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Reflections on the Future of Class Actions

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This Essay, a condensed version of a longer piece that is forthcoming in the Washington University Law Review, argues that in recent years courts have cut back sharply on the ability to bring class action lawsuits. The Essay surveys ten disturbing trends, each of which makes it increasingly difficult for class representatives and counsel to obtain class certification.

INTRODUCTION

In a forthcoming, full-length article,[1] I describe how federal courts in recent years have cut back on the availability of class action lawsuits. These courts have tightened the requirements for almost every element of class certification under Federal Rule of Civil Procedure 23. This case law undermines the compensation, deterrence, and efficiency functions of the class action device. In this Essay, I discuss the major conclusions of my forthcoming article.

I. HISTORICAL PERSPECTIVE

Modern Rule 23, adopted in 1966, was designed to encourage more frequent use of class actions,[2] and for many years, it had the desired effect. Courts certified even complex mass tort cases, driven in part by

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1. Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. (forthcoming 2013). All page references in subsequent footnotes are based on the manuscript of this forthcoming article, which can be accessed from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038985 (last updated Nov. 30, 2012).

2. *See, e.g.*, Charles Alan Wright, *Class Actions*, 47 F.R.D. 169, 170 (1970) (explaining purposes of Rule 23).

(but not limited to) the asbestos crisis.[3] Beginning in the mid-1990s, however, courts became increasingly concerned that class certification was pressuring defendants to settle even questionable cases, using terms such as "shakedown" and "judicial blackmail" to describe the coercion.[4] Because interlocutory appeal was rarely available,[5] defendants had no practical avenue for appellate review of a district court's class certification decision, other than taking a potentially bankrupting case to trial and challenging class certification on appeal of the final judgment. Defendants were also concerned that many multistate class actions raising state law claims were brought in state courts, and that those cases were often assigned to elected judges who were unsympathetic to out-of-state corporate defendants.[6]

Rule 23(f), adopted in 1998, solved the reviewability problem for federal court cases by providing discretionary appellate review of an order granting or denying class certification.[7] The Class Action Fairness Act of 2005 (CAFA)[8] largely solved the concern about state court venues by expanding federal jurisdiction to cover most major class actions.[9] As a result of Rule 23(f) and CAFA, there is now a substantial body of federal case law across a broad spectrum of class certification issues.[10] And while the jurisprudence has been far from uniform, several recent trends have emerged that make class certification more difficult to obtain than at any point since the adoption of modern Rule 23 in 1966.[11] This Essay discusses ten troublesome trends.

3. Klonoff, *supra* note 1, at 6–7.

4. *See, e.g.*, Fener v. Operating Eng'rs Const. Indus. & Miscellaneous Pension Fund (Local 66), 579 F.3d 401, 406 (5th Cir. 2009) ("[C]lass certification creates insurmountable pressure on defendants to settle . . . ." (citations and internal quotation marks omitted)) (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996)). *See generally* Klonoff, *supra* note 1, at 4, 7, 10, 19, 64–65 (citing cases and providing further historical background).

5. Klonoff, *supra* note 1, at 10.

6. *Id.* at 16.

7. FED. R. CIV. P. 23(f).

8. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C. (2006)).

9. Klonoff, *supra* note 1, at 17.

10. *See, e.g.*, Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1610 (2008) ("CAFA has increased not only the number of class action removals to federal court, but also the number of class action original filings in federal court.").

11. *See* ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL 23–25, 30–133 (4th ed. 2012) (stating that to obtain class certification, plaintiffs must satisfy three threshold requirements: a proper class definition, and a representative who is both a member of the class and has a live claim; four explicit requirements under Rule 23(a) (numerosity, commonality, typicality, and adequacy of representation); and a requirement that the putative class satisfy all the elements of at least one subdivision of Rule 23(b)—(b)(1)(A), (b)(1)(B), (b)(2), or (b)(3)).

