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The Supreme Court's Recent Class Action Jurisprudence: Gazing into a Crystal Ball

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THE SUPREME COURT'S RECENT CLASS ACTION JURISPRUDENCE: GAZING INTO A CRYSTAL BALL

by
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In this Article, Professor Kane analyzes the six class-action cases most recently in the Supreme Court, starting with the Court's opinion in Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co. *at the end of the 2009–10 Term through the five cases in the 2010–11 Term to determine if there is any common theme underlying the decisions, as well as what their impact may be. She draws two conclusions. First, the cluster of class-action cases decided by the Court is particularly significant largely because it covers many different and important issues central to the field rather than because the Court embarked on new, uncharted paths. Second, although the availability of class arbitration has been severely restricted, if not effectively eliminated for state consumer claims, the Court has not sounded the death knell for future class litigation and Rule 23 may continue to serve as a viable procedural remedy for resolving aggregate disputes. This is seen by examining how the lower courts are interpreting these opinions and are continuing to certify class actions under the Court's newly-articulated standards.*

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I. INTRODUCTION

It is not a surprising or particularly insightful observation to note when the United States Supreme Court decides to grant certiorari to a number of cases in the same field within a short period of time, that the Court may be seeking to deliver some important message that may change substantially the way in which litigation in a given area is able to proceed in the future.[1] In the field of civil procedure, for example, consider the trilogy of summary-judgment cases in the mid-1980s[2] that clarified the parties' burdens on those motions and effectively increased the possibility of successful summary-judgment motions. Or even more recently, consider the Court's pleading decisions that changed the standard for determining whether a claim for relief has been stated to one looking at whether sufficient facts are pleaded to show a claim "that is plausible on its face," not merely conceivable.[3]

In the class-action arena, the Court similarly has periodically entered the fray to respond to lower court efforts to manage and deal with this modern form of complex litigation and the enthusiastic reception it first received after the 1966 amendments to Rule 23.[4] Thus, during the 1970s the Court limited the availability of diversity class actions when it issued its famous jurisdiction decisions holding that class members could not aggregate their individual claims to meet the required jurisdictional amount in controversy.[5] The Court also tackled the notice requirements for Rule 23(b)(3) common-question suits, requiring plaintiffs to absorb all costs for delivering individualized notice to class members who are identifiable through a reasonable effort,[6] and rejecting the lower courts'

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[1] Consider, for example, that in May–June of 1989, five decisions on Title VII were handed down by a sharply divided Supreme Court. As noted by one commentator, "This is a remarkably large number of Supreme Court decisions to be issued interpreting a single title of a single statute in less than two months, and it signaled a clear move by the Court to turn back the rising tide of private Title VII lawsuits." SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 180 (2010). And it was those decisions that led to the 1991 Civil Rights Act.

[2] Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

[3] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

[4] *See generally* 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1754 (3d ed. 2005).

[5] Zahn v. Int'l Paper Co., 414 U.S. 291, 301 (1973); Snyder v. Harris, 394 U.S. 332, 336–38 (1969).

[6] Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358–59 (1978) (holding that the plaintiff must bear the cost of compiling the class member list so that notice can

attempts to develop approaches to allow the opportunity for interlocutory appeals of decisions either to grant or deny class certification.[7] And at the end of the 1990s, it dealt with the problems posed by class settlements of present and future claims in the nationwide asbestos litigation,[8] finding that class treatment could not be allowed consistent with due-process concerns for the absent class members.

Of course, there were additional individual Supreme Court decisions from time to time that dealt with discrete class-action issues.[9] But, for purposes of this Article, the point is that often when the Court has determined to make more than one major pronouncement in a field during the course of one or two terms, it can be seen as attempting to correct a direction in which the lower courts appear to be heading or seeking to establish a new "order" or theoretical framework to govern the field.

Thus, noting the Court's seminal opinion involving governing law in federal diversity class actions, issued in March of the 2009–2010 Term,[10] and that five class-action certiorari petitions were pending in the 2010–2011 Term, it seemed at the start of last year's term that we might again witness another major movement in class-action procedural law. Indeed, since most of the prior class-action procedural shifts just mentioned entailed only two or three cases, and the current Court in the span of two terms would have the potential of ruling on six cases, a seismic event might be on the horizon. Consequently, when Dean Klonoff extended to me the invitation to serve as the Distinguished Higgins Visitor in March

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be sent to them); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974) (holding that individual notice must be provided to Rule 23(b)(3) class members who are identifiable through a reasonable effort).

[7] Coopers & Lybrand v. Livesay, 437 U.S. 463, 468–69, 476 (1978) (holding that denial of class certification is not appealable under the "collateral order" doctrine or the "death knell" theory); Gardner v. Westinghouse Broad. Co., 437 U.S. 478, 478–79 (1978) (affirming that 28 U.S.C. § 1292(a)(1) cannot be used to allow an immediate appeal of an order refusing class certification). The impact of these decisions restricting early review of class certification orders was eliminated with the adoption in 1998 of Rule 23(f), authorizing a discretionary interlocutory appeals system for class certification decisions. *See* 7B WRIGHT, MILLER & KANE, *supra* note 4, at § 1802.2.

[8] Ortiz v. Fibreboard Corp., 527 U.S. 815, 864–65 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997). In both these cases, which involved settlements, the Court found that class certification was improper, as the interests of the absent class members were not adequately represented, and in the instance of future claimants, could not be so. Certification in *Ortiz* also was held improper as a mandatory, limited-fund class action under Rule 23(b)(1)(B). Taken together, these cases raised serious questions whether any global resolution of present and future claims in mass toxic-tort cases would be possible by adequately structuring the representation and notice features to respond to the Court's concerns.

[9] *See, e.g.*, Devlin v. Scardelletti, 536 U.S. 1 (2002) (holding that class objectors can appeal a judgment upholding a class settlement without formally intervening); Phillips Petrol. Co. v. Shutts, 472 U.S. 797 (1985) (applying personal jurisdiction, due process and preclusion to state class-action judgments).

[10] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010).

2012, well after the Supreme Court would have acted on all those cases, I thought this might provide an opportunity to reflect on what new paths the Court may have illuminated or new frameworks it may have imposed. Of course, this topic had its own risks since I agreed to explore it having no idea what the Court was going to do. The evidence is now in, and I would like to share what I learned from the Supreme Court's most recent class-action jurisprudence.

I will begin by describing, in the order in which they emerged, what class-action question each of the cases involved and then turn to looking at their results and the Court's analysis to see whether there is any common theme linking them together. I then will look at how the lower courts appear to be responding to the Court's decisions and offer some reflections on what the significance of this line of Supreme Court cases might be.

II. THE CASES BEFORE THE COURT

The first case to be considered is *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*[11] The case, among other things, involved class claims that the defendant insurer had violated New York law in failing to pay statutory interest penalties on overdue payments of insurance benefits owed under no-fault automobile insurance policies. The question posed was whether Rule 23 should govern over a New York statute that prohibited class actions in suits seeking penalties or statutory minimum damages.[12]

The Court rendered a 5–4 decision, with Justice Scalia writing for the majority,[13] Justice Ginsburg writing for the dissent,[14] and Justice Stevens filing a concurrence in part. The majority held that Federal Rule 23 was in conflict with New York state law. As Justice Scalia reasoned, the federal rule authorizes any class action that meets its requirements, Rule 23 is a valid rule under the Rules Enabling Act, and thus Rule 23 controlled, allowing the class action to proceed.[15] Standing alone, there is no question but that *Shady Grove*'s primary significance is not because it is a class action, but because Justice Scalia's analysis changed substantially the approach taken in previous governing law decisions[16] of seeking to avoid finding a conflict between a federal rule and state law and thus allowing both to co-exist.[17] However, for class-action implications, the majority's

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[11] *Id.*

[12] *Id.* at 1436.

[13] The other justices in the majority were Chief Justice Roberts and Justices Stevens, Thomas, and Sotomayor. *Id.* at 1435.

[14] The other dissenters were Justices Kennedy, Breyer, and Alito. *Id.* at 1460.

[15] *Id.* at 1437–38, 1442–43; *see also* Rules Enabling Act, 28 U.S.C. § 2072 (2006).

[16] *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996).

[17] As Justice Ginsburg noted in her dissent, "[b]y finding a conflict without considering whether Rule 23 rationally should be read to avoid any collision, the

interpretation of Rule 23 as offering an absolute right to class certification for any action meeting its requirements[18] makes the case important to consider in light of the Court's treatment of district court discretion in applying and interpreting class-action requirements in the 2010–2011 Term.[19]

The second case to be considered is *AT&T Mobility LLC v. Concepcion*,[20] another 5–4 decision, rendered on April 27, 2011. The case was brought by a California telephone customer alleging that the company's offer of a free phone to anyone who signed up for its cellphone service was fraudulent because customers were charged sales tax on the retail value of the phones. The company moved under its contract with the customer to compel arbitration. Standard provisions in its cellphone contracts prohibited classwide arbitrations. The question posed was whether California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts involving small amounts controlled. If so, the state could condition the enforceability of those agreements on the availability of classwide arbitration procedures and thereby, effectively, require that classwide arbitration be available for small consumer contracts.[21]

Justice Scalia again wrote for the majority,[22] Justice Thomas filed a concurring opinion, and Justice Breyer wrote for the dissent.[23] The majority held that the Federal Arbitration Act preempts California's rule regarding the unenforceability of such arbitration agreements. Additionally, it found that classwide arbitration interferes with the fundamental attributes of arbitration and greatly increases risks to defendants because the absence of multilayered review in arbitration makes it more likely that errors will go uncorrected. That risk of error was deemed unacceptable when damages allegedly owed to thousands of claimants are aggregated and decided at once.[24] The dissent, not

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Court unwisely and unnecessarily retreats from the federalism principles undergirding *Erie*." *Shady Grove*, 130 S. Ct. at 1468.

[18] After highlighting the Rule 23 requirements, Justice Scalia concluded: "By its terms this creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action. . . . Rule 23 provides a one-size-fits-all formula for deciding the class-action question." *Id.* at 1437.

[19] See the discussion at notes 43–65 *infra*.

[20] 131 S. Ct. 1740 (2011).

[21] *Id.* at 1744–46.

[22] The other members in the majority were Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. *Id.* at 1743.

[23] The other dissenters were Justices Ginsburg, Sotomayor, and Kagan. *Id.* at 1756.

[24] *Id.* at 1748–53. In fact, the distinctions between bilateral and class arbitration highlighted by Justice Scalia reflected similar views seen in an opinion from the previous year, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), in which a divided Court (five majority justices led by Justice Alito, and three dissenters, led by Justice Ginsburg, with Justice Sotomayor not taking part in the decision) held that when an arbitration contract is silent on the question whether class arbitration is allowed, it is contrary to the Federal Arbitration Act for the arbitrators to interpret

surprisingly, found no inconsistency between California's rule and the federal act's language and purpose and further noted that while the majority highlighted perceived disadvantages of class arbitrations, "class proceedings have countervailing advantages. In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate."[25] Thus the dissent concluded:

> In California's perfectly rational view, non-class arbitration over such sums will also sometimes have the effect of depriving claimants of their claims (say, for example, where claiming the $30.22 were to involve filling out many forms that require technical legal knowledge or waiting at great length while a call is placed on hold). . . . Why is this kind of decision—weighing the pros and cons of all class proceedings alike—not California's to make?[26]

But, according to the majority, "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[27]

The third case, decided by the Court on June 6, 2011, is *Erica P. John Fund, Inc. v. Halliburton Co.*[28] The case was a putative securities-fraud class action in which the plaintiffs sought to satisfy the reliance element of their fraud claim by utilizing a rebuttable presumption that reliance existed because the conduct involved a "fraud on the market" as a whole. The issue before the Court was whether, in order to trigger the rebuttable presumption for reliance so as to obtain class certification, it was necessary for the plaintiffs first to prove "loss causation"—that is, that defendant's deceptive conduct caused the stock prices to fall resulting in the investors' claimed economic loss.[29] Chief Justice Roberts, writing for a unanimous Court, sided with the plaintiffs and ruled that the loss-causation issue is not a barrier to finding that the Rule 23(b)(3) predominance requirement is met. The Court found that to hold otherwise would have been inconsistent with its 1988 decision in *Basic Inc. v. Levinson*,[30] which upheld the ability of plaintiffs to invoke the rebuttable presumption for reliance if they based their claims on a fraud-on-the-market theory.[31] Indeed, Chief Justice Roberts noted that in the *Basic* decision the Court recognized that requiring individualized proof of reliance would effectively prevent plaintiffs from proceeding on a class basis because individual issues then necessarily would predominate and

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the contract as imposing class arbitration because the changes necessitated by moving from bilateral to class arbitration were too fundamental. *Id.* at 1775.

