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by Julian W. Poon and Blaine H. Evanson

CLASS DISTINCTIONS

The circuits have invoked a variety of different standards in certifying classes for litigation

The number of class actions in California and the country is rising at a dramatic pace. According to a report in the *Los Angeles Daily Journal*, 30 percent of U.S. companies and 39 percent of California companies had a class action filed against them in 2009.[1] Between late 2001 and early 2007, consumer class actions rose 156 percent and accounted for more than 20 percent of all class action filings in the latter period. Labor class actions increased 228 percent, constituting 46.9 percent of class action filings in late 2007. The Ninth Circuit, in particular, has experienced a surge in class actions. There was a 560 percent increase in filings between July-December 2001 and January-June 2007.[2]

It should not be surprising that the increase in class action filings has caused a corresponding rise in the number of federal appellate court decisions on issues relating to class certification. Particularly since 1998, when Rule 23 of the Federal Rules of Civil Procedure was amended to allow for discretionary interlocutory review of class-certification decisions,[3] federal appellate courts have been thrust into a developing and complex area of the law.

The U.S. Supreme Court has, however, remained largely silent. The most recent Supreme Court decision to address class certification in any significant detail was *Ortiz v. Fibreboard Corporation,* over 10 years ago.[4] Lower federal courts have thus been left to wrestle with the complex issues related to class certification, and clear splits among these courts have developed.

The lack of Supreme Court guidance has led to divergent approaches by the lower courts in many key areas, including 1) the standards governing the extent to which claims for monetary relief may be pursued in Rule 23(b)(2) "mandatory" class actions for injunctive and declaratory relief, 2) the use of so-called hybrid class actions, 3) the standing requirements for absent class members, 4) the burden of proof on plaintiffs at the class-

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certification stage, and 5) the certification of punitive damages and statutory penalties, and the aggregation problem to which they give rise. Practitioners should pay careful attention to developments and divergences in these areas.

Monetary Relief in 23(b)(2) Classes

As most practitioners are aware, there are three types of class actions under Rule 23 of the Federal Rules of Civil Procedure. In the past decade, plaintiffs have increasingly resorted to Rule 23(b)(2) class actions in seeking injunctive relief and monetary damages.[5] They have done so in part because Rule 23(b)(2) avoids the expensive notice and opt-out requirements of (b)(3) certification.[6] Defendants have also sought (b)(2) certification in certain circumstances in order to avoid the added inefficiency and cost of dealing with individual plaintiffs who exercise their right under Rule 23(b)(3) to opt out.[7]

Rule 23(b)(2) only authorizes the certification of a class if "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." The Supreme Court in *Ticor Title Insurance Company v. Brown* suggested that monetary relief may not be sought in (b)(2) classes, because "class members may have a constitutional due process right to opt-out of any class action which asserts monetary claims on their behalf," and (b)(2) does not require notice or provide for opt-out rights.[8] But *Ticor* did not resolve this issue, and lower courts have adopted different standards on how district courts are to analyze whether a putative class seeks relief that is predominantly injunctive and/or declaratory, as Rule 23(b)(2) requires.

The Fifth Circuit was the first to address the issue, holding in *Allison v. Citgo Petroleum Corporation* that claims for monetary relief impermissibly predominate in putative (b)(2) class actions unless they are "incidental" to plaintiffs' requests for declaratory and injunctive relief.[9] Monetary relief is "incidental" when the damages "flow directly to the class as a whole," and the court can calculate damages without the need for individualized determinations.[10] The *Allison* test is the most stringent of the three major standards to have been adopted by different circuits so far. Although it is not completely in keeping with the Supreme Court's concern in *Ticor,* the *Allison* test is less likely to raise due process concerns for defendants than the competing standards. The Third, Sixth, Seventh, and Eleventh Circuits all generally follow the Fifth Circuit's rule.[11]

The Second Circuit, in contrast, adopted a more malleable, pro-plaintiff interpretation of when claims for monetary relief impermissibly predominate. In *Robinson v. Metro-North Commuter Railroad Company,* the Second Circuit rejected the *Allison* rule and applied an "ad-hoc balancing" test instead.[12] *Robinson* holds that the court must assess "whether (b)(2) certification is appropriate in light of 'the relative importance of the remedies sought, given all of the facts and circumstances.'"[13] This flexible approach focuses on whether the plaintiffs' request for injunctive relief is just a sham.[14]

