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Donald R. Frederico
dfrederico@pierceatwood.com

THE ARC OF CLASS ACTIONS: A VIEW FROM THE TRENCHES

*Donald R. Frederico, Esq.**

I. INTRODUCTION: MAKING SENSE OF THE WRECKAGE

Think of the class action as a wounded beast – limited in its range of motion, yet dangerous to those within its reach. This image emerges from some of the most significant developments in class action law and practice over the past several years. Plaintiffs' and defendants' class action lawyers frequently debate the continued vitality of class action practice, the former decrying their setbacks, the latter reveling in their victories, and both sides determined to fight on. Academics sift through the rubble of class action jurisprudence, attempting to discern patterns and to predict what lies ahead.[1] Judges struggle to apply conflicting precedents and fill in gaps, at times reluctantly surrendering to rigid pronouncements from on high.

Over the years, a divided Court has issued powerful decisions that rein in many class actions. Congress also has at times gotten into the act. One can debate the motivations behind any particular decision or legislative action, but two opposing views stand out: 1) restrictions on class actions have been necessary to prevent abuses by some over-reaching plaintiffs' attorneys, and 2) restrictions on class actions have been imposed to promote an unfair and oppressive pro-business agenda. There likely is some truth to each of these explanations, and other, less politically charged factors at play as well.

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*Pierce Atwood LLP, Boston, Massachusetts

[1] *See, e.g.*, Arthur R. Miller, *The American Class Action: From Birth to Maturity*, 19 Theoretical Inquiries L. 1 (2018); J. Maria Glover, *The Supreme Court's "Non-Transsubstantive" Class Action*, 165 U. Pa. L. Rev. 1625 (2017); Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. Pa. L. Rev. 1495 (2017); Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 Emory L. J. 1569 (2016); Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DePaul L. Rev. 497 (2016).

Any explanation of the forces at work to constrict or expand class actions should start with a foundational principle: in the right cases, the class action can be a useful device for resolving the claims of numerous claimants through a process that balances interests of efficiency with concerns for fairness to all stakeholders, including plaintiffs, absent class members, and defendants. The several subdivisions of Federal Rule of Civil Procedure 23 are designed to guide courts to achieve such balance, but determining how they apply to any particular case can be a complex undertaking.

A corollary to this principle is that the balance envisioned by Rule 23 is in the eye of the beholder, and the beholder who matters most is the judge. Judges' interpretations of class action law may be influenced by a variety of factors. Most judges honestly strive to apply Rule 23 correctly to the cases before them. Their interpretations are informed by the Rule's language, by precedent, by notions of fairness, and by pragmatic judgments of where to draw the certification/no-certification line. Of course, like all mortals, even the best judges may at times bring unconscious biases to their decision-making. Judges also have an institutional stake in the process, as they bear responsibility for the efficient management of their dockets.

Conscious biases and political affinities also can influence class action rulings. In 2011, Justice Scalia authored the groundbreaking opinions of the Court in *AT&T Mobility LLC v. Concepcion*[2] and *Wal-Mart Stores, Inc. v. Dukes*.[3] Many observers believed he was displaying overt hostility to class action litigation as a matter of his judicial philosophy. That belief is understandable, given that Justice Scalia was appointed to the Court in part because of his strongly held conservative views, and because each of these decisions upended conventional wisdom about Rule 23 and the place of class actions in resolving disputes. Still, attempting to divine Justice Scalia's or any other jurist's motivations, to the extent doing so is even relevant, can be more difficult than one might expect.

II. *AMCHEM* AND THE RULE 23(B)(3) CLASS

[2] 563 U.S. 333 (2011).

[3] 564 U.S. 338 (2011).