[25] *AT&T Mobility*, 131 S. Ct. at 1760 (Breyer, J., dissenting).

[26] *Id.* at 1761.

[27] *Id.* at 1753 (majority opinion).

[28] 131 S. Ct. 2179 (2011).

[29] *Id.* at 2183–85.

[30] 485 U.S. 224 (1988).

[31] *Id.* at 250.

that would be an improper burden on investors who traded in an impersonal market.[32] Thus, to add an additional hurdle, such as the need to prove loss causation at the class-certification stage, particularly when that issue is not logically related to the fraud-on-the-market theory, would be in error.[33]

The fourth case to be considered is *Smith v. Bayer Corp.*,[34] decided on June 16, 2011. The case involved two putative consumer damages class actions against the same manufacturer, one in federal court and one in West Virginia state court. The cases alleged similar state-law claims and the named plaintiffs in the state-court action were unnamed class members in the federal action. The federal district court reached the certification question first and denied certification finding that individual issues predominated over the common questions so that certification under Rule 23(b)(3) was not proper.[35] It then went on to enjoin the pending state action in order to prevent the relitigation of its denial of class certification.[36] In a unanimous decision,[37] written by Justice Kagan, the Court held that the injunction was improper. Even though West Virginia had a class action rule nearly identical to the federal rule, it interpreted the predominance requirement differently so that the issues in the two actions were not identical. This meant that issue preclusion could not apply and the relitigation exception to the Anti-Injunction Act[38] could not apply either.[39] Further, Justice Kagan ruled that an unnamed class member cannot be considered a "party" to the action before the class is certified and thus cannot be bound by rulings therein.[40] The Court did acknowledge that class actions pose special problems of relitigation, but concluded that those cannot be addressed by altering preclusion rules or by construing the Anti-Injunction Act

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[32] *Erica P. John Fund*, 131 S. Ct. at 2185.

[33] "The fact that a subsequent loss may have been caused by factors other than the revelation of a misrepresentation has nothing to do with whether an investor relied on the misrepresentation in the first place, either directly or presumptively through the fraud-on-the-market theory. Loss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory." *Id.* at 2186.

[34] 131 S. Ct. 2368 (2011).

[35] *Id.* at 2374. *See generally* 7AA WRIGHT, MILLER & KANE, *supra* note 4, at § 1778 (discussing Rule 23(b)(3)'s requirement that "common questions of law or fact must predominate over . . . individual issues").

[36] *Smith*, 131 S. Ct. at 2373.

[37] Justice Thomas joined in the first two parts of the Court's opinion, but refused to join in the last part dealing with whether unnamed class members in actions that ultimately are not certified are "parties" to the action. *Id.* at 2373 n.*; *see infra* note 40 and accompanying text. Justice Thomas did not issue a separate opinion, however.

[38] 28 U.S.C. § 2283 (2006).

[39] *Smith*, 131 S. Ct. at 2377–79.

[40] "Neither a proposed class action nor a rejected class action may bind nonparties. What does have this effect is a class action approved under Rule 23." *Id.* at 2380.

exceptions broadly.[41] Rather, congressional action and notions of comity would have to suffice to address the problem.[42]

The fifth class-action case in the Court's 2010–2011 Term is the 900-pound gorilla in the room, *Wal-Mart Stores, Inc. v. Dukes*,[43] decided on June 20, 2011. This case was undoubtedly the one most watched by class-action advocates and opponents because the context and the issues involved offered the opportunity for a ruling that would significantly change the way in which courts apply Rule 23. The case was a Title VII employment-discrimination action brought on behalf of a nationwide class of some 1.5 million former and current female employees, who alleged sex discrimination in both promotion and pay throughout the national retail-store chain. The core of their case was that the store vested discretion in the local supervisors over these decisions, and that discretion was exercised disproportionately in favor of men and had a disparate impact on female employees, resulting in discrimination. In this way, plaintiffs sought to bring this case within an earlier Supreme Court pronouncement that commonality under Rule 23(a)(2) in employment-discrimination class actions might be satisfied if the employer had an entirely subjective decisionmaking process.[44] To buttress their claim that they could prove discrimination by common evidence, they presented statistical evidence revealing pay and promotion disparities between men and women; anecdotal reports of discrimination from about 120 female employees; and testimony by a sociologist presenting a "social framework analysis" indicating that the workplace culture fostered sex discrimination throughout the company in violation of Title VII. Plaintiffs sought injunctive relief to end the practices, as well as back pay for those lost opportunities. The question presented was

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[41] *Id.* at 2381–82.

[42] Justice Kagan opined that Congress had attempted to help the problem by allowing many more state class actions to be removed and consolidated in the federal courts under the Class Action Fairness Act. *Id.* at 2382; *see also* Class Action Fairness Act of 2005, Pub. L. No. 109-2, sec. 5, § 1453, 119 Stat. 4, 12 (codified at 28 U.S.C. § 1453 (2006)). And once cases are removed, she noted, "we would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute." *Smith*, 131 S. Ct. at 2382.

[43] 131 S. Ct. 2541 (2011).

[44] In *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), the Court held that a Mexican-American plaintiff alleging discriminatory treatment in promotions could not bring a class action on behalf of Mexican-American applicants for employment because he did not present a claim typical of the class and there was no common question between his claim and all the other class members. The Court found that it was not sufficient to merely allege that defendant's entire employment practices were discriminatory to meet Rule 23's requirements. *Id.* at 149, 157–59. However, the Court noted in a footnote that an across-the-board class could be certified if there was "[s]ignificant proof that an employer operated under a general policy of discrimination," and if "the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Id.* at 159 n.15.

whether the case could be certified, as it was by the court below, under the requirements of Rule 23(a) and Rule 23(b)(2).[45]

Turning first to whether the action could be brought under Rule 23(b)(2), it is important to understand why utilizing that subdivision, which applies to actions seeking injunctive relief, was deemed particularly important. Critically, that provision does not require a finding that common questions predominate over individual issues, as would be required if the action were to be certified as a damages action under Rule 23(b)(3).[46] Suits certified under subdivision (b)(2) also avoid the expense and necessity of providing individualized notice to all class members who can be identified with a reasonable effort and of providing class members with the opportunity to opt out of the class.[47] Given the large, dispersed nature of the class in the *Wal-Mart* case, the predominance requirement could be difficult to meet and thus certification was more readily accomplished if Rule 23(b)(2) applied.

Lower courts had been grappling with the issue of how to certify actions seeking both injunctive and monetary relief (commonly referred to as "hybrid class actions")[48] for some time. The general approach used was to determine if the damages sought were "incidental" to the injunctive relief and the lower courts had developed various approaches to determine the answer to that question. The Ninth Circuit, in which *Wal-Mart* arose, had looked to whether the claims for injunctive relief were the "predominant" form of relief sought to determine the propriety of certification.[49] So this case offered an opportunity for the Supreme Court to determine how to treat these hybrid cases, potentially either making it more difficult to certify them or endorsing lower-court efforts to allow certification under certain circumstances.

The Court unanimously held that Rule 23(b)(2) was not available and that the back-pay claims could be certified only if the district court determined that they met the predominance and superiority requirements of Rule 23(b)(3).[50] The Court also went on to hold that

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[45] *Wal-Mart*, 131 S. Ct. at 2547–49.

[46] FED. R. CIV. P. 23(b)(2–3).

[47] FED. R. CIV. P. 23(c)(2).

[48] *See* 7AA WRIGHT, MILLER & KANE, *supra* note 4, at § 1784.1.

[49] *See* Molski v. Gleich, 318 F.3d 937, 949–50 (9th Cir. 2003). This approach actually was endorsed by the advisory committee. FED. R. CIV. P. 23 advisory committee's note to 1966 amendment, *reprinted in* 12A CHARLES ALLEN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 235, 238–39 (2011). But Justice Scalia, writing for the Court, specifically rejected any reliance on that history, noting that the Court interprets the rule and that the committee note cannot change the rule. *Wal-Mart*, 131 S. Ct. at 2559.

[50] *Wal-Mart*, 131 S. Ct. at 2558–59. The four dissenting Justices agreed that the action, if certifiable, should have been considered under Rule 23(b)(3) and that that issue should be reserved for remand. *Id.* at 2561 (Ginsburg, J., concurring in part and dissenting in part). However, as Justice Ginsburg observed, the Court "disqualifies the class at the starting gate, holding that the plaintiffs cannot cross the 'commonality' line set by Rule 23(a)(2)." *Id.* at 2562.

predominance could not be satisfied for the back-pay claims because of the existence of affirmative defenses to the employees' claims that required individualized hearings and that could not be resolved appropriately using a sampling procedure.[51]

In contrast, the Court split 5–4 on the second issue—the application of the Rule 23(a)(2) common-question requirement. Justice Scalia, who wrote for the five-member majority,[52] found that the requirement was not satisfied, setting forth a new definition of what needed to be shown to do so, while Justice Ginsburg wrote for the dissent in part.[53]

The Court's holdings on both issues surprised many. This is because, although the question of hybrid class certifications was certainly percolating in the lower courts, those courts were virtually uniform in finding that back-pay claims were incidental to any injunctive relief sought in an employment-discrimination suit and that they did not prevent certification under Rule 23(b)(2).[54] Yet all nine members of the Court disagreed with this long-established conclusion. Further, the appropriate standard for determining compliance with Rule 23(a)(2) was a question raised not by the parties, but by the Court when it granted certiorari,[55] and Justice Scalia's elaboration of why Rule 23(a)(2) was not satisfied presents a new, complicated threshold analysis for a prerequisite on which most lower courts had not placed much emphasis.[56] Thus, the Court's rationale for its decision bears close scrutiny as both holdings represent major changes in the application of Rule 23.

In the Court's treatment of the back-pay claims, Justice Scalia rejected any Rule 23(b)(2) standard that looked to whether the injunctive relief predominated or whether back-pay claims themselves should be deemed equitable and thus within the scope of subdivision (b)(2). Just as he did in his *Shady Grove* opinion, he looked to the language of the rule and found nothing there to support those interpretations.[57] Justice Scalia recognized that in some instances Rule

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[51] *Id.* at 2561 (majority opinion).

[52] The other members of the majority were: Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. *Id.* at 2546.

[53] *Id.* at 2552–57. The other dissenters were: Justices Breyer, Sotomayor, and Kagan. *Id.* at 2546.

[54] See, for example, the cases cited in 7AA WRIGHT, MILLER & KANE, *supra* note 4, at § 1775 n.34.

[55] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 795 (2010).