The Ninth Circuit fashioned a new, third approach earlier this year in *Dukes v. Wal-Mart Stores, Inc.*[15] The court held that a (b)(2) class may seek only monetary damages that are "not superior in strength, influence, or authority to injunctive and declaratory relief."[16] The Ninth Circuit formulated this new standard based on a collegiate dictionary definition of "predominate" as "superior in strength, influence, or authority"—as well as other not-yet-enumerated factors.[17]

However, the main thrust of its test remains functional:

> [W]hether the monetary relief sought determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature—as measured by recovery per class member—raise particular due process and manageability concerns.[18]

The Supreme Court has granted certiorari to review the Ninth Circuit's decision.

There are at least two significant concerns that will likely influence any resolution of this issue by the Supreme Court. First, certification of a (b)(2) class seeking monetary relief runs counter to the Supreme Court's reasoning in *Ortiz v. Fibreboard Corporation,* which rejected an expansive application of Rule 23(b)(1) because the case went beyond (b)(1)'s historical roots.[19] Allowing significant claims for monetary relief in a (b)(2) class similarly extends (b)(2) beyond its historical roots.

Second, a (b)(2) class seeking monetary relief may raise due process and fairness concerns because it may give rise to intra-class conflict. Some members may have large monetary claims and others small claims.[20] These conflicts of interest undermine the fairness of binding divergent class members to the same outcome in the settlement or other resolution.

Hybrid Class Actions

Some courts and commentators have suggested that any concerns regarding monetary relief claims in putative (b)(2) class actions could be resolved through hybrid class actions, to the extent the concerns can be resolved at all.[21] Unfortunately, the term "hybrid" has sometimes been used imprecisely to describe a number of distinct hybrids. The different hybrids include 1) the quasi hybrid of providing notice and possibly opt-out rights in a (b)(2) class, and 2) the (b)(2)/(b)(3) hybrid. These hybrids suffer from significant flaws that militate against their use.

For example, in an attempt to alleviate due process concerns, some courts and litigants have provided notice and opt-out rights in a (b)(2) class action. Some courts have permitted individual plaintiffs with conflicting interests to opt out of the class on the basis that because courts may have more discretion to deviate from the (b)(3) requirement of "best notice practicable,"[22] the cost of notice may be lower than in a comparable (b)(3) class.[23]

But this resulting quasi hybrid (b)(2) class action raises the same concern that has split the circuits over how to determine when claims for monetary relief in putative (b)(2) classes impermissibly "predominate" over claims for injunctive and declaratory relief. The quasi hybrid also runs counter to *Ortiz,* given that it arguably departs too much from the historical antecedents and models for (b)(2) classes. For example, a federal court in California certified a putative gender-discrimination class action under (b)(2) that sought compensatory and punitive damages.[24] In doing so, the court noted that the monetary damages could require 19 individualized determinations.[25] Such a case could be seen as standing in stark contrast to the examples that the Advisory Committee on the Federal Rules of Civil Procedure has provided. The committee's (b)(2) examples all requested classwide injunctive (or declaratory) relief to the exclusion of individualized claims for money damages.[26]

A (b)(2)/(b)(3) hybrid may ameliorate some of the problems affecting (b)(3) hybrids and quasi hybrids, but the concerns remain. In a (b)(2)/(b)(3) hybrid, the court certifies an injunctive class under (b)(2) and separately certifies a damages class under (b)(3), effectively treating two different (but related) cases as one.[27] This process may at least address some due process concerns, because individual plaintiffs would receive notice and the opportunity to opt out.[28]

The (b)(2)/(b)(3) hybrid raises problems of its own, however. Courts may be tempted to cut the analysis short as to whether each of the respective requirements of Rules 23(b)(2) and (b)(3) have been satisfied. But essential to the validity of this hybrid is that the district court performs a full (b)(2) analysis (i.e., the defendant must have "acted or refused to act on grounds that apply generally to the class," and injunctive relief must be "appro-

priate respecting the class as a whole") for the injunctive class, and a full (b)(3) analysis for the monetary relief class (i.e., predominance of common questions, manageability, and superiority of a class action). Too often courts fail to ensure that each class component satisfies these requirements.[29]