ACTION

Take Justice Ginsburg's opinion in the well-known asbestos case, *Amchem Products, Inc. v. Windsor*.[4] That decision, more than any other, limited the availability of class certification in cases involving personal injury claims, and emphasized the imperative of avoiding intra-class conflicts in class action settlements. It thereby struck a serious blow to lawyers seeking to employ Rule 23 to resolve mass tort claims. No doubt Justice Ginsburg's restrictive reading of the Rule (which was joined by her conservative colleagues) was born largely from a concern that courts that do not properly apply Rule 23's requirements to class action settlements would fail to fulfill their responsibility of protecting absent class members' interests in receiving a fair return for their individual claims. To that extent, her opinion can be viewed both as a proper interpretation of a rule designed to balance a variety of interests and as aligned with traditionally liberal values. Nevertheless, by rejecting an approach that would have relaxed Rule 23's requirements in the settlement approval process and glossed over myriad individual issues inherent in personal injury claims, Justice Ginsburg crafted an opinion that has by and large benefited defendants and disadvantaged the plaintiffs' class action bar. Whatever one thinks of the outcome, one can admire the honesty of the approach.[5]

After *Amchem*, three things seemed clear: 1) that settlement class actions do not get a pass from most Rule 23 requirements,[6] 2) that conflicting interests among settlement class members create Rule 23(a)(4) adequacy concerns that may preclude class certification, or at least require the creation of separately represented subclasses, and 3) that personal injury claims, which frequently

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[4] 521 U.S. 591 (1997).

[5] For an interesting discussion of partisanship, and the lack thereof, on the Supreme Court, *see* David Cole, *Keeping Up Appearances*, THE NEW YORK REVIEW OF BOOKS, Aug. 15, 2019, Vol. 66, No. 13, at 18.

[6] As Justice Ginsburg explained, the one exception is the factor of manageability relevant to Rule 23(b)(3)'s superiority requirement: "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* FED. R. CIV. P. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context." 521 U.S. at 620.

implicate issues of causation unique to each claimant, are generally not amenable to class treatment under Rule 23(b)(3). This last point would also become relevant to claims of property damage caused by environmental contamination where the parties disputed the contamination's sources and effects. In a world increasingly fraught with claims of mass harm, creative lawyers would have to look for new routes to global peace.

III. THE POST-*AMCHEM* RISE OF THE RULE 23(B)(2) CLASS ACTION

In response to *Amchem*, some lawyers began to look for viable alternatives to the Rule 23(b)(3) personal injury and property damage classes. One avenue they explored was to re-frame their mass tort cases to request something other than traditional monetary relief. For example, in cases involving exposure to hazardous products, rather than seek damages for personal injuries, some sought injunctive relief in the form of medical monitoring necessary to detect the onset of latent disease, and premised class certification on 23(b)(2) instead of 23(b)(3). The perceived advantage was that a (b)(2) class did not require proof of the (b)(3) elements of predominance and superiority. One year after *Amchem*, the Third Circuit rejected that approach in a tobacco case,[7] holding that, because (b)(2) class actions are mandatory class actions, with no opportunity for class members to opt out, it was especially important that they be cohesive. And, the court concluded that a class consisting of persons with varying degrees of exposure to and impacts from tobacco, and individualized affirmative defenses such as comparative and contributory negligence and statutes of limitations, was not sufficiently cohesive to warrant (b)(2) certification.[8]

Despite such roadblocks, some plaintiffs continued to seek certification of their personal injury, property damage, and other cases under Rule 23(b)(2), with mixed success in the lower federal

[7] *Barnes v. American Tobacco Co.*, 161 F.3d 127 (3rd Cir. 1998), *cert. denied*, 526 U.S. 1114 (1999).

[8] Another approach some parties pursued in attempting to settle mass tort claims was to seek certification of limited fund class actions under Rule 23(b)(1)(B). The Supreme Court delineated the limits of the limited fund approach two years after it decided *Amchem*, reversing approval of a limited fund asbestos settlement in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). Justice Ginsburg again joined the conservative majority, with Justice Breyer writing a dissenting opinion in which Justice Stevens joined.

courts. Such efforts to end-run *Amchem*'s interpretation of (b)(3) ultimately met their match in the surprising interpretation of Rule 23 the Supreme Court announced in *Wal-Mart Stores, Inc. v. Dukes*.

