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In this Analysis & Perspective, Gibson Dunn & Crutcher attorneys Gail E. Lees, Andrew S. Tulumello, G. Charles Nierlich, Mark Whitburn, and Chris Chorba provide an in-depth update on trends in class action practice through the first quarter of 2009.

The authors say they expect to see a spike in the growth of suits based on consumer fraud and deception.

Analysis

2009: First-Quarter Update on Class Action Trends

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Introduction

Class action lawsuits are an increasingly pervasive force in today's business world. Defending and defeating these cases efficiently and prudently is a top priority for many in-house legal teams and their outside counsel. This 2009 first-quarter update reports on key trends in class action practice. It provides an overview of Rule 23, reviews key class action decisions from 2008 and the first quarter of 2009, and identifies important class action issues likely to be litigated in 2009 and in the years ahead.

The number of class actions has grown exponentially in recent years. Although reliable numbers are hard to come by, Federal Judicial Center statistics suggest that new class action cases filed in or removed to federal court increased 72 percent between 2001 and 2007,¹ reaching approximately 4,000 to 5,000 annually as of mid-2007 (the last period for which data are available). This represents more than a dozen new lawsuits every day.² And while the Class Action Fairness Act (CAFA) has shifted many putative nationwide class actions from the state to the federal system, Gibson Dunn & Crutcher class action lawyers report that state court class action activity in many courts has not diminished. CAFA has prompted a flurry of single-state class actions filed in state courts, and recent statistics show that in at least one forum favored by the plaintiffs' bar (Los Angeles), state class action filings continue to grow.

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¹ Figures are derived from Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, Federal Judicial Center, April 2008, at 1 & Appendix B.

² Figure derived from Lee & Willging, Appendix B, Figure 1.

We predict that these trends will increase in 2009, as recently enacted and anticipated legislation will expand the ability of the plaintiffs' bar to bring new suits. We already are seeing a surge in labor and employment, consumer fraud, and products liability litigation. That trend will continue, as a new administration and Democratic Congress enact laws—such as the Lilly Ledbetter Fair Pay Act—that expand or create new legal remedies, and cut back on or repeal federal statutes and administrative regulations that have in the past preempted state-law based suits.

We also expect the Supreme Court to enter the debate over Rule 23. To date, there has been a significant mismatch between the Supreme Court's docket and the pervasiveness of Rule 23 cases in the federal system. Despite the overwhelming number of class action cases flowing through the federal judiciary, the Supreme Court has continued to steer clear of core Rule 23 and class certification issues for many years—a trend that should not and cannot last much longer. In the last five terms alone, the Supreme Court has decided seven tax cases, six ERISA cases, five Title VII cases, and five cases under the Age Discrimination in Employment Act. However, in the last *thirty-five* years, the Supreme Court has decided fewer than a dozen cases involving core class action issues.³ Splits across an important range of issues continue to develop and percolate in the lower courts, and it is appropriate and urgent for the Court to provide much-needed guidance on these issues.

³ See, e.g., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (notice to class members); *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981) (limits on communication with unnamed members of class); *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) (typicality); *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984) (*res judicata*); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (choice of law); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (settlement class actions); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (“limited fund” class actions).

Part I of this update provides an overview of Federal Rule of Civil Procedure 23.

Part II identifies significant trends in class action practice at the federal and state levels.

Part III highlights key class action decisions from 2008 and the first quarter of 2009.

Part IV identifies key unresolved issues in the federal courts.

Part V identifies key unresolved issues in the state courts.

We conclude our review with some predictions for the year ahead.

I. Federal Rule of Civil Procedure 23—An Overview

Federal Rule of Civil Procedure 23 governs class action practice in federal court. To be certified as a class action, a suit must satisfy all four requirements of Rule 23(a) and at least one section of Rule 23(b).

A. Rule 23(a)

Rule 23(a) establishes four prerequisites. To assert claims on behalf of a class, plaintiffs must show that (1) the class is so numerous that joinder of all members is impracticable (“numerosity”), (2) there are questions of law or fact common to the class (“commonality”), (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (“typicality”), and (4) the representative parties will fairly and adequately protect the interests of the class (“adequacy”).

Plaintiffs usually have little difficulty meeting the numerosity and commonality requirements. Federal courts have held that relatively low numbers satisfy the “numerosity” requirement,⁴ and they have applied a low threshold when evaluating whether a named plaintiff’s claims share “common” questions of law or fact with the claims of absent class members. Plaintiffs often face greater challenges satisfying the third and fourth requirements. Where defendants can point to some feature of the named plaintiffs’ circumstances that renders them atypical of the class or unsuitable to represent the class or some subgroup of the class adequately, they rightly can convince a court that certification is inappropriate.

⁴ However, as the Sixth Circuit pointed out early in 2009, plaintiffs may not satisfy the numerosity requirement through mere speculation as to the number of potential class members. See *Turnage v. Norfolk Southern Corp.*, 2009 WL 140479, *3, 5 (6th Cir. Jan. 22, 2009). Furthermore, even a relatively large number of putative class members who live in “tight geographical proximity to each other” may not satisfy the numerosity requirement because plaintiff may not be able to show the impracticability of joinder. *Id.* at *2.

B. Rule 23(b)

If they manage to satisfy all of the prerequisites of Rule 23(a), would-be class plaintiffs also must show that they satisfy at least one of the three 23(b) requirements.

If they seek certification under Rule 23(b)(1), plaintiffs must generally show that the prosecution of separate individual actions would prejudice the defendant or putative class members either by establishing incompatible standards of conduct for the party opposing the class or by adjudicating the interests of other putative class members or preventing them from protecting their interests. Rule 23(b)(1) cases are relatively rare—the Rule is typically invoked to resolve competing claims to a particular piece of property or an identifiable set of proceeds such that a declaration of one person’s rights necessarily resolves the rights of all other members in the class.

Certification under Rule 23(b)(2) is appropriate where “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]” Rule 23(b)(2) classes are often called “injunctive” classes. Unlike Rule 23(b)(3), 23(b)(2) does not require that class members receive “opt-out” rights. Nor does it require a showing (necessary under Rule 23(b)(3)) that common issues “predominate” over individual issues,⁵ or that a class action is “superior” to other approaches. As we discuss below, plaintiffs increasingly have sought to shoehorn a wide swath of suits into Rule 23(b)(2) in order to avoid the more demanding requirements of Rule 23(b)(3).

⁵ As the Sixth Circuit recently pointed out in *Romberio v. UnumProvident Corp.*, 2009 WL 87510 (6th Cir. Jan. 12, 2009), Rule 23(b)(2) classes must nevertheless be “cohesive” in the sense that “the case will not depend on adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members[.]” *Id.* at *9 (citation omitted).

Rule 23(b)(3) applies to damages class actions. It authorizes class certification where “questions of law or fact common to class members predominate over any questions affecting only individual members, and [where] a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” The “predominance” and “superiority” requirements, especially the “predominance” requirement, are key to the success or failure of many class actions and have generated significant debate in the federal courts.

II. Recent Class Action Trends

A. Class Action Practice Is on the Rise Across Many Sectors

Class actions in federal court have risen steadily in recent years, increasing 72 percent between 2001 and 2007 and averaging 4,000-5,000 per year as of mid-2007. The sectors that account for the largest increases in activity are labor and consumer protection/fraud cases. Between July-December 2001 and January-June 2007, labor class actions alone increased an astonishing 228 percent. Labor class actions accounted for 46.9 percent of new class action filings in the first half of 2007, up from 24.6 percent in 2001. Consumer protection/fraud class actions have increased a staggering 156 percent over the same period and now account for approximately 20.8 percent of all federal class actions—up from 13.9 percent in 2001.⁶ Recent years have seen a boom in the use of federal labor statutes, such as Title VII of the Civil Rights Act of 1964, ERISA, and the Fair Labor Standards Act, and in suits brought under federal fraud statutes, particularly the Racketeer Influenced and Corrupt Organizations Act (RICO).

⁶ Figures derived from Lee & Willging, Appendix B, Figure 1, and pages 3-5.

July-Dec 2001 / Jan-Jun 2007

B. The Importance of the Class Certification Decision

Not surprisingly, class certification itself continues to be the pivotal moment in most class cases. As the chart below reflects, if certification is granted, settlement frequently follows. 89 percent of certified class actions settle, with a class trial occurring in only 4 percent of certified cases. If certification is denied, these cases wither on the vine.⁷

⁷ Figures derived from Thomas E. Willging & Shannon R. Wheatman, *An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation*, Federal Judicial Center, 2005, at 50.

