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In Re Deepwater Horizon and the Need To Clean Up Rule 23(B)(3) Certification Jurisprudence Through Legislation

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IN RE DEEPWATER HORIZON AND THE NEED TO CLEAN UP RULE 23(B)(3) CERTIFICATION JURISPRUDENCE THROUGH LEGISLATION

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The certification stage is considered the main event in class action litigation. Every class seeking damages must satisfy Rule 23(b)(3) prior to judicial approval. Yet the federal circuits have been unclear as to how much proof class members must show in order to satisfy the Rule. A number of circuits have certified classes for plaintiffs who either cannot show, or cannot possibly plead, a legal injury. Other circuits have required a more rigorous Rule 23(b)(3) showing. While the Supreme Court has provided some guidance on this matter, the split between the circuits is alive and well. This Note suggests amending existing legislation—the Class Action Fairness Act of 2005—in an attempt to bring some clarity to the Rule 23(b)(3) landscape. In doing so, plaintiffs, defendants, the courts, and the class action vehicle, will all benefit.

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INTRODUCTION

Both commentators[1] and the Supreme Court[2] recognize that "many companies justifiably fear class actions, and with good reason."[3] Increasingly, most class actions that survive the class certification stage[4] end in settlement.[5] This makes the certification determination the defining moment in a class action's life.[6] A court's denial of certification "can be the 'death knell' of the

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[1] *See* Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 546 (2006); Kent A. Lambert *Class Action Settlements in Louisiana*, 61 LA. L. REV. 89, 131–133 (2000) (observing the "unprecedented extortive leverage" that class action suits can have on defendants).

[2] *See, e.g.*, AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1752 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of devastating loss, defendants will be pressured into settling questionable claims."); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 559 (2007) ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases.").

[3] Robert W. Wood, *Defining Employees and Independent Contractors: Don't Try This at Home!*, BUS. L. TODAY, May–June 2008, at 45, 48.

[4] Class certification is the initial step the plaintiff(s) seeking to bring a class action must satisfy in order to "aggregate their claims and proceed as a class against a common defendant." Ryan Patrick Phair, *Resolving the "Choice-Of-Law Problem" in Rule 23(b)(3) Nationwide Class Actions*, 67 U. CHI. L. REV. 835, 835 (2010).

[5] Robert G. Bone & David E. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1291 (2002) ("[T]he vast majority of certified class actions settle, most soon after certification.").

[6]

> For class members, a favorable certification decision can mean greater litigating power and enhanced settlement leverage. And, for the defendant, certification can mean the difference between facing a massive and essentially uninsurable liability risk in one suit or a more manageable series of risks in individual suits. Because strategic implications are so substantial, parties today invest a great deal in litigating certification motions.

Id. at 1262–63.

case."[7] Conversely, an affirmative grant may "create such a death threat to [the] defendant that settlement is her only option."[8]

The federal circuits are deeply divided, however, as to one significant issue that figures prominently in class certification decisions and, by implication, settlement. There is no consensus as to whether, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure,[9] courts may certify a class that includes a plurality of members who have not, individually, pled facts sufficient to demonstrate that the defendant's conduct caused their injuries. Courts in the D.C., Eighth, and Eleventh Circuits decline certification when the putative class contains members who cannot trace their injuries to the defendant's actions.[10] Yet the Second, Third, and Fifth Circuits have followed a less rigorous standard, granting certification even when significant portions of the class include plaintiffs unable to allege a colorable claim.[11]

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[7] Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 325 (2011); Charles Silver, *"We're Scared To Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003).

[8] *Id.*

[9] Rule 23(b)(3) of the Federal Rules of Civil Procedure, which states that "a class action may be maintained if," along with satisfying Rule 23(a),

> [T]he court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (d) the likely difficulties in managing a class action.

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

[10] *See* Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 780–81 (8th Cir. 2013); Bussey v. Macon Cnty. Greyhound Park, Inc., 562 F. App'x 782, 788 (11th Cir. 2014); *In re* Rail Freight Surcharge Antitrust Litig., 725 F.3d 244, 252 (D.C. Cir. 2013).

[11] *See In re* Am. Int'l Grp., Inc. Sec. Litig., 689 F.3d 229, 242–43 (2d Cir. 2012) (holding that "a settlement class's failure to satisfy the fraud-on-the-market presumption does not necessarily preclude a finding of predominance"); Sullivan v. DB Invs., Inc., 667 F.3d 273, 304 (3d Cir. 2011) (holding that, under Rule 23(b)(3) and Third Circuit precedent, certification of a class is proper without requiring individual class members to state a valid legal claim); *In re* Deepwater Horizon*,* 744 F.3d 370, 380 (5th Cir. 2014) (Dennis, J., concurring) (claimants were not required to prove their claims using trial-type evidence that

This Note focuses primarily on two recent Fifth Circuit decisions. Each decision involved litigation that arose out of the 2010 Deepwater Horizon[12] oil spill. The first decision, in January 2014, held that Rule 23(b)(3)[13] was met despite noting that members of the class were not required to submit evidence of damages.[14] In March, the Fifth Circuit held that class members were not required to prove their claims using trial-type evidence to trace their alleged damages to the spill.[15]

Congress must put forth a uniform pleading standard as to the level of proof of injury that class members must show in order to meet Rule 23(b)(3)'s predominance requirement. Congress can accomplish this by amending existing legislation—the Class Action Fairness Act of 2005.[16] Providing clarity in this context will benefit class members[17] and defendants,[18] and increase the

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showed their injuries were traceable to the spill).

[12] Deepwater Horizon, which will be used interchangeably with the "BP Oil Spill," refers to the April 2010 explosion of a British Petroleum (BP) mobile offshore drilling unit in the Gulf of Mexico, which killed eleven workers, and resulted in "the Nation's largest oil spill ever, with substantial environmental and economic impacts." Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Increased Safety Measures for Energy Development on the Outer Continental Shelf, 75 Fed. Reg. 63346, 63354 (Oct. 14, 2010) (to be codified at 30 CFR Part 250).

[13] Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3).

[14] *In re* Deepwater Horizon (*Deepwater Horizon II*), 739 F.3d 790, 815–19 (5th Cir. 2014).

[15] *In re* Deepwater Horizon (*Deepwater Horizon III*), 744 F.3d 370, 380 (5th Cir. 2014).

[16] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. §§ 1332(d), 1453, 1711–15, 2071).

[17] The Supreme Court has recognized the need for heightened scrutiny at certification in order to ensure that plaintiffs are not burdened by overbroad class definitions, acknowledging that, when faced with settlement certification questions, courts "need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial" but, at the same time, "other specifications of the Rule [23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997); *see also* Robert G. Bone, *Sorting Through the Certification Muddle*, 63 VAND. L. REV. 105, 112–13 (2010) (describing the

viability of the class action vehicle going forward by ensuring that Rule 23(b)(3)'s aims of equity, uniformity of result, and efficiency are pursued.[19]

Part I of this Note provides a primer on class actions and the Class Action Fairness Act of 2005 ("CAFA"). Part II focuses on the Deepwater Horizon litigation, beginning at the district court level and tracing two decisions to the Fifth Circuit. Part III discusses the implications of these decisions and assesses the two competing approaches the circuits currently follow as to Rule 23(b)(3) certification. This discussion will show how the approach taken by the Second, Third, and Fifth Circuits is inconsistent with CAFA and the Supreme Court's precedent.

Part IV discusses the preliminary concerns that the CAFA amendment must consider. This includes a discussion of the Private Securities Litigation Reform Act ("PSLRA") of 1995.[20] The PSLRA, which added a heightened pleading standard to securities fraud cases, will be useful in thinking about whether and how to draft the proposed amendment. Part V will conclude by urging Congress to adopt a modified Individualized Proof standard, currently utilized by the D.C., Eighth, and Eleventh Circuits. It will describe the specific components of this standard and the necessity that it includes exceptions for certain types of class actions. In setting this standard, Congress would not only support the central aims of CAFA and Rule 23(b)(3) but would codify a fair and consistent standard in an area of uncertain jurisprudence.[21]

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social costs associated with erroneous certifications).

[18] *See* Bone, *supra* note 17, at 110 (describing how tightening the standard of proof can work to avoid certification of meritless or weak class actions and thereby reduce the pressure on defendants to settle).

[19] As the advisory committee's comments to Rule 23(b)(3) make clear, the viability of class actions depends on achieving "economies of time, effort, and expense, and [promoting] uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." FED. R. CIV. P. 23(b)(3) advisory committee's note (1966).

[20] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

[21] Two of Congress's stated purposes behind CAFA were to "assure fair and prompt recoveries for class members with legitimate claims," and to "benefit society by encouraging innovation and lowering consumer prices."

I. CLASS ACTION PRIMER (POLICIES, PROCEDURES, AND CAFA)

The following discussion begins with the policy goals that underlie class actions. It will then describe procedural requirements for class certification under Rule 23(a) and (b). Part I.C provides background on the Class Action Fairness Act, its drafters' goals, and its impact on class action litigation. This will show how the Act's omission of a pleading standard has led to inconsistent approaches from the circuits. Part I concludes with the Supreme Court's recent attempts to resolve the issues surrounding Rule 23(b)(3) class action certification.

A. Representative Litigation: Policy Rationales Underlying the Class Action

The class action device provides a vehicle for the aggregation of claims among individual but similarly situated plaintiffs when case-by-case litigation may be impractical or inefficient.[22] In aggregating a suit that thousands of individuals may be unwilling or unable to pursue on their own, class actions promote important policy goals, including the compensation of victims and the deterrence of bad actors.[23] Professor Howard M. Erichson refers to

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Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 5 (codified as amended at 28 U.S.C. § 1711 note). Rule 23(b)(3) seeks to promote efficient, fair, and consistent judicial decision-making where numerous small claims could be aggregated into class actions; but it is likely not appropriate where the "individual stakes are high and disparities among class members are great." *Amchem*, 521 U.S. at 625 (citing Fed. R. CIV. P. 23(b)(3) advisory committees notes (1966)).

[22] Elizabeth J. Cabraser, *The Essentials of Democratic Mass Litigation*, 45 COLUM. J.L. & SOC. PROBS. 499, 503 (2012) ("At its best, mass litigation can be utilized to promote and protect democratic principles not only when consumer rights or public health and safety are at issue, but when the case implicates fundamental human rights."). *See also* Megan E. Barriger, *Due Process Limitations on Rule 23(b)(2) Monetary Remedies: Examining the Source of the Limitation in* Wal-Mart Stores, Inc. v. Dukes, 15 U. PA. J. CONST. L. 619, 622 (2012) ("Class actions allow plaintiffs to pool claims that would otherwise not be litigated due to their small size or where joinder of all interested parties would be impractical.").

[23] *See* HOWARD M. ERICHSON, INSIDE CIVIL PROCEDURE: WHAT MATTERS AND WHY 181 (Wolters Kluwer ed., 2d ed. 2012) [hereinafter ERICHSON, CIVIL

class actions as "representative litigation" because of their potential to bind individuals who do not participate in the litigation but are nevertheless sufficiently similar to the class representative(s).[24] It is therefore vital that legitimate plaintiffs, both named and absent members of the class, are not encumbered by an overbroad or diluted class definition.[25] In order to accomplish these goals, the law places a series of procedural requirements that a prospective class must satisfy before proceeding to litigation.[26]

B. Certification Procedures

Class certification is governed by Rules 23(a) and (b) of the Federal Rules of Civil Procedure.[27] If potential plaintiffs can satisfy these Rules, their class will be certified. Individual members, along with their claims, will then be aggregated for litigation.[28]

1. Rule 23(a) and "Mandatory Class Actions" under Rules 23(b)(1) and (b)(2)

The initial step in class certification is meeting the general requirements of Rule 23(a).[29] The prospective class must then

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PROCEDURE] (describing the policies furthered by class action litigation).

[24] *Id.*

[25] The inability to re-define a class once it has been certified requires "undiluted, even heightened, attention" to the characteristics of the class at the Rule 23 stage. *See* Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century*, 44 UCLA L. REV. 1773, 1779 (1997) (quoting *Amchem* , 521 U.S. at 620).

[26] ERICHSON, CIVIL PROCEDURE, *supra* note 23, at 181.

[27] *See* FED. R. CIV. P. 23(a)–(b); ERICHSON, CIVIL PROCEDURE, *supra* note 23, at 182–83.

[28] ERICHSON, CIVIL PROCEDURE, *supra* note 23, at 182.

[29] Under Rule 23(a), every potential class must satisfy each of four general prerequisites: (1) numerosity, which requires that the number of potential plaintiffs makes joinder impracticable; (2) commonality, which ensures that "questions of law or fact common to the class" exist; (3) typicality, in that "the claims or defenses of the representative parties are typical of claims or defenses of the class"; and (4) adequacy of representation, which ensures that lead

demonstrate that it satisfies one of three categories of class actions under Rule 23(b).[30] The first two categories are 23(b)(1) and (b)(2).[31] Although "distinct under the Rules," these first two categories "have largely merged with each other."[32] Actions brought under *both* (b)(1) and (b)(2) are referred to as "mandatory class actions."[33] Once certified, members cannot opt out of the class, and as a result, (b)(1) and (b)(2) actions include a "more flexible notice provision" for absentees.[34] In contrast, Rule 23(b)(3) classes provide absentees the right to opt out and are characterized by a "more stringent notice requirement."[35]

2. Rule 23(b)(3): Damages Class Actions and Predominance Requirement

The Supreme Court has referred to Rule 23(b)(3) as an "adventuresome innovation."[36] It is designed for cases where class treatment is not "as clearly called for" as it is under (b)(1) or

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plaintiffs represent absent class members in a fair and adequate manner. *See* FED. R. CIV. P. 23(a)(1)–(4); ERICHSON, CIVIL PROCEDURE, *supra* note 23, at 182–83.

[30] *See* FED. R. CIV. P. 23; ERICHSON, CIVIL PROCEDURE, *supra* note 23, at 183.

[31] Rule 23(b)(1) permits certification when prosecuting separate actions by individual members would create "incompatible standards of conduct," or when pursuing separate actions would "substantially impair or impede" the class members' ability to protect their interests. FED. R. CIV. P. 23(b)(1)(A), 23(b)(1)(B). The second category, Rule 23(b)(2), pertains to class actions seeking injunctive or declaratory relief as opposed to money damages. Under this category, certification will be granted when the class can show that the defendant "has acted or refused to act on grounds that apply generally to the class." FED. R. CIV. P. 23(b)(2).

[32] Jenna G. Farleigh, Note, *Splitting the Baby: Standardizing Issue Class Certification*, 64 VAND. L. REV. 1585, 1594 (2011) (citing RICHARD A. NAGAREDA, THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 195 (2009)).

[33] ERICHSON, CIVIL PROCEDURE, *supra* note 23, at 184.

[34] *Id.*

[35] *Id.*

[36] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2558 (2011) (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997)).

