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I. Introduction

Class actions suits developed in the United States as a form of "group litigation," an alternative to the impracticability or inequities of separate, individual actions of a similarly situated class of plaintiffs and, eventually, defendants. Congressional passage of the Class Action Fairness Act of 2005 (CAFA) provided the federal courts with expounded diversity jurisdiction for the purpose of "assur[ing] fairer outcomes for class members and defendants." However, recent circuit splits regarding class certification under Rule 23 of the Federal Rules of Civil Procedure (FRCP) and the use of aggregate proof in certifying classes have, in an ironic twist of legal fate, resulted in the very same "inconsistent or varying" standards that the rule was designed to prevent.

II. The Origins and History of Class Action Litigation

A class action is "an action in which a representative plaintiff sues or a representative defendant is sued on behalf of a class of plaintiffs or defendants who have the same interests in the litigation as their representative and whose rights or liabilities can be more efficiently determined as a group than in a series of individual suits."[1] Class action suits are a derivative form of "group litigation," which existed as a part of English common law since the Middle Ages and was imported to the

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1. MERRIAM-WEBSTER'S DICTIONARY OF LAW 80-81 (1996).

United States by Justice Joseph Story in the early nineteenth century.[2] Most notably, as a federal judge on the United States Court of Appeals for the Circuit of Rhode Island (the modern-day United States Court of Appeals for the First Circuit), Justice Story wrote the opinion in *West v. Randall*, in which he stated: "It is a general rule in equity, that all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be."[3]

Modern-day class actions are governed by Rule 23 of the FRCP, which was first adopted in 1938, and was amended in 1966 to preclude civil action litigation from "supplement[ing] the role of] regulatory agencies,"[4] and as a result of civil rights legislation.[5] Although "[s]tate rules generally mirrored the federal rule . . . 'entrepreneurial' class action lawyers increasingly filed class actions in state courts" in order to game the legal system by filing in plaintiff-friendly states.[6] The inconsistent and varying standards of these courts frustrated the development of comity within the body of law.

CAFA [7] was enacted as a measure of tort reform, amending and expanding federal diversity jurisdiction primarily to reduce "forum shopping" among plaintiff-friendly state courts. In addition, it aimed to reform coupon settlements to discourage ambitious plaintiffs' attorneys from seeking out tenuous claims that were otherwise void of any substantial economic benefit to individual class members. Such tenuous claims had resulted in excessive attorneys' fees, and cost corporations millions of dollars in damage awards and settlement costs (despite such claims lacking in merit or being otherwise untriable on an individual basis).[8] The stated purpose of the legislation was "to amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes."[9] Although CAFA has succeeded in directing national and

2. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 38, 216-20 (1987).

3. 29 F. Cas. 718, 721 (C.C.D.R.I. 1820).

4. YEAZELL, *supra* note 2, at 232 (citing Harry Kalven, Jr.& Maurice Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 721 (1941)).

5. *Id.* at 240.

6. Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1593 (2006).

7. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended at various sections of 28 U.S.C. (2006)).

8. *See generally id*. *See also* Sherman, *supra* note 6, at 1593, 1614-15.

9. Pub. L. No. 109-2, 119 Stat. 4, 4.

multistate actions into federal courts, thereby decreasing inconsistency among class actions between federal and state courts, recent circuit splits regarding class certification under Rule 23 of the FRCP and the use of aggregate proof in certifying classes has threatened such consistency.

III. Class Certification

A. *Rule 23*

FRCP Rule 23(a) states that members of a class may sue as representatives of all members only if the class meets the prerequisites of numerosity, commonality, typicality, and adequacy of representation.[10] To maintain a class action, the class must meet all of the Rule 23(a) prerequisites, as well as one of the following conditions under Rule 23(b): (1) prosecuting separate, individual actions "would create a risk of . . . inconsistent or varying adjudications . . . that would establish incompatible standards of conduct" of opposing parties, or would otherwise be dispositive to, impede, or substantially impair the interest of other class members; (2) the opposing party's actions or refusal to act "appl[ies] generally to the class, so that final injunctive or corresponding declaratory relief is appropriate respecting the class as whole; or" (3) common questions of law or fact among class members "predominate over any questions affecting only individual members" and "class action is superior to other available methods for . . . adjudicating the controversy."[11]

10. FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.").

11. FED. R. CIV. P. 23(b). *See also* Sherman, *supra* note 6, at 1593-94 (The 1966 "amendment created two new class action categories: a Rule 23(b)(2) class action for injunction or declaratory relief against defendants who had acted on grounds applicable to the class, and a Rule 23(b)(3) class action for money damages on behalf of a grouping of persons who had a question of law or fact in common. The former lead to the civil rights and institutional reform class actions of the 1970s and 1980s that resulted in significant changes in certain practices of both governmental institutions and private businesses. The latter lead initially to class actions based on federal laws such as antitrust, securities fraud, and employment discrimination, but, by the 1980s and 1990s, migrated to a broad spectrum of commercial, consumer protection, environmental, product liability, and mass tort cases.") (internal citations omitted).

After the 1966 amendments, district courts struggled with how to determine whether a class met the prerequisites and conditions of Rule 23, especially given that some factors included a preliminary review of evidence.[12] Even within the circuits, sister district courts issued polarizing opinions, some endorsing full evidentiary reviews on the merits and others rejecting any kind of review of certification requirements if the question rested even partially on the merits of the case.[13]

B. Eisen *Rule and* Falcon

In *Eisen v. Carlise & Jacquelin*, the Supreme Court was confronted with the evidentiary issue and held that "[t]here is nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[14] Here, the Court found improper the district court's use of a preliminary hearing on the merits to determine the appropriateness of shifting from the representative plaintiff to the defendant the onerous and prohibitive cost[15] of notice to other class members.[16] The Court based its finding on an opinion by Judge Wisdom of the United States Court of Appeals for the Fifth Circuit, stating: "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."[17] *Eisen* quickly became the standard rule, precluding a preliminary

12. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 15 DUKE L.J. 1251, 1263-64 (2002).

13. *See id.* (citing Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968); Mersay v. First Republic Corp. of Am., 43 F.R.D. 465 (S.D.N.Y. 1968)).

14. 417 U.S. 156, 156-58 (1974).

15. Expenses for notice were two hundred and twenty-five thousand dollars, and the individual claim of the representative plaintiff was seventy dollars. *See id.* at 157, 161, 167.

16. *See id.* at 157, 165, 166.

