Chapter 19

Class Actions

by John F.X. Peloso, J. Gordon Cooney, Jr., Joseph B.G. Fay, and Gregory T. Fouts[*]

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I. INTRODUCTION

§ 19:1 Scope note

This chapter discusses class actions in federal court. The chapter begins by examining the provisions of Fed. R. Civ. P. 23 and the prerequisites for class certification.[1] The chapter then addresses a number of special procedural and constitutional issues that arise in the class action context, including issues relating to class certification procedure, notice to absent class members,[2] subject matter jurisdiction,[3] defendant classes,[4] settlement classes,[5] and the due process concerns that inevitably arise when final judgments are entered against absent class members.[6] The chapter also discusses issues relating to awards of attorney's fees in class actions[7] and several specific ethical issues that can arise in class actions.[8] Finally, the chapter considers the use of the class action device in a variety of substantive contexts to il-

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[Section 19:1]

[1]See §§ 19:8 to 19:48.

[2]See §§ 19:30 to 19:32.

[3]See §§ 19:65 to 19:66.

[4]See §§ 19:49 to 19:60.

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[7]See §§ 19:46 to 19:48.

[8]See §§ 19:81 to 19:85.

lustrate the interaction between the class procedure and different bodies of substantive law and to identify particular issues likely to arise in class actions in particular substantive areas.[9] This final portion of the chapter focuses on the actual application of class action principles in particular kinds of cases, with special emphasis on the practical considerations counsel are likely to encounter in prosecuting or defending class actions in different substantive settings.[10]

II. STRATEGIC CONSIDERATIONS FOR THE PRACTITIONER

§ 19:2 The advantages of class actions

The modern class action, in federal courts and most state courts, is the product of the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure. The frequency and subject matter of class actions, however, have expanded dramatically since the Rule's promulgation. With the widespread docket congestion of the 1980s, many courts across the country grew increasingly receptive to procedural devices that promised to lower transaction costs and resolve more cases quickly. The class action emerged as a principal method of achieving these goals. Embraced by some, the move away from traditional focus on individual claims has been disparaged by others on the grounds that it subjugates individual justice to the goals of efficiency and conservation of judicial resources.[1] Nonetheless, Rule 23 class actions (as well as other procedural vehicles of mass adjudication, such as multidistrict litigation)[2] are frequently used to aggregate claims for resolution.

With the encouragement and prompting of the plaintiffs' bar, a number of courts have recognized the advantages of class action suits over other alternatives. The power of numbers is great. The fact that hundreds, thousands, or even millions of potential

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[9]See §§ 19:86 to 19:129.

[10]In April 2015, the Rule 23 Subcommittee of the Civil Rules Advisory Committee issued a report outlining possible amendments to Rule 23. The possible amendments touched a number of subjects, including specifically settlement approval criteria, settlement class certification, the treatment of cy pres distributions, procedures for dealing with objections to settlements, the relationship between offers of judgment under Rule 68 and class actions, issue classes under Rule 23(c), and means of notice. By the Spring of 2016, the focus of possible amendments had changed somewhat, and that evolutionary process continues. It remains to be seen what amendments, if any, will be enacted.

[Section 19:2]

[1]See, e.g., Rosenberg, Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases, 71 N.Y.U. L. Rev. 210, 210–211 (1996).

[2]See generally Chapter 14 "Multidistrict Litigation" (§§ 14:1 et seq.).

claims may be aggregated in one case provides a substantial impetus for resolution by settlement, which many judges value in their efforts to manage litigation and control dockets. The aggregate force of numbers also has an impact on defendants, which often conclude that settlement is the only viable alternative to a serious risk of economic harm. Placing the fate of an entire company, or even an industry, in the hands of a single jury is a real and frightening possibility and ensures serious consideration of settlement options where no such incentives might exist in a more conventional litigation setting.[3]

Class actions may provide advantages to plaintiffs when a court must balance the countervailing hardships between the parties in considering equitable relief. Proof of threatened harm to many people from continuing conduct (such as selling a particular product) may have greater force, in equity, than threatened harm to one. Class actions also allow a limited group of class representatives to obtain broad discovery relevant to claims against a company or industry compared to multiple plaintiffs pursuing repetitive discovery regarding the same defendant or industry in the context of litigating numerous individual claims. The sharing of expenses among a pool of plaintiffs can assist in amortizing the significant costs of major litigation. In addition, the opportunities for attorney's fees awards are increased in the context of the class action.[4]

Class actions also have a tendency to raise public awareness. With the increased profile conferred by large numbers and the potential for greater media attention, class actions present an opportunity to generate and strengthen media support for resolving issues or for redressing a perceived wrong. Plaintiffs may use the class action vehicle to magnify what is asserted to be wrongful conduct by a group of defendants, a trade association, or an entire industry. Public sympathies may be particularly heightened when the defendants' conduct is alleged to have caused bodily injury or financial loss to a large number of claimants.

Although there are considerable risks for absent class members in the conduct of a class action (*i.e.*, being bound by an adverse ruling[5] or settlement), there are also potential advantages. The filing of a class action may toll the running of a statute of limitations for the members of the putative class as to the claims

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[3]Arbitrators, as opposed to juries, might also make such weighty decisions. See § 19:77 below.

[4]See generally §§ 19:46 to 19:48.

[5]See §§ 19:34 to 19:36.

defined in the complaint.[6] In addition, plaintiffs with weak, small, or uncertain individual claims can, in effect, have the value of their claims enhanced through class treatment and can receive the fruits of a victory by the class representative. In federal court, at least, unnamed class members also may appeal an adverse judgment in a class action[7] or object to a proposed settlement without intervening in the case.[8] If the named plaintiff loses standing during the pendency of the class action, the court may choose to allow a substitute, thus avoiding the mootness problem and obviating the need for repetition of preliminary proceedings.[9] For all these reasons, class actions are frequently viewed by plaintiffs' lawyers as a valuable alternative to the traditional case-by-case adjudication of disputes in litigation.

§ 19:3 Weighing the pros and cons of the class action alternative

From the standpoint of judicial economy, class certification may not be appropriate if a number of class members with large claims have the practical ability to pursue their claims individually, rather than as part of a class action. The relevant inquiry from an efficiency standpoint is not so much whether some class members can pursue separate litigation, but rather whether class members will desire to litigate individually. The potential tension between strong and weak claims may present an obstacle to certification of a class action. This is one of many areas of potential conflict between groups or subgroups of plaintiffs whose alleged injuries or amounts of damages may differ significantly from those of the class representatives. The analysis of whether this divergence precludes class certification is often undertaken in applying the requirement that the named plaintiffs be "adequate representatives" of the interests of the class.[1]

A further issue for consideration, from the perspective of class members, is the practical surrender of individual rights by members of the class. A class action may delay individual relief. The process of certifying the class, taking class discovery, providing notice, and complying with other procedural formalities frequently delays the resolution of a class action far beyond what would be expected in forms of aggregation involving other

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[6]See §§ 19:74 to 19:76.

[7]See § 19:73.

[8]See §§ 19:42 to 19:43.

[9]See §§ 19:70 to 19:72.

[Section 19:3]

[1]See §§ 19:12 to 19:14.

methods of joinder.[2] These intricacies often can extend the cumulative duration of the various phases of a class action for several years. An empirical comparison between nonclass civil actions and class actions suggests that "class actions are not routine in terms of their longevity."[3] Indeed, one study has estimated that the average time from filing to disposition is roughly two to three times longer for class actions.[4]

Absent class members not only do not get to select their own counsel, but often they are unaware that their legal rights may be compromised by counsel who are not constrained by a traditional attorney-client relationship with the absent class members. The process of settling a class action generally does not allow meaningful participation by the typical absent class member.[5] Thus, the mantle of class counsel provides tremendous power to the attorneys who act in that capacity. In addition, even the class representative may have little say over the selection of the forum or the claims asserted. Class certification procedures consume considerable resources in determining matters unrelated to the merits of the case. Finally, absent plaintiffs can be exposed to counterclaims, perhaps without their knowledge or informed consent.

As in other litigation, there is always the risk that the class action ultimately will fail on the merits. The litigation expenses and opportunity costs of an unsuccessful class action can be massive. Even the failure of class certification can undermine subsequent individual efforts to obtain settlements on a case-by-case basis. Further, the res judicata effect of a class judgment may block relitigation of an individual claim in another forum.[6] Moreover, class actions tend to shift the focus of settlement negotiations from the facts of individual cases to the specific facts of the named plaintiffs' cases. Where the named plaintiffs have strong claims, it tends to create pressure for the defendants to settle cases for an amount greater than their true value, by the same token, where the named plaintiffs' claims are weaker, it may result in under-compensation of absent class members. Although some courts extol individual rights,[7] the reality is that often these rights are disregarded or overlooked when the court

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[2]See Chapter 13 "Joinder, Severance, and Consolidation" (§§ 13:1 et seq.).

[3]Willging, et al. An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 92 (1996).

[4]Willging, et al. An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. Rev. 92 (1996).

[5]See §§ 19:42 to 19:43.

[6]See §§ 19:34 to 19:36.

[7]See, e.g., In re Pet Food Products Liability Litigation, 629 F.3d 333, 354–55, Prod. Liab. Rep. (CCH) P 18550 (3d Cir. 2010) (vacating class settle-

and the representative parties have coalesced behind a proposed settlement.

§ 19:4 Plaintiffs' strategies

In determining whether to proceed with a class action, a claimant should assess the potential defendants' amenability to class certification and the likely effects of resistance to certification. Defendants occasionally prefer to defend against class claims rather than individual actions, reasoning that unitary litigation will conserve resources and, upon the conclusion of the litigation, provide a broad bar against future claims brought by individuals falling within the class definition. In addition, class treatment can provide an opportunity for broad resolution of claims.

Generally, however, plaintiffs can expect that the decision to assert class claims will substantially increase the stakes in the litigation. Although the class action device provides greater, and in some cases excessive, leverage for compelling the ultimate settlement of claims, the response it elicits from defendants generally forces the plaintiffs to expend time and money far beyond that which would have been required to bring individual actions. The litigation almost undoubtedly will be lengthened, and plaintiffs' counsel will need to master numerous complex legal issues relating to the certification of the class.[1]

If and when claimants elect to pursue class treatment, the selection of adequate class representatives is a critical threshold step in the class certification process. An analysis must be undertaken to ensure that the named class representatives have no conflict with other class members and that they understand the special responsibilities of being the named representatives, including the burden of discovery. The importance of the adequacy of the named class representatives in the settlement context was highlighted in the Supreme Court's decision in *Amchem Products, Inc. v. Windsor.*[2] In *Amchem,* the Court held, in relevant part, that conflicts between current and future claim-

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ment and requiring district court to compare "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing . . . with the amount of the proposed settlement.") (citation omitted); In re Fibreboard Corp., 893 F.2d 706, 709–711, 15 Fed. R. Serv. 3d 1147 (5th Cir. 1990) (invoking constitutional norms of due process to reject class-wide proportionate determinations of causation and damages in asbestos class action).

[Section 19:4]

[1]See §§ 19:12 to 19:13.

[2]Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689, 37 Fed. R. Serv. 3d 1017, 28 Envtl. L. Rep. 20173 (1997).

ants undermined adequacy.[3]

The process of drafting a class action complaint and selecting an appropriate forum for filing is complex and requires careful consideration by plaintiffs' counsel. The description of the class, including its geographical and conceptual boundaries and objective characteristics, often will be the subject of controversy in the certification process. The claims included might depend on a strategic choice of whether it is preferable to litigate the action in federal or state court, although the Class Action Fairness Act of 2005 significantly expanded federal court jurisdiction over class actions.[4] In the mass tort area, for example, the recovery of costs associated with medical monitoring or the increased risk or fear of a particular injury may depend on the forum chosen and the applicable common law.[5] Additionally, the selection of defendants may require deliberation. Selecting industry representatives, determining the role of trade associations, and ensuring that appropriate defendants are named in the suit often involve extensive investigation prior to filing the complaint. Finally, plaintiffs' counsel will certainly want to carefully research and consider the general approach of the forum court to class certification, as reflected in current case law.

Carefully defining the core or common issues for certification requires a significant expenditure of resources. Claims involving individual reliance or particularized causation must be avoided and sometimes abandoned. The alleged conduct of the defendants, including whether or not punitive damages are appropriate, often presents issues common to the class, but the U.S. Supreme Court has made clear that "commonality" does not exist merely because each member of a purported class allegedly suffered a violation of the same provision of law. Instead, "commonality requires the plaintiff to demonstrate that the class members have suffered the same injury."[6] This may preclude class certification where many purported class members have suffered no injury at all. The plaintiffs' attorneys must therefore draft a complaint drawing attention to one or more common issues that are truly central to the validity of each one of the proposed class member's claims.

In some cases, defendants who have defeated class certification

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[3]See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623–624, 117 S. Ct. 2231, 2249–2250, 138 L. Ed. 2d 689, 37 Fed. R. Serv. 3d 1017, 28 Envtl. L. Rep. 20173 (1997).

[4]See § 19:65.

[5]See generally Chapter 110 "Mass Torts" (§§ 110:1 et seq.).

