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Front-Loading, Avoidance, and Other Features of the Recent Supreme Court Class Action Jurisprudence

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INTRODUCTION

From 2010 through 2014, the Supreme Court issued thirteen class action decisions.[1] This unprecedented flurry started with *Shady Grove*

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1. I say "decisions" as opposed to "cases" to denote opinions in which the Court addressed some aspect of class practice. In some cases, the Court addressed a substantive issue that just happened to arise in a class suit. For example, in *Northwest Inc. v. Ginsberg*, 134 S. Ct. 1422 (U.S. 2014), the Court held that the Airline Deregulation Act preempted state-law claims being asserted by a putative class. Moreover, although the Court granted certiorari in three cases to resolve an issue involving the Securities Litigation Uniform Standards Act (SLUSA), the three were consolidated and resulted in one opinion. Chadbourne & Parke, LLP v. Troice, 134 S. Ct. 1058 (U.S. 2014). Finally, though *Mississippi ex rel. Hood v. AU Optronics Corp.,* 134 S. Ct. 736 (U.S. 2014), was

Orthopedic Associates, P.A. v. Allstate Insurance Co.[2] In 2011, the Court decided four more.[3] It took a breather in 2012 but returned with five decisions in 2013.[4] In 2014, it added three.[5] Though the Court granted certiorari in one case for the 2015 Term, it has since dismissed the writ as improvidently granted.[6] With the flow at least temporarily abated, it seems an opportune time to take stock of what these decisions might mean for federal class action practice.

This group of decisions includes some good news for plaintiffs. Indeed, federal class practice survived two significant threats. First, in *Shady Grove*, by holding that Federal Rule 23 was on-point and valid under the Rules Enabling Act, the Court saved federal diversity class actions from ready evisceration by state law.[7] Second, in *Halliburton Co. v. Erica P. John Fund, Inc.* (*Halliburton II*), the Court spared federal securities class action practice by retaining the fraud-on-the market presumption of reliance in Rule 10b-5 cases.[8] Contrary decisions in either case would have altered the legal landscape in stunning ways.

And plaintiffs got other good news. In two decisions, the Court further facilitated securities fraud classes by holding that neither loss causation nor materiality must be demonstrated at the certification stage.[9] In two others, it held that putative class members of uncertified classes cannot be bound by the representative's stipulations about damages and, more importantly, remain free to re-litigate the question of class certification.[10] In still two more cases, the Court interpreted federal jurisdictional grants narrowly, thereby allowing plaintiffs to litigate in

brought not as a class action but as a "mass action," it is included in this study because it raised an issue under the Class Action Fairness Act (CAFA).

2. Shady Grove Orthopedics Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010).

3. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (U.S. 2011); Smith v. Bayer Corp., 131 S. Ct. 2368 (U.S. 2011); Erica P. John Fund, Inc. v. Halliburton Co. [hereinafter *Halliburton I*], 131 S. Ct. 2179 (U.S. 2011); and AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (U.S. 2011).

4. Am. Express Co. v. Italian Colors Rest. 133 S. Ct. 2304 (U.S. 2013); Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (U.S. 2013); Comcast Corp. v. Behrend, 133 S. Ct. 1426 (U.S. 2013); Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (U.S. 2013); and Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184 (U.S. 2013).

5. Halliburton Co. v. Erica P. John Fund, Inc. [hereinafter *Halliburton II*], 134 S. Ct. 2398 (U.S. 2014); *Chadbourne & Parke*, 134 S. Ct. 1058; and *Hood*, 134 S. Ct. 736.

6. Police & Fire Ret. Sys. v. IndyMac MBS, Inc., 721 F.3d 95 (2d Cir. 2013), *cert. granted sub nom.* Pub. Emps.' Ret. Sys. v. IndyMac MBS, Inc., 134 S. Ct. 1515 (U.S. 2014), *cert. dismissed*, 135 S. Ct. 42 (U.S. 2014).

7. *See infra* note 24 and accompanying text.

8. *See infra* note 159 and accompanying text.

9. *See infra* notes 144 and 147 and accompanying text.

10. *See infra* notes 248-49 and accompanying text.

their preferred state forum.[11]

Despite all this, the ledger is fuller on the defendants' side.[12] In four principal ways, recent case law does not augur well for plaintiffs. First, in *Wal-Mart Stores, Inc. v. Dukes*, the Court restricted the recovery of money in Rule 23(b)(2) classes.[13] Second, in the same case, it increased the showing required for satisfaction of the commonality requirement under Rule 23(a)(2).[14]

Third, there is a clear trend toward "front-loading" class litigation – that is, the need to do more and prove more in the early stages of the case. The Court has made clear that certification does not raise a question of pleading, but must be based upon "conclusive proof." The fact that the evidence overlaps with the substantive merits of the dispute is irrelevant. Further, it is likely that expert testimony bearing on certification must be from witnesses qualified under the Federal Rules of Evidence and after a full *Daubert* hearing.[15] Moreover, in damages cases, the representative must prove that damages can be demonstrated on a class-wide basis.[16] Front-loading increases the expense of gaining certification. Though both sides are affected, the burden may fall harder on plaintiffs' counsel, who likely will be working on a contingent fee. The increased scope of litigation requires greater outlay by counsel to progress to the adjudication stage.

Fourth, and most consequentially, the Court has countenanced the wholesale avoidance of dispute resolution by upholding contractual "waivers" of the right to seek group vindication of rights. Such provisions are commonly found in conjunction with arbitration clauses. Successful melding of arbitration clauses with class "waivers" means that many claims (particularly negative-value claims) will never be asserted.[17]

This Article discusses each of the thirteen Supreme Court decisions with the goal of drawing at least tentative conclusions for their impact on federal class practice. The thirteen decisions may be placed into five groups. Only three of the cases directly involve the general interpretation

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11. *See infra* notes 286-95 and accompanying text.

12. Writing after the 2010 and 2011 decisions, Dean Kane concluded that the five cases decided at that point did not evince any discernible jurisprudential theme. Mary Kay Kane, *The Supreme Court's Recent Class Action Jurisprudence: Gazing Into a Crystal Ball*, 16 LEWIS & CLARK L. REV. 1015, 1028 (2012).

13. *See infra* note 41 and accompanying text.

14. *See infra* notes 70-72 and accompanying text.

15. Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993).

16. *See infra* note 112 and accompanying text.

17. *See infra* notes 175-77 and accompanying text.

and application of Rule 23, while the other ten fall into four particular substantive areas. Reflecting these divisions, this Article proceeds in five parts. Part I discusses the three cases directly interpreting Rule 23. Part II addresses the three decisions involving securities classes brought under Rule 10b-5. Part III discusses the three decisions involving the Federal Arbitration Act. Part IV engages the two decisions addressing the non-party status of class members. And Part V concerns those decisions interpreting specialized grants of federal jurisdiction.

I. INTERPRETING RULE 23

This section addresses the three decisions that interpret Rule 23 directly. Of course, these cases affect federal class actions generally, regardless of the substantive claims asserted.

A. Shady Grove*: Saving Diversity Class Actions*

In *Shady Grove*, an insurance company failed to make timely payments of benefits.[18] Plaintiffs filed a federal class action, which invoked jurisdiction under the Class Actions Fairness Act (CAFA).[19] Class members asserted small statutory claims to recover interest on the overdue insurance benefits (the representative's claim, for instance, was for $500).[20] The New York Civil Practice Law forbade assertion of such claims in a class; they had to be pursued individually.[21] Everyone agreed that the case satisfied the requirements for certification under Rule 23.[22] But can the federal courts permit a class action when state law would not? The Court said yes, but it was close.

Five justices concluded that Rule 23 was on-point and clashed with state law and, thus, that the matter was governed by *Hanna v. Plumer*.[23] They went on to find the provision valid under the Rules Enabling Act (REA).[24] The four dissenters concluded that Rule 23 did not "answer the

18. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 397 (2010).
19. *Id.*at 458.
20. *Id.* at 436.
21. N.Y. C.P.L.R. LAW § 901(b) (McKinney, Westlaw through L.2015).
22. *Shady Grove*, 559 U.S. at 397-406.
23. Hanna v. Plumer, 380 U.S. 460 (1965).
24. 28 U.S.C. § 2072 (2012). On this point, however, there was no majority. Justice Scalia's plurality opinion applied Sibbach v. Wilson & Co., 312 U.S. 1 (1941), which requires only that a Rule "really regulate procedure" to be valid under the Rules Enabling Act. Because Rule 23 deals with aggregation of claims, it regulated procedure. Justice Stevens prescribed a more searching test for validity under the REA. *Shady Grove*, 130 S. Ct. 393 at 416-23. Ultimately, however, he concluded that Rule 23 passed muster under his test. Thus, five justices upheld the Rule. *See* RICHARD D. FREER, CIVIL PROCEDURE 549-54 (3d ed. 2012).

question in dispute" and therefore rejected *Hanna* in favor of analysis under *Erie Railroad v. Tompkins*.[25] *Shady Grove*'s principal legacy, then, will be in vertical choice-of-law and not in class action practice. Nonetheless, two aspects of the case are relevant for the present purpose.

First, the majority concluded that the issue of whether Rule 23 "answer[ed] the question in dispute" was easy.[26] Over a decade before, in his majority opinion in *Semtek International Inc. v. Lockheed Martin Corp*.,[27] Justice Scalia opined that courts should interpret ambiguous federal directives narrowly to avoid different outcomes in federal and state court.[28] In *Shady Grove*, he reiterated that position but concluded that Rule 23 was not ambiguous.[29] The provision was susceptible of only one reading, and applied to the facts of the case.[30] Justice Scalia wrote for himself and three others.[31] On this point, however, Justice Stevens joined, so five justices agreed that Rule 23 governed the matter in dispute.[32]

Second, it is important to give *Shady Grove* its due in preserving federal class practice. Had the case been decided the other way, two things would now be true. One, class practice could differ significantly from federal court to federal court (depending on state law). Two, state legislatures could prohibit class litigation not only in their courts but in federal tribunals as well, at least in diversity of citizenship cases. So, as Professor Mullenix reminds us, *Shady Grove* saved the federal diversity class action from "a near-death experience."[33] And it is of at least passing note that in *Shady Grove* the "conservative wing" of the Court,

25. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). The dissent in *Shady Grove* was authored by Justice Ginsburg. Her *Erie* analysis led her to conclude that state law should govern even in the face of Rule 23. *Shady Grove*, 559 U.S. at 428-36. Justice Stevens, though sensitive to state interests in vertical choice of law, thought the dissenters contorted Rule 23 beyond recognition. *Id.* at 429 ("Simply because a rule should be read in light of federalism concerns, it does not follow that courts may rewrite the rule.").

26. *Shady Grove*, 559 U.S. at 393.

27. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001).

