CLASS ACTIONS IN THE YEAR 2025: A PROGNOSIS
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In my 2013 article, The Decline of Class Actions,1 I explained that, starting in the mid-1990s, federal courts began to erect significant barriers to class certification.2 Underlying that trend, I argued, was a fear among many judges that even meritless class actions had coerced defendants to agree to massive settlements.3 I did not pronounce class actions dead, but I did express concern that they had been seriously eroded. In this Article, I reflect on what the federal judiciary has done in recent years, and I attempt to predict what the class action landscape will look like a decade from now. That is not an easy task; as Yogi Berra once said, “It’s difficult to make predictions, especially about the future.”

My predictions fall into several categories:

First, I discuss whether the basic class action framework—Federal Rule of Civil Procedure 234—is likely to be revamped in the next decade. I predict that there is little chance that the basic

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2Id. at 733, 739.
3Id. at 739.
4 FED. R. CIV. P. 23.
structure of Rule 23 will change. Calls by some scholars to rewrite Rule 23 will not make headway. The only caveat to this prediction is that either Congress or the Supreme Court could repudiate so-called no injury classes—i.e., classes in which some unnamed class members suffered no harm—a result that would not change the text of Rule 23 but would adversely impact certain kinds of class actions, such as consumer cases.

Second, I examine the likely state of class action jurisprudence in the year 2025. In that regard, I make several predictions:

- Securities class actions will continue to flourish, but consumer, employment, and personal injury class actions will continue to decline.
- The Supreme Court will curtail the ability of plaintiffs to establish liability or damages through expert statistical sampling (referred to frequently as “trial by formula”).
- The “ascertainability” requirement imposed by the Third Circuit will be repudiated by the Supreme Court or by the Third Circuit itself.
- The Supreme Court will conclude, as have numerous circuits, that an unaccepted offer of judgment to a class representative pursuant to Federal Rule of Civil Procedure 68 is a legal nullity and does not moot the individual’s claim or the putative class action.
- Defendants will advance several arguments against class certification that, until now, have had only limited success. These will include expansive applications of Rule 23’s typicality, predominance, and superiority requirements. Although defendants will not be fully successful with these arguments, they will succeed in erecting some additional barriers to class certification.
- During the next decade, courts addressing class certification and the fairness of settlements will give greater weight to allegations of unethical behavior by class counsel and by counsel representing objectors to settlements.
- The future of class actions will ultimately lie in the hands of a small number of appellate court judges who have a special interest and expertise in aggregate litigation.

Third, I focus on the administration and resolution of class actions and offer two predictions: (1) by 2025, a significantly larger number of class action cases will go to trial than at
any time since 1966; and (2) technological changes will fundamentally alter the mechanics of class action practice, offering more sophisticated tools for notice, participation by class members, and distribution of settlement proceeds.

At bottom, the next ten years will be a fascinating—but challenging—time for those involved in litigating class actions.

I. POSSIBLE RESTRUCTURING OF RULE 23

A. No Major Structural Changes to Rule 23 Will Occur in the Next Decade

Rule 23 has generated an extensive body of case law interpreting and applying it. Much of the recent case law has been controversial. Nonetheless, subject to an important caveat discussed in part I.B, I do not believe that there will be major structural changes to the class action device.

The current version of Rule 23 is largely unchanged from the 1966 version. The original version of Rule 23, from 1938, contained three categories of class actions: “true,” “hybrid,” and “spurious.” Those categories, however, proved to be deficient. The 1966 version of Rule 23 abandoned those categories and created four new types of class actions. Rule 23(b)(1)(A) applies when myriad individual actions would result in inconsistent standards of conduct for the party opposing the class. Rule 23(b)(1)(B) applies when numerous separate actions would substantially impair or impede the interests of individual class members. Rule 23(b)(2) applies in suits seeking primarily declaratory or injunctive relief. And Rule (23)(b)(3) applies when common questions of

6 Id. at 170–77.
law or fact predominate over individual questions and a class action is superior to other methods of adjudication.\(^7\) To achieve certification, a class must fall within at least one of those four categories. In addition, Rule 23(a) contains four criteria that plaintiffs must satisfy in every case: numerosity, commonality, typicality, and adequacy of representation.\(^8\)

The current rule is not without flaws. For instance, the two (b)(1) categories are confusing, and in recent years, plaintiffs have rarely utilized them. Many courts have held that Rule 23(b)(1)(A) does not apply to damages suits but only to suits for declaratory or injunctive relief.\(^9\) It is thus difficult to discern any role for (b)(1)A that is not already covered by (b)(2). Similarly, classes under (b)(1)(B) are difficult to maintain, especially after the Supreme Court’s decision in *Ortiz v. Fibreboard Corp.*,\(^10\) which substantially curtailed plaintiffs’ ability to bring “limited fund” class actions.\(^11\) In addition, Rule 23(b)(2) is poorly drafted, leaving courts to figure out the important question of when (if at all) it encompasses class actions that also seek monetary relief in addition to injunctive or declaratory relief.\(^12\) And the four superiority criteria of Rule 23(b)(3)(A)-(D) are confusing and difficult to apply.\(^13\) Similarly, it is hard to articulate a clear distinction between typicality (Rule 23(a)(3)) and adequacy of representation (Rule 23(a)(4)), both

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\(^7\) *See generally* ROBERT KLOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL 74–133 (West 4th Ed. 2012) [hereinafter KLOFF, NUTSHELL].

\(^8\) *Id.* at 38–73. Courts have also recognized three additional, threshold requirements: a clear, objective definition of the class, at least one representative who is a member of the class, and a live controversy. *Id.* at 30–37.

\(^9\) *See, e.g.*, *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539 (8th Cir. 1987).


\(^11\) KLOFF, NUTSHELL, *supra* note __, at 85–89.

\(^12\) *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011) (leaving open question of whether Rule 23(b)(2) applies if there is *any* request for money, even if the monetary request is incidental to the injunctive or declaratory relief sought).

\(^13\) KLOFF, NUTSHELL, *supra* note __, at 126–32. (explaining that some of the four criteria do not make clear whether they favor or undercut class certification).
of which ultimately turn on the ability of the class representative to represent the class.\textsuperscript{14} It is
difficult to envision a situation in which a class representative has atypical claims or defenses but
is nonetheless an adequate representative. Thus, Rule 23(a) and (b) could be rewritten to achieve
greater simplicity and clarity. And, of course, attorneys who litigate class actions might wish to
see a new rule that is either more pro-plaintiff or more pro-defendant in its overall approach to
class certification.

Not surprisingly, there have been some calls for structural changes to Rule 23. For the
most part, those arguments have been made not by lawyers and judges in the trenches but by law
professors. To give four recent examples:

\begin{itemize}
  \item Professor Linda Mullenix proposes to eliminate class actions for damages and to
  preserve class actions solely for injunctive relief.\textsuperscript{15} In her view, “[m]any of the
  class action harms that have developed recently would be avoided with elimination
  of the damage class action from the rule.”\textsuperscript{16}
  \item Professor Robert Bone argues that the commonality and typicality requirements of
  Rule 23(a) should be eliminated.\textsuperscript{17} In his view, there was no “convincing
  justification for their inclusion” in 1966.\textsuperscript{18}
  \item Professor Mollie Murphy argues that “it may be time to reconstruct the [Rule 23(b)]
  categories, or more radically, to eliminate them.”\textsuperscript{19} She notes that the focus of Rule
  23(b) on “the nature of relief requested” is “an incomplete substitute for the
  questions the district court must resolve—should a class be certified and, if so, what
\end{itemize}

\textsuperscript{14} The Supreme Court has recognized on several occasions that commonality, typicality, and adequacy tend to merge.
See, e.g., \textit{Dukes}, 131 S. Ct. at 2551 n.5 (citing Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157–58 n.13 (1982)).
\textsuperscript{15} Linda Mullenix, \textit{Ending Class Actions as We Know Them: Rethinking the American Class Action}, 64 \textit{Emory L.J.} 399 (2014).
\textsuperscript{16} \textit{Id.} at 440.
\textsuperscript{18} \textit{Id.} at 1116.
\textsuperscript{19} Mollie A. Murphy, \textit{Rule 23(b) After Wal-Mart: (Re)Considering a “Unitary” Standard}, 64 \textit{Baylor L. Rev.} 721, 768 (2012).
protections should be afforded absent class members?” She thus proposes that Rule 23(b) be modified to embody only those two questions.

- Professor Max Helveston proceeds in a different direction: He proposes to restructure class actions not by rewriting Rule 23(a) or Rule 23(b) but “by introducing a new participant in all class action suits”: the “Public Advocate.” That person “would represent the public’s interest in class action litigation, ensuring that class-based suits are adjudicated in an expedient, just manner” and that “they are resolved in ways that respect the public’s interest.”

The four proposals differ dramatically in their approaches, but they share a common premise: The current class action device needs to be fixed. Of course, the four scholars offer very different solutions: eliminate most class actions (Mullenix), reconfigure some of the basic elements (Bone, Murphy), or add a new layer of protection for the public (Helveston).

Given the fundamental shift in class action jurisprudence that I described in my *Decline* article, one might expect that judges and practitioners would support the idea of rewriting Rule 23, even if they do not agree on how that should be done. In fact, most judges and attorneys seem to believe that, despite its flaws, the current Rule 23 works reasonably well. To my knowledge, no prominent judge or practitioner has publicly called for a major overhaul of Rule 23 or has asked the Advisory Committee on Civil Rules (the “Advisory Committee”) to proceed in that direction.

Currently, the Class Action Subcommittee of the Advisory Committee (the “Subcommittee”) is considering a wide array of possible changes to Rules 23. In materials prepared for both the October 2014 and April 2015 Advisory Committee meetings, the Subcommittee identified possible “front burner” and “back burner” issues for class action

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20 Id.
22 Id.
rulemaking.\textsuperscript{23} The list did not include a fundamental overhaul of Rule 23.\textsuperscript{24} To the contrary, all of the possible changes that the Committee is considering can best be described as incremental.\textsuperscript{25} Also, in the dozens of written submissions provided to the Class Action Subcommittee, virtually no one has advocated the kinds of structural changes urged by Mullenix, Bone, Murphy, and Helveston.\textsuperscript{26}

For several reasons, I am confident that that lack of interest in overhauling Rule 23 will continue throughout the next decade.

First, there is now a substantial body of case law applying the existing Rule 23. Any major conceptual change (short of simply eliminating entire categories of Rule 23(a) or Rule 23(b), as Professors Mullenix and Bone have proposed) would mean drafting a new rule and developing case law that implements and interprets that rule. For example, under Professor Murphy’s proposal to collapse the Rule 23(b) categories, cases construing the four current Rule 23(b) categories would


\textsuperscript{24} The possibility of a “[f]undamental revision of Rule 23” was mentioned as a “back burner” issue in the Advisory Committee’s March 2012 materials, see Advisory Committee on Rules of Civil Procedure, Agenda Book Mar. 22-23, 2012, at 465, available at http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/agenda-books, but the topic was subsequently removed even from the “back burner” list.

\textsuperscript{25} For example, among the issues identified in April 2015 for conceptual sketches are settlement approval criteria; settlement-class certification; cy pres settlements; approaches for dealing with objectors; Rule 68 offers of judgment as applied to class actions; issue classes; and class action notice. Advisory Committee Apr. 2015 Agenda Book, supra note __, at 244–97.

\textsuperscript{26} One exception is a submission by Professors Steinman, Davis, Resnik, and Lahav. Their February 24, 2015 proposal would, among other things, eliminate the numerosity, commonality, and typicality requirements of Rule 23(a), leaving only adequacy of representation. Letter from Adam Steinman, Univ. of Ala. Sch. of Law, to Rule 23 Subcommittee (February 24, 2015), available at www.uscourts.gov/file/17953/download?token=LHp2TwpO. It would also add a requirement that the class action would “materially advance the resolution of multiple civil claims in a manner superior to other realistic procedural alternatives.” \textit{Id}. 
be rendered largely irrelevant. And Professor Helveston’s proposal to add a “Public Advocate” would give rise to numerous issues, including the weight courts should give to the Advocate’s opinions; criteria for addressing challenges to the Advocate for bias or conflict of interest; and the standards for *ex parte* communications with the lawyers, parties, and the court. In my opinion, none of the proponents of major changes to Rule 23 (including the four professors described above) has made the case for substantially changing Rule 23.

Second, structural changes to Rule 23—especially those aimed at making class actions either harder or easier to bring—would be highly contentious. The class action bar would be severely divided, and those who stood to lose would lobby hard to avoid an adverse outcome. The business community would seek to preserve the great success it has had in convincing courts to restrict class actions under the current rule. 27 At the same time, significant class actions are still being filed, certified, settled, and (in some instances) tried. 28 Thus, while no stakeholder is entirely satisfied, the status quo is not sufficiently egregious for anyone to pursue the Herculean task of pursuing a revamped class action rule. Indeed, Professor Mullenix—whose proposal to eliminate all class actions for damages would eviscerate the device—concedes that her proposal is “dead on arrival” and is nothing more than an “impractical ivory tower professorial musing[].” 29

Third, it is revealing (as noted above) that, in the Advisory Committee’s current process of examining possible changes to Rule 23, neither the plaintiffs’ bar nor the defense bar has pressed

27 *See Decline, supra* note __, at 745–823.
28 *See infra* p. __.
29 *Id.* at 449.
for a fundamental change to Rule 23. 30 Surely, both camps understand that, after its current review, the Advisory Committee may not return to Rule 23 for many years.

Finally, the lack of momentum for major rule change is an indication that, despite its flaws, and despite serious setbacks for plaintiffs, Rule 23 is working reasonably well even after almost 50 years. It would thus be difficult to make a case that the Rule as written is so flawed that the rule makers should start from scratch.

B. One Possible Exception: “No Injury” Classes May be Eliminated

There is one serious caveat to the above prediction of no major change to the class action device: It is quite possible that, by 2025 (and, perhaps, within the next year), “no injury” classes will be barred. That change will come, if at all, not by a rule change but by case law or statute.

The so-called no injury case can arise, for example, in the consumer context, where the class representative owns a product that has failed in some way, but a significant number of class members own similar products that have not failed. It can also arise in the employment context—for example, where a class representative sues for overtime pay, but at least some of the unnamed class members did not work overtime or otherwise are not entitled to overtime pay. It can arise in toxic tort cases in which the remedy sought is medical monitoring. 31 It can arise in a multi-state class action based on state law when, in some states, no cause of action exists. And it can arise in

30 See supra p. ___ & n.___.
data breach cases where class members sue for fear of adverse repercussions from the disclosure of personal data.32

In recent years, defense attorneys and the business community have devoted major effort to invalidating such “no injury” classes, relying heavily on the “case or controversy” requirement of Article III of the U.S. Constitution.33 Some courts have rejected the argument, holding that “a class action is permissible so long as at least one named plaintiff has standing.”34 Other courts, however, have held that all class members must have standing.35 Defendants also argue that “no injury” classes inflate the number of claims (by combining meritorious and invalid claims), thereby increasing the pressure on defendants to settle.36

Plaintiffs respond in a number of ways. They argue that: (1) Article III only requires that the named plaintiff (and not the unnamed class members) demonstrate standing; (2) the question whether a particular class member was injured is a merits issue that is not appropriate at the class certification stage; and (3) the whole notion of lack of injury is, in many cases, wrong as a factual and legal matter.

33 U.S. CONST. art. III.
35 See, e.g., Denney v. Deutsch Bank, 443 F.3d 253, 264 (2d Cir. 2006) (“[N]o class may be certified that contains members lacking Article III standing.”).
That Article III issue was litigated in two consumer class actions, *Glazer v. Whirlpool Corp.*, 37 and *Butler v. Sears, Roebuck & Co.* 38 In both cases, purchasers of washing machines complained that the machines were defective because they were susceptible to mold growth. Defendants argued that most class members had not personally experienced the mold problem, and therefore the suit violated Article III’s “case or controversy” requirement. Both the Sixth Circuit and the Seventh Circuit, in interlocutory appeals from class certification, rejected defendants’ argument that certification of the purported “no injury” classes violated Article III. 39 A leading defense firm, Mayer Brown, sought Supreme Court review in both cases. Supporting review were nine amicus briefs filed by 12 organizations, many written by prestigious law firms. 40 Clearly, the class action defense bar and the business community were engaged in a coordinated (and expensive) strategy to convince the Supreme Court to impose yet another major barrier to class certification. In opposing certiorari, plaintiffs argued that all purchasers were harmed under applicable state law because they alleged that all of the washers accumulated mold and that expensive measures were required for every machine to remedy the problem. 41 The Supreme Court denied certiorari in both cases.

Recently, however, the Supreme Court has agreed to take up the “no injury” issue in two separate class actions. In *Spokeo, Inc. v. Robins*, 42 the Supreme Court granted certiorari on the

38 702 F.3d 359 (7th Cir. 2012), vacated, 133 S. Ct. 2768 (2013), judgment reinstated, 727 F.3d 796 (7th Cir. 2013), cert. denied, 134 S. Ct. 1277 (2014).
39 See supra notes __ & __.
40 Amici included, among others, the U.S. Chamber of Commerce, the National Association of Manufacturers, the Product Liability Advisory Council, and the Washington Legal Foundation. Law firms authoring the briefs included, e.g., King & Spalding; Skadden, Arps, Slate, Meagher & Flom; Gibson, Dunn & Crutcher; and Cleary, Gottlieb, Steen & Hamilton.
42 742 F.3d 409 (9th Cir. 2014), cert. granted, 135 S. Ct. 1892 (Apr. 27, 2015) (No. 13-1339).
question “[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.” In Spokeo, plaintiff filed a putative class action under the Fair Credit Reporting Act (FCRA), claiming that the web site known as “Spokeo” posted inaccurate information about him, thereby harming his prospects for finding work. The defendant argues that the plaintiff has not suffered actual injury but is merely speculating about the potential for harm.

The Supreme Court’s grant of certiorari in Spokeo is puzzling. The decision below (from the Ninth Circuit) merely held—consistent with other courts—that, because Congress, in enacting the FCRA, created a private right of action without the need to show actual harm, a suit for violation of that statute was not barred by Article III. Although the defendant cited two cases under the Employee Retirement Income Security Act (ERISA) to support a purported conflict, both of which were distinguished by the plaintiff, it cited no contrary FCRA cases. Moreover, the Ninth Circuit’s decision was written by a respected conservative judge, Diarmuid O’Scannlain. In addition, the facts do not present a good vehicle to resolve the issue: Even if it were true that a cause of action could not be pursued under the FCRA without a showing of actual injury, in Spokeo the plaintiff alleged specific financial and emotional injury (i.e., that the falsely published information harmed his prospects for finding employment).