C. The Impact of the Class Action Fairness Act

Since it went into effect in 2005, CAFA has had a significant impact on the number of class action filings in federal court based on the diversity of the parties. CAFA changed the playing field for diversity cases, allowing defendants to remove cases where there is “minimal” diversity (*i.e.*, one member of the putative class is from a different State than one of the defendants), and where the total amount in controversy (not just the amount sought by the named plaintiffs) exceeds \$5 million. As a result, it is now much easier to remove a multi-state class action from state court to federal court. CAFA has two exceptions to this

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rule—the so-called “home state” and “local controversy” exceptions (28 U.S.C. § 1332(d)(4)(B), 28 U.S.C. § 1332(d)(4)(A))—but the increased ability to remove cases is undeniable.

CAFA has led to a substantial increase in federal class action filings based on diversity between the 2002-2003 pre-CAFA time period and the period from July 1, 2005 to June 30, 2007, the period immediately following CAFA's enactment.⁸ As the chart below makes clear, the increase in most circuits has been dramatic.

⁸ Estimates portrayed in chart are derived from Lee & Willging, Appendix B, Figure 4.

Percent Increase in Diversity Class Action Filings by Circuit

CAFA also has promoted a secondary trend. While many multi-state cases are being pushed into the federal system, the plaintiffs' bar has responded to CAFA by filing “single state” class suits to avoid CAFA's removal provisions. It is now increasingly common for plaintiffs to sue on behalf of “all consumers in California” or “all citizens in New Jersey” in an effort to plead themselves around the CAFA provisions triggering federal court jurisdiction. This is often an orchestrated effort in which a consortium of plaintiffs' firms files multiple single-state class suits in staggered fashion in many different jurisdictions.

Recent statistics also suggest that the overall number of state class action filings has increased substantially in recent years, as well. As a report released in March by the California Administrative Office of the Courts shows, class action activity was increasing in California even before 2005 (the last year for which the report had complete data). See Hilary Hehman, *Findings of the Study of California Class Action Litigation, 2000-2006: First Interim Report* (March 2009). According to this report, class actions filed in twelve representative courts across the state increased from 460 in 2000 to a high of 833 in 2004, with a slight drop-off to 751 in 2005. *Id.* at 3 (Fig. 1). We have determined that this trend continued after 2005. In Los Angeles alone, for example, class action filings have increased 55 percent in the last three years—from 516 filings in 2005 to 801 filings in 2008—based on statistics we have obtained from the L.A. Superior Court. The Los Angeles filings alone exceed the total number of filings the Administrative Office of the Courts reported for the twelve studied courts combined in 2005.

Like several counties in California, Los Angeles has a designated panel of complex case judges who are very experienced in handling class action and other complex litigation, and this program has proved extremely popular among plaintiffs and defendants. Notably, removals occurred in only 12 percent of the class cases filed in Los Angeles County Superior Court in December 2008.

D. A Move to Overarching Federal Statutes to Sustain Nationwide Class Actions

Before the advent of CAFA, plaintiffs bringing nationwide classes could assert state-law claims in a favored state forum and press for certification. CAFA made those types of cases removable to the federal courts, where defendants have had great success defeating state-law based nationwide class actions on the ground that variations in the laws of the fifty states prevent common issues from predominating over individual issues. See, e.g., *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 726 (5th Cir. 2007); *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1015-18 (7th Cir. 2002); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189-90 (9th Cir. 2001); *Castano v. American Tobacco Co.*, 84 F.3d 734, 741-44 (5th Cir. 1996).

Consumer protection/fraud class actions now account for approximately 20.8 percent of all federal class actions—up from 13.9 percent in 2001.

The purveyors of nationwide class action litigation have increasingly turned away from state common law

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theories toward overarching federal statutes when asserting nationwide class claims. RICO, Title VII, the FLSA, and ERISA have been particular favorites for this purpose. See, e.g., *Klay v. Humana*, 382 F.3d 1241 (11th Cir. 2004) (overturning certification of state-law based claims but affirming certification of a RICO class on the ground that the existence of a “RICO conspiracy” among the defendants was an issue that predominated over individual issues); *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2007), *vacated and en banc rehearing ordered by* 556 F.3d 919 (9th Cir. 2009), (upholding, under Rule 23(b)(2), the certification of a class of 1.5 million women working in 3,400 stores across the United States who since 1998 were allegedly “subjected to [the defendant’s] allegedly discriminatory pay and promotions policies” on the ground that the existence of a policy of discrimination was a common issue that “predominated” over the individual issues necessary to resolve each class member’s claims).

We expect to see an increase in this trend, particularly in light of the Supreme Court’s decision last term in *Bridge v. Phoenix Bond & Indemnity Co.*, 128 S. Ct. 2131 (2008). Although *Bridge* did not itself involve a class action, the Supreme Court held that “a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant’s alleged misrepresentations.” *Id.* at 2145. In light of this decision, the plaintiffs’ bar is very likely to bring more nationwide RICO fraud cases, citing *Bridge* as inviting a new rule that individualized issues of reliance in RICO fraud cases no longer “predominate” over common issues. In certifying a nationwide RICO class of institutional plaintiffs suing for overpayment for pharmaceuticals in *In re Zyprexa Prods. Liab. Litig.*, 253 F.R.D. 69 (E.D.N.Y. 2008), Judge Weinstein appears to have embraced this theory. See *id.* at 193, 198-99 (holding that overpayments redressable under RICO were common to the class and predominated over individualized issues, in part because the plaintiffs did not need to show first-party reliance). After the Second Circuit agreed to review this class certification decision, the parties settled the *Zyprexa* litigation—leaving room for future debates over *Bridge*’s impact on the certification of RICO fraud theories.

The plaintiffs’ bar in recent years has focused on “economic torts” as a way of trying to overcome obstacles to the certification of multi-state classes.

We also expect to see a spike in the growth of suits based on consumer fraud and deception, where differences in state laws are (according to the plaintiffs’ bar) reduced and the necessity of showing individual injuries is removed because the case is about “mispricing,” or about the “difference in money paid versus value received,” rather than about personal injury. See, e.g., *In re Bluetooth Headset Prods. Liab. Litig.*, 2:07-ml-01822 (C.D. Cal.) (asserting claims on behalf of a putative nationwide class based on allegations that various headsets could cause hearing loss and seeking damages for amounts paid out for purchases of these headsets, but specifically avoiding any request for damages for personal injury); *Birdsong v. Apple, Inc.*, No. 5:06-cv-02280 (N.D. Cal.) (asserting claims on behalf of a putative nationwide class based on allegations that iPods could damage hearing and seeking various remedies, including diminished value damages, but eschewing personal injury tort claims). The plaintiffs’ bar in recent years has focused on these “economic torts” as a way of trying to overcome obstacles to the certification of multi-state classes.

E. The Evolution of Rule 23(f)

Until 1998, a defendant had no clear and immediate right to appeal an order certifying a class in federal court. That changed with Rule 23(f), which grants the courts of appeals discretionary authority to review a class certification decision. The Advisory Committee explained the reasons for the change: “An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.”⁹ In other words, without an opportunity to appeal, the certification decision might prove the “death knell” of the litigation because a defendant might be forced to settle even unmeritorious claims given the exaggerated damages exposure of aggregated class claims. Rule 23(f) was designed to remedy this problem.

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⁹ Notes of Advisory Committee on 1998 Amendments to Federal Rule of Civil Procedure 23.

The federal courts of appeals have implemented Rule 23(f) in varied ways, and the Rule has had an inconsistent impact on class litigation. As the chart below indicates, some circuits, such as the Third and the Fourth, have granted almost every 23(f) petition before them, while some circuits, such as the Eighth, Ninth, and Tenth Circuits, have granted proportionately fewer.¹⁰ In fact, as discussed below, the Tenth Circuit had not even articulated its standards for granting such a petition until February 2009. See *Vallario v. Vandehey*, 554 F.3d 1259 (10th Cir. 2009).