There are also Seventh Amendment concerns with the (b)(2)/(b)(3) hybrid.[30] By seeking to recover claims for monetary damages, the (b)(3) portion of a (b)(2)/(b)(3) hybrid could implicate the jury-right clause. Monetary damages are traditionally recoverable in common-law courts (rather than courts of equity).[31] Although the (b)(2) portion of this hybrid typically would not trigger a jury-trial right (because it seeks only an injunction or declaration), the Seventh Amendment requires a jury to decide all disputed facts affecting the right to recover on the (b)(3) money damages claim, including those facts that overlap with the (b)(2) injunctive relief claim.[32]

The right to a jury also implicates the Seventh Amendment's reexamination clause. Due to the complexity of a typical (b)(2)/(b)(3) hybrid, a single jury may not always be able to hear and decide all of the pertinent issues triable to a jury. The reexamination clause prohibits a second jury from reexamining the factual findings of the first jury.[33] Therefore, the court must ensure, through, for example, careful instructions or innovative procedures, that successive juries do not come to different factual conclusions.[34] However, this approach could render the (b)(2)/(b)(3) hybrid unmanageable and inefficient, and an unmanageable and inefficient class action defeats the purpose of a (b)(3) class action and should not be certified.[35]

Standing Requirements

Another constitutional issue dividing the courts of appeal is Article III's case-or-controversy limitation on the jurisdiction of federal courts. This limitation requires an injury-in-fact that is traceable to the challenged action and likely redressable.[36] Although there is broad agreement among courts (including the Ninth Circuit)[37] and commentators that at least one named plaintiff must have standing, there is currently a circuit split on whether every class member must have standing.

In *Denney v. Deutsche Bank AG,* the Second Circuit held that every class member must have standing, reasoning that standing is a threshold, constitutional requirement that may not be relaxed or modified through the procedural device of Rule 23 or any other Federal Rule of Civil Procedure.[38] In contrast, the Seventh Circuit, in *Kohen v. Pacific Investment Management Company,* held that only one named plaintiff must have standing.[39] Writing for a unanimous panel, Judge Richard A. Posner reasoned that proving a class member was not injured leads to a dismissal on the merits, not a dismissal for lack of jurisdiction.[40]

Arguably, *Denney* more faithfully applies Article III's requirements to the class-action context. *Kohen,* in contrast, could be read as conflating an Article III injury-in-fact with an injury sufficient to win the lawsuit on the merits. As the *Denney* court explained, "[A]n injury-in-fact need not be capable of sustaining a valid cause of action under applicable tort law."[41] The proper rule is likely that all class members must have suffered some injury, "[b]ut this requisite of an injury is not applied too restrictively."[42]

Burden of Proof

Issues of constitutional law are not the only area of divergence. Perhaps the most fundamental question related to class certification is the level of proof required of plaintiffs in order for a court to certify a class. This question, along with that of the appropriate level of rigorousness with which district courts should analyze plaintiffs' proffered evidence, has led to serious disagreement among the circuits.

A preliminary question relating to burdens at class certification is the burden of proof on plaintiffs, as movants, to establish each of the Rule 23 factors. Rule 23 does not specify the amount of proof required, and the Supreme Court has not yet addressed the issue. The trend among the circuits is to require plaintiffs to prove the Rule 23 factors by a preponderance of the evidence. The Third Circuit, in *In re Hydrogen Peroxide Antitrust Litigation,* held that "to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23,"[43] and other courts, including the Second and Fifth Circuits, have held the same.[44] Commentators have lauded this trend because plaintiffs, as movants, bear the burden of establishing that class adjudication is appropriate. In addition, because class actions are the "exception to the usual rule,"[45] the "preponderance of the evidence standard makes the most sense."[46]

Still, there remains much confusion among other courts, which have not specified what standard of proof applies.[47] The standard district courts use therefore tends to vary, on an "ad hoc, case-by-case basis."[48] And the guidance from some appellate courts has been somewhat confusing. For example, in the Tenth Circuit plaintiffs must meet a "strict burden of proof" at class certification.[49] At the same time, the Tenth Circuit has held that allegations in the complaint should be accepted as true at that stage of the proceeding.[50]

