The Fiftieth Anniversary of the Rule 23 Amendments: Are Class Actions on the Precipice?

BY ELLEN MERIWETHER

FIFTY YEARS AGO, RULE 23 WAS amended to specify the core requirements for class certification so familiar today. According to Professor Arthur Miller, who identifies himself as a "percipient witness and participant in the process," the goal of the 1966 amendments was to encourage efficiency and fairness through the liberal joinder of claims and parties.[1] Innovation in case management was perceived to be necessary not only to provide a "receptive procedural vehicle for the explosion of civil rights cases" but also to "provide a mechanism for allowing the joinder of related, modest-sized claims, held by a significant number of people, the pursuit of which would be economically unviable if obliged to be advanced one by one."[2]

To that end, the new rule created a completely new category of claims, i.e., damages claims that would qualify for aggregated treatment under Rule 23(b)(3), thus allowing joinder in common litigation of what we now call "negative value claims."[3] As the Supreme Court noted in *Amchem Products, Inc. v. Windsor*,[4] this was a key objective of the 1966 Rule amendments: "'[T]he Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'"[5]

The ensuing 50 years of Rule 23 practice have seen various amendments to the language of the Rule relating to such matters as the timing of the certification motion, appeal rights, the content and form of notice, and settlement requirements. But the core requirements for class certification specified in Rules 23(a) and (b) have remained unchanged for 50 years.[6]

You would never know it! Judicial interpretations of those requirements, along with the practices of attorneys and parties in class action cases, have changed radically over time. Until at least the mid-1990s (and perhaps later), motions for class certification were made and decided early in the litigation.[7] Discovery, if taken at all, was often bifurcated and limited to "class issues."[8] Expert materials were perfunctory or non-existent, and the courts were prohibited from engaging in "a battle of the experts."[9] Most significantly, following an apparent directive from the Supreme Court in *Eisen v. Carlisle & Jaquelin*, courts were required to assume the facts as alleged in the complaint were true and were not permitted to "conduct a preliminary inquiry into the merits."[10] In many courts, there was a judicial presumption favoring class certification in "doubtful" cases.[11] Particularly in antitrust cases, the important role class actions play in private enforcement was a factor that augured in favor of class certification.[12] Indeed, despite the Supreme Court's admonition in *General Telephone Co. v. Falcon* that a class certification requires a "rigorous analysis,"[13] as late as 1997, the Court stated in *Amchem* that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."[14]

That was then. Today, by contrast, courts deciding class certification are required not only to probe behind the pleadings but also to resolve factual disputes that bear on Rule 23 requirements even if they involve contested merits issues.[15] Plaintiffs not only must proffer *admissible* evidence from which a factfinder *could* find in their favor (i.e., meet the summary judgment standard) but also must submit evidence sufficient to demonstrate compliance with each element of Rule 23 by a preponderance of the evidence.[16] If expert evidence is necessary for plaintiffs to carry their burden, then that evidence is (presumably) subject to the standards set forth in *Daubert v. Merrill Dow Pharmaceuticals Inc.*[17] And even if expert evidence is admissible and reliable, the court is required to determine whether it is more persuasive than the opposing expert's evidence. In other words, courts must not only engage in but also resolve the "battle of the experts."[18]

Consequently, class certification motions and decisions (at least in antitrust cases) are now routinely delayed until the completion of full-blown merits discovery, and often involve

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full production of industry-wide sales data, extensive expert analysis, full evidentiary hearings and *Daubert* motions, as well as the expenditure of millions of dollars in attorney time and costs on both sides of the "v." And all of this takes place before either side has a notion of the value of the case.

How we got from there to here has been the subject of much discussion and scholarly writing and is beyond the scope of a single article in this magazine.[19] Perhaps not coincidentally, the evolution in class certification standards began shortly after the 1998 amendments to Rule 23 that added Rule 23(f) permitting interlocutory appeals of class certification decisions.[20] Recognizing the importance of the class certification decision in the litigation, the circuit courts embraced the opportunity to take a second look at the interplay between *Eisen* and *Falcon*, ultimately interpreting the "rigorous analysis" requirement of Falcon to require resolution of factual disputes that bear on the requirements for class certification. Thus, in *Szabo v. Bridgeport Machines, Inc.*, Judge Easterbrook wrote: "[N]othing in the 1966 amendments to Rule 23, or the opinion in Eisen, prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in that rule and exercise the discretion it confers."[21] Multiple other courts followed this analysis, culminating in the Third Circuit's seminal *Hydrogen Peroxide* decision in 2008.[22]

Driving the analysis in *Szabo* and in other cases was the accepted "truism"[23] that the most rigorous of analyses was required because class certification placed defendants in a bet-the-company position, inducing substantial settlements of even weak claims.[24] The Third Circuit highlighted this concern as driving its certification analysis: "In some cases, class certification 'may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability'. . . . Accordingly, the potential for unwarranted settlement pressure 'is a factor we weigh in our certification calculus.'"[25]

Missing from that calculus is the countervailing factor: the role of Rule 23 as a vehicle for the litigation of negative value claims and the reality that, in denying class certification, the choice is not between a class case and an individual action but between a class action and no action at all.[26] The current trend towards heightening plaintiffs' burden means concern over avoiding hyperbolic settlement pressures has decidedly outpaced concern over providing a mechanism for litigating low-value claims. As discussed below, the Roberts Court's decisions reinforce this trend, effectively rejecting as compelling public policy the aim of providing a forum for the "vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'"[27]