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43 Petition for Writ of Certiorari at i, Spokeo, 135 S. Ct. 1892 (No. 13-1339).
45 742 F.3d at 412–14.
In seeking certiorari, the defendant received significant amicus support (ten briefs, some by multiple entities). For example, the Chamber of Commerce (joined by the International Association of Defense Counsel) argued that the Ninth Circuit’s decision “transform[ed] a technical statutory violation into Article III standing.” An amicus brief by eBay, Facebook, Google, and Yahoo! predicted dire consequences absent reversal, arguing that “[t]he in terrorem effect of statutory damages may cause defendants to settle even meritless claims.” At the merits stage, defendant’s case generated even more interest: 17 separate amicus briefs—some written on behalf of multiple entities—were filed on behalf of the defendant. Defendant and amici no doubt hope that the Court will reverse the judgment in Spokeo in a broadly worded opinion that covers not just statutory damages claims under the FCRA but also claims under a variety of other statutes and common law theories. As one defense law firm blog explained:

The implications of a Supreme Court decision in Spokeo go well beyond the FCRA. The same standing question arises under numerous other federal statutes that also provide private rights of action and authorize recovery of statutory damages, including the Truth in Lending Act, the Fair Debt Collection Practices Act, the Electronic Fund Transfer Act, the Video Privacy Protection Act, and the Electronic Communications Privacy Act. Claims under the federal privacy statutes in particular have been the subject of standing challenges, with defendants arguing that plaintiffs cannot pursue claims for violation of these federal statutes absent allegations of some actual, concrete injury. The Supreme Court’s ruling will likely impact the standing requirements of these statutes as well.

The ruling likely also will have implications for certification of classes pursuing these no-injury claims. Whether the challenged practice caused injury to plaintiff and each putative class member often creates an individualized issue that is not subject to common proof. The Supreme Court’s views on whether no-injury


plaintiffs can certify no-injury classes will have an enormous impact on the class action landscape.49

The Court has also granted review in \textit{Tyson Foods, Inc. v. Bouaphakeo},50 a wage-and-hour suit claiming unpaid overtime. \textit{Tyson Foods} raises (as one of two questions presented) the issue of “[w]hether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act [(FLSA)], when the class contains hundreds of members who were not injured and have no legal right to damages.”51 As in \textit{Spokeo}, the defendant in \textit{Tyson Foods} has received significant amicus support. Seven amicus briefs were filed in support of certiorari, and 14 amicus briefs (from a vast array of corporations and pro-business organizations) have been filed on the merits in support of defendant.

As the question presented indicates, \textit{Tyson Foods} was brought as a class action (for state law claims) and as a collective action for claims under the FLSA.52 The members of the class and collective action were workers at a pork-processing facility who alleged entitlement to overtime based upon the time involved in “donning” and “doffing” protective gear and walking to and from their work areas. Because proof of actual donning and doffing time for each employee would have raised significant individualized issues, plaintiffs relied—over defendant’s objection—on an expert study that purported to calculate the average donning and doffing time, based on a sample of employees. At trial, the expert admitted that there was significant variation among class members because employees performed different jobs, used different equipment, and put on

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50 765 F.3d 791 (8th Cir. 2014), \textit{cert. granted}, 135 S. Ct. 2806 (June 8, 2015) (No. 14-1146).


different quantities of protective gear depending on the specific work performed. The expert also admitted that the sample was not random. Another expert for plaintiffs used the average to calculate classwide damages but conceded that more than 212 of the approximately 1300 employees did not suffer injury because, even including the estimated average time, they did not work more than 40 hours per week. The jury found for plaintiffs and awarded damages, but in an amount that was significantly less than that calculated by plaintiffs’ expert. A divided Eighth Circuit panel affirmed.\textsuperscript{53}

The Court could use \textit{Spokeo, Tyson Foods}, or both to repudiate “no injury” cases across the board. As noted, the defense bar and business community have focused heavily on eliminating no-injury classes, and they have now succeeded in convincing the Supreme Court to address the issue in two separate cases during the 2015 Term. Given several recent 5–4 Supreme Court decisions cutting back on class actions,\textsuperscript{54} the defense bar and business community have reason to be optimistic that their attacks on “no injury” classes will be successful.

The defense bar’s attack on “no injury” classes has focused not only on the courts. With strong urging from the business community, Congressmen Bob Goodlatte and Trent Franks introduced H.R. 1927, the “Fairness in Class Action Litigation Act of 2015.”\textsuperscript{55} The proposed Act provides, in relevant part:

No Federal court shall certify any proposed class unless the party seeking to maintain a class action affirmatively demonstrates through admissible evidentiary

\begin{itemize}
\item \textsuperscript{53} 765 F.3d 791.
\item \textsuperscript{54} \textit{See Decline}, supra note __, at 773–80, 817–23.
\item \textsuperscript{55} H.R. 1927, 114th Cong. (2015).
\end{itemize}
proof that each proposed class member suffered an injury of the same type and extent as the injury of the named class representative or representatives.\textsuperscript{56}

Read literally to require “the same type and extent of injury” by every class member, the legislation could have far-reaching consequences. As Professor Alexandra Lahav testified before the Judiciary Committee:

[S]uppose a bank charges an illegal fee of $2 to every customer when he or she withdraws funds with a debit card. During the class period, James engaged in 15 transactions and Sarah engaged in 20. Accordingly, James’s loss is $30 and Sarah’s is $40. Assuming that the court would interpret the loss of funds as an “impact” on their “property,” under this bill the court would still not be permitted to certify this case as a class action because the extent of their losses is different: Sarah has lost $10 more than James and H.R. 1927 requires that the extent of their injury be the same.\textsuperscript{57}

Even if the “same type and extent of injury” language is not taken literally, but instead is simply interpreted to require \textit{some} injury by each class member, the bill could have major consequences. For example, the law could be used to foreclose class certification in many consumer product cases. It is frequently the case that a product with a propensity to fail works fine for some consumers but not for others. Indeed, wholly apart from consumer cases, there are many kinds of cases in which a class could include members who arguably have not suffered injury. As one consumer advocate blogger noted, the bill

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\textsuperscript{56} H.R. 1927, § 2(a). \textit{See also id.} § 2(b) (defining “injury” as “the alleged impact of the defendant’s actors on the plaintiff’s body or property”).

would preclude numerous class actions over predatory lending practices, anti-trust violations, employment law violations, unfair bank overdraft policies, denial of insurance benefits, and more . . . 58

Thus, it is not surprising that H.R. 1927 has generated significant controversy and debate. Liberal groups have condemned H.R. 1927. The American Association for Justice, for example, argues that the proposal “stacks the deck against Americans who seek to hold corporations accountable in court if they break consumer protection laws.” 59 A columnist for the LA Times described the Fairness in Class Action Litigation Act as unfair and thus “shamelessly titled.” A columnist for the LA Times described the Fairness in Class Action Litigation Act as unfair and thus “shamelessly titled.”60 Public Citizen has said that “[t]he aim [of the bill] is to wipe out class-action lawsuits.”61 The American Bar Association, in addition to accusing Congress of circumventing the Judicial Conference’s process for amending rules of civil procedure, asserted that “the proposed legislation would severely limit the ability of victims who have suffered a legitimate harm to collectively seek justice in a class action lawsuit.”62 By contrast, a letter by the Chamber of Commerce and more than two dozen other entities—addressed to Congressmen Goodlatte (and to Congressman John Conyers, the ranking Democrat on the House Judiciary Committee)—stated that the “bill is very modest legislation.”63 In testimony at a hearing on the bill, John Beisner, on behalf of the Chamber

61 Id.
of Commerce, asserted that “[a]doption of the proposed legislation would not mark a radical change in federal class action law.”\(^{64}\) As those comments show, perspectives on the proposed bill are sharply divided. Undoubtedly, the bill will remain contentious and controversial as it makes its way through the legislative process.

As of the date that this Article was submitted for publication, the House Judiciary Committee had voted to send the bill to the full House, but no further action had been taken.\(^ {65}\) Of course, even if the bill passes the full House, it must still pass the Senate and survive a potential Presidential veto. Those are major hurdles,\(^ {66}\) but for the reasons outlined above the bill has the plaintiffs’ bar worried—and with good reason.

In sum, the impact of such “fairness” legislation—or of a definitive Supreme Court ruling barring no-injury classes—would be enormous.

II. STATE OF CLASS ACTION JURISPRUDENCE IN 2025

As noted, I do not believe that Rule 23 itself will be fundamentally altered (although I do believe that there is a serious possibility that either the Supreme Court or Congress could repudiate “no injury” classes). But even if the basic structure of Rule 23 remains intact, and even if “no

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\(^{65}\) The Judiciary Committee added language limiting the Act to classes “seeking monetary relief for personal injury or economic loss,” thus excluding classes (such as some civil rights suits) seeking only injunctive relief. That added language does little to limit the sweep of the bill, which still covers all class actions for money in which the statutory test is met.

\(^{66}\) See *H.R. 1927: Fairness in Class Action Litigation Act of 2015*, GOVTRACK.US (August 12, 2015), https://www.govtrack.us/congress/bills/114/hr1927 (“Based on factors that are correlated with successful or failed bills in the past, this site gives this specific bill a 25% chance of being enacted.”).
injury” classes survive, I believe that the courts will continue to chip away at the class action device.

To begin with, as I explain below, the next decade is likely to witness a continuing decline in certain kinds of class actions, including consumer, employment, and mass tort cases. On the other hand, some courts will resist some of the most troublesome trends. Defendants will push too hard in relying on pro-defendant precedents and will suffer setbacks. Consequently, defendants will search for new and creative rationales for challenging class certification. As I explain, defendants are likely to look to typicality, predominance, and superiority in fashioning such arguments.

Another important trend I see is that courts are now giving greater scrutiny than ever to allegations of ethical improprieties by class counsel and objectors. Until recently, attorneys in class actions were reluctant to make personal attacks on other attorneys, and courts were uncomfortable in relying on alleged misconduct in adjudicating Rule 23 issues. That situation is changing. Lawyers in class actions are no longer shy about leveling ethical charges against other lawyers. In class settlements, objectors are frequently claiming misconduct by class counsel, and courts are becoming more receptive to such arguments. Correspondingly, I believe that plaintiffs’ counsel will increasingly challenge the ethical conduct of attorneys who seek to derail class action settlements on behalf of objecting class members.

Finally, I explain below that, in recent years the class action jurisprudence has been authored largely by a handful of appellate judges, and I offer my prediction that that trend will continue (although the faces are likely to change as some of those judges retire from the bench). This is an important trend: Because such judges are inclined to form strong views either for or
against class actions, and because their leadership in the field gives them great clout among their colleagues, the future of class actions will rest in the hands of that small subset of judges and will take shape in large part based on their approaches to aggregate litigation.

A. Predictions by Class Action Types

1. Securities Class Actions Will Remain Frequent

In *Decline*, I describe how federal appellate courts have cut back on various kinds of class actions. One exception that I discussed, however, was securities fraud class actions. I explained that, notwithstanding the enactment of the Private Securities Litigation Reform Act of 1995 (PSLRA), which was designed to rein in securities fraud class actions, such actions continued to thrive. I believe that securities fraud suits will remain frequent in the next decade.

The U.S. Supreme Court has had several opportunities to shut down many securities fraud class actions, but in each case has declined to do so. I discussed two of those cases in my *Decline* article:

- In *Erica P. John Fund, Inc. v. Halliburton Co. (Halliburton I)*, the Court unanimously held that a securities fraud plaintiff need not prove that the defendant’s misconduct caused the economic loss at issue (a concept known as “loss causation”) to certify a class.

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67 Class action lawsuits cover a wide spectrum of federal and state law. Because of space limitations, I cannot offer predictions for all kinds of class actions. I have chosen to focus in this article on four areas—securities, consumer, employment, and mass tort—but many of the topics in this piece (such as the attacks on "no injury" classes) could impact a wide variety of class actions.

68 See *Decline*, supra note __, at 745–823.

69 Id. at 824–26.


71 See *Decline*, supra note __, at 825.

In Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, the Court held that proof of the materiality of the alleged misrepresentations was not a prerequisite to class certification.

After the publication of my Decline article, the Court handed down another pro-plaintiff securities decision—perhaps the most important of the three. In Halliburton v. Erica P. John Fund (Halliburton II), the Court addressed the question whether it should overrule the “fraud on the market” principle of Basic, Inc. v. Levinson. That principle presumes that investors rely on material misrepresentations when the stock trades on a well-developed market. Basic enables plaintiffs in class actions to avoid the argument that individual reliance issues defeat class certification. The Court, in a portion of the opinion in which six Justices joined, refused to overrule Basic, rejecting a litany of arguments by Halliburton as to why the case was wrongly decided.

To be sure, the Halliburton II Court did hold that “defendants must be afforded an opportunity before class certification to defeat the [fraud on the market] presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock.” The evidentiary opportunity afforded to defendants prevents the case from being characterized as a complete victory for plaintiffs. Nonetheless, I do not believe that that aspect of the case will have a major impact on the prosecution of securities fraud class actions. Although it was partially helpful to Halliburton itself, several other courts have been unpersuaded by defendants’ efforts

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73 133 S. Ct. 1184 (2013).
76 134 S. Ct. at 2417. Because of that holding, the Court reversed the judgment, and thus Justices Thomas, Scalia, and Alito concurred in the judgment.
to rebut the Basic presumption with evidence presented at the class certification stage. Moreover, as one defense firm noted, the opportunity to submit evidence afforded by Halliburton II is not novel or new; rather, it “has been a common approach to defending securities fraud claims in the past.” In my opinion, the most important impact of Haliburton II is that the “fraud on the market” presumption will still be available in most securities fraud cases.

Recent statistics confirm that securities suits are still thriving two decades after the adoption of the PSLRA. A January 2015 report found that the “[n]umber of 10b-5 filings was up 14 percent post Halliburton II, compared to the period when Halliburton II was pending.” Another study found that 170 federal securities class actions were filed in 2014 (as compared with 166 in 2013). Although a mid-2015 study observed a drop in securities class action filings (from 92 in the second half of 2014 to 85 in the first half of 2015), I do not believe that those statistics undermine my overall point that securities fraud suits will remain frequent in the next decade. The


number from the mid-2015 study (85) is only about 10 percent below the average number of new securities class actions brought every six months between 1997 and 2014.\textsuperscript{83}

There is a simple reason why securities fraud class actions have not been severely impacted by the overall decline in class actions: They are highly suitable for class certification. With the availability of the Basic presumption of reliance, individual issues are relatively rare. In virtually all securities fraud class actions, the common issues will resolve the case for everyone in the class; the classes are usually large and easily identifiable; and in most instances damages can be mathematically calculated based on the number of shares held during a specific time frame. Because of the suitability of securities fraud cases for aggregate adjudication, they have been able to weather such newly established requirements as more stringent commonality (\textit{Dukes}), attacks on numerosity, and challenges to “trial by formula.” I predict that in the year 2025, securities fraud class actions will still be among the most frequently litigated class actions.

\textbf{2. Consumer and Employment Class Actions Will Become Less Frequent Because of Arbitration Clauses}

Even if the business community’s opposition to “no injury” classes does not succeed, I believe that consumer and employment class actions will decline in the next decade.

In recent years, many companies have inserted arbitration clauses in a variety of contracts with the aim of prohibiting class action suits in court or arbitration.\textsuperscript{84} In a number of cases, those clauses have been challenged on unconscionability and other grounds.\textsuperscript{85} In two significant cases


\textsuperscript{84} \textit{Decline, supra} note __, at 816.

\textsuperscript{85} See \textit{id.} at 818.
discussed in my Decline article—AT&T Mobility LLC v. Concepcion, and American Express Co. v. Italian Colors Restaurant—the Supreme Court upheld such arbitration clauses. In Concepcion, the Court held that the Federal Arbitration Act (FAA) preempted arguments that such arbitration clauses were unconscionable under state law. In American Express, the Court rejected the argument that such clauses should be unenforceable if the effect is to preclude plaintiffs from vindicating their rights (in that case under the antitrust laws) because of the high costs of litigating the claims individually.

Unless and until the composition of the Supreme Court changes, I do not believe that the Court will shift course and overrule Concepcion and American Express. To the contrary, it is very likely that the Court will reaffirm those decisions during the 2015 Term. On March 23, 2015, it granted review in DIRECTV, Inc. v. Amy Imburgia, in which DIRECTV has challenged the refusal of California’s state appellate courts to enforce an arbitration clause with a class action waiver. The state intermediate court had refused to require enforcement of that clause in the context of two class actions filed in state court, and the California Supreme Court denied review. The intermediate court found that the issue was governed entirely by state law, and thus it did not address preemption under the FAA. That decision is certain to be reversed by (at least) the same 5-4 majority that decided Concepcion (American Express was a 5-3 opinion).

At least one commentator, defense attorney and blogger Andrew Trask, believes that Concepcion and American Express will not have a drastic impact on class actions, and that those

86 Id. at 817–23.
88 133 S. Ct. 2304 (2013).
who argue otherwise are engaging in “hyperbole.”

Trask argues that, in many instances, plaintiffs still have potentially viable legal arguments for challenging arbitration clauses notwithstanding Concepcion.

Most commentators, however, predict that those cases will result in major cutbacks in class actions, especially in the consumer and employment contexts. Professor Brian Fitzpatrick is one such commentator. In a recent article, he explained that both consumers and employees “are in transactional relationships with the businesses that they sue.”

He noted that, even if consumers do not sign contracts with arbitration clauses (as they do, for example, for cell phones), companies can put binding language on the packaging of products. And in the case of employment contracts, “businesses can (and often do) ask their employees to sign contractual agreements, including clauses to arbitrate suits that might arise.”


92 See id.; accord, e.g., Richard Frankel, Concepcion and Mis-Concepcion: Why Unconscionability Survives the Supreme Court’s Arbitration Jurisprudence, 2014 J. DISP. RESOL. 225 (2014).

93 See, e.g., Myriam Gilles & Gary Friedman, After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 623 (2012) (“[M]ost class cases will not survive the impending tsunami of class action waivers.”); Jean R. Sternlight, Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice, 90 OR. L. REV. 703, 716–17 (2012) (“Concepcion is giving companies far greater power than they previously had to use arbitral class action waivers to protect themselves from class actions.”); Sarah Rudolph Cole, On Babies and Bathwater: The Arbitration Fairness Act and The Supreme Court’s Recent Arbitration Jurisprudence, 48 HOUS. L. REV. 457, 467 (2011) (“[T]he Court appears to have placed an insurmountable obstacle in the path of consumer efforts to vindicate low-value claims. . . . Concepcion is proving to be a tsunami that is wiping out existing and potential consumer and employment class actions.”); cf. Andrew J. Pincus & Archis A. Parasharami, Supreme Court Rejects Challenge to Arbitration Agreements, MAYER BROWN CLASS DEFENSE BLOG (June 20, 2013), https://www.classdefenseblog.com/2013/06/supreme-court-rejects-challenge-to-arbitration-agreements/ (opining that American Express “eliminated the last significant obstacle” to widespread arbitration and “sen[t] a clear message that . . . courts cannot refuse to enforce arbitration agreements simply because they bar class actions”).