28. *Id.* at 498.

29. *Shady Grove*, 559 U.S. at 406.

30. *Id.* at 405-06.

31. *Id.* at 395-96.

32. Reasonable people may disagree, but the conclusion seems correct. Some Federal Rules either apply to the issue before the court or they do not. Rule 23 in this case and Rule 4 in *Hanna* are examples (the latter at least as to methods for serving process). Other Rules are more problematic. Rule 59, for instance, allows the grant of a new trial but does not give reasons for doing so. With such a Rule, it is easier to imagine that the federal provision and state law might co-exist.

33. Linda S. Mullenix, *Federal Class Actions: A New-Death Experience in a* Shady Grove, 79 GEO. WASH. L. REV. 448 (2010).

in rebutting this existential threat, supported consumers (by allowing a class action that would not be permitted in state court) while the "liberal wing" supported big business's assertion that it should be free from aggregate litigation in any court. The "conservative" wing supported federal preemption of state law,[34] while the "liberal" wing championed application of state law.

B. Wal-Mart*: The Certification Bar*

In *Wal-Mart*, the lower courts approved a nationwide class of roughly 1,500,000 of the retail giant's female employees.[35] Class members asserted Title VII sex discrimination claims regarding pay and lack of promotion.[36] Wal-Mart divides its 3,400 stores into 41 regions.[37] Store managers make pay and promotion decisions locally with limited central oversight.[38] Plaintiffs argued that this local discretion was exercised disproportionately in favor of men and created a corporate culture of discrimination.[39] The Ninth Circuit upheld class certification under Rule 23(b)(2) for injunctive and monetary relief (in the form of back pay).[40]

The Supreme Court reversed on two grounds. Unanimously, the justices concluded that the monetary relief was improper in a Rule 23(b)(2) class.[41] Then, by a five-to-four margin, the Court held that the class failed to satisfy the commonality requirement of Rule 23(a)(2).[42] Along the way, the Court threw in some hints (and maybe some holdings) on several procedural points.

The limitation of remedies in Rule 23(b)(2) classes seems plainly

34. The scope of that preemption under *Hanna* is narrower than some plaintiffs have contended. For example, in Mitchell-Tracey v. United Gen. Title Ins. Co., 442 F. App'x 2 (4th Cir. 2011), the class representative argued that satisfaction of Rule 23 meant that members did not have to exhaust administrative remedies as required by the relevant state law. The Fourth Circuit pointed out that *Shady Grove* involved an "explicit state-law prohibition" on aggregate litigation; it could discern no "basis on which to read it as excusing named class action plaintiffs from the threshold procedural requirements that they would face as individual litigants. To similar effect is DWFII Corp. v. State Farm Mutual Auto. Ins. Co., 271 F.R.D. 676 (S.D. Fla. 2010), *aff'd per curiam* 469 F.App'x 762 (11th Cir. 2011), in which the court held that Rule 23 did not render irrelevant Florida's requirement that each claimant send a demand letter to defendant insurance companies.

35. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2546 (U.S. 2011).

36. *Id.* at 2546.

37. *Id.*

38. *Id.*

39. *Id.* at 2548.

40. *Id.* at 2550.

41. *Id.* at 2557.

42. *Id.* at 2555.

correct. Again, the Court was unanimous on the point, and I am not alone in thinking that the Ninth Circuit invited reversal by overreaching in approving the nationwide certification.[43] Rule 23(b)(2), according to the Court, focuses on "indivisible relief."[44] There are important distinctions between mandatory classes under Rules 23(b)(1) and (b)(2), on the one hand, and opt-out classes under Rule 23(b)(3), on the other. The former do not require showings of predominant common questions or superiority of class litigation because those characteristics are assumed.[45] Classes satisfying Rule 23(b)(1) or (b)(2) are cohesive either because individual litigation would be impossible or because the relief sought automatically inures to the benefit of all. In view of this inherent cohesiveness, due process does not require that class members be notified of their membership in the class or be given the right to opt out of the class.[46]

In contrast, the Rule 23(b)(3) class bundles individual claims that are bound only by common questions.[47] These class members are yoked not by legal relationships but merely by facts – they happened, for instance, to be on the same airplane or to use the same defective product. Because of the lack of relational cohesiveness, due process requires that classes predominantly asserting individual monetary claims provide the additional procedural protections of notice and an opportunity to opt

43. *See* Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1 (impact of *Wal-Mart* and *Concepcion* cases could have been avoided had plaintiffs' counsel not overreached).

44. This conclusion, all justices agreed, is supported by the terms of the Rule, which require that relief must be appropriate "respecting the class as a whole" and that the defendant "acted on grounds that apply generally to the class." FED. R. CIV. P. 23(b)(2). The conclusion is also supported by history, because the provision was written to facilitate desegregation, where conduct could be remedied by a single class-wide order. *Wal-Mart*, 131 S. Ct. at 2557-58.

45. *Wal-Mart*, 131 S. Ct. at 2558.

46. In the wake of *Wal-Mart*, the Federal Circuit addressed an interesting issue in Beer v. United States. There, an earlier case (*Williams*) was certified as a Rule 23(b)(2) class on behalf of Article III judges. It argued that Congress's failure to give cost-of-living adjustments to judges' salaries violates the Compensation Clause because it results in a *de facto* reduction of judicial pay. The class sought a declaration of compensation due. Class members were not given notice or an opportunity to opt out. The judges lost on the merits. *Beer* is a separate class action asserting the same claim, and the question is whether class members were bound by the judgment in *Williams*. The answer is no. The Federal Circuit concluded that *Williams*, though brought under Rule 23(b)(2) was about the payment of money; it was essentially a claim for damages. Under *Wal-Mart*, due process requires notice in such a case. Because it was not given, the members were not bound. The court declined to address whether due process also required a right to opt out. Because the class members in *Beer* were not bound by *Williams*, the court was free to decide the merits. The court, sitting *en banc*, concluded that Congress had violated the Compensation Clause. Beer v. United States, 696 F.3d 1174, 1185 (Fed. Cir. 2012).

47. FED. R. CIV. P. 23(b)(3).

out.[48]

The back pay claims in *Wal-Mart*, unlike those in some Rule 23(b)(2) cases, did not flow naturally from the injunctive relief that was being sought. Indeed, injunctive relief would be meaningless for about half the class members because they no longer worked for Wal-Mart.[49] Moreover, because of different circumstances around the country, back pay would not be readily calculable; the claims were not liquidated and there was no ready formula for determining figures for the group.[50] Thus, back pay determinations would require myriad individual determinations, which, the Court concluded, would predominate over any common questions.[51]

Here, the Court threw in one of its hints without an express holding: when individual determinations predominate, there is "the serious possibility" that due process requires that class members be given notice and the opportunity to opt out of the class.[52] This "serious possibility" counseled the Court to interpret Rule 23(b)(2) narrowly and to reject certification.[53]

Wal-Mart reins in practice under Rule 23(b)(2) to a degree. Through the years, some lower courts had allowed recovery of monetary relief in 23(b)(2) classes. They did so on three theories, two of which are rejected by *Wal-Mart*. First, some courts justified recovery of money that could be characterized as "equitable" relief, such as restitution.[54] But, as the Court pointed out in *Wal-Mart*, Rule 23(b)(2) speaks only of "injunctive" and "declaratory" relief, and not of general "equitable" remedies.[55] Second, some courts held that money could be recovered as long as the demand for equitable relief "predominates."[56] But, again, as the Court noted in *Wal-Mart*, Rule 23(b)(2) does not use that term; predominance is a factor only in Rule 23(b)(3) classes.[57]

Only the third theory survives *Wal-Mart*. This permits recovery of money in a Rule 23(b)(2) class when the sum will "flow directly from liability to the class as a whole on the claims forming the basis of the

48. *Wal-Mart,* 131 S. Ct. at 2559.
49. *Id.* at 2560.
50. *Id.* at 2557.
51. *Id.*
52. *Id*. at 2559.
53. *Id.* at 2544.
54. *See, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791, 801-02 (4th Cir. 1971).
55. *Wal-Mart*, 131 S. Ct. at 2560.
56. *See, e.g.*, Bratcher v. Nat'l Standard Life Ins. Co. (*In re* Monumental Life Ins. Co.), 365 F.3d 408, 415 (5th Cir. 2004).
57. *Wal-Mart,* 131 S. Ct. at 2559-60.

injunctive or declaratory relief."[58] The archetypal example, which the Court cited in *Wal-Mart*, is *Allison v. Citgo Petroleum Corp.*[59] There, the injunction ordered the promotion of class members from one pay grade to another.[60] Back pay flowed automatically from the fact that the class members were underemployed, which was remedied by the injunction for all class members in the same way – they were all bumped up a level.[61] In this circumstance, the dollar figure for back pay is essentially liquidated: it consists of the difference between the pay grades multiplied by the time each was underemployed.[62] After *Wal-Mart*, this theory remains viable, and lower courts seem to be hewing the line.[63]

In *Wal-Mart*, the Ninth Circuit had tried to get around the need for individual hearings on back pay by prescribing a trial by formula: a subset of cases would be tried, and other class members' back pay would be extrapolated from those results.[64] The Court rejected this plan because it would deny Wal-Mart its right under Title VII to present defenses to individual claims.[65] This, in turn, would raise the specter of abridging Wal-Mart's substantive rights in violation of the Rules Enabling Act.[66]

58. *Id*. at 2560.

59. Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998).

60. *Id.* at 415.

61. *Id.*

62. *Id.*

63. An easy case is *Cobell v. Salazar*, in which the court upheld a monetary recovery by class members in a Rule 23(b)(2) suit for accounting. Cobell v. Salazar, 679 F.3d 909 (D.C. Cir. 2012). The case involves claims by individual Native Americans for the Department of the Interior's breach of duty to account for funds held in trust. Part of a settlement involved a $1,000 cash distribution per person. Under the unique facts (including congressional approval of the agreement), "the information produced from an historical accounting is not likely to be worth significantly more to some class members than to others, and thus the $1,000 settlement payment is properly viewed as non-individualized and does not run afoul of *Wal-Mart*." *Id.* at 918.

McReynolds v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 672 F.3d 482 (7th Cir. 2012), involved a class of black securities brokers who alleged that their employer engaged in racial discrimination in selection of teams and distribution of accounts. The district court denied certification and the Seventh Circuit, on Rule 23(f) appeal, reversed. Although local managers for the brokerage firm had considerable discretion in setting up teams of brokers and distributing accounts, the case differed from *Wal-Mart* because they acted under two company-wide policies; these policies could account for disparate impact among employees. Thus, the court instructed the lower court to certify a Rule 23(b)(2) class for determining common issues. Interestingly, however, the court did not permit recovery of money in the Rule 23(b)(2) class. Rather, if the class were to be successful, pecuniary relief – back pay and possibly compensatory or punitive damages – could be sought in "hundreds of separate suits." *Id.* at 492.

