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## A Question of Taste: Touchstones for Determining the Certifiability of Classwide Claims for Declaratory and Injunctive Relief under Rule 23 of the Federal Rules of Civil Procedure

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# A QUESTION OF TASTE: TOUCHSTONES FOR DETERMINING THE CERTIFIABILITY OF CLASSWIDE CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF UNDER RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

*Randy D. Gordon\**

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## I. INTRODUCTION

Almost since the birth of modern class action procedure in 1966, the device has attracted champions, who laud it as “one of the most socially

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useful remedies in history,” and critics, who pillory it as “legalized blackmail.”<sup>1</sup> As with most concepts that elicit such pointed disagreement, the truth lies somewhere in the middle.<sup>2</sup> At its best, a class action facilitates the vindication of small claims that otherwise would go unredressed *merely because of* their small size in relation to litigation costs.<sup>3</sup> But this move toward convenience and economy comes at a price: “the ability to aggregate large numbers of litigants tends to shift the focus from the client to the lawyer, from actual damages to attorneys’ fees, and from actual litigation to settlement.”<sup>4</sup> Perhaps nowhere is this tension more evident than in the discussions and decisions surrounding Rule 23(b)(2) of the Federal Rules of Civil Procedure, which provides for class actions seeking declaratory or injunctive relief.<sup>5</sup> This Article examines Rule 23(b)(2) class actions and the conflicts that arise when the relief sought is a matter of taste or belief—i.e., a matter that cannot be resolved with reference to neutral and objective criteria.<sup>6</sup> Along the way, we will consider the impact that the United States Supreme Court’s most recent class-action decision, *Wal-Mart Stores, Inc. v. Dukes*,<sup>7</sup> is likely to have on practice under Rule 23(b)(2).<sup>8</sup>

## II. AN OVERVIEW OF CLASS ACTION PROCEDURE

Class actions gain their legitimacy from principles of judicial economy and efficiency.<sup>9</sup> These principles animate Rule 23, but—as with

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<sup>1</sup> JONATHAN M. LANDERS ET AL., *CIVIL PROCEDURE*, 545-46 (2d ed. 1988) (quoting Abraham L. Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259, 1259 (1970) and Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suit—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971)).

<sup>2</sup> See *infra* text accompanying notes 3-4 (describing benefits and drawbacks of class actions).

<sup>3</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (“Class actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually.”).

<sup>4</sup> LANDERS, *supra* note 1, at 546-47.

<sup>5</sup> See FED. R. CIV. P. 23(b)(2) (permitting class actions where injunctive or declaratory relief appropriate for class as whole).

<sup>6</sup> See *infra* Part III (discussing conflicts arising from Rule 23(b)(2) class action seeking relief not resolved through impartial standards).

<sup>7</sup> 131 S. Ct. 2541 (2011).

<sup>8</sup> See *infra* Part III (discussing *Wal-Mart Stores, Inc. v. Dukes* decision).

<sup>9</sup> See *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 (1982) (denying class certification because named plaintiff’s claim not typical of class). In *Falcon*, the court held that the named plaintiff’s claim of intentional employment discrimination was not typical of the class and, thus, maintaining a bifurcated suit would not “advance ‘the efficiency and economy of litigation which is a principal purpose of the procedure.’” *Id.* (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974)); see also 5 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 23.02 (3d ed. 1997) (“The class action device was designed to promote judicial efficiency and to

all abstract statements of purpose—disagreements abound over their application in concrete instances.<sup>10</sup> Nonetheless, Rule 23 is loaded with standards that provide at least some guidance.<sup>11</sup> Specifically, a court may not certify a class unless it finds that the prerequisites set out in Federal Rule of Civil Procedure 23(a) and at least one subsection of Rule 23(b) have been met.<sup>12</sup> The requirements of Rule 23(a) are commonly referred to as numerosity, commonality, typicality, and adequacy.<sup>13</sup>

Rule 23(a) provides in pertinent part:

- “the class [be] so numerous that joinder of all members is impracticable . . . .”<sup>14</sup> Practicality of joinder depends on the size of the class, ease of identifying its members and determining their addresses, facility of making service on them if joined, and their geographic dispersion.<sup>15</sup> To satisfy Rule 23(a)(1), joinder of all parties need only be impractical, not impossible.<sup>16</sup>
- “there [be] questions of law or fact common to the class.”<sup>17</sup> Commonality is satisfied when at least one issue’s resolution “will affect all or a

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provide aggrieved persons a remedy when individual litigation is economically unrealistic . . . .”).

<sup>10</sup> Compare *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action . . . .”), with *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996) (“Rule 23 is to be applied flexibly, the manageability problems [here] defeat the Rule’s underlying purposes and render these claims inappropriate for class treatment.”). See generally *MOORE ET AL.*, *supra* note 9, ¶ 23.03 (“Courts do not agree on the proper standards for construing Rule 23’s requirements for class action suits.”).

<sup>11</sup> See generally FED. R. CIV. P. 23 (outlining class action certification requirements).

<sup>12</sup> See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997) (denying class settlement certification for asbestos-related injuries). The court held that because class members suffered different types of injuries and a broad range of symptoms, Rule 23’s typicality and commonality requirements were not satisfied. *Id.*

<sup>13</sup> See *id.* at 613 (describing Rule 23 prerequisites to class certification).

<sup>14</sup> FED. R. CIV. P. 23(a)(1).

<sup>15</sup> Compare *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980) (denying certification because proposed class consisted of thirty-one ascertainable members living in compact geographical area), with *Murillo v. Musegades*, 809 F. Supp. 487, 502 (W.D. Tex. 1992) (certifying class of over 2000 geographically-dispersed members because joinder not practicable).

<sup>16</sup> See *Slanina v. William Penn Parking Corp.*, 106 F.R.D. 419, 423-24 (W.D. Pa. 1984) (finding twenty-five members satisfies numerosity even though joinder possible because individuals justifiably feared reprisal); *Republic Nat’l Bank of Dall. v. Denton & Anderson Co.*, 68 F.R.D. 208, 213 (N.D. Tex. 1975) (finding joinder impracticable for class with over forty potential members residing in eleven different states).

<sup>17</sup> FED. R. CIV. P. 23(a)(2).

significant number of the putative class members.”<sup>18</sup> “For this reason, the threshold of ‘commonality’ is not high.”<sup>19</sup>

- “the claims or defenses of the representative parties [be] typical of the claims or defenses of the class . . . .”<sup>20</sup> Although the inquiry into typicality is case-specific, its test often has more bite than that used to assess commonality.<sup>21</sup> The typicality requirement cannot be satisfied unless a plaintiff’s claims arise out of the same event or course of conduct as the class members’ claims and are based on the same legal theories.<sup>22</sup> At a minimum, then, proposed representatives must belong to the class and share the same interest and injury as the class members.<sup>23</sup>
- “the representative parties will fairly and

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<sup>18</sup> *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993) (quoting *Stewart v. Winter*, 669 F.2d 328, 335 (5th Cir. 1982)) (certifying ERISA class and finding common issues as to whether defendant violated ERISA’s nonforfeiture provisions); *see also Durrett v. John Deere Co.*, 150 F.R.D. 555, 558 (N.D. Tex. 1993) (finding commonality satisfied because action arose out of plaintiffs’ virtually identical contracts with defendant); *Republic Nat’l Bank*, 68 F.R.D. at 215 (“The true test [of commonality] is whether common or individual questions will be the object of most of the efforts of the litigants and the Court.”).

<sup>19</sup> *Forbush*, 994 F.2d at 1106 (quoting *Jenkins v. Raymark Indus.*, 782 F.2d 468, 472 (5th Cir. 1986)) (commonality met despite differing interests and claims of various plaintiffs).

<sup>20</sup> FED. R. CIV. P. 23(a)(3).

<sup>21</sup> *Compare Forbush*, 994 F.2d at 1106 (“The test for typicality, like commonality, is not demanding . . .”), and *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993) (“Allegations of similar discriminatory employment practices . . . satisfy the commonality and typicality requirements of Rule 23(a).”), and *Durrett*, 150 F.R.D. at 558 (finding commonality and typicality met for claims arising out of same form contract), with *Byes v. Telecheck Recovery Servs., Inc.*, 173 F.R.D. 421, 424-25 (E.D. La. 1997) (denying certification despite commonality because lack of typicality where not all class members harmed the same). *See* 1 NEWBERG ON CLASS ACTIONS § 3:13 (4th ed. 2011) (describing overlap between commonality and typicality). Although commonality and typicality often overlap, while a finding of typicality necessarily entails commonality, a finding of commonality only probably entails typicality. *Id.*

<sup>22</sup> *Durrett*, 150 F.R.D. at 558 (“To meet the typicality requirement, the putative class representatives must establish the bulk of the elements of each class members’ claims when they prove their own.”).

<sup>23</sup> *Id.* (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982)) (finding representatives claims “typical if not identical” to class claims when based on form contracts); *see also E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403-04 (1977) (finding insufficient typicality because class representatives did not suffer discriminatory practices suffered by qualified drivers).

adequately protect the interests of the class.”<sup>24</sup> Adequacy requires an inquiry into the zeal and competence of the representative’s counsel and into the class representative’s “willingness and ability” to actively participate in the litigation to ensure the interests of the absentee class members.<sup>25</sup> This entails two inquiries, one focused on the named plaintiff, one on counsel:

- The primary issue in determining whether a named class representative is adequate is “whether any antagonism exists between the interests of the named plaintiffs and those of the remainder of the class.”<sup>26</sup> The typicality and adequacy analyses for class certification overlap in this area.<sup>27</sup> Specifically, to the extent that the named plaintiff satisfies the typicality requirement by demonstrating that his claims are the same as those of the putative class, he takes some steps towards establishing a lack of conflict between himself and the putative class.<sup>28</sup> But, as we will see below,

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<sup>24</sup> FED. R. CIV. P. 23(a)(4).

<sup>25</sup> *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 484 (5th Cir. 1982). The Fifth Circuit held that the adequacy requirement was satisfied because of the class counsel’s zeal in prosecuting the appeal and the named plaintiff’s willingness to become familiar with the complaint. *Id.*

<sup>26</sup> *Dresser Indus., Inc. v. Snell*, 847 S.W.2d 367, 373 (Tex. Ct. App. 1993) (finding adequacy because no antagonism when common lease interest exists between representatives and class members); *see also* *Murillo v. Musegades*, 809 F. Supp. 487, 502 (W.D. Tex. 1992) (holding representative adequate when treated similarly as class members and no conflicts with class); *Gibb v. Delta Drilling Co.*, 104 F.R.D. 59, 75-79 (N.D. Tex. 1984) (identifying no antagonism between current and former shareholders because liability independent of shareholder status); *Parker v. Bell Helicopter Co.*, 78 F.R.D. 507, 512 (N.D. Tex. 1978) (resolving antagonism by bifurcating trial when issue of liability applies to all class members).

<sup>27</sup> *Horton*, 690 F.2d at 485 n.27 (noting antagonism analyzed under typicality or adequacy but expressing preference for analysis under adequacy); *Longden v. Sunderman*, 123 F.R.D. 547, 557 (N.D. Tex. 1988) (finding no antagonism because interests of representatives and class members coincided and were typical); *see also* NEWBERG, *supra* note 21, § 3:13 (discussing overlap and citing additional sources).