[6]Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374, 112 Fair Empl. Prac. Cas. (BNA) 769, 94 Empl. Prac. Dec. (CCH) P 44193, 161 Lab. Cas. (CCH) P 35919, 78 Fed. R. Serv. 3d 1460 (2011). For a detailed discussion of commonality, see § 19:10.

in federal court have faced repetitive class action litigation in state courts. One defense strategy had been to ask the federal court to enjoin state courts from reconsidering the class issue. The U.S. Supreme Court, however, ruled unanimously in *Smith v. Bayer Corp.*[7] that a federal district court, having rejected certification of a proposed class action, could not on that basis take the additional step of enjoining a state court from addressing a motion to certify a similar class under state law. The Court held that principles of stare decisis and comity should govern whether the federal court's ruling had a controlling or persuasive effect in the latter case, and the state court should have had an opportunity to determine the precedential effect (if any) of the federal court ruling. After *Bayer,* a defendant who has defeated class certification may not generally enjoin subsequent state-court bids for class certification in a case raising the same legal theories unless that later bid is advanced by the same named plaintiff(s) (or a person who falls within one of the few discrete exceptions to the general rule against binding nonparties) and the defendant can establish that state standards for class certification are similar to Federal Rule 23. In this regard, the Court held that "[m]inor variations in the application of what is in essence the same legal standard do not defeat preclusion," but if the state courts would apply a "significantly different analysis" than the federal court, an injunction will not be upheld.[8]

A number of strategic steps can be taken to reduce the burdens, expenses, and risks associated with multiple class action lawsuits. For example, the enactment of the Class Action Fairness Act enhanced removal opportunities for state court class actions.[9] If subsequent class actions are filed in state court and removed, multidistrict litigation proceedings may be available for coordination of pretrial proceedings to avoid repetitive litigation.[10]

§ 19:5 Defense strategies

From the defendants' perspective, class actions are often perceived as high stakes or "bet the company" cases that require careful consideration of defense or settlement options because of the enormous economic threat posed by the aggregation of what may be marginal claims. Defending class actions is also time-consuming and expensive. A defendant's participation in some

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[7]Smith v. Bayer Corp., 564 U.S. 299, 131 S. Ct. 2368, 180 L. Ed. 2d 341, 73 A.L.R. Fed. 2d 645 (2011).

[8]Smith v. Bayer Corp., 564 U.S. 299, 131 S. Ct. 2368, 2378 n.9, 180 L. Ed. 2d 341, 73 A.L.R. Fed. 2d 645 (2011). See §§ 19:35 to 19:36 for discussion of claim preclusion and issue preclusion in the class action context.

[9]See § 19:65.

[10]See generally Chapter 14 "Multidistrict Litigation" (§§ 14:1 et seq.).

class actions have continued for upward of 10 to 15 years, and, because of the procedural steps, *e.g.*, certification, broad discovery, notice, and the delays inherent in the litigation of peripheral issues, the costs are often immense.

However, defendants may view class actions as beneficial in some situations. The possibility of obtaining broad res judicata protection against future lawsuits,[1] the potential for a broad release from a large group of absent class members in a settlement,[2] and general protection against the cost and unfairness of repeated serial litigation are some of the benefits defendants might garner from a class action under the right circumstances.

The process of class discovery[3] and certification as well as the broad scope of discovery on the merits permit defendants some flexibility with regard to scheduling and the sequence of discovery. Punitive damages exposure also may be lessened by a class action because courts may be sensitive to the limited availability of funds to satisfy large punitive damages judgments.[4]

Furthermore, defendants gain the benefit of avoiding repeated exposure to punitive damages that may arise in a series of individual actions. Further, when serial litigation is the alternative, there may actually be reduced costs and less time invested in defending a single unitary class action, as opposed to defending hundreds of individual claims.

§ 19:6 Defense strategies—Opposition to class certification

One critical consideration for a defendant in determining whether to oppose class certification is the number of individual cases likely to arise in the absence of a class action. This issue is often complex and not capable of precise determination. It is clear, however, that class actions are frequently pursued where there are large numbers of either small or weak claims. Further, the opt-out right in classes certified under Rule 23(b)(3) permits those plaintiffs with strong or large claims to opt out and pursue individual relief.[1] Thus, in many cases, the defendants get the worst of both worlds in having to face the strong individual claims in the opt-out individual actions while defending a large number

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[Section 19:5]

[1]See § 19:35.

[2]See § 19:42.

[3]See § 19:67.

[4]See generally Chapter 48 "Punitive Damages" (§§ 48:1 et seq.).

[Section 19:6]

[1]See § 19:30.

of aggregated weak claims in a class action setting.

In many instances, class action resolution of matters may provide some business certainty for potential defendants. There may be value in capping liability at a known amount rather than being forced to anticipate which claimants may pursue individual actions. In this regard, defendants may find significant benefit in obtaining broad releases from absent class members, which, in some cases, may make settlement of a class action a better business decision than defending myriad individual claims around the country, where the ultimate exposure is necessarily unknown.

§ 19:7 Defense strategies—Timing the opposition

The timing of any challenge to class certification deserves careful attention. One option is to challenge class certification at the outset, prior to discovery. "Nothing in the plain language of [the rule] either vests plaintiffs with the exclusive right to put the class certification issue before the district court or prohibits a defendant from seeking early resolution of the class certification question."[1] It often makes sense to undertake class discovery[2] early and make a strong attack on the arguments in favor of certification, developing differences or tensions among the named class representatives and absent class members in an effort to undermine the adequacy of the class representatives[3] and to demonstrate the lack of predominance of common issues over the individual issues.[4] Even if a class is certified, it is possible to seek decertification if and when discovery on the merits reveals problems with manageability or the adequacy of class representatives.

In the mass tort setting,[5] an initial challenge to class treatment because of an inadequate causal link between the claimed injuries and the conduct alleged to have caused the harm has additional advantages. Defendants can make a full record as to the inability of the named plaintiffs with their limited injuries to represent adequately the myriad harms allegedly suffered by members of the class. Through discovery relating to individual medical histories, environmental exposures, and personal habits, defendants may be able to demonstrate that individual causation issues predominate over common issues so that plaintiffs cannot

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[Section 19:7]

[1]Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 939–40, 14 Wage & Hour Cas. 2d (BNA) 1797, 158 Lab. Cas. (CCH) P 35603 (9th Cir. 2009).

[2]See § 19:67 for a discussion of class certification discovery.

[3]See §§ 19:12 to 19:13.

[4]See § 19:22.

[5]See Chapter 110 "Mass Torts" (§§ 110:1 et seq.).

meet their burden under Fed. R. Civ. P. 23(b)(3).

The U.S. Supreme Court has suggested that a district court must scrutinize expert opinions offered in support of class certification. In making this ruling, the Court suggested that the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[6] may apply to expert evidence used in the class certification process.[7] Defendants can also shift the focus from the conduct of the defendants to the conduct of the plaintiffs (under a contributory or comparative negligence theory, for example) or to other factual issues specific to particular plaintiff's claims, including the knowledge of the plaintiffs (for example, to establish a reliance or statute of limitations defense). These strategies have the benefit of not only destroying the commonality and the predominance of issues relevant to the entire class, but also can establish a defense on the merits and serve as the basis for a simultaneous motion for summary judgment on the named plaintiffs' individual claims and an opposition to class certification. Defendants will often have a right to a jury trial on these defenses, which will often be an additional argument to undermine class certification.

III. THE REQUIREMENTS OF FED. R. CIV. P. 23

A. FED. R. CIV. P. 23(A)

§ 19:8 General requirements of Fed. R. Civ. P. 23(a)

The Supreme Court has explained that because class actions depart from "the usual rule that litigation is conducted by and on behalf of the individual named parties only," before a court may certify a class, it should undertake a "rigorous analysis" to determine whether a party seeking class certification has satisfied the requirements of Rule 23(a).[1] Although in the past, only a "showing" was required to establish the appropriateness of class

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[6]Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 27 U.S.P.Q.2d 1200, Prod. Liab. Rep. (CCH) P 13494, 37 Fed. R. Evid. Serv. 1, 23 Envtl. L. Rep. 20979 (1993). See Chapter 29 "Selection of Experts, Expert Disclosure and the Pretrial Exclusion of Expert Testimony" (§§ 29:1 et seq.), and Chapter 43 "Expert Witnesses" (§§ 43:1 et seq.).

[7]Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 180 L. Ed. 2d 374, 112 Fair Empl. Prac. Cas. (BNA) 769, 94 Empl. Prac. Dec. (CCH) P 44193, 161 Lab. Cas. (CCH) P 35919, 78 Fed. R. Serv. 3d 1460 (2011); Sher v. Raytheon Co., 419 Fed. Appx. 887 (11th Cir. 2011); American Honda Motor Co., Inc. v. Allen, 600 F.3d 813, Prod. Liab. Rep. (CCH) P 18425, 76 Fed. R. Serv. 3d 809 (7th Cir. 2010).

[Section 19:8]

[1]Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515, 2013-1 Trade Cas. (CCH) ¶ 78316, 85 Fed. R. Serv. 3d 118 (2013); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2550, 180 L. Ed. 2d 374,

certification, the Supreme Court has since held that "Rule [23] 'does not set forth a mere pleading standard.' "[2] Instead, the party seeking certification must "be prepared to prove" that each of the four requirements of Rule 23(a) (*i.e.*, numerosity,[3] commonality,[4] typicality,[5] and adequacy of representation[6]) is met.[7] The party also must "satisfy" through "evidentiary proof" the appropriateness of a class action under one of the provisions of Rule 23(b).[8] Provided that the trial court abides by the framework established by Rule 23, the decision whether to certify a class lies within the

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112 Fair Empl. Prac. Cas. (BNA) 769, 94 Empl. Prac. Dec. (CCH) P 44193, 161 Lab. Cas. (CCH) P 35919, 78 Fed. R. Serv. 3d 1460 (2011); General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 155, 102 S. Ct. 2364, 2369, 72 L. Ed. 2d 740, 28 Fair Empl. Prac. Cas. (BNA) 1745, 29 Empl. Prac. Dec. (CCH) P 32781, 34 Fed. R. Serv. 2d 371 (1982), quoting Califano v. Yamasaki, 442 U.S. 682, 700–701, 99 S. Ct. 2545, 2557–2558, 61 L. Ed. 2d 176, 27 Fed. R. Serv. 2d 941 (1979). See also Shelton v. Bledsoe, 775 F.3d 554, 559, 90 Fed. R. Serv. 3d 677 (3d Cir. 2015); Gariety v. Grant Thornton, LLP, 368 F.3d 356, 365, Fed. Sec. L. Rep. (CCH) P 92810, 58 Fed. R. Serv. 3d 379 (4th Cir. 2004).

[2]Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374, 112 Fair Empl. Prac. Cas. (BNA) 769, 94 Empl. Prac. Dec. (CCH) P 44193, 161 Lab. Cas. (CCH) P 35919, 78 Fed. R. Serv. 3d 1460 (2011).

[3]See § 19:9.

[4]See § 19:10.

[5]See § 19:11.

[6]See §§ 19:12 to 19:14.

[7]Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515, 2013-1 Trade Cas. (CCH) ¶ 78316, 85 Fed. R. Serv. 3d 118 (2013); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374, 112 Fair Empl. Prac. Cas. (BNA) 769, 94 Empl. Prac. Dec. (CCH) P 44193, 161 Lab. Cas. (CCH) P 35919, 78 Fed. R. Serv. 3d 1460 (2011). See also Bell v. PNC Bank, Nat. Ass'n, 800 F.3d 360, 376, 25 Wage & Hour Cas. 2d (BNA) 414, 165 Lab. Cas. (CCH) P 36374 (7th Cir. 2015); Parsons v. Ryan, 754 F.3d 657, 674 (9th Cir. 2014) (plaintiff must come forward with evidence showing a common systemic question); Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 777, 85 Fed. R. Serv. 3d 1491 (8th Cir. 2013); Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc., 725 F.3d 1213, 1218, 85 Fed. R. Serv. 3d 1666 (10th Cir. 2013) (It was error for the district court to shift to the defendant the burden of disproving that Rule 23(a) requirements are met as it is the plaintiff's affirmative burden to show compliance with Rule 23); In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305, 320, 2008-2 Trade Cas. (CCH) ¶ 76453 (3d Cir. 2008), as amended, (Jan. 16, 2009); Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 202, Fed. Sec. L. Rep. (CCH) P 94878 (2d Cir. 2008).

[8]Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1428–29, 185 L. Ed. 2d 515, 2013-1 Trade Cas. (CCH) ¶ 78316, 85 Fed. R. Serv. 3d 118 (2013); In re Blood Reagents Antitrust Litigation, 783 F.3d 183, 2015-1 Trade Cas. (CCH) ¶ 79122, 91 Fed. R. Serv. 3d 693 (3d Cir. 2015); Colorado Cross Disability Coalition v. Abercrombie & Fitch Co., 765 F.3d 1205, 1213, 89 Fed. R. Serv. 3d 585 (10th Cir. 2014); Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 777, 85 Fed. R. Serv. 3d 1491 (8th Cir. 2013); Alkire v. Irving, 330 F.3d 802, 820, 55 Fed. R. Serv. 3d 1023, 2003 FED App. 0165A (6th Cir. 2003). See also §§ 19:21 to 19:23.

court's sound discretion.[9]

It has often been said that under Rule 23, the merits of the controversy are separate from the determination of whether the requirements of the Rule have been satisfied and that a court should not weigh the merits in ruling on class certification.[10] There is a difference in this regard between whether the merits of plaintiff's claims are strong -inquiry that is impermissible under Rule 23 — and whether, for example, proof relating to the merits of plaintiff's claims requires individualized evidence — a proper scope of inquiry under Rule 23. Thus, "frequently" the "rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim."[11] Yet, the Rule 23 certification analysis does not grant courts "license to engage in free-ranging merits inquiries" and as a result merits should only to be considered to the extent that they are "relevant" to determine whether the prerequisites for class certification have been met.[12]

Generally speaking, the first two factors of Rule 23(a), often referred to as numerosity and commonality, focus on judicial efficiency and the justification for the proposed class, and factors three and four, typicality and adequacy of representation, focus

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[9]M.D. ex rel. Stukenberg v. Perry, 675 F.3d 832, 836, 82 Fed. R. Serv. 3d 219 (5th Cir. 2012); Gunnells v. Healthplan Services, Inc., 348 F.3d 417, 424, 31 Employee Benefits Cas. (BNA) 1833, 57 Fed. R. Serv. 3d 132 (4th Cir. 2003); In re American Medical Systems, Inc., 75 F.3d 1069, 1079, 34 Fed. R. Serv. 3d 685, 1996 FED App. 0049P (6th Cir. 1996).

[10]Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 177, 94 S. Ct. 2140, 2159, 40 L. Ed. 2d 732, 9 Fair Empl. Prac. Cas. (BNA) 1302, 7 Empl. Prac. Dec. (CCH) P 9374A, Fed. Sec. L. Rep. (CCH) P 94570, 1974-1 Trade Cas. (CCH) ¶ 75082, 18 Fed. R. Serv. 2d 877, 4 Envtl. L. Rep. 20513 (1974).

