

## Class Actions along the Path of Federal Rule Making

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### INTRODUCTION

Perhaps, intentional was the irony in the title of this Symposium, “The Future of Class Actions and Its Alternatives,” with the singular possessive “Its” suggesting that the “Alternatives” are to the “Future” and not “Class Actions.” Indeed, some of the other presentations at this Symposium seem to reinforce this irony in suggesting that class actions don’t have much of a future, or whatever future they have is a problematic or limited one.<sup>1</sup>

Dean Klonoff, who predicts a particularly dim future for class actions, asserts that courts have “tightened the requirements for almost every element of class certification” and thereby “undermine[d] the compensation, deterrence, and efficiency functions of the class action device.”<sup>2</sup> From another vantage point, Professor Issacharoff observes

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1. *Compare Wal-Mart Wins. Workers Lose.*, N.Y. TIMES, June 20, 2011, [http://www.nytimes.com/2011/06/21/opinion/21tue1.html?\\_r=0](http://www.nytimes.com/2011/06/21/opinion/21tue1.html?_r=0) (“Justice Scalia significantly raised the threshold of certification, writing that there must be ‘glue’ holding together the claims of a would-be class. Now, without saying what the actual standard of proof is, the majority requires that potential members of a class show that they are likely to prevail at trial when they seek initial certification. In this change, the court has made fact-finding a major part of certification, increasing the cost and the stakes of starting a class action.”), with Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. COLLOQUY 34, 44 (2011) (“The implications of this close, highly controversial portion of the *Dukes* opinion are varied. On the one hand, the Court’s ruling may have little impact on employment discrimination class actions. . . . [C]ases the size of *Dukes* are rare. With 1.5 million potential class members nationwide, *Dukes* unquestionably tested the outer bounds of what it takes to hold a class together. Smaller classes are bound to be more successful.”).

2. Robert H. Klonoff, *Reflections on the Future of Class Actions*, 44 LOY. U. CHI. L.J. 533, 533 (2012) [hereinafter Klonoff, *Reflections*].

that while class actions “offer[] an alternative form of collective organization to the state, [they lack] the elements of popular participation, political consent, and electoral accountability that justify governmental authority in a democracy.”<sup>3</sup> Relatively cheerful by comparison, Judge Martinotti explains that as obstacles to class certification have increased, parties are finding alternatives through the multidistrict process and, in any event, class actions are alive and still kicking (at least in New Jersey).<sup>4</sup>

I, for one, am unconvinced that class actions are on the ropes, ungoverned by the political process or confined to the Garden State. Rather, I believe that class actions will continue to play a vital role in resolving vast numbers of claims in the federal courts by affording relief to persons who might not otherwise be able to do so, and by affording preclusion to defendants under federal judicial supervision. Rather than fatal to class actions, the recent tightening of class certification standards are but steps along the normal path of federal procedural rule making and interpretation and should help ensure the vitality of class actions in the future.<sup>5</sup> The criticisms of these tighter standards seem to ignore that they have been prompted by perceived abuses in the application of the class action device, that addressing these abuses is an antidote necessary to preserve the device, and that some of the remedies have come through the political process.

#### I. DYNAMICS OF FEDERAL RULE MAKING: THE CASE OF CLASS ACTIONS

There is no question that the requirements for class certification have tightened in recent years. Legislative action has played a significant role in this constriction, including the Private Securities Litigation Reform Act,<sup>6</sup> the Securities Litigation Uniform Standards Act<sup>7</sup> and the

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3. Samuel Issacharoff, *Class Actions and State Authority*, 44 LOY. U. CHI. L.J. 369, 371 (2012).

4. See generally Hon. Brian R. Martinotti, J.S.C., *Complex Litigation in New Jersey and Federal Courts: An Overview of the Current State of Affairs and a Glimpse of What Lies Ahead*, 44 LOY. U. CHI. L.J. 561 (2012).

5. See Editorial, *A Sensible Call on the Wal-Mart Class-Action Suit*, WASH. POST, June 20, 2011, [http://www.washingtonpost.com/opinions/a-sensible-call-on-the-wal-mart-class-action-suit/2011/06/20/AGgd1LDH\\_story.html](http://www.washingtonpost.com/opinions/a-sensible-call-on-the-wal-mart-class-action-suit/2011/06/20/AGgd1LDH_story.html) (“The court did not foreclose a smaller and better-defined class action against Wal-Mart. Individual women may also bring cases, though for many the costs could be prohibitive. Class actions may no longer be the blunt instruments they once were, but they can and should remain an important, more focused tool that gives workers the strength in numbers often needed to combat discrimination.”).

6. Private Securities Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C. (2006)). PSLRA’s procedural reforms included, *inter alia*, new requirements for those who may serve as lead plaintiff and plaintiffs’ counsel in fraud cases, reducing the availability of joint and several liability, and heightened

Class Action Fairness Act (CAFA).<sup>8</sup> CAFA may also be explained as an effort to ensure the availability of national forums for actions involving nationwide or multistate classes.<sup>9</sup> This in no way questions the competence of state courts in administering class actions, but rather, recognizes that federal courts are insulated from political pressures in a way that is rare at the state level. Recent Supreme Court decisions also have tightened certification standards, most notably *Wal-Mart Stores, Inc. v. Dukes*<sup>10</sup> and *AT&T Mobility LLC v. Concepcion*.<sup>11</sup>

A. *A Brief Response to Dean Klonoff and Professor Issacharoff's Concerns about the Future of Class Actions and Its Alternatives*

Dean Klonoff plainly aligns himself with the critics of these developments. He believes that making class certification more difficult to obtain hinders class actions from performing their primary functions.<sup>12</sup> This may, of course, in one sense be true. But Dean

pleading standards. Ann Morales Olazábal, *Defining Recklessness: A Doctrinal Approach to Deterrence of Secondary Market Securities Fraud*, 2010 WIS. L. REV. 1415, 1416 n.1.

7. Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 122 Stat. 3227 (codified as amended in scattered sections of 15 U.S.C. (2006)). In 1995, to combat non-meritorious private securities actions, Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA). Enzo Incandela, Note, *Recourse Under § 10(b) on Life Support: The Displacement of Liability and Private Securities Fraud Action after Janus v. First Derivative*, 43 LOY. U. CHI. L.J. 935, 945-46 (2012). PSLRA consisted of comprehensive federal procedural, jurisdictional, and substantive reforms. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81-82 (2006). To skirt such reforms, however, plaintiffs merely brought their suits in state courts under state statutes and common law. See *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 123 (2d Cir. 2003) ("Confronted with more onerous procedural requirements and dimmed prospects of success under the PSLRA, litigants simply abandoned use of federal court and filed suit in state court under state securities laws."), *abrogated by Romano v. Kazacos*, 609 F.3d 512 (2d Cir. 2010). In response, Congress passed SLUSA in 1998. SLUSA amended the Securities Act of 1933 to make federal court the primary venue for nearly all securities class action lawsuits and to "prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than Federal, court." H.R. REP. NO. 105-803, at 13 (1998) (Conf. Rep.).

8. Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C. (2006)). CAFA, in theory, was enacted to reduce the ability to bring class action lawsuits. See generally Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 213 n.213 (2009).

9. See Edward F. Sherman, *Class Actions after the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1595 (2006) ("In recent years, federal courts had been perceived by both plaintiff and defendant lawyers as less sympathetic to class actions and to plaintiffs' cases than certain state courts. . . . These kinds of concerns led to focusing the legislation on expanding federal court 'diversity jurisdiction' and defendants' right to remove state class actions to federal court.").

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

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

12. See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. (forthcoming 2013) (manuscript at 1) [hereinafter Klonoff, *The Decline of Class Actions*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2038985](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038985) ("[I]n recent years courts have cut

Klonoff does not discuss the costs that class actions impose nor does he weigh these costs against the benefits of class litigation.<sup>13</sup> Class actions are expensive. They are obviously expensive for defendants,<sup>14</sup> but they are also expensive in opportunity costs for class counsel who could devote themselves to more productive endeavors if the social value of the relief obtained in class litigation fails to match the effort and resources put into it.<sup>15</sup> Class actions are also expensive for the judiciary. Opening the door wider for class actions lawsuits invites more class action lawsuits, in the same way that a new freeway often manages to increase traffic without decreasing congestion. We have entered an era of budgetary limits for the judiciary. Litigation that consumes large amounts of judicial resources crowds out other types of litigation.<sup>16</sup> These costs are substantial. Tightening certification standards may simply rebalance the costs and benefits of class actions to take proper account of both.

All class actions ratchet up the costs of any litigation. Thus, an action under either Rule 23(b)(1) or 23(b)(2) of the Federal Rules of

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back sharply on the ability to bring class action lawsuits, thereby undermining the compensation, deterrence, and efficiency functions of the class action device.”).

13. For a detailed discussion about the general benefits and costs of class actions, see Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 124 (2006).

14. See Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT’L L. 179, 190 (2001) (“For defendants, aggregation should reduce transaction costs by comparison with litigating claims individually. Higher claiming rates, however, are likely to increase the total price of settlement beyond what it might have been if all the claims necessitated individual litigation. With larger amounts of money at stake, plaintiff attorneys may litigate more aggressively, leading to higher defense fees and expenses, and thereby eroding the transaction cost savings accrued from aggregation.”). A defendant’s interests in reducing negative publicity and to prevent a drop in stock prices may also drive up the settlement value of large-scale litigation. *Id.*

15. For plaintiffs’ attorneys, class actions entail two types of investment expenditures: (1) investment of legal services (human and intellectual capital devoted to the action); and (2) financial investment (the cost incurred throughout the litigation process). Guy Halfteck, *The Class Action as a Financial Call Option* 24–25 (Harvard John M. Olin Discussion Paper Series, Discussion Paper No. 466, 2004), available at [http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/466.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/466.pdf).

16. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1363–64 (1995); see also William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1445 (2006) (“Judges are also unlikely to police class action attorneys [because] . . . [t]hey often have their own vested interest in seeing cases settle. Settlement removes the matter from the judge’s docket, not an unimportant factor in a time of onerous caseloads.”). One study by the Federal Judicial Center found that class action suits require nearly five to eleven times the work of a non-class action, and that on average, judges spend more than thirty-four hours on class actions but less than three hours on a class action settlement. THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMIC, FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 7, 61, 169 (1996).

Civil Procedure (“Federal Rules” or “Rules”) ups the stakes of any claim to which it is linked, while the force of aggregating parties who in no way consent to join in the litigation under Rule 23(b)(3) creates a particular momentum that imposes costs unlike almost any other form of litigation.<sup>17</sup> The tightening of certification standards decried by Dean Klonoff responds to those costs.<sup>18</sup> Rebalancing the costs and benefits of class actions and efforts to ensure their effective judicial administration respond to what have been widely perceived as missteps in judicial oversight of class actions.<sup>19</sup>

The belief that tightening of class certification standards has gone too far is certainly reasonable, but is by no means evident. Rule 23 is a creature of the judiciary that remains responsible for its administration. There can be no question that the judicially imposed restrictions on class actions criticized by Dean Klonoff were legitimate exercises of the Supreme Court’s authority to interpret the Federal Rules; after all, the Court promulgated the Federal Rules in the first place.<sup>20</sup> Congress, which delegated to the judiciary the power to craft the Federal Rules, is well within its right to intervene on occasion when it believes that the judiciary’s handiwork can be improved. The steps taken in recent years to restrict class certification can be criticized and may be unwise, as Dean Klonoff argues,<sup>21</sup> but illegitimate they surely are not.

Professor Issacharoff focuses on another aspect of class litigation. Class actions, if not a substitute for state action, are at least a supplement to it, but without the democratic controls that normally

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17. In addition to meeting the requirements for class certification under Rule 23(a), a class action must also satisfy either Rule 23(b)(1), 23(b)(2), or 23(b)(3). See ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL 47–85 (1999) [hereinafter KLONOFF, CLASS ACTIONS] (providing a summary of Rule 23(b)).

18. See Klonoff, *Reflections*, *supra* note 2, at 533 (opining that federal courts have cut back on the availability of the class action device by tightening the requirements for almost every element of Rule 23).

19. See Robin Conrad, *Opposing View: Wal-Mart Ruling Preserves Fairness*, USA TODAY (June 20, 2011 9:11 PM), [http://www.usatoday.com/news/opinion/editorials/2011-06-20-Wal-Mart-ruling-preserves-fairness\\_n.htm](http://www.usatoday.com/news/opinion/editorials/2011-06-20-Wal-Mart-ruling-preserves-fairness_n.htm) (“Some activist-minded judges have watered down class-certification requirements to the point that some courts certify classes even when the different plaintiffs have virtually nothing in common with one another. They have also made it far too easy for trial lawyers to lump plaintiffs with legitimate claims into a single class-action lawsuit along with many more plaintiffs with frivolous claims. These distortions of the law force defendants to settle unmeritorious claims that would never have prevailed in individual trials.”).

20. Rules Enabling Act (REA), 28 U.S.C. § 2702(a) (2006). Under the REA, the Supreme Court “shall have the power to prescribe the general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.” *Id.*

21. Klonoff, *Reflections*, *supra* note 2, at 542 (calling recent class action jurisprudence “troubling”).

attend the latter.<sup>22</sup> Sensibly enough, Professor Issacharoff cautions against delegating to private parties the authority to undertake governmental or governmental-like activity without serious thought about the consequences.<sup>23</sup> But serious and deliberate thought attends the process by which the Federal Rules are promulgated, amended and applied. And what we are witnessing in the decisions and legislative developments that have been criticized at this Symposium are examples of the normal ebb and flow of the federal rule making process.