IV. *DUKES* AS AN ANTIDOTE TO THE RULE 23(B)(2) CLASS

On one level, the outcome of *Wal-Mart Stores, Inc. v. Dukes* is not surprising. Before the Court issued its opinion, the case was already famous for its class size – approximately 1.5 million female employees of Wal-Mart stores across the country. It seemed quite possible that the Court would simply conclude the class was too large for a lower court to manage. The facts also did not clearly lend themselves to class treatment. As Justice Scalia, who authored the Court's opinion, explained, the employees allegedly subjected to gender discrimination in violation of Title VII worked in thousands of different stores, under the supervision of thousands of different managers, each of whom had discretion to make pay and promotion decisions. The company's broadly decentralized pay and promotion practices did not help the plaintiffs' position. Moreover, to the extent the company had a relevant, uniform policy, it was a policy *against* discrimination, and to prevail on a class-wide basis, plaintiffs would have to prove a class-wide practice that deviated from it.

Perhaps to meet this challenge, plaintiffs sought certification not under 23(b)(3), but under 23(b)(2), seeking an injunction against allegedly ongoing discrimination and equitable relief in the form of back pay. The Court likely could have relied on reasoning like that of the Third Circuit in *Barnes*, holding that the class was not sufficiently cohesive to merit certification under (b)(2). Instead, it took a different, more radical tack. Justice Scalia's opinion completely redefined the standard for commonality under Rule 23(a)(2), a requirement that has to be met for both (b)(2) and (b)(3) cases.

Prior to *Dukes*, most courts and practitioners understood that commonality was a low bar, and because it was subsumed in the predominance requirement for (b)(3) cases, it most often was given short shrift. After all, if the individual issues in a case overwhelmed any possible common issues, there was no need to decide whether the common issues existed in the first place. But because there is no predominance requirement in (b)(2), Justice Scalia's

ability to breathe new life into (a)(2) commonality had a profound effect on plaintiffs' strategy of seeking certification under (b)(2). By elevating the burden for (a)(2) commonality almost to the same level as for (b)(3) predominance (and arguably blurring the distinction between the two), Justice Scalia was able to limit, if not completely negate, (b)(2)'s utility as an alternative to the (b)(3) class action.

Justice Scalia's decision in *Dukes* was revolutionary, and effectively nullified a significant plaintiff strategy. Its effects on class action practice, however, have been more nuanced. It removed an incentive for plaintiffs' lawyers to attempt to end run Rule 23(b)(3), and likely resulted in a return to (b)(3) as the lifeblood of most class litigation.[9] Certification decisions therefore continue to turn on issues of predominance and superiority that some practitioners had hoped to avoid by invoking (b)(2). Nevertheless, certification decisions evaluating (a)(2) commonality are still a mixed bag. Some courts follow the *Dukes* approach, applying the Supreme Court's enhanced interpretation of (a)(2), and sometimes denying certification under that provision. Other courts continue to recite the pre-*Dukes* interpretation, understanding (a)(2) to present a low threshold and glossing over it as they move on to the (b)(3) analysis.[10]

V. *CONCEPCION*'S FRONTAL ASSAULT

Two months before Justice Scalia authored the surprising decision in *Dukes,* he authored the arguably more far-reaching decision in *AT&T Mobility LLC v. Concepcion.* Writing for the same five-Justice majority that would soon decide *Dukes*, Justice Scalia

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[9] Some lawyers continue to seek (b)(2) certification in cases in which money damages are the principal relief requested. The Eleventh Circuit recently rebuffed such an attempt, focusing not on Rule 23(a)(2) commonality, but on the retrospective focus of the plaintiffs' claims. *See AA Suncoast Chiropractic Clinic, P.A. v. Progressive American Ins. Co.*,938 F. 3d 1170 (11th Cir. 2019).