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

65. *Id.*

66. Usually, the concern under the Rules Enabling Act (REA) is whether application of a Federal Rule will modify a substantive right under state law. In *Wal-Mart*, the concern was that trial by formula, as envisioned by the Ninth Circuit, would rob the defendant of a federal substantive right – the right under Title VII to present defenses to individual claims.

One upshot of *Wal-Mart* may be an increased number of motions to certify "hybrid" classes, which seek injunctive or declaratory relief under Rule 23(b)(2) and monetary relief under Rule 23(b)(3).[67]

Though important, the holding on Rule 23(b)(2) pales beside the five-to-four portion of the case addressing the commonality requirement of Rule 23(a)(2). Because commonality is a prerequisite for all class actions, a higher hurdle on this score affects practice under all three types of classes under Rule 23(b). (Indeed, the holding on commonality doomed any effort to seek certification as a Rule 23(b)(3) class in *Wal-Mart*.)

On its face, the holding – that the class claims failed to present any common question[68] – is surprising. Commonality had never been much of a factor. It was all but impossible to find cases in which courts denied certification because of a failure to satisfy Rule 23(a)(2).[69] With *Wal-Mart*, commonality becomes a more serious hurdle to certification. The majority confirmed that Rule 23(a)(2) requires that only a single question be common to the class members' claims.[70] According to the

Justice Scalia voiced the general concern of the effect of class actions on substantive rights in *Philip Morris USA Inc. v. Scott*. There, he wrote as Circuit Justice of the Fifth Circuit and stayed a Louisiana intermediate appellate court ruling. The case, a class action brought on behalf of all smokers in Louisiana, was based upon common law fraud and alleged that the defendant tobacco companies had "distorted the entire body of public knowledge" about the addictive effect of nicotine. The state appellate court upheld a judgment on that theory of about $250,000,000, to be used to fund a 10-year smoking cessation program in Louisiana. 131 S. Ct. 1 (U.S. 2010).

Justice Scalia focused on one asserted error. The state court recognized that an individual plaintiff attempting to recover damages would be required (as part of the fraud claim) to show reliance on a knowing misstatement by the defendant. In this class action (seeking payment into a fund that will benefit the class), however, the plaintiffs need make no such showing. This was because the trial court had found that the entire class relied upon the defendants' distortion of "the entire body of public knowledge." Moreover, defendants were not permitted to argue that particular plaintiffs did not rely on the alleged misrepresentations. As a result, individuals who could not recover if they sued alone will be permitted to recover because the litigation is structured as a class suit.

Justice Scalia concluded: "The extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question." *Id.* at 4. Particularly because intrastate classes such as this cannot be removed to federal court under CAFA, he was concerned that "the constraints of the Due Process Clause will be the only federal protection." *Id.* The Court ultimately denied certiorari in the case.

67. *See, e.g.*, Gooch v. Life Investors Ins. Co. of Am., 672 F.3d 402 (6th Cir. 2012) (discussing need for hybrid class action after *Wal-Mart*).

68. *Wal-Mart*, 131 S. Ct. at 2556-57.

69. To the extent commonality got much of an airing in the case law, it was in Rule 23(b)(3), which requires that common questions predominate over individual questions. In retrospect, however, perhaps we should not be surprised at the holding: the Court itself added the Rule 23(a)(2) issue to the case when it granted certiorari. Obviously, then, at least four justices wanted the issue on the table.

70. *Wal-Mart*, 131 S. Ct. at 2556.

Ninth Circuit, the common question was whether the members were subject to a single set of policies (as opposed to independent discriminatory acts) that favored men over women.[71] The Supreme Court shifted the focus of the inquiry. The key is not whether one can posit common *questions*, but whether the class litigation will generate common *answers* that will drive resolution of the case.[72] In other words, the class members must suffer the same injury and not simply violation of the same law. Their claims "must depend upon a common contention," such as bias on the part of the same supervisor.[73] That common contention "must be of such a nature that it is capable of class-wide 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."[74] In *Wal-Mart*, the majority concluded that there was no such "glue"[75] – the litigation of no single issue would generate an answer for the entire class. Any discrimination was the result of thousands of individual judgment calls, which presented no commonality under Rule 23(a)(2).[76]

The Ninth Circuit had concluded that there was proof of a policy of company-wide discrimination, relying on the expert opinion of a sociologist.[77] The lower courts in *Wal-Mart* concluded that expert testimony could be considered at certification without proof of admissibility under Federal Rule of Evidence 702 and thus without a showing of reliability under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[78] In another of its hints, the *Wal-Mart* Court "doubt[ed] that this is so."[79] It thus suggested, but did not hold, that a full *Daubert* analysis was proper at the certification stage.[80]

At any rate, the Court concluded, the sociologist's opinions were worthless. Though the expert opined that Wal-Mart decision-makers were susceptible to reliance on gender stereotypes, he was unable to say how frequently such stereotypes actually affected employment

71. *Id.* at 2549.
72. *Id.* at 2551.
73. *Id.*
74. *Id.*
75. *Id.* at 2544.
76. *Id.* at 2552.
77. *Id.* at 2549.
78. Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993).
79. *Wal-Mart*, 131 S. Ct. at 2554.
80. Typical of the response to *Wal-Mart* on this issue is: "[i]f a district court has doubts about whether an expert's opinions may be critical for a class certification decision, the court should make an explicit *Daubert* ruling." Messner v. Northshore Univ. Healthsystem, 669 F.3d 802 (7th Cir. 2012).

decisions.[81] Thus, the Court concluded, "we can safely disregard what he has to say."[82] Without proof of a policy of discrimination, there was no commonality under Rule 23(a)(2).

Plaintiffs were no more successful in relying on statistics and anecdotal evidence to show that individual decisions were made in a common way. The statistics may have showed differentials between genders, but did nothing to identify a "specific employment practice" that caused it.[83] And the anecdotal evidence was too skimpy, constituting only one story per 12,500 class members and touching upon only 235 stores.[84] There was no commonality under Rule 23(a)(2) because there was "no convincing proof of a companywide discriminatory pay and promotion policy."[85] Plaintiffs thus failed in three ways – by sociological analysis, statistics, and anecdotal evidence – to show an employment practice that would tie together 1,500,000 claims.[86]

Did *Wal-Mart* bring a sharp break with prior interpretation of Rule 23(a)(2)? Some courts say that it did. For example, in *M.D. ex rel. Stukenberg v. Perry*,[87] the Fifth Circuit rejected its earlier precedent that "the test for commonality is not demanding"[88] and explained that *Wal-Mart* "heightened the standards for establishing commonality under Rule 23(a)(2)."[89] Thus, the court concluded, although finding that a single issue would affect a *significant* number of class members sufficed to show commonality before *Wal-Mart,* it is now insufficient. Resolution of some issue must be central to the validity of *each* claim.[90]

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81. *Wal-Mart*, 131 S. Ct. at 2553.

82. *Id.* at 2554.

83. *Id*. at 2555-56.

84. *Id*. at 2556.

85. *Id*.

86. *Id.* at 2555-57.

87. M.D. *ex rel.* Stukenberg v. Perry, 675 F.3d 832, 839 (5th Cir. 2012). *See also* Reyes v. Julia Place Condo. Homeowners' Ass'n, No. 12-2043, 2014 U.S. Dist. LEXIS 175111, at *19 n.1 (E.D. La. Dec. 18 2014) ("Although plaintiffs claim that the bar is low for commonality, the case they cite to has been superseded by the U.S. Supreme Court's decision in *Wal-Mart*."); Baughman v. Roadrunner Commc'ns, LLC, No. CV-12-565-PHX-SMM, 2014 U.S. Dist. LEXIS 120983, at *8 (D. Ariz. Aug. 29, 2014) ("The purpose of the rigorous commonality standard is to require that class members' claims depend upon a common contention whose truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.").

88. Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 625 (5th Cir. 1999).

89. *Perry*, 675 F.3d at 839.

90. *Id.* at 840. In Glazer v. Whirlpool Corp. (*In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.), 678 F.3d 409, 418 (6th Cir 2012), the court characterized the *Wal-Mart* commonality requirement: "The . . . inquiry focuses not on whether common questions can be raised, but on whether a class action will generate common answers that are likely to drive resolution of the lawsuit." *But see* Suchanek v. Sturm Foods, Inc., 764 F.3d 750 (7th Cir. 2014) (*Wal-Mart* did not counsel finding lack of commonality regarding whether a reasonable consumer

In practice, though, it is not clear how much higher the hurdle may be. In a later case, the Fifth Circuit emphasized that this new standard does not mean that differences in the harm suffered by class members will defeat commonality. The *Wal-Mart* requirement that class members "have suffered the same injury"[91] is satisfied by showing a common instance of injurious *conduct* even though class members' harm may vary dramatically.[92] *Wal-Mart* clearly does not require that every question be common; rather, Rule 23(a)(2) is satisfied by "a single *significant* question of law or fact."[93] Indeed, to a surprising extent, some district courts (perhaps particularly in the Ninth Circuit) continue to rely upon pre-*Wal-Mart* authority in determining whether commonality is satisfied.[94]

Though it is hard to quantify how *Wal-Mart* commonality might be more rigorous than earlier practice, the focus on generating common *answers* rather than asking common *questions* is new. It causes courts to engage the commonality requirement to a degree rarely encountered before. And, undeniably, this increased engagement results in rejection

would be confused by defendant's packaging).

91. *Wal-Mart*, 131 S. Ct. at 2551 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982)).

92. *In re* Deepwater Horizon, 739 F.3d 790, 810-11 (5th Cir. 2014). *See also* Serna v. Transp. Workers Union of Am., No. 3:13-CV-2469-N, 2014 U.S. Dist. LEXIS 181701, at *9 (N.D. Tex. Dec. 3, 2014) ("There is no requirement under the commonality prong that Plaintiffs establish the nonexistence of a conflict of interest.").

93. Mazza v. Am. Honda Motor Co., 666 F.3d 581, 589 (9th Cir. 2012) (emphasis added). *See also* Parsons v. Ryan, 754 F.3d 657, 688 (9th Cir. 2014) ("While each of the certified ADC policies and practices may not affect every member of the proposed class and subclass in exactly the same way, they constitute shared grounds for all inmates in the proposed class and subclass."); Abdullah v. U.S. Sec. Assocs., 731 F.3d 952, 957 (9th Cir. 2013) ("This does not, however, mean that *every* question of law or fact must be common to the class."); DL v. Dist. of Columbia, 713 F.3d 120, 128 (D.C. Cir. 2013) ("Again, none of this is to suggest that a class can never be certified in this kind of case. Rule 23(a)(2) does not require that all questions be common to the class.").