The Roberts Court Weighs In

The discretionary review afforded by Rule 23(f) also provided the Roberts Court with opportunities to weigh in on class certification standards. Prior to this term, the Roberts Court had addressed class action issues in at least six cases,[28] ruling in all but one of them in favor of curtailing class actions.[29] A trilogy of decisions all but closed the door entirely on arguments that class action bans in arbitration agreements violated state public policy or precluded the effective vindication of federal statutory rights.[30] In fact, in *Italian Colors*, the Court unabashedly rejected arguments that Rule 23 played a compelling role in either the vindication of small dollar claims or the private enforcement of antitrust laws, holding instead that the "[a]ntitrust laws do not guarantee an affordable procedural path to vindication."[31]

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In *Wal-Mart Stores*, the Court reversed class certification, establishing a new and more stringent requirement to demonstrate the existence of commonality under Rule 23(a)(2). Importantly for purposes of the issues now before the Court (and being litigated in various courts of appeals), the Court also rejected as a "trial by formula" plaintiffs' suggestion that they could try the back-pay claims of class members using a bellwether trial procedure and extrapolate the results across the class.[32] While the Court's decision would appear to have limited applicability in a Rule 23(b)(3) context, the "trial by formula" rubric has been used by defense counsel to cast doubt on the use of all or most statistical sampling or averaging in class certification proceedings.[33] As discussed below, the appropriate use of statistical analysis and "averages" is now before the Supreme Court in *Tyson Foods Inc. v. Bouaphakeo*.[34]

In *Comcast v. Behrend*, the Court addressed class certification in the Rule 23(b)(3) context, reversing certification on the ground that the plaintiff's expert proffered a damages model measuring aggregate classwide damages under four theories of liability, where only one of the theories had been held by the district court to be provable with common evidence.[35] Since that decision, there has been considerable debate as to its import and breadth, with some maintaining that the ruling "breaks no new ground on the standard of certifying class actions"[36] while others urge that it requires a demonstration of "commonality of damages" and a damages model that would allow individual damages to be established with common proof.[37]

For plaintiff-side practitioners, the one bright spot in the Roberts Court's class certification decisions prior to this term is *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*.[38] There, in a securities fraud case arising under Rule

10b-5,[39] the Court held that proof of the "materiality" of the misrepresentation need not be made at the class certification stage because materiality is subject to classwide proof, and "the failure of proof on the element of materiality would end the case for one and for all," leaving no individual issues to litigate.[40] In reaching this conclusion, the Court underlined three points that may bear on the cases currently being decided: (1) resolution of factual issues at class certification should be limited to those issues that are necessary to determining Rule 23 compliance; (2) a plaintiff need not establish that he or she will prevail on the merits to obtain class certification; and (3) common evidence need not predominate on each element of the claim, but only in the case as a whole.[41]

Current Issues

The Supreme Court's interest in class certification has continued into the current term with the grant of certiorari in several cases that may affect class action practice going forward: *Tyson Foods, Inc. v. Bouaphakeo*,[42] *Campbell-Ewald Co. v. Gomez*,[43] and *Spokeo v. Robins*.[44] In addition, many observers expect that the Court will grant certiorari to resolve a circuit split over the evolving standard of "ascertainability," a split embodied by the Third Circuit's decision in *Carrera v. Bayer Corp.* and the Seventh Circuit's decision in *Mullins v. Direct Digital LLC*.[45] These cases, as well as others now pending in the courts of appeal, involve emerging issues in class certification jurisprudence that could, broadly or narrowly, address some or all of the following topics:

Use of Averages and Statistical Evidence. *Tyson Foods, Inc. v. Bouaphakeo* has the greatest potential for significant ramifications in class certification practice going forward. It presents the question of whether and to what extent statistical evidence and evidence employing averages or extrapolation techniques may be used to prove liability and/or damages in class actions.

In that case, arising under the Fair Labor Standards Act (FLSA), the plaintiffs asserted that Tyson failed to properly compensate them under the Act for "donning" and "doffing" time—that is, the time it takes to put on or take off clothing and gear necessary for the performance of their jobs. In order to prove that the employees were underpaid, the plaintiffs introduced a "time study" whereby the plaintiffs' expert observed over 700 employees donning and doffing work gear. The average time observed in the study was then extrapolated across class members to demonstrate aggregate underpayment. After class certification was granted and affirmed by the Eighth Circuit, the plaintiffs prevailed at trial.[46]

The Supreme Court granted certiorari on the issue of whether the plaintiffs' expert's use of averages and extrapolation techniques in that case, both at class certification and at trial, was appropriate.[47] A narrow ruling by the Court, based on the reliability of the particular time study at issue (or the defendants' failure to challenge it under *Daubert*), or on the substantive law under the FSLA,[48] would have little consequence to broader practices under Rule 23(b)(3). A broad ruling, however, one curtailing or eliminating the use of statistical evidence or averaging in general, as urged by Tyson and its amici,[49] could have substantial ramifications, especially in antitrust cases. Statistical evidence, including regression analyses, has long been accepted as a method of proving common impact and aggregate damages in antitrust cases.[50] Should the Court cast doubt on the use of such techniques in general, the decision could have a profound effect on class certification in antitrust cases,[51] and on substantive law in general, as average, statistical, and representative evidence is routinely used as a matter of course in a wide variety of litigation.[52]

Without attempting to predict the outcome, the passing of Justice Scalia—a likely vote for reversal—may result in a 4–4 tie, leaving the lower court decision in favor of plaintiffs undisturbed.

