THE BRIEF

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MESSAGE FROM THE EDITOR

Over the past decade, the complexity of the legal and regulatory framework governing the delivery of financial services to consumers has increased dramatically. As a consequence, many of our clients in the industry find themselves managing through waves of litigation. Our Spring 2021 Newsletter shares some commentary on recent substantive and procedural developments in the law. We hope you find it informative.

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RULE 23(F) APPEALS: VARYING STANDARDS IN THE CIRCUIT COURTS

Following the addition of the modern class action device to the Federal Rules of Civil Procedure in 1966, it became apparent to many judges, lawyers and commentators that the significance of the class certification determination was, to a degree, in tension with the general rule in the federal courts that appellate review can occur only after the entry of final judgment. Because class certification is not a final judgment, and because a decision on class certification can often create irresistible pressure either to settle or to drop a case, class certification decisions often put an end to litigation without any opportunity for appellate review.

The Seventh Circuit's much discussed (and much criticized) decision in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) brought attention to the issue. In *Rhone-Poulenc*, the Seventh Circuit granted a petition for writ of mandamus seeking to reverse the certification of a class below. Writing for a divided court, Judge Posner noted that the Court of Appeals had no appellate jurisdiction over the class certification decision, but nonetheless granted mandamus, because the defendant would have been required to stake the company on the outcome of a single jury trial when the propriety of the certification decision was, in the view of the majority, in serious doubt.

Three years later, the Federal Rules of Civil Procedure were amended to include Rule 23(f), which provides for discretionary appeals of orders granting or denying class certification. The Committee Notes regarding the amendment make clear that the "court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." Notably, Rule 23(f) does not require an appellant to seek leave of the trial court to appeal, as is required under §1292(b).

How then do circuit courts exercise the unfettered discretion afforded them under Rule 23(f)? While there are common themes across the circuits, there are subtle and potentially important differences for counsel to consider when building a record toward a possible appeal.

COMMON PRINCIPLES – ALL CIRCUITS

Courts of appeal have uniformly emphasized that, while Rule 23(f) affords discretion to accept appeals of class certification orders, the general disfavor in which interlocutory appeals are held suggests that Rule 23(f) appeals should be rare. See, for example, *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000) (because "interlocutory appeals are disruptive, time-consuming , and expensive… [w]e should err, if at all, on the side of allowing the district court an opportunity to fine-tune its class certification order rather than opening the door too widely to interlocutory appellate review") (internal citation omitted); *Lienhart v. Dryvit Sys.*, Inc., 255 F.3d 138, 145 (4th Cir. 2001) ("Standards [for appeal] certainly must reflect the limited capacity of appellate courts to consider interlocutory appeals, as well as the institutional advantage possessed by district courts in managing the course of litigation and the judicial diseconomy of permitting routine interlocutory appeals"). None of the circuit courts considering Rule 23(f) review has come anywhere close to suggesting that interlocutory review of class certification orders should be routine or commonplace.

The courts have also been uniformly keen to preserve their "unfettered discretion" to entertain appeals. Hence, they have described their holdings as presenting, for example, "guidelines, not a rigid test." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 960 (9th Cir. 2005). There are no bright line rules. See *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999); *Lienhart*, 255 F.3d at 143 ("[i]t would be inappropriate to adopt a bright-line approach which would unduly constrain the court's discretion"). Instead, the courts have hewn to the Committee Notes published with Rule 23(f) that observe that an appeal "may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." Fed. R. Civ. P. 23(f) advisory committee's note to the 1998 amendment.

However, without appearing to create an appeal as of right or constraining the broad discretion afforded by the Rule, most circuits[1] have articulated guidelines or indications of when interlocutory review of a class certification order is most appropriate.

THE BLAIR/MOWBRAY STANDARD – SEVENTH AND FIRST CIRCUITS

The first court to address the factors governing the appropriate exercise of the jurisdiction afforded under Rule 23(f) was the Seventh Circuit, in *Blair*. Taking cues from the Committee Notes accompanying Rule 23(f)'s publication, the *Blair* court identified three types of cases that are most likely to merit an interlocutory review by the circuit court.

The first of these is a case in which an adverse ruling on class certification sounds the "death knell" for a plaintiff's case. *Blair*, 181 F.3d at 834 ("when denial of class status seems likely to be fatal, and when the plaintiff has a solid argument in opposition to the district court's decision, then a favorable exercise of appellate discretion is indicated"). Such a ruling can be fatal when "the representative plaintiff's claim is too small to justify the expense of litigation." *Id.* Notably, the court's indication that review can be appropriate when there is a "solid argument" that the district court erred sets a fairly low bar. The court also cautioned that many cases remain viable as individual claims that can, after victory and final judgment, be sent back to the trial court for class treatment when appellate review in the normal course indicates that class certification was improperly denied.

Mirroring the "death knell" scenario, but on the defense side, the second type of case identified in *Blair* as a good candidate for interlocutory review is when a "questionable" decision certifying a class raises the stakes for a defendant so high that it might be forced to settle, in order to avoid the risk of a catastrophic judgment. *Id.* Noting that "[m]any corporate executives are unwilling to bet their company that they are in the right," the court observed that the pressure to settle in such circumstances, even when the plaintiff's probability of success on the merits is slight, often results in a settlement which insulates the class certification decision from review.

Blair's final category of candidates for interlocutory review includes cases in which an appeal "may facilitate the development of the law." *Blair*, 181 F.3d at 835. The court added that "[w]hen the justification for interlocutory review is contributing to development of the law, it is less important to show that the district judge's decision is shaky." *Id.*

The First Circuit considered Rule 23(f) just months after *Blair* and largely adopted *Blair's* reasoning and structure in *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000). The *Mowbray* court found *Blair* to be "cogently reasoned" and "the Seventh Circuit's taxonomy [to be] structurally

[1] Neither the Fifth Circuit nor the Eighth Circuit has to date articulated a set of guidelines applicable to Rule 23(f) appeals.

sound." The court noted with approval that *Blair* "made pellucid that an applicant who invokes either of the first two classifications must also 'demonstrate that the district court's ruling on class certification is questionable – and must do this taking into account the discretion the district court possesses in implementing Rule 23, and the correspondingly deferential standard of appellate review.'" *Id.* at 293. Hence, the "death knell" and irresistible settlement pressure categories are the same in the First Circuit as in the Seventh Circuit.