(b)(2).[37] Rule 23(b)(1) is used where individual adjudications are nearly impossible.[38] Such may be the case when one party is "obliged by law to treat the members of the class alike."[39] Rule 23(b)(2) applies to classes seeking injunctive relief, which will unavoidably affect the entire class in a similar manner.[40] Rule 23(b)(3), however, enables the class to seek individualized monetary relief, which will then be binding upon any member who does not opt out.[41] It is common that a successful Rule 23(b)(3) class will win a single judgment, or, more likely, reach a settlement figure from the defendant, that is then apportioned to claimants on an individual basis, often by a claims administrator.[42]

Greater procedural requirements have been established in order for a class to meet certification as a "damages" class under Rule 23(b)(3).[43] Principally, these are superiority and predominance.[44] The superiority requirement asks the court to consider whether "a class action is superior to other available methods for fairly and

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[37] *Id.* (quoting *Amchem*, 521 U.S. at 615).

[38] *See id.*; FED. R. CIV. P. 23(b)(1)(A)–(B).

[39] *Amchem*, 521 U.S. at 614. Examples include "a utility acting toward customers[,] a government imposing a tax[], or where the party must treat all alike as a matter of practical necessity." *Id.* (quoting Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 388 (1967)).

[40] *See* FED. R. CIV. P. 23(b)(2). "'Civil rights cases against parties charged with unlawful, class-based discrimination, are prime examples' of what (b)(2) is meant to capture." *Wal-Mart*, 131 S. Ct. at 2558 (quoting *Amchem*, 521 U.S. at 614).

[41] FED. R. CIV. P. 23(b)(3); *see also Amchem*, 521 U.S. at 592 (describing that Rule 23(b)(3) permits "judgments for money that would bind all class members save those who opt out").

[42] *See* Melissa Hart, *Civil Rights and Systemic Wrongs,* 32 BERKELEY J. EMP. & LAB. L. 455, 466 n.56 (2011) ("[N]either defendants nor courts are generally involved with the individualized allocation of a total settlement amount or damages award among plaintiffs.") (citing 7AA CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 1784 (3d ed. 2005)).

[43] FED. R. CIV. P. 23(b)(3); *Wal-Mart*, 131 S. Ct. at 2558.

[44] ERICHSON, CIVIL PROCEDURE, *supra* note 23, at 185; FED. R. CIV. P. 23(b)(3). There are also the aforementioned structural provisions that provide absentees with mandatory notice and the right to opt out of any damages class action certified under the Rule. *See* FED. R. CIV. P. 23(b)(3); *Wal-Mart*, 131 S. Ct. at 2545.

efficiently adjudicating the controversy."[45] The predominance inquiry asks whether "questions of law or fact common to class members predominate over any questions affecting only individual members."[46] Generally, *common questions* pertain to the "defendant's conduct and class-wide defenses."[47] *Individual questions* concern particular issues of causation and damages, as well as individual defenses by members of the class.[48]

In many large class actions, there is an asymmetry between the *common questions*—the defendant's liability—and the many *individual questions* about damages or causation pertaining to each member.[49] This tension creates practical difficulties for courts as well as putative class plaintiffs.[50] Courts must decide whether, and in how much detail, to scrutinize the merits of individual claims at the certification stage.[51] Similarly, the class seeking certification must convince the court upon "some creditable basis" that "factual differences among the class members' cases are minor and immaterial."[52] In practice, the degree of evidence that courts find sufficient to create this creditable basis varies among circuits.[53] This has contributed to an uneven field of Rule 23(b)(3) jurisprudence.[54] This Note argues that clarity can be provided through amendment to the Class Action Fairness Act.

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[45] ERICHSON, CIVIL PROCEDURE, *supra* note 23, at 185 (quoting *Walmart*, 131 S. Ct. at 2545).

[46] FED. R. CIV. P. 23(b)(3).

[47] ERICHSON, CIVIL PROCEDURE, *supra* note 23, at 185.

[48] *Id.*

[49] *See* Alex Parkinson, Comcast Corp v. Behrend *and Chaos on the Ground*, 81 U. CHI. L. REV. 1213, 1218 (2014) (describing that, in a mass tort class action, establishing the defendant's negligence "will be nearly, if not exactly, identical" to evidence offered by any other claimant, while the question of damages will likely be unique to each member).

[50] *Id.* at 1217.

[51] *See* 6A STACY L. DAVIS, ET AL., FEDERAL PROCEDURE, LAWYERS EDITION §12:210 (2012).

[52] *Id*.

[53] *See* Farleigh, *supra* note 32, at 1588 (describing the variance among circuits in applying Rule 23 certification procedures).

[54] *See* Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1613 (2008) [hereinafter Erichson, *CAFA's Impact*] (describing the "disproportionate growth" in filings in circuits with more liberal

C. The Class Action Fairness Act of 2005

1. Federalizing Class Actions: CAFA's Aims and Purposes

The Class Action Fairness Act ("CAFA") was enacted in 2005.[55] Predicated on strong tort reform[56] overtones, CAFA was justified, in large part, upon the belief that the class action vehicle was being abused.[57] For example, supporters of the legislation feared that plaintiffs could gain an unfair advantage over corporate defendants by cherry-picking particular state courts around the country where judges and juries were known to be unsympathetic to large commercial actors.[58] In response, proponents of the bill believed that "federal courts could offer a safe haven"[59] from what the American Tort Reform Association artfully dubbed "judicial hellholes."[60] In order to channel class claims from state courts into

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certification standards).

[55] Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. LEGIS. 76, 97 (2009).

[56] Tort reform, in its classical sense, seeks to minimize legal rules that are especially costly for defendants. *See 'Common Sense' Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1767 (1996) ("Classical tort reformers call for the elimination of legal rules that are particularly expensive for defendants."). When Republicans took over the House of Representatives in 1994, one of the key components of the "Contract with America," a ten-point series of legislative proposals, was passing tort reform legislation. Patrick Hoopes, *Tort Reform in the Wake of* United States v. Lopez, 24 HASTINGS CONST. L.Q. 785, 785 (1997).

[57] After a bipartisan Senate majority passed the bill, President G.W. Bush called CAFA a "strong step forward in our efforts to reform the litigation system," noting that the legal system encouraged "junk lawsuits that undermine[d] confidence in our courts while hurting our economy, costing jobs, and threatening small businesses." Statement on Senate Action on Class-Action Lawsuit Reform Legislation, 41 WEEKLY COMP. PRES. DOC. 227 (Feb. 10, 2005)).

[58] *See* Cameron Fredman, *Plaintiffs' Paradise Lost: Diversity of Citizenship and Amount in Controversy Under the Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 1025, 1028 (2006) (describing the concerns of CAFA's proponents).

[59] *Id.* at 1027–28.

[60] Victor E. Schwartz et al., *Taking a Stand Against Lawlessness in*

federal courts, CAFA makes three significant changes to class action procedure: it gives federal courts original jurisdiction over class actions,[61] expands federal diversity jurisdiction pertaining to class actions, and updates procedures for settling class actions in federal court.[62]

Section 2 of CAFA articulates the law's findings and purposes. It is clear that the bill's supporters were concerned with the economic costs associated with class actions.[63] Legislators noted abuses of the class action vehicle over the prior decade that "harmed class members with legitimate claims and defendants that have acted responsibly," and resulted in many class members receiving little or no benefit in cases where "unjustified awards are made to certain plaintiffs at the expense of other class members."[64] Congress found that these "[a]buses . . . undermine the national judicial system, the free flow of interstate commerce."[65] Accordingly, Section 2(b) declares that the purposes of CAFA are to: "assure fair and prompt recoveries for class members with legitimate claims," and "benefit society by encouraging innovation and lowering consumer prices."[66]

American Courts: How Trial Court Judges and Appellate Justices Can Protect their Courts from Becoming Judicial Hellholes, 27 AM. J. TRIAL ADVOC. 215, 216 (2004).

[61] Pursuant to CAFA, federal courts have original jurisdiction over class actions if minimal diversity is met, the class contains at least one hundred members, and the aggregate amount in controversy is at least $5,000,000. Patricia A. Seith, *Civil Rights, Labor, and the Politics of Class Action Jurisdiction*, 7 STAN. J. C.R. & C.L. 83, 91 (2011).

[62] Key settlement provisions include enhanced judicial scrutiny over "coupon settlements," which allows the court to hold a hearing and issue written determination that the settlement is fair, reasonable, and adequate for class members, as well as a notification provision, requiring the defendant to send notice to the appropriate state and federal official in each state where a class member resides. *See* Linda Pissott Reig et al., *The Class Action Fairness Act of 2005: Overview, Historical Perspective, and Settlement Requirements*, 40 TORT TRIAL & INS. PRAC. L.J. 1087, 1097–98 (2005) (summarizing CAFA and describing the three primary changes).

[63] *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4–5 (codified as amended at 28 U.S.C. § 1711).

[64] *Id*. at 4.

[65] *Id.* at 5.

[66] *Id.*

2. CAFA's Impact on Forum Shopping: Same Shopping, Different Shops

In the years since its enactment, CAFA has faced a variety of criticisms.[67] Some have argued that the law has unnecessarily increased burdens on bringing and certifying class actions.[68] Others have assailed CAFA as being predicated on anecdotal, overly cynical views toward class action plaintiffs and attorneys.[69] One thing is clear. Although CAFA has succeeded in funneling class actions to federal courts, it has not ameliorated the perceived abuses of the class action vehicle by way of forum shopping.[70]

Shortly after CAFA's enactment, Federal District Judge Sarah Vance portended that, "although Congress intended CAFA to eliminate 'forum shopping' in the class action arena, it is safe to predict that the parties will continue to engage in strategic behavior

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[67] *See* Archis A. Parasharami & Kevin S. Ranlett, *The Class Action Fairness Act, Five Years Later*, MAYER BROWN (Apr. 12, 2010), http://www.mayerbrown.com/news/The-Class-Action-Fairness-Act-five-years-later-04-12-2010 (describing that, in the five years following its passage, CAFA's intended reforms had "mixed success").

[68] *See, e.g.*, Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2528 (2008) (arguing that CAFA's minimal diversity requirements for removal, namely the application of multiple states' laws to highly individualized issues across a class, results in manageability problems that prevent many class actions from being certified in federal court); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 745 (2013) ("Federal courts have not simply heard and decided more cases as a result of Rule 23(f) and CAFA; they have adopted troublesome new standards applicable to plaintiffs seeking classwide relief.").

[69] *See* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1448 (2008) (discussing that CAFA has been called "legislation by anecdote"); *see also* Erichson, *CAFA's Impact*, *supra* note 54, at 1596 (arguing that proponents of CAFA were motivated by a "mistrust of class action lawyers" and "successfully portrayed class action lawyers as opportunistic aggregators who get rich on litigation of their own making").

[70] Parasharami & Ranlett, *supra* note 67 ("That CAFA has shifted many cases from state to federal court does not mean that forum-shopping has ceased . . . plaintiffs' attorneys have adapted by choosing to file suit in particular federal courts . . . where the law is particularly favorable to class certification.").

when it comes to choosing a forum."[71] Preserving elements of strategic behavior is important for maintaining the adversarial nature of litigation. But when the circuits vary in evaluating critical questions of proof at the class certification stage, all participants in the litigation face a troublesome degree of uncertainty. This demands legislative clarity in order to serve the policy goals that CAFA and the class action vehicle are designed to serve.

3. "A Maze of Ambiguity":[72] The Problem of No Clear Standard in a Post-CAFA World

CAFA's express legislative intent demonstrates two prominent aims. First, the law provides a guarantee that legitimately harmed class members can receive fair and prompt adjudication through the class action vehicle.[73] Second, the law provides an assurance that defendants responsible for compensating these harms do not suffer unnecessary losses by overcompensating or paying for meritless claims.[74] Yet, omitted from the Act are means through which courts can ensure that these aims are achieved. Nowhere in the law is there a procedural standard that ensures a causal relationship between each plaintiff's alleged injury and the defendant's conduct.[75]

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[71] Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1617, 1642 (2006). Judge Vance appears to be correct. In 2007, the Federal Judicial Center released a preliminary study assessing CAFA's impact on channeling state-law classes into federal courts. Erichson, *CAFA's Impact*, *supra* note 54, at 1607–08. This data not only showed an increase in the number of class actions both filed and removed to federal courts, but that plaintiffs' attorneys filed originally in the most favorable federal forums. *Id.* at 1613 ("Given lawyers' perception of the Ninth Circuit as relatively liberal on class certification, the disproportionate growth of filings in its districts should come as no surprise . . . . The growth was much smaller in the Fourth, Sixth, Seventh, Eighth, and Tenth Circuits.").

[72] Farleigh, *supra* note 32, at 1588.

[73] Congress explicitly sought to "assure fair and prompt recoveries for class members with legitimate claims." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b), 119 Stat. 4, 5 (codified as amended at 28 U.S.C. § 1711).

[74] Congress's stated purpose was to "benefit society by encouraging innovation and lowering consumer prices." *Id.*

[75] *See* Kevin Tamm, *The Class Action Fairness Act and Colorable Reasons*

As a result of Congress's failure to articulate a standard, "[l]itigants seeking class certification still muddle through a maze of ambiguity."[76] The principles of proof followed by a particular circuit will determine the issue of certification as well as the size of the class with which a defendant will likely seek to negotiate in settlement proceedings. When these principles vary significantly, many of the concerns that precipitated CAFA's enactment still remain intact.

Yet drafters of the Act may have been wary of including a "one size fits all" standard of proof due to concerns of impracticability. Class action litigation arises in a wide range of contexts, with issues of proof varying greatly depending upon the type of harm alleged and the size of the proposed class. For example, while securities fraud cases may typically advance past the certification stage, Title VII claims face a steeper burden in meeting Rule 23's commonality and predominance requirements.[77]

In a securities fraud action involving a security traded on a public exchange, courts have held the overarching finding of reliance sufficient to fulfill Rule 23(b)(3).[78] In such cases, classes

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for Separate Class Actions, 81 U. CIN. L. REV. 313, 329 (2012). The act does not address the proper standard of proof or pleading required to bring a class action. *Id.* A statute predicated on removing class actions to federal court, CAFA was notably ambiguous on the question of which party has the burden of proof to establish damages exceeding the amount in controversy necessary for diversity jurisdiction. *Id*.

[76] Farleigh, *supra* note 32, at 1588.

[77] *See* Klonoff, *supra* note 68, at 824 ("[S]ecurities fraud suits involving securities traded on a major stock exchange are commonly certified. Such cases tend to involve overarching issues that impact all class members, and seek damages that can be easily calculated."); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2545 (2011) (denying certification in an employment discrimination class action, and holding that in certification of Title VII claims, "[w]ithout some glue holding together the alleged reasons for those [employment] decisions, it will be impossible to say that examination of all the class members' claims will produce a common answer to the crucial discrimination question").