<sup>28</sup> *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993) (concluding representative adequate despite different pension plans because defendant’s general practices applicable to entire class); *Longden*, 123 F.R.D. at 557-58 (finding adequacy despite factual differences because defendant’s conduct uniformly fraudulent and all members suffered harm).

the analysis does not end here.<sup>29</sup>

- The named plaintiff must also show that he has employed counsel able to prosecute the action vigorously to a successful conclusion.<sup>30</sup> Additionally, the plaintiff's counsel must have no conflicts with the interests of the class and must have the resources to devote to prosecution of the class action, so that the due process rights of the class members are protected.<sup>31</sup>

Rule 23(b) provides in pertinent part:

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

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<sup>29</sup> See *infra* Part III.C (discussing whether class certification appropriate).

<sup>30</sup> *Horton*, 690 F.2d at 484 (recognizing counsel's zeal and competence, even if questionable at outset, established through prosecution of appeal); *Boos v. AT&T, Inc.*, 252 F.R.D. 319, 323 (W.D. Tex. 2008) (determining counsel sufficiently adequate because previously represented class with virtually identical claim).

<sup>31</sup> *Horton*, 690 F.2d at 484 (verifying zeal and confidence of plaintiffs' counsel); *Longden*, 123 F.R.D. at 558 (finding counsel adequate despite dropping claims against some defendants because decision within counsel's discretion).

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy . . . .<sup>32</sup>

This Article focuses on the second of these three options: viz., class actions primarily seeking injunctive or declaratory relief and, even more tightly, on those actions in which the efficacy and desirability of the requested relief is a matter of debate amongst members of the putative class.<sup>33</sup>

### III. THE SCOPE OF RULE 23(B) CLASS ACTIONS

The textual simplicity of Rule 23(b)(2) belies its underlying complexity. Historically Rule 23(b)(2) was “designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons . . . .”<sup>34</sup> A paradigmatic case of this type might turn, for example, on a claim that a public facility unlawfully discriminated on the basis of race.<sup>35</sup> In such a case, it would likely be impossible to identify everyone who had actually suffered past injury, and the true aim of the suit would be to ensure future non-discriminatory access to the facility via injunctive or declaratory

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<sup>32</sup> FED. R. CIV. P. 23(b)(1), (2), (3). If the court determines that an action fulfills the requirements of all three subsections of Rule 23(b), it would most likely order that the suit be maintained as a class action under Rules 23(b)(1) and/or (b)(2) (rather than under (b)(3)): A mandatory class action is seen as preferable because there is no risk that individual members will opt out of the class and pursue separate litigation that might prejudice other class members or the defendant. MOORE ET AL., *supra* note 9, ¶ 23.40(3).

<sup>33</sup> See *infra* Part III.C (describing relevant factors for considering appropriateness of certifying Rule 23(b) class actions).

<sup>34</sup> NEWBERG, *supra* note 21, § 4:11; see *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 670 (Tex. 2004) (“The members of a (b)(2) class are generally bound together through ‘preexisting or continuing legal relationships’ or by some significant common traits such as race or gender.”) (quoting Comment, *Notice in Rule 23(b)(2) Class Actions for Monetary Relief: Johnson v. General Motors Corp.*, 128 U. PA. L. REV. 1236, 1252-53 (1980)).

<sup>35</sup> See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 219 (1971) (determining whether city council closed public pools in whole or in part to avoid desegregation); *Hernandez v. Woodard*, 714 F. Supp. 963, 970 (N.D. Ill. 1989) (considering unlawful discrimination claimed by African-American class when city closed public pools to avoid integration); *Willie v. Harris Cnty.*, 202 F. Supp. 549, 554-55 (S.D. Tex. 1962) (arguing county discriminated against African-American class by denying access to public park).

relief.<sup>36</sup> The language of the Rule is not, however, limited to claims of this sort, and much of the case law may be seen as (often conflicting) efforts to stake its bounds.<sup>37</sup>

According to a leading commentator, two forces have contributed to (b)(2)'s popularity and expansion.<sup>38</sup> First, the possibility of (often substantial) attorney's fees awards has encouraged counsel to "act as private attorneys general in advancing important public policy."<sup>39</sup> Second, many courts enlarged the conceptual scope of (b)(2) classes by allowing classes to seek monetary relief that is "ancillary" to the claimed injunctive or declaratory relief.<sup>40</sup> For these and perhaps other reasons, (b)(2) class actions are now the most commonly brought.<sup>41</sup> But this expansion in scope has come at an associated theoretical cost: namely, that there are very few (if any) bright-line rules to guide courts and litigants as they assess the certifiability of many contested class actions. This Article examines this problem and develops a few standard tools for separating certifiable sheep from uncertifiable goats.

As a threshold matter, we must pause to consider the United States Supreme Court's most recent pronouncements on the subject.<sup>42</sup> In *Wal-Mart Stores, Inc. v. Dukes*, the Court was called upon to consider whether a class action can be so large that it smothers typical notions of justice and due process of law.<sup>43</sup> Specifically, the case took up the question whether hundreds of thousands of female Wal-Mart employees could pursue a class-action discrimination suit.<sup>44</sup> As it stood after certification by the district court (and affirmance by the Ninth Circuit), the case was, according to the Supreme Court, "one of the most expansive class actions ever."<sup>45</sup> At the outset, the Court emphasized the unwieldy nature of the class by drawing attention to Wal-Mart's different store types, scores of national

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<sup>36</sup> See *Willie*, 202 F. Supp. at 554-55 (allowing class action based on racial discrimination despite Fourteenth Amendment protecting individual personal rights). The court reasoned that even though Fourteenth Amendment protections are individual, the park's segregation harmed an entire class of individuals and as such was a proper basis for a class action seeking injunctive relief to stop the discriminatory practices. *Id.*

<sup>37</sup> See NEWBERG, *supra* note 21, § 4:11 (noting claims can range from civil rights to environmental and other types of litigation).

<sup>38</sup> *Id.*; see also *id.* § 4:14.

<sup>39</sup> *Id.* § 4:11 & n.25; see also *id.* § 4:14.

<sup>40</sup> *Id.* § 4:11.

<sup>41</sup> *Id.*

<sup>42</sup> See *infra* notes 37-49 and accompanying text (analyzing *Wal-Mart Stores, Inc. v. Dukes* decision).

<sup>43</sup> See 131 S. Ct. 2541, 2547 (2011) (stating issue before Court).

<sup>44</sup> *Id.* at 2547.

<sup>45</sup> See *id.*

and regional divisions, thousands of stores, and over one million employees spread over many job classifications.<sup>46</sup> As a technical matter of procedure, the Court examined the record facts and the theories of recovery advanced within the framework of Rule 23(a) and (b)(2).<sup>47</sup>

The Court made two broad pronouncements.<sup>48</sup> First, the Court held that the named plaintiffs failed to raise even a single common question that was significant for purposes of Rule 23(a).<sup>49</sup> According to Justice Scalia, the plaintiffs had to show that every class member “suffered the same injury,” which entails claims that depend on a “common contention.”<sup>50</sup> “That common contention, moreover, 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.”<sup>51</sup> In the context of the *Dukes* case, the Court held that proof that one woman suffered discrimination would prove nothing as to the next, thus evincing a lack of commonality.<sup>52</sup> This holding—although hotly disputed on the facts—should not prove terribly controversial as a definitional statement because most courts and observers have always opined that a truly “common” question is one that, when answered for one class member, is answered for all.<sup>53</sup>

For purposes of our discussion, the Court’s unanimous holding that the *Dukes* plaintiffs’ claims could not be certified under (b)(2) is the more important, especially given the majority and concurring opinions’ differing approaches to the issues presented.<sup>54</sup> All the Justices agreed that a (b)(2) class cannot be certified where the plaintiffs seek monetary relief that is not purely incidental to the entry of an injunction or declaration.<sup>55</sup> This is so because (b)(2) “does not authorize class certification when each class

<sup>46</sup> See *id.* (noting Wal-Mart is largest private employer in U.S.).

<sup>47</sup> See *id.*, at 2548-50 (analyzing basis for court’s holding).

<sup>48</sup> See *infra* text accompanying notes 49-53 (announcing and explaining Court’s holding).

<sup>49</sup> Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551-52 (2011).

<sup>50</sup> *Id.* at 2551.

<sup>51</sup> *Id.*

<sup>52</sup> See *id.* at 2552 (“Without some glue holding the alleged *reasons* for [employment] decisions together, it will be impossible to say that examination of all of the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored?*”).

<sup>53</sup> See Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157-59 (1982) (finding no commonality where representative claimed intentional discrimination but class members claim disparate impact); NEWBERG, *supra* note 21, § 3:10-12 (considering common questions of law or fact requirements).

<sup>54</sup> See *Dukes*, 131 S. Ct. at 2555 (announcing majority holding); *id.* at 2565-67 (Ginsburg, J., concurring in part) (agreeing Rule 23(b)(2) certification improper).

<sup>55</sup> See *id.* at 2557-59 (majority) (holding claims for monetary relief may not be certified under Rule 23(b)); *id.* at 2561 (Ginsburg, J., concurring in part) (agreeing with majority’s certification denial because monetary relief not incidental to injunctive or declaratory relief).

member would be entitled to an individualized award of money damages.”<sup>56</sup> The open question, post-*Dukes*, is what level of commonality will be required in all class actions, including especially (b)(2) actions.<sup>57</sup>

As discussed below, some courts have required (b)(2) classes to be “cohesive,” which some have argued is akin to the “predominance” requirement of (b)(3).<sup>58</sup> The *Dukes* majority did not take this precise tack, but it did state that “[d]issimilarities within the proposed class” can “impede the generation of common answers.”<sup>59</sup> In so doing, according to Justice Ginsburg, the majority essentially smuggled (b)(3)’s predominance and superiority standards into (a)(2), which works as a practical matter to collapse all class actions into a common framework.<sup>60</sup> It thus remains to be seen whether the lower courts will all migrate to a fairly robust standard of commonality in all class actions and adopt some version of the cohesiveness test that we will soon examine.<sup>61</sup>

In addition to the matters of scope put to rest in *Dukes*, we must also consider matters of subject: viz., is a class action appropriate—or the most appropriate—method of resolving a particular dispute?<sup>62</sup> To that subject we now turn.

#### *A. Are There More Appropriate or Efficient Ways to Litigate the Claims Alleged?*

If efficiency is the conceptual hallmark of the class action device, then a court must consider at the outset whether any particular case is likely to serve those ends in light of all available options. There are, of course, myriad ways to define and measure “efficiency,” but one ready shorthand is an evaluation of litigation costs.<sup>63</sup> In other words, a court should ask

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<sup>56</sup> *Id.* at 2557 (majority).

<sup>57</sup> See *infra* Part III.C.2 (assessing level of commonality required before certification appropriate).

<sup>58</sup> See *infra* Part III.C.2 (discussing cohesion and conflicts among class members).

