 731, 737 (7th Cir. 2023).

<sup>254</sup> *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (“Ordinarily, of course, this or any other Article III court must be sure of its own jurisdiction before getting to the merits.”) (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101–02 (1998)).

<sup>255</sup> The confusion stems from a pair of cases, *Ortiz v. Fibreboard Corp.* and *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997). In *Amchem*, the Court held that because “class certification issues are dispositive ... their resolution here is logically antecedent to the existence of any Article III issues” and “it is appropriate to reach them first ... mindful that Rule 23’s requirements must be interpreted in keeping with Article III constraints.” 521 U.S. at 612-13. In *Ortiz*, this logic was again applied and the Court noted that “[o]rdinarily, of course, this or any other Article III court must be sure of its own jurisdiction before getting to the merits ... [b]ut the class certification issues are, as they were in *Amchem*, ‘logically antecedent’ to Article III concerns ... and themselves pertain to statutory standing, which may properly be treated before Article III standing.” 527 U.S. at 831.

<sup>256</sup> See *In re AllianceBernstein Mut. Fund Excessive Fee Litig.*, 2005 WL 2677753, \*9 (S.D. N.Y. 2005) (noting the *Ortiz* exception is an unusual and that it “should only [be] applied when a court is confronted with an extremely complex case defying customary judicial administration”).

2. Class certification issues are “logically antecedent” to issues of standing in all cases and the question of certification must be considered prior to standing in all cases.<sup>257</sup>
3. In some matters, class certification issues are “logically antecedent” to any issue of Article III standing.<sup>258</sup>

This variation in position should not be read to mean that a class may include members without standing. The Supreme Court’s decision in *TransUnion* makes clear that all class members must individually have standing.<sup>259</sup> Instead, the *Amchem* and *Ortiz* cases stand for the proposition that—at least sometimes—a decision on certification is dispositive of standing issues.

In *Amchem*, for example, the challenge arose because the district court certified a class for settlement purposes that included a subclass of individuals who had been exposed to asbestos but not yet suffered any injury.<sup>260</sup> Objectors challenged the settlement, in part, by arguing that this exposure-only class lacked standing to sue for want of any concrete injury.<sup>261</sup> The Third Circuit and the Supreme Court found that the standing problem only arose out of the certification problem: if the settlement class was improperly certified, then the standing problem disappeared.<sup>262</sup> Therefore, it was appropriate for a court to consider class standing *after* making a decision on certifying the class.

The upshot is that courts need not reach Article III standing where plaintiffs lack a legal right to bring their cause of action in the first place.<sup>263</sup> Because Rule 23 determines whether a putative class action is viable, courts may defer addressing standing where it is intertwined with certification.<sup>264</sup> In other words, a class action may be defeated where a named plaintiff cannot show injury; causation; and redressability; but, once the named plaintiff has shown standing, whether they can maintain a class action on behalf of others is a question of certification, not of jurisdiction.<sup>265</sup>

The Court in *TransUnion* ultimately left open the question of whether every proposed class member’s standing must be determined at the time of certification.<sup>266</sup> The Second Circuit has taken a restrictive approach under which “no class may be certified that contains members lacking Article III standing.”<sup>267</sup> On the opposite end of the spectrum, the Third Circuit has held that class standing only becomes relevant at the damages stage.<sup>268</sup> The Seventh and Ninth Circuits have

<sup>257</sup> See, e.g., *Abraham v. WPX Prod. Prods., LLC*, 184 F.Supp.3d 1150, 1200 (D. N. M. 2016) (“The Defendants err, however, if they suggest...that the Court must...determine whether proposed class members have standing before the Court certifies a class”).

<sup>258</sup> See, e.g., *Haynes v. Walmart, Inc.*, 2021 WL 5811732, at \*4–5 (N.D. Ala. Dec. 6, 2021) (finding that, where members of a national class each base their claims on their respective state’s laws, “practicality cautions against ruling on standing before certification”).

<sup>259</sup> 594 U.S. at 431 (“Every class member must have Article III standing in order to recover individual damages”).

<sup>260</sup> *Amchem*, 521 U.S. at 600–01.

<sup>261</sup> *Id.* at 612.

<sup>262</sup> *Id.*

<sup>263</sup> See *Steel Co.*, 523 U.S. at 92.

<sup>264</sup> *Ortiz*, 527 U.S. at 831.

<sup>265</sup> See *Abraham*, 184 F.Supp.3d at 1199–1200.

<sup>266</sup> 594 U.S. at 431 n. 4.

<sup>267</sup> *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d. Cir. 2006).

<sup>268</sup> *Huber v. Simon’s Agency, Inc.*, 84 F.4th 132, 154–55 (3d Cir. 2023).

taken a middle path, holding that a low proportion of putative class members without standing does not defeat certification.<sup>269</sup>

In 2025, the Supreme Court granted certiorari in the Ninth Circuit case of *Lab'y Corp. of America v. Davis* to address this circuit split, but the Supreme Court later dismissed the grant as improvidently granted because of a subsequent mootness argument.<sup>270</sup> As a result, it is unclear whether this circuit split will be remedied in the future.

### III. Tolling

#### A. General Rule

Special tolling rules in class actions allow for plaintiffs to preserve their claims in certain circumstances. These rules have their genesis in the U.S. Supreme Court decision *American Pipe*.<sup>271</sup> The rule laid out in the *American Pipe* provides that limitations periods are tolled, i.e., paused, for putative class members that seek to intervene in the putative class representative's lawsuit after class certification has been denied.<sup>272</sup> The tolling is in effect until class certification is denied or the case is dismissed, at which point the limitations period resumes running.<sup>273</sup> This rule was later extended to plaintiffs who file their own, individual lawsuits after denial of class certification.<sup>274</sup>

In other words, putative class members who have timely claims at the commencement of a class action lawsuit do not lose those claims if the limitations period runs out before class action certification is denied, provided that those putative class members then seek to intervene in the original plaintiffs' lawsuit or file an individual lawsuit themselves.<sup>275</sup>

Generally, for a plaintiff to take advantage of *American Pipe* tolling, five requirements must be met:

1. another plaintiff must have filed the purported class action;
2. the class action complaint must include the plaintiff within the purported class;
3. the plaintiff must possess a claim that was timely when the putative class action suit was filed;
4. the plaintiff must possess a claim that the prior class action asserted; and

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<sup>269</sup> See *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825–26 (7th Cir. 2012); *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (*en banc*).

<sup>270</sup> 605 U.S. 327, 328 (2025).

<sup>271</sup> *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974).

<sup>272</sup> *Id.* at 553.

<sup>273</sup> See *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983).

<sup>274</sup> *Crown, Cork*, 462 U.S. at 350.

<sup>275</sup> See *American Pipe*, 414 U.S. at 553; *Crown, Cork*, 462 U.S. at 350.

5. the plaintiff must assert the claim against a defendant named in the original class action.<sup>276</sup>

### ***B. Jurisdictional Differences in American Pipe Tolling***

Although the requirements of *American Pipe* tolling seem straightforward, there are important differences in their application across jurisdictions. These differences will be examined in this section.

#### **1. Circuit Split on the Effect of Standing**

As demonstrated by the *American Pipe* line of cases itself, *American Pipe* tolling often arises when a putative class is denied certification for failure to meet one of the prerequisites to class certification found in FRCP 23(a)-(b).<sup>277</sup> The analysis is much less clear, however, when class actions are dismissed because the putative class representative is found to lack standing.

The Seventh Circuit and some district courts from the Ninth Circuit have held that plaintiffs may not take advantage of *American Pipe* tolling if the original class action was dismissed for a lack of standing.<sup>278</sup>

Conversely, the Third and Eleventh Circuits and district courts from the Second, Fourth, Fifth and Eighth Circuits have held *American Pipe* tolling applies during the pendency of a putative class action, even if the original plaintiff is eventually determined to lack standing.<sup>279</sup>

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<sup>276</sup> See 3 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra* note 1, § 9:56; see also *American Pipe*, 414 U.S. at 551-52, 555; *Crown, Cork*, 462 U.S. at 350, 353-54.

<sup>277</sup> See *American Pipe*, 414 U.S. at 543; *Crown, Cork*, 462 U.S. at 337-38.

<sup>278</sup> See *Walters v. Edgar*, 163 F.3d 430, 432-33 (7th Cir. 1998) (“Certification of a class action comes after the suit is filed, so if the named plaintiffs lacked standing when they filed the suit, there were no other party plaintiffs to step into the breach created by the named plaintiffs’ lack of standing; and so there was no case when class certification was sought.”); *Series 17-03-615 v. Express Scripts, Inc.*, 2023 WL 4850676, at \*5 (N.D. Ill. July 28, 2023) (stating that “the Seventh Circuit held that *American Pipe* tolling only applies to claims when the original plaintiff has standing.”); *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 934 F. Supp. 2d 1219, 1229–31 (C.D. Cal. 2013) (stating that “[w]hen a class action plaintiff lacks standing with respect to certain claims, jurisdiction does not attach for those claims, meaning that federal courts have no power to extend the statutorily defined limitation periods” and that “*Walters* applies whenever federal jurisdiction does not attach to the class action.”).

<sup>279</sup> *Haas v. Pittsburgh Nat. Bank*, 526 F.2d 1083, 1095–98 (3d Cir. 1975) (holding that *American Pipe* applies to toll statutes of limitations where the putative class representative is found to have lacked standing); *Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 1994) (“The district court reasoned that there is an exception to the tolling rule announced in *American Pipe* and *Crown, Cork & Seal* when the class action relied upon was decertified on grounds that no class representative had standing to bring the claim asserted in the individual suits. We disagree.”); *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 810 F. Supp. 2d 650, 668-69 (S.D.N.Y. 2011), order vacated on reconsideration on other grounds, 23 F. Supp. 3d 203 (S.D.N.Y. 2014) (holding that *American Pipe* applies where the original plaintiffs lacked standing); *Popoola v. Md-Individual Prac. Ass’n, Inc.*, 230 F.R.D. 424, 429–30 (D. Md. 2005) (holding that *American Pipe* tolling applies when the original plaintiff lacks standing); *In re Enron Corp. Sec. Derivative & ERISA Litig.*, 529 F. Supp. 2d 644, 709-11 (S.D. Tex. 2006) (holding that *American Pipe* applies when the original plaintiff lacked standing); *Rose v. Arkansas Valley Env’t & Util. Auth.*, 562 F. Supp. 1180, 1193 (W.D. Mo. 1983) (holding that “the fact that a class action is disallowed because the class representative lacks ‘standing’ does not, *per se*, prevent application of the *American Pipe* tolling rule.”).

## 2. Open Question on the Effect of Class Definition Changes

As previously mentioned, *American Pipe* tolling operates to preserve the claims of plaintiffs that fall within the definition of the purported class.<sup>280</sup> In most jurisdictions, courts have not yet ruled on the tolling effect of changes in the definition of the class. However, the Fourth and Seventh Circuits have held that when the class definition is changed to exclude members of the class, the limitations period begins to run again for the newly excluded class members.<sup>281</sup> None of these decisions change the baseline rule that *American Pipe* tolling does not protect plaintiffs who were never included in the proposed class definition(s), even if their claims derive from the same facts.<sup>282</sup>

### C. *Class Action Tolling Under State Law*

While *American Pipe* applies to the federal court system, states are free to craft their own class action tolling rules. States can be grouped into four general categories when considering state-specific class action tolling rules:

1. States that recognize *American Pipe* tolling regardless of where the original class action was filed. States in this category include Delaware and New York.<sup>283</sup>
2. States that recognize *American Pipe* tolling but only if the original class action was filed in that state's court system. States in this category include Illinois, Texas, and Pennsylvania.<sup>284</sup>
3. States that recognize *American Pipe* tolling if the original class action was filed in that state, but are unclear as to whether it applies when the original class action was filed out-of-state. States in this category include California and Massachusetts.<sup>285</sup>

<sup>280</sup> *American Pipe*, 414 U.S. at 553.

<sup>281</sup> *Smith v. Pennington*, 352 F.3d 884, 894 (4th Cir. 2003) (holding that when a plaintiff moves for class certification with a class definition that is unambiguously narrower than that asserted in the complaint, *American Pipe* tolling ceases for the newly excluded class members); *Knauf Insulation, Inc. v. S. Brands, Inc.*, 820 F.3d 904, 907-08 (7th Cir. 2016) (holding that *American Pipe* tolling no longer applies when a putative class member becomes excluded by a new class definition).

<sup>282</sup> See, e.g., *Berkery v. Verizon Commc'ns Inc.*, 658 F. App'x 172, 174 (3d Cir. 2016); *Bolton v. First Advantage LNS Screening Sols, Inc.*, 2015 No. 14 CIV. 5735 PAC, 2015 WL 4039834, at \*2 (S.D.N.Y. July 1, 2015).

<sup>283</sup> *Dow Chem. Corp. v. Blanco*, 67 A.3d 392, 393 (Del. 2013) (holding that Delaware recognizes cross-jurisdictional tolling); *Bermudez Chavez v. Occidental Chem. Corp.*, 158 N.E.3d 93, 101 (N.Y. 2020) (holding that New York recognizes cross-jurisdictional class action tolling).

<sup>284</sup> *Portwood v. Ford Motor Co.*, 701 N.E.2d 1102, 1105 (Ill. 1998); *Ravitch v. Pricewaterhouse*, 793 A.2d 939, 944 (Pa. Super. Ct. 2002); *Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 758 (Tex. App. 1995).

<sup>285</sup> *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 933 (Cal. 1988) (recognizing *American Pipe* tolling). While no appellate court in California has recognized or refused to recognize cross-jurisdictional tolling, at least one trial court has held that cross-jurisdictional can apply in certain circumstances. *VHS Liquidating Trust v. Blue Cross of California*, 2022 WL 2073534, at \*7 (Cal. Super. Ct. June 1, 2022) (holding that California law recognizes *American Pipe* tolling where the original class action was filed in federal court); *Patterson v. Novartis Pharms. Corp.*, 909 F. Supp. 2d 116, 130 (D.R.I. 2012) ("Plaintiffs have not shown that Massachusetts has adopted [cross-jurisdictional tolling], nor that it would").

4. States that do not recognize *American Pipe* tolling. Florida is included in this category.<sup>286</sup>

#### ***D. Recent Developments***

As detailed by the preceding sections, the bounds of *American Pipe* tolling are still being decided. Two recent developments on tolling and class actions, generally, bear noting.

##### **1. Tolling and Subsequent Class Actions**

In *China Agritech, Inc. v. Resh*,<sup>287</sup> the Supreme Court recently held that *American Pipe* tolling does not extend to new class action lawsuits by putative class members after class certification has been denied.<sup>288</sup> In other words, unlike individual claims or interventions, *American Pipe* cannot be used to toll subsequently asserted class claims after class certification in the original class action has been denied.<sup>289</sup> Accordingly, all class claims must be filed within the applicable limitations period.

##### **2. Tolling and Class Certification Appeals**

Rule 23(f) provides that appellate courts may permit appeals from orders granting or denying class certification. Under that Rule, a petition for permission to appeal must be filed within 14 days of the order.

The Supreme Court's recent decision in *Nutraceutical Corp. v. Lambert*<sup>290</sup> held that the Rule 23(f) time limit is not subject to any equitable tolling.<sup>291</sup> Plaintiffs that have been denied class certification therefore must petition to appeal the denial of class certification within 14 days of the trial court's order. This topic is discussed in greater detail in Part Three.

#### **IV. Rule 23(b)(2) and 23(b)(3) Class Actions**

Under Rule 23(b), the type of relief sought by the plaintiffs in a class action dictates the substantive and procedural requirements the plaintiffs must satisfy in order to obtain class certification and class-wide relief. This section primarily addresses the requirements and nuances of Rule 23(b)(2) and Rule 23(b)(3) class actions.<sup>292</sup>

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<sup>286</sup> FLA. STAT. § 95.051(2) (“A disability or other reason does not toll the running of any statute of limitations except those specified in this section....”); *Becnel v. Deutsche Bank, AG*, 507 F. App'x 71, 73 (2d Cir. 2013) (“Florida does not allow tolling during the pendency of class action lawsuits no matter where they are filed.”).

<sup>287</sup> *China Agritech, Inc. v. Resh*, 584 U.S. 732 (2018).

<sup>288</sup> *Id.* at 747.

<sup>289</sup> *Id.*

<sup>290</sup> *Nutraceutical Corp. v. Lambert*, 586 U.S. 188 (2019).

<sup>291</sup> *Id.* at 195–96.

<sup>292</sup> A class action may also be certified under Rule 23(b)(1)(A) or Rule 23(b)(1)(B). These class action categorizations are “rarely used,” see *Gaston v. LexisNexis Risk Sols., Inc.*, 483 F. Supp. 3d 318, 339 (W.D.N.C. 2020), and are thus outside the scope of this section.