Another question that has been largely resolved is the district court's burden at class certification, separate and apart from the burden on the plaintiffs. The previous confusion dates back to the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin,* in which it stated that "nothing in either the language or history of Rule 23…gives a court any authority to conduct a preliminary inquiry into the merits of a suit to determine whether it may be maintained as a class action."[51] Some courts had read this statement as pro-

hibiting any analysis at the class certification stage of issues that go to the merits of the case, even if those same issues are relevant and necessary to resolve the question whether a plaintiff has satisfied the requirements of Rule 23.

The emerging consensus, however, is that courts are not only permitted but required to resolve issues that go to the merits when necessary to resolve an issue of Rule 23 certification.[52] There was, for a time, a line of cases from the Second Circuit that held otherwise.[53] Some district courts had cited those cases as support for eschewing any analysis of the merits of the case at class certification. But those decisions were disavowed in the Second Circuit's landmark *In re IPO* decision, which held that district courts can and must resolve any merits inquiry that overlaps with a proper analysis of the Rule 23 requirements.[54] Courts of appeal across the country have largely followed *In re IPO*.

An interesting exception to this emerging trend is the Ninth Circuit's en banc decision in *Dukes v. Wal-Mart,* which distinguished *In re IPO* and other similar cases, instead following a Southern District of New York decision rejecting such a rigorous analysis at class certification. The en banc court refused to follow *In re IPO* because it was a securities fraud case, not a Title VII case, and because the Second Circuit was analyzing Rule 23(b)(3)'s predominance requirement, rather than the Rule 23(a) commonality requirement at issue in *Dukes*. The approach in *Dukes* represents a clear break with the *In re IPO* line of cases, and it remains to be seen whether the court's reasoning will gain traction with the Supreme Court or in other appellate courts.

The final issue relating to burden of proof is the question of how district courts are to deal with competing expert testimony offered by the parties in support of and in opposition to class certification. The use of expert testimony in support of class certification has continued to grow as class actions become more widespread and more complex. And the proper level of scrutiny district courts should engage in with respect to expert testimony offered in support of or in opposition to class certification has been the subject of much controversy, recently creating a circuit split on the issue.

When expert evidence is offered by a plaintiff in support of class certification, the initial question becomes whether a district court should analyze the testimony, analysis, or report for admissibility under Rule 702 of the Federal Rules of Evidence. The Seventh Circuit recently held that a full *Daubert* analysis is required at the class-certification stage to ensure that district courts are only relying on admissible evidence.[55]

Other courts have recognized that some scrutiny of expert testimony is warranted at the class-certification stage, and have therefore performed some *Daubert* analysis, without engaging in full-fledged *Daubert* scrutiny. This line of cases stems from a district court decision in *In re Visa Check/MasterMoney Antitrust Litigation,* in which the Eastern District of New York held that a full *Daubert* inquiry is inappropriate at class certification; the court must only inquire as to whether the expert opinion is "fatally flawed."[56] The "fatally flawed" standard does not require the same rigorous analysis as does *Daubert* and allows expert testimony at the class-certification stage that could ultimately be inadmissible for use at trial on the merits.

Apart from the analysis of whether expert testimony is admissible, many courts have held that even this is insufficient scrutiny at the class-certification stage, when the district court is the finder of fact, and must therefore weigh expert testimony and determine whether a plaintiff's evidence is sufficiently persuasive to meet his or her burden of establishing the Rule 23 factors. This was the focus of the Third Circuit's *Hydrogen Peroxide* decision, in which the court held summarily in a footnote that the testimony was admissible[57] but undertook significant further analysis to weigh the plaintiff's testimony against the analysis of the defendant's competing testimony.[58]

The Third Circuit's analysis in *Hydrogen Peroxide* seems to be more in keeping with the Supreme Court's admonition that a class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[59] As the Seventh Circuit remarked, failing to engage in this analysis would amount to a "delegation of judicial power to the plaintiffs," who could obtain certification simply by hiring a competent expert.[60] But this issue, particularly with respect to expert testimony, is far from settled in the courts of appeal.