[56] *See* 7A WRIGHT, MILLER & KANE, *supra* note 4, at § 1763 & nn.6–11.

[57] "Of course it is the Rule itself, not the Advisory Committee's description of it, that governs. And a mere negative inference does not in our view suffice to establish a disposition that has no basis in the Rule's text, and that does obvious violence to the Rule's structural features. The mere 'predominance' of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)'s procedural protections: It neither establishes the superiority of *class* adjudication over *individual* adjudication nor cures the notice and opt-out problems. We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a 'predominating request'—for an injunction."

23(b)(2) certification might be utilized when incidental monetary relief accompanied an injunction claim. But he noted that might only apply when the damages being sought flow directly from liability to the class as a whole and the determination of damages does not require complex individualized determinations.[58] This was not the case at hand and no short-cuts could be made to avoid individual damage determinations.

The majority's application of Rule 23(a)(2) is even more broad-reaching. Justice Scalia concluded that the three means by which plaintiffs had attempted to show that discretionary decisionmaking by managers created a general policy of discrimination presenting a core common issue for their employment-discrimination claim did not constitute significant proof that Wal-Mart operated within a general policy of discrimination.[59] His conclusion that plaintiffs had failed to meet their burden of proof under Rule 23(a)(2) raises important questions about what proof might possibly meet the standard.[60] Justice Scalia's conclusion that the standard was not met also is very much tied to the way in which he interpreted that requirement. As he saw it, commonality requires that plaintiffs have suffered the same injury and that means that "[t]heir claims must depend upon a common contention."[61] Further, that common contention "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[62] To resolve whether that standard is met, the issue then becomes whether dissimilarities between the claims may impede a common resolution, which, in *Wal-*

Wal-Mart, 131 S. Ct. at 2559. The fact that back-pay claims may be equitable in nature also was deemed immaterial. "The Rule does not speak of 'equitable' remedies generally but of injunctions and declaratory judgments." *Id.* at 2560.

[58] *Id.* at 2560. This standard for defining incidental relief was the one developed by the Fifth Circuit in dealing with hybrid class certifications. *See* Allison v. Citgo Petrol. Corp., 151 F.3d 402, 418–19 (5th Cir. 1998). However, the Court did not formally adopt this standard. Justice Scalia ended his opinion saying only: "And because the necessity of that litigation will prevent backpay from being 'incidental' to the classwide injunction, respondents' class could not be certified even assuming, *arguendo*, that 'incidental' monetary relief can be awarded to a 23(b)(2) class." *Wal-Mart*, 131 S. Ct. at 2561.

[59] *Wal-Mart*, 131 S. Ct. at 2552–54.

[60] Justice Scalia found the social-framework analysis inconclusive, questioning the strength of that type of analysis altogether. As for the statistical proof of disparate treatment, he commented, "Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice." *Id.* at 2556. Finally, as to the anecdotal evidence, he discounted it because it was concentrated in only six stores and represented "about 1 for every 12,500 class members—relating to only some 235 out of Wal-Mart's 3,400 stores." *Id.* Thus he concluded: "Even if every single one of these accounts is true, that would not demonstrate that the entire company 'operate[s] under a general policy of discrimination.'" *Id.* (alteration in original) (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982)).

[61] *Wal-Mart*, 131 S. Ct. at 2551.

[62] *Id.*

Mart, given the size and dispersal of the class, the majority found to be the case. Also important is the fact that Justice Scalia noted that to analyze whether Rule 23(a)(2) is met, it is necessary to go behind the pleadings and engage in a rigorous analysis that may require "some overlap with the merits of the plaintiff's underlying claim."[63]

In contrast, it is worth pointing out that while the dissent disagreed with the majority's conclusions regarding the sufficiency of the evidence submitted by plaintiffs to show a pattern and practice of discrimination,[64] it also interpreted Rule 23(a)(2) much differently, noting that there is nothing in the rule requiring a finding that the common questions are central to resolving the underlying case. Rather, the rule focuses the court on whether there will be the need to review common evidence pertinent to all the claims, which in this instance could be found by the need to examine the particular company-wide policies and practices alleged to affect women at all Wal-Mart stores. Thus, Justice Ginsburg noted that Justice Scalia had blended the threshold common-question requirement with the more stringent predominance-of-common-questions criteria of Rule 23(b)(3) damage actions. Because the Rule 23(a) commonality requirement applies to all class actions, she opined that the majority's interpretation potentially raises the bar for class certification of suits seeking certification under Rules 23(b)(1) and 23(b)(2), neither of which has a predominance requirement.[65]

The sixth and final decision I want to note is a bit different from all the preceding. Indeed, I am not sure Court watchers were paying great attention to it, but, given the decisions already described, it should be easy to see why it had the potential to cause major shifts in the class-action landscape. Thus, perhaps as a cautionary tale, it seems a fitting way

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[63] *Id.* For an examination of how lower courts prior to *Wal-Mart* were embracing a merits scrutiny as part of the class certification process and what the implications of that trend may be, see Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 349–71 (2011). But to say that there must be some inquiry into the merits in order to determine that Rule 23 is satisfied does not mean that the court must find that individual class members have a valid claim in order to go forward. Sullivan v. DB Invs., Inc., 667 F.3d 273, 304–07 (3d Cir. 2011) (en banc).

[64] *Wal-Mart*, 131 S. Ct. at 2565 (Ginsburg, J., concurring in part and dissenting in part) ("The evidence reviewed by the District Court adequately demonstrated that resolving those claims would necessitate examination of particular policies and practices alleged to affect, adversely and globally, women employed at Wal-Mart's stores. Rule 23(a)(2), setting a necessary but not a sufficient criterion for class-action certification, demands nothing further.").

[65] *Id.* at 2565–67. "Because Rule 23(a) is also a prerequisite for Rule 23(b)(1) and Rule 23(b)(2) classes, the Court's 'dissimilarities' position is far reaching. Individual differences should not bar a Rule 23(b)(1) or Rule 23(b)(2) class, so long as the Rule 23(a) threshold is met." *Id.* at 2566. Justice Ginsburg also noted that the majority was reaching out to decide an unnecessary issue and erect unnecessary roadblocks to class certification, given the Court's holding that if the back-pay claims were to go forward, they would need to satisfy Rule 23(b)(3) and that that issue was not before the Court, but should have been preserved for consideration on remand. *Id.* at 2561–62.

to end this Supreme Court review. The case on which certiorari was sought was *Philip Morris USA Inc. v. Scott*.[66] It involved a state-court class action against several tobacco companies on behalf of all Louisiana smokers alleging fraud in the distortion of knowledge to the public about the addictive effects of nicotine. Plaintiffs had been successful in the trial court and obtained a judgment of some $250 million to fund a 10-year smoking cessation program. The tobacco companies sought Supreme Court review alleging many due-process violations in the way the case was handled below. They also obtained a stay of the judgment from Justice Scalia while certiorari was pending.[67]

The grounds for obtaining a stay from a Supreme Court justice are: (1) that there is a reasonable probability that certiorari will be granted; (2) that there is a significant possibility that the judgment will be reversed; and (3) that, assuming the applicant's position on the merits is correct, there is a likelihood of irreparable harm if the judgment is not stayed.[68] Justice Scalia found all three requirements satisfied and, in particular, noted one asserted error below that might merit review and reversal.[69] As he described it, Louisiana fraud law typically requires proof that the plaintiff detrimentally relied on the defendant's misrepresentations. But the Louisiana appellate court had held that although that element would need to be proved if plaintiffs sought individual damages, it did not need to be proved insofar as the plaintiffs were seeking payment into a fund that would benefit all plaintiffs.[70] The result of this interpretation of Louisiana law was that defendants were deprived of the reliance defense. This holding, Justice Scalia asserted, "implicates constitutional constraints on the allowable alteration of normal process in class actions."[71] As he put it, the consequence of the Louisiana court's holding was "that individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action."[72]

Of note is the fact that this statement parallels Justice Scalia's treatment of the lower court's determination in *Wal-Mart* that the back-pay awards could not be made using a sampling technique rather than relying on individual proceedings. There he ruled that because the defendant had the right to raise individual affirmative defenses to any

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[66] 131 S. Ct. 1 (Scalia, Circuit Justice 2010).

[67] *Id.* at 2–3.

[68] *Id.* at 3.

[69] *Id.*

[70] *Id.* ("Thus, the court eliminated any need for plaintiffs to prove, and denied any opportunity for applicants to contest, that any particular plaintiff who benefits from the judgment (much less all of them) believed applicants' distortions and continued to smoke as a result.").

[71] *Id.*

[72] *Id.* at 4.

back-pay claims in a pattern-or-practice suit, "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims," or Rule 23 would violate the Rules Enabling Act.[73] On June 27, 2011, the Court acted in *Philip Morris*, denying certiorari.[74] Justice Scalia apparently was not successful in persuading three other justices to take up the issue in this other context, and *Philip Morris* can be viewed as the case that got away! But the broader issue of what constitutional limits the Court might impose on the lower courts when they are adapting ways to present evidence in order to allow class actions to be certified clearly looms in the future.

III. SEARCH FOR A COMMON THEME: A PATH NOT TAKEN

Having described the array of class-action cases decided by the Court since 2010, the question becomes whether there is an identifiable common theme or theory underlying them. As stated at the outset, this is what I had thought we might be able to discern from such a significant cluster of cases in the class-action arena. However, gazing into a crystal ball carries significant risks. Having looked at the Court's rationales, the results reached, and the kinds of issues presented, I must confess that I have not been able to identify any such major or broad theoretical underpinnings in the Court's recent class-action rulings. Rather, the cases appear to be very tied to the individual issues or circumstances presented. Thus, the possibility that the Supreme Court might be developing through these cases a new class-action jurisprudence or a central theory of class actions to guide modern litigation appears unlikely, as no such path is readily apparent. Indeed, even broad themes are difficult to ascertain. Let me briefly explain why.

Early news accounts or comments after some of the decisions were announced expressed, either with great dismay or with applause, that it now was clear the Court was "anti-class actions" or was developing class-action law to reflect a pro-business or anti-consumer bias.[75] Consideration of all of the cases together belies that simple conclusion, however. It is true that if the only cases the Court had decided were *AT&T Mobility* and *Wal-Mart*, then those concerns might appear more viable since both cases reveal the majority's concerns about whether the class-action device is appropriately utilized in certain kinds of cases. Thus, they raise the question whether a majority of the Court might be moving in the direction of limiting the availability of class relief accordingly. This is

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[73] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011); *see also* Rules Enabling Act, 28 U.S.C. § 2072 (2006).

[74] Philip Morris USA Inc. v. Jackson, 131 S. Ct. 3057 (2011).

[75] *See, e.g.*, Arthur H. Bryant, Editorial, *Class Actions Are Not Dead Yet*, NAT'L L.J., June 20, 2011, at 46; John C. Coffee Jr., *The Future (if Any) of Class Litigation After* 'Wal-Mart,' NAT'L L.J., Sept. 12, 2011, at 12; Editorial, *The* Wal-Mart *Ripple Effect*, WALL ST. J., Oct. 18, 2011, at A36.

particularly so since both cases were decided on a 5–4 split, with the same justices appearing in the majority and dissent. Further support for that conclusion is that the majority in *AT&T Mobility* completely rejected any notion of class arbitration, using language suggesting that class actions sometimes cause more burdens than efficiencies.[76] And, in *Wal-Mart*, the majority significantly increased the threshold needed to satisfy the commonality requirement of Rule 23(a)(2). Moreover, the Court unanimously held that the back-pay claims could not be deemed incidental relief and, if they were to go forward, must meet the predominance-of-common-questions requirement of Rule 23(b)(3)—a much higher threshold. Based on those two decisions alone, fears of an anti-class action or a pro-business tilt could be viewed as well-grounded. However, when you examine those cases in the context of the other class-action cases that the Court decided, the answer is not so clear.