However, the First Circuit was troubled by the breadth of the third *Blair* category, and expressed worry that "the third category, as framed, may encourage too many disappointed litigants to file fruitless Rule 23(f) applications." *Id.* at 294. *Mowbray* therefore tweaked the *Blair* formulation of the third category to limit review to "those instances in which an appeal will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself and likely to escape effective review if left hanging until the end of the case." *Id.* The Seventh Circuit has not adopted *Mowbray's* narrowed scope of the third category.

THE PRADO FIVE FACTOR TEST (ELEVENTH AND FOURTH CIRCUITS)

Following quickly on the heels of *Mowbray*, the Eleventh Circuit laid out its approach to Rule 23(f) in *Prado v. Bush*, 221 F.3d 1266 (11th Cir. 2000). After reviewing with general approval the formulations in both *Blair* and *Mowbray*, the Eleventh Circuit prefaced the discussion of its framework with a thorough analysis of the reasons why interlocutory appeals remain disfavored, notwithstanding the adoption of Rule 23(f). *Id.* at 1273-74. The court pointed particularly to the sheer number of class actions in the federal courts and to the impingement on district court judges' ability to manage their cases that inheres in any interlocutory appeal.

The *Prado* court then identified five "guideposts" that the court can use to determine whether to grant interlocutory review under Rule 23(f). The first and "most important" of these is "whether the district court's ruling is likely dispositive of the litigation by creating a 'death knell' for either plaintiff or defendant." *Id.* at 1274. The court went on to clarify that "the decision to grant interlocutory review based primarily on this factor generally should be limited to those cases where the district court's ruling, as a practical matter, effectively prevents the petitioner from pursuing the litigation." *Id.* Thus, the plaintiff with a very small individual claim or a defendant facing irresistible settlement pressure both fit under the first *Prado* guidepost. Importantly, the court made clear that class size and the defendant's financial resources are relevant considerations, thus signaling to defense counsel the need to build a record on just how irresistible the settlement pressure actually is, when a class is improvidently certified.

The second guidepost in *Prado* is whether the petitioner has demonstrated a "*substantial* weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion." *Id.* (emphasis in original). This articulation is more stringent than *Blair's* "solid argument" criterion.

Prado adopted as its third guidepost *Mowbray's* reformulation of the third *Blair* factor – a legal issue that is "important to the particular litigation as well as important in itself." *Id.* at 1275.

Prado's fourth guidepost is that the appellate court should consider, in deciding whether to grant interlocutory review, the nature and status of the litigation before the trial court. *Id.* at 1276. Though the court's reasoning on this guidepost is somewhat vague, the point seems to be that review is more appropriate the more fully developed the trial court record is. For example, a certification before discovery may be more appropriately left for the district court judge to adjust based on matters disclosed in discovery or in expert submissions.

Prado's final guidepost considers the "likelihood that future events may make immediate appellate review more or less appropriate." *Id.* The court pointed to settlement discussions and a party's imminent potential bankruptcy as examples of matters to consider under this guidepost. The concern seems to be that events that, as a practical matter, could moot the appeal should be relevant to the appeals court's commitment of time to interlocutory review. Conversely, *Prado* notes that cases that are among a series of related or similar actions raising the same issues can be strong candidates for Rule 23(f) review, because an early read on the important issues may facilitate the disposition of the other cases in the series. *Id.*

One year after *Prado*, the Fourth Circuit expressly adopted *Prado's* framework in *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138 (4th Cir. 2001). However, the Fourth Circuit tweaked the formulation in light of an apparent sensitivity to manifestly erroneous class certification decisions in the district courts, holding that *Prado's* "substantial weakness" prong "operates on a sliding scale to determine the strength of the necessary showing regarding the other *Prado*[] factors." *Lienhart*, 255 F.3d at 145-46. Thus, "[w]here a district court's certification decision is manifestly erroneous and virtually certain to be reversed on appeal, the issues involved need not be of general importance, nor must the certification decision constitute a 'death knell' for the litigation." *Id.* at 145. Moreover, "[i]n extreme cases, where decertification is a functional certainty, the weakness of the certification order may alone suffice to permit the Court of Appeals to grant review." *Id.* In so holding, the *Lienhart* court expressed concern for the waste of resources attending the prosecution of a matter to final judgement, based on a patently erroneous class certification order.

THE STREAMLINED STANDARDS OF THE SECOND AND THIRD CIRCUITS

The Second Circuit weighed in on Rule 23(f) in *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134 (2d Cir. 2001). After summarizing approvingly the approaches and analyses of its sister courts, the Second Circuit adopted a two-factor test for exercising Rule 23(f) jurisdiction. The appellant "must demonstrate either (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution." *Sumitomo*, 262 F.3d at 139.

Sumitomo is perhaps best understood as an effort to articulate some guidance for litigants regarding the application of Rule 23(f), while preserving the Second Circuit's resources and flexibility. Thus, after cautioning at length regarding the general disfavor of interlocutory appeals, the *Sumitomo* court stated "[w]e anticipate, therefore, that the standards of Rule 23(f) will rarely be met." *Id.* at 140. And the court expressly left open "the possibility that a petition failing to satisfy either of the foregoing requirements may nevertheless be granted where it presents special circumstances that militate in favor of an immediate appeal." *Id.*

Writing virtually contemporaneously with the Second Circuit, the Third Circuit explained its approach to Rule 23(f) in *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,

259 F.3d 154 (3rd Cir. 2001). Like the Second, the Third Circuit was careful in *Newton* to preserve the unfettered discretion described in the Committee Notes to Rule 23(f). Hence, the standard in the Third Circuit affords interlocutory review "[i]f granting the appeal… would permit us to address (1) the possible case-ending effect of an imprudent class certification decision… (2) an erroneous ruling; or (3) facilitate development of the law… But these instances should not circumscribe our discretion." *Newton*, 259 F.3d at 165.

THE LORAZEPAM FORMULATION – DC, NINTH AND TENTH CIRCUITS

The DC Circuit next offered guidance on Rule 23(f) in *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98 (DC Cir. 2002). The court reviewed the views expressed by its sister circuits and identified a concern with respect to manifestly erroneous certifications that would, under the *Blair/Mowbray* standard, not be subject to appellate review, unless the error created a "death knell" situation for either plaintiff or defendant. The court observed that manifestly erroneous certification decisions should be subject to review independent of other factors, if only to avoid the waste of resources attending lengthy and costly trials that will ultimately be for naught. *Lorazepam*, 289 F.3d at 105. Thus, while being careful to preserve its discretion, the DC Circuit articulated a three-factor set of guidelines governing the propriety of Rule 23(f) appeals.