II. RECENT TRENDS

A. Resolving the Merits at the Class Certification Stage

A significant point of departure from earlier decisions is the view of virtually all federal circuits that district courts must resolve merits issues when those issues overlap with a class certification requirement.[12] This approach is a significant change from earlier cases that had allowed class certification to be based on the pleadings or on a threshold evidentiary showing.[13] For example, under the view currently espoused by many courts, if the plaintiff's expert in an antitrust case testifies that the antitrust injury and damages can be proven on a class-wide basis, whereas defendant's expert testifies that individualized proof is required, the court must choose which expert is more persuasive in deciding whether to certify the case as a class action.[14] This case law imposes a new, substantial burden on plaintiffs and means that much—if not all—merits discovery must now occur prior to the class certification hearing.[15]

B. Class Definition

Although the requirement is not expressly set forth in Rule 23(a), courts have universally held that a clear, objective class definition is required before a court can certify a case as a class action.[16] Prior to 2000, it was rare for a court to deny class certification based on a flawed definition. Instead, courts typically allowed plaintiffs to reformulate their class definitions when such definitions were found to be deficient.[17] Recently, however, courts have been far more willing to

12. *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008) ("[T]he court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits . . . ."); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 674–75 (7th Cir. 2001) (listing merit issues requiring resolution prior to "any sensible decision about class certification"). *See generally* Klonoff, *supra* note 1, at 20–25 (tracing the development of Rule 23 jurisprudence requiring evidence as opposed to allegations).

13. Klonoff, *supra* note 1, at 20.

14. *See In re Hydrogen Peroxide*, 552 F.3d at 324 ("Resolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court . . . .").

15. The Supreme Court may shed light on this issue in the 2012 Term. *See* Behrend v. Comcast Corp., 655 F.3d 182 (3d Cir. 2011), *cert. granted in part sub nom.* Comcast Corp. v. Behrend, 80 U.S.L.W. 3442 (U.S. June 25, 2012) (No. 11-864) (granting certiorari on the issue of "[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis").

16. Klonoff, *supra* note 1, at 34. *See also* FED. R. CIV. P. 23(c)(1)(B) (requiring "[a]n order that certifies a class action" to "define the class and the class claims, issues, or defenses").

17. Klonoff, *supra* note 1, at 35.

deny class certification because of a flawed class definition without giving plaintiffs a chance to rewrite the definition.[18]

C. Numerosity

Rule 23(a)(1) provides that a court may certify a class only if "the class is so numerous that joinder of all members is impracticable."[19] Because courts have held that classes with as few as twenty to forty members are sufficiently numerous, plaintiffs have rarely had difficulty satisfying this requirement.[20] Indeed, defendants have frequently stipulated to numerosity. In recent years, however, courts have denied class certification in a significant number of cases based on numerosity.[21] These courts have required strict proof of class size and have refused to apply common sense assumptions (for example, that a particular definition is likely to encompass hundreds or thousands of members, even if it is not possible to come up with a precise number).[22]

D. Commonality

Under Rule 23(a)(2), a court cannot certify a class unless "there are questions of law or fact common to the class."[23] Prior to 2011, commonality was construed liberally by courts and was thus rarely an issue for plaintiffs; in fact, defendants frequently stipulated to the existence of a common question of law or fact.[24] In *Wal-Mart Stores, Inc. v. Dukes*,[25] however, the Supreme Court substantially increased the burden on plaintiffs by requiring that the common question be essentially dispositive: "[The] 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*."[26] This

18. *See, e.g.*, John H. Beisner, Jessica D. Miller & Jordan M. Schwartz, *Ascertainability: Reading between the Lines of Rule 23*, 26 B.N.A. TOXICS L. REP. (Mar. 17, 2011) (recounting cases where the court found that the class definition was impermissibly broad or otherwise problematic); Klonoff, *supra* note 1, at 36–37 (citing cases).

19. FED. R. CIV. P. 23(a)(1).

20. *See* Klonoff, *supra* note 1, at 41–42 (stating that the "numerosity bar [is] not high," and noting that classes of forty or more have usually been deemed sufficient, and in some instances, classes of only thirteen or twenty members have been deemed sufficient).