The entire history of the federal rule making process, including the interpretations of the Rules by the Supreme Court, and the institutional gauntlet that any change in the Rules must run, has ordained that changes in the Rules and their interpretation have been incremental rather than bold. This system has not, however, prevented critics of these changes from voicing alarm, sometimes strenuously. Observe the reaction to *Bell Atlantic Corp. v. Twombly*<sup>24</sup> and *Ashcroft v. Iqbal*,<sup>25</sup> recent Supreme Court recent decisions that tightened the pleading standards of Rule 12(b)(6).<sup>26</sup> The dissenters in those cases suggested that the Supreme Court was acting out of turn and that any changes in pleading standards should have come not from the Court, but through the rule making process.<sup>27</sup>

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22. See Issacharoff, *supra* note 3, at 383–84 (“At the furthest remove from the idea of exclusive state regulatory authority is the use of the class action as a form of regulatory authority designed to be relatively independent of formal state administration.”).

23. See *id.* at 371 (“[D]elegation of collective authority to an institution without the democratic pedigree of the state demands some justification, especially in countries with the strong statist tradition emerging from Roman law.”).

24. 550 U.S. 544 (2007).

25. 556 U.S. 662 (2009).

26. See, e.g., Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOY. U. CHI. L.J. 627, 628 (2012) (“[The Court] rewrote the rules of pleading in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* in a manner that arguably turned Rule 12(b)(6) motions into bad applications of summary judgment.”); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431–32 (2008) (“In a startling move by the U.S. Supreme Court, the seventy-year-old liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2) has been decidedly tightened (if not discarded) . . .”). See generally Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1824–28 (2008) (providing an overview of the academic response to *Twombly*). For a comprehensive overview of *Twombly* and *Iqbal*, see Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 183–91 (2010).

27. See *Iqbal*, 556 U.S. at 699 (Souter, J., dissenting) (“By my lights, there is no principled basis for the majority’s disregard of the allegations linking Ashcroft and Mueller to their subordinate’s discrimination.”); *Twombly*, 550 U.S. at 579 (Stevens, J., dissenting) (“I would not rewrite the Nation’s civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so. Congress has established a process—a rulemaking process—for revisions of that order.”).

Some changes in federal practice do in fact originate in the rules committees. The recent changes in Rule 45 (dealing with subpoenas)<sup>28</sup> were the product of work by the Advisory Committee on Federal Rules of Civil Procedure (“Advisory Committee”) and Standing Committee on Rules of Practice and Procedure (“Standing Committee”), not as a result of or in response to decision making by the Supreme Court. Similarly, the changes to Rule 26 (work product protection of expert witness drafts and communications with counsel)<sup>29</sup> were the product of the Advisory Committee and the Standing Committee in response to the Bar’s complaints about the unworkability of a lack of protection for such materials.<sup>30</sup> And, of course, the Style Project which altered much of the language in the Federal Rules to promote uniformity and simplicity was not in any respect initiated because of Supreme Court decision making.<sup>31</sup>

The 2010 amendments to Rule 56, on the other hand, were the product of the Committees responding to changes in the summary judgment standards announced by the Supreme Court in *Anderson v. Liberty Lobby, Inc.*,<sup>32</sup> *Celotex Corp. v. Catrett*,<sup>33</sup> and *Matsushita v. Electric Industrial Co. v. Zenith Radio Corp.*,<sup>34</sup> as well as other decisions<sup>35</sup> and in response to comments and suggestions from the bench and bar.<sup>36</sup>

In other words, the process of federal rule making takes place in a kitchen with many cooks. No doubt, these cooks sometimes produce a stew that could be improved. But the Advisory Committee, Standing Committee and the Supreme Court have been remarkably mindful of the limitation on the rule making process embodied in the Rules Enabling Act: “[Federal] rules shall not abridge, enlarge or modify any substantive right.”<sup>37</sup> The Rules Enabling Act operates as a sort of “No

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28. FED. R. CIV. P. 45.

29. FED. R. CIV. P. 26.

30. *See id.* advisory committee’s note (2010).

31. *See generally* Lisa A. Eichhorn, *Clarity and the Federal Rules of Civil Procedure: A Lesson from the Style Project*, 5 J. ASS’N LEGAL WRITING DIRECTORS 1, 2–6 (2008) (providing background on the Style Project).

32. 477 U.S. 242 (1986).

33. 477 U.S. 317 (1986).

34. 475 U.S. 574 (1986).

35. *See* Marcy J. Levine, *Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court*, 37 EMORY L.J. 171, 210 (1988) (discussing the effect of the three 1986 cases through other court decisions).

36. *See, e.g.*, Lee H. Rosenthal, *The Summary Judgment Changes That Weren’t*, 43 LOY. U. CHI L.J. 471, 472–98 (2012) (discussing the process of amending Rule 56 after the Supreme Court decided the *Anderson/Celotex/Matsushita* trilogy in 1986).

37. 28 U.S.C. § 2072(b) (2006).

Trespassing” sign that Congress erected when it granted the federal courts the authority to make their own rules. It was the price extracted by Congress when the Rules Enabling Act of 1934 rounded out the authority of the judiciary, a void that the Founders had left when they completed their work and the first Congress had left in an ambiguous state in the first Judiciary Act and its subsequent iterations during the nineteenth century and the early part of the last century.<sup>38</sup>

## II. RULE 23 JURISPRUDENCE: A MODERN CAUTIONARY TALE

The line demarking what is substantive and what is procedural is sometimes murky and difficult to perceive. This has been notably evident in Rule 23, which governs the procedure and conduct of federal class actions.

The Rule itself, of course, requires an inquiry at two levels. First, Rule 23(a) establishes four criteria that a class action must satisfy: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of the representation.<sup>39</sup> Second, Rule 23(b) requires the party seeking class certification to establish that the action is necessary to achieve one of the three objectives of class actions: (1) avoidance of inconsistent determinations or impairment of individuals’ rights; (2) implementation of injunctive or declaratory relief; or (3) recovery of damages.<sup>40</sup>

Let’s go back a few years to set the stage for this brief look into modern Rule 23 jurisprudence. *Eisen v. Carlisle & Jacquelin*,<sup>41</sup> decided in 1974, presented one of the first opportunities for the Supreme Court to address Rule 23 after the Advisory Committee made significant amendments to the Rule in 1966. In *Eisen*, the Supreme Court stated that an inquiry into the merits of the case was not appropriate at the class certification stage:

We find 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. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it.<sup>42</sup>

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38. For a thorough overview and commentary of the Rules Enabling Act, see Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303 (2006).

39. FED. R. CIV. P. 23(a)(1)–(4). See KLONOFF, CLASS ACTIONS, *supra* note 17, at 19–46 (explaining Rule 23(a)).

40. FED. R. CIV. P. 23(b)(1)–(3).

41. 417 U.S. 156 (1974).

42. *Id.* at 177.