First, an appeal is appropriate "when there is a death knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable…" *Id.* Second, an appeal should lie "when the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review." *Id.* Third, "when the district court's class certification decision is manifestly erroneous." *Id.*

Three years later, the Ninth Circuit adopted the *Lorazepam* framework in *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005). The *Chamberlan* decision did add one bit of gloss – that "[t]he kind of error most likely to warrant interlocutory review will be one of law, as opposed to an incorrect application of law to facts." *Chamberlan*, 402 F.3d at 959. The Ninth Circuit expressly declined to adopt a sliding scale approach, a la *Prado*, under which a particularly weak district court decision would reduce the showing required for other factors. *Id.* at 960. However, in light of the fact that the Ninth Circuit regards manifestly erroneous class certification as meriting interlocutory appeal anyway, it can be argued persuasively that the Ninth Circuit's approach simply tips the scale all the way over when there is a particularly weak certification decision below.

The Tenth Circuit signed on to the *Lorazepam* formulation in 2009. See *Vallario v. Vandehey*, 554 F.3d 1259 (10th Cir. 2009).

THE SIXTH CIRCUIT'S AMALGAM

The Sixth Circuit's approach was to collate notions from its sister courts and to outline out a set of considerations relevant to Rule 23(f) applications. See *In re Delta Air Lines*, 310 F.3d 953 (6th Cir. 2002). First, the court noted that a court of appeals has broad discretion under Rule 23(f) and expressly eschewed any hard-and-fast test. *Id.* at 959. Second, 23(f) appeals should be rare and certainly not routine. *Id.* Consideration of the merits of the class certification decision is always relevant. *Id.* at 960. And the standard of review is abuse of discretion. *Id.*

The Sixth Circuit recognized the importance of affording review in a "death knell" situation, but cautioned that a petitioner "must go beyond a general assertion" when invoking the "death knell" principle. *Id.* While noting that novel issues also count in favor of granting review, the court acknowledged that "[i]t is logical that this factor weigh more heavily in favor of review when the question is of relevance not only to the litigation before the court, but also to class litigation in general. *Id.*

Delta Air Lines also noted that "[t]he weakness of the district court's decision or, stated another way, the likelihood of the petitioner's success on the merits is a factor in any request for a Rule 23(f) appeal." *Id.* Finally, the Sixth Circuit nodded to *Prado* in noting that the posture of the case in the district court is relevant to the appeals court's consideration of the appropriateness of interlocutory review. *Id.*

Lawyers in any circuit looking for an overview of matters to evaluate when contemplating an application under Rule 23(f) would do well to read the *Delta Air Lines* opinion as a starting point. Of course, familiarity with the standard in the applicable circuit is of obvious importance. Analyzing published decisions denying review under Rule 23(f) can also be informative. However, perhaps the most significant common theme across all circuits is that the courts of appeals are most likely to allow for interlocutory review when a district court has made a clearly erroneous error of law that puts either the plaintiff or defendant in an untenable position with respect to litigating the case through to a final order.

TEN YEARS ON, HAS *WAL-MART V. DUKES* HAD ANY IMPACT ON CLASS CERTIFICATION?

We looked at ten district courts to see whether the rate at which contested class certification motions were granted changed after *Wal-Mart*. The result: *Wal-Mart* has not made any significant difference.

The Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), in June 2011. The opinion, by Justice Scalia, focused on the commonality requirement in Federal Rule 23(a)(2) that there be "questions of law or fact common to the class." In a passage that has been quoted thousands of times in class certification motions and decisions, the Court stated (quoting a law review article), that:

> [The] common contention [...] must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.
>
> "What matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." [Nagareda, Class Certification in the Age of Aggregate Proof, 84 N. Y. U. L. Rev. 97, 132 (2009).]

The plaintiff in *Wal-Mart* alleged the company discriminated on the basis of sex by denying female employees equal pay or promotion. But, the Court held (*Id.* at 349) that certain common questions could not support class certification:

> Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification.

The Court noted that sufficient commonality might be shown by evidence of a company policy common to all class members, but:

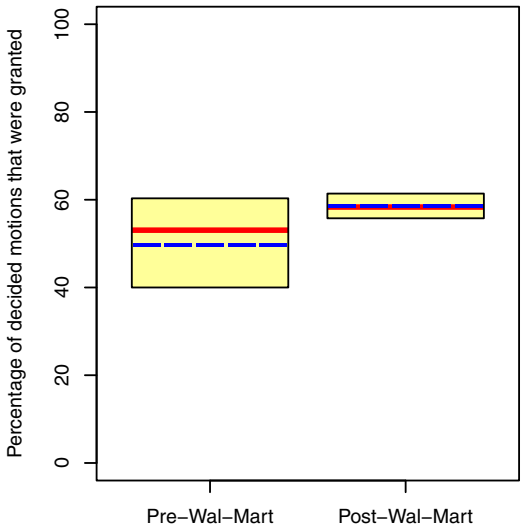
> The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's "policy" of allowing discretion by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices. *Id.* at 355.

The lesson of *Wal-Mart*, then, is that the Rule 23(a)(2) commonality requirement must focus not on common questions, but on common proof of liability. Unless some aspect "central to the validity" of the class claims can be resolved for all class members ("at a stroke"), the commonality requirement is not met.

We studied rates of class certification pre- and post-*Wal-Mart* in ten districts: Southern and Eastern Districts of New York; Central and Northern Districts of California; Northern and Southern Districts of Illinois; Southern District of Florida; Eastern District of Pennsylvania; Eastern District of Texas; and Northern District of Georgia.

For each of these jurisdictions, we used Westlaw's Litigation Analytics tool to identify the outcomes of contested class certification motions since January 2000. Westlaw's Litigation Analytics classifies the outcome of those motions as either "Granted," "Granted in Part," "Denied," "Denied as Moot," "Struck," "Vacated," or "Withdrawn." For each of the ten jurisdictions, we calculated the percentage of class certification motions that were granted each year from 2000-2010 and from 2012-2020 by dividing the number of motions either "Granted" or "Granted in Part" by the total number of motions. We then separated those data by the date the motions were resolved into the "pre-*Wal-Mart*" period (January 2000-December 2010) and "post-*Wal-Mart*" period (January 2012-November 2020). For purposes of this analysis, we ignored data from 2011, the year in which *Wal-Mart* was decided.