[11]Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374, 112 Fair Empl. Prac. Cas. (BNA) 769, 94 Empl. Prac. Dec. (CCH) P 44193, 161 Lab. Cas. (CCH) P 35919, 78 Fed. R. Serv. 3d 1460 (2011); Soseeah v. Sentry Ins., 808 F.3d 800, 809, 93 Fed. R. Serv. 3d 771 (10th Cir. 2015); Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791, 802, 23 Wage & Hour Cas. 2d (BNA) 330, 164 Lab. Cas. (CCH) P 36259 (8th Cir. 2014); In re Initial Public Offerings Securities Litigation, 471 F.3d 24, 41–42, Fed. Sec. L. Rep. (CCH) P 94137 (2d Cir. 2006), decision clarified on denial of reh'g, 483 F.3d 70 (2d Cir. 2007); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 166–69, Fed. Sec. L. Rep. (CCH) P 91496, 50 Fed. R. Serv. 3d 1205 (3d Cir. 2001), as amended, (Oct. 16, 2001).

[12]Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, 133 S. Ct. 1184, 114–95, 185 L. Ed. 2d 308, Fed. Sec. L. Rep. (CCH) P 97300, 84 Fed. R. Serv. 3d 1151 (2013); Brown v. Nucor Corp., 785 F.3d 895, 903, 126 Fair Empl. Prac. Cas. (BNA) 1793, 99 Empl. Prac. Dec. (CCH) P 45306, 91 Fed. R. Serv. 3d 1169 (4th Cir. 2015); Bell v. PNC Bank, Nat. Ass'n, 800 F.3d 360, 376–77, 25 Wage & Hour Cas. 2d (BNA) 414, 165 Lab. Cas. (CCH) P 36374 (7th Cir. 2015); In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation, 722 F.3d 838, 852–53, Prod. Liab. Rep. (CCH) P 19191, 86 Fed. R. Serv. 3d 242, 104 A.L.R.6th 611 (6th Cir. 2013), cert. denied, 134 S. Ct. 1277, 188 L. Ed. 2d 298 (2014).

on due process and ensuring an appropriate class representative. When evaluating a proposed class action under Rule 23, however, courts often merge one or more of the factors together, finding, for example, that commonality is related to typicality, or explaining that the same facts that make the named plaintiff atypical also make her an inadequate class representative.[13] Notwithstanding this tendency by courts, a practitioner evaluating a potential class action lawsuit from the standpoint of a plaintiff or a defendant should analyze each subpart of Rule 23(a) separately.

In addition to the express criteria set forth in Rule 23(a), numerous courts have implied a requirement that there be an identifiable class.[14] Courts often have referred to this implied requirement as "ascertainability."[15] A class definition should be sufficiently definite so that it is objectively and administratively feasible for the court to determine whether a particular individ-

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[13]See generally Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2551 n.5, 180 L. Ed. 2d 374, 112 Fair Empl. Prac. Cas. (BNA) 769, 94 Empl. Prac. Dec. (CCH) P 44193, 161 Lab. Cas. (CCH) P 35919, 78 Fed. R. Serv. 3d 1460 (2011); General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157–158 n.13, 102 S. Ct. 2364, 2370–2371 n.13, 72 L. Ed. 2d 740, 28 Fair Empl. Prac. Cas. (BNA) 1745, 29 Empl. Prac. Dec. (CCH) P 32781, 34 Fed. R. Serv. 2d 371 (1982); Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc., 725 F.3d 1213, 1219, 85 Fed. R. Serv. 3d 1666 (10th Cir. 2013); Beck v. Maximus, Inc., 457 F.3d 291, 296 (3d Cir. 2006).

[14]See, e.g., EQT Production Co. v. Adair, 764 F.3d 347, 358, 89 Fed. R. Serv. 3d 604 (4th Cir. 2014) ("We have repeatedly recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be " 'readily identifiable.' "); Grimes v. Rave Motion Pictures Birmingham, L.L.C., 264 F.R.D. 659, 663–64 (N.D. Ala. 2010) ("Although not explicit in Rule 23(a) or (b), courts have universally recognized that the first essential ingredient to class treatment is the ascertainability of the class . . . Thus, the named plaintiff must define the proposed class in a manner that adequately identifies its members."); In re Initial Public Offering Securities Litigation., 227 F.R.D. 65, Fed. Sec. L. Rep. (CCH) P 93014 (S.D. N.Y. 2004), vacated and remanded, 471 F.3d 24, Fed. Sec. L. Rep. (CCH) P 94137 (2d Cir. 2006), decision clarified on denial of reh'g, 483 F.3d 70 (2d Cir. 2007); In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation, 209 F.R.D. 323, 336, 55 Env't. Rep. Cas. (BNA) 1218, 164 O.G.R. 995 (S.D. N.Y. 2002); Clay v. American Tobacco Co., 188 F.R.D. 483, 490 (S.D. Ill. 1999) ("Before the Court can address the issues raised by Rule 23(a), two implied prerequisites to class certification exist. First, the class must be sufficiently defined so that the class is identifiable.").

[15]See Byrd v. Aaron's Inc., 784 F.3d 154, 161 & n.4 (3d Cir. 2015); Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012); In re Initial Public Offering Securities Litigation., 227 F.R.D. 65, Fed. Sec. L. Rep. (CCH) P 93014 (S.D. N.Y. 2004), vacated and remanded, 471 F.3d 24, Fed. Sec. L. Rep. (CCH) P 94137 (2d Cir. 2006), decision clarified on denial of reh'g, 483 F.3d 70 (2d Cir. 2007); In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation, 209 F.R.D. 323, 336, 55 Env't. Rep. Cas. (BNA) 1218, 164 O.G.R. 995 (S.D. N.Y. 2002).

ual is a member of the proposed class.[16] A proposed class should not be certified if members of the proposed class cannot be ascertained from the outset,[17] and "[t]he Court must be able to make this determination without having to answer numerous fact-intensive inquiries."[18]

Some courts have determined that a "judicially implied" "ascertainability" requirement is "inappropriate" for Rule 23(b)(2) classes.[19] These courts have reasoned that "ascertainability" is less of an issue in Rule 23(b)(2) actions because such cases raise fewer issues with respect to who is eligible to receive relief or is foreclosed by a class judgment. These courts find that general class definitions based on the alleged harm suffered by plaintiffs may be acceptable in class actions seeking declaratory or injunctive relief under Fed. R. Civ. P. 23(b)(2).[20] In *Rice v. City of Philadelphia*,[21] the court stated that a "precise definition of the class is relatively unimportant" for class actions under Rule 23(b)(2).[22] Courts have similarly indicated that ascertainability may not an issue in Rule 23(b)(1) classes for similar reasons.[23]

While nearly all circuit courts have found that Rule 23 contains

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[16]See Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 537–38 (6th Cir. 2012); Ehret v. Uber Technologies, Inc., 148 F. Supp. 3d 884 (N.D. Cal. 2015); see, e.g., Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013) (reh'g den.) (vacating district court's order certifying class for failure to satisfy ascertainability requirement and noting "[i]f a class cannot be ascertained in an economical and administratively feasible manner, significant benefits of a class action are lost").

[17]See Barfield v. Sho-Me Power Elec. Co-op., 2015 WL 5022836, at *18–19 (W.D. Mo. 2015); In re Rezulin Products Liability Litigation, 210 F.R.D. 61, 79, 53 Fed. R. Serv. 3d 373 (S.D. N.Y. 2002); Clay v. American Tobacco Co., 188 F.R.D. 483, 490 (S.D. Ill. 1999).

[18]Carrera v. Bayer Corp., 727 F.3d 300, 307–08 (3d Cir. 2013); Menkes v. Stolt-Nielsen S.A., 270 F.R.D. 80, 93, Fed. Sec. L. Rep. (CCH) P 95852 (D. Conn. 2010); Daniels v. City of New York, 198 F.R.D. 409, 414, 49 Fed. R. Serv. 3d 936 (S.D. N.Y. 2001).

[19]Shelton v. Bledsoe, 775 F.3d 554, 90 Fed. R. Serv. 3d 677 (3d Cir. 2015); Shook v. El Paso County, 386 F.3d 963, 972 (10th Cir. 2004) ("[W]hile the lack of identifiability is a factor that may defeat Rule 23(b)(3) class certification, such is not the case with respect to class certification under Rule 23(b)(2)."); Floyd v. City of New York, 283 F.R.D. 153, 171–72, 82 Fed. R. Serv. 3d 833 (S.D. N.Y. 2012).

[20]See In re Monumental Life Ins. Co., 365 F.3d 408, 413 (5th Cir. 2004) ("Some courts have stated that a precise class definition is not as critical where certification of a class for injunctive or declaratory relief is sought under rule 23(b)(2).").

[21]Rice v. City of Philadelphia, 66 F.R.D. 17 (E.D. Pa. 1974).

[22]Rice v. City of Philadelphia, 66 F.R.D. 17, 19 (E.D. Pa. 1974). See also § 19:33, addressing Rule 23(c) and describing the different requirements for judgments in action certified under 23(b)(2) and 23(b)(3).

[23]See Lilly v. Jamba Juice Company, 308 F.R.D. 231 (N.D. Cal. 2014)

an ascertainability requirement, there is currently a split in the circuit courts concerning what is required to be shown by the party seeking certification to satisfy the requirement.[24] The Third and Eleventh Circuits impose a heightened requirement for establishing ascertainability and require a showing by the party seeking certification that the class is defined with objective criteria and that there is a reliable and administratively feasible mechanism for identifying class members (and one that permits defendant to challenge the evidence used to prove class membership).[25] The ascertainability requirement does not mean that a plaintiff must identify all class members at certification; rather, a plaintiff only needs to show through "evidentiary support" that that class members can be identified.[26] Under this more rigorous test, a class of purchasers of dietary supplements could not be certified because there were insufficient records of the class members' purchases of the supplements and plaintiff's proposal to identify class members by the submission of class member affidavits was not reliable or administratively feasible.[27] Some other circuit courts have indicated that they are in accord

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(indicating that ascertainability may not be a requirement for Rule 23(b)(1) class actions).

[24]Compare Rikos v. Procter & Gamble Co., 799 F.3d 497, 524, 92 Fed. R. Serv. 3d 652 (6th Cir. 2015) (rejecting heightened ascertainability prerequisite that would require a plaintiff to show a reliable and feasible method for determining class membership); Mullins v. Direct Digital, LLC, 795 F.3d 654, 659, 672, 92 Fed. R. Serv. 3d 178 (7th Cir. 2015) (same), with In re Nexium Antitrust Litigation, 777 F.3d 9, 19, 2015-1 Trade Cas. (CCH) ¶ 79036, 90 Fed. R. Serv. 3d 1100 (1st Cir. 2015) (adopting a heightened ascertainability prerequisite to class certification requiring a plaintiff to show that there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition); EQT Production Co. v. Adair, 764 F.3d 347, 358, 89 Fed. R. Serv. 3d 604 (4th Cir. 2014) (same); Carrera v. Bayer Corp., 727 F.3d 300, 305 (3d Cir. 2013) (same). See also Gannon v. Network Telephone Services, Inc., 628 Fed. Appx. 551 (9th Cir. 2016) (affirming denial of class certification due to lack of ability to ascertain class members, but not providing analysis); In re Deepwater Horizon, 739 F.3d 790, 821, 77 Env't. Rep. Cas. (BNA) 1829, 2014 A.M.C. 984, 102 A.L.R.6th 695 (5th Cir. 2014), cert. denied, 135 S. Ct. 754, 190 L. Ed. 2d 641, 2015 A.M.C. 2998 (2014) (recognizing ascertainability prerequisite, but providing little elaboration); In re Initial Public Offerings Securities Litigation, 471 F.3d 24, 30, 45, Fed. Sec. L. Rep. (CCH) P 94137 (2d Cir. 2006), decision clarified on denial of reh'g, 483 F.3d 70 (2d Cir. 2007) (same).

[25]See Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015); Karhu v. Vital Pharmaceuticals, Inc., 621 Fed. Appx. 945, 947–48 (11th Cir. 2015); Carrera v. Bayer Corp., 727 F.3d 300, 305 (3d Cir. 2013); Walewski v. Zenimax Media, Inc., 502 Fed. Appx. 857, 861 (11th Cir. 2012); Marcus v. BMW of North America, LLC, 687 F.3d 583, 592–94, 83 Fed. R. Serv. 3d 246 (3d Cir. 2012).

[26]Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015).

[27]Karhu v. Vital Pharmaceuticals, Inc., 621 Fed. Appx. 945, 949–50 (11th Cir. 2015); Carrera v. Bayer Corp., 727 F.3d 300, 309–11 (3d Cir. 2013). See also

with this "heightened" approach on ascertainability.[28]

The Sixth and Seventh Circuits have explicitly rejected the heightened approach to ascertainability articulated by the Third Circuit.[29] In *Mullins v. Direct Digital, LLC*, the Seventh Circuit stated that Third Circuit's approach to ascertainability "goes much further than the established meaning of ascertainability and misreads Rule 23."[30] Instead, the Sixth and Seventh Circuit have a self-described "weak" version of ascertainability that only requires class membership to be defined clearly by reference to objective criteria.[31] Thus, the party seeking class certification under this standard need not demonstrate a reliable and administratively feasible mechanism for identifying class members to satisfy ascertainability.[32] Rather, classes will fail to satisfy the ascertainability standard only if they are (1) vague and lack a "clear definition" (one that "identif[ies] a particular group, harmed during a particular time frame, in a particular location, in a particular way"); (2) defined by subjective criteria; or (3) defined based on the merits of the claims (also known as a

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In re Processed Egg Products Antitrust Litigation, 312 F.R.D. 124 (E.D. Pa. 2015) (antitrust class of indirect egg purchasers was not ascertainable because there were no purchase records and plaintiffs proposed that class membership be established by affidavit).

[28]In re Nexium Antitrust Litigation, 777 F.3d 9, 19, 2015-1 Trade Cas. (CCH) ¶ 79036, 90 Fed. R. Serv. 3d 1100 (1st Cir. 2015) (quoting Carrera, 727 F.3d at 307 with approval); EQT Production Co. v. Adair, 764 F.3d 347, 358, 89 Fed. R. Serv. 3d 604 (4th Cir. 2014) (the Fourth Circuit emphasized that "[it] ha[s] repeatedly recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable' " and signaled its accord with the Third Circuit decision on ascertainability).