94. *See, e.g.*, *In re* Air Cargo Shipping Servs, Antitrust Litig., No. 06-MD-1175 (JG)(VVP), 2014 U.S. Dist. LEXIS 180914, at *187 (E.D. N.Y. Oct. 15, 2014) ("Unlike the related inquiry into 'predominance' posed by Rule 23(b)(3), commonality does not present plaintiffs with a particularly exacting standard."); Cunningham v. Multnomah Cnty., No. 3:12-cv-01718-ST, 2014 U.S. Dist. LEXIS 180960, at *18 (D. Or. Sept. 11, 2014) ("The commonality standard is not strictly construed . . ."; fact that claims of each class member required individual inquiry into reasonableness of search did not defeat commonality of challenge to practices of county allegedly subjecting prisoners to unconstitutional searches); Stemple v. QC Holdings, Inc., No. 12-cv-01997-BAS(WVG), 2014 U.S. Dist. LEXIS 125313, at *11 (S.D. Cal. Sept. 5, 2014) (relying upon pre-*Wal-Mart* authority that existence of shared legal issues with divergent factual predicates satisfies Rule 23(a)(2)); *In re* Conagra Foods, Inc., 302 F.R.D. 537, 568 (C.D. Cal. 2014) (citing pre-*Wal-Mart* authority for the proposition that "The commonality requirement is construed liberally, and the existence of some common legal and factual issues is sufficient.").

of some certification motions for failure to satisfy Rule 23(a)(2).[95]

Even if we conclude that *Wal-Mart* brings negligible change in the standards for Rule 23(a)(2) and Rule 23(b)(2), the case makes life more difficult for plaintiff classes by injecting various procedural hurdles, sometimes through passing remarks. We have already seen two: the suggestion (if not holding) that expert witnesses giving evidence regarding certification be vetted under *Daubert*[96] and the "serious possibility" that due process require notices and opt-out for class members seeking individualized monetary recovery.[97] There are others, and they raise the expense of litigating class certification.

For starters, "Rule 23 does not set forth a mere pleading standard."[98] Instead, plaintiff must "be prepared to *prove* that . . . in fact" the requirements are met.[99] Quoting *General Telephone Co. of Southwest v. Falcon*,[100] the Court noted that there must be "rigorous analysis," "significant proof," and "actual, not presumed, conformance with Rule 23."[101] Plainly, then, certification is not to be decided on the pleadings; the parties must present and the court must consider evidence.

In assessing this proof, one nagging question has been what the Court meant in *Eisen v. Carlisle & Jacquelin*[102] when it implied that a court dealing with class certification should not decide facts that overlap with the underlying merits. In *Falcon*, the Court seemed to retrench, saying that consideration of the merits may be unavoidable when ruling on certification.[103] *Wal-Mart* now makes this clear, calling the implication to the contrary in *Eisen* "purest dictum."[104] In *Eisen*, the issue was shifting the cost of notice in a Rule 23(b)(3) class from the representative to the defendant.[105] The district court in that case allocated the cost based upon its assessment of likelihood that the plaintiff would prevail on the merits.[106] It was in that context (and not class certification) that the Court decried consideration of the merits. There is no need for such timidity in ruling on class certification, and *Wal-Mart* fosters front-loading by envisioning that courts may consider and even rule upon

95. *See, e.g.*, *DL*, 713 F.3d at 126-28.
96. *See supra* note 80 and accompanying text.
97. *See supra* note 52 and accompanying text.
98. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (U.S. 2011).
99. *Id.* at 2551 (emphasis added).
100. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982).
101. *Wal-Mart*, 131 S. Ct. at 2551, 2553, 2551.
102. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).
103. *Gen. Tel. Co*., 457 U.S. at 155.
104. *Wal-Mart*, 131 S. Ct. at 2552 n.6.
105. *Eisen*, 417 U.S. at 177.
106. *Id.* at 168.

factual issues that implicate the merits.[107]

C. Comcast*: Increased Procedural Front-Loading*

In *Comcast*, the Court revisited the topic of evidentiary proof at certification. This was an antitrust case in which the plaintiffs asserted that Comcast unlawfully "clustered" cable television providers in the Philadelphia area, thereby excluding entities that could provide competitive alternatives for cable service.[108] The big questions at certification were whether antitrust injury and damages could be demonstrated on a class-wide basis.[109] The plaintiffs asserted four theories of antitrust impact.[110] The district court rejected three of these and permitted the case to proceed only on an "overbuilder" theory of impact.[111] The expert testimony on damages, however, was aimed at showing damages under all four of the original theories of antitrust impact.[112] It was not limited to the "overbuilder" theory.[113]

Despite this disconnect between the substantive theory of impact and the damages model, the Third Circuit held that impact and damages were susceptible of class-wide proof.[114] This holding supported certification under Rule 23(b)(3) because it ensured that common questions predominated.[115] Moreover, the court refused to allow Comcast to challenge the damages model at certification because, it

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107. Of course, a court should not decide merits-based issues unrelated to certification. "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1194-95 (U.S. 2013).

108. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1428 (U.S. 2013).

109. Plaintiffs need not prove the antitrust injury or damages themselves at certification. Rather, they must demonstrate that at trial they will be able to prove "to the satisfaction of a jury that 'all putative class members suffered an injury and that the injury resulted from anti-competitive harms to the market as a whole.'" *In re* Sulfuric Acid Antitrust Litig., 847 F. Supp. 2d 1079 (N.D. Ill. 2011).

110. *Comcast*, 133 S. Ct. at 1430.

111. *Id.* at 1431.

112. *Id.*

113. *Id.*

114. Behrend v. Comcast Corp., 655 F.3d 182 (3d Cir. 2011). The Third Circuit heard the matter under Rule 23(f) on January 11, 2011, but did not issue its decision until August 23, 2011. Undoubtedly, it waited for the decision in *Wal-Mart*, which issued on June 23, 2011. The Third Circuit majority opinion cited *Wal-Mart* in four footnotes, but based its holding largely on *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008). Indeed, the majority says that in *Wal-Mart*, the "Supreme Court confirmed our interpretation of the Rule 23 inquiry [from *Hydrogen Peroxide*]." *Behrend*, 655 F.3d at 190 n.6.

115. Rule 23(b)(3) requires that common questions predominate and that class litigation be superior to other means of resolving the dispute.

concluded, such arguments would improperly enmesh the court in consideration of the underlying merits.[116] Finally, the expert evidence on damages was not vetted under *Daubert*.

The Court granted certiorari on the question of "whether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."[117] Comcast waived the *Daubert* issue by failing to object to the admission of plaintiffs' expert testimony.[118] Though this failure made it impossible for Comcast to argue that the testimony was not "admissible evidence," Comcast remained free to argue that the evidence (when admitted) failed to show that damages could be shown on a class-wide basis.[119]

The Court reversed certification.[120] The five-member majority emphasized that its ruling was based upon Rule 23 and not on substantive antitrust law.[121] It made three significant pronouncements. First, the need for "evidentiary proof" (as opposed to allegations) required in *Wal-Mart* applies to Rule 23(b) as well as to Rule 23(a).[122] Indeed, "[i]f anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)."[123] Second, because of the need for litigation of whether common questions predominated, the lower courts erred by not permitting Comcast to present evidence against the plaintiffs' proffered damages model.[124] And third, that model was fatally flawed because it was not limited to the "overbuilder" theory of antitrust impact.[125]

None of these three conclusions is surprising after *Wal-Mart*. It would be unthinkable that one need proof to satisfy Rule 23(a) but not Rule 23(b). And once we decide to litigate questions overlapping with the merits, it would be unthinkable not to let the defendant litigate the issue. The holding on the third point also echoes *Wal-Mart*: even if we considered the plaintiffs' expert evidence without a *Daubert* hearing, it

116. *Comcast*, 133 S. Ct. at 1431.
117. *Id.* at 1435.
118. *Id.* at 1436.
119. *Id.* at 1431-32 n.4.
120. *Id.* at 1435.
121. "This case thus turns on the straightforward application of class-certification principles; it provides no occasion for the dissent's extended discussion . . . of substantive antitrust law." *Id.* at 1433.
122. *Id.* at 1432.
123. *Id*.
124. *Id.* at 1432-33.
125. *Id.* at 1433.

was worthless. In *Wal-Mart*, the expert could not say that the Wal-Mart "culture" he perceived had affected a single employment decision.[126] In *Comcast*, the class-wide proof on damages did not match the theory of antitrust impact and, therefore, of liability.[127]

With *Wal-Mart* and *Comcast*, the Court has done more than limit the availability of monetary relief in Rule 23(b)(2) classes and up the ante for showing commonality under Rule 23(a)(2). It has interpreted Rule 23 to increase the scope of litigation at class certification. Certification is not decided on pleadings but requires presentation of evidence concerning satisfaction of Rule 23(a) and 23(b). The factual issues decided may overlap with the merits of the case. Expert testimony probably must satisfy Rule 702 of the Federal Rules of Evidence, which means that there must be litigation concerning whether the expert is qualified under *Daubert*. The plaintiffs must hew their substantive theory of liability with their expert evidence that damages may be proved *en masse*. And defendants must be permitted to challenge whether the class has satisfied any of these steps.

This front-loading increases the expense of litigating class certification. More is on the table at an early stage than in prior practice. I call this "procedural front-loading" because it is imposed by Rule 23. We turn next to efforts by defendants to front-load certification litigation further by insisting that certain substantive matters be litigated at the certification stage. The examples come from securities fraud cases.

II. REJECTION OF SUBSTANTIVE FRONT-LOADING IN SECURITIES LITIGATION

Three times since 2011 the Court has dealt with "substantive front-loading" in the context of securities class actions under Rule 10b-5. By this I mean litigation at the certification stage that is not imposed by Rule 23 but by the substantive law of the claim asserted. Two of the opinions involve the same case: *Halliburton I*,[128] decided in 2011, and *Halliburton II*,[129] decided in 2014. Between them, in 2013, the Court decided *Amgen*.[130] In each, the fact pattern is familiar: a publicly traded company (or its agent) makes a misrepresentation that inflates the price of its stock; plaintiffs buy the stock at the inflated price; a corrective

126. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553 (U.S. 2011).
127. *Comcast*, 133 S. Ct. at 1434.
128. *Halliburton I*, 131 S. Ct. 2179 (U.S. 2011).
129. *Halliburton II*, 134 S. Ct. 2398 (U.S. 2014).
130. Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184 (U.S. 2013).

announcement is made, and the price of the stock falls. Everyone agrees that a class of buyers or sellers of the stock will satisfy Rule 23(a). The question is whether common questions can predominate for certification of a damages class under Rule 23(b)(3).