The Presence of Uninjured Class Members. In *Tyson*, certiorari was also granted on the question of whether a class may be certified if it contains uninjured class members.[53] Tyson itself has stepped back from its initial position on that issue, arguing more narrowly that in this particular case there would be no way to determine which class members had in fact been injured without extensive mini-trials, thus destroying predominance.[54] The question as to whether and to what extent classes may be certified despite the presence of uninjured class members continues to arise, however,[55] with an exhaustive analysis recently undertaken by the First Circuit in *In re Nexium Antitrust Litigation*.[56] There, the court held that it was not required to exclude uninjured class members prior to class certification so long as, "prior to judgment, it will be possible to establish a mechanism for distinguishing the injured from the uninjured class members," and that "this mechanism will be administratively feasible."[57]

Even if the Court does not reach this issue in the pending *Tyson* case, it is likely to continue to arise until finally resolved. Even now, litigants can expect extensive debate over what constitutes an "administratively feasible mechanism" for identifying uninjured class members.

Ascertainability. Although not now before the Court, many expect the issue of "ascertainability" to be addressed at some point, as there is a distinct circuit split embodied in the *Carrera* and *Mullins* decisions from the Third and Seventh Circuits, respectively.[58]

The courts have long imposed an ascertainability requirement as a prerequisite to class certification. But that requirement had until recently been evaluated as a function of class definition, specifically whether the class could be defined by reference to objective criteria.[59] In *Carrera v. Bayer Corp.*, however, the Third Circuit set forth an additional requirement to establish ascertainability—specifically, that there exists "a reliable and administratively feasible" method for ascertaining class membership.[60] Importantly, the Third Circuit held that any process by which class members would self-identify through affidavits was not "reliable and administratively feasible."[61]

While some courts have followed the Third Circuit's approach,[62] others, including the Seventh Circuit in *Mullins v. Direct Digital, LLC*, have rejected it.[63] In declining to follow *Carrera*, the Seventh Circuit noted that the Third Circuit's heightened ascertainability requirement erects "a nearly insurmountable hurdle at the class certification stage in situations where a class action is the only viable way to pursue valid but small individual claims."[64] It held that the policy concerns underlying the Third Circuit's decision were best addressed through other requirements of Rule 23, such as the superiority requirement.[65]

While a heightened ascertainability requirement would likely have the most significant impact in consumer class actions, where class members may not have "proof" of class membership (other than their say-so), *Carrera* has been applied to reject certification bids in indirect purchaser antitrust cases[66] and has also caused the rejection of an antitrust settlement class comprised of direct purchasers.[67]

Common Proof of Damages. In the wake of *Comcast*, issues continue to arise over what is required of a damages model to support class certification, specifically whether a damages model must be proffered that is capable of calculating (1) classwide aggregate damages arising from the violation; (2) individual damages suffered by members of the class; (3) none of the above; or (4) all of the above.

Relying on *Comcast*, defendants have urged that class certification requires not only common proof of impact but a common methodology of proving the damages suffered by each member of the class.[68] Most of the circuit courts addressing this issue since *Comcast* have held that *Comcast* does not materially alter the longstanding rule that individual damages issues do not, by themselves, preclude class certification.[69] The Seventh Circuit has explicitly addressed this issue in several recent decisions, including *McMahon v. LVNV Funding, LLC*, where it held that the need for individualized proof of damages does not necessarily preclude class certification.[70]

A related issue prompted by *Comcast* is whether plaintiffs must proffer a classwide measure of aggregate damages. In *Comcast*, an antitrust case, the plaintiffs' expert did in fact propose a classwide aggregate measure of damages, which the Court ultimately rejected as not matching the liability theory of the case.[71] The Court did not hold, because it was not at issue there, that class certification *requires* the proffer of a classwide aggregate damages measure.[72] While in antitrust cases such a requirement might not materially alter class certification practice, as classwide aggregate damages analyses are routinely provided in certification proceedings, such a requirement may cause significant difficulty in obtaining class certification in consumer or product defect cases where classwide aggregate measures of damages may not be available.