The results are shown in the charts below. The broken blue line is the average of the annual rates that contested class certification motions were granted over the relevant period. The red line is the median of those annual rates, and the tops and bottoms of the yellow boxes are the 75th and 25th percentiles of the annual rates of certification.



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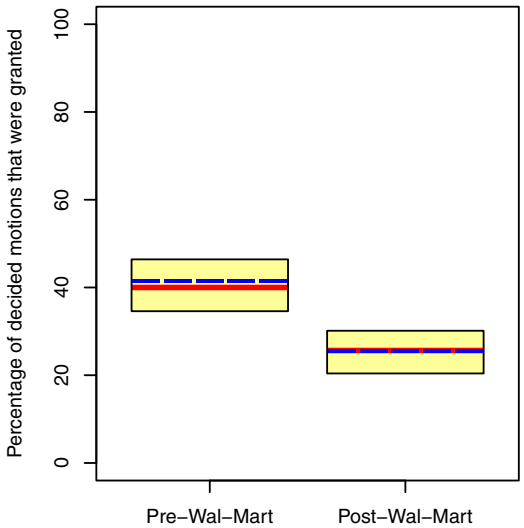

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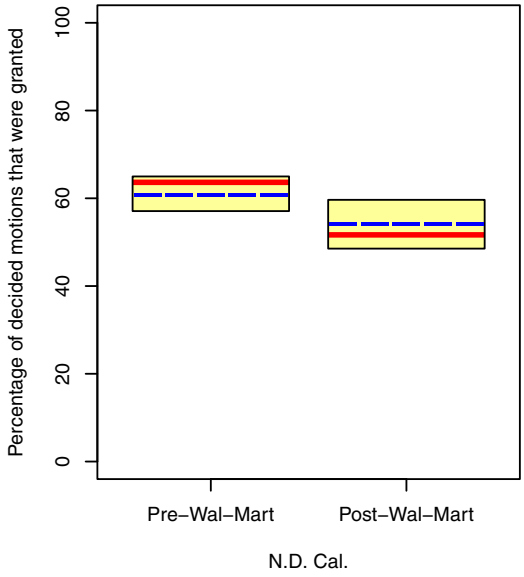

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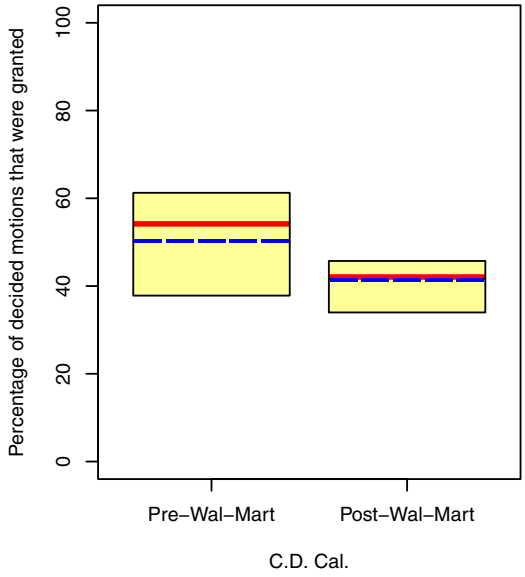

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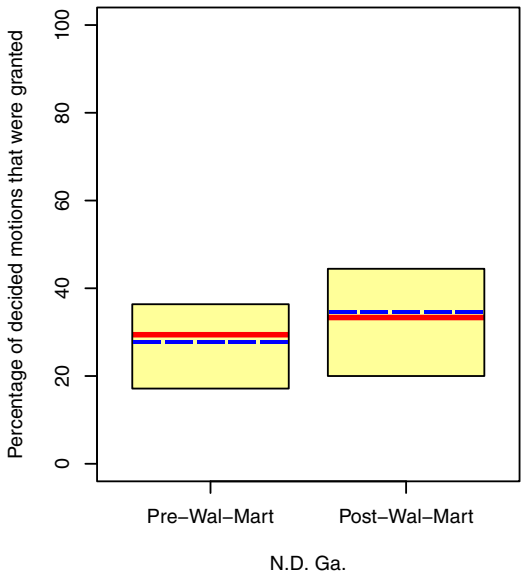

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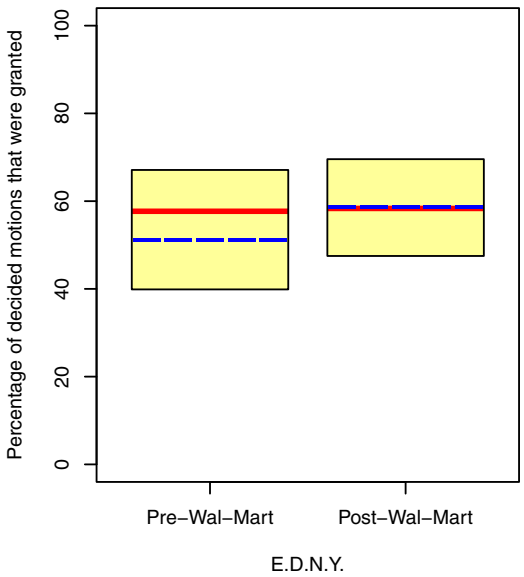

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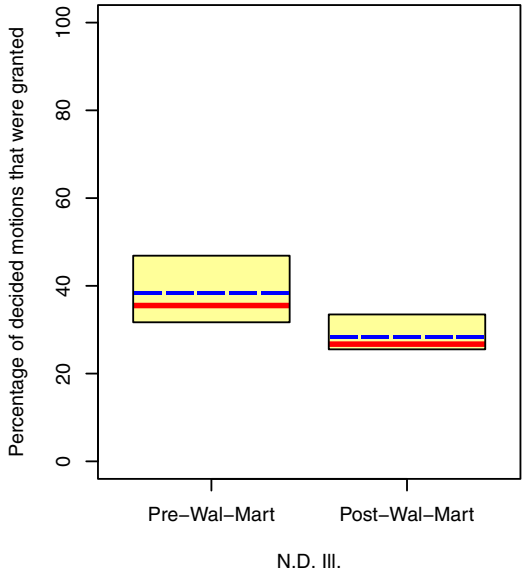