17. *Id.* at 178 (citing Miller v. Mackey Int'l, Inc., 452 F.2d 424, 427 (5th Cir. 1971)). In *Miller*, Judge Wisdom further stated:

> Rule 23 delineates the scope of inquiry to be exercised by a district judge in passing on a class action motion. Nothing in that Rule indicates the necessity or the propriety of an inquiry into the merits. Indeed, there is absolutely no support in the history of Rule 23 or legal precedent for turning a motion under Rule 23 into a Rule 12 motion to dismiss or a Rule 56 motion for summary judgment by

review of the merits of a case at class certification, including those cases where such a review would identify frivolous or weak class action suits and, more importantly, those cases that do not satisfy the requirements and conditions of Rule 23.[18]

Although the rule was broadly accepted, judges were still faced with the same evidentiary determinations in ensuring compliance with Rule 23. The Supreme Court, in *General Telephone Co. of the Southwest v. Falcon*, again citing the United States Court of Appeals for the Fifth Circuit, noted "[t]he need to carefully apply the requirements of Rule 23(a)."[19] Here, the Court rejected a class certification for racial discrimination, where the plaintiff who alleged discrimination in promotion failed to provide sufficient evidence to establish a common connection between alleged discriminatory promotion practices and alleged discriminatory hiring practices, and therefore failed to establish the commonality prerequisite of Rule 23(a).[20] The Court effectively disavowed the across-the-board rule, which recognized racial discrimination as class discrimination, that some courts used to bypass the requirements of Rule 23.[21] The Court held that a class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[22] District courts were forced to reconcile the "rigorous analysis" required in *Falcon* with the *Eisen* rule, and while the courts agreed upon the difficulty of their dilemma,[23] there was no such unison among the circuits as to its

> allowing the district judge to evaluate the possible merit of the plaintiff's claims at this stage of the proceedings. Failure to state a cause of action is entirely distinct from failure to state a class action.

452 F.2d at 428.

18. *See* Bone & Evans, *supra* note 12, at 1265-66.

19. 457 U.S. 147, 160-61 (1982) (citing Johnson v. Ga. Highway Express, Inc., 417 F.2d 1122, 1125-27 (5th Cir. 1969)).

20. *Id.* at 160 ("The District Court's error in this case . . . is the failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a).").

21. *See id.* at 157.

22. *Id.* at 161.

23. *See* Eggleston v. Chi. Journeyman Plumbers' Local Union No. 130, 657 F.2d 890, 895 (7th Cir. 1981) ("We have noted that the boundary between a class determination and the merits may not always be easily discernible."); Stastny v. S. Bell Tel. & Tel. Co., 628 F.2d 267, 275 (4th Cir. 1980) ("The resulting difficulty of making a fair determination of class action status in advance of trial on the merits in these cases produces a dilemma for trial courts that is well known and for which no happy general solution has yet been, or is likely to be, found.").

solution.[24]

C. *Circuit Split*

1. Rigorous Analysis

The United States Court of Appeals for the Fifth Circuit, relying on, but also differentiating its case from, *Falcon*,[25] held in *Castano v. Am. Tobacco Company*, that "[a] district court certainly may look past the pleadings to determine whether the requirements of Rule 23 have been met . . . [and this] is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues."[26] Here, the court rejected a class certification because the district court failed to properly consider the effect of state law on the "predominance" of common questions of law or fact and the "superiority" of class action as required in Rule 23(b)(3).[27]

The United States Court of Appeals for the Seventh Circuit, in *Szabo v. Bridgeport Machines, Inc.*, rejected the twin notions that a court may not delve into the facts of a case to determine if it is proper for class action litigation and, with regards to class certification, that the plaintiff's pleadings should be accepted as true.[28] The court determined that prior to class certification, "a judge should make whatever factual and legal inquiries are necessary under Rule 23."[29] "[S]ometimes it may be necessary for the court to probe beyond the pleadings before coming to rest on the certification question."[30]

But the United States Court of Appeals for the Fourth Circuit, in *Gariety v. Grant Thornton, LLP*, provided the greatest departure from the standard *Eisen* rule, holding that *Eisen* "does not mean that consideration

24. *See* Bone & Evans, *supra* note 12, at 1268.

25. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996) ("In *Eisen*, the Court held that it was improper to make a preliminary inquiry into the merits of a case, determine that the plaintiff was likely to succeed, and consequently shift the cost of providing notice to the defendant.").

26. *Id.*

27. *See id.* at 745-46.

28. 249 F.3d 672, 675 (7th Cir. 2001) ("The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it.").

29. *Id.* at 676.

30. *Id.* at 677 (citing Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160 (1982)).

of facts necessary to a Rule 23 determination is foreclosed merely because they are required to be proved as part of the merits."[31] The court held such determinations:

> [M]ust focus on the requirements of the rule, and if findings made in connection with those requirements overlap findings that will have to be made on the merits, such overlap is only coincidental . . . [and] serve the court only in its determination of whether the requirements of Rule 23 have been demonstrated.[32]

Furthermore, *Gariety* emphasized the requirement of the court to issue findings as to whether the case meets the prerequisites and conditions of Rule 23.[33]

The United States Court of Appeals for the Fifth Circuit, relying on *Falcon* and building on *Gariety*, held in *Unger v. Amedisys Inc.* that courts must apply "rigorous, though preliminary, standards of proof" to ensure compliance with Rule 23.[34] Further, the court stated in *Bell v. Ascendant Solutions, Inc.* that to deny the requirement of such a standard "betrays a mis-reading of *Eisen*, which . . . does not suggest that a court is limited to the pleadings when deciding on class certification."[35] Instead, *Eisen* "stands for the unremarkable proposition that to the description of this the strength of a plaintiff's claim should not affect the certification decision."[36] Both *Unger* and *Bell* dealt with securities fraud cases, where the plaintiff class of investors failed to establish sufficient evidence to support a rebuttable presumption of an "efficient market" as required to support the fraud-on-the-market doctrine[37] and thereby failed

31. 368 F.3d 356, 366 (4th Cir. 2004).

32. *Id.*

33. *Id.* ("Thus, while an evaluation of the merits to determine the strength of plaintiffs' case is not part of a Rule 23 analysis, the factors spelled out in Rule 23 must be addressed through findings, even if they overlap with issues on the merits.").

34. 401 F.3d 316, 322 (5th Cir. 2005).

35. 422 F.3d 307, 311 (5th Cir. 2005).

36. *Id.* (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996)).

37. *See generally* Basic, Inc. v. Levinson, 485 U.S. 224 (1988). In *Levinson*, the Supreme Court articulated the fraud-on-the-market doctrine—the notion that, in a securities fraud case, an efficient market gives rise to a rebuttable presumption of reliance as required for a 10b-5 claim. In a class action, the presumption establishes reliance for the class as a whole. *See id.* Without it, a plaintiff class in a 10b-5 case could not be certified because the questions of law and fact for a showing of reliance by each plaintiff would be individualized and predominate over common issues, and, most likely, the

to establish the class-wide reliance element required to certify the class of a 10b-5 claim.[38] *Unger* also authorized full discovery to ensure compliance with the conditions and requirements of Rule 23.[39]

The United States Court of Appeals for the Second Circuit attributed the confusion of lower courts regarding *Falcon* to a misreading of *Eisen* by the very same courts.[40] The court, in *IPO*, aligned itself with "*Szabo, Gariety*, and all other decisions" permitting an inquiry into the merits of a case when determining class certification.[41] And while the *IPO* court resisted the call for requiring "findings," the court did require a "definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues."[42] The court concluded that: a determination must be made as to whether "each of the Rule 23 requirements has been met;" the district judge must "resolve[] any factual disputes relevant to each of the Rule 23 requirements;" such obligation "is not lessened by overlap between a Rule 23 requirement and a merits issues;" and while the district judge may not evaluate any merits issues "unrelated to a Rule 23 requirement," he has broad "discretion" as to the scope and extent of any "discovery" or "hearing[s]" necessary to "determine whether [the] requirements are met."[43] In doing so, the *IPO* court rejected the use of a "some showing" standard—disavowing its own precedents implying such a standard, as well as the assertion that expert testimony may establish a component of Rule 23 merely by not being "fatally flawed."[44]

claims and defenses would also be individualized as well. *See id.*

38. *See Unger*, 401 F.3d at 322; *Bell*, 422 F.3d at 312.