<sup>59</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131-32 (2009) (stressing importance of common answers, rather than common questions, in class certification)).

<sup>60</sup> *Id.* at 2566-67 (Ginsburg, J., dissenting in part) (noting “dissimilarities” inquiry developed in Rule 23(b)(3) context). Justice Ginsburg argues that the majority’s emphasis on dissimilarities within the proposed class “mimics” Rule 23(b)(3)’s predominance inquiry. *Id.* at 2566.

<sup>61</sup> See *infra* Part III.C.2 (discussing cohesiveness requirements to ensure no class antagonism).

<sup>62</sup> See *infra* Part II.A.1-2 (discussing appropriateness of proceeding as class action versus derivative action).

<sup>63</sup> See *Maddock v. KB Homes, Inc.*, 248 F.R.D. 229, 248 (C.D. Cal. 2007) (“A class action

whether (and the named plaintiff must show that) a class action would reduce litigation costs.<sup>64</sup> This evaluation should be made in light of other available options, two of which warrant detailed discussion.

### 1. Should the Case Be a Derivative Action?

Some (b)(2) class actions aim to modify corporate conduct or policies on behalf of shareholders.<sup>65</sup> A threshold question thus emerges: are the claims derivative or direct?<sup>66</sup> In a derivative action, a corporate shareholder sues on behalf of the corporation to redress a wrong committed against the corporation that the corporation's management has not pursued.<sup>67</sup> The gravamen of this type of claim is an alleged injury to the corporation that causes "derivative" injury to the suing shareholder and all other shareholders.<sup>68</sup> Thus, "the alleged injury must affect all the shareholders by virtue of their status as collective owners of the corporation."<sup>69</sup> Claims for waste or mismanagement provide a recurring example of this type of suit, especially given that one reason that a corporation would be unlikely to pursue such claims is that managers of the corporation necessarily participated in the alleged wrongdoing.<sup>70</sup>

If the claims are derivative, then a class action is at least arguably a disfavored approach because derivative actions exist, in significant part, to prevent "strike suits" and weed out spurious claims (which are sometimes brought by a corporate shareholder with a personal ax to grind or a political

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may be superior where 'class-wide litigation of common issues will reduce litigation costs and promote greater efficiency.')

 (quoting *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996)).

<sup>64</sup> See *Maddock*, 248 F.R.D. at 248 (requiring class proponent to demonstrate class action as superior method of adjudication). Many other courts have also held that the plaintiff carries the certification burden. See, e.g., *Fener v. Operating Eng'rs Constr. Indus. & Misc. Pension Fund*, 579 F.3d 401, 406 (5th Cir. 2009) (charging party seeking certification with burden of proof); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996) (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)) (same); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 693 (Tex. 2002) (considering whether plaintiffs have met certification burden).

<sup>65</sup> See *infra* text accompanying notes 120-27127.

<sup>66</sup> See *Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1461-62 (9th Cir. 1995) (addressing whether ERISA claim should be maintained as derivative suit or class action).

<sup>67</sup> See MOORE ET AL., *supra* note 9, ¶ 23.1.02 (defining derivative action).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1419-21 (9th Cir. 1995) (considering derivative action for gross mismanagement by defendant bank as brought by the bank's depositors); *In re Cray Inc.*, 431 F. Supp. 2d 1114, 1116-17 (W.D. Wash. 2006) (addressing derivative claims of gross mismanagement and waste brought by shareholders); see also MOORE ET AL., *supra* note 9, ¶ 23.1.02 (describing examples of derivative actions).

agenda to advance) before the corporation is put to the enormous expense of litigation, especially class litigation.<sup>71</sup> Accordingly, derivative rules typically require that the plaintiff—before suing derivatively—make demand on the corporation to sue directly, verify pleadings under oath, and plead certain aspects of its case with particularity.<sup>72</sup> These rules also provide for neutral investigation, respect for the business judgment of officers and directors, and fee shifting.<sup>73</sup> For example, a plaintiff might complain that a corporation's election procedures are flawed. A court's first order of business, then, would be to determine whether a class action or a derivative action best serves the ends of judicial and party economy.<sup>74</sup>

To answer this question, a court should look at the various (sometimes conflicting) tests that courts have developed to distinguish direct from derivative claims. For example, for a member of a corporate entity “to assert a direct action against a corporate fiduciary, she must have been injured ‘*directly or independently* of the corporation’ . . . . The test to distinguish between derivative and direct harm is whether the plaintiff suffered a ‘special injury.’”<sup>75</sup> Under this line of thinking, a plaintiff cannot show “special injury” when complaining of election procedures unless her “individual vote[] w[as] invalidated,” because “[t]he right to fair and reasonable election procedures inures to the benefit of all members, and . . . a director's interference with elections does not constitute a separate and distinct injury creating a right of direct action in an individual

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<sup>71</sup> See *Smith v. Ayres*, 977 F.2d 946, 949 (5th Cir. 1992) (stating derivative plaintiff must not have ulterior motives or advance personal agenda); see also MOORE ET AL., *supra* note 9, ¶ 23.1.05 (“The verification requirement was designed to discourage strike suits, in which complaints are filed without regard to their truth in order to coerce corporate managers to settle.”).

<sup>72</sup> There are two dimensions to these rules: one substantive, one procedural. The substantive aspects are usually found in state corporation laws. See, e.g., DEL. CH. CT. R. ANN. 23.1 (West 2010) (following for the most part FED. R. CIV. P. 23.1); TEX. BUS. ORG. CODE §§ 21.551-.563 (2010) (following MODEL BUS. CORP. ACT § 7.42 (2005)); *In re Schmitz*, 285 S.W.3d 451, 455-58 (Tex. 2009) (specifying what such a demand must include under Texas law). The procedural aspects are often contained in rules of civil procedure. See FED. R. CIV. P. 23.1 (describing procedural prerequisites and pleading requirements of derivative actions).

<sup>73</sup> See TEX. BUS. ORG. CODE §§ 21.551-563 (setting forth standards for derivative suits).

<sup>74</sup> Compare *Wixon v. Wyndam Resort Dev. Co.*, No. C 07-02361-JSW, 2008 WL 1777494, at \*3 (N.D. Cal. Apr. 18, 2008) (concluding claims based on “actions to manipulate the election process” are derivative, not direct), with *Lapidus v. Hecht*, 232 F.3d 679, 683 (9th Cir. 2000) (finding standing to assert individual claims where shareholder alleges conduct harming contractual voting rights), and *In re Gaylord Container Corp. S'holders Litig.*, 753 A.2d 462, 486 n.84 (Del. Ch. 2000) (finding directors' defensive takeover measures reasonable because court previously granted certification on complaint's alleged facts).

<sup>75</sup> *Paskowitz v. Wohlstadter*, 822 A.2d 1272, 1277 (Md. Ct. Spec. App. 2003) (citations omitted) (quoting *Kramer v. W. Pac. Indus.*, 546 A.2d 348, 352 (Del. 1988)).

member.”<sup>76</sup> Indeed, a plaintiff in such a case lacks “standing to assert a direct action on behalf of [others].”<sup>77</sup>

## 2. Is a Class Action Necessary?

At least in theory, a declaratory judgment or injunction action by a single plaintiff could achieve the same result as a class action. And since the class device necessarily adds a layer of complexity and associated cost to any action, a court should at least consider whether a class action is indeed necessary.<sup>78</sup> For example, if a plaintiff seeks broad, absolute injunctive relief that affects numerous individuals, then certification of a class may be of little practical import.<sup>79</sup> Suppose a plaintiff sues to block construction of a road through a swamp because it will interfere with his ability to fish. If the plaintiff’s suit is successful and the road is never built, then not only he but all other fishermen will benefit, with or without certification of a class. (But, as we’ll see in a minute, the matter becomes rather more complicated when the number of competing interests begins to multiply.)

In analyzing whether certification is needed on the facts of any given case, the answers to several questions should guide the decision. First, would a declaration or an injunction obtained by a single plaintiff accrue to the benefit of all putative class members? This would seem to be the case whenever the challenged conduct is that of a government agency

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<sup>76</sup> *Dunn v. Ceccarelli*, 489 S.E.2d 563, 566-67 (Ga. Ct. App. 1997).

<sup>77</sup> *Id.* Another way to articulate this distinction is with resort to the “internal affairs” doctrine—i.e., claims that relate solely to the internal affairs of a corporation are derivative, not direct. See *Bagdon v. Bridgestone/Firestone*, 916 F.2d 379, 383-84 (7th Cir. 1990) (applying internal affairs doctrine and finding claims derivative, not direct); see also 28 U.S.C. § 1332 (d)(9)(B) (2006) (excluding certain “internal affairs” cases from Class Action Fairness Act’s expanded jurisdiction).

<sup>78</sup> See, e.g., *Ali v. Quarterman*, No. 9:09-CV-52, 2009 WL 1586691, at \*1 (E.D. Tex. June 4, 2009) (justifying case closing because injunctive relief in pending non-class action would provide same remedy); *Access Now Inc. v. Walt Disney World Co.*, 211 F.R.D. 452, 455 (M.D. Fla. 2001) (finding “complexity and expense” of class action unnecessary when injunctive relief would provide same remedy); *Fairley v. Forrest Cnty., Miss.*, 814 F. Supp. 1327, 1329-30 (S.D. Miss. 1993) (determining class action unnecessary because declaratory and injunctive relief would have same effect); see also *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974) (“Even with the denial of class action status, the requested injunctive and declaratory relief will benefit not only the individual appellants . . . but all other persons subject to the practice under attack.”). But see *Dominguez v. Schwarzenegger*, 270 F.R.D. 477, 485 n.6 (N.D. Cal. 2010) (noting class certification not improper simply because injunctive relief provides same remedy).

<sup>79</sup> See Bryant G. Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 *Nw. U. L. Rev.* 492, 499 (1982) (“One person represented by a private attorney may seek broad injunctive relief affecting numerous individuals and the public interest.”).

involving, for instance, a general policy or criteria for qualifying for a benefit.<sup>80</sup> Second, will the defendant agree to comply with any judgment for declaratory or injunctive relief? Here again, the matter seems relatively straightforward with respect to a government agency or other stable organization.<sup>81</sup> Third, would a declaration or injunction by itself fully resolve the matter and provide full relief, or would matters inevitably require individual attention? For instance, a single-plaintiff declaration that a policy is illegal might resolve that matter in theory and on a going-forward basis, but if full relief would require ancillary disgorgement or restitution on a case-by-case basis, then the balance might well tip in favor of certification.<sup>82</sup>

The answers to several other questions may also weigh in the balance. Would collateral estoppel preclude a defendant from contesting the facts established in an individual action?<sup>83</sup> If so, the importance of the binding effect of a class-wide judgment will be diminished. Would a single plaintiff be able to recover her attorney's fees? (Some declaratory judgment acts provide for the award of attorneys' fees to a successful movant.)<sup>84</sup> Is the class action lawyer driven, with the recovery of attorney's fees as the principal object of the case?<sup>85</sup> Finally, is the delay

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<sup>80</sup> See *Lincoln Cercpac v. Health & Hosps. Corp.*, 920 F. Supp. 488, 493 (S.D.N.Y. 1996) (denying class certification deemed superfluous in action against government agency); *Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Social & Rehab. Servs.*, 822 F. Supp. 687, 689 (D. Kan. 1993) (declaring class certification unnecessary because invalidation of Medicaid reimbursement plan benefits all proposed class members); see also NEWBERG, *supra* note 21, § 4:19 (describing cases where courts have denied Rule 23(b)(2) certification because class action unnecessary).