[78] Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2184–85 (2011); Basic Inc. v. Levinson, 485 U.S. 224, 243 (1988); *In re* Bank of Am. Corp. Sec., Derivative, & ERISA Litig., 281 F.R.D. 134, 148 (S.D.N.Y. 2012) (citing authority that in these "fraud on the market" cases, once "'liability can be determined on a class-wide basis, individualized damage issues are not ordinarily a bar to class certification'") (citation omitted).

will be certified if plaintiffs can satisfy the rebuttable presumption that they relied upon the defendant's deceptive acts in making the relevant transaction.[79] If this is done, class plaintiffs need not prove "loss causation"—that the defendant's conduct or misconduct in fact caused the economic loss complained of.[80] In contrast, some courts impose a steeper certification burden in cases alleging disparate treatment employment discrimination under Title VII.[81] In Title VII cases, the alleged harm is that a class of employees was discriminated against on the basis of their membership in a protected class.[82] But successful certification demands the plaintiff to show that the employer subjected members of the class to a "pattern or practice of intentional discriminatory treatment."[83] Naturally, these showings become difficult to make when "overt acts of employment discrimination are relatively rare," and practices take on "more subtle if no less invidious forms."[84] Recognizing these differences, some commentators have eschewed arguments advancing a uniform standard and instead have urged that a more flexible approach is optimal.[85]

A more flexible approach would permit judges to exercise discretion in determining whether Rule 23's requirements are met, depending on the unique characteristics or category of the claim.[86]

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[79] *Erica P. John Fund*, 131 S. Ct. at 2182; *Basic*, 485 U.S. at 250. Each plaintiff doesn't individually have to prove that they *actually* relied on the deceptive acts. *Erica P. John Fund*, 131 S. Ct. at 2185. Instead, as long as the misrepresentation is reflected in the market price, there is a presumption of reliance. *Id.*

[80] *Erica P. John Fund*, 131 S. Ct. 2179. This is in part because, once reliance is shown, issues of individual damages are readily susceptible to calculation. Klonoff, *supra* note 68, at 824–25 ("Such cases tend to involve overarching issues that impact all class members, and seek damages that can be easily calculated.").

[81] Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 HARV. L. REV. 619, 620 (1986).

[82] *Id.*

[83] *Id.* at 628.

[84] *Id.*

[85] *See, e.g.*, Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PA. L. REV. 1897 (2014) (arguing that district courts should exercise pragmatic discretion in deciding to certify a class).

[86] *See* L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class*

Yet this suggestion would likely contribute to the divergent approaches among the circuits and the problems associated with forum shopping.[87] This is certainly the case in multi-district, national, or interstate litigation, where the availability of a "single positive trumps all the negatives."[88] A decision to certify a nationwide 23(b)(3) class binds the representative plaintiffs and absentees that are similarly situated.[89] But a denial of certification will not produce the same permanent effect since the plaintiffs may subsequently seek certification in state court or other circuit courts.[90] Thus, although a majority of courts might find certification inappropriate, plaintiffs can still file in other courts, strategically choosing those with more amenable Rule 23(b)(3) certification standards. All that is needed then is one "positive" result and a nationwide class is certified.[91]

Aggregation of Mass Torts Creates Second-Class Settlements, LA. L. REV. 157, 165 (2004) ("Without including flexibility that permits judges to use judicial discretion in managing a mass tort according to its unique characteristics, reforms that purport to overhaul the system of mass torts have not succeeded.").

[87] As the following section discusses, under a flexible approach, Courts have proven incapable of applying standards that are remotely consistent, allowing class counsel to select the most favorable forum to file their claims. *See also* Erichson, *CAFA's Impact*, *supra* note 54, at 1613 (describing how lawyers' perceptions of a given circuit's certification procedures effect filing).

[88] *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 766–67 (7th Cir. 2003).

[89] *See* ERICHSON, CIVIL PROCEDURE, *supra* note 23, at 183 (describing the binding impact of an affirmative certification grant.). In a damages class, these members may opt-out, whereas members of a class certified under (b)(1) or (b)(2) cannot. *Id.* at 182–84; *see also* Smith v. Bayer Corp., 131 S. Ct. 2368, 2380 (2011) ("Neither a proposed class action nor a rejected class action may bind nonparties. What *does* have this effect is a class action approval.") (emphasis added).

[90] In *Smith v. Bayer Corp.*, the Supreme Court unanimously held that federal court denial of certification is an improper basis to preclude absent members of the uncertified class from seeking certification of the same class in state court. *Bayer*, 131 S. Ct. at 2373; *see also* JOSEPH M. MCLAUGHLIN, 1 MCLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE § 3:16 (11th ed. 2014).

[91] In a pre-CAFA decision, Circuit Judge Frank Easterbrook used an illustrative example to highlight this notion. Although Easterbrook was addressing this problem in state courts, his observation rings true with regard to federal circuits in a post-CAFA world. First, he posited to "[s]uppose that every state in the nation . . . deem[s] inappropriate a nationwide class" related to a

D. Wal-Mart*,* Comcast*, and the Supreme Court's Attempts to Resolve the Rule 23(b)(3) Predominance Analysis*

Still, commentators in favor of a uniform standard believe that the Supreme Court, rather than Congress, is the appropriate body to clarify these issues.[92] If the present circuit split and the Fifth Circuit's BP decisions are any indication, however, judicial discretion does not appear to be the solution. Before addressing these cases, it is important to set the stage with two recent Supreme Court decisions regarding Rule 23(b)(3) analysis. *Wal-Mart Stores, Inc. v. Dukes*[93] and *Comcast Corp. v. Behrend*[94] provide this necessary backdrop.

In *Wal-Mart*, current and former female employees brought a class action against the retail giant on behalf of nearly 1.5 million plaintiffs.[95] The class alleged that Wal-Mart's hiring and promotion practices discriminated against women in violation of Title VII of the Civil Rights Act of 1964.[96] As with the BP litigation, the critical question was whether individual issues pertaining to the putative class were so central as to preclude certification.[97] The Court found that the members failed to prove that common questions of law or fact—namely, the pattern or practices of discrimination—predominated over any questions affecting individual members.[98] The Supreme Court held "Rule 23 does not set forth a mere pleading standard . . . certification must

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particular set of claims or products. *Bridgestone/Firestone*, 333 F.3d at 766. In practice, this would yield "something like '9 of 10 judges in every state'" or in federal courts, "3 of 4 judges," to rule against certifying the potential class. *Id.* He went on to explain that "[a]lthough the 10% that see things otherwise are a distinct minority, one is bound to turn up if plaintiffs file enough suits—and, if one nationwide class is certified, then all the no-certification decisions fade into insignificance." *Id*.

[92] *E.g.*,Richard A. Nagareda, *Common Answers for Class Certification*, 63 VAND. L. REV. EN BANC 149, 157 (2010) [hereinafter Nagareda, *Common Answers*].

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

[94] Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013).

[95] *Wal-Mart*, 131 S. Ct. at 2547.

[96] *Id*.

[97] *Id*. at 2556–57.

[98] *Id.*

affirmatively demonstrate [the party's] compliance with the Rule—that is, [the party] must be prepared to prove that there are *in fact* . . .common questions of law or fact."[99]

In *Comcast*, a group of cable television subscribers sought certification under 23(b)(3) of an antitrust class action against Comcast Corporation.[100] The class alleged that Comcast had entered into unlawful "swap" agreements[101] with regional competitors in violation of federal antitrust laws.[102] The issue before the Supreme Court was whether the common question of liability sufficiently predominated over any individual damages issues across the class.[103] Specifically, the Court considered whether a district court could certify a class under Rule 23(b)(3) "without resolving whether the plaintiff class ha[s] introduced admissible evidence . . . to show that the case is susceptible to awarding damages on a class-wide basis."[104] Denying certification, the Supreme Court held that plaintiffs must demonstrate a reliable, non-speculative, model for quantifying damages on a class-wide basis to meet Rule 23(b)(3).[105] The Court reiterated that inquiry into these models may often require rigorous analysis of the underlying merits.[106]

II. THE *IN RE DEEPWATER HORIZON* DECISIONS & THEIR IMPLICATIONS

As the following discussion will demonstrate, courts have been inconsistent in their application of the Supreme Court's recent Rule 23(b)(3) jurisprudence. The Fifth Circuit's *In re Deepwater*

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[99] *Id.* at 2551.

[100] Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1430 (2013).

[101] *Id.* at 1430. This practice would consist of Comcast "exchanging its television operations in different regions with those of competitors" in another consolidated region. Parkinson, *supra* note 49, at 1220.

[102] *Comcast Corp.*, 133 S. Ct. at 1430.

[103] *Id.* at 1431 n.4.

[104] *Id.*

[105] *See id.* at 1433.

[106] *Id.* at 1432; Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

Horizon decisions highlight the problems in relying on and applying judicial precedent in this area.

A. Background: The Spill and In Re Deepwater Horizon *District Court Decisions*

On April 20, 2010 an oilrig belonging to British Petroleum (BP) exploded in the Gulf of Mexico.[107] This explosion resulted in eleven deaths[108] and spewed millions of barrels of oil into the Gulf.[109] As a result of this event, thousands of individuals and businesses filed claims against BP.[110] These claims ranged from cleanup workers' personal injury claims to hotels' lost business allegations.[111] In August 2010, the Judicial Panel on Multidistrict Litigation[112] consolidated all federal claims pertaining to the spill

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[107] Campbell Robertson & Leslie Kaufman, *Size of Spill in Gulf of Mexico Is Larger Than Thought*, N.Y. TIMES, Apr. 28, 2010, http://www.nytimes.com/2010/04/29/us/29spill.html?pagewanted=all&_r=0

[108] *Id.*

[109] Richard Thompson, *Determining How Much Oil Spilled from BP's Gulf Well 'Not an Easy Task,' Judge Says,* THE TIMES-PICAYUNE, June 27, 2013, http://www.nola.com/news/gulf-oilspill/index.ssf/2013/06/determining_how_much_oil_spill.html (noting the difficulty in pinpointing an exact figure, but describing that estimates have ranged from 3.26–5.5 million barrels of oil spilled as a result of the accident).

[110] Kathy Finn, *BP Oil Spill Claims Chief Braces for Surge in Filings*, INSURANCE J., May 17, 2013, http://www.insurancejournal.com/news/national/2013/05/17/292400.htm (citing BP Claims Administrator noting that, as of May 15, 2013, 165,877 claims were filed, of which 40,970 were eligible for payment).

[111] Douglas McCollam, *The Other Oil Cleanup*, N.Y. TIMES, Nov. 4, 2010, http://www.nytimes.com/2010/11/07/magazine/07oil-t.html?pagewanted=all&_r=0 (describing the various groups of claimants who had filed claims against BP).

[112] The Judicial Panel on Multidistrict Litigation, consisting of seven sitting federal judges, determines whether multidistrict litigation should be consolidated to a particular district court. *Overview of Panel*, UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, http://www.jpml.uscourts.gov/panel-info/overview-panel. These procedures are codified in 28 U.S.C. § 1407, which allows civil actions involving one or more common questions of fact that are pending in multiple districts to be centralized to any "district for coordinated or consolidated pretrial proceedings." *Id*. The Panel also selects the judge or judges to administer the proceedings. *Id*.

(excluding securities suits) into one action.[113] This included seventy-seven actions that were initially filed in seven federal courts.[114] Most of these claims, the Panel recognized, were "comprised largely of putative class actions seeking recovery for property damage and other economic losses."[115] After recognizing that the Eastern District of Louisiana represented the closest jurisdiction to "the geographic and psychological 'center of gravity,'"[116] all claims were transferred to District Judge Carl Barbier of that court.[117]

On October 19, 2010, the district court issued a Pretrial Order that created "pleading bundles" for each type of claim.[118] The most important subclass for this Note is the "B1 bundle," or the Business and Economic Loss ("BEL") claimants.[119] This group consists of all private, non-governmental claims for economic loss

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[113] *In re* Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex., on Apr. 20, 2010, 910 F. Supp. 2d 891, 900 (E.D. La. 2012).

[114] *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, 731 F. Supp. 2d 1352, 1353 (J.P.M.L. 2010). Thirty-one actions were filed in the Eastern District of Louisiana, twenty-three in the Southern District of Alabama, ten in the Northern District of Florida, eight in the Southern District of Mississippi, two in the Western District of Louisiana, two in the Southern District of Texas, and one in the Northern District of Alabama. *Id.*

[115] *Id.* at 1354.

[116] *Id.* at 1355.

[117] *In re Oil Spill by Oil Rig*, 910 F. Supp. 2d at 900.

[118] *Id.* Some bundles were created based upon the type of plaintiff involved—for example, private individuals versus emergency responders—while others were designated based upon the nature of the injury. Edward F. Sherman, *The BP Oil Spill Litigation and Evolving Supervision of Multidistrict Litigation Judges*, 30 MISS. C. L. REV. 237, 240 (2011); Cent. for Biological Diversity, Inc. v. BP America Prod. Co., 704 F.3d 413, 432 (2013). Rule 16(c)(2)(L) of the Federal Rules of Civil Procedure enables a court to create these bundles as a judicial management tool. *See* 5 Bus. & Com. Litig. Fed. Cts. § 60:5 (3d ed. 2014) (describing that the Fifth Circuit relied on the Rule in upholding the use of pleading bundles in the BP litigation).

[119] Pretrial Order No. 11 [Case Management Order No. 1] at 3, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, 910 F. Supp. 2d 891 (E.D. La. 2012) (MDL No. 2179) [hereinafter Pretrial Order No. 11], *available at* http://www.laed.uscourts.gov/OilSpill/Orders/PTO11.pdf.

and property damages.[120] On August 13, 2012 the BEL claimants moved to certify the class under Rule 23(b)(3).[121]

1. The District Court's Rule 23 Certification Decision

On December 21, 2012, the district court certified the BEL claimants pursuant to Rules 23(a) and (b)(3).[122] The class was defined as: individuals[123] and entities[124] that were (1) within one of several geographic areas within two years of the spill[125] and, (2) whose claims met at least one of fifteen Damage Categories.[126] In

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[120] *In re Oil Spill by Oil Rig*, 910 F. Supp. 2d at 900–01; Pretrial Order No. 11, *supra* note 119, at 3.

[121] *In re Oil Spill by Oil Rig*, 910 F. Supp. 2d at 902–03.

[122] *Id.* at 913.

[123] The court defined "individuals" to include "all Natural Persons" who, "at any time between April 20, 2010 and April 16, 2012, lived in, worked in, were offered and accepted work in, owned or leased real or personal property located within, or owned or leased or worked on a vessel harbored or home ported" in one of the geographical areas. *Id.* at 965–66.

[124] The court defined this term to include "all entities doing business or operating" in the geographic areas that "at any time from April 20, 2010 to April 16, 2012, owned, operated, or leased a physical facility" in the area and sold products in the area directly to consumers, end users, or other entities, or entities that "regularly purchased seafood harvested from specified gulf waters in order to produce goods for resale." *Id.* at 966. "Entities" were also defined as any service business with "one or more full-time employees (including owner-operators) who performed their full-time services" while present in the areas between the relevant time period, as well as any entities doing business that "owned, operated, or leased a vessel" home ported in the area, or landed seafood in the area, or which "owned or leased real property in the area" between April 20, 2010 to April 16, 2012**.** *Id.*

[125] The areas cover the entire states of Louisiana, Mississippi, and Alabama, as well as thirty counties in Florida, four counties in Texas, and "all adjacent Gulf waters, bays, estuaries, straits, and other tidal or brackish waters" within Louisiana, Mississippi, Alabama, and described counties of Texas and Florida. *Id.* U.S. waters in the Gulf of Mexico were also specified and described in a map, and included within the geographic definition as "Specified Gulf Waters." *Id.*

[126] Damage Category 1.3.1.2. pertains to economic damages. *Id.* at 967. It includes "[l]oss of income, earnings or profits suffered by Natural Persons or Entities as a result" of the spill. *Id.* Additional categories include commercial fishermen, vessels that were physically damaged, and real property (and

its certification order, the district court purportedly settled two issues regarding causation and individual damages.[127]

On the causation issue, the district court wrote that only "some business claimants must demonstrate that the spill *caused* their losses."[128] The court further held that "[i]n many other cases causation is presumed."[129] Causation was presumed for claimants residing or working in the areas defined "Zone A."[130] Other claimants, including businesses located in Zones B and C, were required to prove causation.[131] This could be shown with documents "typically required to calculate business economic loss," or "documents that businesses either keep in the ordinary course or that may readily be prepared from a business's books and records."[132]

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property sales) damage. *Id.* at 966–67. A full list of every damage category, and exceptions, is described in the district court's opinion, under Section 1.3.1 of the class definition. *Id.*

[127] The court discusses these issues in its Rule 23(b)(3) analysis. *See id*. at 924–28.