21. *See id.* at 42–47 (discussing recent circuit court decisions that have used the numerosity requirement as a rationale for denying class certification, indicating a trend towards heightened judicial scrutiny with respect to numerosity).

22. *Id.* at 42–45 (citing cases).

23. FED. R. CIV. P. 23(a)(2).

24. Klonoff, *supra* note 1, at 47 (citing cases).

25. 131 S. Ct. 2541 (2011).

26. *Id.* at 2551 (emphasis added).

heightened burden, as the dissent in *Dukes* pointed out,[27] is akin to the "predominance" standard of Rule 23(b)(3).[28] But there are four kinds of classes under Rule 23—those under (b)(1)(A), (b)(1)(B), (b)(2), and (b)(3). Under the text of these subdivisions, only (b)(3) contains a predominance requirement. Thus, *Dukes* arguably requires predominance under all four types of class actions. As a practical matter, *Dukes* gives class defendants a new weapon to challenge class certification, especially in cases brought under (b)(1) and (b)(2).

E. Adequacy of Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class."[29] This requirement is well-grounded: Because class actions are representative actions, it is important that class representatives and class counsel be knowledgeable, competent, and free of conflicts of interest.[30] In recent years, however, many courts have added a troublesome new component to adequacy: class representatives and counsel may be inadequate if they omit from their complaint potentially viable claims, even if those claims are not suitable for class certification.[31] The rationale is that the failure to bring such claims may later preclude class members from asserting them by way of collateral estoppel or res judicata.[32] These cases undermine the traditional notion that the very job of the lawyer is to select the best—or most viable—claims from among the universe of potential claims. Part of that assessment means excluding claims that are not suitable for class certification. Moreover, courts adopting this approach do not attempt to minimize the res judicata or collateral estoppel effects, such as providing in the certification order that the action is without prejudice to the ability of class members to pursue claims not raised in the class action.[33]

27. *Id.* at 2565 (Ginsburg, J., dissenting).

28. *See* FED. R. CIV. P. 23(b)(3) (requiring "that the questions of law or fact common to class members predominate over any questions affecting only individual members").

29. FED. R. CIV. P. 23(a)(4). *See also* FED. R. CIV. P. 23(g) (requiring adequacy of counsel and setting forth a framework for selecting class counsel).

30. *See, e.g.*, Robert H. Klonoff, *The Judiciary's Flawed Application of Rule 23's "Adequacy of Representation" Requirement*, 2004 MICH. ST. L. REV. 671 (referring to the need for adequate representation in class action cases to ensure efficiency and thoroughness throughout the process and to obtain a fair resolution of the dispute).

31. *See* Klonoff, *supra* note 1, at 56–60 (discussing recent cases holding that omission of potentially viable claims constitutes inadequacy).

32. *Id.* at 56.

33. *See id.* at 57–62 (describing case law trends).

F. Rule 23(b)(2)

Rule 23(b)(2) permits classes seeking declaratory or injunctive relief.[34] Traditionally, courts permitted plaintiffs to plead monetary claims along with claims for declaratory or injunctive relief, so long as the monetary relief was of lesser importance.[35] All federal circuits that had addressed the issue had permitted back pay in employment discrimination actions under (b)(2).[36] In *Dukes*, however, the Supreme Court unanimously held that back pay could not be sought in a (b)(2) action.[37] Under (b)(2), only incidental monetary damages (which do not include back pay) are appropriate.[38] Indeed, the Court left open the possibility that even incidental damages under (b)(2) might not be consistent with due process, given that (b)(2) does not afford class members the right to opt out of the class.[39]

G. Rule 23(b)(3) Predominance

In recent years, many courts have adopted a virtually per se rule that fraud actions cannot be certified under (b)(3) when individualized reliance issues exist.[40] Similarly, many courts have adopted an equally inflexible approach in holding that cases involving the laws of multiple states fail the predominance requirement stated in (b)(3).[41] By adopting such a rigid approach in fraud and choice-of-law cases, courts provide plaintiffs with no real opportunity to show that, despite the individualized issues, common issues predominate.