<sup>81</sup> See *Ruiz v. Blum*, 549 F. Supp. 871, 878 (S.D.N.Y. 1982) (stating certification unnecessary where court assumes public officials would apply determination to all persons equally); see also *Johnson v. City of Opelousas*, 658 F.2d 1065, 1070 n.5 (5th Cir. 1981) (noting circuit split as to whether a "need" standard exists in determining class certification); NEWBERG, *supra* note 21, § 4:19 (discussing need for class action for Rule 23(b)(2) certification). But see *Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth.*, 239 F.R.D. 9, 23-24 (D.D.C. 2006) (noting no "necessity" requirement exists under Rule 23); 7A WRIGHT, MILLER & KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1785.2 (3d ed. 2006) (discussing doctrine).

<sup>82</sup> See *Nehmer v. U.S. Veterans' Admin.*, 118 F.R.D. 113, 119-20 (N.D. Cal. 1987) (stating certification needed so class members could obtain benefits previously denied under challenged policy); see also NEWBERG, *supra* note 21, § 4:19 (describing circumstances favoring Rule 23(b)(2) class certification).

<sup>83</sup> See NEWBERG, *supra* note 21, § 4:29 (noting the use of offensive collateral estoppel without mutuality of parties has affected certification determinations).

<sup>84</sup> See TEX. CIV. PRAC. & REM. CODE § 37.009 (2010) (demonstrating declaratory judgment that allows award of attorney's fees to successful movants).

<sup>85</sup> See *In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1122 (8th Cir. 2005) (determining class action seeking medical monitoring inappropriate if driven by lawyer's desire for larger fee); *Bilodeau v. Webb*, 170 S.W.3d 904, 915 (Tex. Ct. App. 2005) ("Generally, conflicts of interest in class actions arise amidst concerns that class counsel has been tempted to further its own interest in securing exorbitant fees as against the interests of the class members." (citing *Gen. Motors*)).

and additional expense associated with the class device worthwhile?<sup>86</sup> None of these questions should be considered as a way to determine the outcome in every case, but they are nonetheless valuable heuristics.

*B. Is the Subject Matter of the Case Appropriate for Litigation at All?*

Even in cases not involving the government, some institutional disputes have an obvious air of “politics” about them. Indeed, the “business judgment rule” tacitly recognizes this fact and, accordingly, bars judicial inquiry into the good-faith acts of corporate directors.<sup>87</sup> There are no bright lines to be drawn here, but the following sections aim to lay out a few markers to help courts steer clear of cases that are not really justiciable, as well as those that—though over the justiciability line—give rise to so many conflicts amongst members of the putative class that certification is inappropriate.<sup>88</sup>

*C. Is a Mandatory Class Appropriate on the Facts Alleged?*

Even if a court determines that an action is appropriate for litigation and need not be adjudicated individually or derivatively, further inquiry is needed to determine whether certification is appropriate.<sup>89</sup> Two questions typically emerge. First, is the defendant’s conduct “generally applicable” to all members of the putative class?<sup>90</sup> Second, is there

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Corp. v. Bloyed, 916 S.W.2d 949, 953 (Tex. 1996))).

<sup>86</sup> See NEWBERG, *supra* note 21, § 5.1 (“Whether it is advantageous for the plaintiff to go the class action route or for the defendant to oppose certification in a suit filed against it, depends on the facts and circumstances of the case . . .”). Apart from the delay and expense associated with the class procedure itself, many procedural rules provide for interlocutory appeals and (sometimes) mandatory stays of the entire litigation. See FED. R. CIV. P. 23(f) (permitting appeal of an order granting or denying class action certification); TEX. CIV. PRAC. & REM. CODE § 51.014(b) (allowing stay of trial’s commencement pending resolution of appeal).

<sup>87</sup> Zapata Corp. v. Maldonado, 430 A.2d 779, 782 (Del. 1981) (stating business judgment rule “presumes propriety . . . in a board’s decision” once decision has been made). Although not of course directly applicable, the “political-question” doctrine is at least roughly analogous. See *id.* Under that doctrine a court will find no justiciable controversy if it cannot make a decision without making a policy choice of a sort that is clearly within the discretion of another government branch. See generally *Flast v. Cohen*, 392 U.S. 83, 95-100 (1968) (discussing history of the doctrine of nonjusticiable political questions).

<sup>88</sup> See *infra* Part III.C.1-5 (analyzing factors that suggest conflict amongst class members).

<sup>89</sup> See *infra* notes 90-91 and accompanying text (explaining questions that arise in inquiry of whether certification appropriate).

<sup>90</sup> See *Heastie v. Cmty. Bank of Greater Peoria*, 125 F.R.D. 669, 679-80 (N.D. Ill. 1989) (concluding class certification appropriate where all class members signed loan documents with same clause); see also MOORE ET AL., *supra* note 9, ¶ 23.43[2][a] (outlining three-part certification test).

“adversity” amongst members of the putative class and, if so, is that a good reason to deny certification?<sup>91</sup> The first of these questions is relatively easy to resolve, but the second presents some of the most nettlesome difficulties in all of complex litigation. We now take these questions in turn, with particular attention to the second.

### 1. Is the Defendant’s Conduct “Generally Applicable” to the Class?

The “generally applicable” standard assures that a plaintiff with a particularized grievance or individualized claim for relief cannot successfully invoke the class device as a litigation tactic.<sup>92</sup> This does not mean, however, that a defendant’s acts must be directed at each member of the class; rather, the issue is whether those acts similarly affected each member of the class.<sup>93</sup> A somewhat tougher question arises when not all members of the class have been harmed by the conduct alleged. One can easily find decisions on either side of the issue.<sup>94</sup> There are, nonetheless, two commonsense limitations to help maintain order here: one qualitative, and one quantitative. First, if all members of the class have suffered metaphysical injury (even if they have suffered no actual damages), then the class may be certifiable. An example of this would be an “access” case like *Arnold v. United Artists Theatre Circuit, Inc.*,<sup>95</sup> in which the named plaintiffs sued a theater chain for violating the California Disabled Persons Act.<sup>96</sup> In *Arnold*, the court certified the class even though the class

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<sup>91</sup> See *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997) (stating certification improper where named plaintiffs challenged policy that some class members might approve); see also *MOORE ET AL.*, *supra* note 9, ¶ 23.25[2][b][i] (explaining identical interest of class representative and class not required).

<sup>92</sup> See FED. R. CIV. P. 23(b)(2) (“[T]he party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”).

<sup>93</sup> See *Boles v. Earl*, 601 F. Supp. 737, 745 (W.D. Wis. 1985) (certifying class despite potential conflicts because alleged government conduct affected all class members); see also *MOORE ET AL.*, *supra* note 9, ¶ 23.43[2][a] (explaining defendant’s conduct must generally apply to all class members).

<sup>94</sup> Compare *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) (certifying narrowly-defined class despite inevitable possibility some members not harmed by defendant’s conduct), and *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 454-55 (N.D. Cal. 1994) (certifying class seeking handicap-accessible theaters even though members did not seek access to all theaters), with *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 1504 (U.S. 2010) (“[A] class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant.”), and *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (denying certification of consumer-fraud class comprising all product purchasers regardless of whether deceived).

<sup>95</sup> 158 F.R.D. 439 (N.D. Cal. 1994).

<sup>96</sup> *Id.* at 443.

definition was not limited to patrons of the chain and, thus, contained many members who had no injury.<sup>97</sup> This fact would not seem to work any great mischief because someone who was not a current patron might be one in the future and, in any event, the cost of compliance with respect to unharmed class members would be de minimis, probably nil.<sup>98</sup> And even in a case involving some equitable monetary relief (e.g., disgorgement, restitution), the presence of some class members who could show no loss in a suit for damages (because of, for example, prior recovery from a third party), should prove no obstacle in the certification and liability phases of the case, assuming that these members are entitled to declaratory and injunctive relief.<sup>99</sup>

Second, and more problematic, are cases in which the class contains a large percentage of members who have suffered neither injury nor damages (or who cannot be determined ab initio to have suffered injury and damages). Commentators have identified at least three variations on this theme.<sup>100</sup> First, there is the “overbroad” class, which is a class including members who would lack standing to sue on an individual basis.<sup>101</sup> Second, there is the “difficult-to-identify” class, which is a class

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<sup>97</sup> See *id.* at 443. This raises the question of whether a case of this type would be equally well served by a single plaintiff seeking injunctive or declaratory relief. See *Access Now Inc. v. Walt Disney World Co.*, 211 F.R.D. 452, 455 (M.D. Fla. 2001) (finding class certification unnecessary where injunction would provide same relief to all similarly situated persons); *Fairley v. Forrest Cnty., Miss.*, 814 F. Supp. 1327, 1329-30 (S.D. Miss. 1993) (determining class action unnecessary because declaratory and injunctive relief would have same effect); see also discussion and sources cited *supra* Part III.A.2 (discussing whether class certification necessary when injunction provides same remedy). In fact, the *Arnold* court openly acknowledged the “extraordinary degree of homogeneity” encountered in dealing with this type of suit involving a common pattern of discrimination. 158 F.R.D. at 452.

<sup>98</sup> See *Arnold*, 158 F.R.D. at 455 (“[P]laintiffs’ ADA claims challenge the same specific design features at defendant’s various theaters . . .”). Because the theaters shared common design elements, the court found it irrelevant that some class members did not suffer harm at a particular theater. *Id.*

<sup>99</sup> See *George v. Kraft Foods Global, Inc.*, 251 F.R.D. 338, 353 (N.D. Ill. 2008) (stating restitution resulting from breach of fiduciary duty does not prevent certification because relief equitable); *Williams v. Empire Funding Corp.*, 183 F.R.D. 428, 436 (E.D. Pa. 1998) (certifying declaratory and injunctive relief despite eligibility of some members for individual statutory relief); see also NEWBERG, *supra* note 21, § 2:4 (discussing standing to sue as class action).

<sup>100</sup> See generally John H. Beisner et al., *Courts Search for Class Certification “Fail Safe” Factor*, NAT’L L. J., Apr. 4, 2011, available at [http://www.skadden.com/content/Publications/Publications2387\\_0.pdf](http://www.skadden.com/content/Publications/Publications2387_0.pdf) (explaining types of class actions where large percentage of members suffer no injury or damages).