[128] *Id*. at 905 (emphasis added).

[129] *Id.* The district court relied on the parties' Settlement Agreement to provide guidance as to which claimants would need to demonstrate causation and which would not. *Id.* at 906. BP and the BEL claimants began settlement negotiations in earnest in February 2011. *Id.* at 901. By August 13, 2012, the parties moved for final judicial approval of the agreement. *Id.* at 902.

[130] This includes specific geographic areas that are set out in detailed maps in Exhibits 1A–1C of the Settlement Agreement. Settlement Agreement at Ex. 1A–C, *In re* Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mex., on Apr. 20, 2010, 910 F. Supp. 2d 891 (E.D. La. 2012) (No. 12-970) [hereinafter District Court Settlement Agreement], *available at* http://www.deepwaterhorizon economicsettlement.com/docs/Amended_Settlement_Agreement_5.2.12_optimi zed.pdf#search. It includes coastal areas in Southeast and Southwest Louisiana, and New Orleans, an area in Southeastern Texas, areas along southern Mississippi and Alabama, as well as areas in the Florida Panhandle, coastal areas from Tampa to Marco Island (along the Western coast of Florida), and the Florida Keys. *Id.* Exhibit 4B describes a list of claimants for "which there is no causation requirement." *Id.* at Exh. 4B. This includes businesses located in Zone A, as well as businesses located in other geographical Zones that meet certain specified business definitional criteria. *Id.*

[131] *Id.*

[132] The Court, however, never specified what these documents might consist of. *In re Oil Spill by Oil Rig*, 910 F. Supp. 2d at 905.

The court then addressed proof of individual damages.[133] The court held that "issues of individual injury do not defeat predominance [Rule 23(b)(3)]" for the purposes of certifying the class for settlement.[134] It acknowledged that, were the class action to proceed to litigation rather than settlement, "certain causation issues remain that would have to be decided on an individual basis."[135] Moreover, the court noted, it was sufficient that "core causation issues" could "be decided on a class-wide basis."[136] These issues pertained primarily to BP's liability.[137] As for the claimants, the court found it would be "fairly capable" to attribute damages through the "various common methodologies" and "formulaic calculations" outlined in the Settlement Agreement.[138]

2. Settlement Agreement Decision and Order by the District Court

In October 2013, a panel of three Fifth Circuit judges addressed an earlier district court decision interpreting the parties' Settlement Agreement.[139] In a portion of that Fifth Circuit opinion,

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[133] *Id.* at 924–25 (finding that "issues of individual injury do not defeat predominance for purposes of evaluating this settlement class's certification").

[134] *Id.* at 924.

[135] *Id.*

[136] *Id.* at 924–25 (quoting Steering Comm. v. Exxon Mobil Corp., 461 F.3d 598, 602 (5th Cir. 2006)) ("[L]imited individualized issues do not defeat predominance in light of the core common issues . . . the necessity of calculating damages on an individual basis will not necessarily preclude certification.").

[137] The court wrote that "[a]ll of the key factual issues are common among members of the class." *Id*. at 922. These issues included whether BP had a valid superseding cause defense, and whether BP unreasonably failed to take precautions to ensure that, in the event of a blowout, the oil would be contained in the immediate vicinity of the well. *Id*.

[138] *Id.* at 926.

[139] *In re* Deepwater Horizon (*Deepwater Horizon I*), 732 F.3d 326, 346 (5th Cir. 2013). According to BP, the Claims Administrator had erroneously interpreted Exhibit 4C of the Settlement Agreement by "not require[ing] the matching of revenues and expenses" in processing BEL claims. *In re* Deepwater Horizon (*Deepwater Horizon III*), 744 F.3d 370, 373 (5th Cir. 2014).

Judge Clement expressed concern that, under the district court's interpretation,[140] damages may be awarded to "BEL claimants who admittedly either have suffered no loss at all or have suffered losses that were not caused by the oil spill."[141] She found that the district court lacked the authority to "approve the settlement of a class that included members that had not sustained losses at all, or had sustained losses unrelated to the oil spill."[142] Judge Southwick, in a concurring opinion, acknowledged that, while "logical," the issues raised by Judge Clement could not be resolved because they had not been briefed or argued by the parties.[143] By a 2-1 vote, the Fifth Circuit remanded for the district court to address whether certification was appropriate under the challenged interpretation.[144] On remand, the district court upheld certification under Rule 23 although the accepted interpretation of the Agreement eschewed the need for groups of claimants to submit evidence that demonstrated causation.[145]

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[140] *In re* Deepwater Horizon (*Deepwater Horizon II*), 739 F.3d 790, 822–23 (5th Cir. 2014) (Garza, J., dissenting). Section 1.3.1.2 of the settlement agreement pertains to BEL claimants, and incorporates Exhibit 4B, which establishes causation requirements, by reference. *Id.* at 823. Together, the language of these provisions establishes a subset of claimants within the class where causation is presumed. *Id.* The Claims Administrator's interpretation, which the district court agreed with, stated that he would compensate eligible BEL claimants "without regard to whether such losses resulted or may have resulted from a cause other than the Deepwater Horizon oil spill." *Id.*

[141] *Deepwater Horizon I*, 732 F.3d at 340.

[142] *Id.* "A class settlement is not a private agreement between the parties. It is a creature of Rule 23, which authorizes its use to resolve the legal claims of a class 'only with the court's approval." (citation omitted). *Id.* at 343.

[143] *Id.* at 346.

[144] *Id.*

[145] Order and Reasons [Responding to Remand of Business Economic Loss Issues], *In re* Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mex., on Apr. 20, 2010, 910 F. Supp. 2d 891 (E.D. La. 2012) *available at* http://www.laed.uscourts.gov/OilSpill/Orders/12242013Order(RevisedBELremand).pdf.

B. The Fifth Circuit's Decisions Affirming Certification & Causation

The opinions described above resulted in two separate decisions by the Fifth Circuit on appeal. Taken together, these opinions highlight the less stringent of the two prevailing approaches applied by the federal circuits regarding the proof class members must provide in order to satisfy Rule 23(b)(3).

1. The January 2014 Decision Affirming Certification ("Certification Decision")

In January 2014, the Fifth Circuit rejected BP's challenge to the district court's certification decision.[146] The court first addressed Rule 23(a)(2)'s commonality requirement.[147] BP argued that the class failed to meet this requirement because of the range of "class members' economic injuries" and "the inclusion of members who 'have suffered no injury at all'" in the certified class.[148] The court disagreed. It held that certification did not violate Rule 23(a)(2) because a number of factual and legal issues were "central to the validity of all" class members' claims.[149] According to the court, questions as to "[w]hether BP had a valid superseding cause defense," or "[w]hether BP took appropriate and timely steps to stop the release of hydrocarbons from the well," were central to all class members' claims.[150]

The court then addressed whether the district court erred in

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[146] *In re* Deepwater Horizon (*Deepwater Horizon II*), 739 F.3d 790, 795 (5th Cir. 2014). BP additionally challenged whether the claimants had standing under Article III, which the court rejected. *Id.*

[147] *Id.* at 809–810. As described above in Part I.B.1, Rule 23(a)(2) requires a showing that "there are questions of law or fact common to the class." *See* FED. R. CIV. P. 23(a)(3).

[148] *Deepwater Horizon II*, 739 F.3d at 810 (citation omitted).

[149] *Id.* at 811. The Fifth Circuit found that in order to satisfy commonality under (a)(2), "class members must raise at least one contention that is central to the validity of each class member's claims." *Id.* at 810. Yet a central contention need not relate to damages. Rather, "an instance of injurious conduct, which would usually relate more directly to the defendant's liability than to the claimant's damages, could satisfy commonality. *Id.*

[150] *Id.* at 811.

finding that the class met Rule 23(b)(3). BP argued that predominance could not be satisfied when class members' damage calculations gave "rise primarily to individual questions that are not capable of class-wide resolution."[151] The Fifth Circuit disagreed. Instead, it held that the diverse individualized damage calculations did not render Rule 23(b)(3) fatal.[152] Rather, as it did earlier in its Rule 23(a)(2) analysis, the court emphasized the list of common *issues* identified by the district court that predominated over those affecting only individual members.[153] "Nearly all of these issues" involved factual questions regarding BP's connection to the "well design, explosion, discharge of oil, and cleanup efforts."[154] According to the court, individual questions pertaining to class members' damages would not need to be addressed for purposes of Rule 23(b)(3).[155] Had the case proceeded rather than settled, however, the district court would "have been obliged to determine" how BP's liability would translate into compensation on an individual basis.[156] But with the parties' reaching an agreement, the court concluded, "by definition the litigation has been resolved and the questions have been answered."[157] Accordingly, the Fifth Circuit rejected BP's argument that the class lacked predominance and affirmed certification of the class for settlement.[158]

2. The March 2014 Settlement Agreement Causation Decision ("Causation Decision")

In December 2013, BP filed a separate appeal contesting the district court's order upholding certification under the challenged interpretation of the Settlement Agreement.[159] Under this

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[151] *Id.* at 815.

[152] *Id.*

[153] *Id.* (recalling the list of factual issues addressed below related to BP's involvement in the spill).

[154] *Id.*

[155] *Id.* at 818.

[156] *Id.* at 816.

[157] *Id.* at 818.

[158] *Id.* at 818–19.

[159] *In re* Deepwater Horizon (*Deepwater Horizon III*), 744 F.3d 370, 374

interpretation, many claimants were not required to demonstrate evidence of causation tracing their damages to the spill.[160] BP argued that this prevented the class from satisfying Rule 23(b)(3), as it produced individual damages questions that would predominate over any issues common to the class.[161] BP alleged that millions had been paid to dubious claimants with either inflated claims or damages not traceable to the spill.[162] One anomalous example includes $21 million paid to a Louisiana rice mill, situated forty miles from the coast, which earned more revenue the year of the spill than it did in each of the three years prior.[163] BP also pointed to "a large cottage industry" of attorneys soliciting claimants who had "never believed they had suffered any losses to file claims '[i]f the numbers work.'"[164]

The Fifth Circuit nevertheless affirmed the district court order.[165] It held that BEL claimants were not required to prove their claims with trial-type evidence demonstrating that their injuries or economic losses were traceable to the oil spill.[166] Judge Southwick's opinion rested in part upon the fact that BP had not objected to the terms of the Settlement Agreement when it was pending approval before the district court.[167] It also emphasized that the parties had agreed to the very form upon which BEL claimants would input their claims.[168] According to the court, any

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(5th Cir. 2014).

[160] *See id.* (summarizing the district court's interpretation as "eschewing the need for evidence of causation").

[161] Brief for Appellees BP Exploration & Prod. Inc., et al. at 43, *In re* Deepwater Horizon (*Deepwater Horizon III*), 744 F.3d 370 (5th Cir. 2014) (No. 12-970) 2013 WL 8718641.

[162] *Id.* at 20.

[163] *Id.*

[164] *Id.* at 21. Members of the certified class included a wireless phone retailer that received over $135,000, despite losing its property to a fire *prior* to the spill, and a lawyer awarded over $172,000 although he lost his license to practice in 2009. Joe Nocera, Op-Ed., *Sympathy for the Devil*, N.Y. TIMES, Aug. 1, 2014, http://www.nytimes.com/2014/08/02/opinion/joe-nocera-sympathy-for-the-devil.html.

[165] *Deepwater Horizon III*, 744 F.3d at 378.

[166] *Id.* at 376–77.

[167] *Id.* at 378.

[168] *Id.* at 376.

Rule 23(b)(3) issues posed by the interpretation and application of the Settlement Agreement had been "put to rest" by the January certification decision.[169]

III. THE CIRCUIT SPLIT

Together, these decisions evidence one of two prevailing approaches taken by the federal circuits as to the level of proof required to meet Rule 23(b)(3). The Second and Third Circuits have followed an approach consistent with the Fifth Circuit's BP decisions.[170] In contrast, the D.C., Eighth, and Eleventh circuits have denied certification when a class contains claimants who cannot demonstrate injury caused by, or traceable to, the defendant's conduct.[171]

While a judicial solution rectifying the split is possible, it remains unlikely. Divergent applications will likely continue until the Supreme Court agrees to resolve these issues. On December 8, 2014, however, it denied certiori to hear BP's appeal of the Fifth Circuit decisions described above.[172]

The next section will discuss the approach taken by the D.C. Circuit, Eighth, and Eleventh Circuits (the "Individualized Proof" approach). The subsequent section will describe the standard that is

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[169] *Id.*

[170] *See In re* Am. Int'l Grp., Inc. Sec. Litig., 689 F.3d 229, 243–44 (2d Cir. 2012); Sullivan v. DB Invs., Inc., 667 F.3d 273 (3d Cir. 2011).

[171] *See In re* Rail Freight Surcharge Antitrust Litig., 725 F.3d 244, 252 (D.C. Cir. 2013) ("Meeting the predominance requirement demands more than common evidence . . . . The plaintiffs must show that they can prove, through common evidence, that all class members were in fact injured."); Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 778 (8th Cir. 2013) ("In order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision."); Bussey v. Macon Cnty. Greyhound Park, Inc., 562 F. App'x 782 (11th Cir. 2014) (denying certification when plaintiffs' damages model could not attribute losses to each defendant).

[172] Marcia Coyle, *Supreme Court Rejects BP's Appeal of Oil Spill Settlement*, NAT'L L. J. (Dec. 8, 2014), http://www.nationallawjournal.com/id=1202678363544/Supreme-Court-Rejects-BPs-Appeal-of-Oil-Spill-Settlement?slreturn=20150121002706.

applied by the Second and Third Circuits (the "Global Peace" approach), which is consistent with the Fifth Circuit's BP decisions.[173] This latter approach will then be examined in light of CAFA's underlying policy aims and the Supreme Court's precedent.

A. Individualized Proof Approach

The cases below illustrate the Individualized Proof approach, which has two distinct features. First, certification is found inappropriate when members of the class cannot sufficiently trace the injury alleged to the defendant's conduct. Second, it demands that district courts conduct a careful evidentiary analysis of the plaintiffs' claims to ensure that an adequate measure for proving damages exists. When the predominance inquiry turns on individualized damages determinations incapable of class-wide resolution, courts will deny certification.

1. The D.C. Circuit: In re Rail Freight Surcharge Antitrust Litigation

In *In re Rail Freight Surcharge Antitrust Litigation* (*Rail*),[174] the D.C. Circuit denied certification when individual injuries could not be shown under the putative class's damages model.[175] The class included a group of shippers alleging that four major freight railroads engaged in a price-fixing scheme in violation of federal antitrust law.[176] The issue concerned "whether the plaintiffs could show, through common evidence, injury in fact to all class members from the alleged price-fixing scheme."[177]

On appeal, the D.C. Circuit held that deficiencies in the damages model rendered certification improper.[178] According to

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[173] *In re* Deepwater Horizon (*Deepwater Horizon II*), 739 F.3d 790, 815 (5th Cir. 2013).