¹⁰ Figures derived from Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 290 (2008), which analyzes data derived from searches of appellate dockets from December 1, 1998, to September 30, 2006. This data is not authoritative (for example, the methodology the authors describe produces a result that does not capture one case we have handled in the Ninth Circuit), as the data is not readily available from the Circuits. As the authors note, their “approach is admittedly non-scientific, and the research is only as good as the data available from the circuits and from Westlaw allow.” However, the study reported the most comprehensive national data our research has revealed.

Graphic

The overall “grant” rate for Rule 23(f) petitions is 36 percent. This may not accurately reflect the likelihood of a 23(f) grant in a given case, especially where the stakes are very high and the case for review is presented compellingly.

III. Key Class Action Decisions From 2008 and the First Quarter of 2009

2008 and the First Quarter of 2009 featured a number of significant class action decisions. Although this list is not exhaustive, we have selected a number of key decisions that are likely to shape class action practice and strategy in the years ahead.

A. The Second, Third, and Ninth Circuits Hold Certain Class Arbitration Waivers Unenforceable

The debate over the enforceability of class action waivers continues—and a spate of recent decisions has invalidated class action waivers utilizing different rationales. In *In re American Express Merchants’ Litig.*, 554 F.3d 300 (2d Cir. 2009), the Second Circuit held that a class action waiver was unenforceable under federal law. The court held that, under a “vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability,” a class action waiver in an arbitration agreement is unenforceable where the plaintiff can show that “the size of the recovery received by any individual plaintiff will be too small to justify the expenditure of bringing an individual action.” 554 F.3d at 320 (emphasis in original). The court accordingly invalidated a provision that would have precluded the litigation or arbitration of class action antitrust claims brought against American Express by a putative class of California and New York businesses under contract with American Express. The Second Circuit held that courts, not arbitrators, should decide the threshold question of the enforceability of the class action waiver, and that such waivers are “incompatible with the federal substantive law of arbitration” where they effectively would preclude individuals from vindicating their rights under the antitrust statutes. The court did caution “that class action waivers in arbitration agreements are [not] *per se* enforceable” nor “*per se*

unenforceable in the context of antitrust actions.” *Id.* at 321. Instead, the court stated that each case must be considered on its own merits, but the court’s reasoning suggests that it may be difficult to enforce arbitration agreements in “negative value” settings where the amounts sought in individual suits may not exceed the transaction costs of litigation or arbitration.

Similarly, in *Homa v. American Express Co.*, 558 F.3d 225 (3d Cir. 2009), the Third Circuit dealt a blow to class action waivers, invalidating a class action waiver in an American Express customer agreement, even though the customer agreement contained a choice-of-law clause selecting Utah law, which authorizes class action waivers. The Third Circuit reasoned that, as a federal court sitting in diversity, it must apply the choice-of-law principles of the forum state (New Jersey), and it construed New Jersey choice-of-law principles as honoring choice-of-law clauses only where those clauses do not conflict with New Jersey public policy. The court concluded that the class action waiver conflicted with New Jersey’s interest in ensuring that its “consumers [have the] ability to effectively pursue their statutory rights under New Jersey’s consumer protection laws” (*id.* at 230)(internal brackets and quotation marks omitted). It therefore declined to honor the Utah choice-of-law clause, applied the New Jersey law of unconscionability, and held that the class action waiver was unconscionable because it effectively prevented individuals from vindicating their rights in “low value” settings.

Finally, in *Chalk v. T-Mobile USA, Inc.*, 2009 WL 792517 (9th Cir. March 27, 2009), the Ninth Circuit held that an arbitration clause with class action waiver was unenforceable under Oregon law. The Court held the clause “substantively unconscionable” and thus unenforceable for two reasons. “First, . . . T-Mobile’s waiver is unilateral in effect: It can hardly be imagined that T-Mobile or its suppliers would ever want or need to bring a class action against T-Mobile’s customers.” *Id.* at *6. “Second, the class action waiver here creates [a] disincentive to litigate. . . [because,] [g]iven the small size of the individual claims covered by the arbitration agreement, the class action waiver . . . is likely to prevent T-Mobile customers from vindicating their rights because the time and expense of prosecuting such claims makes it impracticable to embark on litigation in which the optimum result might be more than consumed by the cost.” *Id.* (citations and internal quotation marks omitted).

The issues raised in *Merchant’s*, *Homa*, and *Chalk* seem destined for Supreme Court review. There is significant debate over whether challenges to class action waivers should be decided by courts or by arbitrators, and whether the FAA and the federal law of arbitrability *prohibit* class action waivers (as the Second Circuit concluded) or whether the FAA *permits* such waivers and *preempts* state law contract doctrines of procedural and substantive unconscionability that bar class action waivers in arbitration agreements.

B. The First and Eighth Circuits Clarify the Burden on a Removing Defendant to Establish the Amount in Controversy Under CAFA

In two recent decisions, the First and Eighth Circuits have held that a defendant removing a case from state court to federal court under the Class Action Fairness Act must establish that there is a “reasonable probability” that the amount in controversy will exceed \$5 million. The lower courts have articulated different standards for removals, with some suggesting that, in certain circumstances, a removing defendant must establish the amount-in-controversy requirement “to a legal certainty.” Both circuits have now squarely rejected that view.

In the First Circuit case, *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41 (1st Cir. 2009), the court affirmed an order remanding a case, holding that “at least where the complaint does not contain specific damage allegations, the removing defendant must show a reasonable probability that the amount in controversy exceeds \$5 million” in a CAFA case. *Id.* at 43. In so holding, the court joined the Second and Seventh Circuits, but observed further that the “reasonable probability” standard was effectively identical to the “preponderance of the evidence” standard employed by several other circuits. *See id.* at 50 (“[T]he reasonable probability standard is, to our minds, for all practical purposes identical to the preponderance standard adopted by several circuits. . . . Yet because questions of removal are typically decided at the pleadings stage where little or no evidence has yet been produced, the removing defendant’s burden is

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better framed in terms of a ‘reasonable probability,’ not a preponderance of the evidence.”).

In *Bell v. Hershey Co.*, 557 F.3d 953 (8th Cir. 2009), the Eighth Circuit vacated a district court decision remanding a putative antitrust class action against five chocolate manufacturers to state court because the district court had applied the wrong legal standard to the amount-in-controversy question. The district court required the defendant manufacturers to prove to a legal certainty that the plaintiff’s claim exceeded the jurisdictional threshold. In vacating, the Eighth Circuit held that “a party seeking to remove under CAFA must establish the amount in controversy by a preponderance of the evidence regardless of whether the complaint alleges an amount below the jurisdictional minimum.” *Id.* at 958.

These decisions also create tension, if not direct conflict, with decisions in the Ninth and Third Circuits that suggest that, where a plaintiff expressly pleads that less than \$5 million is in controversy, the defendant must show “to a legal certainty” that this is incorrect.

These cases clarify the legal standards governing removal and suggest that removing defendants need to consider carefully the evidence they present to support their contentions that \$5 million is in issue. In *Amoche*, for example, the First Circuit held that evidence on the remand record was “at best . . . a draw” (556 F.3d at 53) and it pointed out that the removing defendant could have submitted different types of evidence (such as statistical sampling or more robust affidavits) to assure the court that jurisdiction was proper. These decisions also create tension, if not direct conflict, with decisions in the Ninth and Third Circuits that suggest that, where a plaintiff expressly pleads that less than \$5 million is in controversy, the defendant must show “to a legal certainty” that this is incorrect. See, e.g., *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 1000 (9th Cir. 2007); *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006).

C. The Tenth Circuit Announces Standards for Evaluating Rule 23(f) Petitions and Clarifies the Role of Merits Inquiries at the Class Certification Stage

Although Rule 23(f) has been on the books since 1998, the Tenth Circuit had not issued standards governing the review of 23(f) petitions until February, 2009. In *Vallario v. Vandehey*, 554 F.3d 1259 (10th Cir. 2009), the Tenth Circuit granted the 23(f) petition in a civil rights case to “consider this question as a matter of first impression.” *Id.* at 1261. The Court held interlocutory review of a district court’s class certification order generally appropriate in three types of cases: (1) “death knell cases” . . . in which a questionable class certification order is likely to force either a plaintiff or a defendant to resolve the case based on considerations independent of the merits[;] (2) cases which might “facilitat[e] the development of the law[;]” and (3) cases in which the district court’s class certification “decision is manifestly erroneous.” *Id.* at 1263. The Court further noted, however, that “[a]lthough cases ripe for consideration under Rule 23(f) will normally fall into one of these three categories, . . . we emphasize that our discretion in granting or denying a petition for interlocutory review is broad, and necessarily so.” *Id.* at 1264.