H. Settlement Certification

In *Amchem Products, Inc. v. Windsor*,[42] the Supreme Court held that when class certification is sought simultaneously with approval of a class-wide settlement, the plaintiffs must nonetheless satisfy all the requirements of Rule 23 for a contested class action. The only exception is that plaintiffs need not satisfy the manageability component

34. FED. R. CIV. P. 23(b)(2).

35. *See, e.g.*, Allison v. Citgo Petroleum, 151 F.3d 402, 415 (5th Cir. 1998) (holding that only "incidental" damages could be sought in a (b)(2) class); Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 164 (2d Cir. 2001) (adopting a more flexible view than *Allison*—that is, an *ad hoc* test that looks at "the relative importance of the remedies sought").

36. Klonoff, *supra* note 1, at 66–67.

37. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011).

38. *Id.*

39. *Id.*

40. Klonoff, *supra* note 1, at 68–72 (citing cases).

41. *Id.* at 79–82. Some courts also reject such actions under the manageability component of Rule 23(b)(3)'s superiority requirement. *Id.* at 79.

42. 521 U.S. 591 (1997).

of superiority when the class is brought under Rule 23(b)(3).[43] Thus, for example, in a (b)(3) settlement class, plaintiffs must still show that common issues predominate over individual issues. *Amchem* has had serious adverse repercussions. Specifically, a number of courts have rejected class-wide settlements in light of *Amchem*,[44] and many mass tort actions now settle outside of Rule 23, without the required protection of judicial review of the fairness of the settlement.[45]

I. Issues Classes

One significantly underutilized provision of Rule 23 is subsection (c)(4), which provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."[46] Although not all courts have curtailed issues classes, there is cause for serious concern.

In the view of some courts, "(c)(4) is a 'housekeeping' rule that does not alter the usual predominance inquiry under Rule 23(b)(3)," meaning that "the case as a whole must still satisfy the predominance test."[47] To be sure, some courts have taken a more practical approach to issue certification. Under one formulation, which has been endorsed by the American Law Institute's *Principles of the Law of Aggregate Litigation*, the proper inquiry under Rule 23(c)(4) is whether certification of one or more issues will "materially advance" the case as a whole.[48]

Quite apart from the question of when Rule 23(c)(4) permits a court to certify an issues class, some courts have also ruled that the Seventh Amendment's Reexamination Clause[49] acts as an additional constraint on a court's authority to sever distinct issues for trial.[50] As one court

43. *Id.* at 620.

44. *See, e.g.*, *In re* Grand Theft Auto Video Game Consumer Litig., 251 F.R.D. 139, 158 (S.D.N.Y. 2008) ("Many courts have determined that differences in underlying state laws applicable to individual putative class members[] . . . preclude a finding of predominance."); *In re* Ephedra Prods. Liab. Litig., 231 F.R.D. 167, 170 (S.D.N.Y. 2005) (denying certification solely for the purposes of a settlement based on the predominance of individual questions).

45. Klonoff, *supra* note 1, at 80. *See* FED. R. CIV. P. 23(e) (listing criteria governing class settlements).

46. FED. R. CIV. P. 23(c)(4).

47. Klonoff, *supra* note 1, at 83 (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 747 (5th Cir. 1996)).

48. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02 (2010). *See also, e.g.*, McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 234 (2d Cir. 2008) (explaining that certifying the issue of defendants' scheme to defraud would not "materially advance" the litigation because it would fail to dispose of larger issues).

49. U.S. CONST. amend. VII ("[N]o fact tried by a jury[] shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.").

50. Klonoff, *supra* note 1, at 88–91. *See, e.g.*, *In re* Rhone–Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) (stating that the court may not "divide issues between separate trials in a

explained, "The Seventh Amendment entitles parties to have fact issues decided by one jury, and prohibits a second jury from reexamining those facts and issues."[51] Therefore, the argument runs, because juries in later proceedings would need to "reexamine" facts that were previously determined by the first jury, this overlap would run afoul of the Reexamination Clause.[52] Again, not all courts have endorsed such a rigorous approach; as one court explained, "the Seventh Amendment prohibition is not against having two juries review the same *evidence* but rather against having two juries decide the same essential *issues*."[53]

In short, while the cases are divided, the ability to bring issues classes has been substantially curtailed by many courts.