Certification of Penalties

A final class certification issue that is still developing in the circuits is the question of how to handle certification of punitive damages or statutory penalties. Certification of penalties raises numerous questions about the superiority of a class action as well as the due process rights of defendants. As one scholar has put it, "[O]nce a class is certified, a statutory damages defendant faces a bet-the-company proposition and likely will settle rather than risk shareholder reaction to theoretical billions in exposure even if the company believes the claim lacks merit."[61]

Based on a 1972 district court decision, *Ratner v. Chemical Bank NewYork Trust Company,* several courts have held that statutory penalties may in some circumstances be inappropriate in Rule 23(b)(3) class actions, because the existence of a penalty makes the class action not "superior" to individual actions, as Rule 23(b)(3) requires.[62] In *Ratner,* Judge Marvin E. Frankel, one of the principal architects of Rule 23, held that paying the statutory minimum of $100 to each of the 130,000 class members for violations of the Truth in Lending Act "would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation.…"[63] The court further held that "the allowance of thousands of minimum recoveries like plaintiff's would carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement." Courts in the Sixth, Ninth, Tenth, and Eleventh Circuits have followed *Ratner,*[64] but a recent decision casts some doubt on whether the Ninth Circuit will continue to follow it.[65]

This superiority rule is intended to balance the values of a class action, such as providing a mechanism for claims that otherwise would not be brought in individual actions, with the risks a proposed class raises. The existence of a built-in statutory penalty may increase the likelihood that individual claims will be brought, because of the incentive of increased potential recovery. A built-in penalty may at the same time raise the risks of a class adjudication, given that such a penalty, when aggregated across tens or hundreds of thousands of class members, would result in a damages award so large that it violates the defendant's right to due process.

Here again, courts have not uniformly followed *Ratner.* Some circuits have held that concerns over the excessiveness of penalties are inappropriate at the class-certification stage, as an unconstitutionally excessive penalty can be reduced postverdict.[66] The problem with this argument is that postverdict review in many class actions may not be a realistic or practically feasible check, because once a class has been certified, class actions—particularly those involving potential penalties—settle at an overwhelmingly high rate. The risk of an extremely high penalty award that courts such as *Ratner* have highlighted is thus extremely important at the class-certification stage. This is therefore another issue of class-certification law that seems ripe for Supreme Court review.

Several core issues of class-certification law have led to deep divisions in the courts of appeal and are ripe for Supreme Court review. The three-way split on the proper standard for determining the extent (if any) to which monetary damages are permissible in a (b)(2) class presents an important and recurring question. And the so-called hybrid

class action—a potential, but extremely problematic, response to plaintiffs' attempts to include monetary damages in a (b)(2) class action—has not been sanctioned by the Supreme Court or uniformly adopted by the courts of appeal. Other issues, such as the standing of absent class members, the burden of proof on plaintiffs at class certification, and the propriety of certifying classes seeking punitive damages or other penalties, raise important and recurring issues that have similarly split the circuits. ■