95 Id. at 176.

96 Id. at 176–77.

97 Id. at 176.
Fitzpatrick does acknowledge that “the empirical evidence does not yet bear out a flight to class action waivers in the consumer and employment context,” but he still argues that “it is only a matter of time” before businesses adopt arbitration clauses more broadly in the consumer and employment contexts.\textsuperscript{98} Similarly, Professor Einer Elhauge argues that “it is hard to see why all businesses would not . . . insert arbitration clauses into their contracts that preclude class arbitration.”\textsuperscript{99}

When Professor Fitzpatrick wrote his piece, he could find no empirical studies in the employment area.\textsuperscript{100} Since then, survey evidence supports his pessimistic predictions regarding the impact of \textit{Concepcion} and \textit{American Express} in the employment context. In April 2015, the \textit{Wall Street Journal} reported on a study conducted by the defense firm of Carlton Fields Jorden Burt LLP (surveying 350 companies), which found that in 2014, 43 percent of companies used arbitration clauses (precluding class action claims) in the employment context, up from 16 percent in 2012, the year after \textit{Concepcion}.\textsuperscript{101}

According to Professor Fitzpatrick, one possible reason why the early post-\textit{Concepcion} statistics are not more dramatic is that many companies have “a great deal of inertia (or ‘stickiness’) that must be overcome before even sophisticated businesses change their standard-

\begin{footnotesize}
\textsuperscript{98} Id. at 193.
\textsuperscript{100} Fitzpatrick, supra note __, at 191.
\end{footnotesize}
form contractual language.”

But he, like Professor Elhauge, predicts that “businesses will eventually flock to arbitration clauses with class action waivers.” I agree with that prediction (assuming that Concepcion and American Express remain good law). By 2025, arbitration clauses barring class actions (either in litigation or in arbitration) are likely to be common in both the consumer and employment areas. And it is unreasonable to believe that companies will voluntarily allow class actions to proceed when they possess signed arbitration agreements. Moreover, after Concepcion and American Express, plaintiffs would appear to have few legal arguments to circumvent such agreements.

In the consumer finance area (e.g., consumer finance agreements for credit cards, checking accounts, and loans), a March 2015 report of the Consumer Financial Protection Bureau (CFPB) found some increase (but not a dramatic one) in arbitration clauses in credit card and checking account contracts. Significantly, the report found that it was common for companies to invoke arbitration clauses as a way of blocking class actions, but relatively rare for companies to invoke such clauses to block individual lawsuits. Under Dodd–Frank, the CFPB has authority to prohibit or limit arbitration clauses in consumer financial contracts if doing so would be in the public interest. More than 50 members of Congress have written to the CFPB urging it to

102 Fitzpatrick, supra note __, at 192.
103 Id. at 193.
105 CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY, supra note __, at 14–15.
106 Id. at 5 n.7; see Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5518(b) (2012).
prohibit the use of forced arbitration clauses in financial agreements. Thus far, the CFPB has not taken any action.

If it were to take action, the CFPB could impact a wide variety of consumer finance agreements, including “credit cards, checking accounts, general purpose reloadable prepaid accounts (‘GPR prepaid cards’), private student loans, storefront payday loans, and mobile wireless third-party billing.” Many types of controversies would be unaffected, however, including (among others) various antitrust, employment discrimination, and wage and hour claims. In addition, even with respect to consumer finance agreements, those who previously signed arbitration clauses would be “grandfathered in,” negating the impact of any potential CFPB action with respect to a large number of people. Moreover, any regulations issued by the CFPB to ban mandatory arbitration clauses in the consumer finance area would almost certainly be challenged as contrary to the FAA’s broad policy favoring arbitration. As one defense firm noted in its analysis of the CFPB’s report: “Whether the CFPB can be delegated the power to unilaterally restrict the provisions of a U.S. law such as the FAA will be a substantial hurdle for the CFPB to overcome.” Indeed, the CFPB as an agency is already controversial, and the issuance of

108 CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY, supra note __, at 7.
109 See Gilles & Friedman, supra note __, at 658 (noting that, even if the CFPB bans class action waivers in consumer financial contracts, “any resulting rule will apply, under a grandfather clause, only to contracts entered into more than 180 days after that rule is issued[,]” likely resulting in a “dash to insert waivers [after] any rulemaking” and proving problematic “especially in the credit card arena, where consumers enter into ‘evergreen’ contracts that remain in place for many years”).
regulations barring mandatory arbitration in consumer finance agreements could increase calls by some members of Congress to de-fund the agency. 111

Thus, while it is possible that the CFPB could take regulatory steps to prohibit or limit arbitration clauses, its actions would be subject to a potentially strong legal attack, and in any event, its actions would not cover the waterfront of offending arbitration clauses. And while Congress could step in, the current climate (with Republicans controlling both Houses) suggests that broad legislation overruling Concepcion and American Express is unlikely to be passed any time soon. Several members of Congress have offered legislation that would prohibit pre-dispute arbitration clauses in a variety of contexts, including consumer, employment, and antitrust. Thus far, however, those efforts have made no headway. 112

In short, it is certainly possible that the CFPB will act to block arbitration clauses within its purview and that its action will be upheld. It is also possible that Concepcion and American Express could be judicially or legislatively overruled in the next decade as a result of changes in the composition of the Supreme Court or in the makeup of Congress. I am certainly not as pessimistic as Professor Fitzpatrick, who predicts “a world without class actions.” 113 At least in the short term, however, Concepcion and American Express will have an increasingly wide impact

112 See id. at 352–53 (discussing proposals that have been offered several times since 2011 and noting that all of the proposals have “died in Congress”). Arbitration clauses have been barred in a few contexts since Concepcion, but those instances constitute a relatively small proportion of circumstances in which arbitration clauses are used. See, e.g., Exec. Order No. 13673, 79 Fed. Reg. 45,309 (July 31, 2014) (prohibiting mandatory arbitration of Title VII claims under certain federal contracts); 48 C.F.R. 222.7402 (2011) (prohibiting mandatory arbitration of Title VII and some tort claims under certain federal defense contracts).
113 Fitzpatrick, supra note __, at 199.
as more businesses require and enforce mandatory “no class action” arbitration clauses in a variety of contexts.

3. **Personal Injury Class Actions Will Remain Infrequent**

The judicial trend against certifying personal injury class actions is well known.\(^{114}\) In brief, in a series of cases dating back to the late 1960s (with a temporary retreat in the 1980s), courts ruled that personal injury class actions usually failed to satisfy the predominance and manageability requirements of Rule 23(b)(3).\(^{115}\) Unable to pursue class actions in most mass tort cases, plaintiffs have looked to other aggregation devices,\(^{116}\) including coordination under the Multidistrict Litigation Act (MDL Act), 28 U.S.C. § 1407.\(^{117}\) I do not see that situation changing in the next decade. Courts are now entrenched in ruling that, in most personal injury class actions, individual issues outweigh common issues, thus disqualifying such actions on predominance and manageability grounds.\(^{118}\)


\(^{115}\) See id. (noting skepticism from late 1960s through early 1980s, surge in mid-1980s, and skepticism again thereafter); Arthur R. Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem”, 92 Harv. L. Rev. 664, 677–82 (1979) (describing that history).

\(^{116}\) See Decline, supra note __, at 803 n.432 (citing examples of mass tort cases treated as “quasi-class actions”).


\(^{118}\) See, e.g., Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (overturning class settlement in asbestos case, in part because of lack of predominance); In re Am. Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996) (class action not appropriate for people claiming injuries from penile implants); Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (overturning class certification in tobacco litigation because of myriad individualized issues). Recent cases have reaffirmed that approach. See, e.g., Nola v. Exxon Mobil Corp., No. 13-439, 2015 WL 2338336, at *6–7 (M.D. La. May 13, 2015) (refusing, on predominance grounds, to certify putative class of individuals alleging harm due to
The one possible counter-trend is in the settlement context. A few courts have been willing to certify personal injury class actions for settlement purposes. Examples include the NFL concussion litigation and the *Deepwater Horizon* case.\(^{119}\) For the most part, however, personal injury mass torts continue to be adjudicated outside of the class action arena.\(^{120}\) I believe that that trend will continue in the next decade.

4. **The Supreme Court Will Curtail Efforts by Plaintiffs to Establish Liability or Damages Through “Trial by Formula”**

In addition to granting review in *Tyson Foods* on the “no injury” issue, the Court also granted review on the propriety of plaintiffs’ use of statistical evidence.\(^{121}\) In its petition for certiorari, Tyson Foods argued that the trial methodology used in the case conflicted with the Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*.\(^{122}\) In *Dukes*, the Supreme Court described as follows the statistical technique that plaintiffs proposed to prove damages for a class of women alleging sex discrimination:

> A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid proximity to defendant’s oil refinery, and noting that “certification is not favored in mass tort cases”); Cannon v. BP Prods. N. Am., Inc., No. 3:10-CV-00622, 2013 WL 5514284, at *14–15 (S.D. Tex. Sept. 30, 2013) (“As a general rule, a ‘mass accident’ is ‘not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways,’ thus necessitating multiple, separately-tried lawsuits.” (quoting Fed. R. Civ. P. 23(b)(3) advisory committee’s note)); Brandner v. Abbott Labs., Inc., No. 10-3242, 2012 WL 195540, at *4 (E.D. La. Jan. 23, 2012) (holding that putative class alleging injury due to recalled baby formula failed to meet predominance requirement).

\(^{119}\) *In re Nat’l Football League Players’ Concussion Injury Litig.,* 307 F.R.D. 351 (E.D. Pa. 2015), *appeal docketed, No. 15-2234 (3d Cir. May 19, 2015)* (class of former players alleging injury due to inadequate safety precautions certified for settlement purposes only); *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex. on Apr. 20, 2010*, 910 F. Supp. 2d 891 (E.D. La. 2012), *aff’d sub nom. In re Deepwater Horizon, 739 F.3d 790 (5th Cir. 2014)* (class of individuals suffering personal injuries from oil spill certified for settlement purposes).

\(^{120}\) See Sullivan v. DB Investments, Inc., 667 F.3d 273, 334 (3d Cir. 2011) (Scirica, J., concurring) (noting trend), *cert. denied*, 132 S. Ct. 1876 (2012); *supra* note ___.

\(^{121}\) See *supra* p. ___.

\(^{122}\) 131 S. Ct. 2541, 2559 (2011).
would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings.\(^{123}\)

The Supreme Court called the statistical model “Trial by Formula” and stated that “[w]e disapprove [of] that novel project.”\(^{124}\)

Subsequently, in *Comcast Corp. v. Behrend*,\(^{125}\) the Supreme Court rejected the statistical model of plaintiffs’ expert. The problem there was not “trial by formula” but instead the fact that “the model failed to measure damages resulting from the particular antitrust injury on which [plaintiffs’] liability in [the] action [was] premised.”\(^{126}\) Nonetheless, the thrust of the case was that courts must conduct a “rigorous analysis” of expert evidence proffered in support of class certification.\(^{127}\)

*Tyson Foods*, a wage-and-hour case, involves yet another challenge to expert testimony. Like *Dukes*, it involves the “trial by formula” context. In *Tyson Foods*, the defendant framed the issue as follows:

> Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.\(^{128}\)

\(^{123}\) Id. at 2561.

\(^{124}\) Id.

\(^{125}\) 133 S. Ct. 1426 (2013).

\(^{126}\) Id. at 1433–34.

\(^{127}\) Id. at 1433 (citation and internal quotation marks omitted).

As noted, the expert study in *Tyson Foods* calculated average donning and doffing time, despite the fact that actual donning and doffing time varied greatly among class members. There was no dispute that the expert relied on a non-random sample.

I have little doubt that, regardless of how it rules on the “injury” point, the Supreme Court will reverse the judgment in *Tyson Foods* (probably unanimously) based on the use of statistical evidence.\(^\text{129}\) Plaintiffs argue that, in using statistics, reasonable estimates are sufficient,\(^\text{130}\) but they cite no case involving statistical flaws even remotely similar to those in *Tyson Foods*. Nor is the case saved by their argument\(^\text{131}\) that the jury received other evidence in addition to the statistical proof. Moreover, I believe that the Supreme Court will apply its ruling both to Rule 23 and to FLSA collective actions.\(^\text{132}\) The statistical study was clearly flawed in my view, because it erroneously assumed that all class members were the same as the average.

My concern, however, is that the Court may go beyond just a narrow ruling condemning the specific (and obviously flawed) statistics used in *Tyson Foods* and instead issue a broader opinion that would severely limit the use of statistical proof in a wide variety of class actions. The very term used by the Supreme Court to describe the statistical proof in *Dukes*—namely, “Trial by Formula”—suggests a contempt for statistical proof, especially given the Court’s use of quotation marks. But statistical proof is used in a variety of areas. As noted by an amicus brief in *Tyson Foods* submitted by a group of law professors on behalf of neither party:

\(^\text{129}\) My prediction for a unanimous outcome is only with respect to the trial by formula issue, not with respect to the “no injury” issue. *See supra* p. __. *Cf.* Duran v. U.S. Bank Nat’l Ass’n, 59 Cal. 4th 1 (Cal. 2014) (unanimous California Supreme Court decision rejecting use of statistical sampling in wage-and-hour case).


\(^\text{131}\) *Id.* at *10.

\(^\text{132}\) *See supra* p. __.
[The Supreme] Court has relied on statistics when analyzing such issues as: discrimination based on race, sex, and national origin, assessment of taxes under the Internal Revenue Code, market dynamics under antitrust laws, Congressional apportionment and redistricting, state enforcement of federal regulations, and regulatory variances under the Clean Water Act. Likewise, scholars have discussed the use of quantitative methods for analyzing a diverse range of additional issues, including the standard of care in medical malpractice suits, consumer confusion in trademark infringement actions, application of the federal sentencing guidelines, adjudication by administrative agencies, and actuarial predictions of future dangerousness that influence detention of sex offenders and imposition of the death penalty. 133

Commentators have noted various benefits from trials by statistics, including equality of outcomes, transparency, efficiency (as opposed to individual trials), deterring wrongful conduct by defendants, avoidance of aberrational jury awards, and ensuring compensation to individual class members. 134 At the same time, use of statistics can result in “over-compensation or under-compensation” for individual class members, deny defendants the right to challenge damages for individual class members, and distort substantive law. 135 In addressing those competing considerations, commentators have analyzed possible approaches to make statistical sampling fair and reliable.

Professor Lahav, for example, defends “trial by formula,” but only if the study is random, unbiased, and “sufficiently large to provide reliable results.” 136 Professor Tidmarsh proposes that


135 Tidmarsh, supra note __, at 1470–76.

136 Lahav, supra note __, at 629–33.
the use of statistical evidence be supplemented by the right of either side to challenge an award for any plaintiff or class member. Absent such a challenge, the award would stand.\textsuperscript{137} As the Lahav and Tidmarsh approaches demonstrate, cogent arguments can be made for the use of statistical proof that ensures accuracy while addressing defendants’ legitimate concerns. It would be ill-advised for the Court to issue a broad condemnation of “trial by formula” in a case that can be decided on narrow grounds. Trial courts should be given a chance, notwithstanding the flawed approach in \textit{Tyson Foods}, to utilize statistical proof in a variety of class actions. I fear that, after \textit{Tyson Foods}, those opportunities could be foreclosed.

5. \textbf{The Next Several Years Will See the Demise of the “Ascertainability” Requirement Adopted By Some Courts}

In \textit{Marcus v. BMW of North America, LLC},\textsuperscript{138} the Third Circuit adopted a sweeping new “ascertainability” requirement for class certification in (b)(3) actions, a requirement mentioned nowhere in Rule 23. As the court explained: “If class members are impossible to identify without extensive and individualized fact-finding or ‘mini-trials,’ then a class action is inappropriate.”\textsuperscript{139} In that case, the court reversed and remanded because of “serious ascertainability issues.”\textsuperscript{140} The class consisted of putative class members who alleged that BMW and Bridgestone failed to disclose that the Bridgestone run-flat tires used on BMWs were defective. According to the Third Circuit, plaintiffs had not identified a feasible way to identify class members whose tires had gone flat and were replaced. The Third Circuit has since reaffirmed \textit{Marcus} on several occasions. In

\textsuperscript{137} Tidmarsh, \textit{supra} note __, at 1506.
\textsuperscript{138} 687 F.3d 583 (3d Cir. 2012).
\textsuperscript{139} \textit{Id.} at 593.
\textsuperscript{140} \textit{Id.}
Hayes v. Wal-Mart Stores, Inc., the class alleged that Wal-Mart improperly sold extended warranties for “as is” merchandise. The court found an ascertainability problem because the business records did not disclose which items were in fact sold “as-is.” And in Carrera v. Bayer Corp., which involved allegations by a putative class that Bayer falsely advertised certain health effects of its One-A-Day WeightSmart, the court found an ascertainability problem because class members were unlikely to have receipts for their purchases, and Bayer had no records of its purchasers. In Byrd v. Aaron’s Inc., the Third Circuit arguably retreated from its prior trilogy, calling the ascertainability requirement a “narrow” one and stating that it is “neither designed nor intended to force all potential plaintiffs who may have been harmed in different ways by a particular defendant to be included in the class in order for the class to be certified.” Nonetheless, the Byrd court did not repudiate the Third Circuit’s prior cases, and it made clear that reliance on affidavits, “without any objective records to identify class members or a method to weed out unreliable affidavits,” did not satisfy ascertainability. Judge Rendell, concurring in Byrd, argued that the Third Circuit should do away with the ascertainability requirement altogether.

The defense bar has highlighted the new ascertainability law in numerous blogs, and it has attempted to convince courts outside the Third Circuit to adopt the Third Circuit’s approach.

141 725 F.3d 349 (3d Cir. 2013).
142 727 F.3d 300 (3d Cir. 2015).
143 Because the classes in Hayes and Carrera were certified before the Third Circuit’s Marcus decision, the Third Circuit in Hayes and Carrera held that plaintiffs should have another chance to satisfy ascertainability. Carrera, 727 F.3d at 312; Hayes, 725 F.3d at 361–62.
144 784 F.3d 154 (3d Cir. 2015).
145 Id. at 165, 167.
146 Id. at 170.
147 Id. at 172–77 (Rendell, J., concurring).
It has had only mixed success, however. Although some district courts outside the Third Circuit have adopted the ascertainability requirement as a threshold requirement for class certification,\(^{149}\) no other circuit has done so.