Consider, for example, that in *Shady Grove* the Court prevented New York State from attempting to limit penalty class actions, holding that federal Rule 23 controlled and contained no such limitation. Further, in *Smith v. Bayer*, the Court held that a federal court cannot enjoin a pending state consumer class action on the ground that it had denied class certification to what was essentially an identical case. In both instances, consumers were allowed to utilize the class-action device despite major objections raised by the business community.

More generally, with regard to whether the Court revealed a desire to restrict class actions or displayed, as some would call it, an anti-class-action bias, three of the Court's decisions suggest otherwise, or at least that the Court is neutral on the question. Again, *Shady Grove* allows Rule 23 to be utilized despite state efforts to control certain class actions deemed abusive.[77] And in *Smith v. Bayer*, the Court's conclusion that an injunction against redundant and overlapping class actions was not proper means that the potential for multiple and duplicative state and federal class-action filings will continue.[78] This is so even though the Court recognized that tying the federal courts' hands may be inefficient

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[76] "[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1751 (2011).

[77] Justice Scalia has authored two contrasting 5–4 decisions. *Compare* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010) (upholding the application of Rule 23 and the ability to certify the class, despite state law restrictions), *with Wal-Mart*, 131 S. Ct. at 2560–61 (2011) (raising the standards for satisfying Rule 23(a)(2) and ruling certification improper). The contrast between these two cases challenges the notion of an over-arching bias or theme, other than perhaps Justice Scalia's known preference to interpret the language of rules or statutes strictly, rather than looking to outside sources and policies to provide interpretative guides.

[78] Justice Kagan did opine, however, that if there were multiple federal court filings, she hoped comity would persuade the remaining federal courts to rule accordingly. Smith v. Bayer Corp., 131 S. Ct. 2368, 2382 (2011).

and wasteful, and certainly the business community argued strongly against the status quo. Despite these recognized outcomes, the ability to limit class-action filings was deemed to be outside the power of the federal courts to address, and the unnamed members of the class in a federal action may not be prevented from raising their class claims elsewhere once the federal court denies certification.[79] Finally, in *Erica P. John Fund*, the Court adhered to much earlier precedent allowing the predominance requirement in securities-fraud class actions to be satisfied by a showing that there had been a fraud on the market, and it declined to restrict securities-fraud class actions by adopting the Fifth Circuit's requirement that loss causation, which was deemed an issue that needed to be proved individually, had to be shown before certification could be authorized.[80] And, although a denial of certiorari cannot be interpreted as sending any particular message, it is at least interesting to note that the Court declined the opportunity in *Philip Morris* to rule on the question whether the states, in actions premised on state law, could adapt their proof requirements to facilitate class actions as against the concerns raised by Justice Scalia, suggesting that to do so might implicate the due-process rights of the defendant businesses.

Another broad question that underlies the three consumer cases is the relationship between the federal and state courts and federal and state law. Remember that the Court, in two 5–4 decisions, held that Rule 23 controls over conflicting state law, which attempted to restrict the availability of class relief, and it also held that a federal statute controls over state law that would authorize class arbitrations in small consumer contract cases. But while federal law appeared to be favored in these situations, a unanimous Court in *Smith v. Bayer* upheld the right of the state courts to determine for themselves whether to certify a consumer damages class action even after a federal court had determined that the action could not be certified under criteria that were similar. And the Court refused to take up the question whether there were restrictions on state courts that want to develop or modify their proof standards to accommodate classwide determinations in products-liability suits. So, here too, the picture or direction is not clearly marked.

For these reasons, I have concluded that there is no overarching theme or theory underlying the Court's most recent class-action jurisprudence. Rather, these cases presented circumstances that allowed the Court to develop differing determinations, some of which may

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[79] *Id.* at 2379 & n.10.

[80] The Court's decision is a very narrow one, however. Thus, it left open the possibility that class certification could be denied on remand if it was determined that the alleged misrepresentations did not affect the company's stock price in the first place so no fraud on the market would have occurred, and it declined to rule on other questions raised by the application of the fraud-on-the-market approach to proving fraud in a class context.

appear to be class-action friendly and others of which appear to favor class opponents.

But the fact that no macro-theory appears does not mean that this cluster of cases is not extremely significant, particularly because they raise so many different issues at the heart of class litigation. Thus, it is important to look at how the lower courts and litigants are applying the rules the Court has announced to see how the cases have impacted the class-action landscape.

Even though only a few months have passed since most of these decisions were announced,[81] the early lower court results may suggest the potential longer-term impact of these decisions, and it is to that inquiry that I now turn.

IV. THE IMPACT ON CLASS LITIGATION IN THE LOWER COURTS

I must begin my analysis of the lower courts' treatment of these new Supreme Court class-action rulings by recognizing that it will be difficult, if not impossible, to assess with any degree of accuracy the impact of the Court's rulings in two of its cases—*Erica P. John Fund v. Halliburton Co.* and *Smith v. Bayer Corp.* This is because in each case the Court effectively allowed class actions to go forward, refusing either to adopt stricter proof requirements for securities-fraud class actions in the *Erica P. John* case,[82] or to allow federal courts to enjoin overlapping or duplicative class actions when they determined that a class could not be certified under Rule 23.[83] Obviously, as a result of both rulings, class certifications that before may have been refused as a result of those proposed restrictions now may proceed more readily. Thus, some lower courts have acknowledged that it now is clear that plaintiffs in securities-fraud actions need not prove loss causation at the class-certification stage.[84] Other courts have acknowledged that it now is not possible to enjoin parallel or subsequent state class actions under the relitigation exception to the Anti-Injunction Act[85] or they have held that federal class relitigation also must be allowed given the Court's ruling that class-

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[81] For purposes of this brief review, I have included only cases decided by December 31, 2011.

[82] *See* the discussion at notes 28–33 *supra.*

[83] *See* the discussion at notes 34–42 *supra.*

[84] *See, e.g., In re* Merck & Co. Sec., Derivatives & ERISA Litig., MDL No. 1658 (SRC), 2011 WL 3444199, at *29 (D.N.J. Aug. 8, 2011); Penn. Ave. Funds v. Inyx Inc., No. 08 Civ. 6857(PKC), 2011 WL 2732544, at *7–8 & n.2 (S.D.N.Y. July 5, 2011); *see also* Sosa v. Safeway Premium Fin. Co., 73 So. 3d 91, 111 (Fla. 2011).

[85] *See, e.g.*, United States *ex rel.* Greenmoor, Inc. v. Travelers Cas. & Sur. Co. of Am., Civil Action No. 06-234, 2011 WL 4915860, at *2 (W.D. Pa. Oct. 17, 2011); Rhodes v. Advanced Prop. Mgmt. Inc., Civil No. 3:10–cv–826 (JCH), 2011 WL 3204597, at *1–2 (D. Conn. July 26, 2011); Pharmacy Records v. Nassar, 806 F. Supp. 2d 1030, 1038–39 (E.D. Mich. 2011); *see also* Anti-Injunction Act, 28 U.S.C. § 2283 (2006).

certification denials cannot bind absent class members.[86] But actually determining whether class suits may increase as a result of these rulings would be difficult to document. This is because it is to be expected that, except for actions that were pending when the Supreme Court issued its decisions, now that the law on these issues is clear, class actions simply will be filed without any challenges on these grounds. Thus, it is reasonable to conclude that in removing two potential barriers to class certification, the Court may have eased the burden on class plaintiffs. However, just what that means in terms of increased class litigation is not readily quantifiable.

The remaining three class-action cases decided by the Court have posed greater interpretative questions for the lower courts and offer more potential for insights into how far reaching the Court's rulings may be. In particular, two important questions are presented. The first is the extent to which states retain the authority to either limit or authorize class relief. The second is whether the Rule 23 requirements now should be interpreted to include heightened standards that may restrict or otherwise limit the scope of available class relief both inside and outside the employment-discrimination field. The answers to these questions obviously may suggest some major shifts in class-action practice as it had evolved prior to these most recent Supreme Court decisions.

Starting first with the Court's 2010 decision in *Shady Grove*, although several courts have invoked that decision to rule that the Rule 23 requirements are the exclusive means of determining the availability of class relief despite conflicting state law,[87] others have distinguished the

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[86] *See, e.g., In re* Sears, Roebuck & Co. Tools Mktg. & Sales Practices Litig., No. 05 C 4742, 2011 WL 2745772, at *4 (N.D. Ill. July 11, 2011) ("It is true that the Court in *Smith* dealt exclusively with relitigation of the class-certification issue in *state* court. But the Court's ruling that denials of class certification are not binding on putative class members is equally applicable to relitigation in federal court.").

[87] Some courts have focused on the fact that "[s]atisfaction of [the Rule 23] requirements . . . categorically entitles a plaintiff to pursue her claim as a class action." Subedi v. Merchant, No. 09 C 4525, 2010 WL 1978693, at *2 (N.D. Ill. May 17, 2010); *see also* Nicholson v. UTi Worldwide, Inc., No. 3:09-cv-722-JPG-DGW, 2011 WL 1775726, at *3 (S.D. Ill. May 10, 2011); Neil v. Zell, 275 F.R.D. 256, 260 (N.D. Ill. 2011); Mezyk v. U.S. Bank Pension Plan, Nos. 3:09-cv-384-JPG, 3:10-cv-696-JPG, 2011 WL 601653, at *4 (S.D. Ill. Feb 11, 2011); Feinman v. FBI, 269 F.R.D. 44, 49 (D.D.C. 2010); *In re* AT&T Mobility Wireless Data Servs. Sales Litig., 270 F.R.D. 330, 340 (N.D. Ill. 2010).

Others have stressed that "Rule 23 is 'valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights.'" Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc., No. 1:09-CV-1162, 2010 WL 2998472, at *3 (W.D. Mich. July 28, 2010) (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1444 (2010)).

Still others stress that "Rule 23 'provides a one-size-fits-all formula for deciding the class-action question.'" *In re* Wash. Mut. Mortg. Backed Sec. Litig., 276 F.R.D. 658, 664 (W.D. Wash. 2011) (quoting *Shady Grove*, 130 S. Ct. at 1437); *see also, e.g.*, Pimental v. Dreyfus, No. C11-119 MJP, 2011 WL 321778, at *2 (W.D. Wash. Jan. 28, 2011); G.M. Sign, Inc. v. Brink's Mfg. Co., No. 09 C 5528, 2011 WL 248511, at *3 (N.D. Ill. Jan. 25, 2011); *In re* Wash. Mut., Inc. Sec., Derivative & ERISA Litig., Nos. 2:08–md–1919 MJP,

case based on the statutes or issues involved. For example, in a Second Circuit case under the Telephone Consumer Protection Act (TCPA),[88] which the Supreme Court had remanded to be reconsidered in light of *Shady Grove*, the appellate court held that unlike *Shady Grove*, the TCPA created a unique federal claim using state law to define the federal claim and that Congress intended some state rules to define what causes of action could exist under the statute.[89] The court concluded: "Congress intended to give states a fair measure of control over solving the problems that the TCPA addresses. The ability to define when a class cause of action lies and when it does not is part of that control."[90] Thus, the same New York law that was deemed generally inapplicable in *Shady Grove* applied to TCPA actions and barred class relief.[91] Similarly, courts have examined other state statutes and found them to be substantive and thus controlling, barring class relief even though Rule 23 might otherwise be satisfied.[92] Courts also have allowed an action to go forward under a state private attorney general law without requiring class certification under Rule 23.[93]

C08–387 MJP, 2010 WL 4272567, at *2 (W.D. Wash. Oct. 12, 2010); Elkins v. Dreyfus, No. C10-1366 MJP, 2010 WL 3947499, at *5 (W.D.Wash. Oct. 6, 2010).