39. *Unger*, 401 F.3d at 321 ("To assist the court in this process it may sanction controlled discovery at the certification stage. The plain text of Rule 23 requires the court to 'find,' not merely assume, the facts favoring class certification. Rule 23(b)(3)."). *See also* FED. R. CIV. P. 23 advisory committee's note.

40. Miles v. Merrill Lynch & Co. (*In re* Initial Pub. Offerings Sec. Litig.), 471 F.3d 24, 33-34 (2d Cir. 2006)

41. *Id.* at 41.

42. *Id.* at 40 ("We resist saying that what are required are 'findings' because that word usually implies that a district judge is resolving a disputed issue of fact. Although there are often factual disputes in connection with Rule 23 requirements . . . the ultimate issue as to each requirement is really a mixed question of fact and law. A legal standard, e.g., numerosity, commonality, or predominance, is being applied to a set of facts . . . which might be in dispute. The Rule 23 requirements are threshold issues, similar in some respects to preliminary issues such as personal or subject matter jurisdiction. We normally do not say that a district court makes a 'finding' of subject matter jurisdiction; rather, the district court makes a 'ruling' or a 'determination' as to whether such jurisdiction exists.").

43. *Id.* at 41.

44. *Id.* at 42.

The court also rejected any notion that prevents the court from weighing conflicting evidence related to class certification merely because the evidence also involves an issue on the merits.[45]

The *IPO* court reached its decision to require a "definitive assessment," rather than "findings," partly on the basis of a prior decision of the United States Court of Appeals for the First Circuit.[46] The First Circuit, *In re Polymedica Securities Litigation*, agreed with the "majority view" that a district judge is "entitled to look beyond the pleadings and consider evidence" in determining whether or not a case meets the requirements of Rule 23 for class certification.[47] In *Polymedica*, the court held that "the question of how much evidence of efficiency" is necessary for the applicability of the fraud-on-the-market doctrine's presumption of reliance was "one of degree," noting that its use of "generalities" would not settle the question, but was "the best we can do."[48] The First Circuit later, in *New Motor Vehicles*, wholly endorsed the rigorous review as to the requirements and conditions of Rule 23 as required by the other circuits.[49] The court, in reviewing a denial of class certification, determined that the district court rightly conducted discovery and a "searching inquiry" into the merits of the case when evaluating and weighing competing expert testimony as to the predominance and superiority requirements of Rule 23(b)(3).[50]

The United States Court of Appeals for the Third Circuit initially held that "[a] class certification decision requires a thorough examination of the factual and legal allegations."[51] The court referred to the class

45. *See id.*

46. *See id.* at 39.

47. 432 F.3d 1, 6 (1st Cir. 2005).

48. *See id.* at 17.

49. *See* Brown v. Am. Honda (*In re* New Motor Vehicles Canadian Exp. Antitrust Litig.), 522 F.3d 6, 25-26 (1st Cir. 2008) ("*PolyMedica* . . . could be read, but we think not properly, as limiting this requirement that district courts probe into the viability of the premises of plaintiffs' theory of injury to cases employing only legal presumptions of injury. Under this circuit's approach, in our view, a searching inquiry is in order where there are not only disputed basic facts, but also a novel theory of legally cognizable injury.").

50. *See id.* at 26 ("We do not need to resolve now whether 'findings' regarding the class certification criteria are ever necessary, but we do hold that when a Rule 23 requirement relies on a novel or complex theory as to injury, as the predominance inquiry does in this case, the district court must engage in a searching inquiry into the viability of that theory and the existence of the facts necessary for the theory to succeed.").

51. Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 166 (3d Cir. 2001) (citing Barnes v. Am. Tobacco Co., 161 F.3d 127, 140 (3d Cir. 1998)).

certification determination as the "defining moment" in class actions, and recognized its importance, in that "it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants."[52] The court also noted that, "in reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action."[53] However, the Third Circuit clarified its position as to the requirements of class certification[54] in a manner similar to how the First Circuit addressed the misperceptions of *Polymedica* in *New Motor Vehicles*.[55]

In *Hydrogen Peroxide*, the United States Court of Appeals for the Third Circuit rejected the notion of a "threshold showing" by a party in establishing that Rule 23 requirements are met, instead requiring each of the requirements to be met by factual determinations using the preponderance of the evidence standard.[56] The court reiterated that it "must resolve all factual and legal disputes relevant to class certification, even if they overlap with the merits – including disputes touching on elements of the cause of action."[57] Finally, and most importantly, the Third Circuit held "the court's obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it."[58] In doing so, the court rejected certification of a class of plaintiffs—in an antitrust claim alleging price fixing by the manufacturers of hydrogen peroxide—consisting of all direct purchasers, disavowing its own precedents, which provided a presumption, or alternatively, required a minimal showing by plaintiffs, that all members of a class of direct purchasers are impacted by a price-fixing conspiracy.[59] The court found that the district court

52. *See id.* at 162.

53. *Id.* at 168-69 ("We must probe beyond the surface of plaintiffs' allegations in performing our review to assess whether plaintiffs' securities claims satisfy FED. R. CIV. P. 23's requirements.").

54. *See generally In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008).

55. *See generally New Motor Vehicles*, 522 F.3d 6 (1st Cir. 2008).

56. *Hydrogen Peroxide*, 552 F.3d at 307. The Third Circuit was joined by the Second and Fifth Circuits in articulating the preponderance of the evidence standard of proof. *See* Alaska Elec. Pension Fund v. Flowserve Corp., 572 F. 3d 221, 228 (5th Cir. 2009); Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196, 202 (2d Cir. 2008).

57. *Hydrogen Peroxide*, 552 F.3d at 307.