### **A. Rule 23(b)(1) Class Actions**

Though class actions are nearly always certified under Rule 23(b)(2) or (b)(3), litigants also may pursue certification under Rule 23(b)(1)(A) or (B).

Rule 23(b)(1)(A) permits class certification where individual actions would “create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct” for the defendant. The drafters of this clause provided several examples of when these types of actions may be sustained: suits seeking to prevent certain municipal appropriations, suits determining riparian rights, or suits defining a landowner’s duties with respect to a claimed nuisance.<sup>293</sup> ERISA class actions often invoke 23(b)(1)(A) because multiple lawsuits could result in fiduciaries facing conflicting standards of prudent management.<sup>294</sup>

Rule 23(b)(1)(B) permits class certification where an adjudication for one class member would dispose of the interests of another class member or substantially impair the second class member’s ability to protect their own interest. The most common situation where 23(b)(1)(B) applies is so-called “limited fund” cases.<sup>295</sup> As the name suggests, these are scenarios where class members all have a claim on a particular fund which is incapable of paying all claims, such as when a party is insolvent.<sup>296</sup> The Court in *Ortiz*, however, restricted the use of 23(b)(1)(B) under a limited-fund theory to cases where (1) the maximum value of the fund is obviously inadequate; (2) the entirety of the fund is available to the class; and (3) class members share a common theory of recovery.<sup>297</sup>

While courts have entertained theories of 23(b)(1)(B) other than a limited-fund theory, putative classes often encounter difficulties in showing that class members with common claims are competing for recovery rather than that class members do, in fact, have different facts requiring individual adjudication.<sup>298</sup> Because of 23(b)(1)’s narrowness, class actions are often instead brought under Rule 23(b)(2) or (b)(3).

### **B. Rule 23(b)(2) Class Actions**

Rule 23(b)(2) class actions enable putative class members to seek injunctive relief. In fact, the Supreme Court has held that claims for monetary relief may not be certified under Rule 23(b)(2), “at least where the monetary relief is not incidental to the injunctive or declaratory relief.”<sup>299</sup> Injunctive relief class actions are often brought by plaintiffs in civil rights cases to avoid mootness concerns during the pendency of the litigation, to augment the scale of any remedy, and to provide a financial incentive to public interest attorneys litigating these cases.<sup>300</sup>

<sup>293</sup> FED. R. CIV. P. 23 advisory committee’s note to 1966 amendments.

<sup>294</sup> See *Klawonn v. Bd. of Directors for Motion Picture Indus. Pension Plans*, No. CV 20-9194-DMG (ASX), 2024 WL 653398, at \*7 (C.D. Cal. Jan. 18, 2024).

<sup>295</sup> See *Ortiz*, 527 U.S. at 835–36.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 838–40.

<sup>298</sup> See, e.g., *Gonzalez v. Corning*, 317 F.R.D. 443, 509–10 (W.D. Pa. 2016) (holding class certification inappropriate because, while plaintiffs had similar claims and were seeking a ruling that defendant’s bankruptcy did not discharge their claims, bankruptcy discharge would need to be evaluated individually for each claimant).

<sup>299</sup> *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011).

<sup>300</sup> See NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra* note 1, § 4:26.

There are two basic requirements for Rule 23(b)(2) class actions: “[t]he class must sue over a uniform action or inaction by the defendant, and it must request a uniform injunction or declaratory judgment from the court.”<sup>301</sup> The first requirement is objective and focuses not on common effects on the class, but instead on a common vector resulting in those effects.<sup>302</sup>

The second Rule 23(b)(2) requirement “encompasses three components: the requested relief must be (1) final, (2) injunctive or declaratory, and (3) appropriate to the class as a whole.”<sup>303</sup> While the first two components are often achieved, the third can pose more difficulty for plaintiffs seeking Rule 23(b)(2) certification. The third component boils down to whether a single injunction or declaratory judgment could adequately provide relief to the entire class because Rule 23(b)(2) “does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant.”<sup>304</sup> For example, even when a proposed class would benefit from injunctive relief, courts will dismiss claims where named plaintiffs are no longer at risk of harm.<sup>305</sup> This “cohesiveness” requirement is considered “more stringent than the predominance and superiority requirements for maintaining a class action under Rule 23(b)(3).”<sup>306</sup>

Like 23(b)(1) actions, a Rule 23(b)(2) class is a “mandatory” class for which there is no opportunity for class members to opt out, and no obligation for the district court to provide notice of the class action to class members.<sup>307</sup> However, the district court retains the *option* to provide notice and opt-out rights to class members.<sup>308</sup> Because Rule 23(b)(2) classes “are [typically] non-opt-out classes,” the Rule 23(a) requirements of “adequacy and typicality take on special resonance,” as it is even more important under such circumstances that the named plaintiffs be representative of the class as a whole.<sup>309</sup>

*Algarin v. Maybelline, Inc.* is illustrative of the strict cohesiveness required. There, the plaintiffs sought injunctive relief against a makeup manufacturer based on the manufacturer’s alleged deceptive labeling and advertising with respect to its claims that its products would provide 24-hour wear.<sup>310</sup> The district court denied certification under Rule 23(b)(2) because the plaintiffs could not show the injunctive relief they requested was necessary relief for the class as a whole.<sup>311</sup>

<sup>301</sup> *Doster v. Kendall*, 54 F.4th 398, 439 (6th Cir. 2022).

<sup>302</sup> *See Dukes*, 564 U.S. at 350, 357.

<sup>303</sup> *Berardi v. City of Pekin, Ill.*, 2021 WL 1535409, at \*10 (C.D. Ill. Apr. 19, 2021).

<sup>304</sup> *Dukes*, 564 U.S. at 360.

<sup>305</sup> *See, e.g., Levin v. Citibank, N.A.*, 2009 WL 3008378, at \*2 (N.D. Cal. Sept. 17, 2009) (dismissing request for declaration that defendant’s practices violate Truth in Lending Act because named plaintiff had closed his account prior to filing suit and therefore had no risk of his rights being violated in the future). Note that this is different than the rule that a plaintiff whose claims become mooted *after* certification may continue to represent the class. *See Sosna*, 419 U.S. at 401.

<sup>306</sup> *Donelson v. Ameriprise Financial Services, Inc.*, 999 F.3d 1080, 1093 (8th Cir. 2021).

<sup>307</sup> *Dukes*, 564 U.S. at 362. Under Rule 23(e), however, a court must provide notice of any proposed settlement, even in a Rule 23(b)(2) case.

<sup>308</sup> *See, e.g., McReynolds v. Richards-Cantave*, 588 F.3d 790, 800 (2d Cir. 2009) (“[T]he language of Rule 23 is sufficiently flexible to afford district courts discretion to grant opt-out rights in ... (b)(2) class actions.”).

<sup>309</sup> *Williams v. Apple, Inc.*, 338 F.R.D. 629, 657 (N.D. Cal. 2021).

<sup>310</sup> 300 F.R.D. 444, 450 (S.D. Cal. 2014).

<sup>311</sup> *Id.* at 458.

Rather, the named plaintiffs “and the portion of the class who purchased the Class Products expecting them to last 24 hours, [were] now well aware of the realities of the products.”<sup>312</sup> Being aware that the product would not last 24 hours, these class members were not in danger of being deceived by the defendant’s advertising and would therefore not benefit from changes to the advertisements.<sup>313</sup> Because the entire proposed class would not obtain relief from an injunction, 23(b)(2) certification was inappropriate.<sup>314</sup>

A final note: while Rule 23(b)(2) bears many similarities to 23(b)(1)(A) with its emphasis on class cohesion, the certification analysis is different. Rule 23(b)(1)(A) considers prejudice to the *defendant*, while 23(b)(2) turns on commonality of the *class members*.<sup>315</sup> For strategic reasons, ERISA class actions, for example, might be brought under both (b)(1)(A) and (b)(2).<sup>316</sup> Under one theory, class certification is appropriate because individual litigation may produce conflicting standards for an ERISA trustee to follow. Under the other, injunctive relief would benefit the entire class in the same way.<sup>317</sup> Because a court need only accept one theory to certify the class, plaintiffs in effect get two bites at the certification apple.

### C. Rule 23(b)(3) Class Actions

A Rule 23(b)(3) class action, on the other hand, is known as a “damages class action,” as classes seeking damages may be certified under this rule.

In addition to the baseline requirements of commonality, numerosity, typicality, and adequacy discussed in Part One above, Rule 23(b)(3) imposes two additional requirements on litigants seeking class certification: (1) that questions of law or fact common to the members of the class *predominate* over any individualized questions; and (2) that a class action be superior to other available methods for the fair and efficient adjudication of the controversy.<sup>318</sup>

Courts confronted with these issues should consider: “(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.”<sup>319</sup>

#### 1. Predominance

The predominance standard asks whether common questions of law and fact outweigh any questions unique to individuals.<sup>320</sup> If “too many individual questions predominate over common

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<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *See Dukes*, 564 U.S. at 361–62.

<sup>316</sup> *See, e.g., Lipari-Williams v. Mo. Gaming Co.*, 339 F.R.D. 515 (W.D. Mo. 2021).

<sup>317</sup> *See Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 369–71 (7th Cir. 2012).

<sup>318</sup> FED. R. CIV. P. 23(b)(3).

<sup>319</sup> *Id.*; *see also Amchem*, 521 U.S. at 616.

<sup>320</sup> *See CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1087 (10th Cir. 2014).

ones, certification is inappropriate.”<sup>321</sup> Predominance can be viewed as an enhanced commonality requirement.<sup>322</sup> While Rule 23(a) only requires a single common question to satisfy commonality, Rule 23(b)(3) demands that common questions be more important to the resolution of the case than any individual questions.<sup>323</sup>

The determination of whether the predominance standard is met usually consists of two steps: first, the court must examine the elements of the underlying cause of action; and second, the court must consider whether the same evidence would generally be offered to prove each class member’s claims.<sup>324</sup> If adding or subtracting class members would vary “the substance or quantity of evidence offered,” then there is likely a predominance problem.<sup>325</sup>

While the predominance standard “requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class,”<sup>326</sup> predominance nevertheless typically “presents the greatest obstacle to class certification.”<sup>327</sup> For example, the need to apply multiple states’ laws to class members’ claims tends to—but does not always—defeat a finding of predominance.<sup>328</sup> Similarly, common issues are unlikely to predominate in mass tort cases where plaintiffs have sustained different personal injuries.<sup>329</sup>

In April 2024, the Supreme Court declined to review a D.C. Circuit decision in affirming class certification in the *Visa Inc. et al. v. National ATM Council Inc. et al.* matter, leaving a minor circuit split regarding the proper predominance inquiry for class certification decisions. The Ninth and D.C. Circuits appear to have adopted a more relaxed approach to the predominance inquiry,<sup>330</sup>

<sup>321</sup> *Orduno v. Pietrzak*, 932 F.3d 710, 716 (8th Cir. 2019).

<sup>322</sup> See *Howard v. Cook Cnty. Sheriff’s Off.*, 989 F.3d 587, 607 (7th Cir. 2021).

<sup>323</sup> See *Eddlemon v. Bradley Univ.*, 65 F.4th 335, 339 (7th Cir. 2023).

<sup>324</sup> See *Speerly v. GM, LLC*, 143 F.4th 306, 317 (6th Cir. 2025); see also *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008) (“[A] district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case.”); *Blades v. Monsanto Co.*, 400 F.3d 562, 569 (8th Cir. 2005) (“Th[e] predominance inquiry] necessarily requires an examination of the underlying elements necessary to establish liability for plaintiffs’ claims.”).

<sup>325</sup> *Speerly*, 143 F.4th at 317.

<sup>326</sup> *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013); see also *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 667 (9th Cir. 2022) (“[A] district court cannot decline certification merely because it considers plaintiffs’ evidence relating to the common question to be unpersuasive and unlikely to succeed in carrying the plaintiffs’ burden of proof on that issue.”); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012) (“In conducting this analysis, the court should not turn the class certification proceedings into a dress rehearsal for the trial on the merits.”).

<sup>327</sup> *CGC Holding*, 773 F.3d at 1087.

<sup>328</sup> *Heldt v. Payday Fin., LLC*, 2016 WL 96156, at \*11 (D.S.D. Jan. 8, 2016) (“It is well-settled that variations in state laws may defeat predominance in a nationwide class action.”).

<sup>329</sup> *Amchem*, 521 U.S. at 623.

<sup>330</sup> See *Van v. LLR, Inc.*, 61 F.4th 1053, 1066–67 (9th Cir. 2023) (stating that the existence of individualized defenses, even if they bar some class members’ claims, does not destroy predominance); *Nat’l ATM Council, Inc. v. Visa Inc.*, No. 21-7109, 2023 WL 4743013, at \*5 (D.C. Cir. July 25, 2023) (“...plaintiffs need only genuinely contest, not definitively rule out, defendants’ alternative ways that a reasonable factfinder might view the evidence”).

while other circuits require a more rigorous analysis of predominance and specifically require that plaintiffs anticipate, and possibly overcome, defendant’s trial defenses.<sup>331</sup>

## 2. Superiority

The superiority requirement, on the other hand, is a comparative inquiry into whether a class action is a superior method of adjudication versus individual actions,<sup>332</sup> and “ensures that litigation by class action will achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.”<sup>333</sup> The primary factors considered with respect to superiority are: (1) the interest of class members in individually controlling their own actions; (2) other pending litigation; (3) the desirability or undesirability of the particular forum; and (4) manageability.<sup>334</sup>

Of these factors, “*manageability* has been the most hotly contested and the most frequent ground for holding that a class action is not superior,”<sup>335</sup> although “failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule.”<sup>336</sup> For example, the Seventh Circuit has found that a nationwide class requiring the application of all 50 states’ laws was unmanageable.<sup>337</sup> While it acknowledged the efficiency gains of concentrating the claims in one court rather than enlisting potentially hundreds of state and federal judges to hear the same claims, the *Bridgestone* court found that—given the guesswork required for a federal judge to apply the laws of 50 jurisdictions—getting to the correct resolution would be “serendipity.”<sup>338</sup>

On the other hand, courts have found that class treatment may be superior even for relatively small classes. In *Rapuno v. Trustees of Dartmouth Coll.*, the District of New Hampshire found that a class of 90 current and former Dartmouth students pursuing allegations of sexual harassment was particularly suited to class treatment because the relatively anonymity of a class action made it more likely that victims would actually pursue their claims.<sup>339</sup>

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<sup>331</sup> See, e.g., *Catholic Health Care West v. US Foodserv.*, 729 F.3d 108, 119–22 (2d Cir. 2013) (predominance exists when the class “will prevail or fail in unison”); *Reinig v. RBS Citizens, N.A.*, 912 F.3d 115, 127–29 (3d Cir. 2018) (stating that predominance is satisfied only when common evidence is sufficient to sustain a favorable jury finding for “each individual Plaintiff”); *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 546 (5th Cir. 2020) (“[To] satisfy the rigor requirement, a district court...must explain and apply the substantive law governing...defenses, articulating why the issues are fit for classwide resolution”); *Colomar v. Mercy Hosp., Inc.*, 242 F.R.D. 671, 680–81 (S.D. Fla. 2007) (in unfair pricing case, a showing that a hospital billed uninsured patients on *average* 70% more than insured patients for respiratory services does not satisfy predominance because individual bills may or may not have been inflated) (emphasis in original).

<sup>332</sup> See *In re Petrobras Sec.*, 862 F.3d 250, 268 (2d Cir. 2017).

<sup>333</sup> *Wright v. S. N.H. Univ.*, 565 F. Supp. 3d 193, 205 (D.N.H. 2021).

<sup>334</sup> FED. R. CIV. PROC. 23(b)(3).

<sup>335</sup> *Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 363 (S.D. Ga. 1996), *aff’d sub nom. Jones v. H & R Block Tax Servs.*, 117 F.3d 1433 (11th Cir. 1997).

<sup>336</sup> *In re Petrobras Sec.*, 862 F.3d at 268.

<sup>337</sup> *In re Bridgestone/Firestone Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1018–19 (7th Cir. 2002).

<sup>338</sup> *Id.* at 1020.

<sup>339</sup> 334 F.R.D. 637, 653 (D.N.H. 2020).

### 3. Third Circuit’s Manageability Rule Tied to Ascertainability

Most circuits have interpreted the manageability consideration to be one comparison: courts should not consider whether class treatment would be difficult to manage but, rather, whether there is another feasible *and* more efficient alternative.<sup>340</sup> However, the Third Circuit has imposed a manageability requirement that plaintiffs show that their proposed class has an “administratively feasible mechanism for determining whether putative class members fall within the class definition.”<sup>341</sup>

The Third Circuit’s stated purpose for this requirement is to eliminate “‘administrative burdens that are incongruous with the efficiencies expected in a class action’ by insisting on the easy identification of class members.”<sup>342</sup> The Court differentiates this inquiry from standing or predominance. Whereas predominance is about the ability to use common evidence to establish all claims, and standing is about a class member’s ability to recover, this “ascertainability” requirement is about whether “objective records” could show whether someone was part of the class definition or not.<sup>343</sup> This helps avoid mini-trials.