Recently, the Seventh Circuit, in *Mullins v. Direct Digital, LLC,*\(^{150}\) emphatically rejected the Third Circuit’s ascertainability jurisprudence. Agreeing with Judge Rendell in *Byrd*, the court ruled that ascertainability was not a valid prerequisite to class certification. The court reasoned that the requirement was not contained in Rule 23 and that the concerns animating the doctrine were best addressed by Rule 23(b)(3)’s superiority requirement (and its mandate that a class action must be manageable). That approach was not merely a shift in terminology: The court made clear that the denial of class certification on manageability grounds “should be the last resort,” and that the district court’s judgment should be given deference.\(^{151}\) In my view, the Seventh Circuit’s refutation of the Third Circuit’s ascertainability rule is convincing.

\(^{149}\) See, e.g., Warnick *v. Dish Network LLC*, 301 F.R.D. 551, 556–57 (D. Colo. 2014) (noting that “[t]he ‘rigorous analysis’ applicable to Rule 23’s requirements appl[ies] to the ascertainability requirement” and refusing to certify class on ascertainability grounds (quoting *Carrera*, 727 F.3d at 306)), *appeal docketed*, No. 15-1100 (10th Cir. Mar. 20, 2015); Jamison *v. First Credit Svcs., Inc.*, 290 F.R.D. 92, 108–09 (N.D. Ill. 2013) (denying motion for class certification on ground that plaintiffs “failed to establish by clear and convincing evidence that the class is ascertainable”); Tietsworth *v. Sears*, 720 F. Supp. 2d 1123, 1146–47 (N.D. Cal. 2010) (granting defendants’ motion to strike class allegations on ground that “the class as alleged in the [complaint] is not ascertainable”).

\(^{150}\) __ F.3d __, No. 15-1776, 2015 WL 4546159 (7th Cir. July 28, 2015).

\(^{151}\) *Id.* at *9; see also Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 YALE L.J. __ (2015) (cited in *Mullins*; author offers myriad grounds for rejecting an ascertainability requirement).
The Advisory Committee has been considering whether ascertainability should be an independent threshold requirement for class certification.\textsuperscript{152} At this stage, however, it is unclear whether the Advisory Committee will address ascertainability, and if it does whether it will reject the Third Circuit’s approach.

Wholly apart from the rulemaking process, the case law could sort itself out. The Third Circuit could reverse itself en banc in some future case; Byrd already signaled a retreat, and Judge Rendell made a powerful case for repudiating the requirement altogether. Moreover, Mullins provides a compelling, well-reasoned analysis for the Third Circuit to reject the requirement, and it demonstrates that the concerns underlying the requirement can be dealt with under the current rule structure.

It is likely that the defendant in Mullins will seek review by the Supreme Court. Assuming that the Advisory Committee does not address the issue and that the Third Circuit itself does not repudiate the requirement, I think that the Supreme Court is likely (in either Mullins or a later case) to grant review to resolve the conflict between the Third and Seventh Circuits. If the Court does grant review, it is my prediction that it will reject the ascertainability requirement. I think the Court will be sympathetic to the argument that the requirement was invented out of whole cloth and that the better way to address issues involving the identification of class members is through the superiority requirement, as Mullins reasoned. In analogous situations (discussed above),\textsuperscript{153} the Supreme Court in Halliburton I\textsuperscript{154} and Amgen\textsuperscript{155} rejected defendants’ arguments that the Court

\textsuperscript{152}See generally Advisory Committee Apr. 2015 Agenda Book, supra note __, at 74, 77, 254.
\textsuperscript{153}See supra pp. __.
should require plaintiffs to establish “loss causation” and “materiality” at the class certification stage. *Halliburton I* and *Amgen* provide strong authority for plaintiffs in arguing that the Court should not adopt certification requirements that do not appear in Rule 23.

6. **The Supreme Court Will Decline to Hold that an Unaccepted Offer of Judgment to a Class Representative Under Federal Rule of Civil Procedure 68 Moots the Action**

In *Campbell-Ewald Co. v. Gomez*, the Supreme Court granted review to decide whether an unaccepted offer of judgment to a class representative, made under Rule 68 before a class is certified, moots the individual’s personal and class claims. Defendants have used Rule 68 creatively in an effort to “pick off” class representatives, hoping that new representatives will not emerge and that the threat of a class action will disappear. Prior to 2013, the circuits were divided on the issue. However, since the Supreme Court’s decision in *Genesis Healthcare Corp. v. Symczyk*, and in particular Justice Kagan’s dissenting opinion, the circuits that have addressed the issue have all agreed that an unaccepted offer is a nullity and thus does not moot either the individual or putative class claims. Writing for herself and three other Justices, Justice Kagan stated in *Genesis Healthcare* that “an unaccepted offer of judgment cannot moot a case[,] . . . however good the terms.”

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157 Rule 68(a) provides that “a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued.” Rule 68(b) states that “[a]n unaccepted offer is considered withdrawn . . . .”

158 133 S. Ct. 1523 (2013).


160 133 S. Ct. at 1533 (Kagan, J., dissenting).
offer is considered withdrawn.’” \textsuperscript{161} No Justice in the majority disagreed with Justice Kagan; rather, the majority believed that the issue was not properly preserved.

It is my prediction that the Court as a whole will embrace the position taken by Justice Kagan (joined by Justices Ginsburg, Breyer, and Sotomayor) in \textit{Genesis Healthcare}. Rule 68 is quite clear that an unaccepted offer has no effect. Acceptance of Campbell-Ewald’s position would enable defendants in putative class actions to engage in gamesmanship by relying on unaccepted offers of judgment to derail putative class actions.

The Subcommittee of the Advisory Committee is also looking at Rule 68. Among various options that it has highlighted in sketches is one that would amend Rule 68 to make clear that the rule “does not apply to class or derivative actions . . . .” \textsuperscript{162} If, for some reason, the Supreme Court does not resolve the issue, the Advisory Committee could conceivably do so, although it could also choose to take no action on the matter.

\textbf{B. Likely Trends in Defense Arguments for Defeating Class Certification}

As I explained in my \textit{Decline} article, starting in the mid 1990s, many federal judges began to take a skeptical view of class actions. \textsuperscript{163} Capitalizing on that sentiment, class action defense counsel began mounting aggressive and novel arguments for defeating class certification, and thus far they have achieved great success. Twenty years ago, no one would have predicted that the longstanding interpretation of commonality under Rule 23(a)(2) would be set aside, \textsuperscript{164} that federal

\textsuperscript{161} \textit{Id.} at 1534 (quoting \textit{Fed. R. Civ. P.} 68(b)) (alteration in original).
\textsuperscript{162} Advisory Committee Apr. 2015 Agenda Book, \textit{supra} note \textsuperscript{___}, at 278.
\textsuperscript{163} \textit{Decline}, \textit{supra} note \textsuperscript{___}, at 733–34, 739–45.
\textsuperscript{164} \textit{Id.} at 773–80.
appellate courts would impose serious new obstacles to establishing numerosity, \(^{165}\) that “ascertainability” would become an important device in at least one circuit for shutting down many class actions, \(^{166}\) that Rule 23(b)(2) would be interpreted to exclude virtually all cases in which damages are sought, \(^{167}\) that courts would demand substantial evidentiary proof at the class certification stage, \(^{168}\) or that defendants could avoid class actions by relying on well-constructed arbitration clauses. \(^{169}\) Defendants are now armed with powerful arguments that in the past would have been considered weak, and class certification has become a far greater challenge for plaintiffs than ever before.

Nonetheless, the assault on class actions has not been a complete one; numerous class actions continue to be certified. \(^{170}\) In some instances, federal circuits have rejected broad readings

\(^{165}\) Id. at 768–73.

\(^{166}\) See supra pp. __.

\(^{167}\) Decline, supra note __, at 788–92.

\(^{168}\) Id. at 747–61.

\(^{169}\) Id. at 815–23.

of Supreme Court precedents. In other instances, some circuits have rejected extreme positions taken by their sister circuits. Accordingly, defense attorneys and the business community must continue to search for new arguments where the current ones are insufficient. I am certain that, during the next decade, class action defense attorneys will continue to push the envelope, advancing novel grounds for defeating class certification. I discuss below several arguments that I believe defense counsel are likely to press in the years ahead. I base my assessments on defense-oriented blogs, amicus briefs filed by the business community, and articles by prominent class action defense lawyers (discussed below).

171 See infra pp. __ (discussing restrictive reading of Comcast by various courts). Significantly, while Dukes has had a broad impact, see, e.g., Gerald L. Maatman Jr., Ada Dolph & Annette Tyman, Wal-Mart Stores Inc. v. Dukes: Has It Lived Up to the Hype?, WORKPLACE CLASS ACTION BLOG (Jan. 25, 2014), http://www.workplaceclassaction.com/files/2014/01/2014-01-24-Wal-Mart-Stores-Inc-v.-Dukes-Has-It-Lived-Up-Tp-The-Hype.pdf, several circuits have distinguished Dukes in other employment cases based on the specific facts and evidence. See, e.g., Chi. Teachers Union, Local No. 1 v. Bd. of Educ. of the City of Chi., __ F.3d __, No. 14-2843, 2015 WL 4667904, at *9–10 (7th Cir. Aug. 7, 2015) (commonality satisfied under facts “worlds away from [those] in Wal-Mart,” because the employment decisions at issue were made by “one decision-making body, exercising discretion as one unit” rather than several lower-level managers individually exercising discretion); Brown v. Nucor Corp., 785 F.3d 895, 909–22 (4th Cir. 2015) (workplace was in a single location, stronger evidence of bias was presented, and class was affected in a uniform manner by the employer’s exercise of discretion); Jimenez v. Allstate Ins. Co., 765 F.3d 1161, 1167–69 (9th Cir. 2014) (case presented “none of the problems identified by Dukes,” and certification order preserved defendant’s right to present individualized defenses to damages claims); In re Johnson, 760 F.3d 66, 72–73 (D.C. Cir. 2014) (applicants for employment were elevated using the same criteria and numeric systems, and all promotion decisions were made by the same manager); McReynolds v. Merrill Lynch & Co., 672 F.3d 482, 487–92 (7th Cir. 2012) (company-wide policies enabled managers to adversely impact African–American employees). Courts have sometimes distinguished Dukes in other contexts as well. See, e.g., Reyes v. Netdeposit, LLC, __ F.3d __, No. 14-1228, 2015 WL 5131287, at *14 (3d Cir. Sept. 2, 2015) (distinguishing Dukes in Racketeer Influenced and Corrupt Organizations Act (RICO) class action, stating, “it is clear that we are not faced with the individual circumstances that were fatal to certification in Wal-Mart”); Parsons v. Ryan, 754 F.3d 657, 681–89 (9th Cir. 2014) (distinguishing Dukes in case alleging Eighth Amendment prison violations on the ground that the prison case involved “systemic policies and practices”); Suchanek v. Sturm Foods, Inc. 764 F.3d 750, 755–58 (7th Cir. 2014) (distinguishing Dukes in consumer protection case and reversing district court decision denying class certification on commonality grounds).

172 See, e.g., Mullins v. Direct Digital, LLC, __ F.3d __, No. 15-1776, 2015 WL 4546159 (7th Cir. July 28, 2015) (discussed supra pp. __) (rejecting Third Circuit’s ascertainability requirement); cf. Decline, supra note __, at 761–68 (discussing several circuits that, contrary to various district courts, have refused to strike down alleged “fail-safe” classes).
1. Increased Reliance on Typicality

As I explained in my *Decline* article, defendants in class actions have been successful in convincing federal appellate courts to breathe new life into the previously lax requirements of numerosity, commonality, and class definition. Another class certification requirement—the “typicality” requirement—has not yielded the same payoff for defendants. Although cases can be found rejecting class certification on typicality grounds, many more can be found in which the typicality requirement was satisfied. And many of the cases finding a lack of typicality also rejected class certification on other grounds, so the lack of typicality was not essential to the outcome. The cases also tend to be very fact-specific, and it has thus been hard for defendants to argue lack of typicality based on prior decisions.

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174 See FED. R. CIV. P. 23(a)(3) (mandating that “the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class”).
176 For examples of cases finding that typicality was satisfied, see, e.g., Golan v. Veritas Entm’t, LLC, 788 F.3d 814 (8th Cir. 2015); Abbott v. Lockheed Martin Corp., 725 F.3d 803 (7th Cir. 2013); Sykes v. Mel S. Harris & Assocs. LLC, 780 F.3d 70 (2d Cir. 2015); Parsons v. Ryan, 754 F.3d 657 (9th Cir. 2014); Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp., 762 F.3d 1248 (11th Cir. 2014); Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co., 765 F.3d 1205 (10th Cir. 2014); Stephens v. Pension Benefit Guar. Corp., 755 F.3d 959 (D.C. Cir. 2014); Britt Green Trucking, Inc. v. FedEx Nat’l LTL, Inc., 511 F. App’x 848 (11th Cir. 2013); Meyer v. Portfolio Recovery Assoc., LLC, 707 F.3d 1036 (9th Cir. 2012); Young v. Nationwide Mut. Ins. Co., 693 F.3d 532 (6th Cir. 2012); Marcus v. BMW of N. Am., LLC, 687 F.3d 583 (3d Cir. 2012); Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015 (9th Cir. 2012); Shahriar v. Smith & Wollensky Rest. Grp., Inc., 659 F.3d 234 (2d Cir. 2011); Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168 (9th Cir. 2010).
Most importantly, typicality has not been pivotal in many cases because most courts have applied an easily satisfied test. For instance, the Ninth Circuit has stated that typicality is a “permissive” standard under which “representative claims are ‘typical’ if they are reasonably coextensive with those of absent class members; they need not be substantially identical.”\(^ {178}\) Or, as another court has stated, it is “inadequate” to “point[] to specific factual differences among the named Plaintiffs to dispute typicality[.]”\(^ {179}\)

Lately, defendants have sharpened their typicality arguments and have had some notable success. For instance, in *Spano v. The Boeing Co.*,\(^ {180}\) the Seventh Circuit—relying heavily on typicality—reversed the district court’s class certification order in an ERISA case alleging a breach of fiduciary duty in connection with 401(k) plan fees, expenses, and investment options. The court noted that “there must be enough congruence between the named representative’s claim and that of the unnamed members of the class to justify allowing the named party to litigate on behalf of the group.”\(^ {181}\) Under that standard, which the district court did not apply, a class representative “would at a minimum need to have invested in the same [investment] funds as the class members.”\(^ {182}\)

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\(^{178}\) *Parsons*, 754 F.3d at 685 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)).


\(^{180}\) 633 F.3d 574.

\(^{181}\) *Id.* at 586.

\(^{182}\) *Id.*
One especially interesting decision from 2013 is *Major v. Ocean Spray Cranberries, Inc.* \(^{183}\) There, plaintiffs claimed that labels on a number of Ocean Spray juice and drink products were deceptive (*e.g.*, “No Sugar Added” and “Healthy”). The defendant argued—and the court agreed—that typicality was not satisfied because multiple products were encompassed by the class definition, and the class representative did not personally purchase all of those products herself. Finding a lack of typicality under such facts is not unprecedented, and on the facts of the case the district court may have been correct in refusing to lump together a variety of different products. \(^{184}\) Nonetheless, the *Major* court’s “typicality” definition is troublesome because it provides that “a class representative must . . . suffer the same injury as the class members.” \(^{185}\) If applied literally as the test for typicality, it is subject to the same criticism that Professor Lahav leveled against H.R. 1927. \(^{186}\) It prevents certification whenever there are *any* differences between the injuries alleged by the representative and the unnamed class members, even when those differences do not conceivably bear on the ability of the representative to represent the class. \(^{187}\)

The importance of *Major* is illustrated by the extensive coverage that it received when it was decided. A number of the country’s most prominent defense firms featured the case on their blogs. \(^{188}\) The case received scholarly attention as well. For instance, Georgetown Law Professor

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\(^{185}\) 2013 WL 2558125, at *3 (emphasis added). *Contrast, e.g.*, Ouellette v. Int’l Paper Co., 86 F.R.D. 476, 480 (D. Vt. 1980) (“Differences in the degree of harm suffered . . . do not vitiate the typicality of a representative’s claims.” (citation omitted)). Although the *Major* court was quoting from *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982), which in turn was quoting from earlier Supreme Court cases, the Court in *Falcon* was merely articulating the principle that a class representative must be a member of the class that he or she represents, not that typicality required the complete absence of factual variations.

\(^{186}\) *See supra* p. __.

\(^{187}\) *See supra* p. __.

\(^{188}\) Jay Connolly & Joe Orzano, *Major v. Ocean Spray: Court Denies Certification of Putative Classes That Include Products Not Purchased by Plaintiff in Food Labeling Case*, CONSUMER CLASS DEFENSE BLOG (June 25, 2013),
Rebecca Tushnet’s well-respected blog highlighted Major in a feature story devoted solely to the case.\(^{189}\) It is highly unusual for a district court class certification decision to generate headline stories in multiple blogs. But the case is indeed noteworthy because it shows that typicality may indeed have teeth as an independent Rule 23(a) requirement.

In my opinion, the Major court’s definition of typicality is incorrect—it allows typicality to derail class actions even when the differences among class members do not affect the class representative’s ability to prosecute a case on a classwide basis and ensure that all segments of the class are adequately represented. Indeed, the Major court’s definition—which requires that the representative allege the same injury as all class members—makes typicality more demanding than predominance, since the latter requirement balances the similarities against the differences.\(^{190}\) Ultimately, I do not believe that the strict definition of typicality articulated in Major will be widely adopted. At the same time, depending on the composition of the Supreme Court in the next several years, I cannot rule out the possibility that the Court will breathe new life into typicality, just as it did for commonality (in Dukes).


\(^{190}\) See FED. R. CIV. P. 23(b)(3) (court must “find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members”).
2. Damages and Predominance

Prior to Comcast, courts had universally held that individualized damages did not, standing alone, preclude class certification. In Comcast, the Supreme Court ruled that Rule 23(b)(3)’s predominance requirement was not satisfied because “respondents’ [damages] model [fell] far short of establishing that damages are capable of measurement on a classwide basis.” After Comcast, defendants began to argue that the existence of individualized damages automatically defeated class certification. The problem was that Comcast was very fact specific and arguably did not represent a shift in the way courts had approached predominance when analyzing individualized damages. As the dissent pointed out, plaintiffs in Comcast did not dispute that, under the specific facts of the case, class certification would be inappropriate if individualized damages existed. According to the dissent, the defendant’s concession meant that the Court did not need to address the “well nigh universal” rule that “individualized damages calculations do not preclude class certification.”

Thus far, defendants have had little success in selling their interpretation of Comcast. The Second Circuit, in Roach v. T.L. Cannon Corp., squarely rejected it, concluding that Comcast “did not hold that proponents of class certification must rely upon a classwide damages model to demonstrate predominance.” The court cited several decisions, including cases from the Fifth, 

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192 Id. at 1433.
193 Id. at 1437 (Ginsburg & Breyer, JJ., dissenting) (citing plaintiffs’ brief). See Decline, supra note __, at __.
194 133 S. Ct. at 1437 (Ginsburg & Breyer, JJ., dissenting) (citing authority).
195 778 F.3d 401 (2d Cir. 2015).
196 Id. at 407 (citations omitted).
Seventh, and Ninth Circuits, in support of its construction of Comcast. The Third Circuit has weighed in on that side as well. The district court in Roach embraced the defendant’s reading of Comcast, but, as noted, that interpretation was rejected by the Second Circuit.