Notice that by referring to the plaintiff obtaining the benefits of a class action, the Court seemed to be concerned that an early look at the merits would unfairly favor plaintiffs.<sup>43</sup> The Supreme Court's intuition was that certifying a class gave plaintiffs considerable leverage in the litigation by substantially increasing the defendant's exposure.<sup>44</sup> The Court recognized the obvious: a class action does much more than simply join parties. Certification of a class produces a dynamic that geometrically raises the stakes in litigation. In other words, the whole of a class action is greater than the sum of its parts.

The Court in *Eisen* continued:

This procedure [of looking at the merits for purposes of certification] is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such as soon as practicable after the commencement of (the) action.<sup>45</sup>

In the years following *Eisen*, it became increasingly clear that the aspiration that the certification question be resolved early in the case and divorced from the merits ran up against the practicalities of class action litigation. Plaintiffs frequently required discovery to identify class members and help determine how the class should be defined, while defendants often sought discovery to challenge the adequacy of the class representative.<sup>46</sup> The class determination far more often than not was not taken up until well into, if not late in, the litigation. Often, courts would not address class determination issues until the parties presented a settlement proposal for preliminary approval or the case was near trial-ready. The 2003 amendments to Rule 23, with its substitution of "at an early practicable time" for "as soon as practicable" language,

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43. *See id.* at 178 ("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." (quoting *Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir. 1971))).

44. *See id.* ("Additionally . . . a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant.").

45. *Id.* (internal quotation omitted).

46. *See Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 142 (N.D. Cal. 2004) ("In preparation for [Plaintiffs' Motion for Class Certification], the parties took extensive discovery. They also filed extensive briefing along with volumes of documentary and testimonial evidence."), *aff'd*, 603 F.3d 571 (9th Cir. 2010), *rev'd*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). *See also* FED. R. CIV. P. 23(a)(4) (requiring class representatives to "fairly and adequately protect the interests of the class").

recognized this change in practice.<sup>47</sup>

Then, in *In re Hydrogen Peroxide Antitrust Litigation*, in an opinion penned by the influential Judge Anthony Scirica, the Third Circuit stated that *Eisen* is best understood to preclude only a merits inquiry that is unnecessary to make a Rule 23 certification determination.<sup>48</sup> A thorough discussion of these issues came recently in *Wal-Mart Stores, Inc. v. Dukes*.<sup>49</sup> In *Dukes*, the district court certified a class under Rule 23(b)(2) of 1.5 million female employees of Wal-Mart Stores who claimed that Wal-Mart had discriminated against the class on the basis of their sex by denying them equal pay or promotions in violation of Title VII of the Civil Rights Act of 1964.<sup>50</sup> Plaintiffs sought injunctive and declaratory relief and an award of back pay.<sup>51</sup>

The Supreme Court unanimously held that the plaintiffs' claim for back pay was unsuitable for class treatment under Rule 23(b)(2), as that provision applies to injunctive or declaratory relief claims but not damage claims.<sup>52</sup> In retrospect, it is surprising that the plaintiffs' efforts to shoehorn a damages remedy into Rule 23(b)(2) got as far as it did before these efforts were called out. The far more interesting part of the *Dukes* opinion concerned the showing necessary to obtain class certification. By a vote of 5-to-4, the Court decided that the class failed to meet certain requirements of Rule 23(a).<sup>53</sup> Obviously, there was no

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47. See FED. R. CIV. P. 23(c)(1)(A) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.").

48. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 317 (3d Cir. 2008). Accord *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 24 (1st Cir. 2008) ("It is a settled question that some inquiry into the merits at the class certification stage is not only permissible but appropriate to the extent that the merits overlap the Rule 23 criteria." (citing *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982))).

49. 131 S. Ct. 2541 (2011).

50. *Wal-Mart Stores, Inc.*, 222 F.R.D. at 141–42.

51. *Id.* at 141.

52. *Dukes*, 131 S. Ct. at 2557. More specifically, the Court held that claims for individualized relief, like backpay, cannot be pleaded by a Rule 23(b)(2) class. *Id.* See Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009) ("[T]he crux of [Rule 23(b)(2)] . . . consists of the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them."). But see Malveaux, *supra* note 1, at 46 ("Courts have regularly permitted back pay for civil rights cases under Rule 23(b)(2) on the grounds that this monetary relief is equitable and critical to Title VII's remedial scheme.").

53. *Dukes*, 131 S. Ct. at 2557. To complete his analysis of Rule 23(a), Justice Scalia opined:

[The plaintiffs] held a multitude of different 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. . . . Some thrived while others did poorly. They have little in common but their sex and this lawsuit.

question that the numerosity requirement of Rule 23(a) was met in *Dukes* and the Court's opinion contained essentially no discussion of the adequacy of representation prong of Rule 23(a). Thus, the Court focused on commonality and typicality.<sup>54</sup>

The majority acknowledged that Rule 23 does not establish a "mere pleading standard."<sup>55</sup> As Judge Scirica aptly stated in *In Re Hydrogen Peroxide*, a party seeking class certification must affirmatively demonstrate compliance with Rule 23:

First, the decision to certify a class calls for findings by the court, not merely a "threshold showing" by a party, that each requirement of Rule 23 is met. Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence. Second, the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action. Third, 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.<sup>56</sup>

Two weeks before it issued its opinion in *Dukes*, the Supreme Court decided *Erica P. John Fund, Inc. v Halliburton Co.*<sup>57</sup> In *Halliburton*, the lower courts had denied class certification in a fraud-on-the-market securities action on the ground that the plaintiffs had failed to establish loss causation on any of their claims.<sup>58</sup> Loss causation, of course, is a required element of a claim under federal securities laws.<sup>59</sup>

The Supreme Court reversed denial of class certification because although loss causation is an element of defendants' liability, it is not essential to establish that element of the plaintiffs' case to determine that defendants had acted in a way that had a common effect on the purported class.<sup>60</sup> Rather, the commonality element of Rule 23(a) is established not by showing loss causation, but by the other causation element in a securities claim—transaction causation.<sup>61</sup> This, the Court held, is furnished in a fraud-on-the-market securities action by the

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

54. *See id.* at 2550–57 (addressing Rule 23(a)(2)–(3)).

55. *Id.* at 2551.

56. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008).

57. 131 S. Ct. 2179 (2011).

58. *Id.* at 2184. The district court made clear, however, that absent the loss causation requirement, it would have granted the Fund's certification request under Rule 23(b)(2). *Id.* at 2183–84.

59. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342 (2005).

60. *Halliburton*, 131 S. Ct. at 2187.