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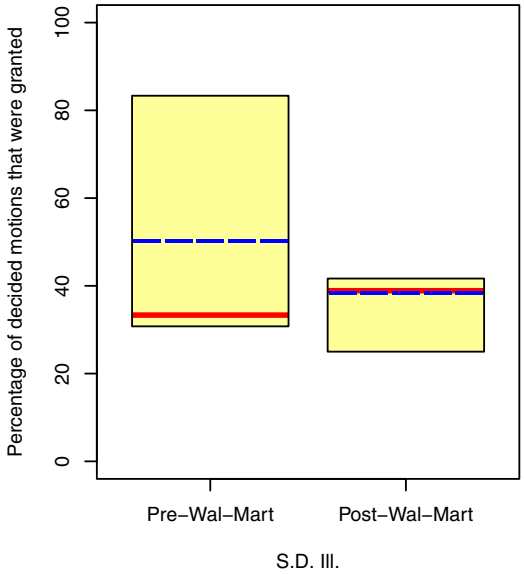

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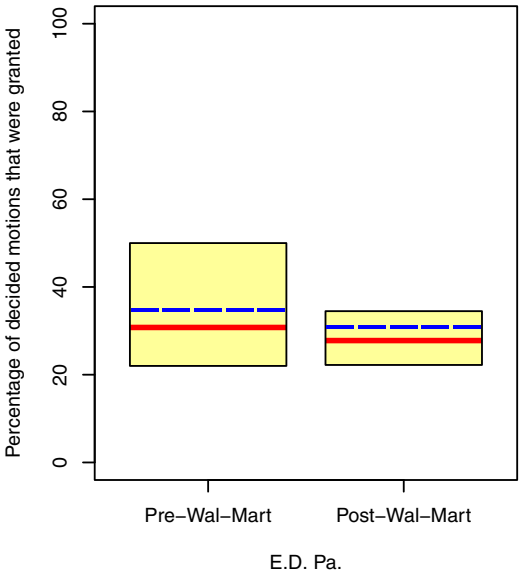

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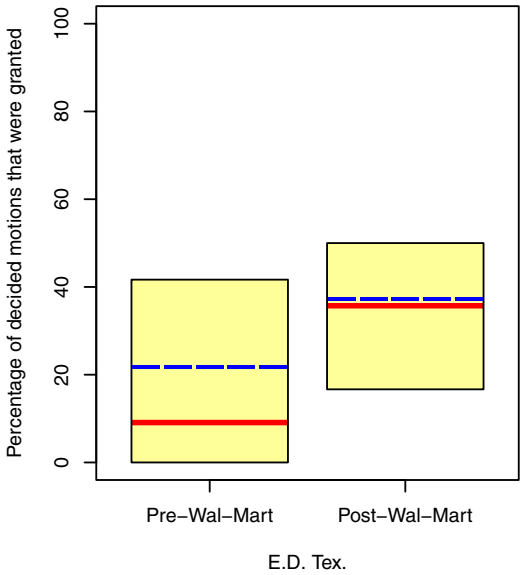

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The charts show that there were small declines in the rates of class certification in the Southern District of Florida and the Northern District of Illinois, and tests show these declines to be statistically significant. The other jurisdictions show no significant change. When all ten jurisdictions are combined, the rate at which class certification motions were granted declines, but not by a statistically significant amount.

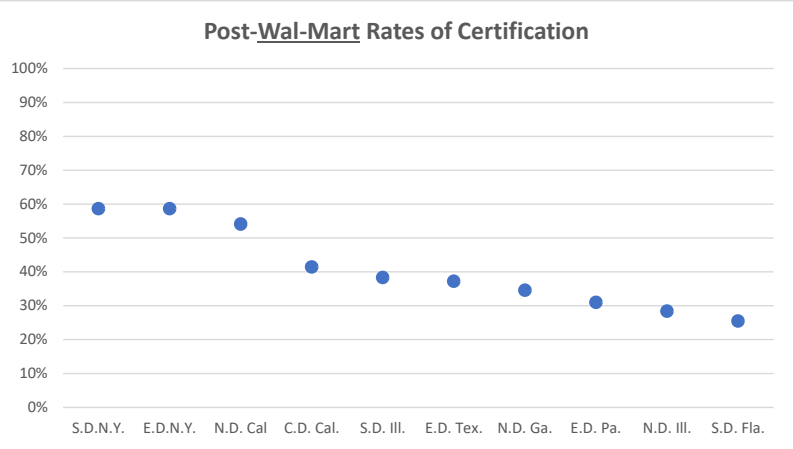
The conclusion to draw from this study is that *Wal-Mart* has made little difference, if any, to class certification decisions. That result is surprising to us given how prominently *Wal-Mart's* lesson on commonality features in many class motions and decisions. We checked to see whether *Wal-Mart* might have made plaintiffs less likely to file borderline class actions, thereby increasing the rate at which class motions were granted in the subsequent period. But the decision did not appear to dampen class action filings. In the three year period 2008-2010, on average, 2,817 class actions were filed each year in these ten jurisdictions combined (according to Westlaw), and, on average, 3,307 were filed each year from 2012-2014 in the same jurisdictions.

The study has its limitations. Westlaw's Litigation Analytics only identifies class certification decisions when it can pair an order with a motion. (For example, if a class certification motion was filed as Docket Number 50, but the order deciding that motion is listed on the docket only as "Order" and does not refer to Docket Number 50, Westlaw will not identify that as a class certification decision.) But there seems no reason to think that that limitation would skew the result.

More significantly perhaps, Westlaw Litigation Analytics did not allow the study to differentiate between types of class actions (for example, consumer class actions or securities class actions), and it might be that there were significant changes in the rates of class certification in some types of class actions but not others.

The following chart compares the rate of certification for each jurisdiction over the ten-year post-*Wal-Mart* period.

Some of the differences on this chart



are striking, but there might be less here than meets the eye. When a jurisdiction gains a reputation for being friendly to class actions, defendants are likely to be more willing to settle before class motions are decided. This might explain why a jurisdiction like the Southern District of Florida has such a low certification rate on contested motions.

NOTEWORTHY

ELEVENTH CIRCUIT REJECTS "ADMINISTRATIVE FEASIBILITY" REQUIREMENT FOR CLASS CERTIFICATION

The Eleventh Circuit recently staked out its position on a circuit split in class action jurisprudence: whether Rule 23 contains an implied "administrative feasibility" requirement. In *Cherry v. Dometic Corp.*, 986 F.3d 1296 (11th Cir. 2021), owners of defective RV refrigerators sought to certify a Rule 23(b)(3) class of persons who had purchased the refrigerators. The manufacturer argued that the putative class representatives failed to establish that their method of identifying members of the class would be workable and thus failed to demonstrate administrative feasibility, which it contended is an element of the ascertainability requirement implied in Rule 23. The District Court agreed, denying class certification.