[88] 47 U.S.C. § 227 (2006).

[89] Holster v. Gatco, Inc., 618 F.3d 214, 217–18 (2d Cir. 2010).

[90] *Id.* at 218 (per Calabresi, J.).

[91] Notably, this interpretation of the TCPA was rejected by the Third Circuit, which held that, because a federal statute was involved, only Rule 23 was relevant and state law need not be consulted. *See* Landsman & Funk PC v. Skinder-Strauss Assocs., 640 F.3d 72, 91 (3d Cir. 2011).

[92] See, for example, cases applying the Florida Motor Vehicle No-Fault Law, FLA. STAT. ANN. § 627.736(10)(a) (West 2011): DWFII Corp. v. State Farm Mut. Auto. Ins. Co., 271 F.R.D. 676, 684 (S.D. Fla. 2010)—the Illinois Antitrust Act, 740 ILL. COMP. STAT. ANN. 10/7(2) (West 1993): *In re* Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 415 (S.D.N.Y. 2011); *In re* Wellbutrin XL Antitrust Litig., 756 F. Supp. 2d 670, 677 (E.D. Pa. 2010)—the Ohio Consumer Sales Practices Act, OHIO REV. CODE ANN. § 1345.09 (West 2004): Kline v. Mortg. Elec. Sec. Sys., No. 3:08cv408, 2010 WL 6298271, at *4 (S.D. Ohio Dec. 30, 2010); McKinney v. Bayer Corp., 744 F. Supp. 2d 733, 748–49 (N.D. Ohio 2010); *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., No. 1:08-WP-65000, 2010 WL 2756947, at *2 (N.D. Ohio July 12, 2010)—and the Consumer Protection Act of 1977, TENN. CODE ANN. § 47-18-109(a)(1) (Supp. 2011): Tait v. BSH Home Appliances Corp., No. SACV 10–711 DOC (ANx), 2011 WL 1832941, at *9 (C.D. Cal. May 12, 2011); Bearden v. Honeywell Int'l Inc., No. 3:09-1035, 2010 WL 3239285, at *10 (M.D. Tenn. Aug. 16, 2010).

[93] See cases applying the California Labor Code Private Attorneys General Act of 2004, CAL. LAB. CODE §§ 2698–2699.5 (West 2011): Cardenas v. McLane Foodservice, Inc., No. SACV 10-473 DOC (FFMx), 2011 WL 379413, at *2–3 (C.D. Cal. Jan. 31, 2011); Mendez v. Tween Brands, Inc., No. 2:10-cv-00072-MCE-DAD, 2010 WL 2650571, at *4 (E.D. Cal. July 1, 2010). *But see* Thompson v. APM Terminals Pac. Ltd., No. C 10–00677 JSW, 2010 WL 6309364, at *2 (N.D. Cal. Aug. 26, 2010) ("To the extent Plaintiff here seeks to bring a representative PAGA action on behalf of other non-party, unnamed aggrieved employees in federal court, such a claim must meet the requirements of Rule 23.").

Other state procedures also have been deemed applicable despite their absence from Rule 23. Thus, the Fifth Circuit rejected a claim that the district court had to permit a *cy pres* distribution of a class settlement to proceed rather than allowing Texas to claim the funds under its unclaimed property laws. The court found that Rule 23(e) governing class settlements did not mention *cy pres* distributions, and therefore did not directly conflict with state law, that the state unclaimed property law was substantive, and thus that state law should be applied.[94] And the Fourth Circuit refused to interpret *Shady Grove* as creating an absolute entitlement to proceed as a class action despite plaintiffs' failure to exhaust their administrative remedies, as required under state law.[95]

In short, it appears that *Shady Grove* has not resulted in the lower courts simply ignoring state requirements, procedural or substantive, and relying solely on Rule 23 to determine the propriety of class relief. Although, as would be expected, there are some courts that have invoked the case as stating a categorical rule,[96] many others have continued to engage in a more nuanced analysis of the relevant state law, as well as the Rule 23 standards. And those courts have concluded that, at least in some circumstances, state law should control and may bar class relief. Thus, while *Shady Grove* may suggest additional layers of analysis that must be considered before deciding to apply state law, it has not resulted in the federal courts simply ignoring state interests and policies when deciding whether state law may be applied and state regulatory interests furthered.

The impact of *AT&T Mobility*'s conclusion that California's state rule holding class-action arbitration waivers in consumer contracts unenforceable was in conflict with the Federal Arbitration Act (FAA) has been more dramatic. Lower courts applying *AT&T Mobility* have been uniform in finding that plaintiffs now are prevented from arguing that class-action waivers in consumer contracts are unenforceable under state law.[97] The courts have recognized that the Supreme Court left open the possibility for class arbitration if the parties actually provided for it in

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[94] All Plaintiffs v. All Defendants, 645 F.3d 329, 333–34 (5th Cir. 2011).

[95] Mitchell-Tracey v. United Gen. Title Ins. Co., 442 F. App'x 2, 6 (4th Cir. 2011) ("[We cannot] discern any basis on which to read [*Shady Grove*] as excusing named class-action plaintiffs from the threshold procedural requirements that they would face as individual litigants."); *see also* Woods v. Stewart Title Guar. Co., Civil No. CCB-06-705, 2010 WL 3395655, at *2 (D. Md. Aug. 26, 2010).

[96] *See supra* note 87.

[97] *See, e.g.*, Chavez v. Bank of Am., No. C 10–653 JCS, 2011 WL 4712204, at *4–5 (N.D. Cal. Oct. 7, 2011); Adams v. AT&T Mobility, LLC, 816 F. Supp. 2d 1077, 1088–89 (W.D. Wash. 2011); *In re* Gateway LX6810 Computer Prods. Litig., No. SACV 10–1563–JST (JEMx), 2011 WL 3099862, at *1–2 (C.D. Cal. July 21, 2011); *In re* Cal. Title Ins. Antitrust Litig., No. 08–01341 JSW, 2011 WL 2566449, at *1–2 (N.D. Cal. June 27, 2011); Wolf v. Nissan Motor Acceptance Corp., No. 10–cv–3338 (NLH)(KMW), 2011 WL 2490939, at *6–7 (D.N.J. June 22, 2011); Wallace v. Ganley Auto Grp., No. 95081, 2011 WL 2434093, at *3 (Ohio Ct. App. June 16, 2011); Bernal v. Burnett, 793 F. Supp. 2d 1280, 1287–88 (D. Colo. 2011).

their contract[98]—albeit this is an unlikely prospect given the business community's control over most of the contract language and its desire, as witnessed in *AT&T Mobility* itself, to avoid class proceedings. Other courts also have noted that while a state rule mandating the availability of class arbitration based on the generalized nature of consumer-protection claims now is clearly preempted by the FAA,[99] a plaintiff still may seek to invalidate or avoid a class-action waiver by showing that the contract itself is unconscionable or otherwise unenforceable under traditional contract doctrine.[100] However, the fact that a class-action waiver is part of the contract is not in and of itself unconscionable.[101] Further, factual or statistical evidence showing that in the absence of class proceedings a plaintiff would not be able to obtain an attorney because it would not be cost effective to pursue the claim unless it was aggregated with others is not enough to avoid FAA preemption.[102] This is because *AT&T Mobility* is viewed as expressly rejecting the public policy arguments against class-action waivers, whether substantiated by facts or not, as insufficient to overcome the FAA's objective of enforcing arbitration agreements by their terms, as long as they are found to be valid contracts.

So the power of the states to regulate the consumer-protection field and, in particular, to rely on class procedures as a means of ensuring broad enforcement of those protections has been seriously limited by

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[98] Bergman v. Spruce Peak Realty, LLC, No. 2:11–CV–127, 2011 WL 5523329, at *4 (D. Vt. Nov. 14, 2011); Yahoo! Inc. v. Iverson, No. 11–CV–03282–LHK, 2011 WL 4802840, at *6 (N.D. Cal. Oct. 11, 2011).

[99] *See* Litman v. Cellco P'ship, 655 F.3d 225, 231 (3d Cir. 2011); Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1215 (11th Cir. 2011).

[100] *See* Unimax Express, Inc. v. Cosco N. Am., Inc., No. CV 11–02947 DDP (PLAx), 2011 WL 5909881, *2 (C.D. Cal. Nov. 28, 2011); Palmer v. Infosys Techs. Ltd., Civil Action No. 2:11cv217–MHT, 2011 WL 5434258, at *5 (M.D. Ala. Nov. 9, 2011); *In re* Checking Account Overdraft Litig., 813 F. Supp. 2d 1365, 1372 (S.D. Fla. 2011), *vacated on other grounds*, 674 F.3d 1252 (11th Cir. 2012); Saincome v. Truly Nolen of Am., Inc., No. 11–CV–825–JM (BGS), 2011 WL 3420604, at *1, *4–10 (S.D. Cal. Aug. 3, 2011); Kanbar v. O'Melveny & Meyers, No. C–11–0892 EMC, 2011 WL 2940690, at *8–9 (N.D. Cal., July 21, 2011); Hamby v. Power Toyota Irvine, 798 F. Supp. 2d 1163, 1164–65 (S.D. Cal. 2011); Hopkins v. World Acceptance Corp., 798 F. Supp. 2d 1339, 1348 (N.D. Ga. 2011); Sanchez v. Valencia Holding Co., 135 Cal. Rptr. 3d 19, 28–30 (Cal. Ct. App. 2011), *review granted*, 2012 Cal. LEXIS 2629 (Cal. March 21, 2011); Moran v. Superior Court, No. F061801, 2011 WL 5560178, at *4–5 (Cal. Ct. App. Nov. 16, 2011); NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 24 A.3d 777, 791–92 (N.J. Super. Ct. App. Div. 2011).

[101] *See Litman*, 655 F.3d at 232; *Hamby*, 798 F. Supp. 2d at 1164 & n.1; Bellows v. Midland Credit Mgmt., Inc., No. 09CV1951–LAB (WMc), 2011 WL 1691323, at *3 (S.D. Cal. May 4, 2011).

[102] *See* Kaltwasser v. AT&T Mobility LLC, 812 F. Supp. 2d 1042, 1048–50 (N.D. Cal. 2011); *Cruz*, 648 F.3d at 1214–15. *But see In re* Am. Express Merchs. Litig., 667 F.3d 204, 214, 217 (2d Cir. 2012) (holding that an arbitration clause rejecting class arbitration was invalid in an antitrust suit when plaintiffs showed that the practical effect was to prevent their ability to vindicate federal statutory rights through arbitration).

AT&T Mobility,[103] as has the expansion of class procedures into the arbitration arena. Whether the concerns expressed by the Court's majority in *AT&T Mobility* about the inherent inconsistency of class arbitrations with the efficiency and streamlined character of arbitration are viewed as legitimate or not, the Court by its expansive reading of the FAA clearly prevented states from experimenting with the remedy and determining whether it was consistent with their own public policy goals.

The last case to be examined, and the one which in many ways has the potential of having the greatest impact on future class litigation, is *Wal-Mart Stores, Inc v. Dukes*.[104] As will be remembered, that case held that the back-pay claims in an employment-discrimination class action under Title VII could not be considered as incidental to the injunctive relief being sought, and the claims had to meet the requirements of Rule 23(b)(3) to be certified as a class. Additionally, the standard for meeting the common-question requirement under Rule 23(a)(2) was redefined to require a centralized common question that could be proved in a common, rather than individualized, fashion. And this standard requires the courts to scrutinize rigorously the proof that may be introduced to meet that burden.