61. *Id.* at 2186.

presumption of reliance established in the Supreme Court's decision in *Basic Inc. v. Levinson*.<sup>62</sup> In *Basic*, the Supreme Court stated that in buying or selling publicly-traded securities, investors rely upon the price of a security in deciding whether to buy or sell.<sup>63</sup> Because of the efficiency of the market and that price reflects a mix of publicly known information, the investor is presumed to have relied upon it unless the defendant can adduce evidence to break the chain of reliance.<sup>64</sup>

Relying on this distinction between the types of causation in securities litigation, the Court in *Halliburton* reversed the lower court and found that the class met the Rule 23(a)(2) commonality prerequisite, noting that what was common to the class was its reliance on the integrity of the market.<sup>65</sup>

### III. WHAT DOES ALL THIS PRESAGE FOR THE FUTURE OF CLASS ACTIONS?

Although *Eisen* has not been overruled, its significance has been greatly reduced. What vigor remains of *Eisen* is that a trial court's decision to certify a class should not be based on its consideration of whether plaintiffs' claim will ultimately prove meritorious.<sup>66</sup> *Eisen* does not, however, foreclose consideration of the merits when such consideration bears on Rule 23 requirements.<sup>67</sup>

As the Rule 23 requirements are frequently enmeshed in the merits of plaintiffs' claims, it seems apparent that a court considering a motion to certify a class must do so based on a clear understanding of the legal elements of the claim for which class treatment is sought, as well as the evidence that can be introduced to support that claim. The class certification decision reaches beyond the pleadings. Thus, the first and most obvious lesson is that in considering a motion for class certification, it is inappropriate for the court to apply the usual presumption attending consideration of a motion to dismiss under Rule 12(b)(6), namely that the allegations of the complaint are true.<sup>68</sup>

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62. *Id.*

63. See *Basic Inc. v. Levinson*, 485 U.S. 224, 241–48 (1988) (analyzing the question of reliance and the fraud-on-the-market theory).

64. *Id.* at 250.

65. *Halliburton*, 131 S. Ct. at 2187.

66. See Mark Perry & Joe Sellers, *Class Actions in the Wake of Dukes v. Wal-Mart*, 8 J.L. ECON. & POL'Y 367, 368 (2011) (“[T]he Court made clear that trial courts may, and indeed should, inquire into the merits of the underlying claims, to the extent it’s necessary, and only to the extent it’s necessary, to ascertain whether the requirements of Rule 23 have been satisfied. In doing so, it put the *Eisen v. Jacquelin Carlisle* decision in its place.” (internal endnote omitted)).

67. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 n.6 (2011).

68. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“To survive a motion to dismiss [under

In deciding whether to certify a class, a court must consider the allegations of the complaint from a different vantage point. That vantage point is informed not merely by a reading of the pleadings, but also matters suitable for judicial notice, deposition testimony, declarations and affidavits, including expert opinion testimony subject to standards tested by the Supreme Court's guidance in *Daubert v. Merrell Dow Pharmaceuticals*.<sup>69</sup> This vantage point at least resembles that associated with a Rule 56 motion for summary adjudication of claims or issues.<sup>70</sup> A careful district judge will no doubt make clear that a merits review at the *certification stage* in no way presages the outcome of the merits of the asserted claims at *trial*, and that such review must be undertaken solely to decide whether the plaintiffs have satisfied the requirements of Rule 23. But how does a judge keep those matters separate?

The answer is not clear. It is clear, however, that lower federal courts are being told to be cautious before cranking up the machinery of class litigation. There must be a solid basis upon which to find that the requested relief can be afforded on a class-wide basis and that a class-wide judgment can be rendered fairly. Can there be serious criticism that such caution is appropriate? Dean Klonoff may be correct that application of such cautionary standards will frustrate class litigation

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Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Regents of the Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc.*, 482 F.3d 372, 380 (5th Cir. 2007) ("Although we may not conduct an independent inquiry into the legal or factual merit of this case as though we were reviewing a motion under Federal Rule of Civil Procedure 12(b)(6) or 56, we may address arguments that implicate the merits of plaintiffs' cause of action insofar as those arguments also implicate the merits of the class certification decision.").

69. Before *Dukes*, courts wrestled with whether they ought to subject class certification experts to careful scrutiny according to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Compare *Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010) (requiring a *Daubert* review for class certification experts), with *Millenkamp v. Davisco Foods Int'l, Inc.*, 562 F.3d 971, 979 (9th Cir. 2009) (holding that, as a general rule, district courts are not required to conduct a *Daubert* hearing for class certification experts). *Daubert* requires that for expert testimony to be admissible, the expert must be qualified to give his opinion and that the expert opinion must be reliable. *Daubert*, 509 U.S. at 590–93. In *Daubert*, the Supreme Court provided a non-exclusive list of factors for the trial judge to consider when determining whether an expert's testimony is reliable and admissible, including: (1) whether the scientific theory can be or has been tested; (2) whether the theory has been subjected to peer review and publication; and (3) whether the theory is generally accepted in the relevant scientific, technical or professional community. 509 U.S. at 593–94 (1993). See FED. R. EVID. 702 (mirroring the requirements set forth in *Daubert*). Without making a bright-line decision, the *Dukes* Court implicitly affirmed that expert testimony, at the certification stage, is subject to the standards set forth by *Daubert*. *Dukes*, 131 S. Ct. at 2554. *Accord* *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011).

70. FED. R. CIV. P. 56.

that otherwise would proceed and afford relief.<sup>71</sup> Reasonable minds can differ on how searching the inquiry into the merits should be, but a district judge who makes a record and conducts a reasoned analysis is unlikely to be second-guessed by the appellate courts. That record simply was not made in *Wal-Mart*.<sup>72</sup> Whether a different record would have produced a different outcome in *Wal-Mart* may soon be revealed. Courts and parties have started to apply the principles of *Wal-Mart* in subsequent cases comprised of more narrowly defined classes.<sup>73</sup>

#### A. *Sweeping up Class Actions in Concepcion*

But Dean Klonoff's critique is not limited to *Wal-Mart*; he aims at a wider target.<sup>74</sup> Recently, in *AT&T Mobility LLC v. Concepcion*,<sup>75</sup> a 5-to-4 majority gave a broad interpretation to the preemptive effect of the Federal Arbitration Act (FAA).<sup>76</sup> *Concepcion* arose following a decision by the California Supreme Court in *Discover Bank v. Superior Court*, in which the state court upheld the California rule invalidating a class action waiver in a consumer contract of adhesion unless the contract at least permits class arbitration.<sup>77</sup> In *Concepcion*, the

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71. See generally Klonoff, *Reflections*, *supra* note 2.

72. But see *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 597–98 (9th Cir. 2010) (“The dissent’s attenuated claim that the district court abused its discretion by failing to require a specific presentation identifying [Rule 23(a)(2) commonality] is vitiated by the twenty-four pages in which the district court exhaustively performed exactly that analysis . . . . In short, . . . it is difficult for us to envision a more rigorous analysis than the one the district court conducted.” (internal citations and quotations omitted)).

73. There have been at least two smaller, regional class actions filed against Wal-Mart in the wake of the Supreme Court’s decision in *Dukes*. See Plaintiffs’ Fourth Amended Complaint, *Dukes v. Wal-Mart Stores, Inc.* (N.D. Cal. Oct. 26, 2011) (No. C-01-2252-CRB); Plaintiff’s First Amended Complaint and Jury Demand, *Odle v. Wal-Mart Stores, Inc.* (N.D. Tex. Jan. 19, 2012) (No. 3:11-cv-02954).