To prevail on the merits in a private Rule 10b-5 case, plaintiffs must demonstrate various elements, which include material misrepresentation,[131] scienter, and a connection between the misrepresentation and the purchase or sale of a security. We focus here on three other elements of a Rule 10b-5 claim: (1) reliance (the plaintiff must have relied on the misrepresentation); (2) materiality (the misrepresentation must have been about something a reasonable investor would have considered important); and (3) "loss causation." The third, imposed by the Private Securities Litigation Reform Act, requires plaintiffs to show that their loss resulted from the misrepresentation and its correction, and not from some other (e.g., macro-economic) cause.[132]

If each class member were required to demonstrate these three things individually, class certification under Rule 23(b)(3) would be impossible, because individual issues would predominate over common ones. The Court recognized this in 1988 in *Basic, Inc. v. Levinson*.[133] There it endorsed the "fraud-on-the-market" theory, which creates a rebuttable presumption of reliance.[134] The presumption arises when the stock is traded on an efficient market and the material misstatement was made publicly.[135] The idea is that efficient markets factor into the stock price the entire mix of public information – good and bad.[136] As the Court later explained, the presumption attaches if (1) the misstatement was made publicly, (2) was material, (3) the securities market on which the security is traded is efficient, and (4) the plaintiff bought or sold during the relevant time frame.[137]

Without *Basic*, few (if any) Rule 10b-5 damages classes could be certified.[138] The representative bears the burden at the certification stage

131. An omission of fact may also be actionable under Rule 10b-5, but for convenience we will assume a case based upon misrepresentation.

132. 15 U.S.C. § 78u-4(b)(4) (2012) (plaintiff "shall have the burden of proving that the act or omission of the defendant . . . caused the loss for which the plaintiff seeks to recover damages.").

133. Basic Inc. v. Levinson, 485 U.S. 224 (1988).

134. *Id.* at 250.

135. *Id.* at 237.

136. *Id*.

137. *Halliburton II*, 134 S. Ct. 2398, 2412 (U.S. 2014).

138. "Absent the fraud-on-the-market theory, the requirement that Rule 10b-5 plaintiffs establish reliance would ordinarily preclude certification of a class action seeking money damages because individual reliance issues would overwhelm questions common to the class." Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1193 (U.S. 2013).

of demonstrating that the fraud-on-the-market presumption of reliance should attach.[139] If she satisfies this burden, reliance is presumed for the entire class and presents no individual questions.[140] The defendant is free to rebut the presumption, but this is a tough row to hoe. For example, the defendant might show that individual class members in fact did not rely on the misstatement. Such proof would be rare, and would probably only pick off a few class members at most.

Through the years, the Fifth Circuit required that the representative show loss causation as a prerequisite to certification.[141] In *Halliburton I*, because the representative did not do so, the Fifth Circuit rejected certification.[142] The Supreme Court reversed unanimously and explained: "Loss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory."[143] Loss causation simply has nothing to do with reliance. Thus, it is a "merits" issue to be proved at the adjudication (not the certification) stage.[144]

In *Amgen*, the Court faced a tougher call: whether the representative, to invoke the presumption of reliance, must demonstrate materiality of the misstatement.[145] Courts of appeals had disagreed on the question and inextricable sub-question of whether the defendant should be permitted to demonstrate – again, at the certification stage – that the misstatement was not material.[146] Materiality presents a difficult

139. *Basic*, 485 U.S. at 225.

140. *Id.* at 225.

141. *Halliburton I*, 131 S. Ct. 2179, 2181 (U.S. 2011).

142. *Id.* at 2181.

143. *Id*. at 2186.

144. It may be difficult to translate the holding in *Amgen* to other substantive areas. For example, in Authors Guild, Inc. v. Google Inc., 721 F.3d 132 (2d Cir. 2013), a class of authors sued Google for copyright infringement for providing "snippets" of millions of copyrighted works. The defendant asserted "fair use" under the copyright law. The district judge certified the plaintiff class. The Second Circuit rejected the effort, however, and ruled that the holding was premature:

> On the particular facts of this case, we conclude that class certification was premature in the absence of a determination by the District Court of the merits of Google's "fair use" defense. Accordingly, we vacate the June 11, 2012 order certifying the class and remand the cause to the District Court, for consideration of the fair use issues, without prejudice to any future motion for class certification.

Id. at 132.

145. Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1189 (U.S. 2013).

146. *Compare, e.g*., Millowitz v. Citigroup Global Mkts., Inc. (*In re* Salomon Analyst Metromedia Litig.), 544 F.3d 474 (2d Cir. 2008) (representative must show materiality at certification stage and defendant may introduce evidence to rebut the showing) *and* Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 265 (5th Cir. 2007) (same), *abrogated on other grounds*, 131 S. Ct. 2179 (U.S. 2011), *with* the Ninth Circuit decision affirmed in *Amgen*, 133 S. Ct. 1184.

issue because it, unlike loss causation, is relevant both for adjudication on the merits (it is an element of a Rule 10b-5 claim) and to invoke the fraud-on-the-market presumption for reliance (after all, no one would rely on an immaterial misstatement about the value of securities).

In *Amgen*, the Court held that the representative is not required to present evidence of materiality at the certification stage.[147] Materiality, the Court explained, will always be susceptible to aggregate proof (and is either met or not met for all class members).[148] Accordingly, materiality can be decided *en masse* at the adjudication stage (trial or summary judgment).[149] If the class fails to demonstrate materiality, every class member's claim will be rejected on the merits.[150] Because proof of materiality is irrelevant in ruling on certification, the Court reasoned, the defendant may not attempt to rebut materiality at that stage.[151]

After remand in *Halliburton I*, the defendant argued that it should be permitted to oppose certification by attacking the applicability of the fraud-on-the-market theory and thus the presumption of reliance.[152] Specifically, it asserted that the misstatement had no "price impact" on the facts of the case.[153] The Fifth Circuit, relying on *Amgen*, held that the defendant could not proffer the evidence and that the case should proceed to adjudication with the presumption of reliance intact.[154]

In *Halliburton II*, the Supreme Court granted certiorari on that question and added the issue of whether *Basic* ought to be overruled.[155] Justice Scalia had raised that bombshell question during oral argument in *Amgen*.[156] Halliburton argued that economic science had demonstrated that the *Basic* presumption was flawed.[157] The Court rejected the argument and held that Halliburton had not met the heavy burden of overcoming *stare decisis*.[158]

147. *Amgen,* 133 S. Ct. at 1188.

148. *Id.* at 1189.

149. *Id.*

150. *Id.* at 1203-04.

151. In *Amgen*, the defendant sought to prove at certification that what it admitted was a public misstatement was not material because the market clearly understood it to be untrue, in part because of other public statements and documents. *Id.*

152. *Halliburton I*, 131 S. Ct. 2179, 2186 (U.S. 2011).

153. *Id.* at 2187.

154. Erica P. John Fund, Inc. v. Halliburton Co., 718 F.3d 423 (5th Cir. 2013).

155. *Halliburton II*, 134 S. Ct. 2398, 2405 (U.S. 2014).

156. Transcript of Oral Argument at 41, Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2013) (No. 11-1085).

157. *Amgen*, 133 S. Ct. at 1198.

158. *Halliburton II*, 134 S. Ct. at 2411.

As with *Shady Grove*, it is worth pondering how a contrary conclusion would have changed the landscape. Just as the former saved Rule 23 from evisceration by state law, *Halliburton II* rejected nothing less than an existential threat to private securities class actions.

Beyond this, *Halliburton II* clarified the discussion in *Amgen* of what issues may be litigated at the certification stage. As noted above, there are four requirements for invoking the fraud-on-the-market presumption: (1) the misstatement/omission was made publicly, (2) it was material, (3) the securities market is efficient, and (4) the plaintiff bought or sold the securities during the relevant time frame.[159] The Court explained that three of the four requirements – publicity, materiality, and efficiency of the market –concern "price impact"; that is, whether the misrepresentation affected the market price of the security.[160] While *Amgen* held that materiality is an issue to be litigated at the adjudication stage, the representative must demonstrate at certification that the other three are satisfied.[161] Without that showing, the plaintiffs cannot invoke the fraud-on-the-market presumption of reliance.[162]

Because these issues are on the table for certification, the defendant must be permitted to demonstrate lack of "price impact" at that time.[163] Specifically, this means that Halliburton will be permitted present evidence that the misrepresentation did not affect the market price.[164] These securities cases represent significant victories for the plaintiffs' bar. First, the Court rejected efforts to overrule *Basic*. Second, it rejected efforts to front-load litigation based upon substantive elements of Rule 10b-5 claims. Of course, the Court permits the defendant to attack the application of the presumption of reliance, which will add to litigation at the certification stage (though probably in very few cases).[165] Third, the Court made clear in *Amgen* that the representative's burden is to

159. *Id.* at 2413.

160. *Id.* at 2414.

161. *Id.* at 2416.

162. *Id*.

163. *Id.* at 2414.

164. The argument is that the public market discounted the misrepresentation/omission in light of other statements. This would appear to come very close to Halliburton's earlier argument that the misstatement/omission was not material. After *Amgen* and *Halliburton II*, Halliburton cannot introduce evidence of immateriality at the certification motion, but it can argue lack of "price impact."

165. In her concurring opinion, Justice Ginsburg noted that the holding "may broaden the scope of discovery available at certification." Because the evidence will be produced by the defendant, however, she concluded that the expansion of front-loading in *Halliburton II* should "impose no heavy toll on securities-fraud plaintiffs with tenable claims." *Halliburton II*, 134 S. Ct. at 2417.

demonstrate that the Rule 23 prerequisites have been met, and not that every question will be answered on the merits in favor of the class.[166]

Cases in the first two Parts of this Article have dealt with defendants' assertion that certification litigation should embrace more issues. We turn next to a more audacious assertion: that class certification may be avoided altogether.

III. AVOIDANCE: THE ARBITRATION/CLASS "WAIVER" TRUMP CARD

The Supreme Court's fulsome embrace of arbitration clauses is well chronicled.[167] The Federal Arbitration Act (FAA), passed in 1925, decreed an end to judicial hostility to the enforcement of arbitration agreements.[168] At the time, arbitration clauses applied to contractual claims between business entities. In the past generation, arbitration clauses have found their way into innumerable contracts of adhesion and have expanded from contract claims to cover a wide variety of consumer, employment, tort, and federal statutory claims. The Court has been willing to uphold clauses in these new contexts, emphasizing the freedom of parties to contract on such matters.[169] More recently, many adhesion contracts have added another provision: a "waiver" of aggregate litigation[170] – that is, a clause that forbids plaintiffs from joining to assert their claims in arbitration.

This combination sets up a collision course between the pro-contract policy of the FAA, on the one hand, and basic access to justice, on the other. The clash is illustrated by *AT&T Mobility LLC v. Concepcion*.[171] There, customers signed up for a cellphone plan with AT&T that offered a free phone.[172] The problem was that AT&T then charged customers for sales tax on the phone ($30.22 per phone).[173] The

166. Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (U.S. 2011) (emphasis in original) ("Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class.").