While other courts have not adopted the Third Circuit’s manageability rule, they have deployed similar analyses with respect to predominance. Recently, the Northern District of California decertified a class of iPhone owners alleging that Apple monopolized the iOS app market.<sup>344</sup> The court initially certified the class with the knowledge that a small fraction of the class had no injuries because the expense of running a full analysis to determine individual damages on such a large dataset would have been “economically unfeasible” without class treatment.<sup>345</sup> However, once the model was run, it became clear that plaintiffs could not tie payment records to individual consumers.<sup>346</sup> Because the plaintiffs could not show class-wide evidence of injuries (or even estimate the proportion of uninjured class members), the Court decertified the class for lack of predominance.<sup>347</sup>

<sup>340</sup> See *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1128 (9th Cir. 2017) (collecting cases).

<sup>341</sup> *Byrd v. Aaron’s Inc.*, 784 F.3d 154, 164–65 (3d Cir. 2015).

<sup>342</sup> *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012) (quoting *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 446 (E.D. Pa. 2000)).

<sup>343</sup> See *Grandalski v. Quest Diagnostics, Inc.*, 767 F.3d 175, 184–85 (3d Cir. 2014). In *Grandalski*, the Court differentiates ascertainability and predominance by explaining that a class was ascertainable because a health care provider’s records could easily show which patients were overbilled, even though some were refunded and others were not. The class failed predominance though because individualized fact-finding would be required to demonstrate whether each patient was defrauded, accidentally overcharged and refunded, overcharged but sent a corrected bill, or overcharged but had no money collected. *Cf.* *Marcus*, 687 F.3d at 593 (“serious ascertainability issues” where no records existed to show whether a car was driven off the dealership lot with the same defective tires that were installed at the factory).

<sup>344</sup> *In re Apple Iphone Antitrust Litig.*, No. 4:11-CV-6714-YGR, 2025 WL 3124160 (N.D. Cal. Oct. 27, 2025) (N.D. Cal. Oct. 27, 2025).

<sup>345</sup> *Id.* at \*16.

<sup>346</sup> *Id.* at \*19–20. Errors in the results included identifying similarly named people as one person, identifying 1.9 million class members in a town of 375 people, and failing to identify that purchases in Manhattan occurred in New York.

<sup>347</sup> *Id.* at 53–54.

**Part Three**  
**Motion Practice Related to Class Certification**

**I. Motions to Strike Class Allegations at the Pleading Stage**

A motion to strike allows the court to “strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”<sup>348</sup> Depending upon the jurisdiction, a motion to strike may be “viewed with disfavor and is infrequently granted.”<sup>349</sup> Nonetheless, in the right case, they should be considered as a potential avenue for defendants facing a putative class action to terminate class proceeding at an early stage.

**A. Standard of Review**

Motions to strike class allegations function as a “preemptive strike” against class certification.<sup>350</sup> Rather than waiting for plaintiffs to move for class certification, defendants may move to strike class allegations even in the absence of a pending motion for certification.<sup>351</sup> A motion to strike still requires the same rigorous analysis of the plaintiff’s compliance with Rule 23’s requirements of numerosity, commonality, typicality, and adequacy.<sup>352</sup> The analysis “generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.”<sup>353</sup>

Because Rule 23 instructs courts to decide class certification at “an early practicable time,” preemptive motions to strike may be permitted as early as the pleadings stage.<sup>354</sup> Early motions to strike are not, however, always beneficial to defendants. Denials of class certification on the pleadings alone are sometimes disfavored because courts may need discovery to conduct a rigorous analysis of class allegations.<sup>355</sup> But where “it is apparent from the [face of a] complaint that a class action cannot be maintained,” striking class allegations at the pleadings stage is appropriate.<sup>356</sup>

Courts are divided on the precise framework for analyzing motions to strike. Some courts have specifically applied the language of Rule 12(f) to the Rule 23 factors, requiring that the class allegations be “redundant, immaterial, impertinent, or scandalous.”<sup>357</sup> Because a motion to strike

<sup>348</sup> FED. R. CIV. P. 12(f). Some courts, though, locate a district court’s power to strike class allegations in Rule 23(d)(1)(D) instead. *See Oliver v. Navy Fed. Credit Union*, 167 F.4th 106, 121 (4th Cir. 2026) (Richardson, J., concurring in the judgment in part). Rule 23(d)(1)(D) permits courts the power to “require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly.”

<sup>349</sup> *Zurich American Life Ins. Co. v. Nagel*, 538 F.Supp.3d 396, 399 (S.D.N.Y. 2021).

<sup>350</sup> *Fedotov v. Peter T. Roach and Assocs., P.C.*, 354 F. Supp. 2d 471, 478 (S.D.N.Y. 2005).

<sup>351</sup> *Id.*

<sup>352</sup> *See Dukes*, 564 U.S. at 350 – 51.

<sup>353</sup> *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982).

<sup>354</sup> *See Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011).

<sup>355</sup> *See id.*; *Donelson v. Ameriprise Fin. Servs.*, 999 F.3d 1080, 1092 (8th Cir. 2021).

<sup>356</sup> *Elson v. Black*, 56 F.4th 1002, 1006 (5th Cir. 2023). The Third Circuit takes a dimmer view of motions to strike class allegations, finding them “premature.” *Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72, 93 (3d Cir. 2011), *opinion reinstated in part*, No. 09-3105, 2012 WL 2052685 (3d Cir. Apr. 17, 2012). However, it recognizes that “rare[ly]” a complaint “itself demonstrates that the requirements for maintaining a class action cannot be met.” *Id.* at 93 n. 30.

<sup>357</sup> *See, e.g., Mayfield v. Ace Am. Ins. Co.*, No. 1:19-CV-02425-SDG, 2020 WL 12029099, at \*7 (N.D. Ga. Mar. 19, 2020); *Gill-Samuel v. Nova Biomedical Corp.*, 298 F.R.D 693, 700 (S.D. Fla. 2014).

requires demonstrating that a putative class cannot satisfy the Rule 23 requirements, many courts’ analyze motions to strike under a standard virtually identical to the certification standard discussed in Part Two.<sup>358</sup> However, because the evidence a court may consider is limited at this stage, motions to strike typically require that a complaint’s class-related defects be obvious.<sup>359</sup>

For example, in *Hystad Ceynar Min., LLC v. XTO Energy, Inc.*, the District of North Dakota granted a motion to strike class allegations in a case where the putative class was composed of royalty owners in oil wells.<sup>360</sup> There, the plaintiffs alleged that the defendant oil company failed to pay statutory interest to the royalty owners.<sup>361</sup> The Court struck the class allegations on typicality and predominance grounds because an individual inquiry would be needed to determine whether each member’s lease entitled them to statutory interest under North Dakota law, on which dates their oil was marketed, and whether any of the statute’s safe harbor provisions applied to them.<sup>362</sup>

Similarly, other courts have recently granted motions to strike where a plaintiff contractually waived the right to bring a class action<sup>363</sup> and where a class alleging telemarketing in violation of the TCPA included multiple categories of individuals who could not have a claim.<sup>364</sup> What these cases have in common is a clear barrier to certification that could not be remedied by common discovery. In *Thomas*, the plaintiff knowingly signed a contract requiring individual litigation; in *Hystad Ceynar* and *Leon*, the applicability of a statute turned upon individual facts. Absent compelling objective barriers, courts may insist on discovery prior to ruling on certification.<sup>365</sup>

A recent Fourth Circuit decision highlights the standard for a motion to strike. In *Oliver*, the Fourth Circuit reversed a district court’s order to strike 23(b)(2) class allegations for lack of commonality.<sup>366</sup> There, plaintiffs alleged that Navy Federal Credit Union had used a discriminatory underwriting algorithm which disfavored non-white mortgage applicants.<sup>367</sup> The appellate court held that the district court abused its discretion by striking the class allegations because—despite plaintiffs’ admission that human loan officers had discretion over whether to approve loans—the plaintiffs’ allegations that Navy Federal used a single algorithm for all applicants created a “sufficient prima facie showing” of commonality at the pleading stage.<sup>368</sup> However, at the same time, the court affirmed the striking of 23(b)(3) class allegations because the putative class members applied for “at least four different products” and had varying success with

<sup>358</sup> See *Elson*, 56 F.4th at 1006.

<sup>359</sup> See *Perkins v. LinkedIn Corp.*, 53 F.Supp.3d 1190, 1221 (N.D. Cal. 2014) (courts only grant motions to strike class allegations “in rare occasions where the class definition is obviously defective in some way”). There is a further split on the amount of discretion trial courts have to strike class allegations. Some courts have closely scrutinized orders to strike class allegations, see *Oliver*, 167 F.4th at 121, while others have permitted greater discretion to strike, see *Pilgrim*, 660 F.3d at 949.

<sup>360</sup> No. 1:23-CV-030, 2025 WL 522550, at \*2 (D.N.D. Feb. 18, 2025) .

<sup>361</sup> *Id.* at \*1.

<sup>362</sup> *Id.* at \*4.

<sup>363</sup> *Thomas v. AAM Holding Corp.*, No. 1:24-CV-7253 (MKV), 2025 WL 2617450, at \*5 (S.D.N.Y. Aug. 26, 2025).

<sup>364</sup> *Leon v. Loandepot.com, LLC*, No. 2:25-CV-01787-JLS-AGR, 2025 WL 2632396, at \*3 (C.D. Cal. Aug. 22, 2025)

<sup>365</sup> See *Schwebel Baking Co. v. FirstEnergy Sols. Corp.*, No. 4:17CV0974, 2018 WL 1419477, at \*5 (N.D. Ohio Mar. 21, 2018)

<sup>366</sup> *Oliver*, 167 F.4th at 115.

<sup>367</sup> *Id.* at 109.

<sup>368</sup> *Id.* at 115.

each product.<sup>369</sup> The Fourth Circuit found that a lack of predominance was evident from the face of the complaint because of the obviously individualized questions of harm and damages.<sup>370</sup>

## II. Use of *Daubert* Motions in Combatting Class Certification

In recent years, *Daubert* challenges have emerged as a useful tool for defendants opposing class certification.<sup>371</sup> As the Supreme Court explained in *Wal-Mart Stores, Inc. v. Dukes*, “A party seeking class certification must affirmatively demonstrate his compliance with [Rule 23].”<sup>372</sup> Plaintiffs often rely on expert testimony to prove they have met the Rule 23 requirements.<sup>373</sup> If, in such cases, a defendant can successfully move to exclude expert testimony, then a named plaintiff relying on such testimony to satisfy the Rule 23 requirements cannot meet its burden to obtain class certification.<sup>374</sup> Simply stated, “the *Daubert* hurdle must be cleared when [expert] evidence is relevant to the decision to certify.”<sup>375</sup>

A *Daubert* challenge refers to the Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals*, in which the Court held that Federal Rule of Evidence 702<sup>376</sup> requires a trial judge to “ensur[e] that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.”<sup>377</sup> A party seeking to exclude expert testimony may file a so-called *Daubert* motion requesting that the court exclude that testimony on the grounds that it does not satisfy the standards set out in Rule 702.<sup>378</sup>

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<sup>369</sup> *Id.* at 115.

<sup>370</sup> *Id.*

<sup>371</sup> See, e.g., *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practs. & Antitrust Litig.*, 2019 WL 1569294, at \*2 (D. Kan. Apr. 11, 2019) (“[T]he trend of authority favors allowing *Daubert*-style challenges at the class certification stage.”).

<sup>372</sup> 564 U.S. 338, 350.

<sup>373</sup> See, e.g., *Fort Worth Employees’ Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 128 (S.D.N.Y. 2014) (“[T]he submissions of Plaintiffs’ expert constitute a significant part of the evidence supporting Plaintiffs’ certification motion.”).

<sup>374</sup> See, e.g., *In re Apple iPhone Antitrust Litig., No. 4:11-CV-6714-YGR*, 2025 WL 3124160, at \*14 (N.D. Cal. Oct. 27, 2025) (decertifying class because plaintiffs’ experts could not reliably sort out duplicated data); *Wilkins v. Bank*, No. 3:20-CV-116-DPM, 2023 WL 1868142, at \*4 (E.D. Ark. Feb. 9, 2023) (denying class certification because expert failed to show his methods could be applied to the facts of the case).

<sup>375</sup> *Prantil v. Arkema Inc.*, 986 F.3d 570, 575 (5th Cir. 2021).

<sup>376</sup> Rule 702 states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.

<sup>377</sup> 509 U.S. 579, 597 (1993); see also *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999) (holding that *Daubert*’s gatekeeping obligation applied to all expert testimony).

<sup>378</sup> Rule 702 was amended in 2000 to codify the *Daubert* standard. See FED. R. EVID. 702, advisory committee note to 2000 amendment.

Prior to the Supreme Court’s 2011 decision in *Dukes*, federal courts generally declined to address *Daubert* issues at the class certification stage.<sup>379</sup> This approach was largely the result of the Supreme Court’s decision in *Eisen v. Carlisle and Jacquelin*, in which the Court held a trial court should not inquire into the merits at the class certification stage.<sup>380</sup> However, in *Dukes*, the Supreme Court suggested for the first time that a *Daubert* analysis at class certification could be appropriate,<sup>381</sup> but it did not ultimately reach or resolve the issue. The Supreme Court granted certiorari on this question in *Comcast Corp. v. Behrend*, but side-stepped the *Daubert* question and instead decided the case on 23(b)(3) predominance grounds.<sup>382</sup>

In the years since *Dukes* and *Comcast* were decided, courts have found that “applying *Daubert* at the class certification stage is in accord with suggestions from the Supreme Court.”<sup>383</sup> However, the circuits have split on whether a full *Daubert* analysis should be conducted at the class certification stage.<sup>384</sup> Defense counsel should be mindful of this circuit split and meticulous about raising objections to expert evidence used to support class certification.

### A. Full *Daubert* Analysis

The Third, Fifth, Sixth, Seventh, Ninth,<sup>385</sup> and Eleventh Circuits take the approach “that when an expert’s report or testimony is critical to class certification,” a full *Daubert* analysis must be conducted.<sup>386</sup> That is, a district court must determine whether a proposed expert’s testimony satisfies the *Daubert*/Rule 702 standard, by a preponderance of the evidence, because “testimony that is insufficiently reliable to satisfy the *Daubert* standing cannot ‘prove’ that the Rule 23(a) [or 23(b)] prerequisites have been met ‘in fact.’”<sup>387</sup>

In *Prantil*, the Fifth Circuit more pointedly held that “the *Daubert* hurdle must be cleared when scientific evidence is relevant to the decision to certify.”<sup>388</sup> The Fifth Circuit reversed the district

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<sup>379</sup> See, e.g., *In re Polypropylene Carpet Antitrust Litig.*, 996 F. Supp. 18, 26 (N.D. Ga. 1997) (declining to address admissibility of expert opinions under *Daubert*, noting that “[a]t the class certification stage, the Court simply examines whether [the expert’s] methodology, as proposed, will comport with the basic principles of econometric theory, will have any probative value, and will primarily use evidence that is common to all members of the proposed class”).

<sup>380</sup> 417 U.S. 156 (1974).

<sup>381</sup> 564 U.S. at 354 (“The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so.”).

<sup>382</sup> 569 U.S. 27, 32 n.4 (2013).

<sup>383</sup> *In re EpiPen*, 2019 WL 1569294, at \*2; see also *Arandell Corp. v. Xcel Energy, Inc.*, 149 F.4th 883, 894 (7th Cir. 2025).

<sup>384</sup> See, e.g., *In re Marriott Int’l, Inc., Customer Data Sec. Breach Litig.*, 602 F. Supp. 3d 767, 772 (D. Md. 2022) (“As a preliminary matter, it is not yet a settled matter that a full-blown *Daubert* challenge should be entertained by the court when deciding a class certification motion.”); *In re EpiPen*, 2019 WL 1569294, at \*2 (“[T]he case law contains some dissonance about the proper breadth of *Daubert*-style challenges at the class certification stage.”).

<sup>385</sup> A later Ninth Circuit opinion suggests the Ninth Circuit may be moving away from the full *Daubert* approach. See *Sali v. Corona Reg’l Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018).

<sup>386</sup> *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815–16 (7th Cir. 2010); see *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015); *Neri v. Nissan N. Am., Inc.*, 122 F.4th 239, 253 (6th Cir. 2024); *Prantil*, 986 F.3d at 575; *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011); *Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248, 1258 n.7 (11th Cir. 2014).