In cases where damage calculations are inherently individualized and not subject to formulaic determination, plaintiff practitioners can point the court to "issue certification" under Rule 23(b)(4) to overcome apparent difficulties arising from individualized damages determinations.[73] Several circuit courts have recognized the possibility of severing damages under Rule 23(c)(4) where damages calculations required individualized proof.[74] Indeed, even in antitrust cases, several courts have certified issue classes under Rule 23(c)(4) after concluding that *Comcast* prevented Rule 23(b)(3) damages class certifications.[75] The appropriateness of this practice in an antitrust case is before the First Circuit in *In re Prograf Antitrust Litigation*.[76]

Class Avoidance Techniques. While not specifically a matter of class action procedure, the Supreme Court is addressing this term several methods by which a defendant may seek to avoid class actions altogether: through bans in arbitration agreements,[77] Rule 68 offers of judgment,[78] and challenges to claims asserting statutory damages.[79]

In *DirectTV Inc. v. Imburgia*, the Court rejected the attempt by a California court to avoid the Supreme Court's directives that class action waivers in arbitration clauses must be enforced notwithstanding contrary state public policy.[80]

In *Spokeo*, the Court is considering the issue of whether the statutory damages provided in some consumer protection statutes satisfies the injury-in-fact requirement necessary to confer Article III standing. Depending upon the breadth of the ruling, the Court's decision may eliminate the possibility of class actions in a variety of cases where common injury is claimed under a statute providing for statutory damages.[81] Again, the passing of Justice Scalia may affect the outcome here, as Court observers now predict a 4–4 deadlock, leaving the lower court decision in favor of plaintiffs intact.[82]

In *Campbell-Ewald Co. v. Gomez*,[83] the Court addressed the issue of whether defendants can defeat class actions by picking off the proposed class representatives with an offer of complete relief for the representative's individual claims, even when the offer excludes any attorneys' fees and is rejected. In a 6–3 decision, with Justice Thomas concurring in the result, the Court rejected the argument that an unaccepted offer of judgment moots the controversy, but reserved a number of issues for later decision, including whether an offer coupled with the tender of payment could moot the claim, whether an admission of liability would also be necessary, and whether plaintiffs' interest in pursuing class relief prevents the case from being mooted.[84]

Legislative Changes

In the wake of all of this activity in the courts, rulemaking and legislative initiatives are under consideration. One such proposal, H.R. 1927, the "Fairness in Class Action Litigation Act," may hurry the demise of class actions. The bill, which has recently passed the House of Representatives, would bar class certification unless the proponent demonstrates—based on a "rigorous analysis"—that each class member has suffered "the same type and scope of injury." The conclusion is all but compelled that passage of the bill would eviscerate class actions as we know them today.[85]

The Rule 23 Subcommittee of the Advisory Committee on

Civil Rules is considering amendments to Rule 23, but has narrowed its anticipated work in the area. None of the amendments under consideration are to the core language of the Rule 23 requirements and, instead, relate primarily to notice and settlement issues. Perhaps in anticipation of upcoming decisions in the courts, the committee has put two issues on hold: ascertainability and Rule 68 "pick-off" offers.[86]

Finally, the Consumer Finance Protection Bureau has announced that it will consider proposing rules that would ban consumer financial companies from using arbitration clauses in their consumer contracts to block class action lawsuits. The ban would apply to "most consumer financial products and services that the CFPB oversees, including credit cards, checking and deposit accounts, prepaid cards, money transfer services, certain auto loans, auto title loans, mall dollar or payday loans, private student loans, and installment loans."[87]

Class Actions on the Precipice?

Many of the important Roberts Court decisions discussed above, including *Wal-Mart*, *Comcast*, and the arbitration decisions *Concepcion* and *Italian Colors*, were authored by Justice Scalia and decided in favor of defendants by narrow margins.[88] Thus, at its 50th anniversary, the future of modern Rule 23 may well depend on whether Scalia's replacement shares similar views on the relative importance of the class action mechanism as a vehicle for the vindication of small dollar claims. Should a Court without Justice Scalia have the opportunity to revisit some settled issues, such as the appropriateness of class action bans in unbargained-for arbitration agreements, the outcome of those future cases may be different.

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Many opportunities exist to restrict, expand, or alter class action practice, both in the cases now before the Court and in others expected to reach the Court in the near future. Broad rulings restricting the use of statistical evidence, requiring common methodologies to prove individual class member damages, or requiring as a prerequisite to class certification that uninjured class members be identified and excluded prior to certification, might impose burdens on class certification that are insurmountable in all but a very few cases.

On the other hand, a "new" Roberts Court with a majority that is more receptive to the role that class actions play in both deterring wrongdoing and recovering for victims, may put to rest some of the emerging arguments that, if accepted, would tend to restrict class actions, or even eliminate them entirely.

After 50 years, are class actions on the precipice and destined for near extinction? Or are they robust and healthy? We may need two more years to tell. ■

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1 Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 294 (2014).

2 *Id.* (citing Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) (providing an introduction to *The Class Action—A Symposium*, expressing the views of the Advisory Committee's Reporter).

3 *Id.*; *see also* FED. R. CIV. P. 23, advisory committee's note to 1966 amendments, note to subdivision (b)(3) ("[C]ertification under subsection (b)(3) may be appropriate where the amounts at stake for individuals may be so small that separate suits would be impracticable.").

4 521 U.S. 591 (1997).

5 *Id.* at 617 (quoting Kaplan, *supra* note 2, at 497); *see also Amchem*, 521 U.S. at 617 ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'") (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

6 *See generally* FED. R. CIV. P. 23 advisory committee's notes.