It is my prediction that, despite their lack of success thus far, defendants will continue to press their expansive reading of Comcast, with the ultimate goal of securing Supreme Court review on the issue. A definitive Supreme Court holding embracing defendants’ broad reading of Comcast would be another major blow to plaintiffs seeking class certification. It is difficult to predict how the Court will rule on the issue, especially given the fact that the Court’s composition is certain to change within the next few years. Assuming that the issue reaches the Supreme Court while all of the current members are still serving, it is conceivable that the same 5-4 configuration that prevailed on the new definition of commonality in Dukes (and that voted to decertify the class in Comcast) could form a majority on the predominance/damages argument as well. On the other hand, given that the predominance test, by its terms, requires a balancing of common and individualized issues, a majority of the Court might be persuaded by the argument that such a per se rule cannot be squared with the language of Rule 23(b)(3). In all events, regardless of how the issue is finally resolved, I am confident that defendants will not rest until they have obtained definitive ruling from the Supreme Court on the reach of Comcast.

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197 Id. (citing In re Deepwater Horizon, 739 F.3d 790, 817 (5th Cir. 2014); Butler v. Sears, Roebuck & Co., 727 F.3d 796, 799 (7th Cir. 2013); Leyva v. Medline Indus. Inc., 716 F.3d 510, 514 (9th Cir. 2013)).
199 Roach v. T.L. Cannon Corp., No. 3:10-CV-0591, 2013 WL 1316452, at *3 (N.D.N.Y. Mar. 29, 2013) (refusing to certify putative class of restaurant employees in wage-and-hour class action on the ground that damages were not “capable of measurement on a classwide basis” (citing Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013))), rev’d, 778 F.3d at 409 (“[B]ecause we do not read Comcast as precluding class certification where damages are not capable of measurement on a classwide basis, we reject the district court’s sole reason for denying Plaintiffs’ motion for class certification.”).
200 See supra note __.
3. Arguments Against Certification Based on “Superiority”

Another aspect of Rule 23 that I believe will be a focus of the defense bar and the business community is “superiority,” which is a required element of all class actions under Rule 23(b)(3).\textsuperscript{201} Like typicality, superiority has not heretofore been a potent weapon in the defendant’s arsenal for opposing class certification. Because a component of superiority is manageability,\textsuperscript{202} the superiority requirement is often invoked when individualized issues outweigh common issues, thus leading to an unmanageable situation.\textsuperscript{203} In such cases, superiority adds nothing to the equation because the identical argument is already a reason to deny certification on predominance grounds.

I believe, however, that in the coming decade, defendants will press superiority beyond the traditional manageability argument. Indeed, there are indications that defendants are already heading in that direction.

First, a number of recent articles have advised defendants to focus on administrative alternatives to a class action in challenging superiority. For example, a 2005 law review article urged the following:

\textsuperscript{201} Most class actions are brought under (b)(3). See, e.g., Saby Ghoshray, Hijacked by Statistics, Rescued by Wal-Mart v. Dukes, 44 LOY. U. CHI. L.J. 467, 478 n.54 (2012) (“Today, most class actions are certified under Rule 23(b)(3)[.]”); Thomas Kays, An Ounce of Prevention: Early Motions Attacking Class Certification, 80 DEF. COUNS. J. 164, 176 n.62 (2013) (noting that “most class actions fall under” (b)(3)).

\textsuperscript{202} FED. R. CIV. P. 23(b)(3)(D).

\textsuperscript{203} See, e.g., Madison v. Chalmette Refining, L.L.C., 637 F.3d 551, 554–57 (5th Cir. 2011) (using both “predominance” and “superiority” in remanding order certifying class because district court did not adequately analyze whether common issues predominated); Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich., 654 F.3d 618, 621, 631 (6th Cir. 2011) (reversing class certification on superiority in grounds in part because individual fact determinations would have to be made for each class member, and noting that, “[g]iven the necessary number of individual inquiries, a class action cannot be a superior form of adjudication”).
“Courts considering requests for class certification should . . . take a close look at pending or completed government law enforcement actions and investigations to determine their effect, if any, on [a] proposed class action.”204

The authors note that “[c]lass actions can . . . be inefficient, costly, and unnecessary, particularly if government law enforcement has solved or is likely to solve the problem.”205 That approach could be sensible in some circumstances. If the government is in the process of resolving a problem administratively, and if the resolution looks promising for the injured parties, perhaps a private lawsuit is not a superior mechanism. The same reasoning applies a fortiori if an administrative proceeding has already afforded adequate relief to aggrieved individuals. Superiority is surely flexible enough to permit an examination of alternative vehicles outside of private litigation for resolving a problem.206

My concern, however, is that commentators have taken the argument well beyond the situation of a pending (or completed) administrative action. As a 2010 article by two antitrust defense lawyers stated: “One effective argument for avoiding class certification could be whether a government action has already, is currently, or could potentially address the same issues raised in the class action complaint.”207 The authors cite a few cases where


205 Hoffman, supra note __, at 1392–93.

206 See, e.g., Brown v. Blue Cross & Blue Shield of Mich., 167 F.R.D. 40, 44 (E.D. Mich. 1996) (after the State of Michigan reached a settlement in which defendant Blue Cross agreed to refund overpayments of co-pays for hospital visits, court denied class certification in a related case, noting that “the interests of the class [are] adequately served by the agreement between defendant and the State of Michigan rendering a class action unnecessary”).

courts have refused to certify class actions on superiority grounds when there has been a prior settlement between the defendant and a government agency.\textsuperscript{208} They also cite a few cases relying on the superiority of a \textit{pending} government action.\textsuperscript{209} They acknowledge, however, that there is authority to the contrary.\textsuperscript{210} And they concede that “no case has yet held that an anticipated or potential suit should be a dispositive factor in precluding certification,” although they claim that “a number of courts have considered the government’s ability to enter the fray as one of the factors influencing the overall class certification decision.”\textsuperscript{211}

A finding of lack of superiority because of the mere \textit{possibility} of a government enforcement action, if adopted, could severely impact the ability of plaintiffs to certify a wide variety of cases, including many consumer, employment, and securities cases. The deterrent effect of private enforcement would be severely crippled. Yet, while the argument seems extreme, I think it is likely that defendants will try to press it as they look for new ways to challenge class certification.

Second, I believe that there will be a push by defendants to revive the substance—if not the terminology—of the “it just ain’t worth it” rule proposed by the Advisory Committee in 1996, but later tabled.\textsuperscript{212} Under that proposal, a court would look at whether the amount of potential recovery by individual class members would be large enough to justify the expense of a class

\begin{itemize}
\item \textsuperscript{208} Id. at 4–6.
\item \textsuperscript{209} Id. at 7–9.
\item \textsuperscript{210} Id. at 5–7.
\item \textsuperscript{211} Id. at 9.
\end{itemize}
action lawsuit.\textsuperscript{213} Presumably, small claims class actions, including many consumer cases, would fail under such an analysis. Although there is nothing to suggest that the Advisory Committee plans to take up that issue any time soon, it is quite possible that defendants will begin to press the argument even without a rule change. The argument would be that \textit{no} action is superior to one in which class members recover little, if anything. The argument would dovetail concerns raised by some courts about \textit{cy pres} settlements: Class actions are questionable if little or no recovery is received by class members.\textsuperscript{214}

Third, when damages are small on a per-class-member basis but large in the aggregate, I expect to see defendants argue—as some already have—that a class action is not the superior mechanism. As one defense attorney specializing in class actions recently asserted with respect to consumer class actions: “[T]he aggregation of statutory damages through the class action mechanism can create potential damage awards that are ruinous to small businesses and, in some cases, large corporations, and grossly disproportionate to any actual harm caused by the technical violations of the consumer protection statutes giving rise to the statutory damage claims.”\textsuperscript{215}

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\textsuperscript{213} In 2013, the State of Arizona considered a similar proposal, under which a court would have been required to consider “whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify maintaining the case as a class action.” S.B. 1452, 51st Leg., 1st Reg. Sess. (Ariz. 2013), available at http://www.azleg.gov/legtext/51leg/1r/bills/sb1452p.pdf; see also Paul Karlsgodt, \textit{Arizona Considers Significant Class Action Reform Bill}, CLASSACTIONBLAWG.COM (Feb. 4, 2013), http://classactionblawg.com/2013/02/04/arizona-considers-significant-class-action-reform-bill/. That proposal, however, was ultimately rejected. See Ariz. Rev. Stat. § 12-1871 (2013) (omitting “it just ain’t worth it” language).

\textsuperscript{214} See, e.g., \textit{In re Baby Prods. Antitrust Litig.}, 708 F.3d 163, 173 (3d Cir. 2013) (“[D]irect distributions to the class are preferred over \textit{cy pres} distributions.”); Nachshin v. AOL, LLC, 663 F.3d 1034, 1038 (9th Cir. 2011) (“[T]he \textit{cy pres} doctrine . . . poses many nascent dangers to the fairness of the distribution process.”).

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Although some district courts have embraced the argument,\textsuperscript{216} two recent federal appellate decisions have rejected it, reasoning that denying class certification on that ground would not be consistent with Congressional intent to compensate victims and deter misconduct.\textsuperscript{217} As one court explained: “To the extent that statutory damages . . . serve a deterrent purpose, a court undermines that purpose in denying class certification on the basis of the proportionality of actual harm and statutory liability.”\textsuperscript{218} Those decisions leave open the possibility that, on the merits, damages could be reduced as unconstitutionally excessive,\textsuperscript{219} but they make clear that denial of class certification on that basis is not appropriate. Nonetheless, despite the recent appellate decisions rejecting the proportionality argument, I have no doubt that defendants will continue to press it in the years ahead.

One final point on superiority: Although the Seventh Circuit’s recent \textit{Mullins} decision (rejecting ascertainability as a separate requirement for class certification\textsuperscript{220}) is largely a victory for plaintiffs, defendants can also make use of the case. In rejecting ascertainability, the court made clear that the superiority requirement can perform some heavy lifting: “If faced with what appear to be unusually difficult manageability problems at the certification stage, district courts have discretion to insist on details of the plaintiff’s plan for notifying the class and managing the

\textsuperscript{216}See, e.g., Ratner v. Chem. Bank N.Y. Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972) (superiority not satisfied where “the proposed recovery of $100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act.”); Shields v. First Nat’l Bank of Ariz., 56 F.R.D. 442, 446–47 (D. Ariz. 1972) (citing Ratner and similar cases).

\textsuperscript{217}See, e.g., Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708 (9th Cir. 2010); Murray v. GMAC Mortg. Corp., 434 F.3d 948 (7th Cir. 2006).

\textsuperscript{218}Bateman, 623 F.3d at 719.

\textsuperscript{219}Id. at 723; Murray, 434 F.3d at 954.

\textsuperscript{220}Mullins v. Direct Digital, LLC. __ F.3d __, No. 15-1776, 2015 WL 4546159 (7th Cir. July 28, 2015). See supra pp. __.
action.” And the court emphasized that “[a] plaintiff’s failure to address the district court’s concerns adequately may well cause the plaintiff to flunk the superiority requirement of Rule 23 (b)(3).” Thus, Mullins gives defendants an important roadmap for placing greater reliance on superiority.

C. Courts Will Focus More Heavily than in the Past on Asserted Ethical Violations by Class Counsel and Counsel for Objectors

As noted above, one major reason for the myriad recent cases cutting back on class actions is a concern that even cases with questionable merit place defendants under “intense pressure to settle.” As one court put it, “[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.” The unstated assumption is that plaintiffs’ lawyers are prone to file baseless lawsuits to coerce the settlement of marginal cases.

In part to reduce the pressure on defendants to settle, Rule 23(f) was adopted in 1998. That rule, which authorizes interlocutory appeals of decisions certifying class actions (at the discretion of the federal appellate court), is designed to give defendants the opportunity to challenge class certification immediately after the district court’s ruling, instead of waiting until the end of the case (or succumbing to the pressure to settle). Rule 23(f) has enabled the federal appellate courts

222 Id. at *16.
223 See supra p. __.
224 In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir. 1995).
225 Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citing Rhone-Poulenc, 51 F.3d at 1298).
226 See Fed. R. Civ. P. 23(f). Rule 23(f) also authorizes interlocutory review of an order denying class certification, but that Rule has disproportionately benefitted defendants who wish to challenge a district court’s order certifying a class. See Decline, supra note __, at 741 (concluding, based on the author’s empirical study, that Rule 23(f) “has served primarily as a device to protect defendants”).
to address myriad issues relating to class certification. The result is that the federal appellate courts have erected significant roadblocks to class certification.227 Many of the cases adopting those stringent new standards have specifically referenced the pressure on defendants to settle meritless class actions.228 In other words, tightening the requirements for class certification is seen by some judges as necessary to combat unscrupulous plaintiffs’ attorneys who bring baseless claims, even if the impact of that approach is to curtail legitimate class actions.

Although arguable ethical misconduct has lurked in the background in some cases, courts have traditionally been unwilling to hold class counsel accountable for improper behavior. In 2004, I concluded, based on empirical research, that “[c]ourts . . . ha[d] almost universally refused to disqualify class counsel [on adequacy of representation grounds] based on ethical misconduct.”229 My research of all published class action decisions since the adoption of modern Rule 23 in 1966 (including those found only on Lexis or Westlaw) revealed only three instances in 38 years in which courts had found class counsel inadequate under Rule 23(a)(4) based on ethical misconduct.230 I was highly critical of the judiciary’s refusal to give weight even to egregious attorney misconduct.231 I was not arguing that ethical abuse was widespread. Indeed, I believe—based on decades of personal experience representing clients in class actions—that most class action attorneys are ethical and conscientious. But egregious situations do arise, and courts have traditionally been reluctant to exercise appropriate oversight even in those situations.

227 Decline, supra note __, at 747–51.
228 See id. at 753, 818 (citing examples).
230 Id. at 692 & n.134 (citing cases).
231 Id. at 692, 697.
The landscape has changed significantly in recent years. As discussed below, ethical misconduct is now front-and-center in many cases. Surprisingly, that important trend has gone virtually unnoticed by commentators. Part of the reason for the recent spate of cases is that, with many courts already expressing concern about the legitimacy of the class action device, attorneys have felt emboldened to make direct accusations of misconduct against other attorneys in their cases. (I saw relatively few such attacks during my many years as a class action practitioner.) And appellate judges are now reviewing more class actions in light of Rule 23(f), and thus are seeing more cases involving allegations of ethical misconduct.

The key precedents are worth examining because they provide insight into what the future is likely to hold. Judge Posner alone has written four important opinions for the Seventh Circuit scrutinizing misconduct of class counsel. In one of those cases, Creative Montessori Learning Centers v. Ashford Gear LLC, the court criticized the lax approach of the district court and adopted a new, onerous test whereby class counsel who has engaged in ethical violations has a heavy burden to show that he or she is nonetheless adequate to represent the class. Based on that test, and on defendant’s allegations of serious misconduct by class counsel—including obtaining material by falsely promising to maintain confidentiality—the court vacated and remanded the district court’s class certification order. In three other opinions for the court overturning class settlements, Judge Posner also relied heavily on misconduct of class counsel. In

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232 See infra pp. __.
233 See supra p. __.
234 662 F.3d 913 (7th Cir. 2011).
235 Id. at 918–19 (rejecting the district court’s test that “only the most egregious misconduct could ever arguably justify denial of class status,” instead holding that “[m]isconduct by class counsel that creates a serious doubt that counsel will represent the class loyally requires denial of class certification[,]” and further noting that “[a] serious or, equivalently, a ‘major’ ethical violation should place on class counsel a heavy burden of showing that they are adequate representatives of the class” (citations omitted; emphasis in original)).
*Eubank v. Pella Corp.*, the court invalidated a class settlement based on numerous ethical violations by class counsel. The violations included a conflict of interest of lead counsel, who was the lead class representative’s son-in-law; the fact that class counsel was facing other disciplinary charges; and the fact that the settlement awarded only modest recoveries (but substantial attorneys’ fees) and required class members to fill out burdensome claim forms. In *Redman v. RadioShack Corp.*, the court found that a one million dollar fee award to counsel was improper because it was disproportionate to the $10 “coupons” received by class members for future purchases at RadioShack. Similarly, in *Pearson v. NBTY, Inc.*, the court again overturned a class settlement where class members received meager recoveries and had to complete onerous claim forms. In all three cases, the Seventh Circuit concluded that class counsel favored their financial interests over those of the class and thus did not zealously represent their clients.

Most recently, in *In re Southwest Airlines Voucher Litigation*, the Seventh Circuit (in an opinion authored by Judge David Hamilton) addressed a conflict of issue objection that was raised for the first time on appeal. Objectors argued that class counsel was not adequate under Rule 23(a)(4) because lead class counsel was co-counsel in another case with one of the two class representatives. Initially, the court noted that “[t]he conflict of interest issue . . . presents a rare instance in which it makes sense for us to consider an issue not raised in the district court,” and it thus rejected the argument that the objection was waived. The court concluded that there was at least a potential for a conflict of interest, and that the relationship should have been disclosed to

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236 753 F.3d 718 (7th Cir. 2014).
237 768 F.3d 622 (7th Cir. 2014).
238 772 F.3d 778 (7th Cir. 2014).
240 *Id.* at *11.
the court. Although the court declined to overturn the settlement (concluding that the class had not been prejudiced), it did eliminate a $15,000 incentive award to the class representative, and also reduced the attorneys’ fees to the offending class counsel by $15,000. Most importantly, the court used strong language in stating that both class counsel and the representative were “fiduciaries for the class” and thus “should have known to disclose their relationship and the potential conflict it posed.”

The Ninth Circuit has similarly imposed significant consequences on class counsel for ethical violations. In *Rodriguez v. West Publishing Corp. (Rodriguez I)*, a settlement provided five of seven class representatives with “incentive payments” based on the amount recovered by the class. Although the court approved the settlement (because there were two class representatives who were not entitled to such payments), it found that the conflicts of the five representatives “implicate[d] California ethics rules that prohibit representation of clients with conflicting interests.” As a result, the court held that the ability of counsel to recover fees was “implicated.” On remand, the district court held that counsel were not entitled to any attorneys’ fees in light of the conflict of interest. In the second appeal, with the case now styled *Rodriguez v. Disner (Rodriguez II)*, the court of appeals affirmed the district court, reasoning that “[a] court has broad equitable power to deny attorneys’ fees (or to require an attorney to disgorge fees already received) when an attorney represents clients with conflicting interests.”