<sup>387</sup> *In re Blood Reagents*, 783 F.3d at 187.

<sup>388</sup> *Prantil*, 986 F.3d at 575.

court’s grant of class certification, noting the lower court’s analysis “reflect[ed] hesitation to apply *Daubert*’s reliability standard with full force.”<sup>389</sup> In explaining its reversal, the Fifth Circuit explained “if an expert’s opinion would not be admissible at trial, it should not pave the way for certifying a proposed class.”<sup>390</sup>

### ***B. Limited Daubert Analysis***

In contrast, the Eighth Circuit takes a more “focused” approach to *Daubert* at the class certification stage, requiring district courts only to “examin[e] the reliability of the expert opinions in light of the available evidence and the purpose for which they were offered.”<sup>391</sup> The Eighth Circuit grounded its decision in Rule 702’s goal of protecting *juries* from dubious evidence, a risk that is not present when only the judge is the gatekeeper.<sup>392</sup>

The Ninth Circuit similarly applied a less demanding standard, albeit in a non-expert context, at the certification stage. In *Sali v. Corona Reg’l Med. Ctr.*, the Ninth Circuit critiqued a trial court’s reliance on “evidentiary formalism” to exclude a witness’s testimony at the certification stage.<sup>393</sup> It counseled that, while admissibility at trial should affect the weight evidence is given at the certification stage, focusing on admissibility “tells us nothing about the satisfaction of the [Rule 23] requirement[s].”<sup>394</sup>

The remaining circuits—the First, Second, Fourth, Tenth, and D.C. Circuits—have yet to definitively weigh in on this issue.<sup>395</sup> In the absence of binding authority, district courts in these circuits have reached different conclusions in applying the *Daubert* standard.<sup>396</sup>

These different approaches to *Daubert* motions should not be viewed too rigidly, however. At least one court has noted that the stricter approaches of the Seventh and Fifth Circuits apply only

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<sup>389</sup> *Id.* at 576.

<sup>390</sup> *Id.*

<sup>391</sup> *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 612 (8th Cir. 2011) (“[R]equiring an even more conclusive *Daubert* inquiry at the class certification stage would [be] impractical.”); *see also Cody v. City of St. Louis*, 103 F.4th 523, 535 (8th Cir. 2024) (explaining *Zurn*).

<sup>392</sup> *Zurn*, 644 F.3d at 613.

<sup>393</sup> 909 F.3d 996, 1006 (9th Cir. 2018). There, the trial court excluded critical witness testimony in part because the documents relied on by the witness for his analysis were not properly authenticated in his declaration. The appellate court reversed because, at trial, plaintiffs could have introduced additional evidence which would have made the testimony admissible.

<sup>394</sup> *Id.*

<sup>395</sup> *See, e.g., Kurtz v. Costco Wholesale Corp.*, 818 F. App’x 57, 61 n.3 (2d Cir. 2020) (noting it “is far from well-established” whether *Daubert* governs expert evidence at the certification stage); *In re EpiPen*, 2019 WL 1569294, at \*2 (“[T]he Tenth Circuit has yet to address the matter”); *Childress v. JPMorgan Chase & Co.*, 2019 WL 2865848, at \*2 (E.D. N.C. July 2, 2019) (“[T]here is no controlling precedent which dictates whether to conduct a *Daubert* analysis at the class certification stage or how focused or full that analysis should be.”); *Campbell v. Amtrak*, 311 F. Supp. 3d 281, 294 (D.D.C. 2018) (“The Court of Appeals for the District of Columbia Circuit (‘D.C. Circuit’) has not yet weighed in on whether a full analysis under *Daubert* is required at the class-certification stage.”).

<sup>396</sup> *See, e.g., In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F.Supp.3d 430, 470 (S.D. N.Y. 2018) (applying limited *Daubert* analysis); *In re Fisher-Price Rock ‘N Play Sleeper Mktg.*, 567 F.Supp.3d 406, 409–10 (W.D. N.Y. 2021) (applying full *Daubert* analysis); *Campbell v. Amtrak*, 311 F.Supp.3d at 295 (applying full *Daubert* analysis).

when critical to certification.<sup>397</sup> In that light, the strict approach is not dissimilar to the Eighth and Ninth Circuit’s focus on the purpose for which expert testimony is offered.<sup>398</sup>

### III. Summary Judgment Motions in Connection with Class Certification

In the class action context, special rules governing summary judgment can create strategic opportunities for defendants. The rules differ depending on which party moves for summary judgment and whether the motion is made before or after class certification.

#### A. Plaintiffs’ Motions: The One-Way Intervention Rule

The one-way intervention rule provides that plaintiffs in putative class actions may not seek summary judgment—or any other judgment on the merits—prior to class certification.<sup>399</sup>

This rule is a crucial safeguard for putative class action defendants. As the Seventh Circuit put it, the one-way intervention rule prevents the defendant from “being pecked to death by ducks. One plaintiff could sue and lose; another could sue and lose; and another and another until one finally prevailed; then everyone else would ride on that single success” by joining in a later-certified class action against the defendant.<sup>400</sup>

Generally, courts have expressed support for the one-way intervention rule and apply it in most circumstances, summary judgment or otherwise.<sup>401</sup> In a minority of cases, courts have allowed class certification to proceed after summary judgment has been entered in favor of the plaintiff.<sup>402</sup>

The *Postow* case is illustrative of a situation in which a court may eschew the one-way intervention rule. There, plaintiffs sued defendant Oriental Building Association (“Oriental”), alleging violations of the Truth in Lending Act.<sup>403</sup> The D.C. Circuit affirmed the district court’s grant of

<sup>397</sup> *Desai v. Geico Cas. Co.*, 574 F. Supp. 3d 507, 525 (N.D. Ohio 2021) (“[the various approaches] differ[] perhaps more in form than in substance”).

<sup>398</sup> *Id.*

<sup>399</sup> See 3 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra* note 1, § 7.10.

<sup>400</sup> *Premier Elec. Const. Co. v. Nat’l Elec. Contractors Ass’n, Inc.*, 814 F.2d 358, 363 (7th Cir. 1987)

<sup>401</sup> See *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1058 (7th Cir. 2016) (“Plaintiffs, by moving for class certification and partial summary judgment at the same time, came dangerously close to precluding review of the class certification decision. Had the district court chosen to decide Plaintiffs’ motion for partial summary judgment prior to deciding class certification, the rule against one-way intervention may have precluded certification.”); *Kerkhof v. MCI WorldCom, Inc.*, 282 F.3d 44, 55 (1st Cir. 2002) (holding that trial court did not abuse discretion in denying class certification after granting summary judgment in favor of plaintiff, because “[p]ost-judgment certification also would frustrate the opt-out mechanism for Rule 23(b)(3) classes provided in Rules 23(c)(2) and (c)(3), which were intended to avoid situations in which class members could choose to join only when the judgment favored the class”); *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 273 (10th Cir. 1977) (“[D]elay in making a decision on certification of the class until after the trial on the merits appears to be a procedure which is not in harmony with the literal terms of Rule 23(c)(1) or with many of the cases”).

<sup>402</sup> See *Novella v. Westchester Cnty.*, 661 F.3d 128, 135–37, 148 (2d Cir. 2011) (remanding class certification determination to district court, on other grounds, after summary judgment granted to plaintiff); *Postow v. OBA Fed. Sav. & Loan Ass’n*, 627 F.2d 1370, 1384 (D.C. Cir. 1980) (“Thus the present state of the law does not necessarily preclude class certification after a judgment on the merits in Rule 23(b)(3) class actions; it suggests there may be equitable reasons for allowing post-judgment certification in some cases. We believe this is such a case.”).

<sup>403</sup> *Postow*, 627 F.2d at 1372.

summary judgment to the plaintiffs on Count II of the complaint and its subsequent grant of class certification on the same count.<sup>404</sup>

Earlier in the case, Oriental sought, and was denied, summary judgment on Count II of the complaint.<sup>405</sup> Simultaneously, the district court certified Count II as a class action.<sup>406</sup> The district court then granted the plaintiffs’ motion for summary judgment on Count II and vacated the opinion certifying Count II as a class action, pending appeal of the summary judgment rulings.<sup>407</sup> Months later, the district court recertified the class.<sup>408</sup> After the class was recertified, notice was sent to potential class members that did not state that the plaintiffs had prevailed on Count II and included a disclaimer stating that “those who did not ask to be excluded [from the class] would be bound ‘whether the court’s ruling was favorable or not.’”<sup>409</sup>

In affirming, the D.C. Circuit explained that “there may be equitable reasons for allowing post-judgment certification in some cases” and that “taking the complicated sequence of events in this case into consideration[,]” it “believe[s] this is such a case.”<sup>410</sup> Specifically, the court relied on the fact that the class was originally certified—and then decertified—before plaintiff’s motion for summary judgment and that “the notice to potential class members did not inform them as to the existence of any judgment in their favor, thus reducing substantially the ‘one way street’ danger of post-judgment certifications.”<sup>411</sup>

In general, absent unique circumstances like those in *Postow*, a plaintiff may not seek summary judgment prior to class certification.

### ***B. Defendants’ Motions For Summary Judgment***

Unlike plaintiffs, defendants in putative class actions may generally choose to move for summary judgment before or after class certification.<sup>412</sup> Whether a defendant should move for summary judgment before or after class certification involves an analysis of several risks and benefits.

When a defendant successfully moves for summary judgment after a class has been certified, the defendant successfully precludes similar claims from members of the class.<sup>413</sup> In other words, a successful post-certification motion for summary judgment will terminate the litigation, within the

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<sup>404</sup> *Id.*

<sup>405</sup> *Id.* at 1383 n.30.

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

<sup>410</sup> *Id.* at 1383–84.

<sup>411</sup> *Id.* at 1383.

<sup>412</sup> See *Toben v. Bridgestone Retail Operations, LLC*, 751 F.3d 888, 890, 896 (8th Cir. 2014) (affirming grant of summary judgment in favor of defendant prior to decision on class certification); *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 93 (D.C. Cir. 2001) (affirming grant of summary judgment in favor of defendant prior to decision on class certification).

<sup>413</sup> *Cooper v. Fed. Rsr. Bank of Richmond*, 467 U.S. 867, 874 (1984) (“There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation.”).

scope of the summary judgment decision, as between the defendant, the named plaintiffs, and all class members.

On the other hand, a defendant’s successful motion for summary judgment before class certification only resolves claims as between the defendant and the named plaintiffs—not the putative class members of the yet-to-be-certified class action.<sup>414</sup>

In other words, a defendant’s successful pre-certification motion for summary judgment will generally not prohibit a class action from proceeding if plaintiff’s counsel can find another named plaintiff to represent the proposed class.<sup>415</sup> Nor will it prohibit would-be class members from individually asserting similar claims against the defendant in the future.<sup>416</sup> Similarly, defendants who wish to settle a plaintiff’s claims would be well advised to consider the risk of future litigation when settling named plaintiff’s claims prior to certification.<sup>417</sup>

### *C. Defendants’ Strategic Considerations in Moving for Summary Judgment*

While a defendant’s successful post-certification motion for summary judgment has a much wider preclusive effect on future claims, a pre-certification motion for summary judgment can still be advantageous for several reasons.

For example, the summary judgment decision itself can serve as precedent when seeking to demonstrate the invalidity of any future class or individual claims. If the summary judgment motion is successful, it also will likely require counsel for the plaintiff to find a new class representative to maintain the class action,<sup>418</sup> which is made more difficult by the need find a named plaintiff that is (1) materially distinguishable from the former named plaintiffs yet (2) still adequately representative of the class.

These factors ultimately may discourage future litigation against a defendant, effectively reaching the same result as if the defendant had moved for summary judgment after class certification. At the same time, it can save litigation costs that would have been incurred had the defendant waited

<sup>414</sup> See, e.g., *Hartley v. Suburban Radiologic Consultants, Ltd.*, 295 F.R.D. 357, 368 (D. Minn. 2013) (“By choosing to file a motion for summary judgment prior to the determination of class certification issues, defendants waive their right to obtain a ruling that will be binding upon the class”).

<sup>415</sup> See *Phillips v. Ford Motor Co.*, 435 F.3d 785, 787 (7th Cir. 2006); but see *Bernor v. Takeda Pharms. Am., Inc.*, No. LACV1204856VAPJPRX, 2018 WL 588563, at \*4 (C.D. Cal. Jan. 25, 2018) (substitution not possible where named plaintiffs settled and released claims before certification because there was no longer a case or controversy).

<sup>416</sup> See *Muhammad v. Giant Food Inc.*, 108 F. App’x 757, 765 n.5 (4th Cir. 2004) (explaining that, in the context of a pre-certification motion for summary judgment, “[w]hile the rejection of the named employees’ individual claims is binding as to those employees, it does not preclude later efforts to certify a class action against Giant or bar any individual claims that might be asserted in such an action.”).

<sup>417</sup> Compare *Bernor*, 2018 WL 588563, at \*4 (no substitution possible where all named plaintiffs released their claims) with *Amey v. Cinemark USA Inc.*, No. 13-CV-05669-WHO, 2018 WL 3956326, at \*4 (N.D. Cal. Aug. 17, 2018) (because she had not released her right to appeal, plaintiff who settled her claims after denial of certification was allowed to pursue class certification a second time when appellate court reversed denial); see also *Narouz v. Charter Commc’ns., LLC*, 591 F.3d 1261, 1264 (9th Cir. 2010) (explaining when a settlement agreement might permit a plaintiff to maintain a “personal stake” in the class claims).

<sup>418</sup> See *Chavez v. Ill. State Police*, 251 F.3d 612, 630 (7th Cir. 2001) (“[If] the court determines that the named plaintiffs’ claims lack merit, such a decision ordinarily, though not invariably, disqualifies the named plaintiffs as proper representatives, thus resolving the issue of class certification”); *Hardy v. City Optical*, 39 F.3d 765, 770 (7th Cir. 1994) (“At that point either another class representative must be found or the suit is kaput”).

until after certification to move for summary judgment. Specifically, it can save defendants the cost of conducting often expensive class-wide discovery.<sup>419</sup>

Accordingly, defendants should carefully weigh the risks and benefits of pre- and post-certification motions for summary judgment to determine which is more advantageous in their particular matter.

#### IV. Appealing Class Certification in Federal Court

A court's decision to grant or deny class certification may be immediately appealable. While granting or denying class status is not a "final" decision that necessarily ends the suit, and thus not appealable as a right,<sup>420</sup> several strategies exist to allow parties to seek immediate review.

##### A. Rule 23(f)

Under the Federal Rules of Civil Procedure, a court of appeals may permit an appeal of a decision granting or denying class certification.<sup>421</sup> Defendants wishing to appeal class certification must file a petition for permission to appeal with the clerk of the relevant circuit court within 14 days of the certification order being entered (45 days if the federal government is a party to the suit).<sup>422</sup>

The timeline for raising a Rule 23(f) appeal can be tricky. The 14-day time period to appeal cannot be extended for any reason.<sup>423</sup> However, if a party files a motion to reconsider with the district court within that 14-day period, the 14-day window restarts when the district judge rules on the motion to reconsider.<sup>424</sup> The interaction between deadlines is critical. Parties have 20 days to file a motion to reconsider, but failing to file that motion within 14 days of entry means that the certification order was unchallenged as of the expiration of the 14-day appeal window.<sup>425</sup> Put another way, Rule 23(f) cannot be invoked if class certification was unchallenged within 14 days of entry.

Rule 23(f) is discretionary. Courts of appeals have slightly different frameworks in determining whether to hear a class certification appeal. Some Circuits have adopted a more restrictive approach to granting appeals, requiring that petitioners show: (1) that the certification order implicates an important legal question justifying immediate review; (2) that the order effectively ends the litigation (the so-called "death knell" doctrine); or (3) that the order was very likely

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<sup>419</sup> See *Vitello v. Natrol, LLC*, No. 4:18-CV-00915-SEP, 2021 WL 1222423, at \*5 (E.D. Mo. Mar. 31, 2021) (resolving summary judgment before certification "could fully dispose of [Plaintiff's] claims and protect both parties from the costs of further litigation").

<sup>420</sup> See 28 U.S.C. § 1291.

<sup>421</sup> FED. R. CIV. P. 23(f).

<sup>422</sup> *Id.*

<sup>423</sup> See *Nutraceutical Corp. v. Lambert*, 586 U.S. 188, 195–96 (2019). Note that the Supreme Court also held in this case that the 14-day filing period is non-jurisdictional, which means that late filings may be accepted if the opposing party fails to object.