58. *Id.*

59. *See id*. *See also* Winoff Indus., Inc. v. Stone Container Corp. (*In re* Linerbard

failed to consider all relevant evidence and arguments by either party and erred when it did not take into consideration the defendant's contrary expert testimony, which showed that half the class suffered no injury.[60]While the Third Circuit's move to permit consideration of expert testimony by both parties was considered by some legal commentators to delve into a "battle of experts," the court doubled down and further stated: "[w]eighing conflicting expert testimony is not only permissible; it may be integral to the rigorous analysis Rule 23 demands."[61] The decision aligned the Third Circuit with the First, Second, Fourth, Fifth, Seventh, and Eighth Circuits in requiring the court to review all relevant evidence relating to class certification, including expert testimony and regardless of whether it overlaps with the merits of the case.[62]

The United States Court of Appeals for the Tenth Circuit, relying on *Gariety*, *IPO*, and its own precedent[63] requiring a rigorous analysis and findings regardless of any overlap with the merits, found a district court erred when the court, relying on *Eisen*, certified a class without properly evaluating whether it met the requirements of Rule 23.[64] Here, the Tenth Circuit held that the claims of inmates alleging a "wide range of

Antitrust Litig.), 305 F.3d 145, 164 (3d Cir. 2002) (allowing for impact of all class members to be proved thorough expert testimony "supported by charts and studies"); Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977) (providing a "shortcut" or presumption of impact by all members of a relevant class of direct purchasers in a price fixing conspiracy).

60. *Hydrogen Peroxide*, 552 F.3d at 312-27. The court, noting defendants moved for but were denied exclusion of the plaintiff's expert testimony based on the *Daubert* standard, reiterated that whether or not expert testimony is admissible under *Daubert* or any other standard does not determine "whether the district court is satisfied, by all the evidence and arguments including all relevant expert opinion, that the requirements of Rule 23 have been met. *Id.* at 315 n.13.

61. *See id.* at 312-27. The court, like in *Unger*, relied on Rule 23's *Advisory Committee Notes*, which "guide[s] the trial court in its proper task—to consider carefully all relevant evidence and make a definitive determination that the requirements of Rule 23 have been met before certifying a class." *Id.* at 320.

62. *See id. See also* Brown v. Am. Honda (*In re* New Motor Vehicles Canadian Exp. Antitrust Litig.), 522 F.3d 6, 20-21 (1st Cir. 2008); Miles v. Merrill Lynch & Co. (*In re* Initial Pub. Offering Sec. Litig.), 471 F.3d 24, 42 (2d Cir. 2006); Blades v. Monsanto Co., 400 F.3d 562, 575 (8th Cir. 2005); Unger v. Amedisys, Inc., 401 F.3d 316, 321 (5th Cir. 2005); Gariety v. Grant Thorton, LLP, 368 F.3d 356, 366 (4th Cir. 2004); West v. Prudential Sec., Inc., 282 F.3d 935, 938 (7th Cir. 2002).

63. *See* Shook v. Bd. of Cnty. Comm'rs, 543 F.3d 597, 613 (10th Cir. 2008) (quoting *Grant Thorton*, 368 F.3d at 366) (requiring "findings," regardless of any "overlap with issues on the merits"); Shook v. El Paso Cnty., 386 F.3d 963, 968 (10th Cir. 2004) (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982)) (requiring "rigorous analysis").

64. Vallario v. Vandehey, 554 F.3d 1259, 1267 (10th Cir. 2009).

[discriminating and unconstitutional] behavior" against a county sheriff failed to allege individual claims "sufficiently similar that they can be addressed," that there was no relationship between the class injuries and the injunctive or declaratory relief sought, and that the class thereby failed to meet the conditions of Rule 23(b)(2).[65] Likewise, the United States Court of Appeals for the Eleventh Circuit has long held that *Eisen* does not limit the court from assuring compliance with Rule 23.[66] More recently, the court held that the district court must "conduct a rigorous analysis of the Rule 23 prerequisites before certifying a class."[67]

2. *Eisen* Remains

However, not all circuits agree that such a rigorous and substantial review is necessary to assure compliance with Rule 23. The United States Court of Appeals for the Sixth Circuit retains a staunch endorsement of the *Eisen* rule, and does not consider class certifications to require any inquiry into the merits of the case.[68] Similarly, the United States Court of Appeals for the D.C. Circuit also views the proposition that *Eisen* permits judges to refuse to "scrutinize" the evidence presented to establish the requirements of Rule 23 as "well-settled law."[69]

65. *See id.* at 1267-68.

66. *See* Love v. Turlington, 733 F.2d 1562, 1564 (11th Cir. 1984) ("While it is true that a trial court may not properly reach the merits of a claim when determining whether class certification is warranted, this principle should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements.") (internal citations omitted).

67. Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1266 (11th Cir. 2009). Further, the Eleventh Circuit explained that "the trial court can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied." *Id.*

68. *See* Beattie v. CenturyTel, Inc., 511 F.3d 554, 560 (6th Cir. 2007) ("Lastly, Rule 23 does not require a district court, in deciding whether to certify a class, to inquire into the merits of the plaintiff's suit."); Daffin v. Ford Motor Co., 458 F.3d 549, 553 (6th Cir. 2006) (quoting Eisen v. Carlise & Jacquelin, 417 U.S. 156, 177-78 (1974) ("The court may ultimately accept or reject this reading of the contract, but a court should not 'conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.'").

69. *See In re* Nifedipine Antitrust Litig., No. 08-8014, 2009 U.S. App. LEXIS 3643, at *2 (D.C. Cir. Feb. 23, 2009) ("[T]he propriety of a district court's refusal to scrutinize the probative value of evidence proffered to demonstrate that the requirements of FED. R. CIV. P. 23 are satisfied is well-settled.") (internal citations omitted); *In re* Rand Corp., No. 02-8007, 2002 U.S. App. LEXIS 13683, at *2 (D.C. Cir. July 8, 2002) (citing *Eisen*, 417 U.S. at 177).

The United States Court of Appeals for the Eighth Circuit, in *Blades v. Monsanto Co.*, held that "the preliminary inquiry [at class certification] may require the court to resolve" factual and legal disputes, even if overlapping with the merits of the case, but "only insofar as necessary that the evidence would be sufficient, if the plaintiff's general allegations were accepted as true, to make out a prima facie case."[70] Invoking *Eisen*, the court warned: "The closer any dispute at the class certification stage comes to the heart of the claim, the more cautious the court should be in ensuring that it must be resolved in order to determine the nature of the evidence the plaintiff would require."[71] This proposition is similar to that which was inferred by the First Circuit in *Polymedica* and later rejected in *New Motor Vehicles*.[72]

Further, the court in *Blades* suggested that such preliminary inquiries at class certification do not require such a rigorous review, as error in certification may be redressed at a later time in trial after full discovery.[73] Such a proposition would be in conflict with the Rule 23 Advisory Committee's notes on the 2003 amendments and a legal inverse of the assertion in *Unger* and *Hydrogen Peroxide* that authorizes full discovery in a court's attempt to ensure compliance with Rule 23.[74]

3. *Ninth Circuit:* Dukes v. Wal-Mart

Still, there is no circuit more difficult than the Ninth Circuit for legal commentators to discern a cogent, cohesive, or even continuous, legal framework with regards to class certification standards. In *Dukes v. Wal-Mart*, a recent and controversial[75] decision, the court clarified its

70. 400 F.3d 562, 567 (8th Cir. 2005).