[10] No doubt some of these approaches result from briefing by some plaintiffs' lawyers who continue to cite pre-*Dukes* cases for the commonality standard, sometimes ignoring *Dukes* entirely. Whatever the explanation may be for their doing so (which could include simply old habits dying hard, cutting and pasting from pre-*Dukes* briefs, or recognizing that (a)(2) commonality is subsumed in (b)(3) predominance), such lawyers provide an opportunity for alert defense counsel to point out their mistake and thus risk undercutting their credibility in court.

reasoned that a class action waiver contained in a consumer contract's arbitration clause was enforceable because the Federal Arbitration Act,[11] which has been held to embody "a liberal federal policy favoring arbitration agreements,"[12] preempted the state law under which the waiver had been declared unconscionable. In other words, even a contractual provision barring class actions that state law had declared grossly unfair to the consumer could be enforced because of a federal law passed in 1925, four decades before the amendments to Rule 23 that gave us the modern class action.[13] The Court, again in an opinion authored by Justice Scalia, doubled down on *Concepcion* when it decided *American Express Co. v. Italian Colors Restaurant,*[14] extending *Concepcion*'s impact to cases raising federal claims, and expressly rejecting the argument that class action waivers should be invalidated where they would effectively deprive plaintiffs of the opportunity to vindicate their rights because of the prohibitive cost of individual litigation.

The Court's decision in *Concepcion* struck a blow from which much class action practice may never recover, at least not without Congressional action.[15] Its impact is deeper than that of *Dukes* because it is different in nature. *Dukes* represents an interpretation of Rule 23, a Rule which is always applied in the first instance by federal judges, and whose application is a matter of discretion, subject to an abuse of discretion standard of review. Litigants who are allowed to proceed in those courts are able to move for class certification because they have been given access to the judicial system.

Concepcion is more radical because it denies plaintiffs access to the courts *ab initio.* Once relegated to arbitration, plaintiffs have no opportunity to advance class claims in court. And, if the

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[11] 9 U.S.C. §§ 1-14 (1925).

[12] *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (U.S. May 21, 2018) (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

[13] *See id.* at 1624 ("Federal Rule of Civil Procedure 23 didn't create the modern class action until 1966").

[14] 570 U.S. 228 (2013).

[15] On September 20, 2019, the House of Representatives passed a bill that would declare pre-dispute arbitration agreements and "joint-action waivers" invalid and unenforceable in employment, consumer, antitrust, and civil rights disputes. Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (1st Sess. 2019). In the Senate, the bill was referred to the Committee on the Judiciary, where it currently resides.

arbitration agreement does not expressly allow for class arbitration, they are limited to arbitration of only their individual claims.[16] Unlike courts ruling on motions for class certification, courts faced with motions to compel individual arbitration because of well-constructed arbitration agreements containing class action waivers generally have no discretion; they may not entertain the plaintiffs' claims.

In the wake of *Concepcion*, many businesses have adopted arbitration clauses with class action waivers in their consumer contracts.[17] Still, many have not. We have seen this disparity, for example, in bank overdraft fee litigation, where some banks have successfully shielded themselves from class action litigation with class action waivers, while others either have not thought to do so or have chosen not to. Some banks were slow to the class action waiver table because Congress, in Dodd-Frank,[18] had authorized the CFPB to determine whether such waivers should be permitted in consumer finance agreements. After years of study, the CFPB issued a final rule prohibiting banks and other providers of consumer financial products and services from using class action waivers in their customer agreements.[19] Less than two months after the rule's effective date, on November 1, 2017, with Republicans having gained control of both Congress and the White House,

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[16] *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412 (U.S. Apr. 24, 2019). After the Supreme Court decided *Lamps Plus*, the Second Circuit reversed a district court's reversal of an arbitrator's decision allowing an employment claim to proceed through class arbitration. The court held that, where the arbitration agreement, signed by all class members, authorized the arbitrator to decide the threshold question of class arbitrability, the arbitrator had acted within her authority in allowing class arbitration to proceed. The court of appeals remanded the case to the district court to determine whether the arbitrator exceeded her authority in certifying an opt-out, as opposed to a mandatory, class. See *Jock v. Sterling Jewelers*, 942 F.3d 617, 620 (2nd Cir. 2019).