<sup>101</sup> See *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513-14 (7th Cir. 2006) (denying certification because consumer fraud class included all product purchasers including those not allegedly deceived); *In re McDonald’s French Fries Litig.*, 257 F.R.D. 669, 671-72 (N.D. Ill. 2009) (holding consumer fraud class overbroad because included all purchasers regardless of exposure to misrepresentations). But see *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) (“While it is almost inevitable that a class will include some people who have not been injured by

defined with reference to an act or state of mind of each putative class member.<sup>102</sup> Finally, there is the “fail-safe” class, which is a class defined with reference to a legal conclusion.<sup>103</sup> There are many ways to analyze these scenarios, but—for purposes of our discussion of Rule 23(b)(2)—the common thread is that each is an instance in which there may be no rule-required “conduct generally applicable to the class.”<sup>104</sup>

## 2. There Are Conflicts Among the Class and, Therefore, It Fails for Lack of Cohesiveness

As noted above, the *Dukes* Court articulated a rigorous standard of “commonality” that is designed to assure that “common” questions are truly so in the sense of generating common answers to legally significant questions.<sup>105</sup> At some level of generality, there is a conceptual overlap between this standard and the idea that a (b)(2) class should be “cohesive.” An important aspect of the cohesiveness inquiry has been to insure not just commonality of questions and answers, but also that the interests of the putative class members are not adverse to each other or to those of the named plaintiffs.<sup>106</sup> In *Amchem Products, Inc. v. Windsor*,<sup>107</sup> the Supreme Court opined that a class should be “sufficiently cohesive to warrant

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the defendant’s conduct . . . this possibility does not preclude class certification.”). The issue here seems to be quantitative: the *Pella* court seemed unconcerned because the class definitions in that case did not “include a great many people who have suffered no injury.” *Id.*; see also Beisner et al., *supra* note 100 (discussing different damages among class members).

<sup>102</sup> See *Oshana v. Coca-Cola Bottling Co.*, 225 F.R.D. 575, 580-81 (N.D. Ill. 2005) (denying certification because class members would have to know when they purchased item at issue); see also Beisner et al., *supra* note 100 (recognizing possible particularity among damages).

<sup>103</sup> See *Campbell v. First Am. Title Ins. Co.*, 269 F.R.D. 68, 73 (D. Me. 2010) (“[Proposed class definition] is problematic because it creates a ‘fail-safe class,’ which ‘impermissibly determines membership based upon a determination of liability.’” (quoting *Lewis v. First Am. Title Ins. Co.*, 265 F.R.D. 536, 551 (D. Idaho 2010))); *Kamar v. RadioShack Corp.*, No. 09-55674, 2010 WL 1473877, at \*1 (9th Cir. Apr. 14, 2010) (“The fail-safe appellation is simply a way of labeling the obvious problems that exist when the class itself is defined in a way that precludes membership unless the liability of the defendant is established.”); *Brazil v. Dell Inc.*, 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008) (denying certification of purchasers of “falsely advertised” products because class membership dependent on defendant’s liability). Words in the class definition such as “wrongfully,” “negligently,” or “illegally” signal the presence of a fail-safe class. See Beisner et al., *supra* note 100 (providing further examples). This tactic is disapproved because one does not know who is in the class until after a merits determination. *Id.* Thus, if the defendant prevails, no one is in the class and no one is bound by the judgment, which completely undermines the efficiencies associated with the class device. *Id.*

<sup>104</sup> See FED. R. CIV. P. 23(b)(2) (stating requirements for class certification).

<sup>105</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548-52 (2011); see also *supra* notes 49-57 and accompanying text (discussing commonality requirement).

<sup>106</sup> See *infra* notes 112-16 and accompanying text (describing cohesiveness analysis).

<sup>107</sup> 521 U.S. 591 (1997).

adjudication by representation.”<sup>108</sup> Although the Court made this pronouncement in connection with a discussion of Rule 23(b)(3)’s predominance requirement, many courts apply the cohesiveness criterion to (b)(2) classes.<sup>109</sup> As the Eighth Circuit, for example, has stated, “[a]lthough Rule 23(b)(2) contains no predominance or superiority requirements, class claims thereunder must still be cohesive.”<sup>110</sup> Other courts have questioned this standard, noting that courts demanding cohesiveness have “[i]n effect . . . imported the (b)(3) predominance requirement into the (b)(2) realm, despite the fact that the Rule itself contains no such language.”<sup>111</sup> At the end of the day, this intercourt dispute may amount to nothing more than a disagreement over nomenclature. Here’s why.

One need look no further than the text of Rule 23(b)(2) to confirm that it does not use the “questions of law or fact common to class members predominate” terminology employed in Rule 23(b)(3).<sup>112</sup> But just as clearly, Rule 23(b)(2) requires that (1) the defendant has “acted . . . on grounds that apply generally to the class,” (2) “so that final injunctive relief . . . is appropriate” (3) “respecting the class as a whole.”<sup>113</sup> And as one court has explicitly conceded, “[t]his three part-inquiry will often look similar to a ‘cohesiveness’ determination . . . .”<sup>114</sup> Two lessons emerge

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<sup>108</sup> *Id.* at 623.

<sup>109</sup> *See, e.g.,* Romberio v. Unumprovident Corp., 385 Fed. App’x 423, 433 (6th Cir. 2009) (noting “well-recognized rule that Rule 23(b)(2) classes must be *cohesive*”); Lemon v. Int’l Union of Operating Eng’rs, 216 F.3d 577, 580 (7th Cir. 2000) (“Rule 23(b)(2) operates under the presumption that the interests of the class members are cohesive and homogeneous . . . .”); Barnes v. Am. Tobacco Co., 161 F.3d 127, 143 (3d Cir. 1998) (“While 23(b)(2) class actions have no predominance or superiority requirements, it is well established that the class claims must be cohesive.”).

<sup>110</sup> *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005); *see also* Thompson v. Am. Tobacco Co., 189 F.R.D. 544, 557 (D. Minn. 1999) (“Rule 23(b)(2) includes an implicit ‘cohesiveness’ requirement, which precludes certification when individual issues abound.”); sources cited *supra* note 109 (discussing Rule 23(b)(2)’s cohesive requirement).

<sup>111</sup> *Donovan v. Philip Morris USA, Inc.*, 268 F.R.D. 1, 11 (D. Mass. 2010); *see also* Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998) (“Although common issues must predominate for class certification under Rule 23(b)(3), no such requirement exists under 23(b)(2).”); Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972) (“[T]he existence of ‘predominating’ questions and the availability of other methods of resolution which might be superior to a class action are not criteria of a subdivision (b)(2) class, but again of a (b)(3) class . . . .”); Davis v. Homecomings Fin., No. C05-1466RSL, 2006 WL 2927702, at \*7 (W.D. Wash. Oct. 10, 2006) (“[T]he Ninth Circuit has never held that ‘cohesiveness’ is required for a Rule 23(b)(2) class. The inquiry is not whether common issues predominate but whether defendant has acted on grounds generally applicable to the class.”).

<sup>112</sup> Compare FED. R. CIV. P. 23(b)(2), with FED. R. CIV. P. 23(b)(3) (text available *supra* Part II).

<sup>113</sup> FED. R. CIV. P. 23(b)(2).

<sup>114</sup> *Donovan*, 268 F.R.D. at 12 n.5.

here. First, no matter what test is used, a putative class may not be certified if the members are so disparately situated that injunctive relief would need to be customized to the needs of individual members.<sup>115</sup> Second, even if an injunction would apply across the board, genuine adversity among members of the class will defeat certification under an “adequacy” analysis—i.e., without resort to a vigorous formulation of “cohesiveness.”<sup>116</sup>

### 3. Is the Principal Dispute “Political”?

Although much class-action litigation is brought in good faith to achieve salutary ends, sometimes litigation is brought by a litigant attempting to force a personal preference on an organization and—by virtue of the class device—on all others similarly situated to him.<sup>117</sup> In this type of case there is neither a clean legal issue (i.e., an issue in which the question of whether some members of the class oppose the litigation is irrelevant, as in a civil rights case) nor an ultimate fact of the matter (i.e., as in a case in which members of the class have differing opinions as to whether the litigation will confer benefits or cause harm). There are myriad factual situations that could give rise to a case of this sort, but there are at least two familiar patterns. In the first, a corporate shareholder challenges a corporate decision (often a decision to merge or sell or acquire assets).<sup>118</sup> In the second, a plaintiff challenges the acts of an institutional body (e.g., a decision of a school board).<sup>119</sup>

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<sup>115</sup> See *supra* Part III.C.1 (discussing need for defendant’s conduct to apply generally to class); see also *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (requiring common answers among class members).

<sup>116</sup> See *supra* notes 24-28 and accompanying text (discussing adequacy requirement of class certification and focus on both counsel and class representative). Some courts do require a rigorous analysis of cohesiveness and a predicate “assumption of homogeneity.” See *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 670 (Tex. 2004). Or, put differently, they require a “common concern” among members of the proposed class. See *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 747 (7th Cir. 2008).

<sup>117</sup> See *Issen v. GSC Enters., Inc.*, 508 F. Supp. 1278, 1282 (N.D. Ill. 1981) (considering pleading of two individual shareholders for declaratory, injunctive, and monetary relief from defendants); *Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist.*, 474 F. Supp. 387, 393 (E.D.N.Y. 1979) (filing suit by only some parents and students opposing restrictions).

<sup>118</sup> See *infra* note 127 (discussing several cases of corporate decision where class certification denied).

<sup>119</sup> See *Boucher v. Syracuse Univ.*, 164 F.3d 113, 116 (2d Cir. 1999) (affirming denial of female athletes’ class because of inherent conflicts between lacrosse and softball interests); *Pico*, 474 F. Supp. at 393 (finding potential different interests concerning book restrictions between some students and majority of parents).

In *Issen v. GSC Enterprises, Inc.*,<sup>120</sup> a minority shareholder sued a host of defendants for alleged securities violations committed in the course of a “going private” merger.<sup>121</sup> The threshold question in this case asked whether the plaintiff’s claims were derivative or direct.<sup>122</sup> The court found that—because the plaintiff claimed constructively to have sold his shares (he did this so as to have standing to sue as a “seller” of securities under Section 10 of the Securities Exchange Act)—he was not a “shareholder” entitled to sue derivatively.<sup>123</sup> But he fared no better with respect to the putative class, which the court declined to certify.<sup>124</sup> To reach its decision, the court balanced, on the one hand, the plaintiff’s requested relief (rescission) against, on the other hand, the fact that over 80% of the putative class members had exchanged their shares under the terms of the merger.<sup>125</sup> Thus, although recognizing “the strong policy favoring class actions in securities fraud cases,” the court found that the named plaintiff’s claim was not typical and that his interests did not “coincide with the bulk of his proposed class as required by one arm of the adequacy of representation requirement embodied in Rule 23(a)(4).”<sup>126</sup> The fatal flaw, according to the court, was that the named plaintiff’s preference for rescission was not universal: “It is unlikely that those minority shareholders who tendered their shares nearly three years ago would now want to rescind the merger and resume their position as minority shareholders of [the merged corporation].”<sup>127</sup>

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<sup>120</sup> 508 F. Supp. 1278 (N.D. Ill. 1981).

<sup>121</sup> See *id.* at 1282 (noting merger type allows payment of minority shareholders without opportunity to vote on merger).

<sup>122</sup> *Id.* at 1295-96 (stating issue before the court).

<sup>123</sup> *Id.* at 1295.

<sup>124</sup> *Id.* at 1296.