71. *Id.* (citing *Eisen*, 417 U.S. at 177-78).

72. *See* Brown v. Am. Honda (*In re* New Motor Vehicles Canadian Exp. Antitrust Litig.), 522 F.3d 6, 24-26 (1st Cir. 2008).

73. *Blades*, 400 F.3d at 567 ("When the decision on class certification comes before full merits discovery has been completed, the court must necessarily conduct this preliminary inquiry prospectively. A decision to certify or not to certify a class may therefore require revisiting upon completion of full discovery.").

74. *See* Unger v. Amedisys Inc., 401 F.3d 316 (5th Cir. 2005). *See also In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008).

75. *See* James Beck, *Dukes v. Walmart -- On to the Supreme Court, We Hope*, FORBES (Apr. 26, 2010), http://www.forbes.com/sites/docket/2010/04/26/dukes-v-walmart-on-to-the-supreme-court-we-hope/; Donald M. Falk et al., Dukes v Wal-Mart Stores*: En Banc Ninth Circuit Lowers the Bar for Class Certification and Creates Circuit Splits in Approving Largest Class Action Ever Certified*, CPI ANTITRUST J. (Aug. 2010), *www.appellate.net/articles/TheCPIAntitrustJournal_Aug2010.pdf*; Mark Moller, *The*

standard in an attempt to "thread the needle" of sufficiently homogenizing its decision with the decisions of other circuits, yet still distinguishing its decision.[76] The Ninth Circuit concluded that, although the circuits have articulated different standards, they essentially achieve the same result.[77] Further, if there are any differences, the court placed itself among "the more rigorous end of [the] spectrum."[78]

The case involved a class of five hundred thousand to 1.5 million female employees at Wal-Mart's thirty-four hundred stores in forty-one geographic regions, alleging Title VII gender discrimination in salary and promotional opportunities.[79] The defendant, Wal-Mart, attacked the commonality and typicality requirements of the class under Rule 23(a), as the class members worked at different levels, for different stores, and for different managers and supervisors responsible for salary and promotions.[80] As noted by the dissent, the fact that some of the class members were the very supervisors who were perpetrating the alleged discrimination created the situation of "placing victims and their alleged victimizers on the same side of the counsel table."[81] The court dispensed with these arguments at great length, mainly supported by district court decisions and selected decisions of other circuits, many of which were

Ninth Circuit's Controversial New Class Action Decision, CATO @ LIBERTY (Apr. 27, 2010, 5:05 PM), http://www.cato-at-liberty.org/the-ninth-circuits-controversial-new-class-action-decision.

76. *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 581-94 (9th Cir. 2010) (en banc).

77. *See id.* at 583 ("[D]ifferent circuits have used different words in articulating the review necessary, we think . . . . [T]he core holding across circuits . . . is essentially unanimous."). *But cf. New Motor Vehicles*, 522 F.3d at 24 (finding a "spectrum" of the degree of analysis required for class certification by the different circuits); Miles v. Merrill Lynch & Co. (*In re* Initial Pub. Offerings Sec. Litig.), 471 F.3d 24, 38 (2d Cir. 2006) (noting the different approaches among circuits regarding the analysis required for class certification).

78. *Dukes*, 603 F.3d at 584 (quoting *New Motor Vehicles*, 522 F.3d at 24).

79. *See id.* at 577-78.

80. *See id.* at 599-615. *See also id.* at 652 (Kozinski, C.J., dissenting) ("Maybe there'd be no difference between 500 employees and 500,000 employees if they all had similar jobs, worked at the same half-billion square foot store and were supervised by the same managers. But the half-million members of the majority's approved class held a multitude of jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed depending on each class member's job, location and period of employment. Some thrived while others did poorly. They have little in common but their sex and this lawsuit.").

81. *Id.* at 630 n.4 (Ikuta, J., dissenting).

decided prior to Rule 23's 2003 Amendments, and CAFA.[82]

Wal-Mart also objected to the certification under Rule 23(b)(2), which requires the plaintiff to show that the defendant "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole."[83] Wal-Mart contended that the district court "paid lip service" to the rule, because it "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[84] The Ninth Circuit dismissed Wal-Mart's argument by disavowing the two standards for determining when monetary relief "predominates" injunctive relief—one of which the court's precedent developed, the district court relied on in certifying the class, and the court in *Dukes* called "fatally flawed."[85] Instead, the Ninth Circuit espoused a third, different standard for testing predominance, which it appropriated directly from *Webster's Collegiate Dictionary*: "superior [in] strength, influence, and authority."[86] The court granted the plaintiff declaratory relief recognizing the company-wide gender discrimination at Wal-Mart and injunctive relief stopping further discriminatory practices by management, rejecting Wal-Mart's argument that the billions of dollars in monetary claims, including back pay, undermined the plaintiff's assertion.[87]

In its petition for a writ of certiorari to the Supreme Court, Wal-Mart, contended that this standard is wrong because it creates a three-way split among the circuits, and encourages plaintiff classes unable to meet the requirements of Rule 23(b)(3) to forum shop "in the hopes of

82. *See generally id.* (majority opinion).

83. *Id.* at 615 (quoting FED. R. CIV. P. 23(b)(2)).

84. *Id.* (quoting FED. R. CIV. P. 23(b)(2) advisory committee's note).

85. *Id.* at 616. *See also* Molski v. Gleich, 318 F.3d 937, 949 (9th Cir. 2003) (requiring the court to look at the intent of the plaintiff class to determine whether or not certification is appropriate); Robinson v. Metro-N. Commuter R.R., 267 F.3d 147, 164 (2d Cir. 2001) (quoting Allison v. Citgo Petroleum Corp., 151 F.3d 402, 430 (5th Cir. 1998) (Dennis, J., dissenting)) (requiring a balancing test to ensure that the "value to the plaintiffs of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed.") (internal quotation marks omitted); *Allison*, 151 F.3d at 425 (holding claims for monetary relief "predominate unless they are incidental to related claims for injunctive or declaratory relief.").

86. *See Dukes*, 603 F.3d at 616 (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 978 (11th ed. 2004)) (internal quotation marks omitted).