[174] *In re* Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869, 725 F.3d 244 (D.C. Cir. 2013).

[175] *Id.* at 252.

[176] *Id.* at 247.

[177] *Id.* at 294.

[178] *Id.* at 255. The plaintiffs attempted to demonstrate injury through two

the court, where unreliable means of proving such injury exist, predominance cannot be met.[179] Instead, "when a case turns on individualized proof of injury, [then] separate trials are in order."[180] The D.C. Circuit noted that "Rule 23 not only authorizes a hard look at the soundness of statistical [damages] models that purport to show predominance—the rule commands it."[181]

2. *The Eighth Circuit:* Halvorson v. Auto-Owners Insurance Company

The D.C. Circuit's application of the predominance requirement is consistent with that taken by the Eighth Circuit in *Halvorson v. Auto-Owners Insurance Company*.[182] There, the court held that Rule 23(b)(3) was not satisfied when individual fact inquiries were required to prove class members' damages.[183] *Halvorson* concerned a breach of contract and bad faith claim arising from allegations that Auto-Owners employed an arbitrary cap on insurance payments under its PIP policy.[184] The

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regression models. *Id.* at 249–50. The first model attempted to "isolate the common determinants of the prices" that plaintiffs paid to the four defendant-railroads. *Id.* at 250. The second model—the "damages model"—attempted to "quantify, in percentage terms, the overcharge due" to the defendant's conduct. *Id.* Yet when the second model was applied to shippers bound by contracts negotiated prior to the alleged misconduct, it yielded similar results. *Id.* at 252. Accordingly, the same formula the district court relied on to satisfy Rule 23(b)(3) "also detect[ed] injury where none could exist." *Id.*

[179] *Id.* at 252–53.

[180] *Id.* at 253.

[181] *Id.* at 255.

[182] Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773 (8th Cir. 2013).

[183] *Id.* at 777.

[184] *Id.* at 774. Under the terms of the Policy, Auto-Owners represented that it would pay "reasonable charges incurred" for medical injuries sustained from car accidents. *Id.* at 775. In practice, the company compared claims against the 80th percentile for services rendered in a defined geographic area. It would routinely approve payments up to the amount that "80 percent of doctors in the area" charge for services. *Id.* Payments for amounts that surpassed that percentile were rejected. *Id.* The plaintiffs contended that this practice resulted in the "nonpayment of reasonable medical expenses" and represented a breach of the insurance policy. *Id.*

Halvorsons, as lead plaintiffs, attempted to bring a Rule 23(b)(3) class action.[185] They sought to certify a class consisting of all persons in North Dakota and Minnesota covered by the policy and who had received less than the full amount of a claim submitted.[186] The district court denied certification for Minnesota policyholders,[187] but granted certification for those covered in North Dakota.[188]

On appeal, the Eighth Circuit found that the individual inquiries pertaining to determining breach of contract and bad faith for each class member precluded certification.[189] Members of the proposed class each sustained different injuries.[190] They "were treated by different medical providers charging different prices for their services."[191] Yet under state law, the plaintiffs' allegations require a determination of the "usual and customary" rate for each claim.[192] In light of the differences among each member's claim, the Eighth Circuit found that individual inquires would predominate over the proposed class.[193] Resolving whether each payment was "usual and customary" would "overwhelm" any common questions of law or fact regarding the defendant's policy.[194]

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[185] *Id.* at 774–76.

[186] *Id.* at 775.

[187] *Id.* at 776. Minnesota state law required arbitration to resolve all no-fault claims for under $10,000. *Id.* The district court found the "arbitration requirement shatters" the requirements of Rule 23(a), as the Minnesota claimants would "comprise a subclass that 'would have radically different interests'" from the North Dakota class members. *Id.* (citation omitted).

[188] *Id.*

[189] *Id.* at 779–80.

[190] *Id.*

[191] *Id.*

[192] *Id.* ("To determine whether there was a breach of contract under North Dakota law will require an analysis of what are 'usual and customary' rates.").

[193] *Id.*

[194] *Id.* at 779 (quoting Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013)).

3. The Eleventh Circuit: Bussey v. Macon County Greyhound Park

In *Bussey v. Macon County Greyhound Park*,[195] the Eleventh Circuit held that certification was improper when the plaintiffs' damages model did not provide an accurate method for calculating—and attributing—the alleged loss to each defendant.[196] The plaintiffs brought state statutory law[197] claims against Victoryland, an Alabama gambling establishment, and the manufacturers of three electronic bingo machines that were in use at the casino.[198] In their claims against the manufacturers, the plaintiffs had to prove not only that they lost money on the machines, but the amount of each member's losses.[199] The district court certified the class despite acknowledging the individualized nature of these inquires.[200] It found that any "shortcomings" pertaining to damages were "issues for sifting at the merits stage, not the class certification stage."[201]

The Eleventh Circuit rejected this notion on appeal.[202] By deferring questions of damages to a later stage in litigation, the district court failed to address the plaintiffs' inability to proffer a method of quantifying the losses attributable to each manufacturer named as a defendant.[203] The Eleventh Circuit relied on *Comcast*, which reiterated the necessity for courts to conduct a careful

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[195] Bussey v. Macon Cnty. Greyhound Park, Inc., 562 F. App'x 782 (11th Cir. 2014).

[196] *Id.* at 790–91.

[197] *Id.* at 784; *see* ALA. CODE § 8–1–150(A) (2014). The statute at issue renders void "all contracts founded in whole or in part on a gambling consideration." ALA. CODE § 8–1–150(A). It further allows persons who have lost money while using a gambling machine to recover that sum by filing an action within six months of payment. *Bussey*, 562 F. App'x at 784; *see* ALA. CODE § 8–1–150(A).

[198] *Bussey*, 562 F. App'x at 784.

[199] Williams v. Macon Cnty. Greyhound Park, Inc., No. 3:10-CV-191, 2013 WL 1337154, at *7 (M.D. Ala. Mar. 29, 2013).

[200] *Id.*

[201] *Id.*

[202] *Bussey*, 562 F. App'x at 790. The Eleventh Circuit appeal concerned the three machine manufacturers, not Victoryland or its officers. *Id.* at 784.

[203] *Id.* at 790.

analysis of the pleadings at the certification stage.[204] This analysis inquires into any individual damages issues up front, then seeks to resolve them before an affirmative grant of certification. Finding that the district court had not conducted this "rigorous analysis," the Eleventh Circuit remanded the case.[205] Without proof that damages were calculable on a class-wide basis, questions affecting individual members predominated over common questions with respect to the manufacturers' liability.[206]

B. The Global Peace Approach

Three circuits engage in the Global Peace approach, which bypasses the rigorous predominance inquiry described above.[207] Instead, these circuits grant certification of classes despite uncertainty over the ability of various members to assert viable claims.[208] Both of the Fifth Circuit BP decisions, as well as recent

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[204] *Id.* (quoting Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013)).

[205] *Id.* at 791. In doing so, it instructed the lower court to allow additional discovery on the issue of damages. *Id.* at 791 n.8.

[206] *Id.* at 790–91 (quoting *Comcast Corp.*, 133 S. Ct. at 1433).

[207] This term is used to highlight the notion that class action settlements, while not all "global" in the literal sense, provide a sense of peace to three distinct parties—class members, defendants, and courts—by serving as "private administrative systems" that "shift claims from the ordinary tort system to a private regime that promises more efficient compensation for plaintiffs, long-term peace for defendants, and a reduced litigation burden for the courts." Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 751 (2002).

[208] *See* In re Am. Int'l Grp., Inc. Sec. Litig., 689 F.3d 229, 242–43 (2d Cir. 2012) (holding that lead plaintiffs not required to prove fraud-on-the-market presumption to satisfy predominance requirement); Sullivan v. DB Invs. Inc., 667 F.3d 273, 304 (3d Cir. 2011) (certifying the class although individual members were unable to bring a valid claim under applicable state law); *In re* Deepwater Horizon (*Deepwater Horizon III*), 744 F.3d 370, 376–77 (5th Cir. 2014) (holding that claimants were not required to prove their claims using trial-type evidence that show their injuries were traceable to the spill); *see also* Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 308 (2014) (citing these same cases as examples of the less stringent application of Rule 23(b)(3) certification procedures).

cases by the Second and Third Circuits, are illustrative of this approach.

Although each of these cases has arisen in classes involving settlement rather than trial, Rule 23(b)(3)'s requirements are no different.[209] The Global Peace approach is an alternative to the Individualized Proof inquiry. Under the approach, predominance can be met despite various class plaintiffs' questionable ability to prove that damages are traceable to the defendant's conduct.

1. The Second Circuit: In re American International Group, Inc. Securities Litigation

In re American International Group, Inc. Securities Litigation (AIG) involved several securities fraud class actions filed against AIG and other defendants in October 2004.[210] In 2006, the lead plaintiffs sought to certify a class defined as all "investors who purchased AIG's publicly traded securities between October 28, 1999, and April 1, 2005."[211] Thereafter, Gen Re, a named defendant, moved for judgment on the pleadings. It argued that, because the plaintiffs had "not established or even pled that the Gen Re Defendants made any public misstatement or omission with regard to AIG," the traditional presumption of reliance could not apply.[212] The district court denied certification, holding that individual issues of reliance would predominate over common issues regarding claims against Gen Re.[213] After the district court rejected a settlement agreement between the Gen Re and the class for the same reason, the parties appealed to the Second Circuit to

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[209] *See* Klonoff, *supra* note 68, at 804 (observing the Supreme Court has "held that predominance must be satisfied even for settlement classes"); *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619 (1997) (explaining that Rule 23(b)(3) demands "undiluted, even heightened, attention in the settlement context").

[210] *In re Am. Int'l Grp.*, 689 F.3d at 232–33. The complaint alleged violations of section 10(b) of the Securities Exchange Act of 1934. *Id*. at 233.

[211] *Id.*

[212] *Id*. (quoting *In re* Am. Int'l Grp., Inc. Sec. Litig., 265 F.R.D. 157, 175 (S.D.N.Y. 2010)).

[213] *Id.* (quoting *In re Am. Int'l Grp.*, 265 F.R.D. at 175).

resolve the issue of certifying the settlement class.[214]

On appeal, the Second Circuit held that the class' inability to satisfy the fraud-on-the-market presumption did not defeat a finding of predominance.[215] According to the court, the existence of a settlement agreement "alter[ed] the outcome of the predominance analysis."[216] It acknowledged that, in a litigation class, deferring plaintiffs' proof of fraud-on-the-market until after certification would be inappropriate.[217] This is because, under Supreme Court precedent, a defendant's successful rebuttal of the presumption defeats the predominance requirement along with any viable 10(b) claims.[218] According to the Second Circuit, however, "with a settlement class, the manageability concerns posed by numerous individual questions of reliance disappear."[219] Effectively, then, defendants may settle class suits "even if a court believes that those claims may be meritless, provided that the class is properly certified under Rules 23(a) and (b)."[220]

2. *The Third Circuit:* Sullivan v. DB Investments, Inc.

In *Sullivan v. DB Investments, Inc.*,[221] the Third Circuit certified a nationwide class under 23(b)(3) although numerous members were unable to bring a valid claim under applicable state law.[222] The case concerned a nationwide class action suit against De Beers, alleging antitrust and consumer protection violations of both state and federal law.[223] There were two nationwide

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[214] *Id*. at 237. The parties contended that, although "certification of a litigation class" was deemed inappropriate, the court "could—and should—nonetheless certify a settlement class." *Id.* at 236–37.

[215] *Id.* at 242–43.

[216] *Id.* at 242.

[217] *Id.*

[218] *Id.* (citing Basic Inc. v. Levinson, 485 U.S. 224, 249 n.29 (1988)).

[219] *Id.* at 241.

[220] *Id.* at 243–44.

[221] Sullivan v. DB Invs., Inc., 667 F.3d 273 (3d Cir. 2011).

[222] *Id.* at 304–05.

[223] *Id.* at 285–86. The complaint alleged that De Beers orchestrated a global sales network with competitor diamond producers. *Id.* at 286. De Beers was charged with "executing output-purchase agreements with competitors,

settlement classes: direct and indirect diamond purchasers.[224] However, only the indirect class sought damages under state, rather than federal, law.[225]

At issue before the Third Circuit was the propriety of certifying the nationwide indirect purchaser class under Rule 23(b)(3) when various members possessed no legal claim under state law.[226] The court found that the variations in the substantive state law underlying individual claims did not overwhelm the common legal and factual issues regarding De Beers' liability.[227] According to Judge Rendell, the settlement posture[228] of the case effectively "marginalize[d]" any concern "that state law variations undermine a finding of predominance."[229] The court concluded that settlement eliminated the "principal burden of establishing the elements of liability under disparate laws."[230] It was instead sufficient that each member of the Rule 23(b)(3) class shared "a similar *legal* question arising from whether De Beers engaged in a broad conspiracy that was aimed to and did affect" U.S. diamond prices.[231]

Underlying the court's application of the predominance

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setting/synchronizing production limits, restricting the resale of diamonds in certain geographic regions, and directing marketing and advertising." *Id.*

[224] *Id.* at 287.

[225] *Id.*

[226] *See id.* at 285. For example, some states allowed indirect purchasers to recover for an antitrust violation. *Id*. at 348 (Jordan, J., dissenting). Still, others have "declared unequivocally" that indirect purchasers lack standing to bring such a claim. *Id.* Even more, a number of other states have observed that indirect purchasers lack standing to bring "what is effectively an antitrust claim." *Id.* In short, in at least some of the states, putative members are fully foreclosed "from bringing an antitrust claim, no matter how they dress it up." *Id.*

[227] *Id.* at 297 (majority opinion).

[228] De Beers and the indirect purchaser class reached a settlement agreement prior to the grant of certification. *Id.* at 287–88. This agreement had two stipulations. First, De Beers would establish a $250 million settlement fund, which would be distributed among members of the indirect purchaser class. *Id.* at 288. Second, it agreed not to contest certification of the class. *Id.*

[229] *Id.* at 302–03.

[230] *Id.* at 303. The court relied on its own precedent in reaching its conclusion. *In re* Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 315 (3d Cir. 1998) (finding that variations in state law do not defeat predominance).

[231] *Sullivan*, at 343 (Jordan, J., dissenting).

requirement is a policy preference for "global peace."[232] Under this notion, a rigorous predominance application, which requires that class members allege a "colorable claim," prevents defendants from effectively buying peace through settlement.[233] The majority determined that by entering into a comprehensive settlement, De Beers sought to avoid prolonged litigation and re-litigation of "settled questions" across state and federal courts.[234] This, according to the court, weighed in favor of overlooking otherwise fatal infirmities among numerous members' claims.[235]

3. The Fifth Circuit: In re Deepwater Horizon *Decisions*

The *In re Deepwater Horizon* decisions discussed above are the most recent application of the Global Peace approach. Both the certification decision and the decision interpreting the Settlement Agreement found predominance satisfied although the class contained members unable to prove their alleged damages had been caused by the spill.[236] In its January decision, the Fifth Circuit acknowledged that damages calculations raised "individual questions that are not capable of class wide resolution."[237] However, the variance among members' ability to prove damages

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[232] *Id.* at 310–11 (majority opinion). Some scholars refer to the "global peace" notion espoused by the court as a "peace premium." *See generally* D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1207 (2013). This concept reflects the notion that defendants may be willing to pay a mark-up to settle a class action in order to resolve all similar claims, meritorious or not, so as to foreclose piecemeal litigation or settlement of individualized issues. Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 416 (2014).