[17] See *Epic Systems,* 138 S. Ct. at 1644 n. 12 (Ginsburg, R.B., dissenting) ("No surprise [after *Concepcion* and *Italian Colors*], the number of companies incorporating express class-action waivers in consumer and employee arbitration agreements spiked.").

[18] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[19] Arbitration Agreements, 12 C.F.R. § 1040 (2017).

the President signed into law a Joint Resolution of Congress nullifying the new rule.[20]

Some businesses that have chosen not to adopt class action waivers may have done so not because they welcome class actions, but because they dread arbitration. For such companies, pain from a small number of large wounds may be preferable to pain from a thousand tiny cuts. And, some plaintiffs' lawyers have indeed inflicted pain on some defendants by bringing large numbers of individual arbitration proceedings against them.[21]

Concepcion's dramatic reach is not limited to consumer cases. Many businesses also have adopted class action waivers in their employment agreements. In the early post-*Concepcion* era, the National Labor Relations Act[22] stood as an obstacle to such efforts when employees complained that requiring them to sign arbitration agreements with class action waivers violated the Act's protections for employees seeking to engage in concerted activities.[23] The Supreme Court put an end to this argument in *Epic Systems v. Lewis*, holding that class and collective action waivers in arbitration provisions contained in employment agreements do not conflict with the NLRA and are, therefore, enforceable. Moreover, the NLRB recently took *Epic Systems* a step further, ruling that employers may require employees to sign arbitration agreements

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[20] Joint resolution providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by Bureau of Consumer Financial Protection relating to "Arbitration Agreements", Pub. L. No. 115-74, 131 Stat. 1243 (2017). *See* Arbitration Agreements, 82 FR 55500 (Nov. 22, 2017) (removing Part 1040 from 12 CFR in light of Congressional action disapproving of the final rule).

[21] For example, after Uber Technologies, Inc. won rulings from the 9th Circuit finding its arbitration agreements and class action waivers enforceable, *O'Connor v. Uber Technologies, Inc.*, 904 F.3d 1087, 1090 (9th Cir. 2018), the drivers' lawyers filed thousands of individual arbitration cases. *See* Joel Rosenblatt, *Uber Gambled on Driver Arbitration and Might Have Come Up the Loser*, L.A. Times, (May 8, 2019), https://www.latimes.com/business/la-fi-uber-ipo-arbitration-miscalculation-20190508-story.html. Given that development, the Third Circuit may have done *Uber* a favor when it held that its arbitration agreements with drivers may be unenforceable under the FAA's exemption for employment contracts of transportation workers. Singh v. Uber Technologies Inc., 939 F.3d 210, 214 (3rd Cir. 2019).

[22] 29 U.S.C. §§ 151-169 (1935).

[23] See, *e.g.*, *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012).

that prohibit them from opting in to collective actions, even after a collective action has been commenced.[24]

VI. WHAT REMAINS OF THE LITIGATION CLASS

It has been widely recognized since *Amchem* that Rule 23(b)(3) class actions seeking damages for personal injuries, such as putative class actions filed in mass tort cases, cannot be certified.[25] Further, since *Dukes*, Plaintiffs' lawyers seeking to circumvent the higher standard of proof for class certification under Rule 23(b)(3) by invoking Rule 23(b)(2) have been limited by that decision's heightened (a)(2) commonality standard. And, after *Concepcion*, the only cases that even have the potential for class action treatment are cases in which the parties' relationships are not governed by written agreements at all (*e.g.*, the relationship between a consumer and a manufacturer of an inexpensive household item purchased in a retail store), are governed by written agreements that do not require individual arbitration, or are governed by written agreements containing class action waivers that are not enforceable as a matter of state contract law.