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241 Id. at *12.
242 563 F.3d 948 (9th Cir. 2009).
243 Id. at 960.
244 Id. at 968.
246 688 F.3d 645 (9th Cir. 2012).
247 Id. at 653.
The following year, in *Radcliffe v. Experian Information Solutions Inc.*, the Ninth Circuit held that class counsel were inadequate to represent a class under Rule 23(a)(4) because their agreement with class representatives provided for incentive payments only if the representatives supported the settlement that class counsel entered into with the defendant. The court again noted that counsel are prohibited from representing clients “with actual or potential conflicts of interest absent an express waiver.” The court thus reversed the settlement as well as the award of attorneys’ fees to counsel.

The fact that, in just the past few years, *eight* U.S. Court of Appeals class action opinions (five from the Seventh Circuit and three from the Ninth) have turned in whole or in part on ethical violations is highly significant. As noted, for most of the period since the adoption of modern Rule 23, ethical violations of counsel almost never impacted the outcome of class certification or settlement approval.

Notably, the recent intense focus on ethical violations is not limited to federal appellate courts. A number of federal district courts have also condemned ethical lapses by class counsel (and, in at least one instance, by class action defense counsel).

For instance, in August 2015, Judge Nicholas Garaufis (Eastern District of New York) rejected a $75 million class settlement in an antitrust suit by various merchants against American Express. The court found that class counsel (Gary B. Friedman of the Friedman Law Group)

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248 715 F.3d 1157 (9th Cir. 2013).
249 Id. at 1167 (citing *Rodriguez I* and *Rodriguez II*).
250 See supra p. __.
had engaged in “egregious conduct” by sharing privileged, highly material information about the case with a class action defense attorney (Keila Ravelo, formerly of the Wilkie Farr law firm and now under federal indictment for unrelated matters), who was counsel in a similar case involving Mastercard. The conduct of defense counsel, of course, was equally egregious in accepting that privileged and confidential information. In an affidavit submitted in the case, Hofstra Law Professor Emeritus Roy Simon, Jr., a legal ethics expert, stated that he could not “recall ever seeing such repeated and serious violations of professional duties” by class counsel and defense counsel. Judge Garaufis’s lengthy opinion emphatically rejected class counsel’s argument that the conduct did not justify invalidating the settlement. Indeed, the court dismissed Friedman as class counsel. Significantly, the ethical misconduct could also put in jeopardy a 2013 class settlement of close to $6 billion in a similar case involving Visa and Mastercard.

In another 2015 case, Johnson v. Smithkline Beecham Corp., Judge Paul Diamond (Eastern District of Pennsylvania) sanctioned one of the country’s premier mass torts plaintiffs’ firms, Hagens Berman, imposing substantial fees and costs. Similarly, in Viveros v. VPP Group, 256

252 See id. at *13.
257 The claim in the Johnson litigation was that the drug thalidomide caused birth defects in plaintiffs about 50 years ago. The case was not technically a class action but instead involved 52 individual plaintiffs represented by Hagens Berman. Defendants (manufacturers and distributors of the drug) alleged that the claims were barred by the statute of limitations. In the face of plaintiffs’ arguments of fraudulent concealment and equitable tolling, defendants produced evidence from discovery indicating that some plaintiffs had known for decades that thalidomide had caused their birth defects and that other plaintiffs had no evidence that their mothers had taken the drug during pregnancy. The court found that sanctions were justified, stating that the law firm’s conduct was “not zealous” but “dishonest.” Id. at *2–11, *14.

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LLC, the court sua sponte found class counsel inadequate under Rule 23(a)(4) based on counsel’s poor performance in the case at issue and in two prior class actions (all labor law cases) before the same judge. The court was also troubled by class counsel’s “disciplinary history,” including both public and private reprimands by the Wisconsin Supreme Court.

In another significant development, albeit in a different context, the Kentucky Supreme Court entered an order in 2013 disbarring Stanley Chesley, one of the country’s premier class action plaintiffs’ lawyers. The court found that Chesley had violated multiple provisions of the Kentucky Rules of Professional Conduct.

To be sure, courts have correctly recognized that not every ethical violation renders class counsel inadequate under Rule 23(a)(4). Nonetheless, the flurry of recent cases holding class counsel accountable for ethical violations represents a sea change. The question, of course, is why there has been that recent focus on ethical violations of class counsel. In my view, there are at least three reasons.

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259 Id. at *11. The court did, however, give counsel one last chance to show that his conduct was not sufficiently egregious to warrant a finding of inadequacy under Rule 23(a)(4). Id. at *11–12.
260 Ky. Bar Ass’n v. Chesley, 393 S.W.3d 584 (Ky. 2013).
261 Among other things, Chesley accepted exorbitant attorneys’ fees after agreeing to decertification of a class (involving persons who claimed injury from use of the diet drug, “fen-phen”) and entering into a settlement that included only his own clients. Although Chesley’s contingent-fee agreement limited him to $14 million based on the recovery he had negotiated, he actually received $22 million in fees. Indeed, in seeking a fee award, he failed to inform the trial court concerning the limits imposed by the contingency-fee agreements. Id. at 592, 598–99. Subsequently, in a civil action filed by his former clients, Chesley was held jointly and severally liable with his co-counsel for $42 million. Abbott v. Chesley, No. 05-CI-00436 (Boone Cir. Ct., Div. III, Ky. July 29, 2014), available at http://www.scribd.com/doc/235960969/Chesley-Order-8-15-14.
262 See, e.g., Reliable Money Order, Inc. v. McKnight Sales Co., Inc., 704 F.3d 489, 498–99 (7th Cir. 2013) (holding that, although class counsel’s conduct, including breaching promises of confidentiality, violated certain Wisconsin ethical rules, defendant “[did] not identify any conflict of interest or prejudice to the class arising from the misconduct”); In re Pfizer Inc. Sec. Litig., 282 F.R.D. 38, 47–48 (S.D.N.Y. 2012) (ethical lapses did not render class counsel inadequate, because those lapses did not prejudice the class).
First, I believe that some judges have come to recognize that it is far more sensible to punish the offending lawyers than to rewrite the criteria that govern all class actions. The opinions by Judge Posner, in particular, appear to reflect a keen understanding that, in many cases, the problem is not lax Rule 23 criteria but the failure to hold counsel responsible for egregious misconduct.

Second, in light of Federal Rule 23(f), federal appellate courts are now reviewing more class actions.\textsuperscript{263} It is thus not surprising that, in deciding whether to exercise discretionary review, appellate courts have been influenced by allegations of misconduct by plaintiffs’ counsel. Prior to 1998, when Rule 23(f) was adopted, the federal circuits rarely had the opportunity to scrutinize class counsel’s handling of class actions. Thus, the focus on ethics represents a logical by-product of Rule 23(f).

Third, in the settlement context, collusive settlements are now less likely to escape attention than in the past. In contrast to the usual non-adversarial context of a class settlement,\textsuperscript{264} aggressive objections by public interest organizations have brought to light some serious ethical abuses. Concerns have been raised, for example, about coupon settlements,\textsuperscript{265} \textit{cy pres} settlements,\textsuperscript{266} and

\textsuperscript{263} See \textit{Decline}, supra note __, at 739–43.
\textsuperscript{264} See \textit{Eubank}, 753 F.3d at 720 (noting that objectors can prove helpful in the non-adversarial settlement context, because “when a judge is being urged by both adversaries to approve the class-action settlement that they’ve negotiated, he’s at a disadvantage in evaluating the fairness of the settlement to the class”); \textit{In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.}, 55 F.3d 768, 789–90 (3d Cir. 1995) (in the settlement context, “the judge never receives the benefit of the adversarial process that provides the information needed to review the propriety of the class and the adequacy of settlement”).
\textsuperscript{265} See, e.g., \textit{In re Online DVD-Rental Antitrust Litig.}, 779 F.3d 934, 949–50 (9th Cir. 2015) (“[The Class Action Fairness Act (CAFA)] directs courts to apply heightened scrutiny to coupon settlements.” (citations omitted)); \textit{Redman}, 768 F.3d at 635–37 (“[T]he district court should be alert to the many possible pitfalls in coupon settlements[,]”); \textit{In re HP Inkjet Printer Litig.}, 716 F.3d 1173, 1177–78 (9th Cir. 2013) (“[C]oupon settlements may incentivize lawyers to negotiate settlements under which class members receive nothing but essentially valueless coupons, while the class counsel receive substantial attorney’s fees.” (citation and internal quotation marks omitted)).
\textsuperscript{266} See supra note __ and accompanying text.
excessive attorneys’ fees.\textsuperscript{267} Objectors with an institutional interest in class actions have become more common, and those objectors are pursuing appeals when district judges pay insufficient attention to alleged ethical violations. Indeed, in some of the cases (especially those by Judge Posner), the district court judges were sharply criticized for their lax treatment of ethical misconduct.\textsuperscript{268}

One objector with an institutional interest in class actions is Ted Frank of The Center for Class Action Fairness (established in 2009). Frank, a former director and fellow of the American Enterprise Institute (and former law clerk to Seventh Circuit Judge Frank Easterbrook), has successfully challenged numerous class action settlements.\textsuperscript{269} His work has garnered him significant media attention,\textsuperscript{270} with one commentator describing him as “the new Robin Hood of

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  \item \textsuperscript{267} \textit{See, e.g.}, \textit{In re HP Inkjet}, 716 F.3d at 1198 (“[T]he problem of excessive attorney’s fees is not limited to coupon settlements . . . ; the risk is also present in settlements providing a small cash award to each class member.”); Thorogood v. Sears, Roebuck and Co., 547 F.3d 742, 744–45 (7th Cir. 2008) (“The defendants in class actions are interested in minimizing the sum of the damages they pay the class and the fees they pay the class counsel, and so they are willing to trade small damages for high attorneys’ fees[].”); \textit{In re Rite Aid Corp. Sec. Litig.}, 396 F.3d 294, 307 (3d Cir. 2005) (“The determination of attorneys’ fees in class action settlements is fraught with the potential for a conflict of interest between the class and class counsel.”); Reynolds v. Beneficial Nat’l Bank, 288 F.3d 277, 282 (7th Cir. 2002) (“The ineffectual lawyers are happy to sell out a class they anyway can’t do much for in exchange for generous attorneys’ fees, and the defendants are happy to pay generous attorneys’ fees since all they care about is the bottom line[].”); \textit{In re Cendant Corp. PRIDES Litig.}, 243 F.3d 722, 732 (3d Cir. 2001) (“[T]he integrity and fairness of class settlements is threatened by excessive attorneys’ fee awards . . . .”).
  \item \textsuperscript{268} \textit{See, e.g.}, Eubank v. Pella Corp., 753 F.3d 718, 723–24, 728–29 (7th Cir. 2014) (“In sum, almost every danger sign in a class action settlement that our court and other courts have warned district judges to be on the lookout for was present in this case. Most were not even mentioned by the district judge, and those that were received a brush-off.” (citations omitted)); Redman v. RadioShack Corp., 768 F.3d 622, 633–38 (7th Cir. 2014) (criticizing the district court judge for, \textit{inter alia}, “[making] no effort to assess” the value of coupons included in a settlement, and stating, with regard to the court’s handling of class counsel’s motion for attorneys’ fees, that “[t]here was no excuse for permitting so irregular, indeed unlawful, a procedure”).
  \item \textsuperscript{269} \textit{See, e.g.}, \textit{In re Baby Prods. Antitrust Litig.}, 708 F.3d 163 (3d Cir. 2013) (overturning \textit{cy pres} settlement); \textit{In re Dry Max Pampers Litig.}, 724 F.3d 713 (6th Cir. 2013) (overturning settlement on ground that it “provide[d] the unnamed class members with nothing but nearly worthless injunctive relief”); Robert F. Booth Trust v. Crowley, 687 F.3d 314 (7th Cir. 2012) (mandating that Frank be given leave to intervene and rejecting settlement in shareholder derivative action); Dewey v. Volkswagen Aktiengesellschaft, 681 F.3d 170 (3d Cir. 2012) (overturning settlement on adequacy of representation grounds); \textit{In re Bluetooth Headset Prods. Liab. Litig.}, 654 F.3d 935 (9th Cir. 2011) (overturning \textit{cy pres} settlement).
the litigation system.” He has been especially vigorous in challenging *cy pres* and coupon settlements. Notably, Frank was the appellate counsel who successfully challenged the settlements in *Eubank v. Pella Corp.* and *Pearson v. NBTY, Inc.*

Because all three factors cited above will continue to exist (and will be reinforced by the precedents discussed above), I believe that the next decade will witness an even greater focus on the ethical misconduct of class counsel.

Importantly, I do not believe that the focus of courts will be limited solely to the ethical conduct of class counsel. As objectors become more aggressive in accusing class counsel of unethical conduct, class counsel will inevitably respond in kind.

Indeed, plaintiffs’ attorneys have already begun to do so—striking back at serial objectors, *i.e.*, attorneys who file baseless objections on behalf of class members for the purpose of extracting payments from class counsel to drop their objections. As an article co-authored by a sitting Third Circuit judge has explained, the hallmark of “professional objectors” is that they make “insubstantial objections to class settlements” that are tantamount to “extortion,” because the

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[273] 753 F.3d 718; see supra p. __.

[274] See supra p. __.
objector “threaten[s] to appeal the judgment approving the settlement unless paid to desist.”

Absent such payments, counsel for objectors can hold up a settlement for years, until the appeal has been resolved.

In one recent case, Dennings v. Clearwire Corp., plaintiffs successfully moved for summary affirmance of the district court’s settlement approval, highlighting the unethical conduct of counsel for the objectors. In that case, the district court had approved a settlement of three class actions against Clearwire involving alleged misrepresentations about the speed of Clearwire’s internet service and alleged wrongful charging of early termination fees. The settlement, which impacted about 2.7 million class members, included both monetary and non-monetary relief. There were only eight objections, including one filed by attorney Christopher Bandas, who represented two class members. The district court had found, after allowing discovery, that neither of Bandas’s clients had read the settlement and that both had prior affiliations with Bandas in other cases. The Ninth Circuit summarily affirmed the settlement.

In several recent cases, plaintiffs’ counsel have secured sanctions against objecting counsel, or at least harsh condemnations. In Dennings itself, the district court barred attorney

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276 Although Rule 23 was amended in 2003 to require district court approval to withdraw an objection, no similar rule exists at the appellate level. Thus, objector “blackmail” can continue during the objector’s appeal. Fed. R. Civ. P. 23(e)(5); see generally Brian T. Fitzpatrick, The End of Objector Blackmail?, 62 Vand. L. Rev. 1623, 1664 (2009) (noting that the rule change was designed “to prevent class members from withdrawing their objections in the district court before the court rules on approval of the settlement” (citing Advisory Committee Notes)).


278 Order, No. 13-35038 (9th Cir. Apr. 22, 2013).
Bandas from practicing in its court (the Western District of Washington). In another case, the district court noted:

Bandas routinely represents objectors purporting to challenge class action settlements, and does not do so to effectuate changes to settlement, but does so for his own personal financial gain; he has been excoriated by courts for this conduct.  

And in yet another case, the district court noted that:

Mr. Bandas was attempting to pressure the parties to give him $400,000 as payment to withdraw the objections and go away. Mr. Bandas was using the threat of questionable litigation to tie up the settlement unless payment was made.

Of course, Mr. Bandas is not the only attorney for objectors who has been accused of ethical misconduct. One court noted that John Pentz, Edward Siegel, and Jeffrey Weinstein, among others, have been recognized as “serial objectors” and are often required to post appeal bonds. Another court noted that Darrell Palmer “has been widely and repeatedly criticized as a serial, professional, or otherwise vexatious objector.”

To facilitate such attacks, one law firm (Anderson & Wanca) has created a website—serialobjectors.com—that monitors and tracks professional objectors, including Bandas and

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several others. Such information will enable plaintiffs’ counsel to share specific information to support sanctions motions.

Recently an ethical attack was leveled against Ted Frank, an objector who, as noted, had been viewed by many as acting on principle and serving the administration of justice. In June 2015, the Seventh Circuit dismissed an appeal filed by Frank of a $75.5 million settlement. Frank’s client had agreed to dismiss his appeal in exchange for a payment by class counsel. The deal was negotiated with serial objector Christopher Bandas. Frank accused class counsel—from a prominent plaintiffs’ firm, Lieff Cabraser—of engaging in unethical conduct by making such a payment. Lieff Cabraser filed a brief in the Seventh Circuit defending its conduct. But the brief did more than that: It also challenged Frank’s public persona as a selfless advocate who fights for principle, not money. It noted (as Frank himself had admitted in an earlier filing in the case) that Frank had “been ‘moonlight[ing]’ for several years for Bandas—working on appeals of class action settlements—to the tune of more than $220,000.” Thus, Lieff Cabraser turned the tables on Frank for his financially lucrative association with a serial objector.


286 Plaintiffs-Appellees Response to Motion of Ctr. for Class Action Fairness to Withdraw from Representation of Jeffrey Collins in Appeal No. 15-1546, to Intervene in Appeal Nos. 15-1400 and 15-1490 as Guardian Ad Litem for the Class, for an Order to Disclose Settlement Terms if Helpful to the Court, and, in the Alternative, an Order Issuing New Notice to the Class, and Opposition of Center for Class Action Fairness to Rule 42 Motion to Dismiss at 2, In re Capital One Tel. Consumer Prot. Act Litig. (7th Cir. 2015) (Nos. 15-1400 & 15-1490). See generally In re Capital One Tel. Consumer Prot. Act Litig., 80 F. Supp. 3d 781 (N.D. Ill. 2015), appeal dismissed, No. 15-1546 (7th Cir. May 5, 2015).
In the coming decade, I expect to see many more attacks on the ethical conduct of objectors, even those with seemingly favorable reputations among courts.

D. The Class Action Appellate Bench Will Continue to be Dominated by a Small Number of Judges

Class action law and practice is highly specialized and complicated. In law schools, it is usually covered in courses entitled “Complex Litigation.” It is the organic chemistry of the law school curriculum. Today, the case law governing class actions is vast, and expertise on how class actions work in the real world is essential to informed decision-making.

It is, therefore, not surprising that most of the seminal class action decisions have been written by a small number of appellate court judges. Those judges either volunteer or are recruited to write opinions in class action appeals in their courts.287 Few other areas of substance or procedure can be cited in which the bulk of landmark cases have been generated by only a handful of judges.288 Although the players have changed since 1966, the current judges fitting that role are easy to identify.

At the U.S. Supreme Court level, two Justices stand out in the class action field: Justices Ginsburg and Scalia. Those two Justices have written the vast majority of pathbreaking class

287 In some instances, a Rule 23(f) motions panel will choose to retain a class action case after granting leave for interlocutory appeal. See, e.g., Margaret V. Sachs, Superstar Judges as Entrepreneurs: The Untold Story of Fraud-on-the-Market, 48 U.C. Davis L. Rev. 1207, 1208 (2015) (discussing that practice within the Seventh Circuit).

action majority opinions and dissents in recent years. Typically, depending on the case, one of them writes for the majority and the other writes for the dissent. No other Justice has had an impact on class actions comparable to that of Justices Scalia and Ginsburg.