[233] *Sullivan*, 667 F.3d at 310.

[234] *Id.*

[235] *Id.* at 310–12.

[236] *See In re* Deepwater Horizon (*Deepwater Horizon II*), 739 F.3d 790, 818–19 (5th Cir. 2014) (holding that the class satisfied the predominance requirement despite some members being unable to trace alleged losses to the spill); *In re* Deepwater Horizon (*Deepwater Horizon III*), 744 F.3d 370, 373 (5th Cir. 2014) (holding that BEL claimants were not required to use trial type evidence to prove losses were caused by the spill).

[237] *Deepwater Horizon II*, 739 F.3d at 815.

was not sufficient to defeat predominance. According to the court, "the existence of a settlement agreement allows the district court to dispense altogether" with resolving issues of individualized damages.[238] Like in *Sullivan*, once common questions regarding liability were established, the need to resolve individualized inquiries pertaining to the class effectively disappeared.[239]

The March decision, upholding certification of the Rule 23(b)(3) class, held claimants need not submit evidence that their alleged injury arose as a result of the spill.[240] It was sufficient that each member attest, "under penalty of perjury, that [their] claim in fact was due" to the oil spill.[241] As with Second and Third Circuits, the Fifth Circuit found settlement to be a mitigating factor in resolving whether individual issues across the class may defeat certification.[242] Predominance was met despite the modest degree of proof required of claimants regarding causation.[243] As the Majority opinion observed, this merely represented "a contractual concession" by the defendant, not a fatal defect in the predominance inquiry.[244]

C. The Global Peace Approach in Light of Supreme Court Precedent

The Global Peace approach directly conflicts with the Supreme Court's Rule 23(b)(3) jurisprudence. Both the *AIG* and *Sullivan* courts found that questionable claims among the class did not defeat predominance. This, they reasoned, was because the case management problems that such individualized issues present are mitigated by the lack of a trial.[245] In the January decision affirming

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[238] *Id.* at 818.

[239] *See* Sullivan, 667 F.3d at 335 (Scirica, J., concurring) (finding same operative fact of liability sufficient when various members could not plead claim under state law).

[240] *Deepwater Horizon III*, 744 F.3d at 372.

[241] *Id.* at 376–77.

[242] *Id.* at 378.

[243] *Id.*

[244] *Id.* at 377.

[245] *See* Sullivan v. DB Invs., Inc., 667 F.3d 273, 302–03 (3d Cir. 2011); *In re* Am. Int'l Grp., Inc. Sec. Litig., 689 F.3d 229, 242 (2d Cir. 2012).

certification, the Fifth Circuit also relied upon what it saw to be an ameliorating effect of settlement upon questionable claims.[246] Although the court recognized that potential infirmities across claims did exist, settlement rendered these issues "resolved and . . . answered."[247]

Like these circuits, the Supreme Court has also recognized that settlement is germane to class certification.[248] But it has stressed the need for *more* vigilance in applying Rule 23(b)(3) when "individual stakes are high and disparities among class members great."[249] The predominance analysis therefore "demand[s] undiluted, even heightened, attention in the settlement context."[250] According to the Court, this serves to protect the interests of absentee members who would be disadvantaged by overbroad or unwarranted definitions of the class.[251]

In light of these concerns, recent Supreme Court decisions have urged for courts to undertake a "rigorous" analysis at the certification stage.[252] This seeks to ensure that damages alleged by class members bear a causal connection to the defendant's conduct.[253] While damage calculations "need not be exact," they must be "attributable" to the legal theory establishing the defendant's liability.[254] Yet in each of the cases following the Global Peace approach, the Court found predominance met despite facial infirmities in this regard. In *AIG*, the Rule 23(b)(3) plaintiffs were incapable of alleging the rebuttable presumption of fraud-on-the-market against the Gen Re defendant.[255] Likewise, in *Sullivan,*

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[246] *In re* Deepwater Horizon (*Deepwater Horizon II*), 739 F.3d 790, 818 (5th Cir. 2014).

[247] *Id.*

[248] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619 (1997) ("Settlement is relevant to a class certification.").

[249] *Id.* at 625.

[250] *Id.* at 620.

[251] *Id.*

[252] Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013) (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551–52 (2011)).

[253] *Id.*

[254] *Id.*

[255] *In re* Am. Int'l Grp., Inc. Sec. Litig., 689 F.3d 229, 242–43 (2d Cir. 2012).

various members of the nationwide class could not legally bring a claim against the defendant under relevant state law.[256] Still, in each case, predominance was satisfied.

The inconsistency between the Global Peace approach and the Supreme Court's Rule 23(b)(3) precedent has only deepened the split between the circuits. The circuits that follow the Individualized Proof approach have relied heavily on cases such as *Wal-Mart* and *Comcast*. Yet, as described above, the Second, Third, and Fifth Circuits have avoided the more rigorous review demanded by the very same opinions. The result: a landscape of class certification jurisprudence that shares many of the policy concerns that precipitated CAFA's enactment.

D. Return to Pre-CAFA Concerns: The Implications of a Circuit Split

Each party involved in the class action loses when circuits apply divergent standards of proof at certification. As Professor Ricahrd Nagareda observed, "a jurisprudence of class actions that includes precedents for both underreach and overreach in the certification inquiry unwittingly adds to the potential for judicial slight of hand in either direction."[257]

Business defendants have been particularly outspoken regarding the potential impact that the present split can have on their interests.[258] In an amicus brief to the Supreme Court, the U.S.

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[256] Sullivan v. DB Invs., Inc., 667 F.3d 273, 348 (3d Cir. 2011). These findings are also difficult to reconcile with *Wal-Mart*. There the Court instructed that the party seeking certification "must affirmatively demonstrate" compliance with requirements of Rule 23. Wal-Mart, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011). In each of the relevant cases, however, the circuits allowed certification despite numerous members lacking the ability to plead a legally cognizable claim.

[257] Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 170 (2009).

[258] Both the United States Chamber of Commerce and the Government of the United Kingdom filed amicus briefs to the Supreme Court on behalf of BP, seeking to have the Court resolve the uncertainty between the circuits. *See* Motion for Leave To File Amicus Brief and Brief for Amici Curiae the Chamber of Commerce of the U.S. of Am., et al. in Support of Petitioners, BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc., 135 S. Ct. 754 (2014) (No. 14-

Chamber of Commerce expressed concern that the Fifth Circuit's decisions, if permitted to stand, may "impose, enormous, unsubstantiated liability" on businesses named as class action defendants.[259] This liability, it argued, would "then affect consumers, in the form of higher prices."[260] According to the Chamber of Commerce, this was a danger "particularly acute in the class action context," where class counsel "are apt to choose a forum that would permit an increase in the breadth of any eventual settlement."[261] "After all," it was sure to point out, "larger settlement results in larger [attorneys'] fees."[262]

These concerns should sound familiar. Business defendants and "their fellow-traveler amici" have been "perfectly capable of ratcheting up catastrophic bombast to" portray perceptions of class actions litigation's "in terrorem effect" on corporations.[263] This was true prior to CAFA, and it appears to be the case today.[264] Yet one need not surrender to this rationale to find merit in resolving the present circuit split. The certification decision is increasingly recognized as the pivotal moment in class action litigation.[265] Denial of certification can leave legitimately harmed parties without representation or a means for redress.[266] Affirmative grants may, despite all the hyperbolic arguments, spell immense trouble for businesses that are named as defendants.[267] Moreover, "there are not a lot of do-overs in the class certification realm."[268] Most

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123), *available at* http://blogs.reuters.com/alison-frankel/files/2014/09/bp-chambercertamicus.pdf [hereinafter Chamber of Commerce Brief]; Brief of Her Britannic Majesty's Gov't of the U.K. of Gr. Brit. and N. Ir. as Amicus Curiae in Support of Petitioners, BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc., 135 S. Ct. 754 (2014) (No. 14-123), *available at* http://blogs.reuters.com/alison-frankel/files/2014/09/bp-ukcertamicus.pdf.

[259] Chamber of Commerce Brief, *supra* note 258, at 11.

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] Linda S. Mullenix, *Putting Proponents to Their Proof: Evidentiary Rules at Class Certification*, 82 GEO. WASH. L. REV. 606, 630 (2014).

[264] *See supra* Part I.C.1.

[265] *See* Bone & Evans, *supra* note 5, at 1262–63.

[266] Mullenix, *supra* note 263, at 630.

[267] *Id.*

[268] *Id.* at 631.

cases settle before trial but after certification, thereby making certification "the district judge's last word . . . [or] test of the decision's factual premises."[269] In order to provide the greatest protections for class-members, defendants, and the viability of the class action vehicle as a whole, a coherent legislative response is required.[270]

IV. PUTTING THE "F" BACK IN CAFA: TOWARD A LEGISLATIVE SOLUTION

A. Preliminary Considerations

The proposal must provide evidentiary governance mechanisms that require a baseline level of proof from the class members at the certification stage. At the same time, the procedural framework must take into account the practical difficulties and concerns pertaining to the availability of such information, and the ultimate issue of how much proof will be sufficient. Any proposed amendment to class action certification

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[269] Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 676 (7th Cir. 2001); *see* Mullenix, *supra* note 263, at 631.

[270] These issues are important, especially in light of the substantial economic costs small claims class actions under 23(b)(3) can impose. Recently, Toyota settled a class action litigation related to unintended acceleration in some of its vehicles, with the class including economic loss members. Jonathan Sourbeer, Op. Ed., *A Close Reading of My $20.91 Settlement Check*, WALL ST. J., Nov. 24, 2014, http://www.wsj.com/articles/jonathan-sourbeer-a-close-reading-of-my-20-91-settlement-check-1416780793. The court awarded the class attorneys over $27 million in fees and costs, with the 25 primary plaintiffs and class representatives receiving $395,270 *in total* and non-representative members, those who never even opted in to the class or actively pursued the litigation, receiving checks for as low as a dime under $21. *Id.* As Mr. Sourbeer writes:

> If all the time, loss and suffering of the 25 plaintiffs and representatives of the lawsuit are only worth some $400,000, what law of efficient economics justifies $27 million in legal expenses for such a paltry return? None, unless the real return goes almost entirely to the law firms—in this case the more than $200 million that will be recouped from future car buyers and others.

Id.

procedures must be responsive to the legitimate aims that the class action vehicle serves. These values include providing dignity, vindication, and individualized civil justice, to groups of legitimately harmed plaintiffs.[271] In that respect, it must strike a fine balance between providing for procedures that enable courts to filter illegitimate claims, while not discouraging meritorious ones. In short, it must provide a framework that preserves "the tripartite values of justice, economy, and efficiency . . . without descending into sloppiness or cynicism."[272]

B. Guidance From the Private Securities Litigation Reform Act (PSLRA) of 1995

Securities litigation is one subcategory within the larger class action context. Yet the Private Securities Litigation Reform Act (PSLRA) of 1995[273] provides an apt example, and subsequently, an assessment, of an attempt to solve perceived misuse of the class action vehicle through procedural legislation.

Like CAFA, the PSLRA made its way through Congress[274] motivated by an attempt to bring "sanity and evenhandedness to the [securities fraud] class-action schema[,]" which was perceived

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[271] As will be discussed in the proposal, this requires an exception for certain cases where the social value of bringing the claim outweighs the cost of allowing the class to be certified when a heightened Rule 23(b)(3) analysis would otherwise lead to denial of certification. *See* Katie Melnick, *In Defense of the Class Action Lawsuit: An Examination of the Implicit Advantages and a Response To Common Criticisms*, 22 ST. JOHN'S J. LEGAL COMMENT. 755, 788–93 (2008) (offering a strong argument regarding the many social benefits that class actions have traditionally been recognized to foster, including deterrence, social justice, and access to the courts).

[272] Cabraser, *supra* note 22, at 518.

[273] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

[274] In fact, the PSLRA passed Congress over presidential veto. The reason for then-President Clinton's veto was the belief that the heightened pleading requirements would impose "an unacceptable procedural hurdle to meritorious claims being heard in Federal courts." *See* Kathryn B. McKenna, *Pleading Securities Fraud Using Confidential Sources under the Private Securities Litigation Reform Act of 1995: It's All in the Details*, 55 RUTGERS L. REV 205, 210 (2002) (quoting 141 Cong. Rec. S19035 (daily ed. Dec. 21, 1995)).

at least by the act's proponents, to be pungent with abuses.[275] To deal with these issues, the PSLRA introduced a heightened pleading standard for securities class actions and other procedural mechanisms,[276] which sought to ferret out non-meritorious claims.[277]

Under the PSLRA, plaintiffs are required to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind" to mislead investors.[278] According to Professor Michael A. Perino, the

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[275] andré douglas pond cummings, *"Ain't No Glory in Pain": How the 1994 Republican Revolution and the Private Securities Litigation Reform Act Contributed To the Collapse of the United States Capital Markets*, 83 NEB. L. REV. 979, 1005–06 (2005). *See also* Swack v. Credit Suisse First Bos., 230 F.R.D. 250, 258 (D. Mass. 2005) (considering, as one of the policies underlying enactment of PLSRA, "Congress' response to perceived abuses in securities fraud litigation"); *In re* Accelr8 Tech. Corp. Sec. Litig., 147 F. Supp. 2d 1049, 1053–54 (D. Colo. 2001) ("The purpose of the PSLRA is to prevent an onslaught of expensive and frivolous lawsuits when stock prices plummet, which could force corporations to settle meritless claims to avoid the expense of discovery and trial.").

[276] Another major component of this legislation was the addition of Section 21D to the Securities Exchange Act of 1934. MELVIN ARON EISENBERG & JAMES D. COX, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 875 (Robert C. Clark et al. eds., 10th ed. 2011). This introduced procedures that enabled courts to appoint lead plaintiffs to monitor the class action litigation and reduce potential agency costs that may result due to divergent interests between class counsel and the class of shareholder plaintiffs. *Id*.

[277] Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 924 (2003) (describing that heightened pleading was considered to function as "an appropriate solution to nonmeritorious class actions"); *see also* EISENBERG & COX, *supra* note 276, at 875 ("What prompted Congress to act was the burgeoning number of securities class actions that Congress believed were largely nuisance suits initiated to extract settlements that benefitted only the class action lawyers, produced small rewards to investors alleged harmed by the fraud, and rendered the U.S. capital markets anticompetitive versus rival foreign markets.").

[278] 15 U.S.C. § 78u-4(b) (2012). Specifically, for a security holder to allege a fraudulent omission or misleading statement, the complaint must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." *Id.*

Securities and Exchange Commission favored a procedural device to curb frivolous claims, rather than substantive changes that may unsettle existing securities law.[279] As both scholars[280] and industry practitioners[281] have noted, however, Congress' failure to adequately define the term "strong inference," the PSLRA's scienter requirement, or "set forth a rubric for courts to use to determine whether a plaintiff pled facts sufficient" to allege such a motive in the statute, yields a situation similar to Rule 23(b)(3) class certification jurisprudence.[282]

Circuits have promulgated wide-ranging approaches to defining key terms under the PSLRA.[283] As a result, courthouses

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[279] Perino, *supra* note 277, at 924 n.63 (citing then-SEC Chairman Arthur Levitt's response to written questions of Senator Domencini of New Mexico, during 1994 Senate hearings prior to enactment of the law, where the former Chairman stated that 'meritless litigation should be addressed through carefully crafted procedural and pleading requirements,' rather than by changing the 'fundamental scope' of substantive securities law).