The Tenth Circuit also used the case as an opportunity to clarify the degree to which a district court may consider the merits of a plaintiff’s claims when evaluating the propriety of class certification. The Tenth Circuit made clear that district courts must conduct a “rigorous analysis” of the Rule 23 requirements, addressing those requirements “through findings,” regardless of whether those findings overlap with the merits. 554 F.3d at 1267. The court of appeals explained that the propriety of class certification does not depend on the merits of plaintiff’s substantive claims, but noted that it would “not allow this principle to be talismanically invoked to artificially limit a district court’s reasoned determination of whether Rule 23’s requirements have been met.” *Id.* (citation and internal quotation marks omitted). Because the district court approached the class certification decision “with an unduly constrained view of the inquiry authorized by Rule 23,” the Tenth Circuit held the district court had abused its discretion and remanded the case for the district court to consider the class certification issues under appropriate legal standards. *Id.* at 1267, 1270. The Tenth Circuit cited the Second Circuit’s decision in *In re IPO*, 471 F.3d 24, 38, 40, 41 (2d Cir. 2006) and joins a number of circuits in requiring district courts to undertake searching inquiries at the certification stage to ensure that the elements of Rule 23(a) and (b) have been met.

D. The Second Circuit Decertifies a Class of Smokers Alleging Deception in the Sale of “Light”

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Cigarettes

In *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), the Second Circuit reversed an order certifying, under Rule 23(b)(3), a nationwide class of smokers allegedly deceived by defendants' marketing into believing that "light" cigarettes were healthier than "full-flavored" cigarettes. Plaintiffs brought the action under RICO, alleging that tobacco companies had engaged in "mail fraud" and "wire fraud" by falsely concealing that smokers obtained as much tar and nicotine from "light" cigarettes as from "full-flavored" ones. Judge Weinstein certified a class consisting of "tens of millions" of smokers against eight tobacco companies on this theory.

The Second Circuit reversed the certification decision, reaching a number of significant conclusions under Rule 23. The court held that the predominance requirement of Rule 23(b)(3) could not be satisfied because (1) in circumstances where smokers may have had countless different reasons for their purchases of "light" cigarettes, reliance on defendants' alleged misrepresentations could not be proved on a class-wide basis (*id.* at 223); (2) loss causation could not be proved on a class-wide basis because the varying levels of individual reliance on defendants' alleged misrepresentations necessarily obscured the degree to which those alleged misrepresentations could have affected market demand (*id.* at 226-27); (3) degree of injury could not be shown on a class-wide basis because different smokers would have acted in different ways but for the defendants' alleged misrepresentations (*id.* at 227-28); (4) "fluid recovery" methods of calculating damages were impermissible under Rule 23 as a substitute for individual proof of damages (*id.* at 231-33); and (5) statute of limitations issues would affect some putative class members but not others in a manner not susceptible of class-wide proof (*id.* at 233-34).

McLaughlin is a significant decision because it squarely holds that RICO class actions predicated on mail and wire fraud cannot be certified under Rule 23(b)(3) because the individualized issues of reliance that fraud claims present overwhelm common issues that otherwise apply to the class.

McLaughlin is a significant decision because it squarely holds that RICO class actions predicated on mail and wire fraud cannot be certified under Rule 23(b)(3) because the individualized issues of reliance that fraud claims present overwhelm common issues that otherwise apply to the class. The decision is a step toward curtailing the use of RICO, an organized crime statute, into a staple of modern civil class action litigation. In light of the Supreme Court's decision in *Bridge*, it is highly likely that the reasoning of *McLaughlin* will come under attack from the plaintiffs' bar.

E. The Third Circuit Vacates Certification Order in Hydrogen Peroxide Antitrust Case and Requires More Rigorous Factual Analysis at Certification Stage

In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2009)(amending opinion of Dec. 30, 2008), saw the Third Circuit enter the debate over the proper standards governing the resolution of competing expert testimony and disputed factual issues at the class certification stage. The Third Circuit vacated the district court's certification order under Rule 23(b)(3) in a case involving nationwide class allegations that producers of hydrogen peroxide and other products had engaged in a conspiracy to restrain trade. In reaching this decision, the Third Circuit held that the lower court had not applied the proper legal standard in assessing a key disputed predominance issue—"whether antitrust impact was capable of proof at trial through evidence common to the class, as opposed to individualized evidence." *Id.* at 312.

The district court had imposed a relatively light burden on the plaintiffs in conducting its Rule 23(b)(3) "predominance" analysis. To show that they would be able to prove antitrust impact at trial through evidence common to the class, the plaintiffs offered an expert who purported to demonstrate through a market analysis that "conditions in the hydrogen peroxide industry favored a conspiracy that would have impacted the entire class." *Id.* He also offered a "pricing structure" analysis purporting to show that "prices across producers, grades and concentrations of hydrogen peroxide, and end uses moved similarly over time" in a manner that "suggested a conspiracy [that] would have impacted all class members[.]" *Id.* at 313. The defendants offered their own expert who disputed these analyses. The district court concluded that, for purposes of the certification stage, plaintiffs had made an adequate showing to satisfy

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the predominance requirement because they had proposed a reliable method for generating class-wide proof. According to the lower court, requiring the plaintiffs to show that the methods would *actually* work would be inappropriate at the class certification stage. *Id.* at 315.

The Third Circuit disagreed with the lower court's approach. Noting that “[a]n overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met” (*id.* at 316) and that “[a]contested requirement is not forfeited in favor of the party seeking certification merely because it is similar or even identical to one normally decided by a trier of fact” (*id.* at 318), the court held that, by requiring merely a “threshold showing” from the plaintiffs that they would likely be able to show injury and damages on a class-wide basis, the district court had applied an improper legal standard in assessing the Rule 23 requirements. “A party's assurance to the court that it intends or plans to meet the requirements is insufficient.” *Id.* The party must *show* that it can do so. The Third Circuit went on to say that “[e]xpert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis.” *Id.* at 323. In fact, the court observed, “[w]eighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.” *Id.*

In re Hydrogen Peroxide is a major addition to the lineup of cases requiring courts to conduct a rigorous analysis of the Rule 23 factors at the class certification stage, including by, if necessary, resolving disputed factual questions and competing expert testimony. Along with the Second Circuit's decision in *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006) (“*IPO*”), *In re Hydrogen Peroxide* should signal the end of class certification decisions based on conjecture, the benefit of the doubt, or viewing complaints in a “favorable light.” Like *IPO*, *Hydrogen Peroxide* counsels strongly in favor of an early and aggressive defense strategy designed to marshal compelling fact and expert testimony demonstrating that the Rule 23 factors cannot be met.

F. The Second Circuit Reinforces Its Requirement That Courts Make Definitive Assessments of Rule 23 Requirements at the Class Certification Stage

In *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474 (2d Cir. 2008), the Second Circuit continued down the path of requiring plaintiffs to establish, through evidentiary showings at the class certification stage, that the Rule 23 factors are satisfied. The Second Circuit vacated a district court order certifying a class under Rule 23(b)(3) in a securities class action alleging in part that a prominent research analyst had conspired with other market participants to defraud consumers about a company's credit facility, thus artificially inflating the share price of the entity at issue.

Defendants argued that the class failed the Rule 23(b)(3) “predominance” test because issues of whether individual investors relied on the analyst's statements in their purchase decisions would outweigh any common questions. The district court determined that individual reliance issues would not predominate in light of the fraud-on-the-market theory endorsed in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Although the *Basic* presumption is rebuttable, the district court held that it was inappropriate—at the class certification stage—to consider and weigh evidence on whether defendants could in fact rebut it.

The Second Circuit vacated the certification order because, as it had recently held (in *IPO*), class certification determinations demand definitive assessment of Rule 23 requirements and any evidence relevant to those requirements. Although recognizing that, under *Basic*, “the burden of showing that there was no price impact is properly placed on defendants at the rebuttal stage” (*Salomon*, 544 F.3d at 483), the Second Circuit held that the lower court erred by refusing to allow the defendants to present their rebuttal arguments prior to certification. *Id.* at 485-86.