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[1] *See* Robert W. Fischer Jr., *California Tops Litigation Wave,* L.A. DAILY J., Dec. 2, 2009.
[2] Stephen G. Grygiel, *The Impact of Four Years of Precedent on Litigating Class Actions,* in CLASS ACTION LITIGATION 2009: PROSECUTION AND DEFENSE STRATEGIES 267 (2009).
[3] FED. R. CIV. P. 23(f).
[4] Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).
[5] *See* Mark A. Perry & Rachel S. Brass, *Rule 23(b)(2) Certification of Employment Class Actions: A Return to First Principles,* 65 N.Y.U. ANN. SURV. AM. L. 681, 689 (2010) [hereinafter Perry & Brass]; Jon Romberg, *The Hybrid Class Action as Judicial Spork: Managing Individual Rights in a Stew of Common Wrong,* 39 J. MARSHALL L. REV. 231, 253 (2006) [hereinafter Romberg].
[6] *See* Romberg, *supra* note 5, at 243.
[7] *See id.*
[8] Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 120–21 (1994).
[9] Allison v. Citgo Petroleum Corp., 151 F. 3d 402, 415 (5th Cir. 1998).
[10] *Id.*
[11] *See* Reeb v. Ohio Dep't of Rehab. & Corr., 435 F. 3d 639 (6th Cir. 2006); Barabin v. Aramark Corp., 2003 WL 355417 (3d Cir. Jan. 24, 2003) (unpublished); Murray v. Auslander, 244 F. 3d 807 (11th Cir. 2001); Jefferson v. Ingersoll Int'l, Inc., 195 F. 3d 894 (7th Cir. 1999).
[12] Robinson v. Metro-North Commuter R.R. Co., 267 F. 3d 147, 164 (2d Cir. 2001).
[13] *Id.* (citation omitted).
[14] *See id.*
[15] Dukes v. Wal-Mart Stores, Inc., 603 F. 3d 571, 616 (9th Cir. 2010) (en banc), *cert. granted,* 79 U.S.L.W. 3128 (U.S. Dec. 6, 2010) (No. 10-277).
[16] *Id.* (internal quotations and brackets omitted).
[17] *Id.*
[18] *Id.* at 617.
[19] Ortiz v. Fibreboard Corp., 527 U.S. 815, 864-65 (1999); Perry & Brass, *supra* note 5, at 682–83.
[20] *See* Romberg, *supra* note 5, at 283; Tobias Barrington Wolff, *Preclusion in Class Action Litigation,* 105 COLUM. L. REV. 717, 737 (2005).
[21] *See, e.g.,* Jefferson v. Ingersoll Int'l, Inc., 195 F. 3d 894, 898 (7th Cir. 1999); Eubanks v. Billington, 110 F. 3d 87, 95–96 (D.C. Cir. 1997); Romberg, *supra* note 5, at 283.
[22] FED. R. CIV. P. 23(c)(2).
[23] Romberg, *supra* note 5, at 254–55.
[24] Ellis v. Costco Wholesale Corp., 240 F.R.D. 627, 642-44 (N.D. Cal. 2007) (currently before the Ninth Circuit on interlocutory review).
[25] *See id.* at 643.
[26] *See* Perry & Brass, *supra* note 5, at 699.
[27] *See* Jefferson v. Ingersoll Int'l, Inc., 195 F. 3d 894, 898 (7th Cir. 1999).
[28] *See id.*
[29] *See, e.g.,* Gianzero v. Wal-Mart Stores Inc., No. 09-00656, 2010 U.S. Dist. LEXIS 38426, at *13 (D.

Colo. 2010) (glossing over the four factors pertinent to certifying under Rule (b)(3)); Mathers v. Northshore Mining Co., 217 F.R.D. 474, 487 (D. Minn. 2003) (failing to analyze any of the (b)(2) or (b)(3) factors).

[30] U.S. CONST. amend. VII. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

[31] *See, e.g.,* Dukes v. Wal-Mart Stores, Inc., 603 F. 3d 571, 621 (9th Cir. 2010) (en banc), *cert. granted*, 79 U.S.L.W. 3128 (U.S. Dec. 6, 2010) (No. 10-277).

[32] *See id.;* Romberg, *supra* note 5, at 287–92.

[33] *See* Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 497 (1931); 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS §8:3 (6th ed. 2009).

[34] *See* Romberg, *supra* note 5, at 287–92.

[35] *See* FED. R. CIV. P. 23(b)(3)(D).

[36] U.S. CONST. art. III; Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

[37] Bates v. UPS, Inc., 511 F. 3d 974, 985 (9th Cir. 2007) (en banc).

[38] Denney v. Deutsche Bank AG, 443 F. 3d 253, 263 (2d Cir. 2006).

[39] Kohen v. Pacific Inv. Mgmt. Co., 571 F. 3d 672, 677 (7th Cir. 2009).

[40] *See id.*

[41] Denny, 443 F. 3d at 264.

[42] 7AA CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE §1785.1 (3d ed. 1998).

[43] In re Hydrogen Peroxide Antitrust Litig., 552 F. 3d 305, 320 (3d Cir. 2008).

[44] *See, e.g.,* Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F. 3d 196, 202 (2d Cir. 2008); Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F. 3d 261, 269 (5th Cir. 2007).

[45] Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979).