J. Defendants' Ability to Eliminate Class Actions with Arbitration Clauses

It has become common in many contracts to require individual arbitration of disputes and to prohibit class-wide proceedings. In *AT&T Mobility LLC v. Concepcion*,[54] the Supreme Court held that the Federal Arbitration Act preempted a state common law unconscionability doctrine that generally barred class action waivers in consumer contracts.[55] The full implications of *Concepcion* could be enormous.[56]

Concepcion makes it easier for potential defendants to avoid class litigation (and class arbitration) by inserting class action waiver clauses into their written agreements. One developing issue is whether the holding in *Concepcion*—which involved a dispute over a tax under a cell phone service agreement—also governs in other contexts. For example, the Second Circuit held that *Concepcion* did not require enforcement of a class action waiver clause in an antitrust suit by a class of merchants against the credit card company defendant.[57] The court explained that "if plaintiffs cannot pursue their allegations of antitrust law violations as a class, it is financially impossible for the plaintiffs to

way that the same issue is reexamined by a different jury"); *Castano*, 84 F.3d at 750–51 (relying on the court's reasoning in *In re Rhone-Poulenc Rorer, Inc.* in reversing and remanding the case with instructions that the district court dismiss the class complaint).

51. *Castano*, 84 F.3d at 750.

52. *See* Klonoff, *supra* note 1, at 88–89 (explaining the rationale of courts that have relied on the Seventh Amendment in rejecting class certification).

53. *In re* Paoli R.R. Yard PCB Litig., 113 F.3d 444, 452 n.5 (3d Cir. 1997) (emphasis added) (citation omitted) (citing *In re* Innotron Diagnostics, 800 F.2d 1077, 1086 (Fed. Cir. 1986)).

54. 131 S. Ct. 1740 (2011).

55. *Id.* at 1753.

56. *See* Klonoff, *supra* note 1, at 96–99.

57. *In re* Am. Express Merchs.' Litig., 667 F.3d 204, 218 (2d Cir. 2012), *cert. granted sub nom.* Am. Express Co. v. Italian Colors Rest., 2012 WL 3096737 (U.S. Nov. 9, 2012) (No. 12-133).

seek to vindicate their federal statutory rights."[58] Other courts, however, have read *Concepcion* much more expansively.[59] The Supreme Court has granted review in the Second Circuit case to resolve the issue.[60]

A particularly troublesome aspect of *Concepcion* is that it may preclude aggregation in cases that the Supreme Court has said are "at the very core of the class action mechanism"[61]—so-called "negative value" suits. These cases, practically speaking, can *only* be litigated on a class basis, because the individual claims are too small to justify the expense of an individual lawsuit. *Concepcion* may thus foreclose many types of small claims cases, thereby undermining the compensation and deference functions of the class action device.

III. THE CURRENT STATE OF CLASS ACTIONS AND POSSIBILITIES FOR REFORM

A. Countertrends

Despite the troubling jurisprudential developments described in Part II, the class action device remains viable to some extent. To begin with, in certain cases, plaintiffs can avoid some of the most restrictive case law by filing class actions in federal circuits that have shown greater receptivity to class actions. Indeed, recent figures from the Federal Judicial Center's study on post-CAFA class action filings suggest that this sort of forum shopping is already taking place.[62]

Moreover, despite this overall disturbing trend, class actions remain alive and relatively well in several subject areas. Courts have continued to authorize class certification in a number of antitrust cases, ERISA cases, securities cases, and wage and hour cases because these types of cases tend to have important overarching common issues.[63] Of course,

58. *Id.* at 219.

59. *See, e.g.*, Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1212–16 (11th Cir. 2011) (applying *Concepcion* despite the argument that bringing an individual action would be costly).

60. *American Express*, 2012 WL 3096737, at *1.

61. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (citation and internal quotations omitted).