[280] *Id.* at 926 ("Courts have split sharply over precisely what the 'strong inference' portion of the standard requires."); *see* James D. Cox, et al., *Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses*, 2009 WIS. L. REV. 421, 421 (2009) ("Federal appellate courts have promulgated divergent legal standards for pleading fraud in securities fraud class actions after the Private Securities Litigation Reform Act.").

[281] Sharon Nelles and Hillary Huber represent financial institutions and global companies in civil lawsuits, regulatory and criminal investigations, and enforcement actions at Sullivan & Cromwell LLP. Their recent article, *Pleading Securities Fraud Claims: The Good, the Bad, and the Ugly*, observes that one fallout from the PSLRA's heightened pleading requirement has been the difficulty federal courts have experienced agreeing upon a uniform interpretation of the provision's key terms. Sharon Nelles & Hilary Huber, *Pleading Securities Fraud Claims: The Good, the Bad, and the Ugly*, 45 LOY. U. CHI. L.J. 653, 656 (2014) (describing that ambiguity as a result of Congress's failure to further define 'strong inference' under the PLSRA has led to "a circuit split, with courts across the country applying different standards").

[282] *Id.*

[283] John M. Wunderlich, Tellabs v. Makor Issues & Rights, Ltd.*: The Weighing Game*, 39 LOY. U. CHI. L.J. 613, 623 (2008) ("Without legislative guidance on how to apply the scienter requirement, the federal courts embarked on the long road of discerning the congressional intent behind the nebulous language of 'strong inference.' The circuits invariably took different paths.").

diverge regarding the pleading sufficient to satisfy the scienter requirement under the statute.[284] Importantly, however, this split has not led to forum shopping.[285] A 2011 study by James Cox, Randall Thomas, and Lynn Bai analyzed over 10 years of post-PSLRA litigation data and estimated that "almost 85 percent of cases being brought [were filed] in the circuit of the defendant firm's principal place of business," rather than the circuit with the most (relatively) favorable interpretation of "strong inference."[286] At the same time, the authors of the study note that the divergent circuit applications raise significant concerns, including the potential undermining of substantive law.[287]

The PSLRA can guide the proposed CAFA amendment in at least two respects. First, a pleading standard seeking to resolve divergent judicial applications will never result in total uniformity in courts across the country. Judges will, and should, exercise discretion when applying the standard to the unique factual characteristics of the class and case presented.[288] The circuits

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[284] *Id.* at 624 (describing the "gamut of possibilities" that different circuits have used in making this determination).

[285] Cox, et al., *supra* note 280, at 451 (finding that "data supports the conclusion that differences across pleading requirements do not support significant forum shopping").

[286] *Id.*

[287] *Id.* at 452. In addition to undermining substantive law, the professors argue that forum shopping contributes to the following: the potential for overburdening of the jurisdiction(s) with the most plaintiff-friendly approach, removing the site of the litigation far from the source of the conflict so as to increase the parties' expenses, and more generally, perpetuating "a negative perception of the fairness of the legal system." *Id.* Although the authors believe that a clear and consistent interpretation can rectify the split, it is important to note that Cox, Thomas, and Bai describe the need for a *judicial* determination from the Supreme Court: "for example, identifying which of the three disparate approaches [among circuits] it believed was consistent with the intent of Congress." *Id.* at 453.

[288] *See generally* Wolff, *supra* note 85 (arguing that courts inherently have, and will continue to, possess some discretion over class certification decisions, which may promote positive values). Professors James A. Grundfest and A.C. Pritchard argue that a level of ambiguity in the drafting of statutes might be optimal. James A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002). As they explain:

grappled with interpreting the PSLRA's "strong inference" language following its enactment.[289] It may be inevitable that a "particularity" standard in the proposed amendment to CAFA would lead to similar interpretive issues.

The PSLRA provides an example of how vague drafting and unclear legislative history can create divergent court approaches.[290] The split regarding the proper interpretation of PSLRA's "strong inference" was, at least in part, a result of ambiguity regarding which circuit approach Congress had intended to adopt.[291] In order to achieve uniformity, any new amendment must—unlike the PSLRA—be articulately drafted and accompanied by a clear legislative history. In amending CAFA, Congress must be unequivocal in adopting the approach of the Individualized Proof circuits. Still, it should not expect to create an automated procedural framework that eliminates room for interpretation.[292] Instead, this Note urges for the implementation of *a standard* in an area of the law where courts presently lack any clear statutory, procedural guidance whatsoever.

> [A]n unresolvable measure of ambiguity may be part of the essential fabric of our legal regime. Efforts to impose greater precision than the underlying political structure can bear may lead nowhere because the political equilibrium between the judicial and legislative branches may benefit from a base level of interpretive ambiguity.

Id. at 636.

[289] *See* Nelles & Huber, *supra* note 281, at 656–58. It is important to note, however, that the PSLRA included *both* "particularity" and "strong inference," and much of the disagreement among courts has been over interpreting the latter. *Id.*

[290] An incoherent legislative history and confusing drafting was a major criticism of the statute. Illustrating the opinion of at least one court, Judge Gilbert Stroud Merritt Jr. of the Sixth Circuit described the PSLRA as a "statute containing general language . . . of abstraction, [and] an ambiguous legislative history." Helwig v. Vencor, Inc., 251 F.3d 540, 544 (6th Cir. 2001).

[291] Specifically, it was unclear whether the statute sought to incorporate the Second Circuit's "motive and opportunity" test, or an even more rigorous standard with this language. Cox, et al., *supra* note 280, at 431.

[292] For a developed analysis of how courts will inevitably interpret statutes and procedural determinations slightly differently, and why this may be beneficial, see Mark Moller, *Procedure's Ambiguity*, 86 IND. L.J. 645 (2011).

V. SHAPING THE AMENDMENT

The following sections urge Congress to adopt a modified Individualized Proof approach. To begin, the practical and policy-driven concerns presented by the competing approaches will be assessed. The remaining sections set forth the components of the proposed approach, which includes three main features: a particularity pleading standard; a provision exempting certain cases from this heightened pleading when obtaining the requisite proof is highly impracticable; and finally, increased evidentiary oversight in cases implementing this exemption. By enacting this amendment, Congress can add a degree of clarity to Rule 23(b)(3) certification, the most pivotal stage in class action litigation.

A. Choosing a Standard Between Competing Approaches

1. The Arguments For and Against The Individualized Proof Approach

The Individualized Proof approach recognizes that discrete issues of proof, particularly damages, are often common among members of a class.[293] It therefore calls for more vigilance at the certification stage to prevent circumvention of Rule 23(b)(3)'s predominance requirement. Each of the three circuits applying this approach emphasized a careful evidentiary analysis of the pleadings to ensure that proffered damages models represent injuries that are in fact traceable to the defendant's conduct.[294] At the same time, one obvious infirmity of this approach is that most, if not all, classes are incapable of providing "perfectly uniform damages."[295]

There are practical difficulties in pleading a class-wide injury in-fact. This is felt acutely in employment discrimination class actions, where showing class-wide discriminatory treatment can present significant hurdles to certification.[296] An accepted benefit

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[293] Parkinson, *supra* note 49, at 1228.

[294] See *supra* Part III.A.

[295] Parkinson, *supra* note 49, at 1229.

[296] *See Certifying Classes and Subclasses in Title VII Suits*, *supra* note 81,

of the class action vehicle is that it allows the class to enforce legal rights that, as individuals, members may not pursue.[297] Critics of heightened certification argue that a more rigorous Rule 23 review deters such claims, and thereby denies access to justice.[298] These are legitimate concerns, which the proposed amendment seeks to address. Still, proponents of a heightened pleading standard have countered the "access to justice" argument with a fairness claim of their own. At least in certain contexts, some believe it is "fundamentally unfair to force a defendant to spend millions or tens of millions" to defend claims rooted in "a few short paragraphs of a complaint," rather than factual proof.[299] Complex litigation is costly and enhanced pleading standards can address the issue.[300]

Another critique of a full-faith application of the Individualized Proof approach would be "the perverse incentive for bad actors" to cause more injury to more persons.[301] As Alex Parkinson imagines, "[b]y increasing the size of the class, the wrongdoer increases its

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at 620 (describing the difficulties proving class-wide injury in Title VII employment discrimination class-actions).

[297] *See* Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v.. Wal-Mart, 106 NW. U. L. REV. 34, 36–37 (2011) (offering a summary of the enforcement benefits class actions provide, and writing that, without the vehicle, "those with small claims and limited resources are unlikely to challenge powerful corporations on their own, effectively immunizing companies from complying with the law").

[298] *See* Francisco Valdes, *Procedure, Policy and Power: Class Actions and Social Justice in Historical and Comparative Perspective*, 24 GA. ST. U. L. REV. 627, 654 (2008) (describing how increased scrutiny over race-based class actions has amounted to a denial of access to justice); Suzette M. Malveaux, *The Power and Promise of Procedure: Examining the Class Action Landscape after* Wal-Mart v. Dukes, 62 DEPAUL L. REV. 659, 661 (2013) (claiming that the Supreme Court's decision in *Wal-Mart* compromises employee-plaintiffs' "access to justice").

[299] This argument has been used in class actions pertaining to antitrust claims. Edward Cavanagh, *Pleading Rules in Antitrust Cases: A Return To Fact Pleading?*, 21 REV. LITIG. 1, 11 (2002). However, it is a valid concern for any large class action.

[300] *See* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 489 (2008) (noting the rising costs of class action litigation and suggesting amending civil pleading standards as a potential solution).

[301] Parkinson, *supra* note 49, at 1230.

chances of creating a variance in damages."[302] In a court adhering to a strict Individualized Proof approach, every additional injured plaintiff represents a net benefit to the defendant. In most cases, each successive harmed plaintiff would not pursue a suit on his or her own.[303] At the same time, the greater the number of injured parties, the greater the variance in damages among members of the class.[304] This, in turn, would chip away at the "perfect uniformity of a proffered class," and make certification under a demanding Individualized Proof regime a less likely result.[305]

The Individualized Proof approach is also susceptible to criticism on grounds that it overlooks potential benefits of judicial economy. This benefit occurs when courts are able to try numerous, relatively minor claims at once, as opposed to hundreds or thousands of separate actions. [306] As the Global Peace approach cases show, this argument appears to have particular force when the parties agree to pursue settlement.[307]

Critics of the Individualized Proof approach also warn that a stringent pre-certification review can lead to previewing the merits of a case before trial.[308] Objectors argue this amounts to judicial "overreaching,"[309] or usurping "the jury's role to weigh and

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[302] *Id.*

[303] *Id.*

[304] *Id.*

[305] *Id.*

[306] *See, e.g.*, Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 671 (2014) ("Rule 23(b)(3) was meant to achieve judicial economy, promote decisional consistency, and enable private enforcement of the substantive law where individual suits were not cost-justified.").

[307] *See supra* Part III.B. Yet it should be reiterated that the Supreme Court has endorsed a more rigorous Rule 23 approach when settlement is proposed. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619 (1997) (stating that Rule 23(b)(3) demands "undiluted, even heightened, attention in the settlement context"); Green, *supra* note 25, at 1779.

[308] *See generally* Sergio J. Campos, *Proof of Classwide Injury*, 37 BROOK. J. INT'L L. 751, 782 (2012); Steig D. Olson, *"Chipping Away": The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935, 935 (2009).

[309] Campos, *supra* note 308, at 782.

adjudicate conflicting evidence,"[310] at a stage where all that is sought to be determined is the procedural question of certification. Others respond that this argument is overstated.[311] As Professor Linda S. Mullenix argues, judges have proven perfectly capable in limiting the appropriate inquiry to "whether the proposed action satisfies the requirements of Rule 23 and nothing more."[312] Moreover, in the absence of a more focused inquiry, *both* parties "have wide latitude to inject frivolous" arguments to "bolster or undermine a finding of predominance."[313] When the certification determination touches upon an underlying legal issue in a claim or defense, it might therefore be optimal for the court to address it.

2. *The Arguments for and Against the Global Peace Approach*

The Global Peace rationale relies on notions of manageability and judicial efficiency as well as the purported contractual nature of class action settlements.[314] A key feature of the approach is the hesitancy to engage in a critical review of pre-certification pleadings.[315] This is buttressed by the belief that "class certification simply provides a procedural means to address civil wrongdoing on a mass scale."[316] Proponents emphasize that Rule

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[310] Klonoff, *supra* note 68, at 756.

[311] *See, e.g.*, Mullenix, *supra* note 263, at 639–40 (attempting to rebut the argument that enhanced certification standards lead to impermissible pre-trial merits reviews); Anthony F. Fata, *Doomsday Delayed: How the Court's Party-Neutral Certification Standards in* Wal-Mart v. Dukes *Actually Helps Plaintiffs*, 62 DEPAUL L. REV. 675, 684–87 (2013) (arguing that "Rule 23 proceedings are not a dress rehearsal for trial," but, as a practical matter, "litigants will continue to put their spin on the merits in class certification proceedings").

[312] Mullenix, *supra* note 263, at 639–40.

[313] Bone & Evans, *supra* note 5, at 1269.

[314] *See e.g.* Sullivan v. DB Invs., Inc., 667 F.3d 273, 312 (3d Cir. 2011) (Scirica, J., concurring) ("[A] district court's certification of a settlement simply recognizes the parties' deliberate decision to bind themselves according to mutually agreed-upon terms without engaging in any substantive adjudication of the underlying cause of action.").

[315] *See id.* at 305 ("Rule 23 makes clear that a district court has limited authority to examine the merits when conducting the certification inquiry.").

[316] Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement*

23 is designed only to answer the threshold question of certification. Weighing the merits at this preliminary stage can lead to attacks of the underlying legal theories in a manner more appropriately suited for trial.[317]

The Global Peace approach places significance on the distinction between litigation and settlement classes in applying the predominance inquiry. An overemphasis on this distinction, however, overlooks "the broader concerns about cohesion, leverage, and fairness" that often arise in large, class action settlements.[318] Many scholars point to issues of agency costs in class action litigation. This occurs when "lawyers who act as agents for the class have financial incentives to negotiate settlements that prioritize their own interests at the expense of class members' interests."[319] As Professor Erichson points out, a "class action settlement binds all members of the certified class even though virtually none of the class members have agreed to it."[320] Nevertheless, courts relying on this approach have been willing to apply a traditional contract law gloss over large class action settlements as justification of either binding the class, as the Third Circuit did in *Sullivan*,[321] or preventing defendants from revoking their deals ex post, as was the driving force behind the Fifth Circuit's BP decisions upholding the agreement.[322] In either case, courts applying this standard may sidestep what can be important,

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Pressure, Class-Wide Arbitration, and CAFA, 106 COLUM. L. REV. 1872, 1873 (2006).