In reaching its decision, the Second Circuit cited *Oscar Private Equity Invs. v. Allegiance Telecom. Inc.*, 487 F.3d 261, 270 (5th Cir. 2007), which similarly held that “[t]he trial court erred in ruling that the class certification stage is not the proper time for defendants to rebut lead Plaintiffs' fraud-on-the-market presumption.” Significantly, although the Second Circuit in *Salomon* did not address the issue, the Fifth Circuit in *Oscar* expressly heightened the requirements plaintiffs must satisfy to take advantage of the

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Basic assumption, holding that plaintiffs must prove that the statements at issue actually had a material impact on the price of the securities. *Id.* at 265. The Fifth Circuit denied that this would shift the burden “from a defendant’s right of rebuttal to a plaintiff’s burden of proof.” *Id.* On the contrary, the court held, once a defendant has made *any* showing that severs the link between the alleged misrepresentation and a plaintiff’s loss, the fraud-on-the-market theory is rebutted on arrival, thus requiring “plaintiffs invoking the fraud on the market theory to demonstrate loss causation.” *Id.* The Fifth Circuit reinforced this holding last year in *Luskin v. Intervoice-Brite Inc.*, 261 Fed. Appx. 697 (5th Cir. 2008), when it similarly held that “in order to qualify for class certification, plaintiffs alleging securities fraud are required to prove that defendants’ alleged misrepresentations were the proximate cause of plaintiffs’ economic loss.” *Id.* at 698.

In re Salomon is a significant addition to the appellate decisions, including *Oscar*, that require securities class action plaintiffs to establish the *bona fides* of their claims at the class certification stage by establishing loss causation and by requiring them to meet credible challenges raised to the fraud-on-the-market presumption.

G. The Seventh Circuit Reverses Certification of a Nationwide Class of Clothes Dryer Purchasers, Holding That Certification of Such a Class Would Undermine Federalism

In *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742 (7th Cir. 2008), the Seventh Circuit reversed a district court order certifying under Rule 23(b)(3) a nationwide class of clothes dryer purchasers who alleged that the defendant had advertised the dryers as having stainless steel drums when part of the drums was made of a different sort of steel. The named plaintiff based his claims on the Tennessee Consumer Protection Act and the consumer protection laws of other states. In holding certification inappropriate, the Seventh Circuit decried the “tendency, when the claims in a federal class action are based on state law, to undermine federalism.” *Id.* at 745. The court pointed to the plaintiff before it who wanted “to litigate in a single federal district court half a million claims wrested from the control of the courts of the 29 jurisdictions in which those claims arose and the laws of which govern the claimants’ entitlement to and scope of relief.” *Id.* at 746. Consequently, even though the plaintiff did not try to impose Tennessee law across the board, the Seventh Circuit held that the attempt to apply “an amalgam of the consumer protection laws of the 29 jurisdictions” and to ignore “the procedural rules by which particular jurisdictions expand or contract relief” was unacceptable and warranted reversal. *Id.* at 746, 748.

Thorogood adds to the growing list of cases declining to certify classes that are based on the laws of multiple states. In these cases, variations in state law make class treatment unmanageable and also raise a host of individualized issues that swamp any issues common to the putative class.

H. The Seventh Circuit Holds That a Class May Not Be Certified for Claims Seeking Rescission Under the Truth in Lending Act

In *Andrews v. Chevy Chase Bank*, 545 F.3d 570 (7th Cir. 2008), the Seventh Circuit granted a Rule 23(f) petition which called upon it “to answer one question: May a class action be certified for claims seeking the remedy of rescission under the Truth in Lending Act (‘TILA’), 15 U.S.C. § 1635?” *Id.* at 571. The Seventh Circuit joined the First and Fifth Circuits in holding that a class seeking rescission cannot be certified. The plaintiffs had obtained a “unique type of loan product offered by [the defendant] that allowed them to vary their payment, depending on their monthly cash flow.” *Id.* However, when they obtained the loan, the plaintiffs did not realize that the applicable interest rate would “adjust[] every month, even though the minimum monthly payment remained fixed according to the initial rate.” *Id.* at 572. The district court granted summary judgment for the plaintiffs and certified a class, “declaring that all class members would have the right to rescind their mortgages.” *Id.* In reversing the certification decision, the Seventh Circuit held that “[r]escission is a highly individualized remedy as a general matter, and rescission under TILA is no exception. The variations in the transactional ‘unwinding’ process that may arise from one rescission to the next make it an extremely poor fit for the class-action mechanism.” *Id.* at 574.

Andrews could have significance well beyond the TILA context. Its reasoning about the individualized nature of the rescission-based remedy itself is not limited to TILA alone and may spark continued focus on whether class suits that seek certain types of remedies like rescission are feasible class cases.

IV. Key Unresolved Issues (Federal Courts)

In 2008, the federal courts continued to develop and refine Rule 23 standards. In the absence of Supreme Court guidance, different approaches to several significant aspects of class action practice have deepened and matured, and in many areas the circuits appear to be significantly divided.

A. Merits Inquiries at Class Certification Stage

The federal courts have engaged in a robust debate in recent years over the degree to which a court at the class certification stage can decide issues necessary to resolve the Rule 23 analysis if those issues overlap with the “merits” of the class members’ underlying claims. The issue originated with over-reliance on language in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), which decided whether a defendant could be taxed with the cost of providing notice to the putative class. The Court stated that the merits of the suit should not be prejudged when deciding that question, and noted that “nothing in either the language or history of Rule 23 . . . 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.” Taking that language out of context, some courts began to apply the so-called “*Eisen* rule” and refused to decide contested issues bearing on class certification if they overlapped with the merits of class claims.

That began to change with the Second Circuit’s decision in *IPO*, 471 F.3d 24 (2d Cir. 2006). In granting class certification to investors in their action against hundreds of underwriters, securities issuers, and individual corporate officers alleging a scheme to defraud the investing public in initial public offerings, the district court had held that the plaintiffs needed to make only “some showing” that they had met the requirements of Rule 23. In particular, the district court had held that it would be inappropriate at the certification stage to weigh expert reports regarding loss causation and other issues relevant to the “predominance” requirement. The Second Circuit vacated the certification, holding that a trial judge must “assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit.” *Id.* at 42. In reaching this conclusion, the court noted that “[t]he oft-quoted statement from *Eisen* was made in a case in which the district judge’s merits inquiry had nothing to do with determining the requirements for class certification.” *Id.* at 33. Where class certification is at issue, a district court must make a “definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues” and must resolve “factual disputes relevant to each Rule 23 requirement.” *Id.* at 41. The Second Circuit also took care to note that it would not be sufficient for a plaintiff to establish a Rule 23 requirement with expert testimony that is “fatally flawed.” *Id.* at 42.

The Third Circuit has joined the Second Circuit with *In re Hydrogen Peroxide*. Similarly, the Tenth Circuit has moved into the *IPO* camp with its February decision in *Vallario v. Vandehey*, 554 F.3d 1259 (10th Cir. 2009), where it held that a district court is authorized to make the necessary Rule 23 findings at the class certification stage, even if those issues are intertwined with the merits. The Ninth Circuit had been an outlier. In its original opinion in *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007), the court shied away from allowing the resolution of conflicting evidence on a motion for class certification, noting that “it has long been recognized that arguments evaluating the weight of evidence or the merits of a case are improper at the class certification stage.” *Id.* at 1227. However, after a petition for rehearing was filed, the panel amended this opinion to note that “courts are not only at liberty to but *must* consider evidence which goes to the requirements of Rule 23 at the class certification stage even if the evidence may also relate to the underlying merits of the case.” *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1177 n.2(9th Cir. 2007), *vacated and en banc rehearing ordered* 556 F.3d 919 (9th Cir. 2009), (emphasis in original; citation and internal punctuation omitted). Nevertheless, the court required much less rigorous standards for resolving conflicting expert testimony at the certification stage than did the Second Circuit in *IPO* and the Third Circuit in *In re Hydrogen Peroxide* and it affirmed the district court’s rulings, which had rejected

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the weighing of expert testimony altogether at the class certification stage.