At the U.S. Court of Appeals level, an astonishingly small number of judges have dominated the field. Out of approximately 175 federal appellate judges, four judges have written most of the seminal decisions. Judge Richard Posner alone has written more than a dozen important decisions. His colleague, Frank Easterbrook, has likewise authored a number of

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289 For example, Justice Ginsburg authored majority opinions in Dart Cherokee Basin Operating Co., LLC v. Owens, 135 S. Ct. 547 (2014) (removal notice under the Class Action Fairness Act (CAFA) need only plausibly allege—that the amount in controversy exceeds the jurisdictional threshold); Amgen Inc. v. Connecticut Ret. Plans and Trust Funds, 133 S. Ct. 1184 (2013) (putative class asserting fraud-on-the-market theory in securities fraud class action need not prove materiality at the class certification stage); and Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (overturning settlement class in asbestos case for failure to comply with requirements of Rule 23(a) and (b)). She authored dissents in Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (dissenting, along with Justice Breyer, from Court’s holding that class certification in an antitrust case was improper because plaintiffs could not show that damages could be proved on a classwide basis); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (dissenting from Court’s adoption of heightened test for commonality); and Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393 (2010) (disagreeing with Court’s holding that federal court could certify a federal class action asserting claims under New York law even though New York law barred class actions for such claims). Justice Scalia wrote the majority opinions in Dukes (adopting heightened test for commonality and severely restricting classes under Rule 23(b)(2)); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (upholding arbitration clause that barred class action litigation and class action arbitration); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (same); Shady Grove; and Comcast Corp. He wrote dissenting opinions in Amgen and Dart Cherokee Basin.

290 See, e.g., Eubank v. Pella Corp., 753 F.3d 718 (7th Cir. 2014) (overturning class certification; discussed supra, p. ___); Redman v. RadioShack Corp., 768 F.3d 505 (7th Cir. 2014) (overturning class certification; discussed supra, p. ___); Pearson v. NBTY, Inc., 772 F.3d 778 (7th Cir. 2014) (overturning class certification; discussed supra p. ___); Reynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012) (reversing order denying class certification in race discrimination case); Butler v. Sears, Roebuck & Co., 702 F.3d 359 (7th Cir 2012) (reversed denial of class certification for claim regarding design defect in washing machines causing mold), vacated, 133 S. Ct. 2768 (2013), judgment reinstated, 727 F3d 796 (7th Cir.), cert. denied, 134 S. Ct. 1277 (2014); Johnson v. Meriter Health Svcs. Emp. Ret. Plan, 702 F.3d 364 (7th Cir. 2012) (affirming certification of ten subclasses in suit under Employee Retirement Income Security Act (ERISA)); Creative Montessori v. Ashford Gear, 662 F.3d 913 (7th Cir. 2011) (overturning certification of class due to misconduct by class counsel; discussed supra p. ___); Thorogood v. Sears, Roebuck & Co., 547 F.3d 74 (7th Cir. 2008) (overturning class certification in consumer case on predominance grounds); Phillips v. Ford Motor Co., 435 F.3d 785 (7th Cir. 2006) (substitution of plaintiffs did not permit removal under CAFA); In re Allstate Ins. Co., 400 F.3d 505 (7th Cir. 2005) (reversing certification of class of former employees in ERISA case); Carnegie v. Household Int’l, Inc., 376 F.3d 656 (7th Cir. 2004) (upholding class certification in RICO case); Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910 (7th Cir. 2003) (upholding class certification in pollution case on issue of whether defendant caused the contamination at issue); In re Rhone-Poulec Rorer Inc., 51 F.3d 1293 (7th Cir. 1995) (reversing class certification in mass tort case); and numerous others. See also Elizabeth J. Cabraser, The Rational Class: Richard Posner and Efficiency as Due Process, 82 GEO. WASH. L. REV. ARGUENDO 82 (2014) (discussing Judge Posner’s class action jurisprudence).
major decisions.\textsuperscript{291} In the Third Circuit, Judge Anthony Scirica has likewise had a significant impact, writing several landmark opinions.\textsuperscript{292} In the Eleventh Circuit, Judge Gerald Tjoflat has likewise written a number of major decisions.\textsuperscript{293} In my opinion, those four judges have been the intellectual giants among circuit judges in the class action field.\textsuperscript{294}

\textsuperscript{291} See, e.g., Silverman v. Motorola Solutions, Inc., 739 F.3d 956 (7th Cir. 2013) (upholding award of attorneys’ fees in class action settlement); In re IKO Roofing Shingle Prods. Liab. Litig., 757 F.3d 599 (7th Cir. 2013) (reversing district court’s refusal to certify as a class action a suit alleging false statements by defendants about roofing shingles); Bolden v. Walsh Constr. Co., 688 F.3d 893 (7th Cir. 2012) (reversing class certification in race discrimination case); In re Bridgestone/Firestone, Inc. 288 F.3d 1012 (7th Cir. 2002) (reversing class certification in products liability suit involving Firestone tires on Ford Explorer SUVs); Blair v. Equifax Check Svs., Inc., 181 F.3d 832 (7th Cir. 1999) (articulating criteria for discretionary review under Rule 23(f)); Premier Elec. Constr. Co. v. Nat’l Elec. Contractors Ass’n, 814 F.2d 358 (7th Cir. 1987) (opt out class members not entitled to invoke nonmutual offensive collateral estoppel).

\textsuperscript{292} See, e.g., Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2012) (vacating class certification in consumer fraud case because plaintiff failed to show that the class was ascertainable; because of intervening decision, court gave plaintiff another chance to establish ascertainability); Sullivan v. DB Investments, Inc., 667 F.3d 273 (3d Cir. 2011) (Scirica, J., concurring) (agreeing with majority opinion upholding class settlement and noting concerns about settlements in mass tort cases without the protections of Rule 23); In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008) (vacating order certifying antitrust class action and holding that court must resolve factual issues relevant to class certification, even if such issues overlap with the merits); In re AT&T Corp., 455 F.3d 160 (3d Cir. 2006) (affirming district court’s approval of settlement in securities fraud class action); In re Diet Drugs, 282 F.3d 220 (3d Cir. 2002) (upholding injunction of state class action where class actions overlapped); In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283 (3d Cir. 1998) (upholding class settlement).

\textsuperscript{293} See, e.g., Graham v. R.J. Reynolds Tobacco Co., 782 F.3d 1261 (11th Cir. 2015) (holding that federal law preempted jury’s finding of strict liability where jury based findings on earlier findings by jury in a state-court class action); Vega v. T-Mobile USA, Inc., 564 F.3d 1256 (11th Cir. 2009) (reversing class certification in suit by former T-Mobile employees regarding company’s commissions policy on sales of prepaid cellular telephone accounts); Klay v. Humana, Inc. 382 F.3d 1241 (11th Cir. 2004) (affirming class certification in lawsuit alleging RICO violations); Rutstein v. Avis Rent-A-Car Sys., 211 F.3d 1228 (11th Cir. 2000) (reversing class certification in case alleging discrimination on the basis of religion), cert. denied, 532 U.S. 919 (2001); Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997) (holding that race discrimination class action was improperly certified).

Obviously, it is not possible to identify precisely who the leading class action jurists will be ten years from now. Some of those individuals may not even be serving on the bench today. But a few predictions can be made with a high degree of confidence.

First, by 2025, the main players at the Supreme Court level will change. In 2025, Justice Ginsburg will be 92 years old, and Justice Scalia will be 89. It is doubtful that either Justice will still be on the Court in ten years. Among the more recent appointments, two have shown a particular aptitude and interest in class actions. On the liberal side, Justice Kagan has authored some very thoughtful opinions on class actions. The fact that she joined the dissents in *Dukes*, *Comcast*, and *Concepcion*, and wrote a strong dissent herself in *American Express*, suggests that she will oppose significant cutbacks on the ability of plaintiffs to bring class actions. She may well take over for Justice Ginsburg as the Supreme Court’s leading liberal voice on class actions.

On the conservative end of the spectrum, Chief Justice Roberts has also shown interest in class actions (although nothing close to that shown by Justice Scalia); he has authored two opinions in the securities fraud class action area and also recently weighed in on the subject of *cy pres* class

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296 See, e.g., Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013) (affirming arbitrator’s decision to construe arbitration clause to allow for class arbitration); Smith v. Bayer Corp., 131 S. Ct. 2368 (2011) (reversing district court’s issuance of injunction to prevent relitigation in state court of class certification issue); Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013) (dissenting from opinion that case is non-justiciable when class representative’s individual case becomes moot; discussed supra p. ___); American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013) (dissenting from opinion upholding contractual waiver of class arbitration; discussed supra p. ___).


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settlements. Although he has been sympathetic to plaintiffs in securities class actions, he joined the majority opinions in *Dukes, Comcast, Concepcion, and American Express*. Thus, he may well take over for Justice Scalia as the Court’s conservative voice in reining in class actions. Both Justice Kagan (currently age 55) and Chief Justice Roberts (currently age 60) are young by Supreme Court standards.

At the circuit level, Judges Posner and Scirica are in their seventies (ages 76 and 74, respectively), and Judge Tjoflat is 85. It is unlikely that those three judges will still be playing a leadership role in class action jurisprudence in 2025. Of the four circuit judges mentioned above, only Judge Easterbrook is under 70 (age 66). But there are other circuit judges under 70 who are emerging as class action experts, including Judge David Hamilton (Seventh Circuit, age 58), Judge Kent Jordan (Third Circuit, age 58), Judge Gerard Lynch (Second Circuit, age 63).

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299 See, e.g., Mullins v. Direct Digital, LLC, __ F.3d __, No. 15-1776, 2015 WL 4546159 (7th Cir. July 28, 2015) (rejecting independent ascertainability requirement; discussed supra pp. ___); In re Sw. Airlines Voucher Litig., __ F.3d __, Nos. 13-3264, 13-3462, 14-2591, 14-2602 & 14-2495, 2015 WL 4939676 (7th Cir. Aug. 20, 2015) (admonishing class counsel and reducing fee award for failure to disclose conflict of interest; discussed supra p. ___); In re Trans Union Corp. Privacy Litig., 741 F.3d 811 (7th Cir. 2014) (affirming distribution of class settlement in class action alleging violations of Fair Credit Reporting Act); Addison Automatics, Inc. v. Hartford Cas. Ins. Co., 731 F.3d 740 (7th Cir. 2013) (holding that individual follow-up action by class representative was removable under CAFA); Messner v. Northshore Univ. Healthsystem, 669 F.3d 802 (7th Cir. 2012) (vacating district court’s refusal to certify class of patients alleging that health care provider’s merger violated Sherman Act and Clayton Act).


301 See, e.g., Johnson v. Nextel Commc’ns Inc., 780 F.3d 128 (2d Cir. 2015) (holding that predominance was not satisfied in putative class action against law firm because of choice-of-law concerns); Charron v. Wiener, 731 F.3d 241 (2d Cir. 2013) (upholding certification in RICO class action involving rent violations); In re Am. Int’l Grp., Inc. Sec. Litig., 689 F.3d 229 (2d Cir. 2012) (overturning district court’s refusal to certify securities fraud class action for settlement purposes); UFCW Local 1776 v. Eli Lilly & Co., 620 F.3d 121 (2d Cir. 2010) (reversing certification
Judge D. Brooks Smith (Third Circuit, age 63), and Chief Judge Diane Wood (Seventh Circuit, age 64). I expect Judges Hamilton, Jordan, Lynch, Smith, and Wood—along with Judge Easterbrook—to be prominent class action judges in the coming decade. Judges Hamilton, Lynch, and Wood tend to be supportive of class actions; Judge Easterbrook and Judge Jordan tend to be skeptical of class actions; and Judge Smith is difficult to pigeonhole. Other judges (some not yet appointed) are likely to emerge as leaders in the field as well. Of course, the viewpoints of future appointees will depend in part on which party occupies the White House. Indeed, in terms of impact on class actions, the importance of the Presidential elections in 2016, 2020, and 2024 cannot be overstated.

Although it is ultimately anyone’s guess who the leading class action jurists will be in 2025, the larger point is that, as is true today, the group is almost certain to be a small one. The dynamics that have led to the emergence of a small number of appellate judges as authors of major of pharmaceutical class action on predominance grounds because putative class members’ claims required individualized proof); Greenwich Fin. Svcs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp., 603 F.3d 23 (2d Cir. 2010) (dismissing putative securities class action as within exception to CAFA jurisdiction).

302 See, e.g., Neale v. Volvo Cars of N. Am., LLC, __ F.3d __, No. 14-1540, 2015 WL 4466919 (3d Cir. July 22, 2015) (vacating and remanding certification of consumer class action in part on predominance grounds, and holding that class action was proper under Article III standing requirement; discussed supra p. __); Byrd v. Aaron’s Inc., 784 F.3d 154 (3d Cir. 2015) (holding that district court erred in applying ascertainability standard); In re Nat’l Football League Players’ Concussion Injury Litig., 775 F.3d 570 (3d Cir. 2014) (denying discretionary review of order preliminarily approving proposed class settlement, and conditionally certifying class); Judon v. Travelers Prop. Cas. Co. of Am., 773 F.3d 495 (3d Cir. 2014) (remanding for determination as to whether amount-in-controversy requirement was satisfied for removal under CAFA); Dewey v. Volkswagen Aktiengesellschaft, 681 F.3d 170 (3d Cir. 2012) (reversing certification of settlement class on ground that class representatives did not adequately represent class subgroup).

303 See, e.g., Remijas v. Neiman Marcus Group, LLC, __ F.3d __, No. 14-3122, 2015 WL 4394814 (7th Cir. July 20, 2015) (holding that putative class members met standing requirement in data breach class action); Suchanek v. Sturm Foods, Inc., 764 F.3d 750 (7th Cir. 2014) (reversing denial of motion to certify class of consumers alleging that food manufacturer violated consumer protection statutes); Abbott v. Lockheed Martin Corp., 725 F.3d 803 (7th Cir. 2013) (reversing denial of class certification in ERISA class action); Ervin v. OS Rest. Svcs., 632 F.3d 971 (7th Cir. 2010) (permitting certification of state-law class action in proceeding including collective action under Fair Labor Standards Act); In re Copper Antitrust Litig., 436 F.3d 782 (7th Cir. 2004) (statute of limitations on federal antitrust claims not tolled during pendancy of state class action raising similar claims); Williams v. Gen. Elec. Capital Auto Lease, Inc., 159 F.3d 266 (7th Cir. 1998) (affirming injunction against overlapping state-court class action).
class action decisions are unlikely to change during the next decade. The class action field will remain complex, and appellate courts will look to those judges with expertise and interest to write the major opinions. How those particular judges view the class action (as a salutary device or as a tool that merely enriches plaintiffs’ attorneys) will determine whether class actions will continue to decline or will experience a rebound.

III. COURTROOM SETTING

In this section, I make predictions relating to the actual litigation and management of class actions.

A. Far More Class Actions Will Go to Trial

When my co-author and I published the first edition of our class action casebook in 2000, we had a hard time finding more than a handful of class actions that had gone to trial in the 34 years since the adoption of modern Rule 23 in 1966.\(^304\) Presumably, both sides viewed the risks as too high to bear in most cases. Defendants faced the possibility of bankrupting verdicts, and plaintiffs risked receiving nothing after spending considerable time and money on a case. Indeed, it has become conventional wisdom that class actions always (or virtually always) settle.\(^305\)

\(^{304}\)See ROBERT KLOFF & EDWARD BLICH, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS 362 (WestGroup 1st ed. 2000) (noting paucity of class action trials and citing authority for proposition that, as of 1982, there had been no recorded class action that had gone to jury verdict).

\(^{305}\)See, e.g., Tidmarsh, supra note __, at 1460 (“Virtually every civil case settles, and class actions or other aggregate litigation are not exceptions to the rule.”); Joshua Levy, When the Stars Align: Narrowing the Scope of Appellate Reversals of Judicially Approved Class Action Settlements, 44 SETON HALL L. REV. 631, 632 (2014) (noting study of over 250 class actions finding that, “in every case where a putative class was certified, a settlement was eventually negotiated and approved” (citation omitted)); Vince Morabito & Jane Caruana, Can Class Action Regimes Operate Satisfactorily Without a Certification Device? Empirical Insights from the Federal Court of Australia, 61 AM. J. COMP. L. 579, 604 (2013) (“The various empirical studies conducted in the United States have revealed unambiguously that ‘cases with a certified class invariably lead to class settlements[.]’” (citation omitted)); Richard
That pattern has changed dramatically in recent years. Although settlement is still the norm, in the past five years numerous class action trials have occurred in a wide variety of areas.

First, there have been a number of significant defense verdicts (or hung juries). For example:

- In October 2014, a federal jury in Cleveland adjudicated a class action against Whirlpool alleging that the company’s front-loading washing machines had a design defect that caused a bad moldy smell. The jury in that case found in favor of the defense.\textsuperscript{306}

- In December of 2014, a federal jury found for the defense in an antitrust class action against Apple in which plaintiffs sought $350 million (along with treble damages) on the theory that Apple created a monopoly in the digital music market by updating its iTunes software.\textsuperscript{307}

- In December 2014, a jury found that AstraZeneca’s agreement with another pharmaceutical company to postpone the generic version of AstraZeneca’s drug Nexium did not violate the antitrust laws.\textsuperscript{308} At issue in the six-week class trial was a claim for damages of $10 billion.\textsuperscript{309}

- In April of 2014, a Louisiana state-court jury found that voters in three Louisiana parishes were not overtaxed to fund a canal diversion.\textsuperscript{310}

- In October 2011, a state-court jury in St. Louis was unable to reach a verdict (and thus the trial court declared a mistrial) in a case alleging that Philip Morris deceived consumers in its marketing of light cigarettes. The class had sought about $700 million in damages.\textsuperscript{311}

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\textsuperscript{306} Frankel, \textit{The Disappearing Opt-Out Right in Punitive-Damages Class Actions}, 2011 WIS. L. REV. 563, 568 (2011) ("[I]n reality most class actions settle.").


\textsuperscript{310} 15 BNA CLASS ACTION LITIG. REPORT 1386 (Dec. 12, 2014).


In 2010, a judge conducting a bench trial entered a verdict for defendant ADT Security Services in a suit seeking close to $400 million for breach of contract. In 2010, a judge conducting a bench trial entered a verdict for defendant ADT Security Services in a suit seeking close to $400 million for breach of contract.

Second, there have been numerous plaintiffs’ trial victories. For example:

- In a 2013 trial in an antitrust price fixing case (in a federal district court in Kansas), Dow Chemical Company was found liable for more than $400 million (an amount increased by the court to more than $1 billion). The Tenth Circuit affirmed, and a decision on certiorari is pending before the Supreme Court.