74. See Klonoff, *Reflections*, *supra* note 2, at 540–41 (discussing defendants’ ability to foreclose class actions with arbitration clauses in consumer contracts after *Concepcion*). See also ALLIANCE FOR JUSTICE, THE CORPORATE COURT’S 2010-11 TERM, PROTECTING CORPORATE INTERESTS WHEN IT MATTERS MOST 4–10 (2011), available at <http://www.afj.org/connect-with-the-issues/the-corporate-court/the-corporate-court-2010-11-end-of-year-report.pdf> (providing information on the Court’s corporate-leaning decisions during its 2010–11 term); Ralph Nader, *The Corporate Supreme Court*, COMMON DREAMS (July 18, 2011), <http://www.commondreams.org/view/2011/07/18-12> (“Taken together the decisions [by the Corporate Court] are brazenly over-riding sensible precedents, tearing apart the state common law of torts and blocking class actions, shoving aside jury verdicts, limiting people’s ‘standing to sue’, preempting state jurisdictions—anything that serves to centralize power and hand it over to corporate conquistadores.”).

75. 131 S. Ct. 1740 (2011).

76. Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16 (2006). For an overview of the FAA, see David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1038–44 (2012).

77. *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 153 (2005), *abrogated by Concepcion*,

Supreme Court held that the refusal to enforce arbitration clauses with class action waivers “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”<sup>78</sup> in Section 2 of the FAA, which makes agreements to arbitrate “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>79</sup>

The facts of *Concepcion* are fairly straightforward. AT&T offered free cell phones for new wireless customers.<sup>80</sup> The Concepcions signed a two-year contract and received their phones.<sup>81</sup> When their first bill arrived, however, while there was no charge for the phones themselves, AT&T had charged them \$30.22 in sales tax on their purchase.<sup>82</sup> The Concepcions felt cheated and sued on behalf of all AT&T customers who were charged sales tax on their “free” phones. Buried in the contract’s terms and conditions, however, was a clause requiring arbitration of any dispute and requiring that the arbitration be in an “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.”<sup>83</sup>

AT&T moved to compel individual arbitration; the Concepcions sought class adjudication and argued that the class action waiver was unconscionable—both procedurally because it was part of a contract of adhesion and substantively because the costs of an individual arbitration effectively prevented them from pursuing their claims.<sup>84</sup> The trial court rejected the Concepcion’s argument, but the Ninth Circuit reversed, holding that the class action waiver was unconscionable under California law.<sup>85</sup> The Supreme Court granted review to consider whether state law rules prohibiting enforcement of class action waivers in arbitration clauses conflicted with the FAA.<sup>86</sup>

The majority opinion, authored by Justice Scalia, explained that “[t]he principal purpose of the FAA is to ‘ensure that private arbitration

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131 S. Ct. at 1755.

78. *Concepcion*, 131 S. Ct. at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

79. 9 U.S.C. § 2 (2006).

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

81. *Id.*

82. *Id.*

83. *Id.* The contract also provided that “the arbitrator may not consolidate more than one person’s claims, and may not otherwise preside over any form of a representative or class proceeding.” *Id.* at 1744 n.2.

84. See Brief for Respondents at 1, 29, 43, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 4411292.

85. *Concepcion*, 131 S. Ct. at 1744–45.

86. See Petition for Writ of Certiorari, at i, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 6617833.

agreements are enforced according to their terms.”<sup>87</sup> It would conflict with the FAA for a state to prohibit arbitrations outright or even to have rules that “disfavored” arbitration.<sup>88</sup> The first example given by Justice Scalia of such a discriminatory rule was a prohibition on contracts that did not allow for judicially supervised discovery.<sup>89</sup> Restrictions on discovery are a fundamental part of why parties choose arbitration: to reduce costs and increase the speed of dispute resolution.<sup>90</sup> Finding a contract unconscionable because it restricts discovery conflicts with one of the principal purposes of arbitration: efficiency.<sup>91</sup> Similarly, confidential arbitrations enable an economical, streamlined procedure.<sup>92</sup>

The majority was unimpressed with the fact that the *Concepcions* had no opportunity to negotiate the terms of the contract, noting that “the times in which consumer contracts were anything other than adhesive are long past.”<sup>93</sup> The majority also brushed aside the argument that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system.<sup>94</sup> Nevertheless, the

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87. *Concepcion*, 131 S. Ct. at 1748 (quoting *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

88. *See id.* at 1747 (“When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.” (internal citation omitted)); *see also* *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (“In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration . . .”).

89. *Concepcion*, 131 S. Ct. at 1747.

90. *Id.* at 1749 (citations omitted). Parties generally favor arbitration because of the economics of dispute resolution, especially in employment disputes. *See* *Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001) (“Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.”).

91. *See Concepcion*, 131 S. Ct. at 1748 (“The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”).

92. *Id.* at 1749.

93. *Id.* at 1750. For support, the opinion cites *Hill v. Gateway 2000, Inc.*, where the terms and conditions of a transaction were stuffed into the box with Hill’s new computer. 105 F.3d 1147, 1148 (7th Cir. 1997), *cert. denied*, 522 U.S. 808 (1997). The contract provided that the customer could reject the terms by returning the computer within thirty days; after thirty days, the terms were binding on the consumer. *Id.* The Seventh Circuit held that this language was sufficient to constitute a binding agreement (as did Justice Scalia and four colleagues on the Court). *See id.* (“[T]erms inside a box of software bind consumers who use the software after an opportunity to read them and to reject them by returning the product.”).

94. *Concepcion*, 131 S. Ct. at 1753. Justice Scalia made clear that “[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.” *Id.* *But see* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (explaining that in drafting Rule

Court went on to say that the claim in *Concepcion* “was most unlikely to go unresolved.” AT&T had agreed that if it lost the arbitration, the arbitrator could award the winning consumer his or her costs and attorneys’ fees *and*, if the arbitrator awarded more than AT&T’s last written offer, AT&T would pay a minimum recovery of \$7500 plus double the consumer’s attorneys’ fees.<sup>95</sup> Of course, AT&T expected to make written offers for the \$30 sales tax to the *Concepciones* long before an arbitrator was even selected.

The Court concluded that “requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”<sup>96</sup> *Concepcion* appears at least in some tension with the Supreme Court’s decision in *Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.*, which held that a party could not be compelled to class arbitration unless the contract containing the arbitration provision expressly provided for class arbitration.<sup>97</sup> The *Concepcion*’s contract with AT&T apparently contained no such provision.

### B. *Legal Implications of Concepcion*

The effect of *Concepcion* will probably not be limited to consumer class actions. This prospect concerns Dean Klonoff.<sup>98</sup> *Concepcion* involved false advertising claims, but nothing in the opinion would prevent its application to product liability cases, among other claims. Indeed, in the short time since it decided *Concepcion*, the Supreme Court has twice found state supreme court decisions preempted by the FAA, in contexts well beyond those considered in *Concepcion*. In *Marmet Health Care Center v. Brown*, the Court held that states could not prevent arbitration merely because the claims involved personal injury or wrongful death.<sup>99</sup> The West Virginia Supreme Court had held

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23(b)(3), the Federal Rules Advisory Committee had “dominantly in mind” the rights of groups of plaintiffs who individually would lack the resources to bring large companies to court in one-on-one litigation); *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.”).