The plaintiffs' bar will continue to press their side of the *Eisen* debate. Some circuits, including, it seems, the D.C. Circuit, continue to adhere to the pre-*IPO* approach. See e.g., *In re Nifedipine Antitrust Litig.*, 2009 U.S. App. Lexis 3643 (D.C. Cir. Feb. 23, 2009) (declining to review 23(f) petition and citing *Eisen* for the proposition that a district court should not consider merits issues at the class certification stage). The appropriate level of analysis required to resolve competing expert testimony in particular is likely to be an ongoing area of focus.¹¹ Given the tremendous consequences of class certification in many cases and the integral importance of this issue to deciding the certification question, the issue may be ripe for further Supreme Court guidance.

¹¹ For the treatment of these issues from a plaintiff's side perspective, see Roger W. Kirby, *As a Threshold Matter: Just What Did the Second Circuit Mean When It Said 'Rule 23 Requirements Are Threshold Issues?'*, 9 BNA's *Class Action Litigation Report* 604 (December 12, 2008), which relies heavily on the now-repudiated district court decision in *In re Hydrogen Peroxide*.

B. Damages Suits Under Rule 23(b)(2)

Rule 23(b)(2) allows certification where “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]” Rule 23(b)(2) does *not* require plaintiffs to show, as they must under Rule 23(b)(3), that questions of law or fact common to class members predominate over any questions affecting only individual members, or that the proposed class action is superior to alternative methods of resolving class member claims. Plaintiffs' counsel therefore have sought to make use of Rule 23(b)(2), even in cases where they seek substantial monetary relief where they might have trouble meeting the “predominance” and “superiority” requirements. The circuit courts have differed in their degree of receptiveness to these contentions.

The Ninth Circuit's decision in *Dukes v. Wal-Mart Inc.*, 509 F.3d 1168 (9th Cir. 2007) (vacated and *en banc* rehearing ordered by 556 F.3d 919 (9th Cir. 2009)), demonstrates one court's willingness to view injunctive and declaratory relief as predominating even where the plaintiffs seek enormous amounts of money. The plaintiffs in that Title VII discrimination case sought no compensatory damages, but they did seek back pay and punitive damages that they claim may amount to *billions* of dollars. Nevertheless, the court observed that “the predominance test turns on the *primary goal* of the litigation—not the theoretical or possible size of the damage award.” *Id.* at 1186 (emphasis in original). The court also quoted with approval the district court's sentiment that “focusing on the potential size of a punitive damage award would have the perverse effect of making it more difficult to certify a class the more egregious the defendant's conduct or the larger the defendant.” *Id.* at 1186-87. Furthermore, although recognizing that the request for back pay weighed against certification, the court upheld the district court's determination that the requests for injunctive and declaratory relief nevertheless predominated. *Id.* at 1187-88.

In *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), by contrast, the Fifth Circuit upheld the district court's denial of certification under 23(b)(2) and 23(b)(3) to a putative class of African-American employees and applicants for employment alleging discrimination under Title VII and seeking substantial monetary remedies. Noting that “a class seeking substantial monetary remedies will more likely consist of members with divergent interests” (*id.* at 413), the court articulated a bright-line test: “[M]onetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief. By incidental, we mean damages that flow directly from liability to the class as a *whole* on the claims forming the basis of the injunctive or declaratory relief.” *Id.* at 415 (emphasis added). Thus, monetary relief in a case where 23(b)(2) certification was appropriate would “be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions.” *Id.* Because recovery of the monetary

remedies sought “required particularly individualized proof of injury, including how each class member was personally affected by the discriminatory conduct”(*id.* at 416), the Fifth Circuit concluded that certification under 23(b)(2) would have been inappropriate.

The conflict between *Dukes* and *Allison* has deepened and matured across the courts of appeals. Some courts, like the Fourth and Eleventh Circuits, have followed the *Allison* approach. See *Cooper v. Southern Co.*, 390 F.3d 695, 720 (11th Cir. 2004) (holding that monetary damages were not “incidental” in light of the plaintiffs’ pursuit of substantial compensatory and punitive damages); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330-32 (4th Cir. 2006) (holding that requests for injunctive and declaratory relief could not be viewed as predominating over requests for monetary relief, where the injunctive relief, even if granted, could no longer benefit the plaintiffs). These conflicts deepened in 2008. See *McLain v. Lufkin Indus.*, 519 F.3d 264, 283 (5th Cir. 2008) (upholding the denial of certification to a proposed (b)(2) class seeking declaratory, injunctive, and back pay relief and refusing to certify an injunctive only class, and noting that “if the price of a Rule 23(b)(2) disparate treatment class both limits individual opt outs and sacrifices class members’ rights to avail themselves of significant legal remedies, it is too high a price to impose.”).

This issue is certainly destined for Supreme Court review. Supreme Court resolution of this issue—both under Title VII and more generally—will provide much needed clarity over whether plaintiffs can use the 23(b)(2) device to circumvent Rule 23(b)(3)’s predominance and superiority requirements in suits that effectively seek substantial money damages awards.

C. The “Predominance” Debate Continues

Courts have also differed with respect to the precise manner in which they construe the predominance test of Rule 23(b)(3). Some circuits attach tremendous weight to allegations that the defendants engaged in a “common course of conduct” and have held that the existence of a “common scheme” is sufficient to satisfy the predominance test, while other courts have given somewhat less emphasis to the defendant’s “common course of conduct,” holding that even in the face of such conduct, individualized issues may nevertheless predominate, such as issues involving the particular impact the defendant’s course of conduct had on individual members of the putative class.

Klay v. Humana Inc., 382 F.3d 1241 (11th Cir. 2004), exemplifies a case in which a purported “common course of conduct” was deemed sufficient to satisfy Rule 23(b)(3)’s predominance requirement. See *id.* at 1255 (“In certifying the plaintiffs’ RICO claims, the district court found that common questions of fact and law predominate because this case ‘involves a conspiracy and joint efforts to monopolize and restrain trade.’ . . . We agree with this analysis.”). The criticism of this case and others like it is that they essentially deprive Rule 23(b)(3) of any force because almost any conduct can be characterized as a “common policy” that obviates the need for evaluating the particulars of each class member’s claim.

By contrast, in *Danvers Motor Co. v. Ford Motor Co.*, 543 F.3d 141 (3d Cir. 2008), the Third Circuit remanded a case to the district court for decertification of a class because the lower court’s finding that Ford had engaged in a “common course of conduct” with respect to the plaintiff franchise automobile dealers by imposing certain program requirements on them was insufficient to establish predominance in the face of the individualized impact the program had on each of the plaintiffs. *Id.* at 148-49.

Likewise, in *Gene & Gene LLC v. Biopay LLC*, 541 F.3d 318 (5th Cir. 2008), the Fifth Circuit reversed the district court’s certification of a class of junk fax recipients. The district court had found the predominance requirement satisfied because the defendant had engaged in a “common course of conduct, fax blasting.” *Id.* at 326. However, the Fifth Circuit observed that the predominant issue of fact was whether each individual member of the putative class had consented to the defendant’s conduct. *Id.* at 327. Because the evidence suggested that the named plaintiff could not prove lack of consent on a class-wide basis, the Fifth Circuit held that the district court had abused its discretion in certifying the class. *Id.* at 328-29.

This debate is also likely to continue until Supreme Court review occurs. The Rule 23(b)(3)

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predominance requirement would lose its force if the mere assertion that a defendant engaged in a “common scheme” is sufficient to satisfy the “predominance” test. That reasoning threatens to convert Rule 23(b)(3) into little more than a Rule 23(a) commonality-type test.

D. Choice of Law Analysis at the Class Certification Stage

Both federal and state courts have struggled with whether a court evaluating a request to certify a nationwide or multistate class should conduct a choice of law analysis and the extent to which a court may certify a class even if doing so would mean extending the law of the forum state to encompass the claims of class members residing in other jurisdictions.

The Arkansas Supreme Court held in 2008 that a trial court need not engage in choice of law analysis at the class certification stage. In *General Motors Corp. v. Bryant*, 374 Ark. 38 (2008), the court affirmed the certification of a nationwide class of purchasers of GM pickups and utility vehicles between 1999 and 2002, seeking damages for alleged brake defects. Although GM contended that variations in the laws of the 51 different jurisdictions in play undermined “predominance,” Arkansas rules did not require as rigorous a predominance analysis as the federal rules. Instead, the court held that satisfaction of the predominance requirement in Arkansas required plaintiffs to show only that “there is a predominating question that can be answered before determining any individual issues.” *Id.* at 44. Holding that the issues of whether the class vehicles contained defective brakes and whether GM concealed those defects were just such questions, the court could not “say that our class-action jurisprudence requires ... a choice-of-law analysis prior to certifying a class[.]” *Id.* at 47. The United States Supreme Court denied certiorari on January 12, 2009.