- In a 2010 class action bench trial in federal district court in California, Wells Fargo Bank was found liable for $203 million for charging customers excessive overdraft fees.

- In 2014, a state court jury in Oregon found British Petroleum liable for $593 million for wrongfully charging $0.35 extra per transaction for customers who paid with debit cards.

- In February 2015, a federal jury in Missouri found various electric utilities and related entities liable for more than $79 million for using electric utility easements for fiber optics without the landowners’ consent.

- In October 2014, a Silicon Valley jury awarded $16.5 million to class members with sexually transmitted diseases after finding that the class members’ profiles were shared with affiliated dating sites despite promises of privacy.

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318 15 BNA CLASS ACTION LITIG. REPORT 1269 (Nov. 14, 2014).
Third, in a number of instances, class actions have settled during or after trial. Presumably, one side or the other felt pressure to settle in light of what had occurred at trial (or on appeal).  

As those examples show—and many others could be cited—the scope and sheer number of recent class action trials constitutes an important new trend. In my opinion, there are several explanations for this trend, and all of them suggest that the trend will only accelerate.

One factor explaining the uptick in trials—at least in federal court—is the availability of interlocutory review in federal cases under Rule 23(f). Prior to Rule 23(f)’s adoption in 1998, there was rarely an opportunity for interlocutory appellate review of a decision certifying or refusing to certify a class. As a result, the decision to certify (or not certify) was the “death knell,” and most cases settled without any trial or appellate review of class certification. Now, the parties are frequently able to obtain appellate guidance on whether a case is suitable for certification. An appellate decision finding class certification appropriate increases plaintiffs’ leverage in settlement negotiations, but it may also lead plaintiffs to make settlement demands that

319 For example, on its website, one defense firm publicized a case from 2007 in which it represented Ford Motor Company in a California consumer fraud class action that sought more than $2 billion. On the day scheduled for closing arguments (after a four-month bench trial), “the plaintiffs agreed to a no-cash, coupon-based settlement not only for the California class, but for classes in three other states in which parallel actions were pending.” WTO Successfully Defends Ford In Four-Month, Certified Class Action Trial, WHEELER TRIGG O’DONNELL LLP, http://wtotrial.com/tried-a-12-week-certified-california-class-action-case-against-ford-that-settled-just-before-closing-arguments-with-no-cash-payout-by-defendant (last visited Aug. 28, 2015). As another example, in 2008, during a jury trial alleging unlawful termination fees for cell phone contracts, the parties settled for $21 million. Roger Cheng & Fawn Johnson, Verizon Wireless to Pay $21 Million In Settlement Over Termination Fees, WALL ST. J., July 10, 2008, http://www.wsj.com/articles/SB121562983731640019. Also in 2008, plaintiffs achieved a verdict of more than $104 million in a class action alleging that class members were charged illegal fees in connection with second mortgages issued by a predecessor company. The appellate court vacated the punitive damages portion of the verdict and remanded for a new trial on damages. At that point, the parties settled. Mitchell v. Residential Funding Corp., No. 03-CV-220489, 2008 WL 310998 (Mo. Cir. Ct. Jan. 4, 2007), aff’d in part, rev’d in part, 334 S.W.3d 477 (Mo. App. W.D. 2010).

320 See Decline, supra note __, at 738 (explaining the limited options for interlocutory review prior to Rule 23(f)).

321 Id. at 739.
defendants view as unreasonable. When that occurs, the likelihood of trial increases. Even the denial of Rule 23(f) review can increase the likelihood of trial. For instance, an unsuccessful attempt by a defendant to obtain reversal of class certification might embolden class counsel to demand a larger settlement, thereby making it more difficult for the parties to reach mutually acceptable terms.

Another factor explaining the uptick in trials is that, in recent years, both plaintiffs’ and defense firms have been showcasing their heretofore limited class action trial experience (and presumably encouraging clients to consider trial as a real option). Such marketing, and actual success stories, have undoubtedly persuaded clients—both plaintiffs and defendants—to roll the dice at trial more frequently than in the past.

Importantly, the web sites of many plaintiffs’ and defense firms now tout actual class action trial experience. Such extensive marketing of class action trial experience did not exist a decade ago. The following are illustrative, but many others can be found:

- **“We try big class action cases, with life-changing results.”** The trial attorneys at Walters Bender Strohbehn & Vaughan, P.C., have a proven track record in class action litigation, both locally and nationally, for plaintiffs and defendants.\(^{322}\)

- **“Gordon & Rees’s class action work is . . . differentiated by the fact that we are trial lawyers with an extensive track record of actual and frequent jury trial experience that few class action defense firms offer.”**\(^{323}\)

- **“O’Melveny [& Myers] is one of the only firms in the country that has successfully tried multiple class actions.”**\(^{324}\)

- **“Gibson, Dunn & Crutcher has an unparalleled track record of trying—and winning—class action cases . . . . We have handled dozens of jury trials of complex**

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and class action litigation in state and federal courtrooms throughout the country, and we have obtained numerous complete defense verdicts in nationwide ‘test’ cases.”

- “We [Carlton Fields Jorden Burt] help clients achieve their business objectives and litigation goals whether that means defeating class certification or winning at trial or on appeal.” [Three examples of class action trials are cited.]

- “Unlike most firms our attorneys [Callahan Thompson Sherman & Caudill] have class action trial experience.”

Yet another explanation for the increase in the number of trials is that courts have become more rigorous in reviewing class action settlements, especially when there is concern that collusion has resulted in large fees for counsel, but little recovery for class members. Because courts in recent years are much more inclined to reject settlements that do not significantly benefit class

328 See, e.g., Eubank v. Pella Corp., 753 F.3d 718 (7th Cir. 2014) (discussed supra p. __); Redman v. RadioShack Corp., 768 F.3d 622 (7th Cir. 2014) (discussed supra p. __); Pearson v. NBTY, Inc., 772 F.3d 778 (7th Cir. 2014) (discussed supra p. __). In the last few years alone, appellate courts have overturned numerous class settlements. See, e.g., Allen v. Bedolla, 787 F.3d 1218 (9th Cir. 2015) (excessive attorney fee award); In re Groupon Mktg. & Sales Practices Litig., 593 F. App’x 699 (9th Cir. 2015) (district court’s findings insufficient to permit review of proposed settlement); Pearson, 772 F.3d 778 (needlessly complicated claims process, inappropriate cy pres award, inappropriate reversion clause, and excessive attorneys’ fees); In re Magsafe Apple Power Adapter Litig., 571 F. App’x 560 (9th Cir. 2014) (district court failed to properly assess reasonableness of attorneys’ fees and implied reversion clauses for possible self-dealing); Eubank, 753 F.3d 718 (ethical misconduct by class counsel, confusing claims process, and excessive attorney fee award compared with insufficient relief for unnamed class members); Redman, 768 F.3d 622 (excessive fees for class counsel relative to benefit to class, district court insufficiently assessed “clear sailing” clause, and untimely motion for attorneys’ fees); Radcliffe v. Experian Info. Solutions Inc., 715 F.3d 1157 (9th Cir. 2013) (adequacy of representation destroyed by incentive awards to class representatives who supported settlement); In re Baby Prods. Antitrust Litig., 708 F.3d 163 (3d Cir. 2013) (settlement contained “cy pres provision permitting distribution of funds to a third party without first fully compensating all claimants”); In re HP Inkjet Printer Litig., 716 F.3d 1173 (9th Cir. 2013) (district court improperly evaluated reasonableness of class counsel’s attorneys’ fees, because redemptive value of coupon settlement was not first calculated); Day v. Persels & Assoc., 729 F.3d 1309 (11th Cir. 2013) (settlement was not “fair, adequate, and reasonable” where class members received no monetary recovery and district court erred in finding that defendants were unable to pay a meaningful award); In re Dry Max Pampers Litig., 724 F.3d 713 (6th Cir. 2013) (insufficient relief for class members and excessive attorneys’ fees); Vassale v. Midland Funding LLC, 708 F.3d 747 (6th Cir. 2013) (improper disparity in relief allocated between class representatives and unnamed class members, insufficient notice of proposed settlement, and adequacy and superiority defects); Dennis v. Kellogg Co., 697 F.3d 858 (9th Cir. 2012) (improper cy pres distributions).
members, it is now more expensive for defendants to achieve a settlement that can withstand appeal. As the cost of settlement increases, trial becomes a more viable alternative for a defendant.

In addition, it is undoubtedly the case that judges are becoming more comfortable trying class actions.329 The examples cited above provide concrete assurance to judges that, in many instances, complex class actions can be tried efficiently and effectively. In that regard, a recent decision by Judge William Young (D. Mass.) is instructive. In In re Nexium Antitrust (Esomeprazole) Litigation,330 Judge Young wrote a lengthy opinion after conducting a class action antitrust trial that resulted in a defense verdict. Plaintiffs filed various motions for a new trial, which Judge Young denied in his written opinion. In the course of his decision, Judge Young entreated fellow judges to try more cases, including class actions. In particular, part VII of the court’s opinion—“WAS IT WORTH IT?—YES, TRIALS MATTER”—contains a passionate plea to judges (as well as the bar) to try more cases. Judge Young notes that “[y]ear by year, federal district judges spend less and less time out on the bench.”331 Although settlement certainly plays a critical role in our civil justice system,332 Judge Young makes a powerful point that our system benefits when class actions (and other civil matters) go to trial. Decisions like that of Judge Young almost certainly will encourage other judges to be more confident in trying even complicated class actions.

331 Id. at *32 (citing Jordan M. Singer & Hon. William G. Young, Bench Presence 2014: An Updated Look at Federal District Court Productivity, 48 NEW ENG. L. REV. 565 (2014)).
Finally, some trials can be explained by the fact that defendants have strong appellate issues if they lose at trial. For instance, the *Tyson Foods* case now pending before the Supreme Court[^333] is a case that went to trial. There, the trial lasted nine days and the jury returned a verdict for more than $2.8 million[^334]. Tyson Foods no doubt understood, in refusing to settle, that if it lost at trial, it still had two strong appellate issues: (1) the “trial by formula” statistical testimony admitted by the district court, and (2) the argument that a significant portion of the class allegedly suffered no injury. As another example, a two-month trial in a Colorado federal court involving alleged contamination of class members’ land by plutonium resulted in a verdict against Dow Chemical of more than $554 million ($926 million after interest). On appeal, the Tenth Circuit overturned the judgment, holding that the claims (arising under state law) were preempted by the Price–Anderson Act, and the Supreme Court denied certiorari[^335]. Dow Chemical surely knew, going into the trial, that it was still preserving a strong preemption argument.

As these examples illustrate, if defendants believe that they have strong appellate issues that are not waived or weakened by going to trial, they may be more willing to risk an adverse verdict. Of course, defendants have always had strong arguments (in some cases) that would have been preserved even after an adverse trial verdict; yet, until the last few years, they still settled virtually every class action and almost never went to trial. So this factor only makes sense when combined with the other factors discussed above.

[^333]: See supra p. __.
[^334]: See *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014).
All of the above explanations suggest that the trend of class actions going to trial will only increase in the next decade. As major companies become accustomed to going to trial in large class actions, a class certification order will not have the same in terrorem effect that it once had. Similarly, as plaintiffs’ lawyers try and win more cases, they will develop the confidence to try other cases if they cannot achieve favorable settlements. And as judges become more confident in trying class actions, they will put less pressure on parties to settle.

B. Changes in Technology Will Fundamentally Alter the Administration of Class Action Lawsuits

In 2008, I co-authored an article discussing the “untapped potential” of the internet to transform class action practice.336 As the title of the article reflected, in 2008 the use of the internet in class actions was just emerging. Although the article cited several examples of the internet’s role in facilitating the administration of class actions, it noted that “[t]he current [2008] use of the internet in the class-action realm falls well short of the internet’s ultimate capabilities.”337

In the past several years, the use the internet in class actions has mushroomed, and I predict that such use will continue to expand in ways we cannot even imagine today. As the following discussion reveals, the internet has already begun to transform class action practice.

337 Id. at 748.
1. Use of Social Media and Other Electronic Sources for Notice

Courts have increasingly utilized social media, including Facebook, to notify class members of certification, settlement, or other developments. That development is very significant; class members who may not read a notice sent by mail or a notice reprinted in a newspaper might well study a notice on a social media site. Thus, use of social media helps to ensure that notice is more widely disseminated and absorbed, allowing more class members to actually participate in the fruits of any successful class action. Use of email as a vehicle for class notice has also greatly expanded. Several recent cases have approved class notice proposals relying primarily on email to provide direct notice to class members. Email is also often used in conjunction with standard mailings and publication.

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340 See, e.g., In re Online DVD-Rental Antitrust Litig., 779 F.3d 934, 946 (9th Cir. 2015) (notice provided “in both mail and email form” sufficient under due process and Rule 23); Lee v. Enterprise Leasing Co.-W., No. 3:10-CV-00326, 2014 WL 4801828, at *2 (D. Nev. Sept. 22, 2014) (“[T]he Court finds that both email and first-class mail is the best notice practicable under the circumstances here.” (emphasis in original)).
2. **Use of the Internet to Locate Class Members**

Locating class members can be a difficult task. As I noted in my 2008 article, according to the U.S. Census Bureau, in 2004 alone about 14% of the U.S. population moved.\(^{341}\) Such moves can be local, national, and even international. Thus, of the persons who moved in 2004, 20 percent of them left their prior state, and 4.6 percent of such individuals moved abroad.\(^{342}\)

Lawyers are increasingly using social media, such as Twitter and Reddit, to locate class members.\(^{343}\) Again, I believe that that trend will continue during the coming decade. The ability to locate class members—thus expanding the pool of people who will be compensated in the event of a trial or settlement—will decrease the likelihood of unclaimed funds and thereby decrease the need for *cy pres* settlements.

3. **Use of Web Sites to Allow Class Members to Observe Live Court Proceedings**

Broadcasts of court proceedings on the internet are now fairly common, especially at the appellate level.\(^{344}\) To my knowledge, however, live streaming of class action trial-level

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\(^{341}\) Klonoff et al., *Making Class Actions Work*, supra note __, at 731 (citing Census).

\(^{342}\) Id.


proceedings has seldom occurred in the United States.\textsuperscript{345} That will surely happen, however; indeed, as one commentator notes, a class action trial in Australia was live streamed over the internet, and class members were given passwords to log in and view the proceedings.\textsuperscript{346} Live streaming will allow “absent” class members to observe, scrutinize, and react to the performance of class counsel and the class representatives at the certification stage and other critical junctures. For instance, class members will have the opportunity to watch fairness hearings over the internet, and through interactive techniques they may even be allowed to raise objections and otherwise provide input without leaving their homes. I do not expect that many class members will be glued to their computer screens to watch routine, small-claims class actions. But I do believe that some class members will participate in live streaming in certain high-profile, large-dollar class actions.\textsuperscript{347}

4. Use of Web Sites to Administer Payment of Claims

A growing number of claims administrators are using websites to administer claim payments, thus avoiding the expense of mailing checks.\textsuperscript{348} This is an extremely important

\textsuperscript{345} One exception occurred in 2013, when Judge Weinstein of the Eastern District of New York ordered live broadcast, and, “[i]f practicable, video live-streaming,” of a summary judgment hearing in a class action by former residents of an assisted living facility. Boykin v. 1 Prospect Park ALF, LLC, 292 F.R.D. 161, 161 (E.D.N.Y. 2013). Judge Weinstein noted in his order that the putative class members were primarily elderly and infirm, and that “[t]he internet and social networking tools are means of creating more efficient communication among lawyers, clients and the court.” \textit{Id.} at 161–62.


\textsuperscript{347} The highly publicized National Football League concussion class action is an example of the type of case that class members almost certainly would watch over the internet. \textit{See In re Nat’l Football League Players’ Concussion Injury Litig.}, 307 F.R.D. 351 (E.D. Pa. 2015), \textit{appeal docketed}, No. 15-2234 (3d Cir. May 19, 2015).

\textsuperscript{348} See, \textit{e.g.}, \textsc{American Legal Claim Services LLC}, https://www.americanlegal.com/page/class-action-service-description (last visited Aug. 31, 2015) (provides direct electronic payment to class members as part of its administrative services for class actions); \textsc{Garden City Group, LLC}, http://www.gardencitygroup.com/expertise (last visited Aug. 31, 2015) (similar); \textit{see also} Tice O’Sullivan, \textit{The Best Class Action Payment Process}, \textsc{Epiq Systems} (Mar. 7, 2014), http://www.epiqsystems.com/Mass-Tort/Best-Class-Action-Payment-Process/05-22-2014/ (discussing pros and cons of different payment methods to class members, including direct electronic payments).
development, especially in small-claims cases. In the past, if a class member’s recovery was (for example) $5, it was hard to justify the postage and handling costs of distributing checks. But if the money can be electronically transmitted to class members at little or no expense, direct distribution to class members makes far more sense, thus reducing the need for *cy pres* awards to third parties. Computer distributions of settlements will, I predict, become much more common in the next decade.

5. **Use of Chat Rooms and Other Social Media to Facilitate Discussion by Class Members**

Chat rooms allow class members to coordinate strategy, discuss issues of concern, and share knowledge about the case.349 They are especially valuable when there is some prior relationship between class members—for example, members of a sports franchise or employees at a single company. Thus far, however, chat rooms have not been widely used in class actions. One article attributes that fact to a concern among class counsel that class members, if organized, might rebel or otherwise make representation of the class difficult.350 I believe that, notwithstanding those concerns, the use of chat rooms in class actions will expand significantly in the next decade.

In addition to chat rooms, social media can facilitate other kinds of interaction among class members. For instance, in some cases class members have set up Facebook pages that allow people

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350 Collignon & Karlsgodt, *supra* note __.
to join a specific group that provides information and commentary about a specific case.\textsuperscript{351} Such use of social media, I believe, will also increase.

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It is inevitable that, in 2025, technology will play a far greater role in class actions than it does today—just as it plays a far greater role today than it did in 2008, when I wrote my article on the “untapped potential” of the internet. As devices such as chat rooms and interactive proceedings gain traction, ethical issues—such as privilege concerns—are likely to emerge, and courts will need to address those issues.

CONCLUSION

In 2025, the class action device will still be an integral part of our civil justice system, and Rule 23 will still exist largely in its current form. Plaintiffs will continue to identify acts of alleged wrongdoing that, in their view, are worthy of resolution on an aggregate basis. And defendants will continue to press every conceivable argument to scale back class actions. Although many factors will control the progress of the case law (including the results of the Presidential and Congressional elections), I fear that, overall, the climate for class actions will continue to deteriorate. At the same time, large and significant class actions will continue to be brought and certified, and trials will become even more common. Vigorous ethical attacks on attorneys will continue (and in some cases succeed), with the salutary result that unethical tactics will be deterred. Technology will make the class action device more transparent and democratic, so that unnamed

class members will be able to play an active part in the process. In short, class actions will remain vibrant, challenging, and fascinating.