<sup>424</sup> *Id.* at 197; *Lambert v. Nutraceutical Corp.*, 783 F. App'x 720, 722 (9th Cir. 2019) (holding that a motion to reconsider filed 20 days after class certification was denied did not "resuscitate" the filing period because the opportunity to appeal under 23(f) had lapsed after 14 days).

<sup>425</sup> *Lambert*, 783 F. App'x at 722.

wrong.<sup>426</sup> Other circuits, conversely, have embraced a “more liberal standard” for hearing appeals, permitting appeals where “class certification risks placing inordinate pressure on defendants to settle” or when hearing the appeal may facilitate development of the law, in addition to the circumstances identified by other circuits.<sup>427</sup>

In addition to the broad categories of cases discussed above, courts also will consider the factual development of the particular case at issue. Where relatively little discovery has been done, courts are more skeptical of hearing an appeal on the merits of class certification.<sup>428</sup> Similarly, courts have been reluctant to grant review where settlement appears imminent or where financial changes (such as bankruptcy) are expected to affect one of the parties.<sup>429</sup>

In the rare circumstances where there is a putative class of defendants, courts of appeals treat defendant classes differently than plaintiff classes. Whereas certification of a plaintiff class can drastically inflate the potential damages a defendant faces, certification of a class of defendants is less likely to warrant immediate review because the potential liabilities of each defendant remain constant.<sup>430</sup>

The court in *Prado-Steiman* illustrated how all these considerations look in practice. In that case, a putative class of disabled plaintiffs eligible for Medicaid in Florida alleged that Florida officials had withheld care and denied procedural rights to disabled individuals receiving at-home care.<sup>431</sup> Defendants petitioned for 23(f) review of the district court’s certification order.

The Eleventh Circuit ultimately permitted the 23(f) appeal, but it acknowledged that it was a close call. First, the court rejected defendants’ argument that the large size of the potential class created an “irresistible pressure to settle.”<sup>432</sup> The court reasoned that, when a class seeks only injunctive relief (as plaintiffs did in this case), the economic pressure on defendants is far less than when monetary damages are sought.<sup>433</sup> For the same reason, the court was unconcerned that the certification order defined the class vaguely, reasoning again that a vague class definition would have “serious implications” if monetary damages were sought instead of purely injunctive relief.<sup>434</sup>

The court credited defendants’ claim that certifying one large class instead of several subclasses was unwise, but it explained that an unwise decision does not necessarily evince a “profound error of law” such that immediate review is necessary.<sup>435</sup> In so doing, the court implied that defendants

<sup>426</sup> See, e.g., *Sumitoto Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005); *In re Johnson*, 760 F.3d 66, 71 (D.C. Cir. 2014). The Second Circuit adopted a slightly more stringent approach in *Sumitoto* than the Ninth by requiring that the certification effectively end the litigation and a “substantial showing that the district court’s decision is questionable.”

<sup>427</sup> *Laudato v. EQT Corp.*, 23 F.4th 256, 260 (3d Cir. 2022); see also *Simpson v. Dart*, 23 F.4th 706, 710 (7th Cir. 2022) (“...exercise of Rule 23(f) review is appropriate where an appeal may facilitate the development of the law”) (citation omitted); *Regents of the Univ. of Cal. v. Credit Suisse First Boston*, 482 F.3d 372, 379 (5th Cir. 2007) (permitting appeal where potential damages were so high that settlement pressure was “particularly acute”).

<sup>428</sup> See *Prado-Steiman v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000).

<sup>429</sup> *Id.*; *Lienhart v. Dryvit Sys.*, 255 F.3d 138, 144 (4th Cir. 2001).

<sup>430</sup> *Tilley v. TJX Cos.*, 345 F.3d 34, 37–38 (1st Cir. 2003).

<sup>431</sup> 221 F.3d at 1266, 1268–69.

<sup>432</sup> *Id.* at 1277.

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

bear a heavy burden in showing that a certification order was likely erroneous. The court was further reluctant to address the erroneousness prong because the factual record was not fully developed, meaning that greater discovery might lead to the district court refining or decertifying the class at a later time regardless.<sup>436</sup>

However, the *Prado-Steiman* court granted the appeal because of the importance of clarifying the legal rights and responsibilities of the parties.<sup>437</sup> Addressing class certification issues early was superior in that case because both plaintiffs and defendants were effectively stuck in limbo with respect to their care or their financial obligations, respectively, until the class issue was decided.<sup>438</sup>

*Prado-Steiman* shows that procedural or practical concerns can move the needle even when the facts of the case may not otherwise favor permitting a 23(f) appeal.

One practical note: Rule 23(f) by its terms does not stay district court proceedings while an appeal is pending. Either the district court or court of appeals may issue a stay in its discretion.<sup>439</sup> But the delays caused by staying litigation pending appeal motivate judges to reserve stays for situations where “the costs of pressing ahead in the district court exceed the costs of waiting.”<sup>440</sup>

### ***B. Standard of Review for Rule 23(f) Petitions***

When a court of appeals agrees to hear a Rule 23(f) appeal, the certification order is reviewed for abuse of discretion.<sup>441</sup> Any factual findings that underpin the class certification are only disturbed if those findings were clearly erroneous.<sup>442</sup> This means that courts of appeal generally will review a class certification with deference to the lower court.<sup>443</sup> The only occasion where an appellate court will not review a lower court’s class certification ruling deferentially is when the district court has allegedly misstated the law.<sup>444</sup>

The Second Circuit has indicated occasionally, however, that it views denials of class certification with less deference than it accords grants of class certification.<sup>445</sup> Defendants should be aware that responding to appeals of class denials may require more attention in the Second Circuit than elsewhere.

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<sup>436</sup> *Id.* at 1278. Because there was so much outstanding discovery, the court also noted that an appeal would likely not have advanced the litigation either way.

<sup>437</sup> *Id.*

<sup>438</sup> *See id.*

<sup>439</sup> FED. R. CIV. P. 23(f)

<sup>440</sup> *Blair v. Equifax Check Servs.*, 181 F.3d 832, 835 (7th Cir. 1999).

<sup>441</sup> *See, e.g., Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 477 (8th Cir. 2016); *Levitt v. J.P. Morgan Sec., Inc.*, 710 F.3d 454, 464 (2d Cir. 2013).

<sup>442</sup> *Ebert*, 823 F.3d at 477. A lower court ruling is “clearly erroneous” when “the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed” even when giving the benefit of the doubt to the lower court. *United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948).

<sup>443</sup> *See Parker v. Time Warner Ent. Co., L.P.*, 331 F.3d 13, 18 (2d Cir. 2003).

<sup>444</sup> *Id.*

<sup>445</sup> *Levitt*, 710 F. 3d at 454, 464 (quoting *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 480 (2d. Cir. 2008)). However, at least one subsequent opinion has denied such a discrepancy. *See In re Petrobras*, 862 F.3d at 261 n.11 (2d Cir. 2017).

An example of abuse of discretion can be found in *Ebert v. Gen. Mills, Inc.* There, a putative class of property owners living near a former General Mills factory sued General Mills for declines in property values after chemical waste from the factory had migrated into the local soil. The plaintiffs sought property damages and injunctive relief to compel remediation.<sup>446</sup>

Finding that General Mills' alleged conduct and the remedies sought were common to the whole class, the district court bifurcated the action into a liability and a damages phase and certified the class under both Rule 23(b)(2) and (b)(3).<sup>447</sup> This permitted common questions of liability to be litigated for both injunctive and monetary relief, first under 23(b)(2), and then, if liability was established, to reconsider whether to certify a (b)(3) class for money damages.<sup>448</sup>

In reviewing the class certification, the Eighth Circuit found that the district court abused its discretion in certifying the class under either 23(b)(2) or (b)(3).<sup>449</sup> First though, the court of appeals declined to disturb the district court's determination that there was sufficient commonality among the class, despite noting some reservations about the decision.<sup>450</sup> The court found the district court abused its discretion by excluding issues that would inevitably need to be litigated in order to certify a 23(b)(3) class.<sup>451</sup> Had the court not excluded these questions, it would have been clear that individual issues predominated over common ones.<sup>452</sup> For similar reasons, certification under 23(b)(2) was an abuse of discretion because no single injunction would remedy each plaintiff's harm.<sup>453</sup>

### C. Circuit-by-Circuit Statistics in Granting Rule 23(f) Appeals

A defendant's calculus in pursuing an appeal under Rule 23(f) should include the likelihood of success at the particular circuit court that will hear its appeal. As a point of reference, below is a table summarizing how each of the 12 appellate circuits has responded to 23(f) petitions challenging class certification between 2015 and 2025.<sup>454</sup> The relationship between the low number of appeals permitted and the reversal rate should be noted. Because courts of appeals infrequently grant 23(f) appeals, the relatively high reversal rate suggests courts are discerning about which appeals are permitted.

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<sup>446</sup> 823 F.3d at 475–76.

<sup>447</sup> *Id.* at 476.

<sup>448</sup> *See, e.g., Eubanks v. Billington*, 110 F.3d 87, 96 n.14 (D.C. Cir. 1997); *see also* 2 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra* note 1, § 4:38. The efficiency of this approach is that it determines liability for the whole class and then permits plaintiffs with unique monetary damages to opt-out of the class, if desired, as required by 23(b)(3) without plaintiffs and defendants having to relitigate liability across multiple suits.

<sup>449</sup> *Ebert*, 823 F.3d at 480.

<sup>450</sup> *Id.* at 478.

<sup>451</sup> The Eighth Circuit identified questions like whether a plaintiff acquired their property before or after the contamination, whether General Mills had already mitigated the exposure on specific properties, whether some properties were more susceptible to chemical migration, or whether migration had occurred on a particular property at all. *Id.* at 479–81.

<sup>452</sup> *Id.* at 479.

<sup>453</sup> *Id.* at 481.

<sup>454</sup> This table reflects only cases where an order *granting* certification was challenged on 23(f) appeal. It excludes cases where plaintiffs challenged an order denying class certification. It also excludes 23(f) appeals which were mooted, dismissed for lack of jurisdiction, or where a court of appeals vacated and remanded a certification order due to factors besides the merits (e.g. changes in law).

<u>Circuit</u>	<u>Total 23(f) Appeals of Certification Considered</u>	<u>Total Reversing Class Certification</u>	<u>Reversal Rate</u>
First Circuit	2	1	50%
Second Circuit	10	8	80%
Third Circuit	20	10	50%
Fourth Circuit	10	9	90%
Fifth Circuit	14	10	71%
Sixth Circuit <sup>455</sup>	16	11	69%
Seventh Circuit	8	5	63%
Eighth Circuit	8	5	63%
Ninth Circuit	25	12	48%
Tenth Circuit	4	2	50%
Eleventh Circuit	6	4	67%
D.C. Circuit	2	1	50%

## V. State Analogs for Class Certification Appeals

While Rule 23(f) applies only to class action certification orders in federal court, various state analogs exist as well. Class action defendants in state court are not without the ability to promptly appeal an adverse ruling on certification. Below are examples of appellate procedures in some high-traffic state courts.

### A. California

In California, appeals of class certification are subject to similar review as in federal court. While there is no particular rule of California civil procedure that permits immediate appeal of

<sup>455</sup> The Sixth Circuit has a unique approach to handling 23(f) petitions. Unlike other circuits, the Sixth Circuit often publishes full opinions even when denying leave to appeal. In some instances, it will grant permission to appeal and decide the appeal at the same time. While denying an appeal has the same effect as affirming a lower court ruling, this chart excludes cases where the sole judgment is denial of permission to appeal—in order to maintain consistency with how other the reversal rate was calculated for other circuits.

certification orders, California courts have permitted appeals of class certification via writs of mandate.<sup>456</sup> A writ of mandate is analogous to the federal mandamus power.<sup>457</sup>

Like their federal counterparts, California courts review appeals of class certification for abuse of discretion.<sup>458</sup> In general, a certification ruling “supported by substantial evidence” will be upheld at this stage.<sup>459</sup> The California Supreme Court has elaborated that “[any] valid pertinent reason stated will be sufficient to uphold the order.”<sup>460</sup> If there is substantial evidence to support certification, certification will only be reversed if improper criteria were used, or if “erroneous legal assumptions were made.”<sup>461</sup>

*Wilson v. The La Jolla Group* is an instructive case in this regard. There, plaintiffs sought class certification on multiple causes of action for violations of labor laws by their employer, La Jolla Group.<sup>462</sup> The trial court denied class certification on the grounds that there were too many individual questions because employees worked longer or shorter hours, in different locations, and at different wage rates.<sup>463</sup> On appeal, the appellate court broadly affirmed this determination because plaintiffs failed to show the trial court had behaved unreasonably, even if class certification could have been possible.<sup>464</sup>

However, the appellate court reversed the trial court as to the plaintiffs’ claim that La Jolla Group failed to provide itemized wage statements to employees as required by California law.<sup>465</sup> Because all plaintiffs were classified as independent contractors instead of employees, the appellate court determined that, as to this claim, whether the plaintiffs were misclassified was a common question that determined La Jolla Group’s liability to the entire putative class.<sup>466</sup> Since the trial court’s sole stated reason for denying certification on that claim was a lack of commonality, the certification order was not supported by substantial evidence.<sup>467</sup>

## **B. Illinois**

Illinois specifically permits interlocutory appeals of class certification orders.<sup>468</sup> As in federal court, appellate review of class certification orders is discretionary.<sup>469</sup> Unlike in federal court, proceedings in the trial court are automatically stayed if the appellate court grants review of the certification order.<sup>470</sup> An appellate court’s decision not to accept an interlocutory appeal is

<sup>456</sup> See *Apple Inc. v. Superior Court*, 19 Cal. App. 5th 1101, 1125–26 (Cal. Ct. App. 2018).

<sup>457</sup> CAL. CIV. PROC. CODE § 1084.

<sup>458</sup> *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 326 (Cal. 2004).

<sup>459</sup> *Id.* at 327.

<sup>460</sup> *Caro v. Procter & Gamble, Co.*, 18 Cal. App. 4th 644, 656 (Cal. 1993); accord *Barriga v. 99 Cents Only Stores LLC*, 51 Cal. App. 5th 299, 337 n. 15 (Cal. Ct. App. 2020).

<sup>461</sup> *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 436 (Cal. 2000).

<sup>462</sup> 61 Cal. App. 5th 897, 904 (Cal. Ct. App. 2021).

<sup>463</sup> *Id.* at 907.

<sup>464</sup> *Id.* at 913.

<sup>465</sup> *Id.* at 920.

<sup>466</sup> *Id.*

<sup>467</sup> *Id.* at 921–22.

<sup>468</sup> ILL. SUP. CT. R. 306(a)(8).

<sup>469</sup> 306(b)(5).

<sup>470</sup> 306(c)(6). The appellate court may choose to vacate the stay if good cause is shown to do so.

generally undisturbed, but the Illinois Supreme Court in its supervisory capacity may instruct an appellate court to review a particular petition.<sup>471</sup>

As in other jurisdictions, appeals of certification orders are reviewed for abuse of discretion.<sup>472</sup> Abuse of discretion in Illinois is defined as exercising authority outside “the framework of the civil procedure rule governing class actions” or by applying “impermissible legal criteria.”<sup>473</sup> The Illinois Supreme Court has further clarified that class action rules in Illinois are patterned after the FRCP 23 and that federal decisions interpreting Rule 23 are highly persuasive.<sup>474</sup>

Illinois courts have shown a willingness to review a trial court’s treatment of the validity of class action claims.<sup>475</sup> Because a class may not be certified unless the named plaintiffs have a cause of action, the existence of an actionable claim is a threshold question for certification.<sup>476</sup> Illinois courts review these questions *de novo*—not for abuse of discretion—because validity is a question of law not committed to a trial court’s discretion.<sup>477</sup>

In *Alley 64 Inc. v. Society Insurance*, for example, the appellate court reversed an order granting class certification because the plaintiffs had failed to state an actionable claim.<sup>478</sup> In that case, a putative class of restaurants sued their insurer for failing to pay for restaurant closures pursuant to COVID-19 executive orders prohibiting on-site dining.<sup>479</sup> The plaintiffs alleged that their insurance policies insured them against business losses incurred while “operations are suspended due to contamination.”<sup>480</sup> While the trial court granted certification, the appellate court reversed because the plaintiffs had failed to allege their premises were “contaminated” with COVID-19 or that their operations were suspended *because* of any such contamination.<sup>481</sup> Because the court found that the named plaintiff had failed to plausibly allege that the relevant insurance provision was applicable, it therefore held that a class action could not be sustained.<sup>482</sup>

Defendants should take notice of Illinois’s less deferential review of class allegations on interlocutory appeal. In *Alley 64*, the defendant, Society Insurance, was able to contest class allegations on three successive occasions. First, it motioned for a judgment on the pleadings, which

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<sup>471</sup> See *Saba Software, Inc. v. Deere & Co.*, 29 N.E.3d 85, 87 (Ill. App. Ct. 2014). Though the Court of Appeals denied a petition for interlocutory review, the appellant sought leave to appeal at the Illinois Supreme Court. The Supreme Court declined to hear the appeal, but simultaneously vacated the lower court’s denial and instructed the Court of Appeals to hear the appeal.