7 The language of the rule required motions to be decided "as soon as practicable," and some local rules imposed time limitations on the filing of the motion. *See* Michael D. Hausfeld, Gordon C. Rausser & Garrett J. McCartney, *Antitrust Class Proceedings—Then and Now*, 26 L. & ECON. OF CLASS ACTIONS: RES. IN L. & ECON. 77, 84 (2014); *see also* Blackie v. Barrack, 524 F.2d 891, 900–01 (9th Cir. 1975) ("The district judge is required by FED. R. CIV. P. 23(c)(1) to determine 'as soon as practicable after the commencement of an action brought as a class action . . . whether it is to be so maintained.'") (quoting FED. R. CIV. P. 23(c)(1)).

8 *See* MANUAL FOR COMPLEX LITIGATION § 21.14 (4th ed. 2004) ("Courts often bifurcate discovery between certification issues and those related to the merits . . . .").

9 *See, e.g.*, *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., No. M 02-1486 PJH, 2006 WL 1530166, at *9 (N.D. Cal. June 5, 2006) ("The court cannot weigh in on the merits of plaintiffs' substantive arguments, and must avoid engaging in a battle of expert testimony."); *In re* Bulk (Extruded) Graphite Prods. Antitrust Litig., No. Civ. 02-6030 (WHW), 2006 WL 891362, at *14 (D.N.J. Apr. 4, 2006) ("[T]he Court is not in a position at the class certification stage to weigh the arguments of the plaintiffs' expert and the defendants' expert.") (citing *In re* Vitamins Antitrust Litig., 209 F.R.D. 251, 267–68 (D.D.C. 2002) (refusing to weigh, at class certification stage, conflicting testimony of the plaintiffs' expert and the defendants' expert).

10 417 U.S. 156, 177–78 (1974) ("We find nothing in either the language or the history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."). *See, e.g.*, Eggleston v. Chicago Journeymen Plumbers' Local No. 130, 657 F.2d 890, 895 (7th Cir. 1981) (inquiry under *Eisen* is "whether plaintiff is asserting a claim which, assuming its merit, will satisfy the requirements of Rule 23"); *Blackie*, 524 F.2d at 901 ("The Court made clear in [*Eisen*] that [the class certification] determination does not permit or require a preliminary inquiry into the merits."); Chiang v. Veneman, 385 F.3d 256, 262 (3d Cir. 2004) ("[I]n determining

whether a class will be certified, the substantive allegations of the complaint must be taken as true.").

[11] *See, e.g.*, Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir. 1985) ("The interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing a class action.").

[12] *See, e.g.*, *In re* Playmobil Antitrust Litig., 35 F. Supp. 2d 231, 239 (E.D.N.Y. 1998) ("Because of the important role that class actions play in the private enforcement of antitrust actions, courts resolve doubts in favor of certifying the class."); Brown v. Pro Football, Inc., 146 F.R.D. 1, 4 (D.D.C. 1992) ("[T]he framers of Rule 23 seemed to target cases such as this [antitrust action] as appropriate for class determination."); *In re* Plastic Cutlery Antitrust Litig, No. 96-CV-728, 1998 WL 135703, at *2 (E.D. Pa. Mar. 20, 1998) ("Class actions are widely-recognized as being particularly appropriate for the litigation of antitrust cases alleging a price-fixing conspiracy because price-fixing schemes presumably impact all purchasers in the affected market, so that common questions on the issue of liability predominate.").

[13] 457 U.S. 147, 161 (1982).

[14] *Amchem*, 521 U.S. at 625 (citing Adv. Comm. Notes, 28 U.S.C. App., p. 697).

[15] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) ("Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule."); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2009) ("[T]he court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action.").

[16] *In re Hydrogen Peroxide*, 552 F.3d at 307 ("Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence.").

[17] 509 U.S. 579 (1973). Several circuit courts have held that the requirements for admissibility of expert evidence articulated in *Daubert* apply at the class certification stage. *See In re* Blood Reagents Antitrust Litig., 783 F.3d 183, 187–88 (3d Cir. 2015) ("[A] plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates . . . that the expert testimony satisfies the standard set out in *Daubert*."); *In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 614 (8th Cir. 2011) ("We conclude that the district court did not err by conducting a focused Daubert analysis which scrutinized the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence."); Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011) ("In its analysis of Costco's motions to strike, the district court correctly applied the evidentiary standard set forth in *Daubert*."); Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815 (7th Cir. 2010) ("We hold that when an expert's report or testimony is critical to class certification . . . a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. That is, the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants."); Carroll v. Otis Elevator Co., 896 F.2d 210, 212 (7th Cir. 1990). While the Supreme Court has not explicitly ruled on this point, it has broadly implied that *Daubert* applies in class certification proceedings. *See Wal-Mart Stores*, 131 S. Ct. at 2553–54 ("The District Court concluded that Daubert did not apply to expert testimony at the certification stage of class-action proceedings. . . . We doubt that is so.").

[18] *In re Hydrogen Peroxide*, 552 F.3d at 307 (holding that the court's obligation to consider and resolve factual disputes relevant to class certification extends to expert testimony).

[19] *See generally* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 731–47 (2013).

[20] *Id.* at 739–41.

[21] 249 F.3d 672, 677 (7th Cir. 2001).

[22] *In re Hydrogen Peroxide*, 552 F.3d at 317–18 ("An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met."): *see also In re* New Motor Vehicles, 522 F.3d 6, 24 (1st Cir. 2008) ("It is a settled question that some inquiry into the merits at the class certification stage is not only permissible but appropriate to the extent that the merits overlap the Rule 23 criteria."); Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372, 380 (5th Cir. 2007) ("[W]e may address arguments that implicate the merits of plaintiffs' cause of action insofar as those arguments also implicate the merits of the class certification decision.").