[29]See Rikos v. Procter & Gamble Co., 799 F.3d 497, 92 Fed. R. Serv. 3d 652 (6th Cir. 2015); Mullins v. Direct Digital, LLC, 795 F.3d 654, 92 Fed. R. Serv. 3d 178 (7th Cir. 2015).

[30]Mullins v. Direct Digital, LLC, 795 F.3d 654, 662, 92 Fed. R. Serv. 3d 178 (7th Cir. 2015).

[31]Mullins v. Direct Digital, LLC, 795 F.3d 654, 662, 659, 92 Fed. R. Serv. 3d 178 (7th Cir. 2015); Rikos v. Procter & Gamble Co., 799 F.3d 497, 524, 525–27, 92 Fed. R. Serv. 3d 652 (6th Cir. 2015). Other circuits have generally recognized an ascertainability requirement, but have not taken a stance regarding precisely the contours or the strength of the ascertainability requirement. See Gannon v. Network Telephone Services, Inc., 628 Fed. Appx. 551 (9th Cir. 2016) (district court did not abuse its discretion in determining members of class were readily ascertainable, but providing limited analysis); In re Deepwater Horizon, 739 F.3d 790, 821, 77 Env't. Rep. Cas. (BNA) 1829, 2014 A.M.C. 984, 102 A.L.R.6th 695 (5th Cir. 2014), cert. denied, 135 S. Ct. 754, 190 L. Ed. 2d 641, 2015 A.M.C. 2998 (2014) (recognizing ascertainability prerequisite to class certification, without detail).

[32]Rikos v. Procter & Gamble Co., 799 F.3d 497, 524, 525–27, 92 Fed. R. Serv. 3d 652 (6th Cir. 2015); Mullins v. Direct Digital, LLC, 795 F.3d 654, 662–64, 659, 92 Fed. R. Serv. 3d 178 (7th Cir. 2015).

"fail-safe" class).[33] As a result, and in contrast to the Third and Eleventh Circuits, the Sixth and Seventh Circuit have certified class actions of the purchasers of dietary supplements when that the class members were proposed to be identified by the submissions of affidavits showing that a consumer had purchased the supplement.[34]

The purposes behind the implied ascertainability requirement are several. First, it provides a court with the information that it will need in order to gauge numerosity, a prerequisite under Fed. R. Civ. P. 23(a).[35] Second, it establishes in a clear manner the scope of preclusive effect that the class action will have, if it is certified.[36] Third, it assists the court in envisioning how the class action will be conducted, and in so doing it allows the court to make a fully informed decision about whether the cause is suited to class action treatment.[37] Last, it enunciates who, if anyone, will be entitled to relief if the plaintiff class ultimately prevails on the merits of the complaint.[38]

A precise class definition is important so that a court can decide, among other things, "who will receive notice, who will share in any recovery, and who will be bound by the judgment."[39] Indeed, if a court were to certify a class action with an imprecise or ambiguous class definition, it would likely face various due process and manageability difficulties down the road. For example, a class definition that is too indefinite to ascertain the actual numbers would make the determinations of numerosity

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[33]Mullins v. Direct Digital, LLC, 795 F.3d 654, 659–61, 92 Fed. R. Serv. 3d 178 (7th Cir. 2015).

[34]Rikos v. Procter & Gamble Co., 799 F.3d 497, 527, 92 Fed. R. Serv. 3d 652 (6th Cir. 2015); Mullins v. Direct Digital, LLC, 795 F.3d 654, 671–72, 92 Fed. R. Serv. 3d 178 (7th Cir. 2015).

[35]See generally Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 354–58, 86 Fed. R. Serv. 3d 192 (3d Cir. 2013) (finding evidence pertaining to class membership for numerosity also could demonstrate class was ascertainable); Campusano v. BAC Home Loans Servicing LP, 2013 WL 2302676, at *3 (C.D. Cal. 2013) ("Courts have frequently considered ascertainability as a component of numerosity.").

[36]See Northside Chiropractic, Inc. v. Yellowbook, Inc., 2012 WL 3777010, at *4–5 (N.D. Ill. 2012), appeal dismissed, (7th Circ. 15-1748) (Aug. 31, 2015).

[37]See Northside Chiropractic, Inc. v. Yellowbook, Inc., 2012 WL 3777010, at *4–5 (N.D. Ill. 2012), appeal dismissed, (7th Circ. 15-1748) (Aug. 31, 2015); Carrera v. Bayer Corp., 727 F.3d 300, 307–08 (3d Cir. 2013) (discussing fact that ascertainability requirement not satisfied where there would be manageability issues with the class).

[38]See Bakalar v. Vavra, 237 F.R.D. 59, 64 (S.D. N.Y. 2006) ("Class membership must be readily identifiable such that a court can determine who is in the class and bound by its ruling without engaging in numerous fact-intensive inquiries.").

[39]Kent v. SunAmerica Life Ins. Co., 190 F.R.D. 271, 278 (D. Mass. 2000).

and typicality more difficult and would raise questions as to whether all members of the class were provided sufficient notice.[40] In this regard, an indefinite class definition undermines the efficiencies sought to be achieved in class actions.[41] Moreover, an objective class definition is important to avoid the problem of so-called "one-way intervention," where class members line up for rewards in the event of a class victory on the merits or claim they are not part of the class in the event of a class defeat. While there is overlap between a precise class definition and ascertainability, the standards governing class definition under 23(c)(1)(B) and the ascertainability requirement are separate preliminary inquiries.[42]

The question of whether a proposed class definition meets this implied requirement is to be determined on a case-by-case basis and will depend the law of the governing circuit as discussed above.[43] The class definition need not be so precise that every potential member must be identified at the commencement of the

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[40]See In re Paxil Litigation, 212 F.R.D. 539, 545–546, Prod. Liab. Rep. (CCH) P 16573 (C.D. Cal. 2003) (holding that a class definition that is too indefinite to ascertain its members "makes it difficult for the Court to determine whether requirements such as numerosity and typicality are met" and raises questions as to whether class members "can be provided notice adequate to allow them to make an informed decision whether to opt-out").

[41]See Kline v. Security Guards, Inc., 196 F.R.D. 261, 268 (E.D. Pa. 2000) ("Thus, the difficulties inherent in identifying membership in the class present serious administrative burdens that are incongruous with the efficiencies expected in a class action. Many are the streamlining benefits that are the hallmark of a proper class action would be lost in the morass of individualized determinations of class membership.").

[42]Byrd v. Aaron's Inc., 784 F.3d 154, 166 (3d Cir. 2015); Hernandez v. County of Monterey, 305 F.R.D. 132, 151 (N.D. Cal. 2015) (discussing that ascertainability must be decided as a "preliminary matter"); Mirabella v. Vital Pharmaceuticals, Inc., 2015 WL 1812806, at *3 (S.D. Fla. 2015) ("Ascertainability is an issue separate and distinct from" other Rule 23 requirements).

[43]See Karhu v. Vital Pharmaceuticals, Inc., 621 Fed. Appx. 945, 946 (11th Cir. 2015) ("[A] a class is not ascertainable unless the class definition contains objective criteria that allow for class members to be identified in an administratively feasible way."); Grandalski v. Quest Diagnostics Inc., 767 F.3d 175, 184 n.5, 89 Fed. R. Serv. 3d 1185 (3d Cir. 2014) ("Our cases that have addressed ascertainability have focused on whether objective records could readily identify class members."); Abdeljalil v. General Elec. Capital Corp., 306 F.R.D. 303, 308 (S.D. Cal. 2015) ("This Court agrees with plaintiff that the class here is ascertainable because class members likely can be determined by objective criteria based on defendant's business records and the class members will likely be able to identify whether they received prerecorded calls from defendant."). See also In re Pharmaceutical Industry Average Wholesale Price Litigation, 588 F.3d 24, 38–41 (1st Cir. 2009) (district court could incorporate its prior orders by reference in certifying an expanded class and still meet Rule 23(c)(1)(B)'s requirements that orders properly define the class).

action.[44] It is also important to note that some courts have held that "a class may be certified even though the initial definition includes members who have not been injured or do not wish to pursue claims against the defendant."[45]

The application and meaning of the ascertainability requirement depend on context. For example, in an antitrust action alleging an illegal conspiracy to fix prices or allocate customers, the class definition should include, at a minimum, such objective criteria as the specific product purchased from the defendants, the relevant geographic market, and the applicable time period.[46] A proper class definition may in some cases include references to the defendant's alleged conduct (such as "all persons with diabetes who are in police custody").[47]

In contrast, a class definition should not include a description of the proposed class members that depends upon the merits of the action, *e.g.*, all persons that were discriminated against, or harmed, by defendants.[48] By attempting to define a proposed class based upon the merits of the action, the class plaintiff nec-

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[44]See EQT Production Co. v. Adair, 764 F.3d 347, 358, 89 Fed. R. Serv. 3d 604 (4th Cir. 2014) ("The plaintiffs need not be able to identify every class member at the time of certification."); see also Bush v. Calloway Consolidated Group River City, Inc., 2012 WL 1016871, at *4 (M.D. Fla. 2012) (finding class definition of all purchasers with certain credit card information printed on receipt to be ascertainable despite not knowing at outset which customers received receipts containing certain credit card information).

[45]Stewart v. Associates Consumer Discount Co., 183 F.R.D. 189, 198 (E.D. Pa. 1998); see also Kohen v. Pacific Inv. Management Co. LLC, 571 F.3d 672, 676 (7th Cir. 2009) (noting it is "putting the cart before the horse" to require all members of a putative class to have been injured and that those who are not injured will simply not submit a claim).

[46]See Rozema v. Marshfield Clinic, 174 F.R.D. 425, 432, 1997-2 Trade Cas. (CCH) ¶ 71905 (W.D. Wis. 1997) (abrogated on other grounds). See §§ 19:86 to 19:90 for discussion of antitrust actions.

[47]See Rosen v. City of Philadelphia, 2001 WL 484114 (E.D. Pa. 2001); see also Shurland v. Bacci Cafe & Pizzeria on Ogden, Inc., 271 F.R.D. 139, 146 (N.D. Ill. 2010) ("[A] class . . . may be defined by reference to defendant's conduct.").

[48]See In re Natural Gas Commodities Litigation, 231 F.R.D. 171, 180, 164 O.G.R. 505 (S.D. N.Y. 2005) (court sua sponte modified proposed class definition because, under proposed definition, "it would be nearly impossible to determine . . . class membership without impermissibly inquiring into the merits of Plaintiffs' complaint"); Mike v. Safeco Ins. Co. of America, 223 F.R.D. 50, 53, 9 Wage & Hour Cas. 2d (BNA) 1562, 150 Lab. Cas. (CCH) P 34921 (D. Conn. 2004) ("The proposed class is untenable because the court would have to conduct an individual inquiry regarding the merits of each proposed plaintiffs claim in order to determine class membership."); Mueller v. CBS, Inc., 200 F.R.D. 227, 233, 25 Employee Benefits Cas. (BNA) 2611 (W.D. Pa. 2001) (denying class certification where "To establish class membership, a putative plaintiff would have to show that Defendant violated his rights by selecting him for termination specifically to prevent him from acquiring benefits"); see also Young v. Nationwide Mut. Ins. Co., 693 F.3d 532 (6th Cir. 2012) ("All parties concede that

essarily creates an initial factual inquiry for each potential class member in order to determine class membership and thereby eviscerates the benefits to proceeding as a class action.[49] A class definition that improperly uses criteria dependent on the merits of the action is generally easy to identify. For example, where a class plaintiff has simply incorporated the substance of a certain statutory prohibition into her class definition (such as "all persons who suffered injury to their businesses or property by reason of concerted action that unreasonably restrained competition"), the implied ascertainability requirement may not be met.[50]

Numerous courts have also denied class certification where the proposed class definition depended on an individual's state of mind.[51] For example, in *Rios v. Marshall*,[52] the court held that a proposed class definition that included individuals "who would have applied for employment in this period but who were discouraged from doing so by" defendant's alleged unlawful acts was improper because it would be administratively unfeasible to identify the discouraged workers in that class membership as determined by the state of mind of the putative class members.

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a class definition is impermissible where it is a 'fail-safe' class, that is, a class that cannot be defined until the case is resolved on its merits. [A] 'fail-safe' class is one that includes only those who are entitled to relief. Such a class is prohibited because it would allow putative class members to seek a remedy but not be bound by an adverse judgment—either those 'class members win or, by virtue of losing, they are not in the class' and are not bound. Such a result is prohibited in large part because it would fail to provide the final resolution of the claims of all class members that is envisioned in class action litigation."). See also Paulino v. Dollar General Corp., 22 Wage & Hour Cas. 2d (BNA) 1157, 164 Lab. Cas. (CCH) P 36231, 2014 WL 1875326, at *4 (N.D. W. Va. 2014) (denying class certification where the court "would be required to conduct an individualized inquiry on the merits to determine whether a person qualifies as a member of the class, resulting in a determination of whether the person has a valid claim" and stating "[t]his is the essence of a fail safe class.").

[49]See Mike v. Safeco Ins. Co. of America, 223 F.R.D. 50, 54, 9 Wage & Hour Cas. 2d (BNA) 1562, 150 Lab. Cas. (CCH) P 34921 (D. Conn. 2004).

[50]See Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162, 1169–1170, 25 Media L. Rep. (BNA) 1908 (S.D. Ind. 1997); see also generally Messner v. Northshore University HealthSystem, 669 F.3d 802, 825, 2012-1 Trade Cas. (CCH) ¶ 77763 (7th Cir. 2012) (discussing issues posed by fail-safe classes).

[51]See, e.g., Simer v. Rios, 661 F.2d 655, 669, 32 Fed. R. Serv. 2d 781, 68 A.L.R. Fed. 235 (7th Cir. 1981) ("Cases have recognized the difficulty of identifying class members whose membership in the class depends on each individual's state of mind."); In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation, 209 F.R.D. 323, 337, 55 Env't. Rep. Cas. (BNA) 1218, 164 O.G.R. 995 (S.D. N.Y. 2002) ("Where any criterion is subjective, e.g., state of mind, the class is not ascertainable."); Gomez v. Illinois State Bd. of Educ., 117 F.R.D. 394, 397, 42 Ed. Law Rep. 1211 (N.D. Ill. 1987) ("A class description is insufficient, however, if membership is contingent on the prospective member's state of mind").