In the Eleventh Circuit, a class must be ascertainable to be certified. While ascertainability is not listed among the requirements of Rule 23(a), the Eleventh Circuit is among the courts holding that an ascertainable class is "an implied prerequisite" because it allows a court to evaluate whether the proposed class satisfies the enumerated requirements of Rule 23(a). The question in *Cherry* was whether the Eleventh Circuit should follow the Third Circuit's lead in adopting a heightened standard for ascertainability, requiring both an adequate class definition and administrative feasibility, meaning that "the identification of class members will be 'a manageable process that does not require much, if any, individual factual inquiry.'" *Id.* at 1302 (quoting *Carrera v. Bayer Corp.*, 727 F.3d 300, 307–08 (3d Cir. 2013)). The First, Third, and Fourth Circuits include administrative feasibility as a prerequisite to class certification, while the Second, Sixth, Seventh, Eighth, and Ninth Circuits do not. In deciding *Cherry*, the Eleventh Circuit joined the majority, holding that administrative feasibility is not a requirement for class certification, either as an element of ascertainability or otherwise.

The Eleventh Circuit noted that its precedents requiring ascertainability did not mandate proof of administrative feasibility but only required a class definition that allowed class membership to be determined. "[M]embership can be capable of determination without being capable of convenient determination." *Id.* at 1303. Thus, the Court held, "[a]dministrative feasibility is not an inherent aspect of ascertainability." *Id.* Additionally, the Court held that administrative feasibility has no connection to Rule 23(a) and thus is not a part of the ascertainability inquiry because it does not bear on the ability of a district court to assess numerosity, commonality, typicality, and adequacy.

The Court likewise held that administrative feasibility is not a requirement for any of the three types of Rule 23(b) classes. The Court held that administrative feasibility is

relevant in weighing the superiority of the class action device under Rule 23(b)(3), which has as a factor under Rule 23(b)(3)(D) the likely difficulties in managing the class action. But because Rule 23(b)(3) requires a balancing test, a district court may not make administrative feasibility a standalone requirement. Thus, administrative difficulties in class member identification "do not alone doom a motion for certification," and the Court admonished that manageability problems will rarely, if ever, be sufficient alone to prevent certification of a Rule 23(b)(3) class.

SUPREME COURT NARROWS THE SCOPE OF THE TCPA

Since 1991, the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, has prohibited calls made without consent from "automatic telephone dialing systems" ("ATDS") to cell phones. When in 2003, the FCC began to interpret the term ATDS to include the "predictive dialers" commonly used by consumer-facing businesses to contact large customer bases, an avalanche of TCPA litigation ensued. However, on April 1, 2021, the Supreme Court held unanimously in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (Apr. 1, 2021), that to qualify as an ATDS, a device "must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator." The decision excludes most predictive dialers from the definition of an ATDS because they do not make random or sequential calls but call specific consumers, thus significantly narrowing the reach of the TCPA.

Facebook had argued to the Ninth Circuit in *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019), that because the statute defines an ATDS as a device with the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator" and dial those numbers, its predictive dialer—which did not generate and dial random or sequential numbers—could not be an ATDS. The Ninth Circuit rejected Facebook's argument and held that an ATDS need only have the capacity to "store numbers to be called" and "to dial such numbers automatically." The Ninth Circuit's decision conflicted with a prior decision from the Third Circuit, *Dominguez v. Yahoo*, Inc., 894 F.3d 116 (3d Cir. 2018), and later decisions from the Seventh and Eleventh Circuits, *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020), and *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301 (11th Cir. 2020), which held that the definition required an ATDS to generate and dial random or sequential numbers.

The Supreme Court resolved the circuit split by holding that "in all cases, whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator." The Court further held that the Ninth Circuit's interpretation would undermine Congress's "nuanced" approach to the problem of automated calls by broadening the statute to proscribe ordinary cell phone calls.

The Court's reading of what an ATDS is thus offers relief to companies that depend on the use of predictive dialers. It also makes clear that if Congress wishes to restrict the use of modern dialers, it will have to enact new legislation tailored to address current technology.

NEW YORK ADOPTS LIBOR "FIX"

The financial industry is bracing itself both for the transition away from LIBOR and for the litigation that may follow. The transition is likely to be smoother thanks to the decision to extend the date on which most US LIBOR benchmarks will expire and the passage in New York of a new statute addressing the transition, which was signed into law by Governor Cuomo on April 6, 2021.

Publication of the seven US LIBOR benchmarks was initially scheduled to cease on December 31, 2021. That date has now been pushed back to June 30, 2023, for five of those benchmarks, including the 1-year and 3-month benchmarks, which are most commonly used. (Publication of the 1-week and 2-month benchmarks will cease as originally scheduled at the end of 2021.) This delay will allow more legacy contracts that use LIBOR as a reference rate to be completed or amended before that rate is no longer available.

New York's new statute will also help ease the transition from LIBOR. The new law is based on a proposal presented by the Alternative Reference Rates Committee ("ARRC"), a group of private-market participants convened by the Federal Reserve Board and the New York Fed to help ensure a successful transition from US LIBOR to a more robust reference rate, the Secured Overnight Financing Rate ("SOFR").

The New York legislation is directed principally at instruments that do not already include a "fallback" provision for replacing LIBOR as a reference interest rate. The legislation provides, among other things, that when LIBOR is discontinued, references to LIBOR-based benchmarks in such contracts,

securities, and instruments will automatically be replaced by a "recommended benchmark replacement" to be selected by the Federal Reserve Board, the New York Fed, or the ARRC. Under the new statute, the cessation of LIBOR will not excuse the performance of any party nor allow any party to terminate or void any contract, security, or instrument based on the cessation of the publication of LIBOR. It also creates a "safe harbor" that prevents any person from being held liable for claims arising out of the use of any "recommended benchmark replacement."

Given that New York law governs many financial instruments and agreements that currently reference LIBOR, the new statute should provide significant reassurance to financial sector participants. Nonetheless, there are many instruments and contracts—including millions of mortgage notes—that are not governed by New York law and so are not covered by the New York legislation. A federal analogue of New York's LIBOR fix that applies nationwide would therefore be of considerable value in allaying concerns about the risks posed by the transition away from LIBOR. While no federal legislation has yet been introduced, a draft bill similar to ARRC's proposed legislation and New York's legislation was developed in October 2020.