[23] I am not aware of any data supporting a connection between class certification and "in terrorem" settlements of meritless cases. *See* Robert H. Lande, *Class Warfare: Why Antitrust Class Actions Are Essential for Compensation and Deterrence*, ANTITRUST, Spring 2016, at 81.

[24] *Szabo*, 249 F.3d at 675 ([C]lass certification "puts a bet-your-company decision to Bridgeport's managers and may induce a substantial settlement even if the customers' position is weak."). *See also In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (granting mandamus petition and reversing class certification after recognizing that the certification decision would put defendants "under intense pressure to settle"); Advisory Committee's 1998 Note on subdivision (f) of Rule 23 (class certification can exert substantial pressure on a defendant "to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011) (noting a "risk of 'in terrorem' settlements" in class actions).

[25] *In re Hydrogen Peroxide*, 552 F.3d at 310 (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 168 n.8 (3d Cir. 2001)).

[26] Carnegie v. Household Int'l., 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."); Am. Express v. Italian Colors Rest., 133 S. Ct. 2304, 2316 (2013) (Kagan, J., dissenting) ("No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands.").

[27] *Amchem*, 521 U.S. at 617 (citing Adv. Comm. Notes, 28 U.S.C. App., p. 697).

[28] These cases are: Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010); AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011); Am. Express v. Italian Colors Rest., 133 S. Ct. 2304 (2013); Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011); Amgen Inc. v. Conn. Ret. Plans and Trust Funds, 133 S. Ct. 1184 (2013). The number depends on how you count them. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), for example, does not address class action standards per se but arose in a class action context and seems to have been driven at least in part by a perception that large class actions take a toll on the court's, and the parties', resources. *See id.* at 546 (noting potential for discovery abuse in case where plaintiffs sought to represent a putative class of millions of telephone and internet subscribers).

[29] The exception is *Amgen*.

[30] *Stolt-Nielsen S.A.*, 559 U.S. at 684 ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so"); *Concepcion*, 563 U.S. at 351 ([S]tate public policy in favor of providing a forum for low value claims must yield in favor of federal policy favoring arbitration.); *Italian Colors*, 133 S. Ct. at 2310–11 (Sherman Act claim must be arbitrated even if pursuit of claim in bi-lateral arbitration is economically unfeasible.).

[31] 133 S. Ct. at 2309; *see also Concepcion*, 563 U.S. at 351 (rejecting the argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system").

[32] 131 S. Ct. at 2561.

[33] *See, e.g.*, Brief of Petitioner Tyson Foods at 9, Tyson Foods Inc. v. Bouaphakeo., No. 14-1146 (U.S. Aug. 7, 2015) [hereinafter Petitioner's Brief] (arguing that plaintiffs' proof based on observed "averages" would result in a "trial by formula" expressly prohibited by *Wal-Mart*).

[34] *Id.* at (i).

[35] 133 S. Ct. at 1434–35.

[36] *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838 (6th Cir. 2013) (*Comcast* "breaks no new ground on the standard for certifying class actions under Federal Rule of Civil Procedure 23(b)(3)."); Roach v. T.L. Cannon Corp., 778 F.3d 401, 408 (2d Cir. 2015) ("[T]he *Comcast* decision turned upon 'the straightforward application of class-certification principles' and held only that a model for determining classwide damages relied upon to certify a class under Rule 23(b)(3) must actually measure damages that result from the class's asserted theory of injury.").

[37] *See, e.g.*, Brief Amicus Curiae, Dow Chemical Co. at 5, Tyson Foods Inc. v. Bouaphakeo, No. 14-1146 (U.S. Aug. 14, 2015) (citing *Comcast* for the proposition that "[c]lass certification is improper unless 'the existence of individual injury' is 'capable of proof at trial through evidence that [is] common to the class rather than individual to its members.'"); *see also In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 255 (D.C. Cir. 2013) (stating that, before *Comcast*, "the case law was far more accommodating to class certification under Rule 23(b)(3)").

[38] 133 S. Ct. 1184 (2013).

[39] 17 C.F.R. § 240.10b-5 (2011).

[40] *Amgen*, 133 U.S. at 1195–96.

[41] *Id.* at 1194–96.

[42] *Cert. granted*, 135 S. Ct. 2806 (U.S. June 8, 2015) (No. 14-1146).

[43] *Cert. granted*, 135 S. Ct. 2311 (U.S. May 18, 2015) (No. 14-857). *See* 136 S. Ct. 663, 666 (2015).

[44] *Cert. granted*, 135 S. Ct. 1892 (U.S. Apr. 27, 2015) (No. 13-1339).

[45] Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013); Mullins v. Direct Digital, LLC, 795 F.3d 654, 671 (7th Cir. 2015); *cert. denied*, No. 15-549, 2016 WL 763259 (U.S. Feb. 29, 2016).

[46] Brief of Respondents at 1–2, 12–16, Tyson Foods, Inc. v. Bouaphakeo, No. 14-1146 (U.S. Sept. 22, 2015) [hereinafter Respondents' Brief].