This latter exception, perhaps originally viewed as narrow, has seen something of a resurgence. It was viewed as narrow because *Concepcion* itself held that the FAA preempted California's contract law doctrine of unconscionability. In my own state of Massachusetts, the courts struggled with similar attempts to avoid class action waivers through the application of state law, only to finally concede after *Italian Colors* that the Supreme Court's decisions made such attempts unavailing.[26]

For those who would like to see state law prevail, there recently have been glimmers of hope. Last year, the First Circuit, applying Massachusetts contract law, struck down a class action

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[24] *Cordua Restaurants*, 368 NLRB No. 43 (Aug. 14, 2019).

[25] *But see In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 434 (3d Cir. 2016) (distinguishing *Amchem* in affirming district court's certification of personal injury settlement class), *cert. denied, Gilchrist v. Nat'l Football League*, 137 S. Ct. 591 (2016), and *Armstrong v. Nat'l Football League*, 137 S. Ct. 607 (2016).

[26] *See Feeney v. Dell, Inc.*, 993 N.E.2d 329, 331 (Mass. 2013) ("Although we regard as untenable the Supreme Court's view that 'the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims,' . . . we are bound to accept that view as a controlling statement of Federal law.").

waiver in a ride-sharing contract because the ride-sharing service had not made its Terms of Service sufficiently conspicuous in its mobile app.[27] Even more recently, the Eighth Circuit reached a similar result based on Missouri contract law in a Fair Labor Standards Act[28] case involving a class action waiver and arbitration provision contained in an employee handbook viewed through a link on a company's network.[29] Because such decisions are based on state law governing contract formation, they are generally thought to be consistent with the FAA's savings clause[30] and with the Supreme Court's arbitration decisions, which of necessity recognize the savings clause's continued vitality. These circuit court rulings may be most relevant to contracts formed electronically, but the willingness of some federal appellate courts to invalidate class action waivers and arbitration agreements after *Concepcion* and *Italian Colors* represents a crack in the *Concepcion* armor.

Outside of the arbitration arena, many important issues affecting federal class actions remain unsettled, including: the existence and nature of an implied requirement of ascertainability;[31] the exact contours of the injury-in-fact requirement for Article III standing;[32] whether *Daubert* applies to expert evidence offered at the class certification stage;[33] whether, and if so, under what circumstances a class can be certified that includes uninjured class

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[27] *See Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 64 (1st Cir. 2018).

[28] Fair Labor Standards Act, 29 U.S.C. §§ 201 – 219 (2018).

[29] *See Shockley v. PrimeLending*, 929 F.3d 1012, 1019-20 (8th Cir. 2019).

[30] 9 U.S.C. § 2 (2018) (declaring arbitration agreements "valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*") (emphasis added).

[31] *See Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015) (discussing split among circuits concerning whether to apply a "heightened" standard of ascertainability that requires showing of a reliable and administratively feasible way of identifying class members, and adopting "weak" standard of requiring only that a class be defined clearly and based on objective criteria), *cert. denied*, 136 S. Ct. 1161 (2016).

[32] *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548-50 (2016) (vacating the Ninth Circuit's reversal of district court's order dismissing FCRA class action for lack of standing because appellate court failed to consider "concreteness" requirement for Article III standing).

[33] *See Comcast Corp. v. Behrend*, 569 U.S. 27, 32 n.4 (2013) (the Court had granted certiorari to address *Daubert*'s applicability at the class certification stage, but addressed a different question because petitioners failed to object to the admission of the expert's testimony).

members;[34] the permissible scope of issue certification under Rule 23(c)(4);[35] the applicability of the Court's personal jurisdiction decision in *Bristol-Myers Squibb Co. v. Superior Court* to class actions;[36] and the fairness of *cy-pres*-only class settlements.[37] State courts also continue to contend with some of these issues, as the California Supreme Court recently did when it rejected ascertainability as an implied requirement for class certification.[38]

Most cases, of course, are decided in trial courts, and United States District Judges continue to play a vital role in determining the fate of would-be class actions. District Judges possess a wide range of experience with class actions, resulting in a similar range of expertise in handling them. Fortunately, through the Federal Judicial Center and other repositories, judges have a host of resources available to assist them in deciding class action issues. Some judges, both in the district courts and, to a lesser extent, in the circuit courts, may feel empowered to boldly distinguish Supreme Court precedent, knowing that the Court is unlikely ever to review their rulings.