<sup>125</sup> *Issen*, 508 F. Supp. at 1296.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* Many other courts have denied certification in this type of situation. See, e.g., *Birnberg v. Milk St. Residential Assoc. Ltd. P’ship*, No. 02 V 0978, 2003 WL 21995177, at \*2 (N.D. Ill. Aug. 20, 2003) (denying certification to rescind sold shares since two-thirds of partners “might not wish [transaction] undone”); *Hastings-Murtagh v. Tex. Air Corp.*, 119 F.R.D. 450, 458 (S.D. Fla. 1988) (“[I]n cases of minority stockholders challenging a consummated merger, conflicts among tendering and nontendering shareholders are commonplace . . . [and] center around the requested remedies.”); *Kas v. Fin. Gen. Bankshares, Inc.*, 105 F.R.D. 453, 462-63 (D.D.C. 1985) (denying certification based on adequacy because many proposed class members “may” not want merger voided); *Weisfeld v. Spartans Indus., Inc.*, 58 F.R.D. 570, 581-82 (S.D.N.Y. 1972) (describing conflict between plaintiff seeking merger rescission and class members who no longer hold shares); *Guttmann v. Braemer*, 51 F.R.D. 537, 538-39 (S.D.N.Y. 1970) (denying certification where potential disagreement among class members whether rescission proper form of relief); *Maynard, Merel & Co. v. Carcioppolo*, 51 F.R.D. 273, 277-78 (S.D.N.Y. 1970) (denying certification because plaintiff’s injury differed from class members who would disapprove of merger rescission); *Pomierski v. W. R. Grace & Co.*, 282 F. Supp. 385,

*Pico v. Board of Education, Island Trees Union Free School District No. 26*<sup>128</sup> presents an example of the second sort: i.e., one growing out of a clash of belief systems and attendant preferences.<sup>129</sup> The case arose after a self-identified “conservative” school board directed the district’s superintendent to remove a number of “objectionable” books from the district’s libraries.<sup>130</sup> The school board ultimately conceded that the books were not obscene, but rather, that they were “in bad taste.”<sup>131</sup> Setting aside the *substantive* issue of how far school boards and administrators may go in restricting student speech and access to library works without running afoul of the First Amendment (an issue that continues to bedevil courts to this day),<sup>132</sup> the *procedural* issue is whether a class can be certified where members of the class have differing views as to whether something is “vulgar, immoral, and in bad taste.”<sup>133</sup> In the face of “reason to believe” that the named plaintiffs and at least some members of the putative class sharply disagreed whether the school district should restrict access to the subject books, the court held that the named plaintiffs’ claims were not typical and that, therefore, certification was not appropriate.<sup>134</sup>

#### 4. Is Injunctive or Declaratory Relief Appropriate?

A court must also ask at the threshold whether the asserted claims are amenable to injunctive or declaratory relief. That is, is the named plaintiff complaining about something reasonably specific and, if so, can an injunction be crafted that would satisfy the requirement of Rule 65(d) that

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392 (N.D. Ill. 1967) (finding named plaintiff’s interest antagonistic because many class members would not want deal undone).

<sup>128</sup> 474 F. Supp. 387 (E.D.N.Y. 1979), *rev’d on other grounds*, 638 F.2d 404 (2d Cir. 1980).

<sup>129</sup> *See id.* at 389-91 (describing dispute underlying case).

<sup>130</sup> *Id.* at 389-92 (noting school board identified itself as “conservative”). The “objectionable” books included: (1) *Slaughterhouse Five* (Kurt Vonnegut, Jr.); (2) *The Naked Ape* (Desmond Morris); (3) *Down These Mean Streets* (Piri Thomas); (4) *Best Short Stories by Negro Writers* (Langston Hughes, ed.); (5) *Go Ask Alice* (Anonymous); (6) *Laughing Boy* (Oliver La Farge); (7) *Black Boy* (Richard Wright); (8) *A Hero Ain’t Nothing But a Sandwich* (Alice Childress); (9) *Soul on Ice* (Eldridge Cleaver); (10) *A Reader for Writers* (Jerome Archer, ed.); and (11) *The Fixer* (Bernard Malamud). *Id.* at 391 n.6 (listing books removed from library at school board’s direction).

<sup>131</sup> *Id.* at 392.

<sup>132</sup> *See Morse v. Frederick*, 551 U.S. 393, 410 (2007) (holding school administrator could discipline student for displaying “Bong Hits for Jesus” banner). The Court reached the decision in a 5-4 vote. *Id.* at 395.

<sup>133</sup> *Pico*, 474 F. Supp. at 392 (stating issue before court).

<sup>134</sup> *Id.* at 393. The court also held that a class action was unnecessary. *Id.* (“A disposition either way would be as effective without the procedural complexities that attend class certification.”); *see supra* Part III.A.2 (considering necessity of class actions).

every injunction “state its terms specifically; and describe in reasonable detail . . . the acts restrained or required[?]”<sup>135</sup> If the answer is not an unequivocal “yes,” this may signal the presence of a class that is not cohesive and that may be brimming with different or competing (even if not directly adverse) interests. *Shook v. Board of County Commissioners (Shook II)*<sup>136</sup> serves as a good example. In this case, the named plaintiffs brought an Eighth Amendment challenge against a county jail, alleging that the conditions there with respect to prisoners with mental health issues constituted cruel and unusual punishment.<sup>137</sup> The district court held that the plaintiffs had not carried their burden to show that the defendants had acted on grounds generally applicable to the class so as to make declaratory and injunctive relief appropriate.<sup>138</sup> Particularly, “the district court noted the factual differences between the individual named plaintiffs’ situations, suggesting that because some plaintiffs were asserting claims for denial of medication, some for lack of supervision, and others for use of excessive force, there was no simple policy or procedure to which all were subject.”<sup>139</sup> The Tenth Circuit was thus called upon to decide whether the factual differences did indeed weigh against certification.<sup>140</sup>

To answer this question, the court approached from a “cohesiveness” angle, opining that

[C]ohesiveness has at least two aspects. First, the class must be sufficiently cohesive that any classwide injunctive relief can satisfy the limitations of Federal Rule Civil Procedure 65(d)—namely, the requirement that it “state its terms specifically; and describe in reasonable detail . . . the act or acts restrained or required.” Second, “[a] class action may not be certified under Rule 23(b)(2) if relief specifically tailored to each class member would be necessary to correct the allegedly wrongful conduct of the defendant.”<sup>141</sup>

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<sup>135</sup> See FED. R. CIV. P. 65(d)(1)(B)-(C). Subsections (a) & (b) of Rule 65 grant the court power to impose preliminary injunctions after notice and hearing or ex parte temporary injunctions. *Id.* Subsection (d) details the required contents and permitted scope of injunctions or restraining orders issued under subsections (a) or (b). *Id.*

<sup>136</sup> 543 F.3d 597 (10th Cir. 2008).

<sup>137</sup> *Id.* at 602 (stating details of class action brought before district court).

<sup>138</sup> *Id.* (announcing district court’s denial of class certification).

<sup>139</sup> *Id.* at 602-03.

<sup>140</sup> *Id.* at 603 (stating issue before appeals court).

<sup>141</sup> *Shook II*, 543 F.3d at 604 (quoting *Monreal v. Potter*, 367 F.3d 1224, 1236 (10th Cir. 2004); *MOORE ET AL.*, *supra* note 9 ¶ 23.43(2)(b)).

So, the court concluded, “if redressing the class members’ injuries requires time-consuming inquiry into individual circumstances or characteristics of class members or groups of class members, ‘the suit could become unmanageable and little value would be gained in proceeding as a class action.’”<sup>142</sup> Indeed, “individual issues cannot be avoided simply by formulating an injunction at a stratospheric level of abstraction; as we have explained before, ‘injunctions simply requiring the defendant to obey the law are too vague to satisfy Rule 65.’”<sup>143</sup> Cast in these terms, “under Rule 23(b)(2) the class members’ injuries must be sufficiently similar that they can be addressed in an single injunction that need not differentiate between class members.”<sup>144</sup>

The Tenth Circuit held that the district court could “reasonably conclude that the class failed to satisfy Rule 23(b)(2).”<sup>145</sup> Specifically, the district court correctly identified that much of the relief sought by the plaintiffs would not be applicable to all class members.<sup>146</sup> This difficulty was not an anomaly. Many of plaintiffs’ claims either required “downstream,” individualized evidence or attempted to impose a standard

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<sup>142</sup> *Id.* (quoting *Shook v. El Paso Cnty. (Shook I)*, 386 F.3d 963, 973 (10th Cir. 2004) (noting cases lack cohesiveness when redressing injury requires time-consuming inquiry into individual class members). Additionally, the Tenth Circuit stated, that “it is precisely these types of manageability issues—relating to the district court’s ability to provide injunctive relief to the class framed in the complaint, a textually authorized consideration—that we held permissible in *Shook I*.” *Id.* (internal citations omitted); see also *Shook I*, 386 F.3d at 973 (“Elements of manageability and efficiency are not categorically precluded in determining whether to certify a 23(b)(2) class.”).

<sup>143</sup> *Shook II*, 543 F.3d at 604.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 604-05.

<sup>146</sup> *Id.* at 605 (noting plaintiff’s injunction would utilize individual characteristics and circumstances to determine class member treatment). As an example, the court noted that

plaintiffs ask for an injunction compelling defendants to “cease using restraints, pepper spray, and electroshock weapons (‘tasers’) against prisoners exhibiting signs of mental illness in circumstances that pose a substantial risk of serious harm to such prisoners.” But by its very terms, this prayer for relief asks the district court to craft an injunction that takes into account the specific circumstances of individual inmates’ plights. What specific mental illnesses place a prisoner at an inordinate risk from the use of the named implements? And under what circumstances is this risk exacerbated? Presumably the “circumstances that pose a substantial risk of serious harm” depend on the nature and severity of the individual’s illness, but where a practice may only be enjoined by reference to circumstances that vary among class members—such as whether an individual inmate is both showing signs of mental illness and at particular risk from the use of tasers—class-wide relief may be difficult to come by. Instead, different injunctions would be required to establish the appropriate behavior towards different groups of class members.

*Id.*

of conduct so vague and fluid as to be no standard at all.<sup>147</sup> For example, the court found the plaintiff's proposed order to require the defendants to provide "safe and appropriate housing for prisoners with serious mental health needs" vague because the definition of "safe and appropriate" depends on the severity of the prisoner's mental illness.<sup>148</sup> The court conceded that some of the requested relief would not require individual adjudication; however, ultimately the court denied certification because the relief sought did not satisfy Rule 65(d)'s specificity requirement.<sup>149</sup>

Finally, the court cautioned that plaintiffs' difficulties would be compounded over time because "the proposed class includes not only current inmates but future ones as well."<sup>150</sup> Thus, "to craft an enforceable injunction aimed at ensuring 'adequate' staffing levels or medication delivery procedures, the district court would have to be able to ascertain the aggregate characteristics of the class as whole, and enforcing the injunction

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<sup>147</sup> See *id.* (describing plaintiff's claims). In the context of class actions, an "upstream" case is one in which the focus is on the conduct of the defendants; a "downstream" case is one in which the focus is on the individual situations of the plaintiffs themselves. See Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 831-32 (1997) (describing differences between "downstream" and "upstream" cases). As a general proposition, an upstream case is more susceptible to certification than a downstream case because it is less likely to require individualized inquiries. *Id.* at 832. A price-fixing case is an example of the former, a mass tort case of the latter. See *United States v. Trenton Potteries Co.*, 273 U.S. 392, 394 (1927).