[52]Rios v. Marshall, 100 F.R.D. 395, 403–404 (S.D. N.Y. 1983).

A class definition that requires a court to conduct a mini-trial for each potential class member in order to ascertain whether he is a member of the class also is inappropriate. For example, in *Adashunas v. Negley,*[53] the Seventh Circuit held that the proposed class of all children attending public schools within Indiana who have specific learning disabilities and are not receiving adequate special education is inappropriate because it included the requirement of determining the adequacy of special education and a battery of tests would be needed to identify a learning disabled child and therefore the proposed class would be "so difficult to identify that it is not adequately defined or nearly ascertainable."

If the proposed class definition is amorphous or indefinite, a court has the power to limit or redefine a class definition in order to bring the class within Rule 23.[54] Alternatively, a court may initially certify a class and, if it becomes apparent after further proceedings that the class definition is unworkable, the court may modify the definition at that time.[55]

§ 19:9 "Numerosity"—Joinder impracticable

Before certifying a proposed class, the court must find that the "class is so numerous that joinder of all members is impracticable."[1] This entails a fact-specific inquiry to determine whether joinder is impracticable in the circumstances of the particular case.[2] If conventional joinder is not impracticable, then a class should not be certified, and the putative class representatives may continue the litigation on their own behalf, perhaps with other members of the alleged class that elect to join the case as plaintiffs. The party seeking class certification need not show that joinder by other means is impossible to satisfy its burden under the Rule.[3] Although the number of members in the proposed class sometimes is the dominant factor in a court's as-

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[53]Adashunas v. Negley, 626 F.2d 600, 604 (7th Cir. 1980).

[54]See Mueller v. CBS, Inc., 200 F.R.D. 227, 234, 25 Employee Benefits Cas. (BNA) 2611 (W.D. Pa. 2001); Zapka v. Coca-Cola Co., 2000 WL 1644539, at *4 (N.D. Ill. 2000).

[55]See Stewart v. Associates Consumer Discount Co., 183 F.R.D. 189, 198 (E.D. Pa. 1998).

[Section 19:9]

[1]Fed. R. Civ. P. 23(a)(1).

[2]General Tel. Co. of the Northwest, Inc. v. Equal Employment Opportunity Commission, 446 U.S. 318, 330, 100 S. Ct. 1698, 1706, 64 L. Ed. 2d 319, 22 Fair Empl. Prac. Cas. (BNA) 1196, 22 Empl. Prac. Dec. (CCH) P 30861, 29 Fed. R. Serv. 2d 925 (1980).

[3]Trevizo v. Adams, 455 F.3d 1155, 1162 (10th Cir. 2006); Robidoux v. Celani, 987 F.2d 931, 935, 25 Fed. R. Serv. 3d 86 (2d Cir. 1993).

sessment of whether joinder is impracticable,[4] often the determination does not rest on that fact alone.[5] In addition to the number of members, courts look at additional factors[6] such as:

(1) geographic dispersion of the class members;[7]

(2) the size of the individual claims;[8]

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[4]James v. City of Dallas, Tex., 254 F.3d 551, 570, 50 Fed. R. Serv. 3d 157 (5th Cir. 2001) (finding numerosity requirement met in case involving more than 100 class members alleging that 580 repairable single-family homes were demolished without adequate notice); Coleman v. Pension Ben. Guar. Corp., 196 F.R.D. 193, 198, 25 Employee Benefits Cas. (BNA) 1948 (D.D.C. 2000) ("The sheer size of the putative class satisfies the numerosity requirement because it persuades the Court that joinder would be impracticable."); Lutz v. International Ass'n of Machinists and Aerospace Workers, 196 F.R.D. 447, 450, 165 L.R.R.M. (BNA) 2548, 142 Lab. Cas. (CCH) P 10853 (E.D. Va. 2000), opinion amended and superseded, 165 L.R.R.M. (BNA) 2732 (E.D. Va. 2000) (finding numerosity requirement met where proposed class included approximately 1,039 members, noting that "it is well-settled that a class exceeding one-thousand members is too large for the practical participation by each individual member").

[5]In re TWL Corp., 712 F.3d 886, 894, 57 Bankr. Ct. Dec. (CRR) 210, 38 I.E.R. Cas. (BNA) 1324, 163 Lab. Cas. (CCH) P 10583 (5th Cir. 2013) (emphasizing that in assessing numerosity "court must not focus on sheer numbers alone" and should also consider other factors); Pennsylvania Public School Employees' Retirement System v. Morgan Stanley & Co., Inc., 772 F.3d 111, 120, 89 Fed. R. Serv. 3d 1787 (2d Cir. 2014), certified question answered, 25 N.Y.3d 543, 14 N.Y.S.3d 313, 35 N.E.3d 481 (2015) ("[T]he numerosity inquiry is not strictly mathematical.").

[6]Novella v. Westchester County, 443 F. Supp. 2d 540, 546, 39 Employee Benefits Cas. (BNA) 2723, 26 A.L.R. Fed. 2d 749 (S.D. N.Y. 2006), vacated on other grounds, 661 F.3d 128, 52 Employee Benefits Cas. (BNA) 1505 (2d Cir. 2011); Sanft v. Winnebago Industries, Inc., 214 F.R.D. 514, 31 Employee Benefits Cas. (BNA) 1581 (N.D. Iowa 2003), amended in part, 216 F.R.D. 453, 31 Employee Benefits Cas. (BNA) 1591 (N.D. Iowa 2003); Newberg on Class Actions § 3.06 (3d ed.).

[7]Wide dispersion of class members may weigh in favor of a finding that joinder is impracticable under Rule 23(a)(1). See, e.g., In re TWL Corp., 712 F.3d 886, 894, 57 Bankr. Ct. Dec. (CRR) 210, 38 I.E.R. Cas. (BNA) 1324, 163 Lab. Cas. (CCH) P 10583 (5th Cir. 2013) (emphasizing that in assessing numerosity court should consider "geographical dispersion of the class"); Adams v. Henderson, 197 F.R.D. 162, 170, 48 Fed. R. Serv. 3d 3 (D. Md. 2000) (numerosity requirement not met where plaintiff failed to show any potential class member lived outside of immediate area); Hubler Chevrolet, Inc. v. General Motors Corp., 193 F.R.D. 574, 577 (S.D. Ind. 2000) (relying on the geographic dispersion of putative members in concluding that class met numerosity requirement). However, such wide dispersion may counsel against certification under Rule 23(b)(3), insofar as it suggests it may be undesirable to concentrate litigation in a single forum (as where class member participation at trial may be necessary).

[8]Jordan v. Los Angeles County, 669 F.2d 1311, 1319, 28 Fair Empl. Prac. Cas. (BNA) 518, 28 Empl. Prac. Dec. (CCH) P 32525, 33 Fed. R. Serv. 2d 1075 (9th Cir. 1982), cert. granted, judgment vacated on other grounds, 459 U.S. 810, 103 S. Ct. 35, 74 L. Ed. 2d 48, 29 Fair Empl. Prac. Cas. (BNA) 1560, 30 Empl. Prac. Dec. (CCH) P 33063 (1982) ("[T]he relatively small size of each class

(3) the financial resources of class members;[9]

(4) the willingness and ability of the individual claimants to bring an action;[10]

(5) judicial economy;[11]

(6) fear of retaliation or prejudice against members of the putative class if they were to sue on their own behalf;[12]

(7) requests for prospective injunctive relief that may involve future class members;[13] and

(8) the transience of the class.[14]

"There is no set numerical cutoff under the numerosity

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member's claim and the probability that the class members may be difficult to locate combine to make it impracticable for individual class members to join in the lawsuit by instituting separate actions."); Lucas v. Mike McMurrin Trucking, Inc., 25 Wage & Hour Cas. 2d (BNA) 724, 2015 WL 5838488, at *3 (N.D. Iowa 2015) (determining that where amount of individual recovery was "relatively small" this "weighs in favor of finding numerosity"); Stoudt v. E.F. Hutton & Co., Inc., 121 F.R.D. 36, 38 (S.D. N.Y. 1988) ("When the size of each claim is significant, and each proposed class member therefore possesses the ability to assert an individual claim, the goal of obtaining redress can be accomplished without the use of the class action device.").

[9]DL v. District of Columbia, 302 F.R.D. 1, 11, 310 Ed. Law Rep. 973 (D.D.C. 2013), leave to appeal denied, (D.C. Circ. 13-8009)(Jan. 30, 2014) (finding fact that putative class consisted of indigent plaintiffs helped demonstrate numerosity).

[10]Gries v. Standard Ready Mix Concrete, L.L.C., 252 F.R.D. 479, 487 (N.D. Iowa 2008); Musmeci v. Schwegmann Giant Super Markets, 2000 WL 1010254 (E.D. La. 2000), judgment amended, 2000 WL 1185510 (E.D. La. 2000) (considering fact that plaintiffs were primarily elderly, retired, and unlikely to pursue claims individually); Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp., 149 F.R.D. 65, 74, 27 Fed. R. Serv. 3d 861 (D.N.J. 1993) (putative class members were automobile dealerships who were capable of litigating for themselves).

[11]In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 290, 26 Collier Bankr. Cas. 2d (MB) 1413, 22 Fed. R. Serv. 3d 1091 (2d Cir. 1992); McCluskey v. Trustees of Red Dot Corp. Employee Stock Ownership Plan and Trust, 268 F.R.D. 670, 674–75 (W.D. Wash. 2010).

[12]Castillo v. Morales, Inc., 302 F.R.D. 480, 487, 2014 Wage & Hour Cas. 2d (BNA) 167553 (S.D. Ohio 2014).

[13]Brooklyn Center for Independence of the Disabled v. Bloomberg, 290 F.R.D. 409, 418 (S.D. N.Y. 2012). See also Sueoka v. U.S., 101 Fed. Appx. 649, 652–653 (9th Cir. 2004) (the numerosity requirement is relaxed when plaintiffs seek only injunctive or declaratory relief, and "plaintiffs may rely on the reasonable inference arising from plaintiffs' other evidence that the number of unknown and future members of [the proposed class] is sufficient to make joinder impracticable").

[14]See Bullock v. Board of Educ. of Montgomery County, 210 F.R.D. 556, 559, 171 Ed. Law Rep. 846 (D. Md. 2002) (considering the transience of the proposed class of homeless children seeking better public education assistance, in finding that the class satisfied Rule 23(a)(1)'s numerosity requirement).

requirement."[15] The movant need not show the exact number of members in the class to satisfy its burden under Rule 23(a)(1), but it must put forth some evidence of the expected class size.[16] A court may rely on "common sense assumptions" when determining whether the numerosity factor has been met.[17] Conclusory allegations, however, are insufficient.[18]

Some commentators have observed as a general rule, that courts may certify classes comprising 40 or more members.[19] In

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[15]Litty v. Merrill Lynch & Co., Inc., 2015 WL 4698475, at *3 (C.D. Cal. 2015); Christiana Mortg. Corp. v. Delaware Mortg. Bankers Ass'n, 136 F.R.D. 372, 377, 1991-1 Trade Cas. (CCH) ¶ 69462 (D. Del. 1991). See also Trevizo v. Adams, 455 F.3d 1155, 1162 (10th Cir. 2006) (refusing to adopt presumption of numerosity at 40 class members; stating "there is no set formula to determine if the class is so numerous that it should be so certified").

[16]Alkire v. Irving, 330 F.3d 802, 820, 55 Fed. R. Serv. 3d 1023, 2003 FED App. 0165A (6th Cir. 2003) (affirming trial court's finding that plaintiff could not meet numerosity requirement through speculation on the number of potential class members subject to county policy); Robidoux v. Celani, 987 F.2d 931, 935, 25 Fed. R. Serv. 3d 86 (2d Cir. 1993); Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 293 F.R.D. 287, 300 (E.D. N.Y. 2013) (noting that "there is no requirement to specify an exact class size in order to demonstrate numerosity," but then examining plaintiff's evidence and emphasizing numerosity requirement was met in light of evidence); Verdow ex rel. Meyer v. Sutkowy, 209 F.R.D. 309, 311 (N.D. N.Y. 2002) ("[A] plaintiff seeking class certification bears the burden to show some evidence or reasonable estimate of the number of class members."); Glenn v. Daddy Rocks, Inc., 203 F.R.D. 425, 428, 49 Fed. R. Serv. 3d 1202 (D. Minn. 2001) (numerosity requirement unmet where asserted size of potential class was supported only by speculation).

[17]Barnes v. Air Line Pilots Association, International, 310 F.R.D. 551, 557, 204 L.R.R.M. (BNA) 3438 (N.D. Ill. 2015).

[18]See Mylan Pharmaceuticals, Inc. v. Warner Chilcott Public Ltd. Co., 2013 WL 6145117, at *3 (E.D. Pa. 2013) (finding that speculation does not satisfy an "evidentiary preponderance" for numerosity); Sandlin v. Shapiro & Fishman, 168 F.R.D. 662, 666 (M.D. Fla. 1996) (finding that plaintiff failed to put forth adequate proof of the proposed class size where the plaintiff stated that defendant's use of standard forms and standard practices "gives rise to a reasonable inference that the number of class members exceeds the 10–40 requirement").