The first question is whether an action ever may be certified under Rule 23(b)(2) for injunctive or declaratory relief when monetary relief also is being sought. The *Wal-Mart* Court rejected the approach that certification under Rule 23(b)(2) might be deemed appropriate as long as the injunctive relief being sought predominated over any monetary relief being requested.[105] However, the Court's concerns related in many

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[103] In cases outside the consumer field, some courts, however, have distinguished *AT&T Mobility* and found that enforcement of an arbitration agreement would interfere with other substantive rights. *See, e.g.*, Brown v. Ralphs Grocery Co., 128 Cal. Rptr. 3d 854, 863 (Cal. Ct. App. 2011) (finding public right to sue under the Private Attorneys General Act cannot be subject to waiver by an arbitration agreement); Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950(LBS)(JCF), 2011 WL 2671813, at *4–5 (S.D.N.Y. July 7, 2011) (denying defendant's motion to reconsider ruling allowing Title VII plaintiffs to arbitrate a "pattern or practice" employment-discrimination claim on a class-wide basis); *see also* Urbino v. Orkin Servs. of Cal., Inc., No. 2:11–cv–06456–CJC(PJWx), 2011 WL 4595249, at *11 (C.D. Cal. Oct. 5, 2011). It also has been held that claims for injunctive relief under the California Consumer Legal Remedies Act are distinguishable from those in *AT&T Mobility* as plaintiff is acting as a private attorney general and California law providing that those injunction claims are not subject to arbitration could be applied. *In re* DirecTV Early Cancellation Fee Mktg. & Sales Practices Litig., 810 F. Supp. 2d 1060, 1072–73 (C.D. Cal. 2011). But not all courts agree. *See In re* Apple & AT&T iPad Unlimited Data Plan Litig., No. C-10-02553 RMW, 2011 WL 2886407, at * 4 (N.D. Cal. July 19, 2011); Arellano v. T-Mobile USA, Inc., No. C 10–05663 WHA, 2011 WL 1842712, at *2 (N.D. Cal. May 16, 2011).

[104] *See* the discussion at notes 43–65 *supra*.

[105] "The mere 'predominance' of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)'s procedural protections: It neither establishes the superiority of *class* adjudication over *individual* adjudication nor cures the notice and opt-out problems. We fail to see why the Rule should be read to nullify these

respects to the facts of the back-pay claims that were involved. Thus, it noted that to hold otherwise would create "perverse incentives" for class representatives to abandon other monetary claims and limit themselves to back pay and would require the district court to constantly reevaluate the roster of class members to ensure that all members remained employed at defendant's company so as to be eligible for injunctive or declaratory relief.[106] Further, the Court did not expressly preclude all monetary claims from being asserted in the context of a Rule 23(b)(2) suit. Indeed, it noted, without deciding whether it was appropriate, that the Fifth Circuit[107] had allowed Rule 23(b)(2) certification when the monetary relief was deemed "incidental" to the injunctive relief sought.[108] In that case incidental relief was defined as "damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief."[109] However, Justice Scalia noted that the back-pay claims could not be certified under Rules 23(b)(2) "at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief."[110]

Given those qualifications, perhaps it is not surprising that some lower courts in cases presenting claims for both injunctive and monetary relief have continued to evaluate whether the monetary relief may be deemed incidental and the action certified under Rule 23(b)(2).[111] The key is whether those monetary claims are sufficiently cohesive so that individual proceedings are not necessary to determine them.[112] Indeed,

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protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a 'predominating request'—for an injunction." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011).

[106] *Id.*

[107] Allison v. Citgo Petrol. Corp., 151 F.3d 402, 415 (5th Cir. 1998).

[108] *Wal-Mart*, 131 S. Ct. at 2560.

[109] *Allison*, 151 F.3d at 415.

[110] *Wal-Mart*, 131 S. Ct. at 2557.

[111] *See, e.g.*, Wu v. Pearson Educ., Inc., 277 F.R.D. 255, 276–77 (S.D.N.Y. 2011) (holding that copyright damage claims are not incidental); Delarosa v. Boiron, Inc., 275 F.R.D. 582, 592–93 (C.D. Cal. 2011) (holding that actual damages, punitive damages, and set statutory damages are incidental, but statutory damages requiring individual findings of harm are not incidental); *see also* Ellis v. Costco Wholesale Corp., 657 F.3d 970, 987 (9th Cir. 2011) (vacating and remanding class certification in light of *Wal-Mart* and instructing the lower court to consider whether punitive damages may be certified as incidental relief under Rule 23(b)(2), but requiring any certification of compensatory damages and back-pay claims under Rule 23(b)(3)).

[112] *Compare* Gates v. Rohm & Haas Co., 655 F.3d 255, 263 (3d Cir. 2011) (describing lower court's holding that medical monitoring and property damage claims in a toxic-tort action could not be certified under Rule 23(b)(2).), *with In re* Conseco Life Ins. Co. Life Trend Ins. Mktg. & Sales Practice Litig., No. C 10–02124 SI, 2011 WL 6372412, at *6, *9 (N.D. Cal. Dec. 20, 2011) (allowing a suit by current insurance policy holders seeking injunctive and declaratory relief to prevent ongoing or future premium requirements and increased charges, as well as the return of past improper deductions from their accounts to be certified under Rule 23(b)(2)

even back-pay claims have been certified under subdivision (b)(2) when the court found that, unlike *Wal-Mart*, they did not require individualized determinations or defenses.[113] Other courts have applied *Wal-Mart* more rigidly, holding that it is appropriate to certify only the issues relating to liability and classwide declaratory and injunctive relief under Rule 23(b)(2); all other claims must satisfy Rule 23(b)(3).[114] And yet other courts have found that *Wal-Mart* also applies to certification under Rule 23(b)(1)[115] and that monetary claims under that subdivision are also inappropriate unless they are incidental.[116]

In sum, most of these early lower court decisions do not appear to have interpreted the Supreme Court's decision as completely barring certification of mixed injunction/monetary claims under Rule 23(b)(2). Indeed, the results in these cases actually are consistent with the range of results and approaches taken before *Wal-Mart*.[117] This includes either bifurcating the claims being asserted under Rule 23(b)(2) and 23(b)(3)

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because the claims for past deductions "are formulaic and objectively calculable" from defendant's records and therefore incidental).

[113] *See, e.g.*, Gilmer v. Alameda–Contra Costa Transit Dist., No. C 08–05186 CW, 2011 WL 5242977, at *7 (N.D. Cal. Nov. 2, 2011) ("Plaintiffs in this case are not situated dissimilarly to one another, as the plaintiffs were found to be in *Dukes*. . . . The variations in the modes of travel of Plaintiffs here, which affect the extent of AC Transit's liability for unpaid travel time, are more limited than the discretionary decision-making that led to failures to promote employees in *Dukes*."); Cronas v. Willis Grp. Holdings, Ltd., No. 06 Civ. 15295(RMB), 2011 WL 5007976, at *4 (S.D.N.Y. Oct. 18, 2011) ("In contrast to *Wal-Mart*, Defendants here have agreed in the Revised Proposed Consent Decree that [t]he allocation [of backpay to class members] will be done by formula . . . [so] that Defendants have no remaining right to raise individual defenses or seek individualized determinations of back pay, which was the concern of the Court in *Wal-Mart*." (first and second alterations in original) (internal quotation marks omitted)).

[114] *See, e.g.*, United States v. City of New York, 276 F.R.D. 22, 33 (E.D.N.Y. 2011) (Rule 23(b)(2) cannot cover claims for individualized relief. "In so holding, a unanimous Supreme Court reduced to rubble more than forty years of precedent in the Courts of Appeals, which had long held that backpay is recoverable in employment discrimination class actions certified under Rule 23(b)(2)."); *see also* Easterling v. Conn. Dep't of Corr., 278 F.R.D. 41, 47 (D. Conn. 2011); Fosmire v. Progressive Max Ins. Co., 277 F.R.D. 625, 635–36 (W.D. Wash. 2011); Bouaphakeo v. Tyson Foods, Inc., No. 5:07–cv–04009–JAJ, 2011 WL 3793962, at *3–4 (N.D. Iowa Aug. 25, 2011).

[115] Rule 23(b)(1) allows certification when "prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." FED. R. CIV. P. 23(b)(1).

[116] *See, e.g.*, Daskalea v. Wash. Humane Soc'y, 275 F.R.D. 346, 364 (D.D.C. 2011); Altier v. Worley Catastrophe Response, LLC, Civil Action Nos. 11–241, 11–242, 2011 WL 3205229, at *14–15 (E.D. La. July 26, 2011).

[117] *See generally* 7AA WRIGHT, MILLER & KANE, *supra* note 4, at § 1784.1.

or focusing more closely on whether the monetary relief flows directly from the injunctive relief and whether it can be awarded without multiple individual determinations.

A critical question that remains is just what forms of aggregate proof can be used to prove class damage claims so as to be able to deem them incidental to the injunctive relief being sought. In *Wal-Mart* itself, the Court specifically noted that in pattern-and-practice cases the procedure for determining individual back-pay would entail additional proceedings at which the company could raise individual affirmative defenses to limit the relief. Further, the Court rejected a proposed trial formula using sample sets of class members whose back pay would be determined in depositions supervised by a master, which would then provide a formula to allow average back-pay awards to be calculated without individualized proceedings. Class certification under Rule 23 using that approach would mean that the rule was interpreted in violation of the Rules Enabling Act, 28 U.S.C. § 2072(b).[118] The implications of this holding on other cases in which courts are presented with possible techniques to allow adjudication on a group, rather than individual, basis are large.

At least one early indication can be seen in the Third Circuit opinion in *Gates v. Rohm & Haas Co.*[119] The case involved a class action by residents who alleged that defendant chemical companies dumped a carcinogen at an industrial complex near their homes, causing damage. The proposed class included only those with economic injury or exposure and excluded anyone alleging physical injury or who already had filed suit. The district court denied class certification, holding that individual issues predominated in a medical monitoring class on the questions of exposure, causation, and the need for medical monitoring, and in a liability-only issue class for the property damage claims, and the Third Circuit affirmed.[120]

In evaluating the plaintiffs' expert evidence of how to calculate the plaintiff class members' exposure to the chemicals, the Third Circuit concluded:

> Instead of showing the exposure of the class member with the least amount of exposure, plaintiffs' proof would show only the amount that hypothetical residents of the village would have been exposed to under a uniform set of assumptions without accounting for differences in exposure year-by-year or based upon an individual's characteristics. . . .

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[118] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011).

[119] 655 F.3d 255 (3d Cir. 2011) (Scirica, J.). It is also worth noting that even prior to *Wal-Mart*, the Third Circuit, in another opinion by Judge Scirica, had rendered a key decision requiring a rigorous evaluation of expert evidence for purposes of deciding class certification under Rule 23(b)(3). *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 323–24 (3d Cir. 2008). The implications of that ruling are explored in Marcus, *supra* note 63, at 351–71.

[120] *Gates*, 655 F.3d at 258, 261–62.

> Plaintiffs cannot substitute evidence of exposure of actual class members with evidence of hypothetical, composite persons in order to gain class certification.[121]

Thus, "[t]he evidence here is not 'common' because it is not shared by all (possibly even most) individuals in the class. Averages or community-wide estimations would not be probative of any individual's claim because any one class member may have an exposure level well above or below the average."[122] The use of expert evidence premised on modeling and assumptions not tied to the individual characteristics of class members did not provide the necessary showing of common proof[123] and, consequently, plaintiffs did not demonstrate the cohesiveness necessary to allow certification.