NEW YORK DISTRICT COURT HOLDS THAT MISTAKEN $900 MILLION PAYMENT CANNOT BE REVERSED

The law generally treats a payment made by mistake as a form of unjust enrichment and so typically requires the recipient to return the mistakenly disbursed funds. In *In re Citibank Aug. 11, 2020 Wire Transfers*, 2021 WL 606167 (S.D.N.Y. Feb. 16, 2021), however, Citibank learned the hard way that some mistakes simply cannot be undone.

On August 11, 2020, Citibank made what it thought was an ordinary interest payment of $7.8 million on behalf of Revlon, Inc. In fact, however, Citibank actually paid off the entire amount Revlon owed in principal and interest, using nearly $900 million of its own money. Because the total payment matched to the penny the total principal and interest owed on the loan, the lenders who received the payment concluded that Revlon had intentionally decided to pay off its loans and so rejected Citibank's demands to return the funds.

Citibank then sued ten of the lenders to recover more than $500 million of its mistaken payment, alleging unjust enrichment, conversion, money had and received, and payment by mistake. Following a trial, the court found it was clear that the funds at issue were Citibank's and that the transfer was made by mistake.

But the court also held that the defendants had proven their "discharge-for-value" defense, which allows a creditor to avoid having to return funds he has mistakenly received when those funds discharge a debt owed to him, as long as the creditor was unaware of the transferor's error. The court found the defendants did not have notice of Citibank's error because the payment's having been for the exact amount due made it "natural and reasonable" for the defendants to treat the payment as an early pay down of the loan rather than as an error. *Id.* at *27. Indeed, the court found that Citibank's sophistication and the size of the payment would have made it "borderline irrational" for them to conclude it was a mistake. *Id.* at *28, 41. Since there was no dispute as to the fact that Citibank's payment discharged Revlon's debt, the defense applied, and the lenders were allowed to keep the payment. The Second Circuit has granted Citibank's motion for an expedited appeal, with argument to be held as early as August 2021.

ELEVENTH CIRCUIT HOLDS A PLAINTIFF'S VOLUNTARY ACTIONS CANNOT CREATE ARTICLE III STANDING

It is well established that parties cannot conjure federal jurisdiction when it would not otherwise exist. In *Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332 (11th Cir. 2021), the Eleventh Circuit applied that principle to hold that a party cannot allege a concrete injury sufficient for Article III standing when its injury resulted from its own voluntary action.

In *Tsao*, the plaintiff alleged that he and class members were injured by a data breach that exposed defendant's customers to identity theft. The complaint quoted a notice the defendant sent customers after learning of the breach, which said that information including cardholder names, credit card numbers, card expiration dates, and CVVs "may have been accessed," but that it "was not possible to determine the identity or exact number of credit card numbers or names that were accessed or acquired during" the cyber-attack.

Defendant moved to dismiss for lack of standing, arguing that plaintiff could not allege actual misuse of customer data. In his opposition, plaintiff insisted he was injured because he lost cash back or reward points (he had to cancel his two cards and so lost the opportunity to accrue points in connection with those cards), lost time spent addressing the problems caused by the cyber-attack, and lost some use of his cards because he had to cancel them. The district court rejected plaintiff's argument and dismissed his complaint.

On appeal, the Eleventh Circuit affirmed, holding the plaintiff failed to allege a concrete injury. Citing its own decision in *Muransky v. Godiva Chocolatier, Inc.*, 979 F. 3d 917 (11th Cir. 2020), the court held that plaintiff's "threadbare" allegations of increased risk of injury did not confer Article III standing because he had not alleged the hypothetical harm was "certainly impending" or that there was a "substantial risk" of such harm. It then cited the Supreme Court's decision in *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), to hold that because the hypothetical harm alleged was not "certainly impending" and there was no "substantial risk of the harm," the plaintiff could not "conjure standing" by inflicting a direct harm on himself to mitigate that "perceived risk." Because the actual harm plaintiff alleged was caused by his own voluntary actions, that harm was not sufficient to create Article III standing. While that outcome may seem harsh—the plaintiff apparently acted quite reasonably to reduce the risk clearly caused by the defendant—it is a good reminder of federal courts' obligation to enforce the Constitutional limits on their subject-matter jurisdiction.

FIFTH CIRCUIT CLARIFIES FDCPA'S DEFINITION OF "COMMUNICATION"

In *Fontana v. HOVG LLC*, 989 F.3d 338 (5th Cir. 2021), the Fifth Circuit held that a "communication" governed by the Fair Debt Collection Practices Act ("FDCPA") must at least imply the existence of a debt to violate the statute. Under that reading, which has also been adopted by the Sixth, Seventh, and Tenth Circuits, a debt collector who asks a third party about how to contact a consumer

debtor will not be liable under the FDCPA as long as the debt collector does no more than identify itself and request that the debtor contact it, and does not mention the purpose of the call.

The debt collector in this case, called the debtor's sister, provided its name and phone number, and asked her to tell her brother to call it back on an "important personal business matter for him." The debtor sued, alleging the defendant violated 15 U.S.C. § 1692c(b) when it "communicated" with his sister "in connection with the collection of [a] debt."

The Fifth Circuit affirmed the dismissal of the complaint, holding that the defendant's call with the plaintiff's sister did not satisfy the statutory definition of "communication," which requires

"the conveying of information regarding a debt directly or indirectly to any person through any medium." The court noted that "[t]he closest [defendant]'s representative came to giving information about a debt was providing the name of the debt collector." Since the average consumer would not recognize that as the name of a debt collector, merely providing that information does not suggest the existence of a debt and so cannot convey "information regarding a debt."

But *Fontana* is not all good news for debt collectors, for the court stated that "[e]ven small bits of information" concerning the purpose of a call may indirectly suggest the existence of a debt and so create liability under 15 U.S.C. § 1692c(b). However, the decision in *Fontana*, together with similar decisions by the Sixth, Seventh, and Tenth Circuit Courts of Appeals, suggest a consensus on the scope of liability for debt collectors who contact third parties in order to reach consumer debtors.