[47] *See* Petition for Certiorari at (i), Tyson Foods, Inc. v. Bouaphakeo, No. 14-1146 (U.S. Mar. 19, 2015).

[48] Under the Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), where an employer does not keep detailed and accurate records of employee hours, an employee need only "produce[] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." Respondents argued that the time-study challenged by Tyson was precisely that type of evidence permitted under *Mt. Clemens*. Respondents' Brief, *supra* note 46, at 38–39.

[49] *See, e.g.*, Petitioners' Brief, *supra* note 33, at 38 ("[C]lass certification based on such averaging results is an impermissible 'alteration of substantive' rights."); Brief Amicus Curiae Chamber of Commerce at 15 (Aug. 14, 2015) (questioning statistical analysis for purposes of litigation" generally); *id.* at 17 (use of statistics "runs a grave risk of violating due process" in class actions).

[50] *See* Brief Amicus Curiae Economists and Other Social Scientists at 2–5, (Sept. 29, 2015); *see also* Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, *in* Fed. Judicial Ctr., Reference Manual on Scientific Evidence 303, 334 (3d ed. 2011) ("Multiple regression . . . is a method in which regression line is used to relate the average one variable-dependent variable to the values of other explanatory variables.").

[51] *See, e.g.*, Brown Shoe, Co. v. United States, 370 U.S. 294, 341 (1962) (accepting proof "through study of a fair sample"); *In re* Scrap Metal Antitrust Litig., 527 F.3d 517, 525–34 (6th Cir. 2008) (accepting expert analysis showing "average" class member damages in cartel case); *In re* TFT-LCD Antitrust Litig., No. 07-1827, 2012 WL 555090, at *5 (N.D. Cal. Feb. 21, 2012) (accepting analysis showing "large average overcharge" as relevant and probative of classwide proof in price-fixing case); *In re* Elec. Books Antitrust Litig., No. 11-MD-2293, 2014 WL 1282293, at *22 (S.D.N.Y. Mar. 28, 2014) ("The Supreme Court has never suggested that widely used tools of economic analysis like regression models must be banned from trials because they rely on a 'formula' . . . . The plaintiffs' [damage model] reflects a classic method for arriving at a class-wide damages figure in an antitrust lawsuit and is not the novel trial by formula rejected in *Dukes*."); *In re* Polyurethane Foam Antitrust Litig., No. 10-MD-2146, 2014 WL 6461355, at *67 (N.D. Ohio Nov. 17, 2014) (approving the use of regression models to establish aggregate overcharges.).

[52] *See generally* Rubinfeld, *supra* note 50, at 306–09 (discussing wide range of cases in which statistical and other empirical evidence is used).

[53] *See supra* note 47.

[54] Petitioner's Brief, *supra* note 33, at 49–51.

[55] All of the circuit courts that have explicitly addressed this issue have confirmed the long-standing view that only the named plaintiff must establish standing and injury prior to the certification decision. *See, e.g.*, Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 362 (3d Cir. 2015) ("We now squarely hold that unnamed, putative class members need not establish Article III standing."); Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 676–77 (7th Cir. 2009) (rejecting the argument that before certifying a class the district judge was required to determine which class members had suffered damages and holding that "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied").

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

[57] *Id.* at 19.

[58] *Carrera*, 727 F.3d 300; *Mullins*, 795 F.3d at 671–72. The Supreme Court denied appellant's petition for certiorari in *Mullins* on Feb. 29, 2016.

[59] *Mullins*, 795 F.3d at 659–60.

[60] 727 F.3d at 307–08.

[61] *Id.* at 309–11.

[62] Karhu v. Vital Pharms., Inc., 621 Fed. App'x 945, 959 (11th Cir. 2014); Xavier v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1089–90 (N.D. Cal. 2011); Weiner v. Snapple Beverage Corp., No. 07 Civ. 8742 (DLC), 2010 WL 3119452, at *12–13 (S.D.N.Y. Aug. 5, 2010).

[63] *Mullins*, 795 F.3d at 671.

[64] *Id.* at 662.

[65] *Id.* at 663–64.

[66] *See, e.g.*, *In re* Processed Egg Prods. Antitrust Litig., No. 08-md-02002-GEKP, 2015 WL 6964281, at *13 (E.D. Pa. Nov. 10, 2015) (applying the Third Circuit's ascertainability standard and denying certification of class of indirect purchasers of eggs for lack of ascertainability); Vista Healthplan, Inc. v. Cephalon, Inc., No. 06-cv-01833, slip op. at 11–24 (E.D. Pa. June 10, 2015) (same for class of indirect purchasers of pharmaceutical).

[67] *In re* Comcast Corp., Set-Top Cable Television Box Antitrust Litig., No. 09-md-02034, slip op. at 5–14 (E.D. Pa. Nov. 5, 2015) (denying certification of a settlement class of direct purchasers of Comcast services where Comcast was unsure that it had kept class members' records), *petition for leave to appeal granted*, No. 15-8115 (3d Cir. Dec. 4, 2014).

[68] *See supra* note 35.

[69] *Id.*; *see also* Christopher Micheletti, *2 Years After* Comcast *Little Has Changed*, Law360 (Mar. 18, 2015) (surveying cases interpreting *Comcast*).