87. *See id.* at 615-20. *But cf.* Cooper v. S. Co., 390 F.3d 695 (11th Cir. 2004) (holding that an employment discrimination suit could not be certified under Rule 23(b)(2) where the final relief related exclusively or predominantly to money damages).

securing a mandatory certification."[88] In the petition, Wal-Mart asked the Supreme Court to settle "[w]hether claims for monetary relief can be certified under Federal Rules of Civil Procedure 23(b)(2)."[89]

D. *Aggregate Proof*

As class actions involve increasingly complex fact scenarios, the use of aggregate proof in class certifications antagonizes and increases the variance resulting from circuit splits. Whereas individual claims look to evidence at the *micro* perspective, aggregate proof allows class actions to view evidence at the *macro* level. Aggregate proof is "evidence—characteristically, in the form of expert submissions involving sophisticated statistical or economic analysis—that presumes a view of the proposed class."[90] Aggregate proof plays a pivotal role in class certification.[91] Where aggregate proof offered by the plaintiff class should show similar wrongs and injuries, the defendant's aggregate proof is likely to show individualized scenarios, making class certification impossible.[92] Moreover, it is often difficult to determine the substantive law from which aggregate proof should be viewed.[93]

Due to technological advances and improved social and economic research, aggregate proof plays a large role in the certification process of class actions in employment discrimination, securities fraud, antitrust, and RICO cases.[94] After *Falcon* did away with the across-the-board rule,[95] a plaintiff class seeking to rely on a company-wide discrimination claim to survive class certification must produce aggregate proof through labor or human resource experts, psychologists, statistics, demographics,

88. Petition for Writ of Certiorari at 17, Wal-Mart Stores, Inc. v. Dukes, 603 F.3d 571 (9th Cir. 2010) (No. 10-277).

89. *Id.* at i.

90. Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 101 (2009).

91. *Id.* at 102 ("The proper role of aggregate proof in class certification is far from a mere technicality. The desired effect of aggregate proof is considerable—indeed, well nigh decisive—on the class certification question.").

92. *See id.* at 103.

93. *See id.* at 104 (quoting McLaughlin v. Am. Tobacco Co., 552 F.3d 215, 220 (2d Cir. 2008)) ("[T]he real concern about aggregate proof in class certification lies in its threat 'to conform the law to the proof.'"). *See also* Bone & Evans, *supra* note 12, at 1271 ("The more controversial cases are those in which the balance between commonality and individuality is much closer and the evidence more difficult to evaluate.").

94. *See generally* Nagareda, *supra* note 90, at 115-30, 135-49.

95. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147 (1982).

and other relevant data. This is required to show commonality under Rule 23(a), and either that the opposing party acted upon the class as a whole, as required under Rule 23(b)(2), or that common questions predominate over individual ones as necessary for certification under Rule 23(b)(3).[96]

While the fraud-on-the-market doctrine articulated in *Basic, Inc. v. Levinson* is still an acceptable and widely used presumption of reliance in efficient markets for 10b-5 claims, it does not apply to inefficient markets. In order to establish that an efficient market exists, some circuits require both aggregate proof (in the form of financial experts, economists, auditors and accountants, market data, and pricing), and other relevant information (such as loss causation and class-wide reliance on the fraud).[97] Similarly, antitrust law requires aggregate proof relating to market pricing and market consequences of the alleged wrong to sustain a class action.[98] RICO claims, similar to securities fraud claims, require a showing of reliance and loss causation, generally produced through aggregate proof.[99]

For courts that do not subscribe to the "rigorous analysis" requirement of class certification, such as *Blades*—which accepts the plaintiff's allegations as true and fails to consider conflicting testimony—the determination will nearly always result in certification.[100] Similarly, the Second Circuit in *IPO* rejected the "some showing" standard for meeting class certification requirements, as well as the notion that expert opinion can satisfy those requirements so long as it is not "fatally flawed."[101]

Even among those circuits that subscribe to a meaningful review of the evidence at class certification, the use of expert opinions and the scrutiny applied by the courts can play a decisive role in whether or not a class is certified. The United States Court of Appeals for the Seventh Circuit held that merely hiring a competent expert does not guarantee certification for a plaintiff class, but rather the court must consider all relevant evidence to determine whether the requirements of Rule 23 are met.[102] When expert testimony is critical to class certification, the

96. *See* Nagareda, *supra* note 90, at 150-51.

97. *See id.* at 136-41.

98. *See id.* at 141-43.

99. *See id.* at 143-49.

100. *See* Blades v. Monsanto Co., 400 F.3d 562, 567 (8th Cir. 2005).

101. *See* Miles v. Merrill Lynch & Co. (*In re* Initial Pub. Offerings Sec. Litig.), 471 F.3d 24, 42 (2d Cir. 2006).

102. *See* West v. Prudential Sec., Inc., 282 F.3d 935, 938 (7th Cir. 2002) ("A

Seventh Circuit has also required consideration of the qualifications, reliability, and credibility of expert testimony, and, if the situation warrants, performance of a full *Daubert* analysis.[103]

The United States Court of Appeals for the Third Circuit also supports review of expert opinion, dismissing concern of merit-based inquiries by noting that determinations at class certification are not binding on the ultimate fact-finder.[104] The Third Circuit went even further, stating that admissibility under *Daubert* does not guarantee that courts will or should be satisfied that the requirements of Rule 23 are met by all the evidence and arguments—including all relevant expert opinions.[105] However, the Ninth Circuit in *Dukes* rejected this notion, embodied in *IPO* and *Hydrogen Peroxide*, stating that expert opinion satisfies class certification when it raises a question to be answered by the jury.[106] In contrast to the *IPO* court, the *Dukes* court held that, because expert testimony was admissible under *Daubert*, conflicting testimony should be evaluated by the ultimate fact-finder.[107] Such disparate frameworks greatly impact whether a class is certified and, ultimately, whether the case is dismissed or settled.

E. *Implications of Circuit Split on Class Action Certifications*

Certification is nearly always "the defining moment" of a class action—where either the plaintiffs' claim receives the "death knell" and is dismissed, or the defendants are forced to settle the case rather than face the legal costs and potential damages of a trial.[108] The broadening gap in standards for class certification between circuits poses a real threat to the continuity of law, and strains the principles behind class actions—to "assure fairer outcomes" and prevent "inconsistent or varying" standards. There is no doubt that plaintiff classes in circuits with a

district judge may not duck hard questions by observing that each side has some support . . . . Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives.").

103. Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815-16 (7th Cir. 2010).

104. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 324 (3d Cir. 2008) ("Rigorous analysis need not be hampered by a concern for avoiding credibility issues; as noted, finding with respect to class certification do not bind the ultimate fact-finder on the merits. A court's determination that an expert's opinion is persuasive or unpersuasive on a Rule 23 requirement does not preclude a different view at the merits stage of the case.").

105. *Id.* at 315 n.13.

106. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 601-4 (9th Cir. 2010).

107. *Id.*

108. *See Hydrogen Peroxide*, 552 F.3d at 310.

rigorous analysis face a much greater hurdle in the class certification stage than those in circuits that do not require or expressly prohibit any preliminary inquiry relating to the merits of the case.

F. *Improvements to the Process*

While the spectrum of standards among circuits does endanger the cohesive legal framework of class certifications, there are several improvements the courts may consider in reducing or minimizing such differences. First, the Supreme Court could seek review of those class action certifications that address these issues and provide the circuits with additional guidance as it relates to class certification.