167. *See, e.g.*, 13D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3569 (3d ed. 1998) (discussing case law and citing literature).

168. Courts traditionally rejected arbitration clauses (and forum selection clauses, for that matter) on the theory that they constituted improper private efforts to "oust" courts of jurisdiction. *See generally id.* § 2569.

169. State-law contract defenses may be invoked to avoid arbitration. The most important is unconscionability.

170. Because the prohibition of aggregate assertion of claims is typically contained in a contract of adhesion, "waiver" – at least insofar as it implies voluntary relinquishment – is a euphemistic term.

171. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (U.S. 2011).

172. *Id.* at 1742.

173. *Id.* at 1744.

agreement provided for arbitration of disputes and forbade class arbitration.[174] Nonetheless, the plaintiffs brought a federal class action based upon state consumer law.[175] The provider moved to compel arbitration, which the district court denied.[176] The Ninth Circuit affirmed.[177] It relied upon *Discover Bank v. Superior Court*, in which the California Supreme Court held that waivers of the right to collective arbitration are unconscionable if included in adhesion contracts involving negative-value consumer fraud claims.[178] The effect of the California holding was to permit the customers to demand class arbitration even though their contract with the retailer forbade it.[179]

The Court reversed.[180] The five-justice majority, led by Justice Scalia, held that the FAA preempts the state case law.[181] The Court noted that Section 2 of the FAA provides for enforcement of arbitration clauses, "save upon such grounds as exist at law or in equity for the revocation of any contract."[182] This "savings clause" permits invalidation of arbitration agreements on state-law grounds applicable to contracts generally (such as fraud or unconscionability),[183] but not on grounds that apply *only* to arbitration clauses.[184] There are two situations in which the FAA preempts state law: (1) when the state law prohibits outright the arbitration of a type of claim and (2) when a general contract defense is applied in a way that disfavors arbitration.[185] Thus, state-law rules that "stand as an obstacle to the accomplishment of the FAA's

174. *Id.*

175. *Id.*

176. *Id.* at 1744-45.

177. *Id.* at 1745.

178. Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005); *Concepcion*, 131 S. Ct. at 1745.

179. Interestingly, as noted, the representatives sought to bring class litigation, not arbitration. *Concepcion*, 131 S. Ct. at 1744 ("In March of 2006, the Concepcions filed a complaint against AT&T in the United States District Court for the Southern District of California.").

180. *Id.* at 1753.

181. *Id.* at 1740.

182. 9 U.S.C. § 2 (2012).

183. *See, e.g.*, Barras v. Branch Banking & Trust Co. (*In re* Checking Account Overdraft Litig. MDL No. 2036), 685 F.3d 1269 (11th Cir. 2012) (provision that expenses of arbitration be borne by customer regardless of outcome is unconscionable as a matter of general contract law; clause was severable from arbitration provision, however, so arbitration would be ordered); Palmer v. Infosys Techs., Ltd. Inc., 832 F. Supp. 2d 1341 (M.D. Ala. 2011) (arbitration agreement unconscionable as a matter of general contract law; "[w]hile the *Concepcion* Court expressed concern about arbitration morphing into a set of formalized, class-based procedures, this arbitration agreement is unconscionable at an antecedent step.").

184. *Concepcion*, 131 S. Ct. at 1746.

185. *Id.* at 1747.

objectives"[186] are preempted.

According to the Court, the California law in *Discover Bank* was such a rule.[187] One purpose of the FAA is to ensure enforcement of arbitration clauses according to their terms.[188] Another is to foster efficient, speedy dispute resolution.[189] The Court concluded that California law obstructed the latter objective by (1) replacing bilateral arbitration with a slower, expensive, procedurally complicated method "more likely to generate procedural morass than final judgment";[190] (2) placing the arbitrator in the unaccustomed position of having to protect absentees' interests; and (3) exposing the defendant to enormous potential liability based upon the outcome of a single case; this risk is exacerbated by the limited appellate review available in arbitration cases.[191] *Concepcion* had an immediate impact. Several courts held that the FAA preempted state consumer protection laws mandating class resolution.[192] In *Kilgore v. Keybank, National Assn.*,[193] a non-class case, the Ninth Circuit got the message (after being reversed in *Concepcion*).[194] It held that the FAA preempts California law that forbids arbitration altogether (class or individual) in cases seeking public injunctive relief.[195] The theory of the California precedent is that such private attorney general cases should be litigated in court and not arbitrated.[196] Because the state case law was a blanket ban on arbitration, it interfered with the policy goals of the FAA and, under *Concepcion*, was preempted.[197]

There are arguments against class treatment (in litigation or arbitration) in cases like *Concepcion*. One of the historic justifications of the class action is efficiency – it will substitute one case (albeit complex) for thousands of small ones. But negative-value claims such as those in

186. *Id.* at 1748.
187. *Id.* at 1756.
188. *Id.* at 1748.
189. *Id.*
190. *Id.* at 1751.
191. *Id.* at 1751-52.
192. *See, e.g.*, Pendergast v. Sprint Nextel Corp., 691 F.3d 1224 (11th Cir. 2012) (court did not have to reach issue of whether Florida law invalidated class action waiver; to the extent it would, it is preempted by FAA); Coneff v. AT&T Corp., 673 F.3d 1155 (9th Cir, 2012) (Washington law); Cruz v. Cingular Wireless, LLC, 648 F.3d 1205 (11th Cir. 2011) (Florida law).
193. Kilgore v. KeyBank, N.A., 673 F.3d 947 (9th Cir. 2012).
194. *Id*. at 959, *reh'g en banc*, 718 F.3d 1052 (9th Cir. 2013).
195. *Id.* at 960.
196. *Id*. at 958.
197. *Id*. at 959

Concepcion will not be asserted individually.[198] As Judge Posner has said, only a lunatic or a fanatic sues for $30.[199] Because the thousands of small claims would never be filed, aggregation actually creates litigation that would never have been filed. Creating litigation usually is thought to be a bad thing. Moreover, promoting proceedings in these cases seems inconsistent with the maxim *de minimis non curat lex*. That precept teaches us that in this world, we occasionally have to take our lumps for $30. And, of course, aggregation of claims exposes a defendant to potentially catastrophic liability on the basis of one roll of the dice.

But there are profound policies in the other direction. Litigation and arbitration are methods of law enforcement. If no one will file a claim, the law will not be enforced. Stated another way, enforcing a class action "waiver" can be exculpatory: it gives the defendant a pass, at least as to negative-value claims that *de facto* will not be enforced individually. So viewed, *Concepcion* thwarts the power of the states to decide how to enforce their consumer protection (and other) laws. It forbids a state from permitting private vindication of its laws in lieu of (or in addition to) administrative or criminal enforcement.

Of course, state policy must bow to valid applicable federal law. According to *Concepcion*, a state "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[200] This is an important phrase. It suggests that "waivers" of class arbitration will be upheld (when preempted by the FAA) even if it is clear that no one in the putative class will bring an individual claim. This implication is consistent with the Court's relentless theme that agreements are to be enforced by their terms.[201] On the facts, the majority in *Concepcion* concluded that claims would be vindicated in individual arbitration.[202] The agreement in the case was seen as

198. Notice the similarity between the class action arbitration waiver in *Concepcion* and the New York statute in *Shady Grove*. Both the contract in *Concepcion* and the statute in *Shady Grove* rule out aggregation in precisely the circumstance – the small claim case – when we fear that individual claims will not be pursued.

199. Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004).

200. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (U.S. 2011).

201. *See, e.g.*, CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669-673 (U.S. 2012) (because Credit Repair Organizations Act was silent regarding arbitration, agreement to arbitrate claims is enforceable); Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 130 S. Ct. 1758 (U.S. 2010) (when contract was silent regarding permissibility of class arbitration, arbitrator may not infer consent to aggregation). The Court has been very active in arbitration in recent years, and has consistently emphasized the importance of enforcing the agreement as written. *See* WRIGHT ET AL., *supra* note 167, § 3569. *See also* 9 U.S.C. § 4 (2012) (FAA requires enforcement of arbitration provisions "in accordance with the terms of the agreement.").

202. *Concepcion*, 131 S. Ct. at 1753.

consumer-friendly.[203] The clause required arbitration in the customer's home county, required AT&T to pay all costs, and, if the arbitration award was higher than the defendant's offer, the customer would recover $7,500 and double attorney's fees.[204] Thus, the Court did not see the provision as preventing vindication of the consumers' claims.

Consumer advocates question whether the terms of the AT&T agreement in *Concepcion* really promoted individual vindication of claims.[205] In *Cruz v. Cingular Wireless, LLC*,[206] the Eleventh Circuit addressed the same contract involved in *Concepcion*. In *Cruz*, though, unlike in *Concepcion*, plaintiffs' lawyers submitted affidavits from attorneys averring that they would not represent consumers on an individual basis in such cases.[207] They also presented evidence that only an infinitesimal percentage of consumers actually pursued claims under the arbitration provision – notwithstanding the pro-consumer provisions.[208] The Eleventh Circuit concluded, however, that it "need not reach the question of whether *Concepcion* leaves open the possibility that in some cases, an arbitration agreement may be invalidated on public policy grounds where it effectively prevents the claimant from vindicating her statutory cause of action."[209] The argument, the court said, was foreclosed by *Concepcion* itself, which had upheld the very same class action waiver provision.[210]

Lower courts appeared to read *Concepcion* broadly – to hold that the FAA's preemptive power is not readily tempered by the need to facilitate civil enforcement of the law.[211] In the face of this trend,

203. The district court concluded that the class members would be better off pursuing that remedy than aggregate resolution.

204. *Concepcion*, 131 S. Ct. at 1744.

205. Alan S. Kaplinsky & Mark J. Levin, *Consumer Financial Services Arbitration: What Does the Future Hold After Concepcion?* 8 J. BUS. & TECH. L. 345 (2013), *available at* http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1205&context=jbtl.

206. Cruz v. Cingular Wireless, LLC, 648 F.3d 1205 (11th Cir. 2011).

207. *Id.* at 1214.

208. *Id.*

209. *Id.* at 1215.

210. *Id.* The contract in *Concepcion* and *Cruz* contained a "blow up" provision under which invalidity of any part of the arbitration provision would result in voiding arbitration altogether. The Eleventh Circuit discussed this non-severability clause in *Cruz*. If state law invalidated the waiver of class arbitration, the court noted, the entire arbitration agreement would be thwarted, and the case could proceed only in the courts. *Id.* This result would thoroughly frustrate the policy of the FAA and constituted another reason to hold the state law preempted. For some reason, neither the Ninth Circuit nor the Supreme Court in *Concepcion* discussed the blow up provision. The Ninth Circuit later adopted the Eleventh Circuit's reasoning in *Cruz*. *See* Coneff v. AT&T Corp., 673 F.3d 1155 (9th Cir. 2012).