Notably, the Arkansas Supreme Court in *Bryant* did not insist that Arkansas law would apply to all members of the nationwide class, but merely allowed postponement of choice of law determinations until after certification. And the case was filed before CAFA's effective date, which would have permitted the defendants to remove the multi-state action to federal court.

Some other courts have seemed willing in recent years to apply the law of one state to all members of a nationwide class. In one example, on March 12, 2009, the Ninth Circuit in *Mazza v. American Honda Motor Co.*, No. 09-80000, granted a Rule 23(f) petition brought by a defendant automobile corporation and permitted that defendant to appeal an order certifying a nationwide class seeking relief under California state law. The district court held that it could apply California law to the claims of all class members because (1) the “Defendant's allegedly deceptive practices originate[d] in, and emanate[d] from, California” (No. 2:07-cv-07857, Dkt. #107, at 11 (C.D. Cal. Dec. 16, 2008)), (2) the defendant had ostensibly failed to show that the differences in the various state laws were material (*id.* at 14), (3) the defendant had ostensibly failed to demonstrate that other states had an interest in applying their laws to the litigation (*id.* at 17), and (4) application of California law would not be arbitrary or unfair to nonresident class members (*id.* at 19).

The petition explains that the various states have material variances between their applicable laws, such that application of California law would have a significant possible effect on the outcome of a trial, and the various other states have an interest in not having their laws and policies subordinated to those of California. It also invokes the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), which squarely holds that the Due Process Clause and the Full Faith and Credit Clause preclude one state from applying its laws to the claims of out-of-state residents, unless the state has “a significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class . . . in order to ensure that the choice of [that state's] law is not arbitrary or unfair.” *Id.* at 821-22.

E. The Removability of State Court Securities Class Actions

A split is emerging in the federal appellate courts over whether a securities class action filed in state court is removable pursuant to CAFA. Although the Securities Act of 1933 provides for concurrent state and federal jurisdiction, the Securities Act specifically prohibits the removal of state court actions asserting

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claims under the Act. See 15 U.S.C. § 77v(a). The Ninth Circuit recently held that the Securities Act's specific prohibition on removal of state court actions trumps CAFA's broader and more general removal provisions. *Luther v. Countrywide Home Loans Serv. LP*, 533 F.3d 1031 (9th Cir. 2008). The Seventh Circuit disagreed in *Katz v. Gerardi*, 552 F.3d 558 (7th Cir. 2009), holding that the Securities Act and CAFA are incompatible, that "[u]sually the older law yields to the newer" (*id.* at 561), and that all securities class actions that satisfy CAFA's jurisdictional requirements are removable (subject to the specific exceptions in 28 U.S.C. § 1453(d)(1)-(3)). *Id.* at 562-63.

F. Preclusion

All defendants who settle class cases seek a global, and permanent, peace. They expect to have that assurance once a settlement has been approved by the district court and affirmed on appeal. But the courts are divided over the standard to be applied when a member of a settled class challenges the validity of a settlement, sometimes years later, in collateral proceedings. These "collateral attacks" generally allege that the earlier settlement is not binding because the plaintiff's interests were not adequately represented in the first proceeding, or because the settlement's notice procedures did not satisfy due process. They may raise these challenges even though the identical challenges were raised in the initial class proceedings. The two key courts of appeals decisions on this issue appear to point in different directions.

In *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999), the Ninth Circuit adopted a "procedural due process" approach to this question. It held that so long as the court reviewing the initial settlement followed the appropriate procedures—*i.e.*, that it held a fairness hearing, provided notice and opt-out rights as required by Rule 23—then a reviewing court should not engage in "collateral second-guessing of those determinations and that review." *Id.* at 648.

However, in *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), the Second Circuit appeared to take a different approach by reviewing the issues raised in a collateral attack *de novo*. *Stephenson* involved a challenge to a settlement, entered into almost 20 years previously, encompassing military personnel injured in Vietnam by Agent Orange or related herbicides. The settlement explicitly provided that "[t]he Class specifically includes persons who have not yet manifested injury." *Id.* at 252. The Second Circuit itself had "affirmed class certification, settlement approval and much of the distribution plan" over predominance and adequacy of representation objections based on the military contractor defense. *Id.* at 253. When plaintiffs in *Stephenson* alleged injuries resulting from exposure to Agent Orange and sued relevant chemical manufacturers, the district court dismissed their case as barred by the 1984 settlement. The Second Circuit reversed, holding that, despite its earlier affirmance of the certification and settlement, class members with injuries not yet manifest at the time of the settlement had not been adequately represented. Notably, the Second Circuit did not view itself as having deviated from *Epstein*, 179 F.3d 641. The court viewed *Epstein* as holding that a collateral attack is barred *only* when the original certifying court or reviewing court specifically found that representation was adequate with respect to individuals situated similarly to those who later seek to attack the preclusive effect of the judgment. *Stephenson*, 273 F.3d at 258 n.7. Because neither the district court in 1984 nor the Second Circuit in its later review had expressly found that absent class members with unmanifested injuries were adequately represented, the judgment had no preclusive effect as to those members. *Id.* at 258.

The rules governing the preclusive effect of class action settlements warrant clarification. If mounting a collateral attack becomes too easy, defendants entering into a class settlement can never be assured of the finality and global peace for which they are paying.

V. Key Unresolved Issues (State Courts)

The states also continue to be hotbeds of class action activity, and there are many issues to watch at the state level in the year ahead. As in previous years, California in particular is set to consider key cases that could have a significant impact on class litigation. The American Tort Reform Association recently elevated Los Angeles, California to its list of "judicial hellholes."¹² And California has become one of the

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jurisdictions of choice for the plaintiff's bar after CAFA, because even a California-based class has substantial size (frequently more than 20 percent of a company's customers). As noted above, class action filings in Los Angeles County Superior Court have increased sharply in recent years.

¹² *Judicial Hellholes 2008*, American Tort Reform Association, available at <http://www.atra.org/reports/hellholes>.

A. Proposition 64 Amendments to California's Unfair Competition Law

California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.*, the "UCL") is a popular class action statute that authorizes plaintiffs to sue for conduct deemed "unlawful" (violations of virtually any law, even if the underlying statute provides no private right of action), "fraudulent" (conduct that is "likely to deceive" reasonable consumers), and "unfair" (defined vaguely and inconsistently by appellate courts). In 2004, following several high-profile abuses of the UCL,¹³ California voters approved Proposition 64, a statewide initiative that modified some of the most pernicious aspects of the UCL by requiring plaintiffs to demonstrate "injury in fact and . . . lost money or property as a result of the unfair competition" and to comply with the procedural requirements governing class actions in California.¹⁴

¹³ See, e.g., *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 178 n.10(2007) (noting that Proposition 64 "restrict[ed] previously broad standing requirements for a private right of action . . . , stating in the preamble to the measure that the broader standard had encouraged frivolous litigation, had been abused by attorneys who were motivated only by private financial gain, and negatively had affected many businesses.") (citing Prop. 64, § 1, subds.(b), (c) & (e), as enacted at Gen. Elec. (Nov. 2, 2004)); *People ex. rel Lockyer v. Brar*, 115 Cal. App. 4th 1315, 1316-17 (2004) (describing abuses of the UCL that fueled Proposition 64, including attorney-manufactured claims generated by "scour[ing] public records on the Internet for what are often ridiculously minor violations of some regulation or law . . .").

¹⁴ The Supreme Court of California will address whether Proposition 64's amendments require formal class certification in *Arias v. Superior Court*, 153 Cal. App. 4th 777, *rev. granted and depublished* 169 P.3d 882 (2007).

The Proposition 64 amendments spawned extensive litigation over whether plaintiffs must establish reliance and causation to pursue private UCL claims. Those issues are now before the Supreme Court of California in pair of cases.¹⁵ In the lead case (*In re Tobacco II Cases*), the court will address the following issues:

¹⁵ See *In re Tobacco II Cases*, 142 Cal. App. 4th 891, *rev. granted by* 51 Cal. Rptr. 3d 707 (2006); *Pfizer Inc. v. Super. Ct.*, 141 Cal. App. 4th 290, *rev. granted by* 51 Cal. Rptr. 3d 707 (2006). In *McAdams v. Monier, Inc.*, 151 Cal App. 4th 667, 672 (2007), *rev. granted and depublished* 168 P.3d 869 (Cal. 2007), the Court of Appeal held that "an 'inference of common reliance' may . . . be applied to a UCL class that alleges a material misrepresentation consisting of a failure to disclose a particular fact.")