In sum, the primary and immediate impact of the *Wal-Mart* Court's decision on the application of Rule 23(b)(2) appears to be that it eliminated the "predominance" standard as a means of determining whether certification of hybrid claims is proper under Rule 23(b)(2) and, in employment-discrimination class actions, it eliminated the "automatic" classification of back-pay claims as incidental and required such claims to receive closer scrutiny as to what they entail and whether they need to be separately treated and certified under Rule 23(b)(3). This actually is true for all cases presenting hybrid claims, and the expert evidence sufficient to allow proof on a common basis in order to demonstrate the cohesiveness necessary to support certification must be grounded in studies that reflect the potential differences between class members. Thus, employment discrimination back-pay claims that before were easily certified under Rule 23(b)(2) now will have additional scrutiny and, as in *Wal-Mart* itself, some will not be allowed to go forward. And all cases will need to be determined in light of their own facts and circumstances; no general presumptions regarding how to characterize the relief sought are allowed. *Wal-Mart* also underscores that in employment-discrimination cases seeking back pay, the scope and size of the class of employees in actions under Rule 23(b)(2) should be carefully defined to include only those that share highly similar positions and claims so that the back-pay claims will not require substantial individual proof, but rather can be

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[121] *Id.* at 266.

[122] *Id.*

[123] *Id.* at 268 ("Plaintiffs have failed to propose a method of proving the proper point where exposure to vinyl chloride presents a significant risk of developing a serious latent disease for each class member. Plaintiffs propose a single concentration without accounting for the age of the class member being exposed, the length of exposure, other individual factors such as medical history, or showing the exposure was so toxic that such individual factors are irrelevant. The court did not abuse its discretion in concluding individual issues on this point make trial as a class unfeasible, defeating cohesion.").

calculated almost mechanically.[124] National company-wide employee classes, such as the one attempted in *Wal-Mart*, are unlikely ever to meet this standard.

Applying the new Rule 23(a)(2) commonality standard advanced by the majority in *Wal-Mart* raises additional class certification barriers and questions. In particular, consider just four preliminary questions. First, have lower courts in other employment-discrimination class actions been able to find that Rule 23(a)(2) is satisfied under the heightened "centrality" of common question standard, and, if so, how? Second, how is the standard being applied outside the employment-discrimination field? Third, how are the lower courts interpreting the majority's treatment of the need to inquire into the merits and to evaluate and weigh expert testimony that may be used to prove the merits in order to determine the centrality of a common question satisfying Rule 23(a)(2)? Is a full *Daubert*[125] hearing now becoming part of all class-certification proceedings? Fourth, and finally, is the application of this new standard having an adverse impact on class certification in suits brought solely under Rule 23(b)(1) or for pure injunctive or declaratory relief under Rule 23(b)(2), as Justice Ginsburg suggested might occur in her dissent?[126]

Not surprisingly, there have been some cases holding that Rule 23(a)(2) has not been satisfied because, after *Wal-Mart*, it is clear that statistical evidence of disproportionate impact, standing alone, is not sufficient to show that plaintiffs will be able to prove their claims on a classwide basis,[127] or because, like *Wal-Mart*, the policies being challenged depend on discretionary decisionmaking that affects each of the class members, but that would need to be examined in light of the individual circumstances of each claim.[128] Yet others have allowed cases to proceed under Rule 23, finding that they met the concerns in *Wal-Mart* and were factually distinguishable from that case. For example, one court in a pay-discrimination case noted that unlike the size and dispersal of the nationwide class in *Wal-Mart*, the case at hand involved only 317 women, all employed at the same location and all at an officer level and subject to a single ultimate decisionmaker.[129] In another case, the court held that

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[124] The size and scope of future classes also is affected by the Court's interpretation of the common-question requirement in Rule 23(a)(2). *See* discussion *infra* notes 127–52.

[125] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

[126] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2566–27 (2011).

[127] *See* Stockwell v. City of San Francisco, No. C 08–5180 PJH, 2011 WL 4803505, at *7 (N.D. Cal. Oct. 11, 2011).

[128] *See* Bell v. Lockheed Martin Corp., Civil No. 08-6292 (RBK/AMD), 2011 WL 6256978, at *5, *8 (D.N.J. Dec. 14, 2011); McReynolds v. Merrill Lynch, Pierce, Fenner & Smith Inc., No. 05 C 6583, 2011 WL 4471028, at *2 (N.D. Ill. Sept. 19, 2011), *rev'd*, 672 F.3d 482 (2012) (finding *Wal-Mart* distinguishable).

[129] *See* Cronas v. Willis Grp. Holdings, Ltd., No. 06 Civ. 15295(RMB), 2011 WL 5007976, at *3–4 (S.D.N.Y. Oct. 18, 2011).

plaintiffs had presented significant proof of a general nondiscretionary corporate policy disfavoring women and thus satisfied Rule 23(a)(2).[130] The cases that already have confronted the impact of *Wal-Mart* in the first six months since it was rendered necessarily have tended to be ones that were filed or were pending when the Supreme Court issued its decision and thus may not meet this new threshold based on the evidence submitted when those cases originally were filed.[131] The important question is what kinds of evidence will suffice in the future. That is why the distinctions drawn by a few of these courts can be instructive. As discussed later, understanding how the courts are using the merits inquiry and evaluating expert evidence for these purposes also is critically important.[132]

When we look at cases outside the employment-discrimination field, we find many courts that have been able to distinguish *Wal-Mart* because the case before them involves a common policy that is applied uniformly to all class members and does not depend on discretionary decisionmakers. This has been true, for example, in wage-and-hour labor disputes under state and federal law, where courts have noted that uniform underlying policies are involved and that there are no discretionary decisions by supervisors at issue.[133] Similar reasoning and

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[130] *See* Jermyn v. Best Buy Stores, L.P., 276 F.R.D. 167, 172–73 (S.D.N.Y. 2011).

[131] Although plaintiffs were found not to have submitted significant proof of a general policy of discrimination in light of *Wal-Mart*, so that a motion for class certification was denied, the court granted a motion for pre-certification discovery to determine if such evidence could be found in *Burton v. District of Columbia*, 277 F.R.D. 224, 230–31 (D.D.C. 2011).

[132] *See* discussion at notes 142–52 *infra*.

[133] *See, e.g.*, Youngblood v. Family Dollar Stores, Inc., No. 09 Civ. 3176(RMB), 2011 WL 4597555, at *4 (S.D.N.Y. Oct. 4, 2011); Nehmelman v. Penn Nat'l Gaming, Inc., 822 F. Supp. 2d 745, 755–56 (N.D. Ill. 2011); Harris v. Smithfield Packing Co., No. 4:09–CV–41–H(1), 2011 WL 4443024, at *4 (E.D.N.C. Sept. 23, 2011); Delagarza v. Tesoro Ref. & Mktg. Co., No. C–09–5803 EMC, 2011 WL 4017967, at *8 (N.D. Cal. Sept. 8, 2011); Gales v. Winco Foods, No. C 09–05813 CRB, 2011 WL 3794887, at *2 (N.D. Cal. Aug. 26, 2011); Nguyen v. Baxter Healthcare Corp., 275 F.R.D. 596, 600–01 (C.D. Cal. 2011); Bouaphakeo v. Tyson Foods, Inc., No. 5:07–cv–04009–JAJ, 2011 WL 3793962, at *3 (N.D. Iowa Aug. 25, 2011); Eddings v. Health Net, Inc., No. CV 10–1744–JST (RZx), 2011 WL 4526675, at *1 (C.D. Cal. July 27, 2011); Ramos v. SimplexGrinnell LP, 796 F. Supp. 2d 346, 356 (E.D.N.Y. 2011); Alonzo v. Maximus, Inc., 275 F.R.D. 513, 520–24 (C.D. Cal. 2011), *motion for reconsideration denied*, No. CV 08–6755–JST (MANx), 2011 WL 3802769, at *1 (C.D. Cal. Aug. 23, 2011). In collective actions under the Fair Labor Standards Act, courts have ruled that because the "similarly situated" standard under that statute is distinct from Rule 23(a)(2)'s commonality requirement, the latter requirement and the *Wal-Mart* Court's heightened scrutiny of it are inapplicable. *See* Robinson v. Ryla Teleservices, Inc., No. CA 11–131–KD–C, 2011 WL 6667338, at *3 (S.D. Ala. Dec. 21, 2011); Ware v. T-Mobile USA, 828 F. Supp. 2d 948, 955–56 (M.D. Tenn. 2011); Faust v. Comcast Cable Commc'ns Mgmt., LLC, Civil Action No. WMN–10–2336, 2011 WL 5244421, at *1 & n.1 (D. Md. Nov. 1, 2011); Troy v. Kehe Food Distribs., Inc., 276 F.R.D. 642, 651 (W.D. Wash. 2011); Sliger v. Prospect Mortg., LLC, No. CIV. S–11–465 LKK/EFB, 2011 WL 3747947, at *2 n.25 (E.D. Cal. Aug. 24, 2011); *Eddings*, 2011 WL 4526675, at *1;

distinctions have supported favorable Rule 23(a)(2) rulings in suits involving breach of form contracts,[134] deceptive trade or advertising practices,[135] insurance coverage,[136] securities and antitrust class actions,[137] and in prisoner civil-rights cases,[138] Fair Housing Act litigation,[139] and other constitutional litigation.[140] And in yet other cases, courts have

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Creely v. HCR ManorCare, Inc., Nos. 3:09 CV 2879, 3:10 CV 417, 3:10 CV 2200, 2011 WL 3794142, at *1–2 (N.D. Ohio July 1, 2011). *But see* MacGregor v. Farmers Ins. Exch., Civil No. 2:10-CV-03088, 2011 WL 2981466, at *4 (D.S.C. July 22, 2011) (stating that while not controlling, the *Wal-Mart* Court's reasoning is "nonetheless illuminating").

[134] *See, e.g.*, *In re* Med. Capital Sec. Litig., No. SAML 10-2145 DOC (RNBx), 2011 WL 5067208, at *2–3 & n.1 (C.D. Cal. July 26, 2011); Altier v. Worley Catastrophe Response, LLC, Civil Action Nos. 11–241, 11–242, 2011 WL 3205229, at *8 (E.D. La. July 26, 2011) (noting that the class definition precludes from membership anyone who did not sign a substantially identical agreement, and that defendants stipulated in a parallel state-court action that all putative class members signed the same contract). But compare Windisch v. Hometown Health Plan, Inc., No. 3:08–cv–00664–RCJ–WGC, 2011 WL 4758715 (D. Nev. Oct. 7, 2011), a suit challenging whether defendant's reimbursement of claims made was contrary to the standardized agreement involved, in which the court found that the claims relying on defendant's use of a standardized software program to bundle and downcode reimbursement claims could meet the Rule 23(a)(2) standard as, unlike *Wal-Mart*, they did not involve "many separate bad acts by multiple actors connected only by the legal theory of relief, but rather a unified bad act—the decision to use the allegedly improper claims processing logic—by the same actor resulting in similar harm to many persons." *Id.* at *5. But the claims that defendants "routinely and unjustifiably" failed to make payments to the class within the time periods prescribed by the agreements or to provide sufficient explanations for denials and reductions, like *Wal-Mart*, could not meet the standard because they alleged a pattern of similar bad acts with no common decision or decisionmaker. *Id.*

[135] *See, e.g.*, Johnson v. Gen. Mills, Inc., 276 F.R.D. 519, 521–22 (C.D. Cal. 2011) (finding a common advertising campaign and rejecting defendant's argument that because reliance and causation are individual issues, certification was improper, stating: "The Supreme Court reversed class certification in *Wal-Mart* because there was no common policy or practice, not because there were factual and legal issues that could not be determined on a classwide basis. Neither Rule 23 nor *Wal-Mart* requires the degree of uniformity that Defendants appear to assert is necessary for certification."); Gray v. Hearst Commc'ns, Inc., 444 F. App'x 698, 701–02 (4th Cir. 2011) (where defendant conceded it had a uniform distribution policy and that the policy applied to all plaintiffs, the key question was whether defendant fulfilled its distribution obligation).