[46] L. Elizabeth Chamblee, Comment, *Between "Merit Inquiry" and "Rigorous Analysis": Using* Daubert *to Navigate the Gray Areas of Federal Class Action Certification,* 31 FLA. ST. U.L. REV. 1041, 1048 (2004) [hereinafter Chamblee].

[47] *See, e.g.,* In re PolyMedica Corp. Sec. Litig., 432 F. 3d 1, 17 (1st Cir. 2005) (acknowledging that "generalities" on the issue of burden of proof "are the best we can do"); CE Design Ltd. v. Cy's Crabhouse N., Inc., 259 F.R.D. 135, 140 (N.D. Ill. 2009) (concluding that the Seventh Circuit has not adopted a burden of proof, "but it has stated that district courts 'should make whatever factual and legal inquiries are required under Rule 23'") (citing Szabo v. Bridgeport Machs., Inc., 249 F. 3d 672, 675-76 (7th Cir. 2001)).

[48] Chamblee, *supra* note 46, at 1048.

[49] Reed v. Bowen, 849 F. 2d 1307, 1309 (10th Cir. 1988).

[50] Vallario v. Vandehey, 554 F. 3d 1259, 1265 (10th Cir. 2009).

[51] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

[52] *See, e.g.,* In re Hydrogen Peroxide Antitrust Litig., 552 F. 3d 305, 316-17 (3d Cir. 2008); Blades v. Monsanto Co., 400 F. 3d 562, 567 (8th Cir. 2005); Gariety v. Grant Thornton, LLP, 368 F. 3d 356, 365-66 (4th Cir. 2004); Szabo, 249 F. 3d at 676–77.

[53] In re Visa Check/MasterMoney Antitrust Litig., 280 F. 3d 124, 141 (2d Cir. 2001); Caridad v. Metro-North Commuter R.R., 191 F. 3d 283, 292 (2d Cir. 1999).

[54] In re IPO Sec. Litig., 471 F. 3d 24, 42 (2d Cir. 2006).

[55] American Honda Motor Co. v. Allen, 600 F. 3d 813, 815–16 (7th Cir. 2010).

[56] In re Visa Check/MasterMoney Antitrust Litig., 192 F.R.D. 68, 76-77 (E.D. N.Y. 2000).

[57] Hydrogen Peroxide, 552 F. 3d at 315 n.13.

[58] *Id.* at 323–25.

[59] General Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982).

[60] West v. Prudential Sec. Inc., 282 F. 3d 935, 938 (7th Cir. 2002).

[61] Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions,* 74 MO. L. REV. 103, 104 (2009); *see also* MARCY H. GREER, A PRACTITIONER'S GUIDE TO CLASS ACTIONS 503 (2010) ("Aggregated penalties…have the potential to distort the underlying legislative scheme, force defendants to settle meritless lawsuits, and result in a punishment that is grossly disproportionate to the reprehensibility of the defendant's conduct.").

[62] Ratner v. Chemical Bank N.Y. Trust Co., 54 F.R.D. 412, 414 (S.D. N.Y. 1972).

[63] *Id.*

[64] *See, e.g.,* Watkins v. Simmons & Clark, Inc., 618 F. 2d 398, 400 n.4 (6th Cir. 1980) (citing Ratner, 54 F.R.D. 412); Wilcox v. Commerce Bank of Kan. City, 474 F. 2d 336, 342 (10th Cir. 1973) (citing Ratner, 54 F.R.D. 412); London v. Wal-Mart Stores, Inc., 340 F. 3d 1246, 1255 n.5 (11th Cir. 2003) (citing Kline v. Coldwell, Banker & Co., 508 F. 2d 226 (9th Cir. 1974) and Ratner, 54 F.R.D. 412); Klay v. Humana, Inc., 382 F. 3d 1241, 1271 (11th Cir. 2004) (citing Ratner, 54 F.R.D. 412); *see also* Parker v. Time Warner Entm't Co., 331 F. 3d 13, 22 (2d Cir. 2003) (adopting similar analysis).

[65] *See* Bateman v. American Multi-Cinema, Inc., 623 F. 3d 708, 715-16 (9th Cir. 2010) (en banc petition pending).

[66] *See* Murray v. GMAC Mortgage Corp., 434 F. 3d 948, 954 (7th Cir. 2006); Parker, 331 F. 3d at 22.