(1) In order to bring a class action under Unfair Competition Law (Bus. & Prof. Code, section 17200 *et seq.*), as amended by Proposition 64 (Gen. Elec. (Nov. 2, 2004)), must every member of the proposed

class have suffered “injury in fact,” or is it sufficient that the class representative comply with that requirement?

(2) In a class action based on a manufacturer's alleged misrepresentation of a product, must every member of the class have actually relied on the manufacturer's representations?

Oral argument before the California Supreme Court was scheduled in this case for March 3, 2009, in San Francisco. Meanwhile, while the Court considers these issues in the context of class certification, several decisions requiring proof of reliance and causation by the named plaintiff remain published and citable to challenge the standing of private plaintiffs in UCL actions in early motions challenging the sufficiency of the pleadings. See, e.g., *Medina v. Safe-Guard Prods., Int'l, Inc.*, 164 Cal. App. 4th 105, 115 (2008), *rev. denied* by 2008 Cal. LEXIS 11533 (Sept. 24, 2008); *Hall v. Time Inc.*, 158 Cal. App. 4th 847, 849, 859 (2008); *Daro v. Superior Court*, 151 Cal. App. 4th 1079, 1097-99 (2007).¹⁶

¹⁶ In addition, several district court cases have reached the same result. *In re Yahoo Litig.*, 251 F.R.D. 459, 475 (N.D. Cal. 2008); *Ironworkers Local Union No. 68 v. Amgen, Inc.*, No. 07-5157, 2008 U.S. Dist. LEXIS 8740, at *17 (C.D. Cal. Jan. 22, 2008); *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 947-48 (S.D. Cal. 2007); *Doe v. Texaco, Inc.*, 2006 U.S. Dist. LEXIS 53930, at *9 (N.D. Cal. July 21, 2006); *Laster v. T-Mobile U.S.A., Inc.*, 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005). *But see In re Ditropan XL Antitrust Litig.*, 529 F. Supp. 2d 1098, 1106 (N.D. Cal. 2007); *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1137-39 (C.D. Cal. 2005) (refusing to require allegations of detrimental reliance to state a claim under the UCL).

Last year witnessed several other significant developments in California class action practice:

• **The UCL Does Not Have Extraterritorial Reach:** In *Sullivan v. Oracle Corp.*, 547 F.3d 1177 (9th Cir. 2008), the Ninth Circuit held that the UCL “does not apply to allegedly unlawful behavior *occurring outside California* causing injury to nonresidents of California.” *Id.* at 1187 (emphasis added). This decision would cut back on efforts by the plaintiffs' bar to file nationwide class actions predicated solely on UCL violations where there is no discernable connection to California. However, it was withdrawn by the Ninth Circuit on February 17, 2009, when the Court certified three questions to the California Supreme Court, including whether the UCL applies “to overtime work performed outside California for a California-based employer by out-of-state plaintiffs. . . if the employer failed to comply with the overtime provisions of the FLSA[.]” 2009 U.S. App. Lexis 2894 (9th Cir. Feb. 17, 2009).

• **Class Needs May Trump Privacy Interests:** In *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360 (2007), the Supreme Court of California held that the named plaintiff's interest in obtaining contact information for other customers who complained about a DVD player manufactured by the defendant sufficiently outweighed the absent, putative class members' privacy interests. The Court held that “[c]ontact information regarding the identity of potential class members is generally discoverable, so that the lead plaintiff may learn the names of other persons who might assist in prosecuting the case.” *Id.* at 373. Following *Pioneer Electronics*, the California Courts of Appeal have authorized discovery of names and addresses of potential class members before certification. See *CashCall, Inc. v. Superior Court*, 159 Cal. App. 4th 273, 286 (2008); *Puerto v. Superior Court*, 158 Cal. App. 4th 1242 (2008); *Belaire-West Landscape, Inc. v. Superior Court*, 149 Cal. App. 4th 554 (2007).

The Second Appellate District even reversed the superior court's denial of class certification in *Lee v. Dynamex, Inc.*, 166 Cal. App. 4th 1325 (2008), because the court did not permit the named plaintiff to discover the identity and contact details for putative class members. In *Crab Addison, Inc. v. Superior Court*, 169 Cal. App. 4th 958 (2008), *rev. denied* by 2009 Cal. LEXIS 2989 (March 18, 2009), that same court rejected the contention that the trial court should use an “opt-in” procedure whereby it would release information only for those employees who executed an authorization form.

B. The *Eisen* and Predominance Debates

The *Eisen* issue percolating in the federal system is also winding its way through the state courts. While the federal courts have generally accepted that disputed Rule 23 issues must be resolved at the certification stage even if they overlap with the merits, some state courts have declined to follow this approach. See, e.g., *General Motors Corp. v. Bryant*, 374 Ark. 38, 47 (2008) (holding that “stray[ing] into the merits of the action itself . . . shall not occur during the certification process”); *In re S.D. Microsoft Antitrust Litig.*, 657 N.W.2d 668, 673, 677(S.D. 2003); *Howe v. Microsoft Corp.*, 656 N.W.2d 285, 291, 293-95(N.D. 2003). Other state courts, however, have not shied away from full-blown factual analysis at the certification stage, as long as that analysis is limited to what is necessary to make the requisite certification determinations. See, e.g., *Cruz v. Unilock Chicago*, 892 N.E.2d 78, 92 (Ill. Ct. App. 2008).

While the federal courts have generally accepted that disputed Rule 23 issues must be resolved at the certification stage even if they overlap with the merits, some state courts have declined to follow this approach.

C. Class Action Waivers

The enforceability of class action waivers also continues to be a hot topic, and recently these waivers have not fared well in the state systems. State courts continue to strike down and disapprove class action waivers in contractual arbitration provisions. See *Fiser v. Dell Computer Corp.*, 188 P.3d 1215 (N.M. 2008); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008); *McKee v. AT& T Corp.*, 191 P.3d 845 (Wash. 2008).

We expect to see continued increases in class action filings across vast sectors of the economy. The new administration, working with significant majorities in the House and Senate, can be expected to support legislation favorable to individuals bringing class actions, and to curtail and repeal the scope of federal preemption, thereby multiplying the set of available state-law theories.

This has been the rule for some time in California, where the state's supreme court, followed last year by the Ninth Circuit, has held that such waivers are unenforceable and unconscionable as a matter of California law. See *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 153 (2005); *Hoffman v. Citibank (South Dakota), N.A.*, 546 F.3d 1078, 1083 (9th Cir. 2008).

Notably, although the Third Circuit had previously indicated that the Federal Arbitration Act (“FAA”) would under certain circumstances preempt state court rulings striking class action arbitration waivers (see, *Gay v. CreditInform*, 511 F.3d 369, 378 (3d Cir. 2007)), it recently held such a waiver unconscionable and unenforceable under New Jersey law in *Homa v. American Express Co.*, 558 F.3d 225 (3d Cir. 2009). See also *In re American Express Merchs' Litig.*, 554 F.3d 300, 320 (2d Cir. 2009) (“We therefore hold that the class action waiver in the Card Acceptance Agreement cannot be enforced in this case because to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery.”); *Chalk v. T-Mobile USA, Inc.*, 2009 WL 792517 (9th Cir. March 27, 2009) (holding T-Mobile class action waiver unconscionable and unenforceable under Oregon law because it was “unilateral in effect” and because it “create[d] [a] disincentive to litigate”).

VI. Conclusion

Class action practice shows no signs of slowing down. We expect to see continued increases in class action filings across vast sectors of the economy. The new administration, working with significant majorities in the House and Senate, can be expected to support legislation favorable to individuals bringing class actions, and to curtail and repeal the scope of federal preemption, thereby multiplying the set of available state-law theories. Doctrinal splits will continue to develop and deepen, cementing the need for Supreme Court guidance on core Rule 23 issues.

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Certification Granted / Certification Denied

Number of Class Action Filed in Los Angeles County Superior Court, 2005-2008