95. Nancy Welsh, *Is the Supreme Court Demanding Enough as it Provides Incentives for the Private Funding of a Federal Small Claims Court?*, SCOTUSBLOG (Sept. 21, 2011 2:13 PM), <http://www.scotusblog.com/2011/09/is-the-supreme-court-demanding-enough-as-it-provides-incentives-for-the-private-funding-of-a-federal-small-claims-court/>.

96. *Concepcion*, 131 S. Ct. at 1748.

97. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010).

98. See Klonoff, *Reflections*, *supra* note 2, at 540–41.

99. 132 S. Ct. 1201, 1203 (2012) (per curiam).

that arbitration agreements in nursing home contracts were unconscionable as a matter of public policy and Congress did not intend the FAA to apply “to personal injury or wrongful death suits.”<sup>100</sup> The U.S. Supreme Court resoundingly rejected the ruling, calling it “contrary to the terms and coverage of the FAA.”<sup>101</sup>

Furthermore, in *Sonic-Calabasas A, Inc. v. Moreno*, the U.S. Supreme Court vacated and remanded an employment case to the California Supreme Court for consideration in light of *Concepcion*, suggesting that *Concepcion* is fully applicable to such cases.<sup>102</sup> The California Supreme Court had decided that an arbitration clause may not require an employee to waive California’s optional wage and hour administrative hearing procedures, which are “statutory advantages accorded to employees designed to make that process fairer and more efficient.”<sup>103</sup>

Many federal appellate courts have dutifully applied *Concepcion* by sending to individual arbitration numerous claims that had been filed as class actions. The Third, Eighth, and Ninth Circuits have applied *Concepcion* to class actions against banks, health insurance companies and employers.<sup>104</sup> Some federal courts, however, have avoided *Concepcion*’s broad scope by looking at express statutory authority for representative actions. For instance, Judge Sweet of the Southern District of New York held in *Raniere v. Citigroup, Inc.* that “a waiver of the right to proceed collectively” under the Fair Labor Standards Act “is unenforceable as a matter of law.”<sup>105</sup> An appeal in *Raniere*, based in part on *Concepcion*, is currently pending.<sup>106</sup> Another New York district judge ruled that class action waivers were unenforceable in a federal

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100. *Id.*

101. *See id.* at 1203–04 (“West Virginia’s prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA.”).

102. *Sonic-Calabasas A, Inc. v. Moreno*, 247 P.3d 130 (Cal. 2011), *vacated*, 132 S. Ct. 496 (2011).

103. *Id.* at 148.

104. *See, e.g.*, *Kilgore v. KeyBank, Nat’l Ass’n*, 673 F.3d 947, 963, 964–65 (9th Cir. 2012) (bank); *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 221 n.3, 224–25 (3d Cir. 2012) (health insurance company); *Quillon v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 237 (3d Cir. 2011) (employer); *Green v. SuperShuttle Int’l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011) (employer).

105. 827 F. Supp. 2d 294, 314 (S.D.N.Y. 2011).

106. Howard L. Mocerf, *Looking into Labor: The Future of Class Action Waivers*, CHI. LAWYER (May 1, 2012), <http://www.chicagolawyerjournal.com/Articles/2012/05/01/Mocerf-Looking-Into-Labor.aspx>. Other courts have found that waivers of FLSA collective actions *are* enforceable. *See, e.g.*, *Quillon*, 673 F.3d at 227, 237.

employment civil rights case under Title VII because the Second Circuit had held that cases alleging a pattern or practice of discrimination may only be brought as class actions.<sup>107</sup> The court opined that a class action waiver would “prevent the plaintiff from vindicating her statutory cause of action.”<sup>108</sup> Separately, the Second Circuit has held that arbitration class action waivers may not be enforced where “the practical effect of enforcement would be to preclude [the] ability to vindicate . . . federal statutory rights.”<sup>109</sup> Relying on testimony from plaintiffs’ expert, who opined that it was economically irrational to pursue an individual action, the Second Circuit concluded that “forcing plaintiffs to bring their claims individually here would make it impossible to enforce their rights under the Sherman Act and thus conflict with congressional purposes manifested in the provision of a private right of action in the statute.”<sup>110</sup>

The shelf life of this theory seems at least questionable in the pro-arbitration mindset of the current Supreme Court.<sup>111</sup> When the Ninth Circuit held that the Credit Repair Organizations Act (“CROA”) prohibited arbitration of claims made under the statute, the Supreme Court reversed, finding that because the CROA was “silent” about arbitration, it could not override the FAA’s policy in favor of arbitration.<sup>112</sup> A different *Concepcion* “work-around” involves California’s private attorney general actions to enforce certain employment laws. A California court of appeal described the private

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107. *Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 394, 408 (S.D.N.Y. 2011).

108. *Id.* at 411. The defendant has appealed to the Second Circuit. See Brief and Special Appendix for Defendants-Appellees, *Parisi v. Goldman, Sachs & Co.* (2d Cir. Mar. 27, 2012) (No. 11-5229-cv), 2012 WL 1077519.

109. *In re Am. Express Merchs.’ Litig.*, 667 F.3d 204, 212 (2d Cir. 2012), *cert. granted sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 2012 WL 3096737 (U.S. Nov. 9, 2012) (No. 12-133). See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 632 (1985) (“Arbitration is also recognized as an effective vehicle for vindicating statutory rights but only so long as the prospective litigant may effectively vindicate its statutory cause of action in the arbitral forum.”).

110. *In re Am. Express*, 667 F.3d at 215 n.6.

111. See Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielson, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT’L ARB. 323, 325 (2011) (“The latest pronouncements of the Supreme Court reflect the increasingly extreme pro-arbitration slant of recent decades and etch in sharp relief the fault lines that divide the factions of the Court and the broader American political landscape.”); George A. Bermann, *The Supreme Court Trilogy and Its Impact on U.S. Arbitration Law*, 22 AM. REV. INT’L ARB. 551, 551 (2011) (explaining that the Court’s recent rulings in *Stolt-Nielson*, *Rent-A-Center*, and *Concepcion* “reveal[s] a determination on the part of the Court’s majority to enhance the autonomy and effectiveness of arbitration as a dispute resolution mechanism, even at the expense of consumer welfare”).

112. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668, 673 (2012).

attorney general approach as a “law enforcement action” distinct from class actions and found *Concepcion* inapplicable.<sup>113</sup>

Undoubtedly, judges will look for exceptions to *Concepcion*; others will seek to expand its application. At this point, it deserves emphasis that although the language of the majority in *Concepcion* was sweeping, the holding merely invalidated a California Supreme Court decision that held class action waivers are invalid if the contract at issue fails to provide plaintiffs with the opportunity for a substitute class proceeding, namely class arbitration.<sup>114</sup>

### C. Legislative and Regulatory Actions in the Wake of *Dukes* and *Concepcion*

Shortly after *Concepcion* came down, U.S. Senator Al Franken (Minnesota), U.S. Senator Richard Blumenthal (Connecticut) and U.S. Representative Hank Johnson (Georgia) introduced the Arbitration Fairness Act of 2011, which would make pre-dispute arbitration agreements unenforceable in employment, consumer and civil rights cases.<sup>115</sup> Senator Blumenthal also introduced the Consumer Mobile Fairness Act, which would invalidate pre-dispute arbitration agreements in cell phone contracts.<sup>116</sup> As these proposed laws indicate, a legislative response to *Concepcion*, *Dukes* and other procedural decisions of the Supreme Court cannot be ruled out. The legislative branch plays a vital, if infrequently exercised, role in federal rule making. Furthermore, even when there is no legislative enactment, courts are not insensitive to the expression of congressional concern.

On the regulatory front, the Financial Industry Regulation Authority (FINRA), an agency charged with regulating securities markets and broker dealers, recently informed Charles Schwab & Co. that it would seek disciplinary sanctions for Schwab’s post-*Concepcion* insertion of class action waivers in its customer agreements.<sup>117</sup> FINRA has

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113. *Brown v. Ralph’s Grocery Co.*, 128 Cal. Rptr. 3d 854, 856, 860 (Ct. App. 2011).

114. See Rhonda Wasserman, *Legal Process in a Box, or What Class Action Waivers Teach Us about Law-making*, 44 LOY. U. CHI. L.J. 391, 405–06 (2012) (explaining how the *Concepcion* Court ruled that the holding in *Discover Bank* interferes with the principal purpose of the FAA—to ensure that private arbitrations agreements are enforced by their explicit terms).

115. See Arbitration Fairness Act of 2011, H.R. 1873, S. 987, 112th Cong. Similar legislation pursuing revisions to the FAA had been introduced (unsuccessfully) in the previous years. See Arbitration Fairness Act of 2009, H.R. 1020, S. 931, 111th Cong.; Arbitration Fairness Act of 2007, H.R. 3010, S. 1782, 110th Cong.

116. Consumer Mobile Fairness Act, S. 1652, 112th Cong. (2011).

117. Press Release, FINRA, FINRA Charges Charles Schwab & Co With Violating FINRA Rules by Using Class Action Waiver in Customer Agreements (Feb. 1, 2012), available at <http://www.finra.org/Newsroom/NewsReleases/2012/P125517>.

interpreted an existing rule as barring class action waivers despite *Concepcion*.<sup>118</sup> Schwab sought injunctive relief in the Northern District of California to prohibit FINRA's disciplinary sanctions for enforcing the class action waivers.<sup>119</sup> The court granted FINRA's motion to dismiss the complaint, holding that because Schwab failed to exhaust FINRA's administrative remedies, the court lacked jurisdiction to hear the case.<sup>120</sup> Similarly, the Consumer Financial Protection Bureau, recently formed as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act,<sup>121</sup> has an express mandate to:

[P]rohibit or impose conditions or limitations on the use of an agreement . . . for a consumer financial product or service providing for arbitration of any future dispute if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.<sup>122</sup>

State legislatures may also get into the act. In *Concepcion*, the Supreme Court recognized that “states remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action waiver provisions in adhesive arbitration agreements to be highlighted.”<sup>123</sup> The full scope of FAA preemption has not been defined and may not be definitively delineated for some time. *Concepcion* does not preclude states from adopting changes in arbitration procedures that may make class arbitrations easier for consumers or their self-appointed champions to pursue.<sup>124</sup>

In another approach, states may also respond to *Concepcion* by expanding private attorney general actions.<sup>125</sup> Given the severe budget

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118. *Id.*

119. Charles Schwab & Co. Inc. v. FINRA, 861 F. Supp. 2d 1063, 1064 (N.D. Cal. 2012).

120. *Id.* at 1079.

121. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of tits. 7, 12, and 15 U.S.C.). For a description of the Dodd-Frank Act, see *Brief Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, U.S. S. COMM. BANKING, HOUS., & URBAN AFFAIRS (July 1, 2010), [http://banking.senate.gov/public/\\_files/070110\\_Dodd\\_Frank\\_Wall\\_Street\\_Reform\\_comprehensive\\_summary\\_Final.pdf](http://banking.senate.gov/public/_files/070110_Dodd_Frank_Wall_Street_Reform_comprehensive_summary_Final.pdf).

122. Dodd-Frank Act § 1028, 124 Stat. at 2003–04.

123. AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740, 1750 n.6 (2011).

124. See, e.g., Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 5 (2012) (“[A]s courts have reinvigorated unconscionability as a policing tool for standardized agreements, they have introduced into the doctrine a ‘sliding scale’ approach that, if properly cultivated, can empower courts, and increasingly, arbitrators, to do what consumers, legislators, and legal scholars have yet been unable to do—control oppression and overreaching in consumer form contracts.”).

125. See Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 630 (2012) (opining that the private attorney general action is alive and should be used more frequently in the wake of *Concepcion*).

crises many states currently face, such an approach may be doubly attractive by saving money the state would have to spend on its attorney general's office and other enforcement and regulatory agencies. This, of course, is one of Professor Issacharoff's observations: class actions can substitute for state action without relying on the public fisc.<sup>126</sup> And, as Judge Martinotti reminds us, when restrictions get too tight at the federal level, there is recourse to the state courts.<sup>127</sup>

#### CONCLUSION

The take-away point of this Article is that the Federal Rules under the regime established by the Rules Enabling Act are not static, nor were they intended to be static. There is a reaction for every action; a ying for every yang. What seems to Dean Klonoff to be a darkness descending on class litigation is likely to be followed by a new dawn. Whether that dawn will be more or less to Dean Klonoff's liking cannot now be known. But it will certainly not be a final solution.

The grist for the mills of litigation is not an unchanging mixture. Today's disputes in court mirror only partly those in the past. And tomorrow's litigation will reflect only partly that of today. So as the cases that go through our federal courts change, inadequacies in the procedural mechanisms that deal with such cases will surely come to light. Congress, state legislative bodies, and federal and state courts will always attempt to right the ship, but against the then-prevailing or recently past winds and tides. Observers would do well to remember that the Federal Rules and federal rule making is a journey, not a destination. It can, at times, be a choppy voyage and not one for a faint spirit.

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126. See Issacharoff, *supra* note 3, at 383–90.

127. See Martinotti, *supra* note 4, at 576 (“With the recently tightened class action certification standards imposed on plaintiffs by the Supreme Court, and defendants’ ability to opt out of class-wide arbitration and litigation clauses, jurists are likely to see a greater number of alternatives to traditional class action lawsuits . . .”).