[19]See Stewart v. Abraham, 275 F.3d 220, 226–227, 51 Fed. R. Serv. 3d 1145 (3d Cir. 2001) (finding numerosity requirement met because class exceeded 40 potential members); Daniels v. City of New York, 198 F.R.D. 409, 417, 49 Fed. R. Serv. 3d 936 (S.D. N.Y. 2001) (finding numerosity requirement met where low estimate of class size exceeded 40-member guideline established by Second Circuit); Street v. Diamond Offshore Drilling, 21 Nat'l Disability Law Rep. P 62, 2001 WL 568111 (E.D. La. 2001) (finding numerosity requirement met because size of potential class exceeded 40 members); Ladegaard v. Hard Rock Concrete Cutters, Inc., 142 Lab. Cas. (CCH) P 34179, 2000 WL 1774091, at *3-*4 (N.D. Ill. 2000) (numerosity requirement is generally met where membership of proposed class is at least 40; consideration of other factors relating to numerosity "is usually necessary only where the proposed class size is smaller than 40"); see also Hirschfeld v. Stone, 193 F.R.D. 175, 182 (S.D. N.Y. 2000) (relying on

specific cases, however, courts have certified classes with as few as 17 members and refused to certify classes with as many as 350 members.[20]

For example, in *Alvarado Partners, L.P. v. Mehta*,[21] a suit brought under the federal securities law, the court certified a class of 33 members where it found that the members were located throughout the country. In *Allen v. Isaac,*[22] an action challenging allegedly discriminatory training and promotion practices, the court found that a class of 17 geographically dispersed members met the requirements of Rule 23(a).

Conversely, in *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.,*[23] the court rejected the plaintiffs' contention that joinder of 123 class members was impracticable. The court reviewed several of the factors listed above, including the location of the class members and whether the class members would be able to pursue their claims individually, and found that joinder was not impracticable because all class members were known and identifiable by name and address, each was located within the State of New Jersey, and each was a "substantial business capable of

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fact that the Second Circuit has presumed numerosity with a class of only 40, court certified class of 150–170 members over objection from defendant that plaintiffs had not established numerosity); Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 627, 2000 A.M.C. 1519, 44 Fed. R. Serv. 3d 885 (5th Cir. 1999) (confirming that a class of merely 40 members would establish numerosity and, thus, affirming district court's finding that class including only 100–150 members met numerosity requirement); Moore's Federal Practice § 23.23, at 23–63 (3d ed.). But see Trevizo v. Adams, 455 F.3d 1155, 1162 (10th Cir. 2006) (refusing to adopt presumption of numerosity at 40 class members). See Marcus v. BMW of North America, LLC, 687 F.3d 583, 595, 83 Fed. R. Serv. 3d 246 (3d Cir. 2012) ("There is no minimum number of members needed for a suit to proceed as a class action. We have observed, however, that 'generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met."); Shahriar v. Smith & Wollensky Restaurant Group, Inc., 659 F.3d 234, 252, 18 Wage & Hour Cas. 2d (BNA) 193, 161 Lab. Cas. (CCH) P 35953, 80 Fed. R. Serv. 3d 1070 (2d Cir. 2011) (stating that numerosity is presumed at a level of 40 members).

[20]Wright, Miller, and Kane, Federal Practice and Procedure: Civil 2d § 1762.

[21]Alvarado Partners, L.P. v. Mehta, 130 F.R.D. 673, 675, Fed. Sec. L. Rep. (CCH) P 95271, 17 Fed. R. Serv. 3d 319 (D. Colo. 1990). Compare Christiana Mortg. Corp. v. Delaware Mortg. Bankers Ass'n, 136 F.R.D. 372, 378, 1991-1 Trade Cas. (CCH) ¶ 69462 (D. Del. 1991) (refusing to certify a class of 28 members even though it found that the proposed class fulfilled three other requirements of Rule 23(a) based on the fact that the class members lived within a 100-mile radius).

[22]Allen v. Isaac, 99 F.R.D. 45, 53, 35 Fair Empl. Prac. Cas. (BNA) 1564, 37 Fed. R. Serv. 2d 351 (N.D. Ill. 1983), order amended, 100 F.R.D. 373, 35 Fair Empl. Prac. Cas. (BNA) 1576 (N.D. Ill. 1983).

[23]Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp., 149 F.R.D. 65, 74, 27 Fed. R. Serv. 3d 861 (D.N.J. 1993).

litigating for itself."[24] In *Minersville Coal Co. v. Anthracite Export Ass'n,*[25] the court determined that joinder of a proposed class of as many as 330 members was not impracticable, relying on an earlier decision in which a court found that joinder of 350 plaintiffs "was far simpler than a class action." At least one court has ruled that if every member of the proposed class could be and was in fact named as a plaintiff in the action, joinder of all members could not be considered impracticable.[26]

§ 19:10 "Commonality"—Common questions of law or fact

Under Rule 23(a)(2), before a court may certify a class, it must find that "there are questions of law or fact common to the class."[1] The Rule does not require that every question of law or fact at issue in the litigation be common to all class members.[2] The language of the Rule can be read to suggest that the class representative must proffer more than one issue of law or fact common to all members of the class,[3] and some courts have followed this

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[24]Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp., 149 F.R.D. 65, 74, 27 Fed. R. Serv. 3d 861 (D.N.J. 1993).

[25]Minersville Coal Co. v. Anthracite Export Ass'n, 55 F.R.D. 426, 428, 1971 Trade Cas. (CCH) ¶ 73765, 15 Fed. R. Serv. 2d 917 (M.D. Pa. 1971).

[26]Joshlin v. Gannett River States Pub. Corp., 152 F.R.D. 577, 579, 8 I.E.R. Cas. (BNA) 1514 (E.D. Ark. 1993) (refusing to certify a class of 95 members named in amended complaint); see also Uniondale Beer Co., Inc. v. Anheuser-Busch, Inc., 117 F.R.D. 340, 345, 1987-2 Trade Cas. (CCH) ¶ 67757 (E.D. N.Y. 1987) (refusing to certify defendant class where class counsel admitted that it could easily name the 124 defendants in the complaint). But see Yazzie v. Ray Vickers' Special Cars, Inc., 180 F.R.D. 411, 415 (D.N.M. 1998) (finding that proposed class met the numerosity requirement, notwithstanding fact that representatives knew names of all 210 proposed members).

[Section 19:10]

[1]Fed. R. Civ. P. 23(a)(2).

[2]Newberg on Class Actions § 3:10 (4th ed.); see Weiss v. York Hosp., 745 F.2d 786, 808–809, 1984-2 Trade Cas. (CCH) ¶ 66211, 39 Fed. R. Serv. 2d 1444 (3d Cir. 1984). See also Armstrong v. Davis, 275 F.3d 849, 868, 12 A.D. Cas. (BNA) 1528, 51 Fed. R. Serv. 3d 448 (9th Cir. 2001) (in a civil rights suit, commonality was satisfied where plaintiffs challenged a system-wide practice or policy that affected all putative class members, even though "individual factual differences among the individual litigants or groups of litigants" existed); Daniels v. City of New York, 198 F.R.D. 409, 417, 49 Fed. R. Serv. 3d 936 (S.D. N.Y. 2001) (commonality requirement does not require that all class members share identical claims); Lutz v. International Ass'n of Machinists and Aerospace Workers, 196 F.R.D. 447, 451, 165 L.R.R.M. (BNA) 2548, 142 Lab. Cas. (CCH) P 10853 (E.D. Va. 2000), opinion amended and superseded, 165 L.R.R.M. (BNA) 2732 (E.D. Va. 2000) (commonality requirement met despite factual differences between different class members).

[3]Wright, Miller, and Kane, Federal Practice and Procedure: Civil 2d § 1763.

interpretation of the Rule.[4] However, the Supreme Court has recognized that "for purposes of Rule 23(a)(2) '[e]ven a single [common] question' will do."[5]

Historically, the commonality requirement of Rule 23(a) was generally a relatively easy one for the moving party to satisfy[6] because, even though commonality remains a distinct requirement under Rule 23(a)(2), courts often consider it together with, and focus principal attention on, Rule 23(b)(3), which requires not only that common questions exist but that they predominate.[7]

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[4]See, e.g., Stewart v. Winter, 669 F.2d 328, 335 n.16 (5th Cir. 1982) ("By its terms, Rule 23(a)(2) requires more than one common question").

[5]Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2556, 180 L. Ed. 2d 374, 112 Fair Empl. Prac. Cas. (BNA) 769, 94 Empl. Prac. Dec. (CCH) P 44193, 161 Lab. Cas. (CCH) P 35919, 78 Fed. R. Serv. 3d 1460 (2011), (quoting Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L. Rev. 149, 176, n. 110 (2003)). See also Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 155, 86 Fair Empl. Prac. Cas. (BNA) 1580, 81 Empl. Prac. Dec. (CCH) P 40846, 50 Fed. R. Serv. 3d 800 (2d Cir. 2001); Johnston v. HBO Film Management, Inc., 265 F.3d 178, 184, R.I.C.O. Bus. Disp. Guide (CCH) P 10130, 50 Fed. R. Serv. 3d 1543 (3d Cir. 2001) ("The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.") (internal quotation marks omitted); James v. City of Dallas, Tex., 254 F.3d 551, 570, 50 Fed. R. Serv. 3d 157 (5th Cir. 2001) (commonality satisfied where at least one issue will affect all or a significant number of putative class members).

[6]Examples of common questions include allegations of a conspiracy to fix prices, allegations of fraud against a corporation arising out of false and misleading news releases regarding the company, allegations of standardized conduct that violates the Truth in Lending Act, or instances where the existence of a discriminatory policy adversely affects members of the proposed class. Wright, Miller, and Kane, Federal Practice and Procedure: Civil 2d § 1763. But see Garcia v. Veneman, 211 F.R.D. 15, 22 (D.D.C. 2002) ("Commonality is defeated—not only by plaintiffs' inability to correlate the discrimination they allege with subjective loan qualification criteria—but also by the large numbers and geographic dispersion of the decision-makers."); Moore Video Distributors, Inc. v. Quest Entertainment, Inc., 823 F. Supp. 1332 (S.D. Miss. 1993) (finding that the commonality element was not met where plaintiffs had not shown that the same terms were present in the contracts at issue or that defendants breached the contracts in the same manner).

[7]Alkire v. Irving, 330 F.3d 802, 821, 55 Fed. R. Serv. 3d 1023, 2003 FED App. 0165A (6th Cir. 2003) (holding that one question common to the class satisfies Rule 23(a)(2)'s requirement, but also that the one common question under consideration did not satisfy Rule 23(b)(3) because of the numerous factual issues that varied among the class members); Fotta v. Trustees of United Mine Workers of America, 319 F.3d 612, 618–619, 29 Employee Benefits Cas. (BNA) 2672 (3d Cir. 2003) (upholding refusal to certify a proposed class of mine workers whose receipt of disability benefits was administratively delayed and who claimed interest for the period of the delay; because putative class members would not be entitled to interest unless delay was wrongful, and because remedy would need to be individually determined in any event, court found no common issues of law or fact); Wright, Miller, and Kane, Federal Practice and

If a court finds that the moving party has met its burden under Rule 23(b)(3), then necessarily the commonality requirement of Rule 23(a) has been satisfied as well. At least one circuit, however, has overturned a district court's certification of a class when the court engaged in such an analysis.[8] In that case, the Eleventh Circuit ruled that the district court abused its discretion because it did not conduct the "rigorous analysis" required for a finding that a class has met the Rule 23 requirements for class actions.

In 2011 the Supreme Court clarified the test for commonality under Rule 23(a)(2) in *Wal-Mart Stores, Inc. v. Dukes*.[9] In that case, the Court rejected plaintiffs' request for class certification under Rule 23(a) and (b)(2). The Court found that allegations that Wal-Mart had a "common" policy of permitting local managers to use discretion to make employment decisions based upon subjective factors did not satisfy the commonality requirement. The Court held that the commonality requirement cannot be met by "generalized" questions that have little bearing on liability and cannot be met where the named plaintiffs and putative class members have not suffered the "same injury."[10] The Court noted that it is not enough to allege that the putative class "all suffered a violation of the same provision of law."[11] The Supreme Court stressed that commonality depends not merely on the presence of common questions, but 'the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."[12] Applying *Walmart v. Dukes*, a circuit court has held that Rule 23(a)(2) was satisfied by class of consumers who al-

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Procedure: Civil 2d § 1763.

[8]Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1269, 28 I.E.R. Cas. (BNA) 1824, 157 Lab. Cas. (CCH) P 60788 (11th Cir. 2009).

[9]Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374, 112 Fair Empl. Prac. Cas. (BNA) 769, 94 Empl. Prac. Dec. (CCH) P 44193, 161 Lab. Cas. (CCH) P 35919, 78 Fed. R. Serv. 3d 1460 (2011).

[10]Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374, 112 Fair Empl. Prac. Cas. (BNA) 769, 94 Empl. Prac. Dec. (CCH) P 44193, 161 Lab. Cas. (CCH) P 35919, 78 Fed. R. Serv. 3d 1460 (2011).

[11]Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374, 112 Fair Empl. Prac. Cas. (BNA) 769, 94 Empl. Prac. Dec. (CCH) P 44193, 161 Lab. Cas. (CCH) P 35919, 78 Fed. R. Serv. 3d 1460 (2011).

[12]Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374, 112 Fair Empl. Prac. Cas. (BNA) 769, 94 Empl. Prac. Dec. (CCH) P 44193, 161 Lab. Cas. (CCH) P 35919, 78 Fed. R. Serv. 3d 1460 (2011) (quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 132 (2009) (emphasis in original)). Courts have recognized the importance and broad application of Dukes, including in decisions regarding whether class certification is permissible under Rule 23(b)(3). See Ahmad v. Old Republic Nat.

leged a RICO conspiracy by telemarketers who allegedly made fraudulent charges to, the consumers' bank accounts even though there was "slight variations" in the defendants conduct underlying the putative class members claims, because unlike *Walmart v. Dukes* the variations did not alter plaintiffs' damages and plaintiffs theory relied on a "common mode" of behavior.[13]

§ 19:11 "Typicality"—Claims or defenses of named representatives typical of class

Rule 23(a)(3) requires a showing that "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[1] Generally, a class representative is considered "typical" when her claims and the claims of the other class members arise out of the same series or kind of events and when they rely on similar legal theories to prove the defendant's liability.[2]

The Supreme Court has also noted that: "The typicality require-

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Title Ins. Co., 690 F.3d 698 (5th Cir. 2012) (reversing decision certifying a (b)(3) class because the "common questions" identified by district court "cannot be answered on a class-wide basis with class-wide proof"); Howland v. First American Title Ins. Co., 672 F.3d 525, 528 (7th Cir. 2012) (affirming denial of class certification and citing Dukes on commonality); Jamie S. v. Milwaukee Public Schools, 668 F.3d 481, 497-98, 277 Ed. Law Rep. 34, 81 Fed. R. Serv. 3d 890 (7th Cir. 2012) (vacating certification of class of special education students who alleged violations of the Individuals with Disabilities Education Act because the class was both fatally indefinite and lacked the commonality required by Rule 23(a)(2). It is not enough that "all class members have 'suffered' as a result of disparate individual IDEA child-find violations"; in the absence of "significant proof that MPS operated under child-find policies that violated IDEA," there was none of the "glue necessary to litigate otherwise highly individualized claims as a class.").