[317] *See, e.g.*, Olson, *supra* note 308, at 935–37 (criticizing inquiries into underlying merits at certification); Klonoff, *supra* note 68, at 731 (finding that engaging in the merits at the certification stage results in "experienced class action defense counsel [that] can frequently identify a number of promising arguments to defeat certification, even in fairly routine cases").

[318] Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 981 (2014) [hereinafter Erichson, *The Problem Of Settlement*].

[319] Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1015 (2005).

[320] Erichson, *The Problem of Settlement*, *supra* note 318, at 967.

[321] Sullivan v. DB Invs., Inc., 667 F.3d 273, 312 (3d Cir. 2011) (Scirica, J., concurring).

[322] *In re* Deepwater Horizon (*Deepwater Horizon II*), 739 F.3d 790, 818 (5th Cir. 2014).

merits-based evaluations. When invoked selectively, this standard yields a "patchwork of discretionary decisions difficult to justify on principled grounds."[323]

B. The Proposed Amendment and Its Key Components

In shaping its amendment to CAFA, Congress should adopt a modified Individualized Proof approach to certifying *all* class actions, including those to be certified for settlement only. This amendment should include three components. First, it must ensure that all members can prove with particularity the elements giving rise to their individual claims. Second, exceptions are necessary for cases where such proof is impracticable. Finally, preliminary judgments[324] should be provided in cases where courts grant an exception.

1. Adding Particularity to the Predominance Review

A stringent standard of proof at the certification stage comports with the Supreme Court's recent precedent. Most recently, in *Comcast Corporation v. Behrend*, the Supreme Court specifically addressed the degree of stringency needed to evaluate Rule 23(b)(3)'s predominance question as it pertains to individualized damage calculations.[325] There, the Court repeated its position in *Wal-Mart* and *Amchem*, stating, "[i]f anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)"

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[323] *See* Bone & Evans, *supra* note 5, at 1254. As Professors Bone and Evans point out, judges tempted to "skirt over technical and complex evidence," especially in cases of settlement, where decisions are insulated from appellate review, run counter to the "intent and purpose" of Rule 23, which has been described as serving to further "the twin policies" of efficiency and deterrence. *Id.* at 1260, 1331.

[324] This term refers to a procedure identified by Professor Geoffrey P. Miller, which is described in greater detail below, and essentially asks judges to engage in non-binding threshold merits determinations, which either party may object to. *See* Geoffrey P. Miller, *Preliminary Judgments,* 2010 U. ILL. L. REV. 165 (2010).

[325] Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432–33 (2013).

and places upon courts a "duty to take a 'close look' at whether common questions predominate over individual ones." [326]

A particularity standard shifts the focus away from generalized claims and puts the onus on the sufficiency of the facts.[327] In the class action context, where the stakes are so large, it is important for claims to be rooted in sufficient factual bases.[328] This attempts to reduce the "natural plaintiff's instinct to be over-inclusive in framing classes."[329] In fact, a particularity requirement strives to impose a notion of procedural fairness. Nearly every class action that is certified will settle before trial.[330] These settlement negotiations can be enhanced with procedural safeguards that require plaintiffs to support their claims with adequate evidence, prior to certification.

A particularity standard is already employed within the context of pleading fraud or mistake under Federal Rule 9(b). Fraud claims have been "understood to raise a high risk of abusive litigation."[331] The standard was justified in part to "protect defendants from sweeping fishing expeditions under the pretext of a lawsuit, as well as specious allegations."[332] Those most critical of the rule contend

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[326] *Id.* at 1432.

[327] *See* Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. INT'L & COMP. L. REV. 1, 6 (2011) (suggesting that a particularity standard requires plaintiffs to plead a greater level of factual detail).

[328] Nagareda, *Common Answers*, *supra* note 92, at 152 ("As a descriptive matter, class certification stands not as a mere judicial byway on the road toward full-fledged trial on the merits but, almost invariably, as the last significant judicial checkpoint on the road toward settlement."); *see also* Mullenix, *supra* note 263, at 632 ("Once the serious consequences of class certification are embraced, it follows that all actors involved should be required to produce and secure as reliable a record as necessary to ensure that a court has appropriate information upon which to make a serious class certification decision.").

[329] Miller, *supra* note 324, at 322.

[330] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 812 (2010) (observing that "virtually all cases certified as class actions and not dismissed before trial end in settlement").

[331] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569 n.14 (2007).

[332] Emily T. Chen, *Depressing Diagnosis: Stringent Particularity Requirement of the Rule 9(B) Pleading Standard as a Critical Bar to Off-Label Promotion Fraud Whistleblowers*, 36 CARDOZO L. REV. 333, 353 (2014).

that it dismisses otherwise colorable claims that do not measure up to the standard.[333] Yet the rule remains in place and its application has shown that courts do not treat the particularity standard as a death knell to otherwise legitimate claims.[334]

Support for a particularity standard requires addressing two objections to heightened certification procedures. The first contention is that enhancing the degree of pre-certification proof leads to expensive discovery that effectively prevents access to the courts.[335] A particularity standard does add a degree of diligence on behalf of counsel prior to initiating the action, but it does not require more spending and does not aim to deter legitimate claims.[336] Attorneys on both the class and defense bar already

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[333] *See, e.g.*, Jeff Sovern, *Reconsidering Federal Civil Rule 9(B): Do We Need Particularized Pleading Requirements in Fraud Cases?*, 104 F.R.D. 143, 147–50 (1985) (describing the drawbacks of 9(b)'s pleading standard). Professor Jeff Sovern writes: "if the pleader lacks access to the information omitted from the complaint, dismissal seems a draconian result. Such a pleader must make his case before engaging in discovery—often an impossible task—rather than pursuing the normal course of engaging in discovery in making his case," thereby potentially allowing "a guilty defendant to hide behind insufficient pleadings to prevent the truth from emerging." *Id* at 154–55.

[334] Morwenna Borden, *Particulars of Particularity: Alleging Scienter and the Proper Application of Rule 9(B) to Duty-Based Misrepresentations*, 98 Minn. L. Rev. 1110, 1118–19 (2014). Borden observes that while courts "vary in their precise application" of the standard, they "have found numerous ways for a fraud claim to meet the particularity requirement." *Id.*

[335] *See* Mullenix, *supra* note 263, at 640 (describing these concerns as dual critiques of enhanced certification standards).

[336] With a more rigorous approach to Rule 23(b)(3), "considerable pre-institution attention must be paid by counsel to the composition and definition of the class as well as the substantive claims to be advanced." Miller, *supra* note 208, at 322. Here, it should also be noted that, for some, class actions have been viewed as a battle between "David"—the class comprised of financially disadvantaged, small-claims plaintiffs—versus "Goliath"—the corporate defendant. *See* Andrew J. Trask, Wal-Mart v. Dukes*: Class Actions and Legal Strategy*, CATO SUP. CT. REV. 319, 331(2011) (citing cases in the Third and Fourth Circuits and evoking such imagery). While the corporate defendant will still likely outspend the class, the traditional "David vs. Goliath" dynamic has changed. *See* John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 339 (2010). The past two decades have seen a tremendous increase in low-risk, high-reward class actions financed by third-party investors, often in the amount of tens of millions of dollars. *Id.* at 339–41

engage in costly discovery concerning pre-trial certification.[337] A particularity requirement does not seek to impose more evidentiary digging. Instead, it demands that attorneys apply "measured evidentiary standards to their offer to the court."[338]

A second objection to a heightened pleading standard is that it can lead courts to address disputes that delve into the genuine merits of the litigation.[339] There is concern that heightened certification inquiries "effectively converts a class certification motion into a minitrial before trial."[340] A particularity standard would urge lawyers to refine the record before certification to hone in on a showing of predominance. It thereby seeks to curb unnecessary "probing behind the pleadings," rather than invite it.[341] Moreover, Professors Robert Bone and David Evans are correct to point out that it would be foolish to "believe the current system completely insulates its procedural rules from a substantive review."[342] The Supreme Court has acknowledged and endorsed the need for courts to engage in assessments of the underlying merits when those substantive issues are relevant to the Rule 23 requirements.[343] A particularity standard would in no way alter this established precedent.

2. The Need for Exceptions

Congress should allow exemptions for certain cases when members are unable to meet the standard for particularized

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(describing the nature of third party litigation financing in the United States and elsewhere, and discussing its policy concerns).

[337] Mullenix, *supra* note 263, at 640.

[338] *Id.* at 641.

[339] *See generally* Olson, *supra* note 308 (criticizing courts for engaging in resolution of "bona fide disputes about the merits of the plaintiffs' claims when deciding whether certification is warranted").

[340] Mullenix, *supra* note 263, at 639.

[341] *Id.* at 639–41 (quoting Wal-Mart v. Dukes, 131 S. Ct. 2541, 2551 (2011)) (arguing that heightened evidentiary requirements at certification mitigate merits-based review).

[342] *See* Bone & Evans, *supra* note 5, at 1283.

[343] *See supra* Part I.D.

proof.[344] This exception is most appropriate in cases where the benefits of bringing a class action outweigh the costs of denial for failure to meet the standard. Many civil rights and employment class actions are driven by their considerable social value, but might be especially susceptible to issues of class-wide proof.[345] This is true in employment discrimination class actions alleging company-wide policies and practices that discriminate on the basis of race or gender.[346] The example of discrimination cases does not attempt to draw a bright line test as to which cases would fall into this exception. Rather, courts should make a series of considerations in determining when these exceptions should apply. The type of case is paramount. The nature of the injury, and whether it is capable of factual proof, is another.

Even in a relatively small class, anti-discrimination claims are difficult to prove with factual, non-anecdotal evidence.[347] Meeting a heightened predominance requirement, then, can turn the certification inquiry into a battle of statisticians.[348] This analysis may also be difficult for juries and judges to follow.[349] Moreover, as compared to economic or physical loss caused by tortious or fraudulent conduct, for example, discrimination cases allege an

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[344] *See* Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. Mich. J.L. Reform 1097, 1118 (2013) (arguing that erroneous certification denials of civil rights class actions pose serious risks of high social costs).

[345] See *supra* Part I.C.3 for a discussion of why Title VII claims generally face a steep burden to certification.

[346] *See* Winnie Chau, *Something Old, Something New, Something Borrowed, Something Blue and a Silver Sixpence for Her Shoe:* Dukes v. Wal-Mart *& Sex Discrimination Class Actions*, 12 CARDOZO J.L. & GENDER 969, 1001 (2006) (describing the substantial value in allowing certification of employment discrimination class actions despite issues of individualized proof).

[347] *See Certifying Classes and Subclasses in Title VII Suits, supra* note 81, at 629 ("[A]s the class decreases in size, so too does the available pool of anecdotal evidence. Thus, the named plaintiff of a small class may well find it difficult to present sufficient proof of any kind.").

[348] *See id.* at 628–29 (describing that certification decisions in employment discrimination cases hinge on the quality of statistical proof).

[349] Peter M. Panken, Epstein Becker & Green, P.C., Statistical Pitfalls in Age Discrimination Cases, ALI-CLE Course Materials, SU015 ALI-CLE 1339 (2012).

injury that is quite possibly incapable of sound calculation.[350] The appropriate certification standard for these cases is the subject of much debate, and is not the focus of this Note.[351] Yet discrimination cases provide one example of the type of injury that might warrant the use of an exception. In any case, these exceptions should be wielded in a pragmatic, prudential fashion.

3. Preliminary Judgments

Congress should require preliminary judgments for cases that are subject to the exemption. These preliminary judgments would clarify the extent to which Rule 23(b)(3) requirements have been met. In a 2010 article, Professor Geoffrey P. Miller describes preliminary judgments as "tentative judicial assessment[s] of the merits of a case or any part of a case."[352] Certification decisions are, by and large, determinations of discretion.[353] However, as noted above, choosing to allow an exception from a particularity standard would implicate an added degree of discretion on behalf of the court. Through requiring preliminary judgments, courts will provide "direct, honest, and systematic"[354] representations as to

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[350] *See* Klonoff, *supra* note 68, at 748, 824 (comparing securities fraud and Title VII class actions and noting that the former often presents readily calculable damages).

[351] There are many articles addressing the appropriate degree of pleading in employment discrimination class actions. *See, e.g.*, A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441 (2013) (urging the Supreme Court to reject heightened pleading because of its perceived effect of deterring employment discrimination cases); Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613 (2011) (discussing the difficulties practitioners and plaintiffs face in framing their complaints, specifically, the sufficient level of proof required in employment discrimination cases).

[352] *See* Miller, *supra* note 324, at 165. Professor Miller uses the term *preliminary judgments* to mean non-binding threshold merits determinations. *Id.* He argues that preliminary judgments can alleviate many of the barriers faced by parties at settlement, while also serving the aims of transparency, consistency, and fairness. *Id.*

[353] *See* Wolff, *supra* note 85 (describing how courts have "broad discretion" in deciding whether a class action will be certified).

[354] Miller, *supra* note 324, at 168.

their findings on the purported class' compliance with Rule 23.

In practice, a preliminary judgment would be non-preclusive and non-final.[355] It would serve the valuable function of providing litigating parties (as well as future litigants) a necessary evaluation of the class and case.[356] This can be beneficial to future claimants by serving notice of the type of proof that works, and that which does not, before they chose to file for certification. It also engages the court in creating a written account of why the proffered class is exempt from a heightened particularity standard. It has been observed that when decision makers can state "the principles upon which [the decision] relie[s]. . .the very act of providing them may engender respect as well by treating the losing litigants and the public at large as deserving of an explanation."[357] Even when exceptions are granted, preliminary judgments create a written record that maintains the focus on compliance with the predominance inquiry.

CONCLUSION

Without a clear standard governing Rule 23(b)(3) determinations, class certification jurisprudence will continue to diverge. Although Congress failed to establish any such standard when it passed CAFA, the inconsistency among circuits harms the legitimacy of the class action vehicle as a tool for ensuring

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[355] Once made, preliminary judgments will not become final until the losing part makes use of its opportunity to object, with or without cause, "in which case the judgment would be vacated and the case would proceed according to ordinary rules of procedure." *Id.*

[356] *See id.* at 186 (explaining that preliminary judgments may increase the supply of information available to future litigants).

[357] Leslie Gielow Jacobs, *Even More Honest Than Ever Before: Abandoning Pretense and Recreating Legitimacy in Constitutional Interpretation*, 1995 U. ILL. L. REV. 363, 384 (1995). In addition, preliminary judgments might prove valuable in settlement negotiations. As Professor Miller points out, "[a]lthough settlement negotiations would still progress in the usual way . . . the range of disagreement would be significantly constrained by the fact of the judgment. Overall, therefore, the preliminary judgment could assist in overcoming signaling effects that interfere with settlement bargaining." Miller, *supra* note 324, at 176.

accountability, equity, and efficiency.[358] Rule 23(b)(3) ensures that class actions can be brought with "economy of effort and uniformity of result" without sacrificing "undue dilution of procedural safeguards" for both class members and defendants.[359] Congress must amend CAFA to prevent these important aims from becoming nothing more than hollow promises.

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[358] *See* Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 509 (2011) (describing the three "identifiable policies" of class actions as "accountability, efficiency, and equity").

[359] *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 390 (1966). Benjamin Kaplan served as the reporter to the Advisory Committee on Civil Rules from its inception through 1966, helping draft subdivision (b)(3) of Rule 23 in 1966.