<sup>148</sup> *Shook II*, 543 F.3d at 605.

What is safe for Ms. Mosby, who is suicidal, may not be the same as for Mr. Shook, who merely requires delivery of his medication. Similarly, "adequate screening and precautions to prevent self-harm and suicide," does not address a cohesive injury suffered by the class. Not all mentally ill people are suicidal, and so this form of relief is overly broad relative to the class as defined, and what constitutes "adequate" precautions against self-harm will necessarily turn on how and in what ways individual inmates are predisposed to harm themselves.

*Id.* (citation omitted).

<sup>149</sup> *Id.* at 605-06 ("At the class certification stage, the injunctive relief sought must be described in reasonably particular detail such that the court can at least 'conceive of an injunction that would satisfy [Rule 65(d)'s] requirements,' as well as the requirements of Rule 23(b)(2)." (quoting *Monreal v. Potter*, 367 F.3d 1224, 1236 (10th Cir. 2004))). Ultimately, the problem was one of burden and proof:

[T]o satisfy Rule 65(d), the levels of services must ultimately be capable of description in a sufficiently objective way that both the defendant and the court can determine if the former is complying, and a class certification motion requesting injunctive relief that simply prescribes "adequate" or "appropriate" levels of services fails to indicate how final injunctive relief may be crafted to "describe[ ] in reasonable detail . . . the acts . . . required.

*Id.* at 606 (internal citations omitted).

<sup>150</sup> *Id.* at 606.

would require monitoring changes to those characteristics over time.”<sup>151</sup> But these inquiries would require “a wealth of information about the class not necessary in many other Rule 23(b)(2) class actions.”<sup>152</sup> For example, a court called upon to enforce an injunction would need to ask—and have answered—questions like these:

How many inmates suffer from serious mental illness at any particular time? What specific illnesses are represented in the class, and in what numbers? What type of staffing and training is necessary to provide “adequate” care for the range of illnesses existing (or likely to exist) in the Jail population at any given time?<sup>153</sup>

At this point, all efficiencies typically inherent in class actions would be off the table.<sup>154</sup>

### 5. Do Class Conflicts Preclude Certification?

It is a commonplace of class-certification law that intra-class conflicts can defeat certification.<sup>155</sup> But one need review no more than a handful of cases to discover that only certain types of conflicts actually do defeat certification. This section aims to uncover the deep—yet often unarticulated—logic at work here. A few examples will set the stage.

The issue of class adversity is usually framed in one of two ways: standing and/or divergent interests.<sup>156</sup> As we will see, though, the first is really just an instantiation of the second. In any event, the standing argument arises when a putative class representative has a status different from at least some of the putative class members.<sup>157</sup> An example of this

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 605.

<sup>153</sup> *Shook II*, 543 F.3d at 605.

<sup>154</sup> *See id.*

<sup>155</sup> 7A CHARLES ALAN WRIGHT & ARTHUR MILLER, FED. PRAC. & PROC. CIV. § 1768 (3d ed. 2011) (“It is axiomatic that a putative representative cannot adequately protect the class if the representative’s interests are antagonistic to or in conflict with the objectives of those being represented.”).

<sup>156</sup> *See* NEWBERG, *supra* note 21, § 2:5 (“[S]tanding . . . does not automatically entitle the plaintiff to maintain a class action unless the additional qualifications of a class representative under Rule 23 [for typicality and adequacy] are also met”). *But see* *Ramirez v. STi Prepaid LLC*, 644 F. Supp. 2d 496, 504-05 (D.N.J. 2009) (noting standing and meeting Rule 23 certification requirements two separate issues).

<sup>157</sup> *See* *Hardin v. Harshbarger*, 814 F. Supp. 703, 707 (N.D. Ill. 1993) (finding class representative lacked standing to seek injunctive relief because representative already personally achieved relief); *see also* NEWBERG, *supra* note 21, § 2:5 (describing standing requirements).

would be a case in which former employees seek to represent a class containing current employees.<sup>158</sup> In these cases, the real inquiry should not be whether there are status differences among class members but, rather, whether those differences matter—i.e., whether the differences amount to genuine adverse interests and, even then, whether those adverse interests are legally cognizable.<sup>159</sup>

For example, in *In re FedEx Ground Package System, Inc. Employment Practices Litigation*,<sup>160</sup> the court was called upon to decide whether—in the context of a case alleging that FedEx had “misclassified” its drivers as independent contractors instead of as employees—“former drivers have significantly different interests than do . . . current contractors.”<sup>161</sup> The defendants argued that “[c]urrent contractors have a long-term interest in whether they are classified as contractors or employees, and whether they can obtain what they believe is a more favorable relationship with FedEx Ground, whereas former contractors have no such interest.”<sup>162</sup> In other words, it might be that current drivers would prefer to leave well enough alone because the relief sought, if granted, would not inure to their benefit and could even harm them. The court made short work of this argument:

All Tennessee plaintiffs signed the same standard Operating Agreement and were classified as independent contractors. The Tennessee plaintiffs were subject to the same regulations regarding their appearance, trucks, delivery methods, and working hours. *Whether they were improperly classified as independent contractors affects all of them equally*, as it entitles both former and current drivers to additional benefits and compensation as well as entitling the current drivers to proper classification in the future. FedEx Ground asserts that current contractors, unlike former contractors, have a long-term interest in their classification, and whether they can obtain what they believe is a more favorable relationship with FedEx Ground. If the Tennessee plaintiffs are being treated as

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<sup>158</sup> See *Cross v. Nat’l Trust Life Ins. Co.*, 553 F.2d 1026, 1030-31 (6th Cir. 1977) (“[T]hat plaintiffs are no longer employees of the defendant does not deprive them of standing to represent a class consisting of current and prospective employees.”).

<sup>159</sup> See *Cross*, 553 F.2d at 1031.

<sup>160</sup> 273 F.R.D. 424 (N.D. Ind. 2008), *upheld on reconsideration*, No. MDL-1700, 2010 WL 597997, at \*3 (N.D. Ind. Feb. 17, 2010).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 438.

FedEx Ground employees, however, the law requires them to be classified as such. *Current contractors don't have the option to be classified as one type and treated as another.*<sup>163</sup>

Although perhaps stated a bit obliquely, the court's point is an important one: adversity arising because some class members might choose an illegal status quo over a legal remedy is not "adversity" in any legally significant sense.<sup>164</sup>

A slightly different—though ultimately related—problem arises when there is a question of fact concerning the benefits of a class-wide injunction or declaration. *In re Motor Fuel Temperature Sales Practices Litigation*<sup>165</sup> offers a particularly good example of this issue and a possible (though somewhat question-begging) solution. Plaintiffs brought class claims for, among other things, injunctive relief against motor fuel retailers.<sup>166</sup> The gist of plaintiffs' claims was "that because defendants sell motor fuel for a specified price per gallon without disclosing or adjusting for temperature expansion, they are liable under state law theories which include breach of contract, breach of warranty, fraud, and consumer protection."<sup>167</sup> To analyze the certification issues presented by these allegations, the court engaged in a nested two-part analysis, beginning with a focus on "two independent but related requirements."<sup>168</sup>

Under this rubric, the court first requires that plaintiffs demonstrate that the allegations of the defendant's actions or inactions applied to all class members.<sup>169</sup> Second, the plaintiffs must show that injunctive relief suits the whole class.<sup>170</sup> Collectively, these requirements insist upon cohesion of class members and their injuries.<sup>171</sup> This relationship entails a further two-part evaluation. First, plaintiffs must show that the proposed class is sufficiently cohesive that any class-wide injunctive relief will satisfy the requirement of Rule 65(d) that every injunction "state its terms specifically; and describe in reasonable detail . . . the act or acts restrained

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<sup>163</sup> *Id.* (emphasis added).

<sup>164</sup> *See id.*

<sup>165</sup> 271 F.R.D. 221 (D. Kan. 2010).

<sup>166</sup> *Id.* at 226-27.

<sup>167</sup> *Id.* at 223.

<sup>168</sup> *Id.* at 224 (setting forth certification analysis).

<sup>169</sup> *Id.* at 224-25 (quoting *Shook II*, 543 F.3d 597, 604 (10th Cir. 2008)) (internal citations omitted) (detailing steps of court's evaluation).

<sup>170</sup> *In re Motor Fuel*, 271 F.R.D. at 224-25.

<sup>171</sup> *Id.* at 225.

or required.”<sup>172</sup> Second, plaintiffs must show that class members’ injuries are “sufficiently similar” that they can be remedied in a single injunction without differentiating between class members.<sup>173</sup> All told, then, “to satisfy Rule 23(b)(2) at the class certification stage, plaintiffs must describe in reasonably particular detail the injunctive relief which they seek so that the Court can at least conceive of an injunction which would satisfy the requirements of Rule 65(d) and Rule 23(b)(2).”<sup>174</sup>

Against this legal framework, the defendants set facts suggesting that the putative class was hopelessly conflicted “because not every purported class member wants temperature adjustment of retail motor fuel sales.”<sup>175</sup> More specifically, the defendants asserted “that because class members may disagree whether they would benefit from injunctive relief requiring mandatory ATC [automatic temperature correction] at retail, plaintiffs cannot adequately represent the class.”<sup>176</sup> The court thus correctly recognized that it faced a *potential* question of intra-class conflict and that, consequently, its principal task was to determine whether this conflict was merely apparent or actually real.<sup>177</sup>

Lurking in the background of the court’s analysis was a potentially controlling Tenth Circuit precedent, *Albertson’s, Inc. v. Amalgamated Sugar Co.*<sup>178</sup> In *Albertson’s*, the named plaintiffs sought to represent a class of direct purchasers of beet sugar in an antitrust action.<sup>179</sup> As relief, the plaintiffs prayed, in part, for an injunction regarding the method that defendants used to calculate freight charges.<sup>180</sup> The district court declined to certify a class as to this question and the appellate court affirmed.<sup>181</sup>

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<sup>172</sup> *Id.* (quoting FED. R. CIV. P. 65(d)(1)). The pertinent portion of Rule 65(d) states as follows:

(1) Contents. Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;  
 (B) state its terms specifically; and  
 (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

FED. R. CIV. P. 65(d)(1).

<sup>173</sup> *In re Motor Fuel*, 271 F.R.D. at 225 (quoting *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1199 (10th Cir. 2010)).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 231.

<sup>176</sup> *Id.* at 232.

<sup>177</sup> *See id.* at 231-33.

<sup>178</sup> 503 F.2d 459 (10th Cir. 1974).

<sup>179</sup> *Id.* at 460.

<sup>180</sup> *Id.* at 462-63.