62. THOMAS E. WILLGING & EMERY G. LEE III, THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: THIRD INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2007). *See* Erichson, *supra* note 10, at 1613–14 (highlighting that the district courts within the Ninth Circuit saw the biggest increase in post-CAFA filings). *See also* Klonoff, *supra* note 1, at 100–01 (summarizing recent data on class action forum selection).

63. *See* Klonoff, *supra* note 1, at 70–71 (summarizing cases in which these common overarching issues permitted class certification). *See also In re* Wash. Mut. Mortg.-Backed Secs. Litig., 276 F.R.D. 658 (W.D. Wash. 2011) (certifying securities class action); *In re* Wellbutrin

Concepcion may soon adversely affect some of these areas.

Finally, it is worth noting that the Supreme Court has not been as consistently anti-class action as might appear at first blush.[64] Three recent decisions are illustrative. First, in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, the Court held that Federal Rule of Civil Procedure 23 conflicted with, and therefore preempted, a contrary state rule that would have otherwise prohibited the suit from being brought as a class action in federal court.[65] Second, in *Erica P. John Fund, Inc. v. Halliburton Co.*, decided during the same term as *Dukes* and *Concepcion*, the Court held (reversing the Fifth Circuit's holding to the contrary) that a securities fraud plaintiff did not need to prove that the defendant's misconduct caused the economic loss at issue in the case in order to obtain class certification.[66] Finally, in *Smith v. Bayer Corp.*, the Court held that a federal district court, having denied class certification, could not enjoin a West Virginia court from certifying a similar class against the same defendant.[67] These cases certainly rebut the notion that the Court is steadfastly anti-class action. Yet, these cases raise issues that do not arise frequently. Thus, in terms of their likely impact, these cases are far less significant than *Concepcion*, *Dukes*, and *Amchem*, which raise issues that arise repeatedly in class actions.

B. Possible Approaches to the Recent Trends

There are no easy ways to address the troubling case law developments discussed in Part II of this Essay. The proper approach will differ from case to case. On some issues, courts can alter their approaches as a matter of case law. On others—such as where the Supreme Court has rendered a decision or there is an unresolved conflict among the circuits—a rule change may be required. And with

XL Antitrust Litig., No. 08-2431, 2011 WL 3563385, at *1, *16 (E.D. Pa. Aug. 11, 2011) (certifying (b)(3) classes of direct and indirect purchasers of a prescription drug); Bauer v. Kraft Foods Global, Inc., 277 F.R.D. 558, 562–64 (W.D. Wis. 2012) (certifying ERISA class under (b)(3)).

64. *See* Mary Kay Kane, *The Supreme Court's Recent Class Action Jurisprudence: Gazing into a Crystal Ball*, 16 LEWIS & CLARK L. REV. 1015, 1028 (2012) (explaining that the cases appear to be based upon the individual issues and circumstances presented to the Court and not upon any broad theoretical underpinnings).

65. 130 S. Ct. 1431, 1437 (2011) (plurality opinion). Justice Stevens's concurring opinion provided the crucial fifth vote for the majority in *Shady Grove*, albeit on somewhat narrower grounds than the plurality opinion by Justice Scalia. *See id.* at 1448–60 (Stevens, J., concurring in part and concurring in the judgment).

66. 131 S. Ct. 2179, 2183 (2011).

67. 131 S. Ct. 2368, 2382 (2011).

respect to *Concepcion*, which is based on the FAA, congressional action will be necessary.[68]

CONCLUSION

In appropriate cases, the class action provides a private remedy for achieving mass justice. In some cases, it may be the *only* realistic vehicle for recovery. The threat of a class action also deters wrongdoing. In addition, a class action avoids the need to resolve the same common issues repeatedly for numerous claimants. Courts should not lose sight of the value and efficiency inherent in the class action device. And they should not allow abstract concerns about blackmail settlements or the theoretical possibility of abuse by class counsel to erode a device that worked so well for many years following the adoption of modern Rule 23 in 1966.

68. *See, e.g.*, Arbitration Fairness Act of 2011, H.R. 1873, S. 987, 112th Cong. (making pre-dispute arbitration agreements unenforceable in employment, consumer, and civil rights cases).