[70] 807 F.3d 872, 876 (7th Cir. 2015) ("[I]t has long been recognized that the need for individual damage determinations at a later stage of the litigation does not itself justify the denial of certification.") (quoting *Mullins*, 795 F.3d at 671); *Comcast*, 133 S. Ct. at 1437 ("[I]t remains the 'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.") (quoting 2 William Rubenstein, Newberg on Class Actions § 4:54, at 208 (5th ed. 2012).

[71] *Comcast*, 133 S. Ct. at 1434–35.

[72] *Roach*, 778 F.3d at 409 (rejecting argument that *Comcast* requires the introduction of an aggregate damages model).

[73] Rule 23(c)(4) provides: "When appropriate, an action may be brought or maintained as a class action with respect to particular issues."

[74] Butler v. Sears, Roebuck and Co., 727 F.3d 796, 800 (7th Cir 2013) ("[A] class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is per-

mitted by Rule 23(c)(4) and will often be the sensible way to proceed."); *In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219 (2d Cir. 2006) (A court may employ Rule 23(c)(4)(A) to certify a class as to a specific issue where the entire claim does not satisfy Rule 23(b)(3)'s predominance requirement); Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 911 (7th Cir. 2003) ("If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings.").

[75] Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 95 & n.15, 109 (2d Cir. 2007) ([P]laintiffs "may seek certification of a class to litigate the first element of their antitrust claim—the existence of a Sherman Act [antitrust] violation—pursuant to Rule 23(c)(4)(A)."); Kamakahi v. Am. Soc'y for Reprod. Med., 305 F.R.D. 164, 186–88 (N.D. Cal. 2015) (certifying a "liability only class" under Rule 23(c)(4) to determine whether a policy violates the Sherman Act); *In re* Steel Antitrust Litig., No. 08-cv-5214, 2015 WL 5304629, at *11–12 (N.D. Ill. Sept. 9, 2015) (certifying an issue class on core issues of defendants' conduct and three elements of the claim (conspiracy, causation, and aggregate damages)); *In re* Prograf Antitrust Litig., No. 1:11-MD-02242-RWZ, 2014 WL 4745954, at *1–2 (D. Mass. June 10, 2014) ("[C]ertifying an issue-specific class here would allow the parties to resolve the question of antitrust violation in one efficient and economical stroke.").

[76] Appeal docketed, LA Health Serv. Indemnity Co. v. Astellas Pharma US, Inc., No. 15-1290 (1st Cir. Mar. 6, 2015).

[77] DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015).

[78] Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016).

[79] Spokeo v. Robins, U.S. No. 13-1339.

[80] 136 S. Ct. at 471.

[81] Spokeo*: Is Violation of Statutory Right Enough to Grant Standing?,"* N.Y.L.J., Oct. 28, 2015.

[82] Allison Grande, *Scalia's Death Adds Uncertainty in Class Standing Fight*, Law360 (Feb. 16, 2016).

[83] Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 666 (2016).

[84] *Id.* at 672, 675; *see also id.* at 679 n.1 (Roberts, C.J., dissenting).

[85] *See, e.g.*, *Butler*, 727 F.3d at 801 ("It would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages.").

[86] *Class Action Issues Update*, Am. Antitrust Inst., (Nov. 2015), http://www.americanantitrustinstitute/org/.

[87] Consumer Fin. Protection Bureau, CFPB Considers Proposal to Ban Arbitration Clauses that Allow Companies to Avoid Accountability to Their Customers (Oct. 7, 2015). An outline of the proposals under consideration is available at http://www.consumerfinance.gov/f/201510_cfpb_small-business-review-panelpacket-explaining-the-proposal-under-consideration.pdf.

[88] *Walmart*, *Concepcion*, and *Comcast* were 5–4 decisions. *Italian Colors* was a 5–3 decision, with Justice Sotomayor abstaining because she sat on the Second Circuit panel that ruled in favor of plaintiffs below. Had she voted, she presumably would have ruled with the minority. *See In re* Am. Express Merchants Litig., 555 F.3d 300, 301 (2d Cir. 2009).

Addendum

Since going to press, the Supreme Court issued its decision in *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146, 2016 WL 1092414 (Mar. 22, 2016), affirming, in a 6–2 decision, a jury verdict in favor of the plaintiff class.

While the Court avoided broad pronouncements impacting class action practice in general, the decision is nevertheless notable in several ways. First, the Court construed the "predominance" requirement under Rule 23, holding that it may be satisfied where "one or more of the central issues in the action are common to the class," even if "other important matters will have to be tried separately, such as damages or some affirmative defenses . . . ." *Id.* at *9. Plaintiffs in antitrust class actions will use this ruling to rebut arguments commonly raised in the wake of *Comcast v. Behrend*, that classes may not be certified unless plaintiffs can demonstrate that there is a common methodology for proving individual class member damages.

Second, the Court rejected the argument that statistical or representative evidence is inappropriate in class actions, holding instead that the admissibility of such evidence is a matter to be determined under *Daubert* and once such evidence is admissible, its persuasiveness is a question for the jury. *Id.* at *10.

Finally, while the Court did not explicitly reach the issue of whether a class may be certified despite the presence of uninjured class members, its discussion suggests that excluding uninjured class members is a problem to be addressed at the recovery stage, not at class certification. *Id.* at *11. ■