<sup>181</sup> *Id.*

Both *Albertson* courts reasoned that although a “mere disparity” in benefits to class members is not a bar to certification, members of the putative class were business competitors, and the requested injunction would alter the competitive position of these members.<sup>182</sup> In short, the court identified the case as one presenting a “winners and losers” scenario, which is often found to be a good reason to deny certification.<sup>183</sup>

So the question that the court faced in the *Motor Fuel* case resolved into this: is the case one in which the requested injunctive relief would create winners and losers?<sup>184</sup> To answer this question, the court first distinguished *Albertson*’s, finding that the putative class was not made up of business competitors and that defendants failed to argue the potential for some class members to profit over others due to varying circumstances.<sup>185</sup> Rather, according to the court, the defendants asserted no more than “class members hold differing *opinions*” as to whether the injunction would benefit the class as a whole.<sup>186</sup> But this is not a *class*-phase issue: “the alleged difference of opinion goes to the ultimate merits of the case. Before plaintiffs may obtain injunctive relief requiring defendants to install ATC, they must prove that the requested relief will benefit the class as a whole.”<sup>187</sup> In other words, there is a fact of the matter, and that fact (i.e., whether ATC at retail would result in higher or lower fuel prices) is a *common* question of fact.<sup>188</sup> Accordingly, the court held that there were no

<sup>182</sup> *Id.* at 464.

<sup>183</sup> *Albertson*’s, 503 F.2d at 464.; see also *Campbell v. City of Chicago*, No. 83-C-3884, 1984 WL 21980, at \*3-4 (N.D. Ill. Aug. 29, 1984) (denying certification because not all members had competitive interest in abolishing licensing system); *Plekowski v. Ralston Purina Co.*, 68 F.R.D. 443, 452-53 (M.D. Ga. 1975) (denying certification because past customers lacked present customers’ interest in harmonious relationship with defendants). But see *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 121 F.R.D. 417, 430 (D.N.M. 1988) (certifying class because there would be no disparate competition effect and no benefits disparity).

<sup>184</sup> See *In re Motor Fuel Temperature Sales Practices Litig.*, 271 F.R.D. 221, 233 (D. Kan. 2010) (describing question before court); *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1190 (11th Cir. 2003) (stating certification improper where some class members benefit from conduct that named plaintiff deems illegal).

<sup>185</sup> *In re Motor Fuel*, 271 F.R.D. at 233 (“[B]ecause the named representatives and class members were business competitors, the case involved much more than a ‘mere disparity’ in benefit.”).

<sup>186</sup> *Id.* (emphasis added).

<sup>187</sup> *Id.* (“If the evidence shows that mandating ATC would actually harm the class, plaintiffs will not prevail in their request for injunctive relief.”).

<sup>188</sup> *Id.* The defendants also argued that class members who regularly purchased fuel at cool temperatures would be harmed by the injunction and, thus, object to ATC. *Id.* at 233 n.21. But they offered this objection as a hypothetical, so the court was able to brush it aside as speculation. *Id.* Even with actual evidence in support of this objection, it is likely the court would still have certified the class based on its earlier finding that any “difference of opinion goes to the ultimate merits of the case,” namely whether an injunction would benefit the class as a whole. *Id.* at 233.

conflicts that would (1) render the named plaintiffs inadequate under Rule 23(a)(4), or (2) show the class to lack “cohesiveness” of the sort that would make certification inappropriate under Rule 23(b)(2).<sup>189</sup>

But, as noted at the outset, this really begs the question. For if the class members disagree about the efficacy of the requested relief, then there is adversity in the class. What the court tacitly found, then, is that essentially uninformed differences of “opinion” are not cognizable as adverse interests.<sup>190</sup> In other words, disagreement over how the facts will turn out doesn’t mean that the facts are not common—i.e., they are what they are, and they will ultimately be found by the ordinary workings of the judicial process.

Sometimes, though, there is not a fact of the matter—or at least not one that can be readily discovered with reference to objective, neutral criteria. Two threads emerge here. First, there are the relatively easy cases in which a defendant alleges that there is widespread disagreement amongst the class as to the desirability of an action that the defendant has taken.<sup>191</sup> However, that argument is a red herring. A common example of this arises when a union raises its members’ dues and a member challenges that act on behalf of himself and all other members.<sup>192</sup> In one recurring pattern, the defendant argues that many members would prefer not to have their dues raised, but the gist of the plaintiff’s claim is that the dues increase resulted from an illegal vote.<sup>193</sup> This tactic confounds a question of whether the class members have different *preferences* (e.g., whether they think a dues increase is a good idea) with a question of *legality*. Courts must disregard class disagreements where those disagreements exist because some members would prefer the result of an illegal act.<sup>194</sup> But, as we’ve seen before in cases like *Pico*, there are other cases in which the class adversity actually is the result of divergent preferences.<sup>195</sup>

Even in a case in which the central dispute is one over the legality of an act, courts often show sensitivity to the divergent interests of class

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<sup>189</sup> *Id.* at 233, 235.

<sup>190</sup> See *In re Motor Fuel*, 271 F.R.D. at 233 (noting difference of opinion must go to ultimate merits of case).

<sup>191</sup> See *Stolz v. United Bhd. of Carpenters & Joiners*, 620 F. Supp. 396, 405 (D. Nev. 1985) (noting members dues increase disagreement immaterial because suit claimed statutory violation of voting process).

<sup>192</sup> See *Gates v. Dalton*, 67 F.R.D. 621, 630 (E.D.N.Y. 1975) (examining whether interests of class antagonistic).

<sup>193</sup> See *Stolz*, 620 F. Supp. at 405 (noting alleged antagonism insufficient to prevent plaintiff from being named class representative); *Hummel v. Brennan*, 83 F.R.D. 141, 146 (E.D. Pa. 1979) (identifying antagonism issue for court’s determination).

<sup>194</sup> See *supra* Part III.C.3 (discussing cases where class disagreements may lack good faith).

<sup>195</sup> See *supra* notes 128-34 and accompanying text (describing *Pico* decision).

members. This is particularly so where the alleged conduct presents a debatable question of classification.<sup>196</sup> *Horton v. Goose Creek Independent School District*<sup>197</sup> is often cited as representative of this type.<sup>198</sup> In this case, the named plaintiffs sued a school district, alleging that the district's use of contraband-sniffing dogs violated the civil rights of students.<sup>199</sup> The Fifth Circuit conceded that a definite possibility existed for disagreement among the class justifying denial of certification.<sup>200</sup> Despite this, the court found that "[t]hough some members may disagree with the named plaintiffs, their position has been asserted energetically and forcefully by the defendant, which has argued that the school administration must be able to use these searches to combat a serious drug problem."<sup>201</sup> Additionally, the court opined that denial of certification would be of little substantive impact because "the stare decisis effect of our decision that the sniffing procedures as they relate to the students are unconstitutional will, as a practical matter, put an end to all searches."<sup>202</sup> Finally, in an explicit nod to "disagreement among class members over appropriate relief," the court ordered "certification on the issue of liability only."<sup>203</sup>

These justifications seem small in the face of genuine conflicts. For example, it is odd to certify a named plaintiff as adequate to "protect the interests of the class" by ceding that responsibility to *the defendant*.<sup>204</sup> And the stare decisis argument is—ironically enough—one typically deployed to demonstrate that a class action is unnecessary.<sup>205</sup> Finally, that the class could be certified as to only a single issue often signals that the class device will not lead to the efficiencies that are the *raison d'être* of the

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<sup>196</sup> See generally NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING 141 (2005) (considering question of classification). MacCormick discusses "the question whether a given situation counts as belonging in a relevant category for purposes of applying a legislative text" (or any legal rule). *Id.*

<sup>197</sup> 690 F.2d 470 (5th Cir. 1982).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 473 (identifying issue before the court).

<sup>200</sup> *Id.* at 485. The court looked specifically at the possible disagreements among class members, which included "the chance that some class members support the canine search program," and the attendant "possibility of antagonistic interests." *Id.*

<sup>201</sup> *Id.* at 487.

<sup>202</sup> *Horton*, 690 F.2d at 487 n.32.

<sup>203</sup> *Id.* at 488 n.33.

<sup>204</sup> Yet courts still employ this procedure in certifying such cases. See *Curley v. Brignoli, Curley & Roberts Assocs.*, 915 F.2d 81, 86 (2d Cir. 1990) ("When the interests of antagonistic class members are adequately represented by the class' opponents, the requirements of due process are satisfied such that a class can be certified."); *Horton*, 690 F.2d at 487 (finding defendant adequately represented dissenting class members when defendant vigorously opposed certification and collusion unlikely).

<sup>205</sup> See *supra* Part III.A.2 (discussing necessity of class action).

device.<sup>206</sup> Of course, the court was no doubt seeking a pragmatic solution to a difficult problem, and its approach is unlikely to work much mischief in cases in which the defendant is a government agency. Nonetheless, as the *Horton* court confirmed, courts should be reluctant to extend this approach to ordinary civil litigation, in which the defendant cannot necessarily be counted on to defend vigorously the positions of dissenting class members.<sup>207</sup>

#### IV. CONCLUSION AND RECOMMENDATIONS

No single heuristic device can settle, once and for all, the question of whether any particular case is suitable for class-action treatment under Rule 23(b)(2). That requires a decisive act of judgment *by a judge*. But such a device can, and this Article argues should, guide this decisive act. When faced with a motion to certify a class under Rule 23(b)(2) involving a request for declaratory or injunctive relief, a court should consider seven (somewhat overlapping) questions:

- 1) Should the case be a derivative action rather than a class action?
- 2) Will an individual action achieve the same ends?
- 3) Is the defendant's conduct generally applicable to everyone in the class?
- 4) Are there conflicts among members of the class?
- 5) Is the dispute "political" rather than "legal"?
- 6) Is injunctive or declaratory relief appropriate?

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<sup>206</sup> See generally Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 609 (2004) (examining problems and limitations of class actions); see also *supra* note 9 (highlighting intentions and goals of typicality requirement for class).

<sup>207</sup> See 690 F.2d at 487 ("In many cases, we would hesitate to rely on the opponent of the class to represent the views of dissenting class members."). Compare *Reese v. Miami-Dade Cnty.*, 209 F.R.D. 231, 233 (S.D. Fla. 2002) (following *Horton* and finding dissenting class members' interests sufficiently safeguarded by interests of governmental defendants), with *Forsyth v. Lake LBJ Inv. Corp.*, 903 S.W.2d 146, 151-52 (Tex. Ct. App. 1995) (declining to allow defendants to represent dissident absent class members). *Forsyth* differed from *Horton* because *Forsyth* involved actual intra-class antagonism rather than the mere possibility of antagonism. See *Forsyth*, 903 S.W.2d at 151.

- 7) If there are disagreements among members of the class, are they of a character that renders certification inappropriate?

If the court is convinced that the answers to these questions are no, no, yes, no, no, yes, and no, then it can move forward more or less assured that it is not wading into a morass of competing belief systems, personal political preferences, or matters of nothing so much as taste. Cast in reverse, the court can rest easy that—whatever the ultimate outcome—it is taking up a case on a classwide basis that squares with what Rule 23(b)(2) intends: redressing claims based on facts which—if proven—have legal significance that is beyond debate.