[136] *See, e.g.*, Nobles v. State Farm Mut. Auto. Ins. Co., No. 2:10–CV–04175–NKL, 2011 WL 3794021, at *4–5 (W.D. Mo. Aug. 25, 2011); Churchill v. Cigna Corp., Civil Action No. 10–6911, 2011 WL 3563489, at *4 (E.D. Pa. Aug. 12, 2011).

[137] *See, e.g.*, Pub. Emps. Ret. Sys. of Miss. v. Merrill Lynch & Co., 277 F.R.D. 97, 106 (S.D.N.Y. 2011) (securities); *In re* Aftermarket Auto. Lighting Prods. Antitrust Litig., 276 F.R.D. 364, 369 (C.D. Cal. 2011).

[138] *See, e.g.*, Logory v. Cnty. of Susquehanna, 277 F.R.D. 135, 143 (M.D. Pa. 2011) (challenge to policy of automatically delousing individuals being strip searched).

[139] *See, e.g.*, Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt., Inc., Civil No. 3:09–cv–58, 2011 WL 4381912, at *4 (D.N.D. Sept. 20, 2011).

[140] *See, e.g.*, Connor B. *ex rel.* Vigurs v. Patrick, 278 F.R.D. 30, 33 (D. Mass. 2011) ("[The *Wal-Mart*] rationale does not apply here where the alleged constitutional

distinguished *Wal-Mart* on the ground that the statistical or other proof provided by the plaintiffs was sufficient to identify a common course of conduct.[141]

Of course, the failure to establish that defendants acted in accordance with a common policy or procedure, or that the legal questions posed can be answered uniformly on a classwide basis, has led to rulings that Rule 23(a)(2) is not satisfied and certification must be denied.[142] Moreover, in non-employment discrimination actions where there is no common written policy or procedure governing defendant's conduct and plaintiff is seeking to rely on statistical evidence to show that, although challenged decisions are being made by multiple actors, those decisions are having a uniform disparate impact on the class members, several courts, applying *Wal-Mart*, have ruled that, under the rigorous analysis now required under Rule 23(a)(2), statistical evidence of average disparities cannot suffice to meet the commonality requirement and certification must be denied.[143]

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violations flow from structural infirmities within a unified child welfare system and where there is no requisite showing of common intent.").

[141] *See, e.g.*, DL v. Dist. of Columbia, 277 F.R.D. 38, 46 (D.D.C. 2011) (In a case challenging whether all children with disabilities were getting a Free Adequate Public Education (FAPE) in the District, the court distinguished *Wal-Mart*, saying "plaintiffs have presented significant proof or 'glue' binding together the various reasons why individual class members were denied a FAPE—namely, 'systemic failures' within defendants' education system. Plaintiffs presented credible evidence of defendants' ineffective policies and practices, which persisted for years without leading to any significant increase in the number of preschool-age children received a FAPE."); Williams-Green v. J. Alexander's Rests., Inc., 277 F.R.D. 374, 383 (N.D. Ill. 2011) (In an action challenging company's distribution of tip pool proceeds as violating company policy to return all proceeds to the employees, in which plaintiff's evidence of the company financial summaries showing collections of tip shares greater than those distributed and managers' statements about the company retaining a portion of the tip pool demonstrate that claims arise from a common nucleus of fact based upon standardized conduct); Morrow v. Washington, 277 F.R.D. 172, 192–93 (E.D. Tex. 2011) (In an action challenging citywide interdiction program as targeting racial and ethnic minorities, the statistical evidence "clearly shows that the proportion of minorities stopped in [the city] increased dramatically once the interdiction program was instituted. The increase in the number of minorities stopped under the interdiction program was so remarkable that it is statistically impossible that it was the result of anything other than a decision to target racial and ethnic minorities.").

[142] *See, e.g.*, White v. W. Beef Props., Inc., No. 07 CV 2345(RJD)(JMA), 2011 WL 6140512, at *5 (E.D.N.Y. Dec. 9, 2011) (overtime dispute spanning nine different departments with qualitative differences in their specialization, size, and levels of responsibility); Red v. Kraft Foods, No. CV 10–1028–GW(AGRx), 2011 WL 4599833, at *9 (C.D. Cal. Sept. 29, 2011) (consumer suit about alleged misleading food labels on six different products with different labeling claims); Haynes v. Planet Automall, Inc., 276 F.R.D. 65, 79 (E.D.N.Y. 2011) (action under the Truth in Lending Act and the New York General Business Law).

[143] *See, e.g.*, *In re* Countrywide Fin. Mortg. Lending Practices Litig., No. 08–MD–1974, 2011 WL 4862174, at *4 (W.D. Ky. Oct. 13, 2011); Rodriguez v. Nat'l City Bank, 277 F.R.D. 148, 155 (E.D. Pa. 2011).

A look at one circuit case that has grappled with the Supreme Court's treatment of the expert evidence and when and how an inquiry into the merits is needed to inform the Rule 23(a)(2) determination provides further insights. The case, *Ellis v. Costco Wholesale Corp.*,[144] came out of the Ninth Circuit. The plaintiff class alleged gender discrimination in a national discount retailer's promotion and management practices. Because the district court had ruled prior to the Supreme Court's announcement of its new commonality standard, the Ninth Circuit remanded the action to allow the district court to conduct the new rigorous analysis and determine whether Rule 23(a)(2) was satisfied.[145] In doing so, the court took the opportunity to set out what the correct standard now should be.

It announced the following guidelines. First, although a court need not always consider the merits in making its Rule 23(a) determinations, it must consider the merits if the merits overlap with the Rule 23(a) requirements.[146] In *Ellis* itself, both parties in the case had presented expert testimony and the defendant challenged class certification on, among other things, commonality grounds and also moved to strike plaintiff's expert evidence.[147] As explained by the Ninth Circuit, the lower court correctly applied the evidentiary standard in *Daubert* to evaluate whether the expert's testimony was reliable in response to the defendant's motion to strike. However, the court noted that the district court erred insofar as it limited its analysis under Rule 23(a)(2) to the question whether the expert's testimony was admissible.[148] In addition to answering that question, the district court "was required to resolve any factual disputes" between the parties' experts that were "necessary to determine whether there was a common pattern and practice that could affect the class *as a whole*."[149] However, it did not need to engage in an in-depth analysis of the merits or make any determination as to which party was likely to prevail.[150] As the Ninth Circuit concluded, "If there is no evidence that the entire class was subject to the same allegedly discriminatory practice, there is no question common to the class. In

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[144] 657 F.3d 970 (9th Cir. 2011).

[145] *Id.* at 974, 980–84.

[146] *Id.* at 981. Other courts also have recognized that the rigorous analysis demanded by the Supreme Court will not always require the courts to go beyond the pleadings and delve into the merits, but they need only do so when the proof of commonality overlaps with the merits' contention, such as when it is alleged that defendant engages in a pattern or practice of discrimination. *See, e.g.*, Connor B. *ex rel.* Vigurs v. Patrick, 278 F.R.D. 30, 33–34 (D. Mass. 2011).

[147] *Ellis*, 657 F.3d at 977–78.

[148] *Id.* at 982.

[149] *Id.* at 983. The court noted that while resolving those factual disputes was appropriate, "the district court was not required to resolve factual disputes regarding: (1) whether women were in fact discriminated against in relevant managerial positions at Costco, or (2) whether Costco does in fact have a culture of gender stereotyping and paternalism." *Id.*

[150] *Id.* at 983 n.8.

other words, the district court must determine whether there was 'significant proof that [Costco] operated under a general policy of discrimination.'"[151] The key is whether that proof can be presented on a classwide basis because, if so, then Rule 23(a)(2) may be satisfied.[152]

Taken together with the Third Circuit's expert-evidence decision for purposes of deciding whether a medical monitoring claim could be tried on a common basis,[153] these two Circuit cases underscore that for expert evidence to be sufficient to show that an ultimate trial can be accomplished based on common evidence, the court must take into account the individual class members' potential circumstances and, having done so, the evidence then must allow or support a finding of a common course of conduct or an injury that can be proved on a common basis.

Finally, turning to the fourth question I raised about the impact of *Wal-Mart*—whether the application of the new Rule 23(a)(2) standard to suits brought under Rules 23(b)(1) or 23(b)(2) will be a significant barrier to certifying those actions—in the six months since the decision was announced there do not appear to be any published lower court opinions confronting this question. Thus, it remains a question merely to speculate about. However, there may be reason to believe that *Wal-Mart* will have little impact. That is because of the nature of the cases that appropriately may be certified under either of those two subdivisions. As just described, lower courts have distinguished the circumstances in *Wal-Mart* from other monetary relief or hybrid cases before them on the basis that the classes there were found to be smaller or more cohesive in their membership, or the claims were centered on a clear policy that was applicable to all the members and thus capable of common resolution as to its validity or legality. Those same factors are likely to be present in most cases under the first two subdivisions in Rule 23(b),[154] at least if we limit Rule 23(b)(2) to actions in which solely injunctive or declaratory relief is sought and in which any injunction that is issued will remedy the claims of all the class.[155] Thus, it is highly likely that the unity of the class

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[151] *Id.* at 983 (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553 (2011) (alteration in original)).

[152] *See In re* Aftermarket Auto. Lighting Prods. Antitrust Litig., 276 F.R.D. 364, 368–69 (C.D. Cal. 2011).

[153] *See* the discussion at notes 119–23 *supra.*

[154] *See generally* 7AA WRIGHT, MILLER & KANE, *supra* note 4, at § 1771–75.

[155] Indeed, this distinction was recognized by Justice Scalia in his opinion in *Wal-Mart* when he said: "Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a (b)(1) class, or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class." *Wal-Mart,* 131 S. Ct. at 2558 (footnote omitted). This distinction was critical in a Third Circuit decision denying Rule 23(b)(2) class certification in a toxic tort case seeking medical monitoring when the court, citing *Wal-Mart,* noted that to allow certification the class members must have a strong commonality of interests and that "[b]ecause causation and medical necessity

members in those two types of actions will support a finding that the claims presented rest upon a common contention that is capable of classwide resolution so that, as required by the majority in *Wal-Mart*, the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[156]

V. CONCLUDING OBSERVATIONS

In conclusion, let me make two observations. First, the cluster of class-action cases decided by the Supreme Court in the last two years is particularly significant in large measure because it covers many different and important issues central to this form of dispute resolution, rather than because the Court embarked on new, uncharted paths. Second, although the availability of class arbitration has been severely restricted, if not effectively eliminated for state consumer claims, the Court has not sounded the death knell for the future of class litigation. To be sure, in many instances heightened pleading and proof standards may increase the burdens and risks of class litigation. However, that alone, while distressing to class proponents and heartening to opponents, does not eliminate the continued viability of Rule 23 to offer a procedural remedy for resolving aggregate disputes. This is seen, even at this early stage, by the careful way in which the lower courts are moving forward and continuing to certify class actions under the Court's newly-articulated standards.

often require individual proof, medical monitoring classes may founder for lack of cohesion." Gates v. Rohm & Haas Co., 655 F.3d 255, 264 (3d Cir. 2011).

[156] *Wal-Mart*, 131 S. Ct. at 2551.