[13]Reyes v. Netdeposit, LLC, 802 F.3d 469, 486–89 (3d Cir. 2015).

[Section 19:11]

[1]Fed. R. Civ. P. 23(a)(3).

[2]See Pella Corp. v. Saltzman, 606 F.3d 391, 394 (7th Cir. 2010) (allowing class treatment where plaintiffs all purchased the same type of window allegedly suffering from the same design defect); Stirman v. Exxon Corp., 280 F.3d 554, 562, 51 Fed. R. Serv. 3d 1152, 154 O.G.R. 107 (5th Cir. 2002) ("Typicality does not require a complete identity of claims. Rather, the critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class.") (quoting James v. City of Dallas, Tex., 254 F.3d 551, 571, 50 Fed. R. Serv. 3d 157 (5th Cir. 2001)); In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 291, 26 Collier Bankr. Cas. 2d (MB) 1413, 22 Fed. R. Serv. 3d 1091 (2d Cir. 1992); Rodolico v. Unisys Corp., 199 F.R.D. 468, 477 (E.D. N.Y. 2001) (typicality requirement met where claims of named plaintiffs and class members arose "from the same allegedly unlawful conduct—namely layoff based on the age of the worker"); Daniels v. City of New York, 198 F.R.D. 409, 418, 49 Fed. R. Serv. 3d 936 (S.D. N.Y. 2001) (typicality requirement met where claims of named plaintiffs and class members arose from same unlawful police conduct); Clauser v. Newell Rubbermaid, Inc., 2000 WL 1053395, at *5 (E.D. Pa. 2000); Hash v. U.S., 2000 WL 1460801, at *9 (D. Idaho 2000). But see Marquis

ment is said to limit the class claims to those fairly encompassed by the named plaintiffs' claim."[3] As a result, the typicality requirement is also linked closely with a named plaintiff's ability to be an adequate representative.[4] As long as the representative's claims are typical of the class claims, a representative that pursues his own claims vigorously can be expected to pursue the class claims vigorously as well.[5] In addition, fewer conflicts are likely to arise if the class representative's interests are closely aligned with the interests of class members.[6]

To satisfy the typicality requirement, the moving party need not show that its claims are identical to the claims of the proposed class.[7] Insignificant factual differences between the class representative's claim and the claims of the class will not destroy typicality if both are pursuing similar legal theories.[8] Thus, where the claims of the named plaintiffs and the claims of absent class

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v. Tecumseh Products Co., 206 F.R.D. 132, 160–161, 88 Fair Empl. Prac. Cas. (BNA) 1815 (E.D. Mich. 2002) (stating, in sexual harassment context, that "To hold . . . that claims are typical so long as they rest on the 'same legal theory' would vitiate the requirement of typicality").

[3]General Tel. Co. of the Northwest, Inc. v. Equal Employment Opportunity Commission, 446 U.S. 318, 330, 100 S. Ct. 1698, 1706, 64 L. Ed. 2d 319, 22 Fair Empl. Prac. Cas. (BNA) 1196, 22 Empl. Prac. Dec. (CCH) P 30861, 29 Fed. R. Serv. 2d 925 (1980). See also Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1279, 47 Fed. R. Serv. 3d 953 (11th Cir. 2000) ("[T]ypicality measures whether a sufficient nexus exists between the claims of the named representative and those of the class at large.").

[4]Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 182–183, Fed. Sec. L. Rep. (CCH) P 91496, 50 Fed. R. Serv. 3d 1205 (3d Cir. 2001), as amended, (Oct. 16, 2001) ("Typicality ensures the interests of the class and the class representatives are aligned 'so that the latter will work to benefit the entire class through the pursuit of their own goals.").

[5]See also Georgine v. Amchem Products, Inc., 83 F.3d 610, 632, 34 Fed. R. Serv. 3d 407, 26 Envtl. L. Rep. 21138 (3d Cir. 1996), aff'd, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689, 37 Fed. R. Serv. 3d 1017, 28 Envtl. L. Rep. 20173 (1997); In re American Medical Systems, Inc., 75 F.3d 1069, 1083, 34 Fed. R. Serv. 3d 685, 1996 FED App. 0049P (6th Cir. 1996) ("The adequate representation requirement overlaps with the typicality requirement because in the absence of typical claims, the class representative has no incentives to pursue the claims of the other class members.").

[6]Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 56, 30 Fed. R. Serv. 3d 1469 (3d Cir. 1994).

[7]Gray v. Golden Gate Nat. Recreational Area, 279 F.R.D. 501 (N.D. Cal. 2011) (difference in injuries and non-identical claims do not defeat typicality); Lapin v. Goldman Sachs & Co., 254 F.R.D. 168, 176, Fed. Sec. L. Rep. (CCH) P 94842 (S.D. N.Y. 2008) ("The commonality and typicality requirements do not mandate that the claims of the lead plaintiff be identical to those of all other plaintiffs.").

[8]Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust v. LaBranche & Co., Inc., 229 F.R.D. 395, 412, Fed. Sec. L. Rep. (CCH) P 92839 (S.D. N.Y. 2004); see also Ault v. Walt Disney World Co., 692 F.3d 1212, 26 A.D. Cas.

members were based on investments in different limited partnerships but on the same course of wrongful conduct and a standardized sales approach, the court found the typicality element satisfied.[9] If, however, the factual differences are material, or if they are numerous, a court may find that the typicality requirement is not satisfied.[10] A court must inquire whether "the named plaintiff's individual circumstances are markedly different" from those of the class members he seeks to represent.[11]

When analyzing the typicality requirement, courts have found, for example, that a named plaintiff whose business transactions with the defendants are of a more limited nature than those of the majority of the class does not satisfy the typicality requirement.[12] In *Jackshaw Pontiac, Inc. v. Cleveland Press Publ'g Co.,* the court found that the facts surrounding the named plaintiffs' positions differed greatly from those of the other proposed class members, and denied class certification. The plaintiffs were advertisers that alleged that two newspapers had conspired to close down one of the newspapers with the purpose of establishing a monopoly in the market for daily newspapers, thereby forcing advertisers to pay higher rates.[13] The defendants put forth evidence to show that the rates paid by each advertiser differed greatly and depended upon a number of variables, including the frequency, size, and place of the ad, among other things.[14] The named plaintiffs conceded that they had paid rates based on only a few of the possible combinations, but they claimed that

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(BNA) 1435, 83 Fed. R. Serv. 3d 373 (11th Cir. 2012).

[9]In re Prudential Securities Inc. Ltd. Partnerships Litigation, 163 F.R.D. 200, 208, Fed. Sec. L. Rep. (CCH) P 98915 (S.D. N.Y. 1995). See also Johnston v. HBO Film Management, Inc., 265 F.3d 178, 184, R.I.C.O. Bus. Disp. Guide (CCH) P 10130, 50 Fed. R. Serv. 3d 1543 (3d Cir. 2001) (noting that typicality can be established regardless of factual differences as long as claims by the named plaintiffs and other class members involve the same conduct by the defendant).

[10]See, e.g., Sprague v. General Motors Corp., 133 F.3d 388, 399, 21 Employee Benefits Cas. (BNA) 2267, 39 Fed. R. Serv. 3d 788, 1998 FED App. 0004P (6th Cir. 1998).

[11]Weiss v. York Hosp., 745 F.2d 786, 809 n.36, 1984-2 Trade Cas. (CCH) ¶ 66211, 39 Fed. R. Serv. 2d 1444 (3d Cir. 1984). See also Brooks v. Southern Bell Tel. & Tel. Co., 133 F.R.D. 54, 58 (S.D. Fla. 1990) ("[C]ourts have repeatedly held representatives' claims to be atypical if they are grounded in factual situations differing from those of other class members.").

[12]Jackshaw Pontiac, Inc. v. Cleveland Press Pub. Co., 102 F.R.D. 183, 1985-1 Trade Cas. (CCH) ¶ 66559, 39 Fed. R. Serv. 2d 811 (N.D. Ohio 1984).

[13]Jackshaw Pontiac, Inc. v. Cleveland Press Pub. Co., 102 F.R.D. 183, 185–186, 1985-1 Trade Cas. (CCH) ¶ 66559, 39 Fed. R. Serv. 2d 811 (N.D. Ohio 1984).

[14]Jackshaw Pontiac, Inc. v. Cleveland Press Pub. Co., 102 F.R.D. 183, 190, 1985-1 Trade Cas. (CCH) ¶ 66559, 39 Fed. R. Serv. 2d 811 (N.D. Ohio 1984).

fact as irrelevant because of the defendants' alleged conspiracy and the resulting injury to all class members.[15]

In rejecting that argument, the court noted that the plaintiffs' alleged injuries were not typical of those of other class members and that this kind of case was inherently unsuitable for a class action because of the great factual differences among potential plaintiffs. The court also noted that "Rule 23(a)(3) may have independent significance if it is used to screen out class actions when the legal or factual position of the representatives is markedly different from that of other members of the class even though common issues of law and fact are raised."[16]

Additionally, a plaintiff class representative is not "typical if the defendant can raise unique defenses against the representative that could not be raised against other class members."[17] For example, in a securities fraud action, the court found the named plaintiff atypical where unique defenses likely would be raised against him: "[Plaintiff's] reliance on the integrity of the market would be subject to serious dispute as a result of his extensive experience in prior securities litigation, his relationship with his lawyers, his practice of buying a minimal number shares [sic] of stock in various companies, and his uneconomical purchase of only ten shares of stock in [Defendant company]."[18]

The concern with unique defenses is that the resolution of these

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[15]Jackshaw Pontiac, Inc. v. Cleveland Press Pub. Co., 102 F.R.D. 183, 189–190, 1985-1 Trade Cas. (CCH) ¶ 66559, 39 Fed. R. Serv. 2d 811 (N.D. Ohio 1984).

[16]Jackshaw Pontiac, Inc. v. Cleveland Press Pub. Co., 102 F.R.D. 183, 190, 1985-1 Trade Cas. (CCH) ¶ 66559, 39 Fed. R. Serv. 2d 811 (N.D. Ohio 1984) (citing Wright, Miller, and Kane, Federal Practice and Procedure: Civil 2d § 1764).

[17]Hanon v. Dataproducts Corp., 976 F.2d 497, 508, Fed. Sec. L. Rep. (CCH) P 97021, 23 Fed. R. Serv. 3d 786 (9th Cir. 1992); see also Walker v. Asea Brown Boveri, Inc., 214 F.R.D. 58, 66, 30 Employee Benefits Cas. (BNA) 1253 (D. Conn. 2003) (finding that the named plaintiffs in an ERISA action did not satisfy the typicality requirement because, as a result of releases they signed, "they are subject to unique defenses which threaten to become the focus of the litigation"); Ostrof v. State Farm Mut. Auto. Ins. Co., 200 F.R.D. 521, 530 (D. Md. 2001) (typicality requirement not met where both class representatives were subject to unique defenses).

[18]Hanon v. Dataproducts Corp., 976 F.2d 497, 508, Fed. Sec. L. Rep. (CCH) P 97021, 23 Fed. R. Serv. 3d 786 (9th Cir. 1992); In re HealthSouth Corp. Securities Litigation, 213 F.R.D. 447, 459–460 (N.D. Ala. 2003) (denying motion for class certification in case involving alleged fraud on the market by health insurer, because class representatives, who were employees and shareholders of company acquired by defendant, had no choice but to receive defendant's stock in merger, had knowledge and information not available to open market purchasers of defendant's stock, and were therefore atypical of putative shareholder class); Wiseman v. First Citizens Bank & Trust Co., 212 F.R.D. 482, 488, 29 Employee Benefits Cas. (BNA) 2805 (W.D. N.C. 2003), adhered to on

issues could consume much of the class litigation, thereby diverting the focus from the claims of the class as a whole.[19] As a result, "the presence of even an arguable defense peculiar to the named plaintiff may prevent certification (or it may lead to the substitution of another named class representative, if one is available, to whom the defense is not applicable)."[20] Whether the issue of "unique defenses is properly analyzed under the typicality requirement, Rule 23(a)(3), or the adequacy of representation requirement, Rule 23(a)(4), has not been established uniformly by the case law."[21] Regardless of the provision under which it is assessed, however, courts universally have raised the same concerns about the effect of "unique defenses." As the Second Circuit stated, "whether the issue [of unique defenses] is framed in terms of the typicality of the representative's claims, or the adequacy of its representation, there is a danger that absent class members will suffer if their representative is preoccupied with

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reconsideration, 215 F.R.D. 507 (W.D. N.C. 2003) (named plaintiffs not typical of proposed class in ERISA action involving alleged violation of fiduciary duty in "mapping" mutual funds from one investment manager to another, where both named plaintiffs were seasoned bankers and experienced investors and may have exercised more independent control of their accounts than other class members). But see In re Salomon Analyst Metromedia, 236 F.R.D. 208, 215 (S.D. N.Y. 2006), vacated and remanded, 544 F.3d 474, Fed. Sec. L. Rep. (CCH) P 94861, 71 Fed. R. Serv. 3d 1144 (2d Cir. 2008) (abrogated by, Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, 133 S. Ct. 1184, 185 L. Ed. 2d 308, Fed. Sec. L. Rep. (CCH) P 97300, 84 Fed. R. Serv. 3d 1151 (2013)) (fact that named plaintiff was a sophisticated investor did not present reliance issue that defeated typicality and adequacy; notion that the named plaintiffs sophistication should count against him is in tension with the principle that sophisticated institutional investors are better suited to control large securities class action litigation).

[19]Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 180, Fed. Sec. L. Rep. (CCH) P 95630, 16 Fed. R. Serv. 3d 700 (2d Cir. 1990); see also Beck v. Maximus, Inc., 457 F.3d 291, 301 (3d Cir. 2006) (no typicality where the proposed class representative "is subject to a unique defense that is likely to become a major focus of the litigation").