<sup>472</sup> See *Demesa v. Adams*, 994 N.E.2d 1007, 1018 (Ill. App. Ct. 2013); *LVNV Funding, LLC v. Davis*, 181 N.E.3d 896, 898 (Ill. App. Ct. 2020).

<sup>473</sup> *Smith v. Ill. Cent. R.R. Co.*, 860 N.E.2d 332, 336 (Ill. 2006).

<sup>474</sup> *Id.* at 448.

<sup>475</sup> See, e.g., *Barbara’s Sales, Inc. v. Intel Corp.*, 879 N.E.2d 910, 925 (Ill. 2007); *Alley 64, Inc. v. Society Ins.*, 206 N.E.3d 1109, 1127–28 (Ill. App. Ct. 2022); *Turnipseed v. Brown*, 908 N.E.2d 546, 551 (Ill. App. Ct. 2009).

<sup>476</sup> *Barbara’s Sales*, 879 N.E.2d at 925 (quoting *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 827 (Ill. 2005)).

<sup>477</sup> See *Turnipseed*, 908 N.E.2d at 552.

<sup>478</sup> 206 N.E.3d at 1134.

<sup>479</sup> *Id.* at 1111.

<sup>480</sup> *Id.* at 1113.

<sup>481</sup> *Id.* at 1132. The court noted that the executive order was not targeted at *restaurants* for being contaminated with the virus but rather at reducing the spread of the virus by and among the *people* who would congregate at the restaurants.

<sup>482</sup> *Id.* at 1134.

was denied.<sup>483</sup> Then, Society was able to contest class certification, which it also lost. Finally, Society was able to seek review under Rule 306(a)(8) by attacking certification for lack of an actionable claim. For defendants, this strategy can provide multiple opportunities to end class action litigation at an early stage.

### C. *New York*

In New York, class certification orders may be appealed as a matter of right under New York Civil Practice Law and Rules § 5701(a), which permits appeal of all final and interlocutory judgments. On appeal, New York deviates from other jurisdictions in reviewing class certification orders. Whereas other jurisdictions review certification orders for abuse of discretion, the New York Appellate Division has the *same* discretion to determine class certification as a trial court.<sup>484</sup>

When reviewing a trial court’s decision to grant or deny class certification, New York appellate courts may affirm or reverse that decision “even when there has been no abuse of discretion.”<sup>485</sup> For both plaintiffs and defendants, this presents a second opportunity to litigate issues of class certification anew.

In *In re Long Island Authority Hurricane Sandy Litigation*, for example, the New York Appellate Division reversed a trial court’s order granting class certification because it found that a class action would be an inefficient means of managing the litigation at hand.<sup>486</sup> In *Konstantynovska v. Friendly Home Care, Inc.*, the New York Appellate Division rejected the trial court’s preliminary finding that a putative class of home health aides had produced evidence that their employer had a policy or practice of denying breaks; as a result, it reversed certification.<sup>487</sup> Similarly, in *Osarczuk v. Associated Univs., Inc.*, the New York Appellate Division reversed a class certification order in light of “complicated issues of fact” that applied to each potential class member, finding that a class action was “not the superior method” of adjudicating their claims.<sup>488</sup>

However, the discretion granted to the New York Appellate Division cuts both ways. For example, in *Diamond v. New York City Hous. Auth.*, the court reversed an order denying class certification to tenants who claimed that the New York City Housing Authority failed to provide adequate heating and/or hot water to their properties.<sup>489</sup> While the trial court had determined that the class lacked commonality because liability would need to be determined with regard to deficiencies in each property’s heating and water systems, the New York Appellate Division concluded that the large number of units affected suggested a system-wide problem that was best managed by a class action.<sup>490</sup> Therefore, the New York Appellate Division ordered the class be certified.<sup>491</sup>

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<sup>483</sup> *Id.* at 1111.

<sup>484</sup> *City of New York v. Maul*, 929 N.E.2d 366, 372 (N.Y. 2010).

<sup>485</sup> *Id.*

<sup>486</sup> *Matter of Long Is. Power Auth. Hurricane Sandy Litig. v. Long Is. Power Auth.*, 161 N.Y.S.3d 174, 178 (N.Y. App. Div. 2021).

<sup>487</sup> *Konstantynovska v. Friendly Home Care, Inc.*, 241 A.D.3d 1537, 1539 (2025).

<sup>488</sup> *Osarczuk v. Associated Univs., Inc.*, 918 N.Y.S.2d 538, 540 (N.Y. App. Div. 2011).

<sup>489</sup> 118 N.Y.S.3d 77, 80 (N.Y. App. Div. 2020).

<sup>490</sup> *Id.*

<sup>491</sup> *Id.*

Defendants litigating in New York courts should thus be aware that, while they have multiple avenues to challenge certification, defeating certification is not necessarily the end of the road. Likewise, defendants should be aware that New York expressly does not require the same analysis of class prerequisites that federal courts do. New York interprets the class requirements broadly because its class action rules were intended to be a “liberal substitute for the narrow class action legislation which preceded it.”<sup>492</sup>

#### **D. Texas**

Texas has a direct analog to Rule 23(f). Under § 51.014(a)(3) of the Texas Civil Practice and Remedies Code, a party may appeal an order granting or denying class certification. All trial court proceedings are stayed pending the resolution of that appeal.<sup>493</sup> As in most other jurisdictions, appeals of class certification are reviewed for abuse of discretion.<sup>494</sup>

In reviewing for abuse of discretion, Texas courts generally employ the same practices as federal courts would under Rule 23(f).<sup>495</sup> The Texas Supreme Court has specifically rejected what it calls a “certify now and worry later” approach to class certification.<sup>496</sup> While a court does not abuse its discretion by certifying a class that may later fail, its certification order must resolve all legal disputes affecting the requirements for class certification and “respond to the defendants’ legitimate protests of individualized issues that could preclude class treatment.”<sup>497</sup> The Texas Supreme Court has emphasized repeatedly the trial court’s responsibility to anticipate how a case is likely to be litigated in determining whether class certification is appropriate.<sup>498</sup>

For example, in *Compaq Comput. Corp. v. Lapray*, a trial court failed to critically analyze the choice-of-law rules that might govern a nationwide class action alleging a breach of warranty.<sup>499</sup> The trial court had initially determined that Texas law would be applied to all claims unless the defendant sought to litigate an issue where Texas law differed with another applicable state.<sup>500</sup> A Texas appellate court affirmed this order on appeal, but the Texas Supreme Court reversed.

The trial court abused its discretion in two ways in *Compaq*. First, by punting on making a determination of which states’ laws would apply, it shifted its responsibility to identify and analyze

<sup>492</sup> *Maul*, 929 N.E.2d at 372.

<sup>493</sup> TEX. CIV. PRAC. & REM. CODE § 51.014(b).

<sup>494</sup> *Henry Schein v. Stromboe*, 102 S.W.3d 675, 691 (Tex. 2002). While not fundamentally different from other jurisdictions, the Texas Supreme Court has made explicit that review is done with respect to a trial court’s “actual, not presumed, conformance with [the law].” That is, not every presumption must be drawn in favor of the trial court. Appellate courts may not rely purely on a trial court’s finding that the requirements of class certification are met. *See Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 435–36 (Tex. 2000).

<sup>495</sup> *See Mosaic Baybrook One, L.P. v. Cessor*, 668 S.W.3d 611, 617 n.3 (Tex. 2023) (“[W]e have found federal decisions interpreting current federal class action requirements instructive”).

<sup>496</sup> *Bernal*, 22 S.W.3d at 436.

<sup>497</sup> *Mosaic*, 668 S.W.3d at 618 (quoting *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 546 (5th Cir. 2020)). *See also Prantil*, 986 F.3d at 579 (“A certification order ought to reflect the district court’s consideration of a defendant’s weightiest arguments against certification”).

<sup>498</sup> *See Mosaic*, 668 S.W.3d at 618; *Bernal*, 22 S.W.2d at 436; *Am. Campus Cmtys., Inc. v. Berry*, 667 S.W.3d 277, 283 (Tex. 2023).

<sup>499</sup> 135 S.W.3d 657, 673 (Tex. 2004).

<sup>500</sup> *Id.*

how the case would likely be litigated, prior to making a certification order, on to the defendant.<sup>501</sup> Second, the Texas Supreme Court identified several potential differences in state laws that could affect aspects of a breach of warranty claim, such as reliance or remedies.<sup>502</sup> Because the trial court had not done a rigorous analysis of potential conflicts of law at the outset, it could not reasonably find that individual questions of law did not predominate.<sup>503</sup>

More recently, a Texas appellate court has reversed a certification order in a putative class action where the defendant had equitable remedies available.<sup>504</sup> Because, by definition, equitable defenses require an analysis of the individual facts in any given case, a class action involving equitable defenses would be difficult to maintain in a fair or efficient way.<sup>505</sup> Because analyzing defenses is essential to determining how a case is likely to be litigated, a failure of a trial court to rigorously engage with defenses can rise to abuse of discretion.<sup>506</sup>

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<sup>501</sup> *Id.* at 672.

<sup>502</sup> *Id.* at 675–81.

<sup>503</sup> *Id.* at 681.

<sup>504</sup> *Am. Gen. Life Ins. Co. v. Dickson*, No. 09-21-00029-CV, 2022 WL 2719633, at \*8 (Tex. App. July 14, 2022).

<sup>505</sup> *See id.*

<sup>506</sup> *Mosaic*, 668 S.W.3d at 627.

## **Part Four** **Arbitration**

### **I. Background: The Federal Arbitration Act**

The Federal Arbitration Act (FAA) provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>507</sup> The Supreme Court has continuously emphasized that the “central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms.”<sup>508</sup>

### **II. Class Action Waivers & Mass Arbitration**

Class action waivers in arbitration agreements reduce the risk of defending class actions in court. An arbitration agreement containing a class action waiver is governed by the FAA. If a claim falls within the parties’ arbitration agreement, each party is entitled to ask a court to resolve that claim through arbitration, and recent Supreme Court decisions have clarified the sequencing and appellate posture of such motions.<sup>509</sup>

The FAA espouses a policy favoring arbitration, which has often been cited by courts, including the Supreme Court, rejecting challenges to class action waivers contained in arbitration provisions.<sup>510</sup> For instance, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation*, the Supreme Court held that “imposing class arbitration on parties who had not agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act.”<sup>511</sup> The *Stolt-Nielsen* decision clarified that, under the FAA, arbitration means bilateral arbitration, not class-wide arbitration.

State laws or rules purporting to limit or prohibit arbitration have generally been rejected as preempted by the FAA. In the landmark *AT&T Mobility LLC v. Concepcion* decision, the Supreme Court invoked the supremacy of the FAA in rejecting the California state court’s decision on the unconscionability of class action waivers.<sup>512</sup> The California state court had held that class action waivers were unconscionable in certain consumer contracts.<sup>513</sup> The Supreme Court overruled the

<sup>507</sup> 9 U.S. Code § 2.

<sup>508</sup> *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684 (2010).

<sup>509</sup> *Coinbase, Inc. v. Suski*, 602 U.S. 143, 149-150 (2024).

<sup>510</sup> See 9 U.S.C. § 2 (“[A]n agreement in writing to submit to arbitration an existing controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.”); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (“Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 20 (2012); *New Prime Inc. v. Oliveira*, 586 U.S. 105, 120 (2019).

<sup>511</sup> *Stolt-Nielsen*, 559 U.S. at 687.

<sup>512</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341–44 (2011).

<sup>513</sup> *Id.*

California court, finding that states cannot circumvent the FAA's 'mandate to enforce arbitration agreements.<sup>514</sup>

In *Concepcion*, the arbitration agreement was consumer friendly in many ways. AT&T paid all arbitration costs for nonfrivolous claims; allowed proceedings in the customer's home county (including by phone or on written submissions); preserved a small-claims option; and barred fee-shifting against the consumer.<sup>515</sup> Most notably, if the arbitrator awarded more than AT&T's last written settlement offer, the clause guaranteed a \$7,500 minimum recovery and twice the consumer's reasonable attorneys' fees. The Supreme Court addressed those favorable features as it considered lower courts' reasons for concern, a provision disallowing class-wide arbitration. Finding such a term unconscionable interfered with the FAA; here, a state law unconscionability rule could not displace the FAA's supremacy.<sup>516</sup> By validating class action waivers and foreclosing state unconscionability doctrines that uniquely burden arbitration, *Concepcion* drove nationwide enforcement of consumer arbitration agreements.

### A. Enforcement of the FAA After *Concepcion*

Since the landmark decision in *Concepcion*, many federal and state courts have relied on *Concepcion* to uphold class action waivers in arbitration provisions.

After *Concepcion*, courts still carefully consider the enforceability of class action waivers, often focusing on whether the arbitration agreement was unconscionable. For example, in *O'Brien v. Am. Exp. Co.*, the court found that the arbitration agreement could be challenged because state law arguments of unconscionability could serve as a defense.<sup>517</sup> In *O'Brien*, the plaintiff sought discovery to argue the arbitration provision at issue was unconscionable. The court found that California and Utah law considered limiting discovery to prevent making an argument of unconscionability to be oppressive or surprising and therefore not allowed.<sup>518</sup> Similarly, in *Brewer v. Missouri Title Loans*, the court found that the arbitration agreement could be challenged as unconscionable under Missouri law and further concluded that the arbitration agreement was unconscionable and thus unenforceable.<sup>519</sup> In so finding, the court held that the imbalance of power in negotiating made the contract unenforceable, citing evidence that no consumer had successfully negotiated the arbitration contract previously.

Post-2019 decisions continue to emphasize that class or other representative arbitration is available only with clear, express contractual consent. In *Lamps Plus, Inc. v. Varela*, the Supreme Court held that ambiguity in an arbitration agreement cannot provide the basis to compel class arbitration under state contract principles, reinforcing bilateral-only arbitration absent an express class authorization.<sup>520</sup> The Supreme Court found that the FAA requires an affirmative, express contractual basis showing the parties agreed to class procedures. The Supreme Court reasoned that class arbitration fundamentally changes the nature and risks of arbitration, so silence or ambiguity

<sup>514</sup> *Id.* at 353.

<sup>515</sup> *Id.* at 337.

<sup>516</sup> *Id.* at 334.

<sup>517</sup> 2012 WL 1609957 (S.D. Cal. May 8, 2012).

<sup>518</sup> *Id.* at \*3-4.

<sup>519</sup> 364 S.W.3d 486 (Mo. 2012).

<sup>520</sup> *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 188 (2019).

preserves individualized, bilateral arbitration unless the contract clearly authorizes class-wide proceedings.

In *Epic Systems Corp. v. Lewis*, the Supreme Court confirmed that the FAA protects agreements requiring individualized arbitration and that the National Labor Relations Act does not displace that result.<sup>521</sup> At the same time, formation and scope disputes remain fact-intensive.

In 2024, the Supreme Court held that, where parties execute conflicting agreements—one delegating arbitrability to the arbitrator and a later one sending disputes to court—a court must resolve which contract governs before any delegation can operate.<sup>522</sup> When courts do compel arbitration, 9 U.S.C. § 3 requires a stay—not dismissal—upon a party’s request.<sup>523</sup> And if arbitration is denied, an interlocutory appeal triggers an automatic stay of district court proceedings under 9 U.S.C. § 16, preventing class litigation from advancing while arbitrability is reviewed.<sup>524</sup>

Courts have addressed timing issues related to considering class action waivers. The Fourth Circuit held that courts must address the implication of an arbitration clause containing a class action waiver prior to class certification, writing “Courts consistently resolve the import of class waivers at the class certification stage—before they certify a class, and usually as the first order of business . . . We think this is the only approach consistent with the nature of class actions and the logic of class waivers.”<sup>525</sup> Related timing rules now provide clear sequencing: courts decide which contract controls where terms conflict; they stay cases compelled to arbitration; and they stay litigation automatically when denials of arbitration are appealed.<sup>526</sup>

### ***B. Mass Arbitration***

Mass arbitration involves thousands of near-simultaneous arbitration demands, creating substantial filing and arbitrator fee exposure. Faced with the cost of filing and arbitrator fees, which may be in the millions of dollars for initial filings alone, some companies have preferred class action lawsuits over individual arbitrations. Recent litigation demonstrates the rise of mass arbitration.