211. *See, eg.*, Litman v. Cellco P'ship, 655 F.3d 225 (3d Cir. 2011); *Cruz*, 648 F.3d 1205; Ferguson v. Corinthian Colls., Inc., 733 F.3d 928 (9th Cir. 2013).

however, the Second Circuit went the other way in *American Express Co. v. Italian Colors Restaurant.*[212] There, a class of restaurant owners sued American Express, alleging that the credit card company violated federal antitrust laws by using monopoly power to force them to accept credit cards at higher interest rates than those charged by competitors.[213] The agreements required arbitration and forbade aggregation.[214] Though the claims were not *de minimus*, plaintiffs argued that they were negative-value claims.[215] Specifically, the cost of retaining expert witnesses on the complex economic issues in such cases would be prohibitive.[216] Only if they could litigate *en masse* would it be feasible to retain experts and prove the case.[217]The Second Circuit struck the class action "waiver" on policy grounds.[218] It distinguished *Concepcion* because the plaintiffs had shown that pursuit of individual claims was not feasible.[219] The court concluded that the "federal substantive law of arbitrability" permits a court to compel class arbitration when it finds that aggregate resolution is the "only economically feasible means" for the plaintiff to pursue its federal-law claim.[220] Stated another way, "effective vindication" of the antitrust laws required invalidation of the class waiver.[221]

The Court reversed, five to three,[222] with Justice Scalia again writing for the majority. Here, the Court could not say, as it could in *Concepcion*, that provisions in the arbitration clause facilitated individual vindication of claims.[223] The Court was willing to accept that

212. Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (*In re* Am. Express Merchs. Litig.), 667 F.3d 204 (2d Cir. 2012), *rev'd sub nom* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (U.S. 2013). The Supreme Court had earlier remanded the case to the Second Circuit for reconsideration in light of *Stolt-Nielsen.* While the case was pending at the Second Circuit on remand, the Court decided *Concepcion*.

213. *Italian Colors*, 667 F.3d at 207.

214. *Id.* at 206.

215. *Id.* at 210.

216. The class asserted that American Express used its monopoly power in the credit card market to force merchants to pay more than they would for competing cards. They argued that the agreement constituted an illegal tying arrangement in violation of Section 1 of the Sherman Act. *Am. Express*, 133 S. Ct. at 2308.

217. *Italian Colors*, 667 F.3d at 212.

218. *Id.* at 219.

219. *Id.* at 214.

220. *Id.* at 213-14. The fact that *Italian Colors* involved federal claims while *Concepcion* involved state-law claims appeared to be of no significance to the Second Circuit or to the Supreme Court.

221. *Id.* at 217.

222. Justice Sotomayor recused.

223. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (U.S. 2013).

individual litigation would be infeasible economically.[224] Still, *Concepcion* governed.[225] The majority explained that nothing in the FAA, the antitrust laws, or Rule 23 evinces an intention to prohibit parties from foregoing their right to assert class claims.[226]

More importantly, the Court discussed the "effective vindication" argument embraced by the Second Circuit.[227] It recognized that "public policy" can invalidate agreements that operate "as a prospective waiver of a party's right to pursue statutory remedies."[228] But nothing in the present agreement impeded the plaintiffs' ability to pursue statutory remedies.[229] The substantive damages claim asserted under the Sherman Act was created 48 years before promulgation of the original Rule 23 made it possible to aggregate such claims.[230] The fact that it is not worth the expense of proving the claim "does not constitute the elimination of the right to pursue that remedy."[231] In short, "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[232] Bluntly, then, the majority concluded that a prohibitively expensive path to vindicate one's rights is not equivalent to the elimination of those rights.[233]

The Court's FAA cases elevate contract over various substantive policies: the plaintiffs agreed (1) to arbitrate instead of litigate and (2) to go it alone. Unless Congress provides that aggregate litigation is necessary for vindication of particular claims, the parties will be bound by their contract.[234] And because of the supremacy of federal law, state law will not be permitted to require group vindication.[235]

Of course, parties are free to contract to arbitrate *en masse*. Presumably, such agreements are rare, and many contracts will not address the issue expressly. In those cases, *Oxford Health* gives some solace to plaintiffs.[236] There, the arbitrator interpreted the arbitration

224. *Id*. at 2313.
225. *Id*. at 2309.
226. Indeed, the Court said, if Rule 23 were interpreted to invalidate private arbitration agreements and waivers, it would likely violate the Rules Enabling Act. *Id.* at 2309-10.
227. *Id*. at 2310-11.
228. *Id.* at 2310 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985)).
229. *Id.* at 2311.
230. *Id.*
231. *Id.*
232. *Id.* at 2306.
233. *Id.* at 2311.
234. *Id.* at 2309.
235. *Id*. at 2320.
236. Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (U.S. 2013).

clause to manifest an agreement to class treatment.[237] Applying the FAA's limited provision for judicial review of arbitration decisions, the Court upheld the order.[238] *Oxford Health* is consistent with the pro-contract policy of the Court's other decisions.[239]

Though *Oxford Health* opens the door for class proceedings, it is not much of an opening. After all, corporations can simply insert class "waivers" into their arbitration provisions. The current state of affairs under *Concepcion* and *Italian Colors* is not encouraging for private enforcement of law through the class mechanism. This problem, however, is not the result of class action jurisprudence. It is a result of the Court's FAA jurisprudence, which uncritically has applied that Act to contracts and claims not envisioned when it was passed. There is, however, no indication that the Court is willing to retreat from its position. Efforts for legislative change have failed. Though the trend threatens aggregate assertion of claims, obviously, not all claims will be subject to contractual limitation. When class litigation proceeds, it is important to determine when the representative's acts can bind class members. We address aspects of that question next.

IV. STATUS OF CLASS MEMBERS IN AN UNCERTIFIED CLASS

Smith v. Bayer Corp.,[240] decided in 2011, and *Standard Fire Ins. Co. v. Knowles*,[241] decided in 2013, concern the fundamental principle that one who has not been accorded a "day in court" cannot be bound by a judgment. *Smith* involved overlapping classes: Case 1 was in federal court under diversity jurisdiction,[242] and Case 2 was in state court.[243] In each, essentially the same class (with different representatives) sued Bayer under West Virginia law for an allegedly defective product.[244] The federal court denied certification under Rule 23(b)(3) because common

237. The parties agreed to submit any "civil action" to arbitration. Because class actions are civil actions, the arbitrator concluded, the parties intended to permit class proceedings. *Id.* at 2067.

238. The arbitrator did not "exceed [his] powers" under 9 U.S.C. § 10(a)(4), so a court is powerless to vacate the order. As the Court explained in *Oxford Health*, the question under that provision is "whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Id.* at 2071.

239. The case is to be distinguished from Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010). There, the arbitrator exceeded his powers by ordering class arbitration in light of the parties' stipulation that they did not agree on the issue of class proceedings.

240. Smith v. Bayer Corp., 131 S. Ct. 2368, 2373 (U.S. 2011).

241. Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (U.S. 2013).

242. *Smith,* 131 S. Ct. at 2373.

243. *Id*.

244. *Id*.

questions would not predominate under applicable state law.[245] The federal court then issued an anti-suit injunction against prosecution of the state class action.[246] It invoked the "re-litigation exception" to the Anti-Injunction Statute, which permits an injunction against state proceedings if necessary to protect or effectuate the federal court's judgments.[247] The Eighth Circuit[248] held that the finding on whether common questions predominated under Rule 23(b)(3) was entitled to issue preclusion and thus that the injunction was justified.[249]

The Court reversed unanimously.[250] First, Case 1 and Case 2 did not present the same issue.[251] Though West Virginia has adopted Rule 23, it interprets the provision differently from federal courts.[252] Thus a finding of predominance of common questions under one did not address the same issue as that raised under the other.[253] Second, the representative in Case 2 could not be bound by the judgment in Case 1.[254] True, he was a class member in Case 1, but he was not the representative, and thus, he was not a party.[255] And because class certification was denied, he could not be bound by the result in Case 1—he had not had his day in court.[256]

Knowles does something similar. Here, the representative filed a class action in state court asserting a state-law claim for alleged breach of homeowners' insurance policies.[257] In the complaint and in an attached affidavit, he expressly limited the amount the class would seek to under $5,000,000.[258] The obvious intent was to defeat removal under

245. *Id*. at 2380.

246. *Id.* at 2374.

247. 28 U.S.C. § 2283 (2012); *Smith,* 131 S. Ct. at 2374.

248. The case was originally filed in state court and removed to federal court in West Virginia, which is in the Fourth Circuit. It was transferred to the District of Minnesota under the MDL statute, 28 U.S.C. § 1407 (2012). That is why the appeal went to the Eighth Circuit.

249. *Smith*, 131 S. Ct. at 2374.

250. *Id.* at 2372.

251. *Id.* at 2378.

252. *Id*. at 2377.

253. The case is reminiscent of Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988), in which differences between the federal and state standards for *forum non conveniens* rendered issue preclusion inapplicable.

254. *Smith*, 131 S. Ct. at 2376.

255. *Id.* at 2380.

256. *Id.*

257. He claimed that the insurance company, in making loss payments to homeowners for hail damage, had unlawfully failed to include a general contractor's fee. The complaint alleged that there were "hundreds, and possibly thousands" of similarly situated policyholders in Arkansas. Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345, 1347 (U.S. 2013).

258. The writ of certiorari and briefs in the case spoke of the representative's "stipulation" to limit the amount sought by the class. The complaint alleged that the representative and class

CAFA, which requires aggregated class claims in excess of $5,000,000.[259]

The defendant removed to federal court under CAFA and showed by a preponderance of the evidence that the claims in fact totaled slightly more than $5,000,000.[260] The burden then shifted to the representative to show to a legal certainty that the claims did not exceed $5,000,000.[261] The district court ordered remand, holding that the statement in the complaint – eschewing damages of more than $5,000,000 – was effective.[262] The Eighth Circuit declined interlocutory review, and the Supreme Court granted certiorari.[263]

The Court vacated the district court's ruling and held that the case invoked subject matter jurisdiction under CAFA.[264] It recognized that a plaintiff can defeat removal by stipulating that she will not accept an amount that would satisfy the jurisdictional amount in controversy requirement.[265] But such a stipulation must be binding on the plaintiff.[266] In *Knowles,* the class representative had no authority to bind the class members to the stipulation because the court had not certified a class.[267] Accordingly, the representative was not in a position to bind the absentee putative class members.[268] The Court explained:

> [A] plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified. . . . Because his precertification stipulation does not bind anyone but himself,

"stipulate they will seek to recover total aggregate damages of less than five million dollars." In an attached affidavit, the representative said that he "will not at any time . . . seek damages for the class . . . in excess of $5,000,000 in the aggregate." *Id.*

259. 28 U.S.C. § 1332(d)(2) (2012). To keep the class claims below $5,000,000, the representative sought only two years' worth of damages on behalf of the class members (of a total of five years that would be permitted under the statute of limitations). *Standard Fire*, 133 S. Ct. at 1347.