Second, courts should embrace the Fifth Circuit's interpretation of Rule 23's Advisory Committee note that authorizes full discovery in class certification.[109] While discovery is both time-consuming and costly, judges would retain the ability to limit the scope at their discretion and would have a greater vantage point to determine whether class certification is appropriate.

Third, because questions of law and fact are so closely intertwined, the circuits should consider addressing whether the standard of review for class certifications ought to be de novo. As with opening full discovery, de novo reviews would be taxing on the circuits. By addressing the concerns related to class certification and thus providing greater guidance to its district courts, however, the court may reduce the number of appeals by.

There are other tools available to the courts, but some may result in increasing fissures among the circuits. By refining the use of Rule 23(c)(4)—allowing the court to certify a class only to particular issues—and Rule 23(c)(5)—permitting a class to be divided into subclasses—courts can ease the problems that arise where the individual claims of class members vary to such an extent that certification would be doubtful in some circuits.[110] The use of subclasses and certification of particular issues, however, would also provide a "backdoor" certification for classes who do not meet the requirements of Rule 23.

Similarly, application of Rule 23(f) (appeal of a class certification) and Rule 23(c)(1)(c) (altering or amending certification order) allows the circuits to address the divided decisions of district courts. The use of

109. *See* Unger v. Amedisys, Inc., 401 F.3d 316 (5th Cir. 2005).

110. *See* FED. R. CIV. P. 23(c)(4)-(5).

these rules emphasizes, however, that a retroactive review fails to provide the viewpoint necessary to achieve a cogent and cohesive legal framework. .[111] And finally, Rule 23(e), which addresses settlement of class action claims, is a helpful and frequently used tool of the courts (and rightly so), but it should not be used at the expense of justice and fairness.[112]

IV. Conclusion

Class actions were designed to provide adjudication to similarly situated plaintiffs and defendants as an alternative to the impracticability or inequities of separate, individual actions. ***Rule*** 23 and CAFA were enacted to "assure fairer outcomes for class members and defendants" and prevent "inconsistent or varying" standards between state and federal courts. However, the divergent standards applied by the different circuit courts with regards to class certification and the use of aggregate proof have created an environment that is ripe for manipulation and forum shopping by both plaintiffs and defendants, thus imposing the very same inequities that the law sought to prevent.

V. Epilogue

Since the writing of this Article, the Supreme Court granted certiorari to Wal-Mart on December 6, 2010.[113] In addition to hearing the issue of whether claims for monetary relief can be certified under Rule 23(b)(2), the Court, sua sponte, directed both parties to brief and argue "[w]hether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)."[114]

In its brief, Wal-Mart argued that "[t]he certification order is flatly inconsistent with Rule 23(a)'s prerequisites," contending that "[t]he claims asserted on behalf of millions of individuals do not remotely satisfy Rule 23(a)'s commonality, typicality, or adequacy requirements. . . . [and s]olely in an effort to satisfy Rule 23(a), the lower courts elected to alter the rules — relieving plaintiffs of the burden of proving elements of their case, and precluding Wal-Mart from presenting otherwise available defenses."[115] Wal-Mart further argued that "the certification

111. *See* FED. R. CIV. P. 23(c)(1)(c), (f).

112. *See* FED. R. CIV. P. 23(e).

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

114. *Id.* at 795.

115. Brief for Petitioner at 13, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-77).

cannot be reconciled with the requirements of Rule 23(b)(2), which is limited by its terms to claims for 'injunctive relief or corresponding declaratory relief.'"[116]

Nearly thirty amicus briefs were filed. The National Partnership for Women & Families, ACLU, NAACP, labor unions, and National Employment Lawyers Association wrote in support of the plaintiff-respondents. The Chamber of Commerce, defense bar associations, trade associations for the manufacturing, financial, and securities industries, as well as companies like Intel, Altria, and rival Costco, wrote in support of Wal-Mart.

On June 20, 2011, the Supreme Court issued its decision.[117] Justice Scalia, writing for the majority, noted the significance of the case, calling it "one of the most expansive class actions ever."[118] The Court began its analysis by stating that class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the . . . named parties only," and departure from that rule requires the named plaintiffs to "suffer the same injury as the class members."[119] Rule 23(a)'s four requirements of numerosity, commonality, typicality, and adequate representation, "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims."[120]

Calling commonality "[t]he crux of this case,"[121] the Court looked to whether there were questions of law or fact common to the class as required by Rule 23(a)(2).[122] The Court recognized the difficulty of this determination, noting that "[a]ny competently crafted class complaint literally raises common 'questions.'"[123] Still, there must be a "common contention . . . . [O]f such a nature that it is capable of classwideresolution . . . [and] will resolve an issue that is central to the

116. *Id.* at 14 ("Rule 23(b)(2)'s text authorizes certification of claims for injunctive or corresponding declaratory relief, and is silent as to monetary relief. Monetary claims must proceed under Rule 23(b)(3), which provides additional protections for defendants, absent class members, and the judicial system.").

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

118. *Id.* at 2547.

119. *See id.* at 2550 (internal citations omitted).

120. *See id.* (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982)).

121. The Court noted that "commonality and typicality tend to merge," with "[b]oth serv[ing] as guideposts for determining whether . . . the class claims are so interrelated that the interests of class members will be fairly and adequately protected in their absence." *Id.* at 2551 n.5. The Court commented that "[i]n light of [its] disposition of the commonality question," it was unnecessary to address the questions of whether the typicality and adequacy requirements of Rule 23(a) were satisfied. *Id.*

122. *Id.* at 2550-51.

123. *Id.* at 2551 (quoting Nagareda, *supra* note 90, at 131-32).

validity of each one of the claims in one stroke."[124]

The Court went on to say that "Rule 23 does not set forth mere pleading standards," but rather "a party seeking class certification must affirmatively demonstrate his compliance with the Rule."[125] Quoting *Falcon*, the Court recognized that "sometimes it may be necessary for the court proper to probe behind the pleadings" and held that certification is only proper if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) [are met]."[126] The Court conceded that a rigorous analysis will frequently "entail some overlap with the merits" of the case, but that such occurrence "cannot be helped."[127] Additionally, the Court dismissed concerns of the propriety or the novelty of such a review, noting that "[t]he necessity of touching aspects of the merits to resolve preliminary maters, e.g., jurisdiction and venue, is a familiar feature of litigation."[128]

Moreover, the Court attempted to dispel the notion that the holding in *Eisen* precluded courts from conducting an inquiry into the merits to determine whether a class should be certified.[129] The Court pointed out that in *Eisen*, the judge was not conducting his inquiry to determine the question of certification, as the class was already certified, but rather to shift the cost of notice from the plaintiff to the defendants.[130] Calling it "the purest dictum," the Court noted that such a contention is contradicted by the Court's other cases.[131]

Looking to the instant case, the Court found that the plaintiff's proof of commonality "necessarily overlaps" with the merits of the plaintiff's claims that Wal-Mart engaged in a pattern or practice of discrimination.[132] Because Wal-Mart had no discriminatory testing

124. *Id.* ("What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class . . . impede the generation of common answers.") (emphasis in original) (quoting Nagareda, *supra* note 90, at 132).