Although companies have historically elected to enforce arbitration agreements, any party to an arbitration agreement may elect to enforce the relevant arbitration agreement (depending upon the arbitration agreement’s terms), and courts have enforced those contracts accordingly. For example, in *Abernathy v. DoorDash, Inc.*, , thousands of DoorDash couriers, alleging that they had incorrectly been classified as independent contractors, sought to compel arbitration under DoorDash’s arbitration clause.<sup>527</sup> The court compelled arbitration, concluding:

For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate

<sup>521</sup> *Epic Sys. Corp. v. Lewis*, 584 U.S. 511 (2018).

<sup>522</sup> *Suski*, 602 U.S. at 148.

<sup>523</sup> *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 744 (2023).

<sup>524</sup> *Id.*

<sup>525</sup> *In re Marriott Int’l, Inc.*, 78 F.4th 677, 686 (4th Cir. 2023)

<sup>526</sup> *Bielski*, 599 U.S. at 744.

<sup>527</sup> 438 F. Supp. 3d 1062 (N.D. Cal. 2020)

common rights . . . The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them . . . [I]n irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate.<sup>528</sup>

Another example of the use of mass arbitration is *In re TikTok, Inc. Consumer Priv. Litig.*<sup>529</sup> There, plaintiffs brought suit over TikTok’s alleged use of private information. The parties reached a settlement, but certain plaintiffs sought to opt out of the settlement agreement in order to arbitrate their claims. TikTok opposed, but the court allowed 851 individuals to opt out individually, subject to a determination that they met the opt-out criteria.

Courts have also clarified limits on judicial involvement when arbitration providers like the American Arbitration Association (AAA) terminate noncompliant filings. In *Wallrich v. Samsung* the Seventh Circuit addressed petitions to compel arbitration and to compel payment of \$4,125,000 in administrative fees after more than 35,000 Illinois consumers’ demands were filed.<sup>530</sup> The court held that the claimants had not carried their burden to prove the existence of arbitration agreements and, independently, that fee allocation and its consequences were committed by the parties’ contract to the administrator; once the AAA exercised its discretion to close the matters for nonpayment, a federal court could not order the business to pay fees not required by the agreement. There, claimants/petitioners provided names and addresses but no proof of being a Samsung customer. The court found that, without evidence of being a customer, which could have included receipts, confirmations of purchase, or affidavits from claimants, there was insufficient evidence of a contract that bound claimants and Samsung to the arbitration process. Further, the court found that, even if the contract required arbitration, claimants had gone through the arbitration process and that the court could not compel further arbitration when the AAA closed claims after claimants refused to advance the arbitration fees.<sup>531</sup>

Another recent lawsuit and a wave of related arbitrations illustrate the use of mass arbitration as a tool providing plaintiff leverage. In *Tubi, Inc. v. Keller Postman LLC*, filed in May 2024, the streaming service alleged that Keller Postman filed nearly 24,000 individual JAMS demands without adequate vetting and in breach of contractual informal dispute resolution requirements.<sup>532</sup> Widely followed, the case was dismissed in November 2025 after a confidential settlement that resolved the underlying arbitration claims.<sup>533</sup>

As a result of the trend toward mass arbitration, businesses have begun amending their mandatory arbitration clauses. Some companies have changed their arbitration agreements, opting for more defendant-friendly policies. For example, by including a mandatory pre-dispute resolution procedure, businesses can require that, to bring a claim whether in arbitration or otherwise, the

<sup>528</sup> *Abernathy*, 438 F. Supp. 3d at 1067–68.

<sup>529</sup> *In re TikTok, Inc., Consumer Priv. Litig.*, 617 F. Supp. 3d 904, 931–33 (N.D. Ill. 2022).

<sup>530</sup> *Wallrich v. Samsung Elecs. Am., Inc.*, 106 F.4th 609 (7th Cir. 2024).

<sup>531</sup> *Id.*

<sup>532</sup> Complaint at 2, *Tubi, Inc. v. Keller Postman LLC*, No. 1:24-cv-01616 (D.D.C. May 31, 2024).

<sup>533</sup> Mike Scarcella, *Fox’s Tubi Ends Lawsuit Against Keller Postman Over Mass Arbitration Claims*, REUTERS (Nov. 3, 2025), <https://www.reuters.com/legal/government/foxs-tubi-ends-lawsuit-against-keller-postman-over-mass-arbitration-claims-2025-11-03/>.

consumer must contact the business in a prescribed way with particular items in their notice of dispute in order to allow the parties to attempt to reach a resolution via a face-to-face or telephonic meet and confer. These provisions deter plaintiffs’ lawyers from pursuing a mass arbitration or class action. Other businesses have removed arbitration clauses from their contracts completely.<sup>534</sup>

AAA and JAMS, the two major arbitration providers, also recognized the rise of mass arbitration by implementing new rules to address the costs and risks of mass arbitration. The new AAA and JAMS policies lower certain up-front costs, add filing verifications, and centralize preliminary issues. These changes aim to reduce fee leverage in mass filings.<sup>535</sup>

Starting with AAA, in January 2024, AAA enacted changes to their Mass Arbitration Supplementary Rules and their Fee Schedule for Consumer and Employment Mass Arbitrations.<sup>536</sup> AAA’s revised Rules and Fee Schedule make it more affordable for businesses to obtain a process arbitrator. Instead of paying a “per claim” fee to appoint a process arbitrator, the new rules require a business to pay an up-front cost of \$8,125 and the process arbitrator’s hourly rate.<sup>537</sup> AAA also restructured up-front charges so that a flat, cohort-level initiation payment covers administrative review, an early administrative conference, and prompt appointment of the Process Arbitrator and/or a mediator; additional per-claim fees attach only as matters proceed beyond the process phase.<sup>538</sup>

This reduces the leverage that plaintiffs’ lawyers use when they threaten mass arbitrations. Previously, mass arbitration defendants faced the prospect of paying thousands or millions in “per claim” filing fees in order to defend themselves against frivolous or fraudulent claims. While businesses must still pay “per claim” filing fees for cases that proceed past the process arbitrator, the single up-front cost for a process arbitrator makes it substantially more affordable for businesses to assert a defense and dispose of non-meritorious claims. AAA has also extended mass arbitration procedures to additional dispute types beyond consumer and employment, such as B2B and construction claims.<sup>539</sup>

AAA’s Rules now require all filings to “include an affirmation that the information provided for each individual case is true and correct to the best of the [lawyer’s] knowledge.”<sup>540</sup> Thus, AAA’s new Rule will deter plaintiffs’ lawyers from abusing the arbitration system by exposing them to

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<sup>534</sup>Thomas I. Elkind, *Some Large Companies Are No Longer Requiring Consumers and Employees to Waive Class Action Claims*, JAMS: ADR INSIGHTS (Apr. 7, 2022), [https://www.jamsadr.com/insight/2022/some-large-companies-are-no-longer-requiring-consumers-and-employees-to-waive-class\\_](https://www.jamsadr.com/insight/2022/some-large-companies-are-no-longer-requiring-consumers-and-employees-to-waive-class_)

<sup>535</sup>America Garza, *Mass Arbitration Is on the Rise—JAMS or AAA? Know the Rules*, JD SUPRA (Dec. 16, 2025), <https://www.jdsupra.com/legalnews/mass-arbitration-is-on-the-rise-jams-or-6069914/>.

<sup>536</sup>AAA 2024 Mass Arbitration Supplementary Rules and Consumer Mass Arbitration and Employment/Workplace Mass Arbitration Fee Schedules, AM. ARB. ASS’N, <https://go.adr.org/2024-mass-arbitration-rules.html> (last visited Jan. 4, 2026).

<sup>537</sup>*Id.*

<sup>538</sup>*Id.*

<sup>539</sup>FAQ: AAA-ICDR Mass Arbitration Rules Revisions, AM. ARB. ASS’N (Apr. 1, 2024), <https://go.adr.org/mass-arbitration-rules-april2024.html>.

<sup>540</sup>Charles Edward Harris et al., *The Evolution of Mass Arbitration: Understanding Changes to the Arbitration Rubric*, *Business Law Today*, A.B.A. (Mar. 14, 2025), [https://www.americanbar.org/groups/business\\_law/resources/business-law-today/2025-march/evolution-of-mass-arbitration/](https://www.americanbar.org/groups/business_law/resources/business-law-today/2025-march/evolution-of-mass-arbitration/).

liability for filing false or frivolous claims. AAA also formalized the role of a “Process Arbitrator” to resolve non-merits issues central to mass filings, including whether contractual conditions precedent have been satisfied, which claims properly belong in a mass proceeding, which AAA rules apply, the appropriate locale, and how fees should be allocated, with reasoned rulings that guide downstream case administration.<sup>541</sup>

AAA’s new Rules also expand the use of mediation. AAA’s old policies required parties to mediate their claims concurrently to arbitration proceedings. However, any party could decide to opt out of mediation. Under the new Rule, even if a party decides to opt out of mediation, the AAA may still appoint a mediator to “facilitate discussions between the parties on processes that may make resolution of the case more efficient.” The cumulative effect is to reduce front-loaded fee exposure and to channel early disputes about filing sufficiency and preconditions to a neutral gatekeeper before arbitrator-by-arbitrator appointments occur.

In May 2024, JAMS likewise enacted new Mass Arbitration Procedures and Guidelines as well as a new Mass Arbitration Fee Schedule.<sup>542</sup> Like AAA’s new Rules and Fee Schedule, the changes in JAMS’ Guidelines and Fee Schedule were aimed at combating the effects of mass arbitration. Notably, JAMS’s new Guidelines apply only to parties who have agreed to JAMS’s Mass Arbitration Procedures and Guidelines in a pre- or post-dispute written agreement.

The new JAMS Guidelines address the issue of plaintiffs’ lawyers filing false and frivolous claims by requiring that demands for arbitration include the claimant’s name, address, email, and the applicable arbitration agreement. Additionally, each demand must include counsel’s sworn declaration that the claims are, to the best of their knowledge, true. JAMS appoints a “Process Administrator” to hear and determine preliminary and administrative matters necessary to ensure orderly and efficient resolution, including filing compliance, satisfaction of conditions precedent, inclusion of claims in the mass proceeding, applicable procedural rules and standards, arbitrator selection mechanics, grouping or batching for administrative efficiency, and the location of any merits hearings.<sup>543</sup> Like the AAA, JAMS’s new Guidelines address cost and administration concerns in mass filings and allow an arbitration defendant to assert a defense to frivolous or fraudulent claims without paying millions of dollars in “per claim” filing fees. Under new rules, there is a \$7,500 nonrefundable filing fee regardless of the number of cases.<sup>544</sup> However, businesses still have to pay additional fees for claims that proceed past the process arbitrator. Because the JAMS mass procedures apply only by agreement, businesses that prefer JAMS administration should expressly adopt those procedures in their arbitration clauses.<sup>545</sup>

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<sup>541</sup> *Id.*; AAA 2024 Mass Arbitration Supplementary Rules and Consumer Mass Arbitration and Mediation and Employment/Workplace Mass Arbitration Fee Schedules, AM. ARB. ASS’N (effective Jan. 15, 2024), <https://go.adr.org/2024-mass-arbitration-rules.html>; FAQ: AAA-ICDR Mass Arbitration Rules Revisions, AM. ARB. ASS’N (Apr. 1, 2024), <https://go.adr.org/mass-arbitration-rules-april2024.html>.

<sup>542</sup> *Mass Arbitration Procedures and Guidelines*, JAMS (effective May 1, 2024), <https://www.jamsadr.com/mass-arbitration-procedures>.

<sup>543</sup> *Id.*

<sup>544</sup> *Mass Arbitration Procedures Fee Schedule*, JAMS (Apr. 30, 2024), [https://www.jamsadr.com/files/uploads/documents/massarbitrationprocedures-fs\\_4.29.24.pdf](https://www.jamsadr.com/files/uploads/documents/massarbitrationprocedures-fs_4.29.24.pdf).

<sup>545</sup> *Mass Arbitration Procedures and Guidelines*, *supra* note 542.

***C. “New Era” Programs and Bespoke Mass-Arbitration Designs***

In response to fee dynamics and administrative bottlenecks, some businesses experimented with arbitration programs designed to group similar cases procedurally, prioritize bellwethers, and cap fees.<sup>546</sup> Courts have scrutinized such programs where rules mandate binding bellwethers or have otherwise departed from bilateral adjudication or due-process norms.<sup>547</sup>

***D. Moving Forward: How Businesses Should Respond***

While the changes implemented by AAA and JAMS help combat some of the most egregious effects of mass arbitration, businesses should still revisit the arbitration provisions in their existing contracts to account for these policy changes and contract for greater protections.

Businesses should consider adding conditions precedent to their existing contract to further mitigate the effects of mass arbitration. Such conditions precedent may include a procedural requirement that a claimant must fulfill prior to filing a demand for arbitration. Some examples include: requiring a claimant to give the defendant pre-dispute written notice of their intent to file a demand and detailed grounds for their demand; requiring a claimant to meet and confer personally via videoconference or telephone with the defendant to discuss the claim; and requiring the claimant and defendant to undergo informal dispute resolution processes before filing a demand for arbitration. As both AAA’s and JAMS’ new policies allow process arbitrators to determine if a claimant has complied with conditions precedent prior to filing their demand, contracting for such requirements is a simple but effective way to screen out inappropriate demands. These prerequisites should be objective, fair to both parties, administrable by the AAA Process Arbitrator or the JAMS Process Administrator, and clauses should authorize dismissal or fee reallocation for noncompliance.

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<sup>546</sup> *Heckman v. Live Nation Ent., Inc.*, 120 F.4th 670 (9th Cir. 2024).

<sup>547</sup> *Id.*

**Part Five**  
**Class Action Settlements: Procedure and Strategy**

**I. Requirements for Class Action Settlement Approval**

When both parties in a class action lawsuit have decided that they do not want to continue litigating the allegations, they may settle. Class action settlements are governed by the requirements laid out in Rule 23(e) of the Federal Rules of Civil Procedure.

**A. Two Step Approval Process**

Class action settlements do not become effective until a judge grants final approval. The process of receiving final approval of a class action settlement involves (1) receiving preliminary approval of the settlement and (2) providing notice and an opportunity to opt-out to absent class members.

**B. Preliminary Approval and Class Certification**

Rule 23(e) was amended in 2018 to codify four core settlement-approval considerations and to formalize the preliminary-approval standard, electronic notice options, and objector-payment limits.<sup>548</sup> Courts evaluate adequacy of representation, arm’s-length negotiation, adequacy of relief (including distribution methods and fee terms), and equitable treatment under Rule 23(e)(2)(A)–(D).<sup>549</sup> The rule and Notes also emphasize that notice may be by U.S. mail, electronic means, or other appropriate means, and require disclosure of any “side agreements.”<sup>550</sup>

Courts typically “preliminarily approve” only upon a showing that they will likely be able to grant final approval under Rule 23(e)(2) and, if not previously certified, certify a settlement class.<sup>551</sup> Combined Rule 23(e)(1) and 23(c)(2)(B) notice is common practice, and courts regularly direct that notice state the opt-out method and deadline and provide a plain-language summary of material terms.<sup>552</sup> The combined notice pairs notice to the class regarding preliminary approval of a proposed settlement and to a damages class explaining key rights, including the right to opt out.

At preliminary approval, the court assesses the Rule 23(e)(2) factors and likely certification for settlement. Parties should also identify allocation, administrator, notice method, and draft notices.

In practice, courts increasingly scrutinize claims processes; reversionary terms (such as residual money in a settlement fund returning to defendant following payment to class members); clear-

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<sup>548</sup> *Guidance on New Rule 23 Class Action Settlement Provisions*, 102 JUDICATURE (2018), <https://judicature.duke.edu/articles/guidance-on-new-rule-23-class-action-settlement-provisions/>.

<sup>549</sup> FED. R. CIV. P. 23(e)(2).

<sup>550</sup> FED. R. CIV. P. 23(e)(1)–(2), (c)(2)(B), (e)(3), (e)(5) advisory committee notes to 2018 Amendment.

<sup>551</sup> *Guidance on New Rule 23 Class Action Settlement Provisions*, *supra* note 548.

<sup>552</sup> FED. R. CIV. P. 23(e)(1)(B), (c)(2)(B) advisory committee notes to 2018 Amendment.

sailing provisions; and incentive awards.<sup>553</sup> Recent appellate decisions have emphasized tying fees to actual, not theoretical, recovery and requiring robust explanations for fee awards.<sup>554</sup>

### C. Class Notice

Rule 23 requires that the notice be made to every member of the class who would be bound by the proposed settlement in a reasonable manner.<sup>555</sup> Parties should coordinate with a claims administrator to ensure that proper notice is disseminated to absent class members and to monitor any absent class members that opt out of the settlement.<sup>556</sup> Absent class members are ordinarily provided the opportunity to opt out and/or object to a proposed class actions settlement. Class notice also should provide absent class members a deadline to file objections with the court prior to the hearing on final settlement approval.