260. *Standard Fire,* 133 S. Ct. at 1348.

261. *Id.*

262. The court relied upon Bell v. Hershey Co., 557 F.3d 953 (8th Cir. 2009), which, while not addressing the "legal certainty" standard imposed in *Knowles*, held that a good faith stipulation limiting plaintiff's recovery can defeat federal jurisdiction.

263. Courts had disagreed on whether a representative's limitation of damages could defeat removal under CAFA. *Standard Fire*, 133 S. Ct. at 1348. Of the thirteen class action cases reviewed in this Article, only *Knowles* and *Mississippi ex rel. Hood*, discussed in Part V below, involved CAFA.

264. *Id.* at 1350.

265. *Id.*

266. *Id.*

267. The situation is different with individual litigation. A plaintiff suing for himself may, for example, limit his recovery to $75,000 or less and thus avoid removal on the basis of diversity of citizenship jurisdiction. *Id.*

268. *Id.* at 1349.

> Knowles has not reduced the value of the putative class members' claims. . . . The Federal District Court, therefore, wrongly concluded that Knowles' precertification stipulation could overcome its finding that the CAFA jurisdictional threshold had been met.[269]

Knowles may be seen to promote plaintiff class practice by forbidding a representative from bargaining away class members' rights to sue for the maximum recovery possible. On the other hand, *Knowles* permits defendants to remove cases to federal court under CAFA (assuming minimal diversity) by showing that the aggregate amount in controversy exceeds $5,000,000.

Smith is far more important for plaintiffs because it allows serial re-litigation of class certification. For instance, suppose Rep-1 seeks to represent Class. The court denies certification, however, because, let's say, common questions do not predominate. *Smith* permits Rep-2 to step up to represent the same class for the same claim. Because class certification was denied in Rep-1's case, no class member is bound by the unsuccessful effort. In theory, the defendant would have to defeat any number of serial certification efforts – to face what Professor Redish calls "death by a thousand cuts."[270]

The pro-plaintiff bent of *Smith* is not the result of developments under Rule 23. It is born of the day-in-court principle, which is ultimately rooted in due process. *Smith* and *Knowles* are nice complements to *Taylor v. Sturgell*,[271] in which the Court rejected virtual representation and described the limited circumstances in which a nonparty may be precluded by a judgment.[272]

Smith points out that even states that adopt the Federal Rules are not required to adopt the Court's interpretation of Rule 23.[273] It is not clear, for example, that state courts will follow *Wal-Mart* in applying the commonality requirement of Rule 23(a)(2) or the federal view on

269. *Id.*

270. Martin H. Redish & Megan B. Kiernan, *Avoiding Death by a Thousand Cuts: The Relitigation of Class Certification and the Realities of the Modern Class Action*, 99 IOWA L. REV. 1659 (2014). To avoid this pro-plaintiff result, the authors suggest a rule estopping class counsel from recruiting serial representatives. Professor Clermont has argued that class members should be estopped from re-litigating class certification by analogy to the "jurisdiction to determine no jurisdiction" doctrine. Kevin M. Clermont, *Class Certification's Preclusive Effects*, 159 U. PA. L. REV. 203, 208 (2011). I have argued that class members can be bound by an adverse ruling on class certification, so long as the court found the representative in the first case to be adequate. Richard D. Freer, *Preclusion and the Denial of Class Certification: Avoiding the "Death by a Thousand Cuts,"* 99 IOWA L. REV. BULL. 85 (2014).

271. Taylor v. Sturgell, 553 U.S. 880 (2008).

272. *Id.* at 896.

273. Smith v. Bayer Corp., 131 S. Ct. 2368, 2382 n.12 (U.S. 2011).

procedural front-loading of certification.[274] For these and other reasons,[275] class plaintiffs may prefer to litigate in state court. They face increased obstacles, however, from expansions of federal jurisdiction. The clearest example, of course, is CAFA, which allows a single defendant to remove state-court class actions to federal court based upon minimal diversity of citizenship and an aggregate amount in controversy of $5,000,000.[276] Such powerful magnets make it more difficult for state-court plaintiffs to stay in state court. As we see now, however, the Court has given at least some aspects of these grants a limited interpretation.

V. LIMITED INTERPRETATIONS OF CAFA AND SLUSA

The two remaining cases feature interpretations, respectively, of CAFA and the Securities Litigation Uniform Standards Act (SLUSA). *Mississippi ex rel. Hood v. AU Optronics Corp.* was a *parens patriae* action brought by Mississippi against manufacturers of liquid crystal displays. The suit, filed in state court, alleged violations of state law and sought restitution on behalf of itself and its citizens.[277] The defendants removed under the "mass action" provision of CAFA.[278] This permits federal jurisdiction based upon minimal diversity not only of class actions but of suits (brought in states that do not recognize the class action, such as Mississippi) for monetary relief brought by 100 or more persons.[279] The Court held that Mississippi was the only plaintiff and rejected the argument that those on whose behalf the state sued should be considered.[280] This interpretation of CAFA permits states or their officers to sue on behalf of citizens, to avoid the capacious jurisdiction of CAFA, and remain in state court.[281]

Chadbourne & Parke[282] involved consolidated state-court class

274. For an example of this interpretation, see Jesse Wenger, *The Applicability of State Appeal Bond Caps in Suits Brought in Federal Courts Pursuant to Diversity Jurisdiction,* 162 U. PA. L. REV. 979, 993 (2014).

275. For example, FED. R. CIV. P. 23(f), which permits appellate review of certification decisions, effective in the federal system since 1998, has not been replicated in all state courts. Plaintiffs might fear that Rule 23(f) gives a defendant a chance to second-guess class certification orders that is not available in state courts.

276. 28 U.S.C. § 1332(d)(D)(6) (2012).

277. Mississippi *ex rel.* Hood v. AU Optronics Corp., 134 S. Ct. 736, 740 (U.S. 2014).

278. 28 U.S.C. § 1332(d)(11).

279. *Mississippi ex rel. Hood*, 134 S. Ct. at 741.

280. *Id.* at 739.

281. *Id.* at 744.

282. Chadbourne & Parke LLC v. Troice, 134 S. Ct. 1058 (U.S. 2014).

actions that alleged violations of state law through defendants' Ponzi scheme in sale of certificates of deposit.[283] SLUSA prohibits securities class actions based upon state law when the alleged misrepresentation or omission concerns a "covered security."[284] The certificates of deposit at issue in the case were not "covered," but the alleged fraud consisted of misrepresentations that they were backed by covered securities.[285] The Court held that SLUSA applies only when the actual trading is in covered securities.[286] Because the alleged misrepresentation did not involve such investments, SLUSA did not apply, and the case was permitted to proceed in state court.[287]

The holdings in these cases are jurisdictional and will not affect class practice per se. In each, though, the Court's narrow interpretations uphold the plaintiff's choice of state-court forum.

CONCLUSION

To be sure, there is good news for plaintiffs in this group of thirteen cases. The continued viability of Federal Rule 23 against state encroachment was assured in *Shady Grove*. The Court turned back attempted inroads on damages class actions for violations of Rule 10b-5 in two ways: first, by retaining the presumption of reliance in fraud on the market cases in *Amgen* and, second, by rejecting efforts to require proof of loss causation and materiality at certification in *Halliburton I* and *Amgen*. In addition, efforts to bind class members in the absence of certification were rebuffed in *Smith* and *Knowles*. Finally, narrow interpretations of jurisdictional provisions in *Mississippi ex rel. Hood* and *Chadbourne & Parke* ensure a state-court forum for plaintiffs in certain instances.

Obviously, one should not minimize the importance of the continued viability of Rule 23. Even so, the plaintiff-side victories are narrow. They are rooted in substantive securities law and obvious notions of the day-in-court principle. The defendant-side victories are more profound because they concern Rule 23 itself, and thus affect federal class actions generally. Under *Wal-Mart*, commonality under Rule 23(a)(2) is a higher hurdle in every federal class action.[288] The focus is undeniably less on raising common questions than on generating

283. *Id.* at 1062.
284. 15 U.S.C. § 78bb(f)(1) (2012).
285. *Chadbourne & Parke*, 134 S. Ct. at 1062.
286. *Id.* at 1071-72.
287. *Id.* at 1062.
288. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2555 (U.S. 2011).

answers on a class-wide basis. Moreover, money (whether labeled damages or equitable) can be recovered in a Rule 23(b)(2) class only in the *Allison*-type case in which it flows automatically from the injunctive/declaratory relief and is essentially liquidated. The "equitable relief" and "predominance" arguments for justifying recovery of money in a Rule 23(b)(2) class are no longer viable. Beyond this, the Court has expanded the scope of litigation to be undertaken at the certification stage. Rule 23 does not set forth a pleading standard.[289] The representative must offer "convincing proof" that the requirements are satisfied. This will focus, *inter alia*, on whether merits issues (such as injury and damages) can be proved at trial *en masse*. Whether they can be shown *en masse* will usually entail a battle of experts, and *Wal-Mart* strongly suggests that expert evidence considered at certification must pass muster under *Daubert*. This, of course, increases the cost of certification litigation. And it is now clear that courts must not limit litigation of certification issues merely because they overlap with determinations on the merits.[290] Moreover, the court must permit the defendant to present evidence rebutting plaintiffs' claims for certification and, in Rule 10-5 cases, rebutting application of the fraud-on-the-market theory.[291]

The most profound development, however, comes from *Concepcion* and *Italian Colors*. *Concepcion* emphatically restates that arbitration is a matter of contract, including the adhesion contract.[292] State law mandating class arbitration in the face of a contract to the contrary is preempted. Combining such provisions with class "waivers" creates the perfect storm for plaintiff classes, at least when the expense of litigation outweighs the expected individual recovery. The present state in this regard is the result of the Court's broad application of the FAA and not of class action jurisprudence. In the clash between enforcing contracts as written and ensuring private enforcement of the law, the Court has sided with the former. As a result, for many disputes, the question will not be whether the prerequisites of class certification can be satisfied. It will be whether Rule 23 has any role to play at all.

289. FED. R. CIV. P. 23.1.
290. *Wal-Mart*, 131 S. Ct. at 2551.
291. *Halliburton II*, 134 S. Ct. 2398, 2414-15 (U.S. 2014).
292. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (U.S. 2011).