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[34] *See In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018) (holding that, where injury-in-fact is an element of a claim, Rule 23(b)(3) requires plaintiff to demonstrate that there is a reasonable and workable plan for defendant to challenge class members' claims of injury in a manner that does not result in overwhelming individual issues, and discussing decisions of other Circuits regarding certification of classes that include uninjured class members).

[35] *See Martin v. Behr Dayton Thermal Prods., Inc.*, 896 F.3d 405 (6th Cir. 2018) (invoking Rule 23(c)(4) and affirming certification of seven issues for class treatment, and discussing other circuits' 23(c)(4) rulings), *cert. denied*, 139 S. Ct. 1319 (2019); *see also* L. Hines, *Codifying the Issue Class Action*, 16 Nev. L. J. 625 (2016).

[36] *See* Joan R. Camagong, *Applying Bristol-Myers Squibb to Class Actions*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2019/applying-bristol-myers-squibb-to-class-actions/ (last updated February 05, 2019); Katherine S. Kayatta, *Federal District Courts Tackle Application of Bristol-Myers Squibb v. Superior Court to Class Actions*, FIRST CLASS DEFENSE BLOG, https://www.firstclassdefense.com/federal-district-courts-tackle-application-of-bristol-myers-squibb-co-v-superior-court-to-class-actions/ (last updated February 14, 2018).

[37] *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (per curiam) (vacating and remanding 9th Circuit decision upholding *cy-pres*-only settlement for lower court to consider issue of standing under *Spokeo*).

[38] *Noel v. Thrifty Payless, Inc.*, 445 P.3d 626 (Cal. 2019).

VII. THE PROSPECTS FOR THE SETTLEMENT CLASS

Consumer and labor advocates and the plaintiffs' bar, on the one hand, and business interests and the defense bar, on the other, tend to vigorously disagree about the social utility of class actions. At one level, the divide between these groups on this issue represents a manifestation of the continued and increasing polarization of American society, or least of the two major political parties. Their disagreements, often intractable, may in some cases diminish at the extremes. For example, even some long-time defense attorneys might quietly agree that some mandatory arbitration decisions have gone too far. Nevertheless, as fiduciaries, defense counsel may consider themselves duty-bound to advise their clients of these decisions and the protections from class litigation that they afford, regardless of whether they agree with them. And, as their clients act on what they learn, more and more potential class litigation battles disappear into the individual arbitration fog.

Despite the generally opposing viewpoints of the two major factions, there is one area of class action practice to which they might look for common ground: class action settlements. In *Amchem*, the Supreme Court had the opportunity to make the settlement task easier by applying a lower standard to settlement class certifications, but it rejected the prospect of effectively amending Rule 23 by fiat. More importantly, in *Amchem* and *Ortiz*, it reinforced the crucial role of federal courts as guardians of the interests of putative settlement class members.[39] Despite attempts in the intervening years to amend the Rule to relax the certification requirements for settlement classes, as of this writing no such change has been made.

Both Congress and the Court have adopted other changes. When it passed the Class Action Fairness Act of 2005,[40] Congress simultaneously broadened federal jurisdiction over class actions, thus helping defendants avoid plaintiff-friendly "magnet"

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[39] The Court in *Amchem* noted that, at the time of its decision, a proposed amendment to Rule 23(b) that would have permitted certification of settlement classes "even though the requirements of subdivision (b)(3) might not be met for purposes of trial" was pending with the Judicial Conference Standing Committee on Rules of Practice and Procedure, but had met significant opposition and had not yet been acted upon. *Amchem Prods. Inc. v. Windsor*, 521 U.S. at 619.