For Rule 23(b)(3) settlements or when ordering settlement notice for a (b)(3) class, courts must direct “the best notice that is practicable,” which may include electronic notice.<sup>557</sup> Objectors must state whether an objection applies to the objector, a subset, or the entire class, and courts must approve any consideration for forgoing or dismissing objections or appeals.<sup>558</sup> Parties frequently include a “blowout” provision (a walkaway clause tied to opt-out rates that permits the defendant to terminate or renegotiate the settlement if exclusions exceed a negotiated threshold); courts assess such provisions for potential collusion concerns alongside clear-sailing and reversion terms.<sup>559</sup>

### D. CAFA Notice

In addition to providing notice to absent class members, parties may be required to provide CAFA notice to appropriate government officials.<sup>560</sup> CAFA’s notice requirement is triggered by filing “a proposed settlement of a class action” in federal court; the statute does not contain a monetary threshold. Each defendant must serve notice within 10 days of filing the proposed settlement on the “appropriate Federal official” and on the “appropriate State official” of each state in which a class member resides, with specified contents.<sup>561</sup> Final approval may not be entered earlier than

<sup>553</sup> William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813 (2003).

<sup>554</sup> Michael D. Leffel & McKenzie L. Ahmet, *New Guidance on Attorneys’ Fee Awards in Class Action Settlements*, 16 Nat’l L. Rev. 62 (Oct. 11, 2023), <https://natlawreview.com/article/new-guidance-attorneys-fee-awards-class-action-settlements>; *In re Broiler Chicken Antitrust Litigation*, 142 F.4th 568, 575 (7th Cir. 2025); Fed. R. Civ. P. 23(e)(2)(C)(ii)–(iii) committee notes to 2018 Amendment; *Lowery v. Rhapsody Int’l, Inc.*, 75 F.4th 985, 992 (9th Cir. 2023).

<sup>555</sup> FED. R. CIV. P. 23(e)(1).

<sup>556</sup> MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.661–.662 (Fed. Jud. Ctr. 2004).

<sup>557</sup> FED. R. CIV. P. 23(b)(3).

<sup>558</sup> FED. R. CIV. P. 23(e)(5).

<sup>559</sup> Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 1 (2020); FED. R. CIV. P. 23(c)(2)(B), (e)(1), (e)(5)(A)–(B); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946–947 (9th Cir. 2011); *Roes, 1–2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1048–1049 (9th Cir. 2019); *Maree v. Deutsche Lufthansa, AG*, 2025 WL 2268254, at \*2 (9th Cir. Aug. 8, 2025).

<sup>560</sup> 28 U.S.C. § 1715(b).

<sup>561</sup> 28 U.S.C. § 1715.

90 days after service of the last CAFA notice, and noncompliance may permit class members to opt out of the judgment.<sup>562</sup> Courts commonly treat late notices as curable if at least 90 days elapse before final approval.<sup>563</sup>

### *E. Final Approval*

After seeking preliminary approval and providing notice to the class, the parties must seek final approval of the settlement. Parties should move the court for final approval of the class action settlement and seek a final approval hearing following expiration of the 90-day CAFA notice period. At this point, the court must determine whether the settlement is fair, reasonable<sup>77</sup> adequate to the class members; courts will also consider any objections filed by absent class members. Courts have continued to intensify scrutiny of fee awards; scope of releases; adequacy of distribution plans; injunctive relief; and incentive awards, with some circuits adopting guardrails unique to their precedents.<sup>564</sup> In the Eleventh Circuit, incentive awards are impermissible, while other circuits allow them subject to Rule 23(e)(2)(D).<sup>565</sup> Objectors and state and federal officials notified under CAFA may submit objections regarding fee reasonableness and distribution equity.<sup>566</sup>

## II. Strategic Considerations in Class Action Settlements

### *A. Practical Tips*

The decision to settle involves many strategic considerations for both parties. Both sides must consider the strength of plaintiffs' claims and the likelihood of success if brought to trial. By weighing the strength of the claims, defendants can estimate the value of settlement and the likelihood of greater costs associated with continued litigation. It is important to consider the uncertainty surrounding bringing the claims to trial and the possibility of a larger verdict than the value of a potential settlement. Plaintiffs must also consider the uncertainty associated with trial and the likelihood of losing the case when determining the value of settlement.

Additionally, arbitration posture materially affects timing, cost, and leverage. The Supreme Court held that when a district court denies a motion to compel arbitration, the court must stay its

<sup>562</sup> *Id.*

<sup>563</sup> 28 U.S.C. § 1715(b), (d), (e); *see also Adoma v. Univ. of Phoenix*, 913 F. Supp. 2d 964, 973 (E.D. Cal. 2012).

<sup>564</sup> *See, e.g., In re Blue Cross Blue Shield Antitrust Litig.*, 85 F.4th 1070, 1088 (11th Cir. 2023) (discussing scope of releases and distinguishing the release at issue from broader releases); *In re Broiler Chicken Antitrust Litig.*, 80 F.4th 797, 801–02 (7th Cir. 2023) (discussing how to weigh and discount fee schedule bids at auction and considering fee allocation methodologies in other circuits); *Lowery*, 75 F.4th at 990–91, 994 (discussing the “Iodestar” method and “percentage-of-recovery” method to determine attorneys’ fee awards while encouraging cross-checking to test reasonableness).

<sup>565</sup> *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244, 1260 (11th Cir. 2020) (holding that while awards that compensate a class representative for time and bringing a lawsuit “are commonplace in modern class-action litigation, that doesn’t make them lawful, and it doesn’t free us to ignore Supreme Court precedent forbidding them”).

<sup>566</sup> Michael E. Solimine & Hailey Martin, *Judicial Review of Settlements Under the Class Action Fairness Act and Deference Due to the Department of Justice and State Attorneys General* (Univ. of Cincinnati Coll. of Law, Faculty Articles & Other Publications, 2025),

[https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1478&context=fac\\_pubs](https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1478&context=fac_pubs); 28 U.S.C. § 1715(d).

proceedings during a non-frivolous interlocutory appeal on arbitrability; this can significantly delay litigation and reduce discovery leverage for plaintiffs.<sup>567</sup>

When defendants decide to settle, they often want the broadest release. Even though the defense likely fought class certification in earlier stages, defendants often look for the broadest release from future liability and to bind as many potential claimants as practicable.

Courts review the scope of the release to ensure consistency with the pleaded claims and settlement consideration and to avoid overbroad releases that sweep in unrelated claims.<sup>568</sup> The Eleventh Circuit's review of the Blue Cross Blue Shield settlement and other cases reinforce that adequacy, conflict checks, and release breadth are central to fairness.<sup>569</sup>

In class action settlements, it is important to consider the possibility of settling with individual plaintiffs rather than with the class as a whole. One caveat is that the named plaintiff and class counsel owe certain duties and obligations to the class following class certification. If a class has been certified, it is significantly more challenging to settle on an individual basis given these obligations. Courts scrutinize individual settlements in putative or certified class actions for potential prejudice to absent members, adequacy of representation, and improper incentives. The Advisory Committee Notes make clear that Rule 23(e) approval is required for compromises that will bind the class, even if not yet certified.<sup>570</sup>

Plaintiffs must consider whether the class claims as a whole would be rendered moot following the individual settlement. In 2016, the Supreme Court held that a lawsuit should not be dismissed as moot simply because the defendant unconditionally offers to give the plaintiff everything he has asked for in a lawsuit.<sup>571</sup> This holding meant that plaintiffs could refuse settlement offers, even if they provided everything requested by the plaintiff, and keep their controversy live. In 2020, the Ninth Circuit held that class actions are rendered moot when the class representative voluntarily settles his individual claims, absent a clear indication of the class representative's continued financial interest in the unresolved class claims.<sup>572</sup>

Individual settlements may invite copycat suits and fail to secure class-wide peace. Settling with the named plaintiff on an individual basis may encourage new lawsuits from plaintiffs alleging the same claims without careful settlement agreement provisions protecting the defendant, to the extent possible under the applicable ethical rules.

### ***B. Judicial Involvement***

Parties must also consider the judge who will be reviewing the proposed settlement. Judges vary in the amount of scrutiny they give to proposed class action settlements. In the past, many judges

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<sup>567</sup> Bielski, 599 U.S. at 744–45.

<sup>568</sup> FED. R. CIV. P. 23(e)(2); see *In re Payment Card Interchange Fee & Merchant Disc. Antitrust Litig.*, 827 F.3d 223, 236-41 (2d Cir. 2016).

<sup>569</sup> *In re Blue Cross Blue Shield Antitrust Litig.*, 85 F.4th 1070, 1088, 1091 (11th Cir. 2023).

<sup>570</sup> FED. R. CIV. P. 23(e) advisory committee notes to 2018 Amendment.

<sup>571</sup> *Campbell-Ewald v. Gomez*, 577 U.S. 153, 162 (2016).

<sup>572</sup> *Brady v. AutoZone Stores*, 960 F.3d 1172, 1175 (9th Cir. 2020).

would routinely approve class action settlements without providing significant scrutiny over the impact of certain terms in a settlement on the class members.

The Advisory Committee’s 2018 amendment Rule 23 codified four core considerations that a district court must consider in determining whether a proposed settlement is fair, reasonable, and adequate.<sup>573</sup> FRCP 23(e)(2)(A)-(D) prescribes consideration of whether “[t]he class representatives and class counsel adequately represented the class”; whether “the proposal was negotiated at arm’s length”; whether “the relief provided for the class is adequate” (“taking into account” the “costs, risks and delay of trial and appeal,” “the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims,” the “terms of any proposed award of attorney’s fees, including timing of payment,” and “any agreement required to be identified under Rule 23(e)(3)”); and whether “the proposal treats class members equitably relative to each other.”

In recent years, some courts have begun to give more scrutiny to terms of a proposed settlement agreement to confirm that it is fair, reasonable, and adequate. In 2014, the Seventh Circuit held that judges should not assume a passive role when reviewing class action settlements for preliminary approval.<sup>574</sup> Below is a collection of cases displaying types of court scrutiny of proposed settlement agreements:

#### 1. Explicit Review of Attorneys’ Fees

- *Camp Drug Store, Inc. v. Cochran Wholesale Pharmaceutical, Inc.*: The Seventh Circuit affirmed the district court’s approval of a class action settlement where it reduced the proposed attorneys’ fees and the proposed incentive awards.<sup>575</sup>
- *In re Broiler Chicken Antitrust Litig.*: The Seventh Circuit amplified expectations for fee-approval reasoning and alignment with results achieved, vacating an award that lacked sufficient explanation.<sup>576</sup>
- *Roes, 1-2 v. SFBSC Management, LLC*: The Ninth Circuit determined that the district court erred in its approval of the settlement because it failed to properly assess the fairness of the proposed settlement. The settlement that the district court approved included a clear-sailing agreement, sizable attorneys’ fees and incentive awards, and reversionary terms. The Ninth Circuit noted that these are warning signs that require a court to “think twice, investigate further, and justify the terms’ inclusion” in the settlement agreement prior to approval.<sup>577</sup>
- *National Veterans Legal Services Program v. United States*: The court approved a \$125 million common-fund settlement over PACER fees, directing that at least 80% be distributed to class members and awarding approximately \$23.86 million in fees and \$1.11 million in costs. The court granted the motion for final approval of the settlement following an analysis of both procedural and substantive fairness. In particular, the court considered

<sup>573</sup> FED. R. CIV. P. 23(e) advisory committee notes to 2018 Amendment.

<sup>574</sup> See *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014) (reversing fee award and stressing active judicial scrutiny of settlement value versus fees); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (vacating approval and emphasizing rigorous review of settlement fairness and fees).

<sup>575</sup> 897 F.3d 825, 834 (7th Cir. 2018).

<sup>576</sup> 80 F.4th 797, 804–05 (7th Cir. 2023).

<sup>577</sup> 944 F.3d 1035, 1060 (9th Cir. 2019).

the timing of the settlement and the potential inequities in the distribution of the common fund, and provided an extensive discussion of the reasonableness of the attorneys' fees.<sup>578</sup>

## 2. Fairness Displayed by Mediation and Negotiation

*George v. Academy Mortgage Corporation (UT)*: A proposed settlement agreement was found to be fair, reasonable, and adequate where the parties settled the action by mediation and the negotiation period continued for over a year after the initial mediation.<sup>579</sup> The court also considered the benefits to the plaintiffs by settling at this phase, rather than continuing to litigate the matter, and compared the potential full recovery to the recovery offered by the settlement.<sup>580</sup>

## 3. Factual Basis Needed to Assess Fairness

*In re Baby Products Antitrust Litigation*: The Third Circuit vacated a class action settlement agreement where the district court had failed to properly assess whether the proposed agreement was in the best interests of the class as a whole.<sup>581</sup> In particular, the district court did not know the amount that would be distributed to the class directly, as opposed to compensating class counsel, to administration costs, and to third-party *cy pres* recipients. Without such information, the district court did not have a sufficient factual basis to conclude that the settlement was fair.<sup>582</sup>

## 4. Value of Injunctive Relief

*Campbell v. Facebook, Inc.*: The Ninth Circuit affirmed the district court's approval of a class action settlement over objector's arguments that the injunctive relief was "worthless."<sup>583</sup> Considering the nature and strength of the claims, the court concluded that the injunctive relief *did* have value, and that the settlement was fair despite the relatively modest value of the injunctive relief both because the class members' claims were fairly weak and because the release of claims in the settlement was narrowly drawn.<sup>584</sup>

## 5. Explicit Review of Strength of Claims

*Hyland v. Navient Corporation*: The Second Circuit affirmed the district court's approval of a settlement agreement over objections that the settlement was unfair.<sup>585</sup> The court found that the district court had adequately considered all factors; in particular, the Second Circuit highlighted that although the settlement amount was lower than the potential liability, there was a "grave risk" that the plaintiffs would have recovered nothing, given the strength of their claims.<sup>586</sup>

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<sup>578</sup> 2024 WL 1206458, at \*18 (Mar. 20, 2024 D.D.C.).

<sup>579</sup> 369 F.Supp.3d 1356 (N.D. Ga. 2019)

<sup>580</sup> *George v. Academy Mortgage Corporation (UT)*, 369 F.Supp.3d 1356, 1370 (N.D. Ga. 2019).

<sup>581</sup> 708 F.3d 163 (3d Cir. 2013)

<sup>582</sup> *In re Baby Products Antitrust Litigation*, 708 F.3d 163, 170 (3d Cir. 2013).

<sup>583</sup> 951 F.3d 1106 (9th Cir. 2020)

<sup>584</sup> *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1124 (9th Cir. 2020).

<sup>585</sup> 48 F.4th 110 (2d Cir. 2022)

<sup>586</sup> *Hyland v. Navient Corporation*, 48 F.4th 110, 121 (2d Cir. 2022).

6. Review of Time Invested in Litigation Compared to Fees

*In re Stericycle Securities Litigation*: The Seventh Circuit vacated the district court’s award of attorneys’ fees equaling 25% of the settlement.<sup>587</sup> The court determined that the district court had abused its discretion and had not adequately considered an existing ex ante fee agreement, the risk of non-payment, and the amount of work involved. In particular, the court did not address whether a settlement at such an early state in the litigation warranted a reduction in fees, and did not discuss the degree to which the prior litigation may have reduced the work required in this matter.<sup>588</sup>

**CONCLUSION**

This handbook surveys the lifecycle of modern class action practice in federal court, from the core certification elements of numerosity, commonality, typicality, adequacy, manageability, and ascertainability, through early jurisdictional and Article III standing considerations, tolling, and Rule 23(b)(2)/(b)(3) frameworks, to motion practice, arbitration and mass arbitration dynamics, and settlement procedures and strategies. The legal landscape continues to evolve rapidly, with shifting United States Supreme Court, state supreme court, and circuit authority on standing; arbitration and class waivers; settlement scrutiny and fee awards; incentive payments; notice; and CAFA compliance; as well as increasing regulatory engagement that reshapes risk and negotiation posture.

Willkie Farr & Gallagher LLP maintains a dynamic, cross-disciplinary team that monitors these developments in real time and partners with clients to translate doctrine into practical strategies. Whether resisting certification, calibrating Daubert and summary judgment tactics, designing and updating arbitration programs, or structuring and approving settlements that withstand heightened judicial review, Willkie attorneys are prepared. We regularly update clients on emerging trends and are available to assist with tailored risk assessments, case strategy, and programmatic solutions aligned to the latest authorities and enforcement priorities.

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<sup>587</sup> 35 F.4th 555 (7th Cir. 2022)

<sup>588</sup> *In re Stericycle Securities Litigation*, 35 F.4th 555, 559–60 (7th Cir. 2022).