125. *Id.* at 2551.

126. *Id.* (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160-61 (1982)). The Court also commented that, "Actual, not presumed, conformance with Rule 23(a) remains . . . indispensable." *Id.* (quoting *Falcon*, 457 U.S. at 160).

127. *Id.*

128. *Id.* at 2552 (citing Szabo v. Bridgeport Mach. Inc., 249 F.3d 672, 676-77 (7th Cir. 2001)) (emphasis in original).

129. *See id.* at 2552 n.6.

130. *See id.* (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 165, 177 (1974)).

131. *Id.*

132. *Id.* at 2552 ("Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged reasons for those

procedure or biased company-wide evaluation methods, the plaintiffs were required to show "significant proof that [Wal-Mart] operated under a general policy of discrimination . . . [that] manifested itself in hiring and promotion practices . . . through entirely subjective decisionmaking processes."[133] The Court held that "significant proof" that Wal-Mart "operated under a general policy of discrimination" was entirely absent from the case.[134]

Turning to the evidence presented by the plaintiffs, the Court scrutinized the testimony of one of the plaintiff class' experts, who testified that Wal-Mart's strong corporate culture made it vulnerable to gender bias.[135] The expert failed to show with any specificity how these stereotypes played any meaningful role in Wal-Mart's employment decision, even conceding that he could not calculate whether .5 percent or 95 percent of Wal-Mart's decisions were determined by these stereotypes.[136] The Court questioned the trial court's conclusion that the *Daubert* standard for expert testimony did not apply here, but did not actually address it, noting that the expert's testimony was of little value to the case.[137] The Court noted that the expert's conclusions were roundly criticized the by the very scholars on whom he relied for his analysis.[138]

The Court also found that plaintiffs failed to establish commonality of how the discretion of managers at Wal-Mart was exercised.[139] Due to Wal-Mart's sheer size and geography, the Court viewed with skeptism the contention that all managers exercised discretion in a common way without some type of common direction.[140] Plaintiffs' statistical evidence showing disparities between men and women at Wal-Mart also failed to prove discrimination on a class-wide basis because it disregards other contributing factors such as regional pay disparity andCourt found that the anecdotal evidence of discrimination

decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.") (emphasis in original).

133. *Id.* at 2553 (quoting and citing Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982)).

134. *Id.*

135. *See id.*

136. *Id.*

137. *Id.* at 2553-54 ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so, but even if properly considered, [the expert's] testimony does nothing to advance respondents' case.") (internal citations omitted).

138. *See id.* at 2553 n.8.

139. *See id.* at 2554-55.

140. *See id.* at 2555.

submitted by the plaintiff did not give rise to a showing of a general policy of discrimination by Wal-Mart.[141] The majority concluded its analysis of the class certification under Rule 23(a) by agreeing with Chief Judge Kozinski's statement that the plaintiffs "have little in common but their sex and this lawsuit."[142]

The dissent, authored by Justice Ginsberg, contended that the majority "import[ed] into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment."[143] Further, it stated that "[t]he Court blend[ed] Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevate[ed] the [Rule](a)(2) inquiry so that it [wa]s no longer 'easily satisfied.'"[144] Moreover, "[t]he Court [gave] no credence to the key dispute common to the class: whether Wal–Mart's discretionary pay and promotion policies [we]re discriminatory."[145] Finally, the dissent found that the majority's "emphasis on differences between class members mimic[ked] the Rule 23(b)(3) inquiry into whether common questions 'predominate' over individual issues," thus "duplicat[ing] [Rule] 23(b)(3)'s question whether 'a class action is superior' to other modes of adjudication."[146]

However, the Court unanimously agreed that monetary claims for relief cannot be certified under Rule 23(b)(2).[147] The Court noted that Rule 23(b)(2) requires that the opposing party act or refuse to act on grounds applying to the class generally, so that injunctive or declaratory relief is appropriate to the class a whole.[148] The Court declined to address whether Rule 23(b)(2) "applies *only* to requests for such injunctive or declaratory relief," holding that "at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule."[149]

The Court cited *Allison v. Citgo Petroleum Corp.*, and its proposition that classes that seek monetary relief may be certified under

141. *See id.* at 2556 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982)) ("Even if every single one of these accounts is true, that would not demonstrate that the entire company 'operates under a general policy of discrimination,' which is what respondent must show to certify a companywide class.") (internal citations omitted).

142. *Id.* at 2557 (quoting Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 652 (9th Cir. 2010) (Kozinski, J., dissenting)).

143. *Id.* at 2562 (Ginsberg, J., dissenting).

144. *Id.* at 2565 (citing 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.23 (3d ed. 2011)).

145. *Id.*

146. *Id.* at 2566.

147. *Id.* at 2557 (majority opinion).

148. *Id.*

149. *Id.*

Rule 23(b)(2) if the damages are "'incidental'" or "'flow directly' from liability to the class as a *whole* on the claims forming the basis of the injunctive or declaratory relief."[150] The *Allison* court further stated that "'incidental damage should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new substantial legal or factual issues, nor entail complex individualized determinations.'"[151] The Court did not decide whether a class certified under Rule 23(b)(2) may claim incidental monetary relief, as in *Allison*, but noted that the plaintiffs would fail to meet such a standard because "Wal-Mart [wa]s entitled to individualized determinations of each employee's eligibility for backpay," which would require additional hearings or complex individualized determinations.[152]

The Supreme Court's decision in *Dukes* provides greater clarity to the lower courts in determining the appropriateness of class certification. The lower courts now must engage in a rigorous analysis to determine whether the class satisfies the requirements of Rule 23 before class certification, even if it entails some overlap with the merits.[153] It also places the burden of proof at certification squarely upon the party seeking certification, who must affirmatively demonstrate compliance with the Rule.[154] Further, the Court indicated that expert testimony must meet the *Daubert* standards.[155]

Moreover, the degree of detail at which the Court reviewed the facts surrounding certification may serve as model for the lower courts in deciding the question of class certification. While this approach may result in an increased use of aggregate proof by both parties in an attempt to defend or attack the certification of a class, the Court's scrutiny of statistical and anecdotal evidence provides greater assurance that broad conclusions and generalities will not satisfy the requirements of Rule 23. Most importantly, the Supreme Court in *Dukes* was able to reduce the "inconsistent and varying standards" for which the Rule was promulgated to prevent. By eliminating disparities among the lower courts, the Supreme Court strengthened the purpose of CAFA in "assur[ing] fairer outcome for class members and defendants."[156]

150. *Id.* at 2560 (quoting Allison v. Citgo Petroleum Corp.,151 F.3d 402, 415 (5th Cir. 1998)).

151. *Id.*

152. *Id.*

153. *See id.* at 2551.

154. *See id.*

155. *Id.* at 2553-54.

156. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 4 (2006)).