[40] Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.).

jurisdictions and changed the rules for calculating attorneys' fees in coupon settlements, thus largely negating what had been considered an abusive settlement practice. The 2018 amendments to Rule 23(e) made two other major changes. Rule 23(e) (1) now requires courts to exercise greater scrutiny over proposed settlements before authorizing notice to the class (commonly, but inaccurately, referred to as the "preliminary approval" stage). Rule 23(e)(5)(B) requires court approval of payments or other consideration provided in exchange for "forgoing or withdrawing an objection" or for "forgoing, dismissing, or abandoning an appeal from a judgment approving" a proposed settlement. Each of these changes has the admirable and important goal of deterring abuses of the settlement process, abuses that draw special, and often deserved, criticism in the context of mass tort litigation.[41] They do so, however, by erecting obstacles and speed bumps that will make even some desirable settlements more difficult to achieve.[42]

Some plaintiffs' lawyers recently came up with an attempt at a new innovation designed to facilitate class settlements in mass tort cases. They proposed the "negotiation class," a class that would be certified solely for purposes of attempting to negotiate a settlement to resolve thousands of individual lawsuits. In a case of first impression, the judge presiding over the prescription opiate MDL pending in the Northern District of Ohio certified the first-ever negotiation class.[43] On interlocutory review, however, a divided panel of the Sixth Circuit reversed the district court's decision, holding that Rule 23 does not authorize certification of a negotiation class, and courts are not free to invent new forms of class action.[44]

Many likely would agree with the Sixth Circuit's ruling that Rule 23 as currently written does not authorize certification of a negotiation class, but that does not necessarily mean that a negotiation class is a bad idea. In the right cases, the argument goes, such a device could help courts clear their dockets of burdensome, difficult-to-manage litigation, provide meaningful relief to claimants,

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[41] For a detailed critical analysis of mass tort settlements, see Elizabeth Chamblee Burch, MASS TORT DEALS (Cambridge Univ. Press, 2019).

[42] The new provisions concerning withdrawal of objections, of course, may also deter the filing of frivolous or extortionate objections, and in that sense may facilitate class action settlements.

[43] *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532 (N.D. Ohio 2019).

[44] *In re Nat'l Prescription Opiate Litig.*, Nos. 19-4097/4099 (6th Cir. Sept. 24, 2020).

and accord businesses repose from significant burden and expense. Whatever one thinks of the concept and its prospects, one must give its proponents high marks for creativity.

Both the plaintiff and defense class action bars should be receptive to new ideas for facilitating class action settlements. They particularly should continue to consider possible amendments to Rule 23 that would ease the requirements for settlement class certification, assuming that amendments can be devised that would not significantly increase the risks of unfairness to absent class members or undue pressure on defendants. The perceived hostility towards class actions reflected in some Supreme Court decisions need not translate into hostility towards class action settlements. Rather, all constituencies should recognize what many trial and appellate judges already know – that class action settlements, properly conceived and implemented, can, in the right cases, serve as useful means for providing relief to large groups of allegedly injured parties, while allowing defendants to put disputes behind them and return their attention to going-forward business concerns.

VIII. CONCLUSION

To paraphrase a misquoted quip of Mark Twain,[45] the reports of the class action's death are greatly exaggerated. Since the Supreme Court's landmark rulings in 2011, however, many have fretted that class actions are on life support. As mentioned at the beginning of this article, Rule 23 was meant to strike a balance among conflicting interests. It should hardly be surprising when that balance tips in the direction in which courts lean, and certainly some significant precedents of the conservative-majority Court lean right. Still, very few cases reach the Supreme Court. Lower federal courts as well as state courts will continue to develop class action law in cases not foreclosed by arbitration, arriving at varying and, at times, conflicting results in the gaps the Court has not yet closed. Even the Court's arbitration rulings, which after all are based only on its interpretations of a federal statute, could become irrelevant when power someday shifts in Washington. For now, it

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[45] Robert Deis, *Reports of Mark Twain's Quip About His Death are Greatly Misquoted...*, THISDAYINQUOTES.COM, http://www.thisdayinquotes.com/2010/06/reports-of-my-death-are-greatly.html (last updated June 2, 2018).

seems safe to say that the arc of class actions bends towards defendants. But it is also true that the arc is long and subject to the many forces of change.