SEVENTH CIRCUIT REJECTS "REASONABLE INDICATION" STANDARD FOR OPTING OUT OF CLASS ACTIONS

A class settlement allows a defendant to resolve in a single case claims that otherwise might require defending many individual cases in numerous courts. Defendants thus have an interest in limiting the number of class members who "opt out" of a settlement. Accordingly, class settlements typically require would-be opt-outs to comply with specific procedures and time limits. The Seventh Circuit's decision in *In re Navistar Maxxforce Engines Mktg., Sales Practices, & Prods. Liab. Litig.*, 990 F.3d 1048 (7th Cir. 2021), holds that once those procedures and limits are approved by the court, class members who do not comply can be held in the class, even in light of some other "reasonable indication" of a desire to opt-out.

In *Maxxforce*, the district court's preliminary-approval order specified the required opt-out procedures. The notice sent to potential class members, however, said only that "[y]ou can file a claim by May 11, 2020, exclude yourself by October 10, 2019, or object to the Settlement by October 10, 2019," and linked to a website with the full opt-out instructions. After final approval, Navistar informed two class members who had been litigating their claims against Navistar in state court that their state action was barred by the settlement. Those class members conceded that they had not complied with the opt-out instructions, but argued that their state action should be deemed a "reasonable indication" of a desire to opt-out.

The Seventh Circuit rejected the class members' argument. It agreed that Rule 23's statement that "the court will exclude from the class any member who requests exclusion" requires "flexib[ility]" in deciding whether a "request" has been made, absent a court order establishing specific requirements for opting out. Once a court has issued such an order, however, that flexibility is not required. As the court explained, following such "mechanical rules" regarding opting out is the only "sure way" to manage class actions, where it would be practically impossible for a judge to decide which of thousands of class members had "reasonably" indicated a desire to opt-out.

FIFTH CIRCUIT REQUIRES THAT EXPERT TESTIMONY OFFERED IN SUPPORT OF CLASS CERTIFICATION SATISFY THE *DAUBERT* STANDARD

Expert testimony is often offered in support of Rule 23 motions, yet courts disagree whether such testimony has to meet the admissibility standard established in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). In *Prantil v. Arkema Inc.*, 986 F.3d 570 (5th Cir. 2021), the Fifth Circuit held that "the *Daubert* hurdle must be cleared when scientific evidence is relevant to the decision to certify," and that "if an expert's opinion would not be admissible at trial, it should not pave the way for certifying a proposed class." The Fifth Circuit thus joins the Third, Seventh, and Eleventh Circuits in requiring that expert testimony offered in support of class certification be admissible under the *Daubert* standard.

In *Prantil*, the district court granted plaintiffs' motion for class certification, based in part on the testimony of three experts. The court actually applied the *Daubert* standard to their testimony – and, in fact, excluded a fourth expert for failing to satisfy *Daubert*. The defendant, however, argued that the court had not correctly applied that standard since it had expressed doubts as to whether a "full" *Daubert* analysis was needed for certification and had stated that while one expert's analysis would have been "better," had he considered an additional factor, that "was not necessary under *Daubert* at the class certification stage." *Id.* at 576.

The Circuit Court agreed with the defendant and vacated the certification order. The district court's error, it held, was that its analyses of the expert reports "reflect hesitation to apply *Daubert's* reliability standard with full force," so that the district court was "not as searching in its assessment of the expert reports' reliability as it would have been outside the certification setting." *Id.* The Circuit Court underscored the importance of subjecting expert testimony to *Daubert* at every stage, stating that "assessment of the reliability of Plaintiffs' scientific evidence for certification cannot be deferred." *Id.* It also approvingly cited the Third Circuit's decision in *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183 (3d Cir. 2015), which held that requiring *Daubert* at the class-certification stage was a "natural extension" of the Supreme Court's admonition in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), to conduct a "rigorous analysis" of compliance with Rule 23.

The Court's close scrutiny of the district court's diligence in applying *Daubert* reflects the need for special attention to class certification because it "changes the risks of litigation often in dramatic fashion." *Id.* at 575 (quoting *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999)). In so doing, Prantil continues the decade-long trend in Rule 23 jurisprudence (prompted by *Wal-Mart* and *Comcast*) toward imposing more rigor in class certification determinations. At the same time, however, *Prantil* is clearly in tension with the Sixth, Eighth, and Ninth Circuits, which, as described in our summary of *Lyngaas v. Curaden AG*, 2021 WL 1115870 (6th Cir. Mar. 24, 2021), in the following paragraph, have held that class certification need not be supported by admissible evidence.

SIXTH CIRCUIT HOLDS INADMISSIBLE EVIDENCE MAY PROVIDE THE "EVIDENTIARY PROOF" REQUIRED FOR CLASS CERTIFICATION

The Supreme Court held in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) that a party seeking to certify a class must show, "through evidentiary proof," that at least one of the provisions in Rule 23(b) is satisfied. Courts are divided, however, on whether such "evidentiary proof" must be admissible. In *Prantil v. Arkema Inc.*, 986 F.3d 570 (5th Cir. 2021), the Fifth Circuit recently held that expert testimony submitted in support of class certification must meet the *Daubert* standard for admissibility. Compare also, e.g., *Unger v. Amedisys Inc.*, 401 F.3d 316 (5th Cir. 2005) (requiring admissible evidence for class certification), with *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996 (9th Cir. 2018), and *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604 (8th Cir. 2011) (admissible evidence not required). In L*yngaas v. Curaden AG*, 2021 WL 1115870 (6th Cir. Mar. 24, 2021), the Sixth Circuit joined the Eighth and Ninth Circuits in holding that class certification need not be supported by admissible evidence, at least as to non-expert testimony.

Lyngaas was a class action case arising from alleged violations of the Telephone Consumer Protection Act. The district court found that the proposed class was ascertainable and that class issues predominated based on call logs that purported to show which numbers the defendant called but that had not been authenticated and so might not be admissible. On appeal, the defendants argued that because the call logs had not been shown to be admissible, the class was improperly certified.

The Sixth Circuit rejected defendants' argument and held that the "evidentiary proof" requirement of Rule 23(b) "need not amount to admissible evidence, at least with respect to non-expert evidence." *Id.* at *11. It cited in support the Supreme Court's statement in General Telephone Company of the Southwest v. Falcon, 457 U.S. 147 (1982), that while the court must undertake a "rigorous analysis" of Rule 23's requirements, sometimes "the issues are plain enough from the pleadings" – which suggests that admissible evidence is not always required. 2021 WL 1115870, at *11. The court also noted that because Rule 23(c)(1)(A) requires class certification to occur at "an early practicable time after a person sues or is sued as a class representative," requiring admissible evidence for certification "risks terminating actions before a putative class may gather crucial admissible evidence." *Id.* (quoting *Saldi*).

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