[20]J. H. Cohn & Co. v. American Appraisal Associates, Inc., 628 F.2d 994, 998, Fed. Sec. L. Rep. (CCH) P 97601, 30 Fed. R. Serv. 2d 418 (7th Cir. 1980).

[21]See, e.g., Beck v. Maximus, Inc., 457 F.3d 291, 301 (3d Cir. 2006) ("[a] proposed class representative is neither typical nor adequate if the representative is subject to a unique defense that is likely to become a major focus of the litigation"). Wright, Miller, and Kane, Federal Practice and Procedure: Civil 2d § 1764 (typicality). Compare Schaefer v. Overland Exp. Family of Funds, 169 F.R.D. 124 (S.D. Cal. 1996), and Gaspar v. Linvatec Corp., 167 F.R.D. 51 (N.D. Ill. 1996) (both noting that the presence of unique defenses against the named plaintiff prevents certification under Rule 23(a)(3)), with Weigmann v. Glorious Food, Inc., 169 F.R.D. 280, 72 Fair Empl. Prac. Cas. (BNA) 1078, 36 Fed. R. Serv. 3d 1275 (S.D. N.Y. 1996), and Barry B. Roseman, D.M.D., M.D., Profit Sharing Plan v. Sports and Recreation, 165 F.R.D. 108 (M.D. Fla. 1996) (finding that the presence of unique defenses against the class representative renders him an inadequate representative under Rule 23(a)(4)).

defenses unique to it."[22]

For a named plaintiff to be typical, she must have a claim against each defendant and must have suffered an injury as a result of the claim.[23] Relatedly, courts have routinely held that a class representative who lacks standing cannot meet the typicality requirement of Rule 23.[24] In certain cases, however, courts have recognized exceptions to the rule. Dicta in the Ninth Circuit's decision in *LaMar v. H & B Novelty Co.* have given rise

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[22]Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 180, Fed. Sec. L. Rep. (CCH) P 95630, 16 Fed. R. Serv. 3d 700 (2d Cir. 1990) (citations omitted); cf. Dunnigan v. Metropolitan Life Ins. Co., 214 F.R.D. 125, 137, 30 Employee Benefits Cas. (BNA) 1079 (S.D. N.Y. 2003) (finding class representative not typical in ERISA case challenging insurer's delay in resolving long-term disability claims; the proposed representative failed to timely respond to information requests, submit to examination, and appeal the denial of her claim).

[23]See La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 466 (9th Cir. 1973) (holding "that a plaintiff who has no cause of action against the defendant can not fairly and adequately protect the interests of those who do have such causes of action") (citations omitted in original). In La Mar, the court addressed two cases from the district court that presented the same issue: whether a plaintiff with a cause of action against one defendant can represent a class against that defendant and "an unrelated group of defendants who have engaged in conduct closely similar to that of the single defendant on behalf of all those injured by all the defendants." In the first case, the named plaintiff sought to certify a class of all customers of all pawnbrokers in the State of Oregon for violations of the Truth-in-Lending Act, 15 U.S.C.A. §§ 1601 to 1677, although he had done business with only one pawnbroker. In the second case, plaintiff, a purchaser of round-trip air tickets from two airlines, alleged that he had been overcharged for his ticket in violation of the Federal Aviation Act. He sought to represent a class of individuals that had paid similar overcharges against the two airlines with whom he had dealings and six other carriers. The court refused to certify the classes, explaining that "typicality is lacking when the representative plaintiffs cause of action is against a defendant unrelated to the defendants against whom the cause of action of the members of the class lies."

[24]See Hines v. Widnall, 334 F.3d 1253, 1256, 92 Fair Empl. Prac. Cas. (BNA) 242, 84 Empl. Prac. Dec. (CCH) P 41479, 56 Fed. R. Serv. 3d 144 (11th Cir. 2003) ("Without individual standing to raise a legal claim, a named representative does not have the requisite typicality to raise the same claim on behalf of a class."); Hall v. Lhaco, Inc., 140 F.3d 1190, 1196, 28 Employee Benefits Cas. (BNA) 1306 (8th Cir. 1998) (finding irrelevant the question of whether other potential members of the class would have standing where proposed representative did not have standing, and thus denying motion for class certification); Weiner v. Bank of King of Prussia, 358 F. Supp. 684, 694, 1973-2 Trade Cas. (CCH) ¶ 74845, 17 Fed. R. Serv. 2d 1536 (E.D. Pa. 1973) (finding that in a case where the named plaintiff sought to represent a class of borrowers against his lender and 19 other banks for violations of federal and state banking laws, certification would be denied where plaintiff had no dealings with the 19 other banks: "[w]ithout standing, one cannot represent a class"); Ramos v. Patrician Equities Corp., 765 F. Supp. 1196, Fed. Sec. L. Rep. (CCH) P 96072 (S.D. N.Y. 1991) (holding that a class representative must have individual claims to assert claims on behalf of the class).

to the so-called "juridical links doctrine."[25] The *LaMar* court indicated that, although a plaintiff without a cause of action against a specific defendant cannot adequately protect the interests of those who do have such a cause of action, it may be possible for a claim to go forward if named and unnamed plaintiffs as a group have suffered an identical injury at the hands of several parties "juridically related in a manner that suggests a single resolution of the dispute would be expeditious."[26] This doctrine has been invoked in cases such as civil rights cases, in which the defendants have been linked as government officials, have acted pursuant to a statewide statute or practice, or have been linked by contract. The doctrine frequently has been held inapplicable, however, in the context of private sector defendants in various business and commercial disputes.[27]

Finally, to satisfy the typicality requirement, the court must find that the plaintiffs' claims encompass the claims of the class.[28] The Supreme Court addressed this issue in *General Tel. Co. of Southwest v. Falcon*.[29] In *Falcon*, an employment discrimination suit, the named plaintiff sued on behalf of an alleged class consisting of the defendant's current and future employees of Mexican-American descent who had been subjected to discriminatory prac-

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[25]See Payton v. County of Kane, 308 F.3d 673, 678–679 (7th Cir. 2002).

[26]La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 466 (9th Cir. 1973).

[27]Compare Payton v. County of Kane, 308 F.3d 673, 679–680 (7th Cir. 2002) (since county sheriffs imposed the bail bond fee at issue pursuant to the same state statute, it was reasonable for putative class to try to hold all counties accountable in one suit), and Moore v. Comfed Sav. Bank, 908 F.2d 834, 838–839, 17 Fed. R. Serv. 3d 942 (11th Cir. 1990) (juridical link may connect defendant savings and loans because each of the plaintiffs and defendants had a common connection with the corporation that had made loans to plaintiffs and sold loan paper to defendants in the secondary market), with In re Eaton Vance Corp. Securities Litigation, 220 F.R.D. 162, 169–171 (D. Mass. 2004) (no juridical link as to mutual funds in which named plaintiffs had not invested); In re Terazosin Hydrochloride, 220 F.R.D. 672, 685–687, 2004-1 Trade Cas. (CCH) ¶ 74388 (S.D. Fla. 2004) (no juridical links among 56 funeral home defendants in suit against crematory; named plaintiffs had no cause of action against defendants with which they did not do business; these defendants were simply unrelated, parallel businesses); see also Matte v. Sunshine Mobile Homes, Inc., 270 F. Supp. 2d 805 (W.D. La. 2003); In re Tri-State Crematory Litigation, 215 F.R.D. 660 (N.D. Ga. 2003); Dash v. FirstPlus Home Loan Owner Trust 1996–2, 248 F. Supp. 2d 489 (M.D. N.C. 2003).

[28]Kennedy v. Unumprovident Corp., 50 Fed. Appx. 354 (9th Cir. 2002) (finding class representative's claims were not typical because representative only had ERISA claim, while other class members would also have state law claims).

[29]General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 102 S. Ct. 2364, 72 L. Ed. 2d 740, 28 Fair Empl. Prac. Cas. (BNA) 1745, 29 Empl. Prac. Dec. (CCH) P 32781, 34 Fed. R. Serv. 2d 371 (1982).

tices or who might be subjected to such practices in the future.[30] The named plaintiff was an employee who had applied for a promotion, but whose application had been denied.[31] At issue was whether the named plaintiff could represent the class in an "across the board attack on the allegedly discriminatory hiring and promotion practices of defendant, even though his specific complaint was that he had been denied a promotion."[32] The Court held that the district court erred in determining that the named plaintiffs' claims were typical of the claims of other class members.[33] In doing so, the Court found that the evidence the named plaintiff would present to show that his denial of a promotion was discriminatory would not necessarily support conclusions that the company's promotion practices overall were motivated by discrimination or that the company's hiring practices were discriminatory.[34] The Court concluded, therefore, that the class claims were not " 'fairly encompassed' within the claim of the named plaintiff."[35]

§ 19:12 "Adequacy"—Named representative will adequately protect class interests

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class."[1] Adequate representation is "constitutionally required to afford due process."[2] Courts, therefore, carefully scrutinize this factor to ensure that the interests of absent class members, who will be

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[30]General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 151, 102 S. Ct. 2364, 2367, 72 L. Ed. 2d 740, 28 Fair Empl. Prac. Cas. (BNA) 1745, 29 Empl. Prac. Dec. (CCH) P 32781, 34 Fed. R. Serv. 2d 371 (1982).

[31]General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 149, 102 S. Ct. 2364, 72 L. Ed. 2d 740, 28 Fair Empl. Prac. Cas. (BNA) 1745, 29 Empl. Prac. Dec. (CCH) P 32781, 34 Fed. R. Serv. 2d 371 (1982).

[32]General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 155, 102 S. Ct. 2364, 2369, 72 L. Ed. 2d 740, 28 Fair Empl. Prac. Cas. (BNA) 1745, 29 Empl. Prac. Dec. (CCH) P 32781, 34 Fed. R. Serv. 2d 371 (1982).

[33]General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 158–159, 102 S. Ct. 2364, 2371-2372, 72 L. Ed. 2d 740, 28 Fair Empl. Prac. Cas. (BNA) 1745, 29 Empl. Prac. Dec. (CCH) P 32781, 34 Fed. R. Serv. 2d 371 (1982).

[34]General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 158–159, 102 S. Ct. 2364, 2370, 72 L. Ed. 2d 740, 28 Fair Empl. Prac. Cas. (BNA) 1745, 29 Empl. Prac. Dec. (CCH) P 32781, 34 Fed. R. Serv. 2d 371 (1982).

[35]General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 158, 102 S. Ct. 2364, 2370, 72 L. Ed. 2d 740, 28 Fair Empl. Prac. Cas. (BNA) 1745, 29 Empl. Prac. Dec. (CCH) P 32781, 34 Fed. R. Serv. 2d 371 (1982).

[Section 19:12]

[1]Fed. R. Civ. P. 23(a)(4).

[2]Fisher Bros. v. Mueller Brass Co., 102 F.R.D. 570, 576, 1984-2 Trade Cas. (CCH) ¶ 66116, 39 Fed. R. Serv. 2d 597 (E.D. Pa. 1984). See also Rattray v.

bound by the results of the litigation, are protected.[3] The court's obligation to ensure the adequacy of the representation continues throughout the lawsuit.[4] If a class representative becomes inadequate after class certification, and one or more other class members are willing and adequate to serve as class representatives, the court may, in some instances, exercise discretion to change class representatives rather than decertify the class.[5]

Adequate representation requires findings by the court regarding both the class representative[6] and class counsel.[7] Whether the class representative and class counsel can adequately protect the class depends on the particular facts and circumstances.[8] To certify the class, the court first must find that the interests of the named plaintiffs are sufficiently aligned with the absentees and that potential conflicts among various members of the class do not exist.[9] Second, the court must find that class counsel is qualified and will be able to serve the interests of the "entire class."[10]

Woodbury County, IA, 614 F.3d 831, 835 (8th Cir. 2010) ("The inquiry into adequacy of representation, in particular, requires the district court's close scrutiny, because the purpose of Rule 23(a)(4) is to ensure due process for absent class members, who generally are bound by a judgment rendered in a class action.").

[3]Stirman v. Exxon Corp., 280 F.3d 554, 563, 51 Fed. R. Serv. 3d 1152, 154 O.G.R. 107 (5th Cir. 2002) (district court erred in failing to conduct its own analysis of the class representative's adequacy); Wright, Miller, and Kane, Federal Practice and Procedure: Civil 2d § 1765.

[4]Key v. Gillette Co., 782 F.2d 5, 7, 50 Fair Empl. Prac. Cas. (BNA) 1623, 39 Empl. Prac. Dec. (CCH) P 35865, 4 Fed. R. Serv. 3d 916 (1st Cir. 1986); In re Fine Paper Antitrust Litigation, 617 F.2d 22, 27, 1980-1 Trade Cas. (CCH) ¶ 63211, 28 Fed. R. Serv. 2d 1140 (3d Cir. 1980); In re Chiron Corp. Securities Litigation, 2007 WL 4249902, at *14 (N.D. Cal. 2007).

[5]Birmingham Steel Corp. v. Tennessee Valley Authority, 353 F.3d 1331, 1339, 57 Fed. R. Serv. 3d 708 (11th Cir. 2003) (district court abused its discretion in decertifying a class without allowing class counsel reasonable time to find a new class representative); Cobell v. Norton, 213 F.R.D. 43, 46 (D.D.C. 2003) (inadequacy of one named plaintiff was not a bar to class certification where there were other potential class representatives whose adequacy had not been challenged). But see Lierboe v. State Farm Mut. Auto. Ins. Co., 350 F.3d 1018, 1023, 57 Fed. R. Serv. 3d 232 (9th Cir. 2003) (adopting Seventh Circuit's approach and dismissing action in its entirety where named class representative never had standing because she was never a member of the class she was named to represent).

[6]See § 19:13.

[7]See § 19:14.

[8]Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 728, Fed. Sec. L. Rep. (CCH) P 93383, 9 Fed. R. Serv. 3d 276 (11th Cir. 1987).

[9]In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 291, 26 Collier Bankr. Cas. 2d (MB) 1413, 22 Fed. R. Serv. 3d 1091 (2d Cir. 1992). See §§ 19:14, 19:45.

[10]In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 291, 26 Collier