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RULE 23: WHAT IT REVEALS ABOUT HOW, AND WHEN, COURTS SHOULD ASCERTAIN THE IDENTITIES OF INDIVIDUAL CLASS MEMBERS

Linda Sandstrom Simard*

Over her distinguished career, Professor Rhonda Wasserman earned the heartfelt respect of fellow academics, honorable jurists, and practicing lawyers. She has received numerous teaching awards, mentored countless students, collaborated with scores of scholars, presented her research at prestigious conferences, and, most importantly, developed strong and treasured relationships with everyone she encountered. She is the type of colleague we all dream to be. Most notably, she is quick to credit the work of others—regardless of whether the author is a seasoned legal scholar, a promising law student,[1] or a cherished loved one[2]—and humble about her own extraordinary accomplishments. A number of years ago, I had the good fortune to meet Rhonda through our shared research interests, and I consider myself lucky to have benefited from her generous spirit and sharp intellect.

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* I wish to extend my sincere thanks to the University of Pittsburgh *Law Review* for inviting me to participate in this edition of the *Review* honoring Professor Rhonda Wasserman. There is little doubt that the next generation of scholars will build upon her many contributions in the field of class action litigation. I believe her work will form the foundation for countless legal advances in the future and will contribute to the resolution of important questions surrounding social equality and access to justice. I am honored to have had the opportunity to participate in this Festschrift because I truly admire Professor Wasserman and her legacy.

[1] Rhonda Wasserman, *Ascertainability: Prose, Policy, and Process*, 50 CONN. L. REV. 695, 698 n.8 (2018) (complimenting articles by a well-known scholar and a student in the same footnote).

[2] *Id.* at 697 * author's note ("I dedicate this article with much love and great pride to my youngest son, Benjamin Wasserman Stern, on the occasion of his graduation from Johns Hopkins University and his selection as a Coro Fellow.").

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Throughout her thirty-five years in the academy, Professor Wasserman consistently produced scholarship that offers deep analysis of complex legal problems, careful evaluation of competing goals, and thoughtful (yet pragmatic) solutions. Her scholarship has been varied, wide-ranging, and influential. Professor Wasserman's first major law review article focused on *Pennoyer v. Neff* and its vestigial impact on the subpoena power.[3] The *Minnesota Law Review* published the article and, recognizing the important insights it revealed, the United States Court of Appeals for the Second Circuit,[4] the Colorado Supreme Court,[5] and the Court of Appeals of Virginia[6] cited it. For most of us, it would be hard to follow such a grand first act, but not for Rhonda. Shortly thereafter, the Supreme Court of the United States quoted the perceptive analysis in her work on the utility of preliminary injunctions as a tool to collect and secure money judgments.[7] Thereafter, she turned her attention to civil procedure in relation to family law and sexuality,[8] earning the Dukeminier Award for one of the Best Sexual Orientation and Gender Identity Law Review Articles in 2009.[9] Few academics can match this prestigious list of honors, and I expect other articles in this Festschrift will focus on the significance of these important contributions. In this Article, I will focus on Rhonda's work on class action litigation, an area of interest that overlaps with my own scholarship and was the genesis of our friendship.

Our professional paths first crossed more than a decade ago when we were both toiling with research regarding the preclusive effects of transnational class actions certified by American courts pursuant to Federal Rule of Civil Procedure 23(b)(3). It was no coincidence that we found ourselves knee deep in the same issue. The

[3] Rhonda Wasserman, *The Subpoena Power:* Pennoyer's *Last Vestiges*, 74 MINN. L. REV. 37 (1989) (although the early English subpoena power had the same reach as the writs used to obtain personal jurisdiction over defendants, the dramatic expansion of state court personal jurisdiction in the United States did not give rise to a parallel expansion in state court subpoena power).

[4] Eli Lilly & Co. v. Gottstein, 617 F.3d 186, 192 n.4 (2d Cir. 2010).

[5] Colo. Mills, LLC v. SunOpta Grains & Foods Inc., 269 P.3d 731, 734 n.4 (Colo. 2012).

[6] Thompson v. Fairfax Cnty. Dep't of Fam. Servs., 747 S.E.2d 838, 855 n.18 (Va. Ct. App. 2013).

[7] Grupo Mexicano de Desarrollo v. All. Bond Fund, 527 U.S. 308, 329, 331, 338, 340 n.5 (1999).

[8] Rhonda Wasserman, *Parents, Partners and Personal Jurisdiction*, U. ILL. L. REV. 813 (1995); Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 WM. & MARY L. REV. 1 (1997).

[9] Rhonda Wasserman, *Are You Still My Mother?: Interstate Recognition of Adaptations by Gays and Lesbians*, 58 AM. U. L. REV. 1 (2008), *reprinted in* 8 DUKEMINIER AWARDS J. 249 (2009).

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Supreme Court had just decided *Morrison v. National Australia Bank Ltd.*,[10] rejecting the extraterritorial application of U.S. securities law in a federal class action filed by Australian shareholders against an Australian bank. Professor Wasserman saw the wide-ranging implications of the case and eagerly dove into the nascent scholarly debate with a powerful article published by the *Notre Dame Law Review*.[11]

Professor Wasserman analyzed the merits of an argument frequently used by defendants to oppose certification of a transnational class.[12] Specifically, such defendants argue that transnational class actions fail the superiority prong of Rule 23(b)(3) because foreign courts are unlikely to recognize or accord preclusive effect to American class action judgments, thereby subjecting defendants to repetitive litigation in foreign courts if a member of a losing class action decides to file suit in a foreign court.[13] If the American court agrees that the risk of repetitive litigation is too substantial, the court will deny certification.[14] In a negative value situation where many plaintiffs suffer small injuries that justify aggregate litigation but each injury alone is too small to justify the cost of individual litigation, the denial of certification often spells the end of the plaintiffs' claims and effectively insulates the defendant from facing litigation. On the other hand, if a court certifies a class, the risk of repetitive litigation only arises if there is a judgment. Yet, class action litigation rarely progresses all the way to a judgment. It is much more common for the parties to negotiate a settlement, which can resolve the hypothetical preclusion problem by including conditions of any future litigation.[15]

In the wake of the Supreme Court's decision in *Morrison*, Professor Jay Tidmarsh and I were working on a closely related question: "When, if ever, should

[10] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010).

[11] Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313 (2011).

[12] *See id.*

[13] *Id.* at 314–15.

[14] *Id.* at 315.

[15] *Id.* at 327–28 ("[I]n class actions that are litigated to judgment, the class action gloss may permit absent class members to pursue some transactionally related individual actions notwithstanding a judgment against the class. But in the substantial majority of certified class actions that settle, the judicially approved settlement agreement may be crafted to provide the defendant with significant protection from follow-up claims by individual absent class members.").

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foreign citizens be included as members of an American class action?"[16] Our analysis challenged the consensus rule that directs courts to exclude from class membership foreign citizens who hail from a country that does not recognize an American class judgment.[17] We argued that the rule is flawed because it fails to account for the fact that a foreign class member who is dissatisfied with an American class judgment may commence a subsequent action in any hospitable foreign forum, not just a home forum.[18] This convergence of scholarly interests brought us together as panelists discussing interjurisdictional prelusion at a scholarly conference.[19]

At around the same time that Professor Wasserman and I focused our scholarly agendas on negative value class litigation, the nation's attention was riveted on a massive protest movement in New York City's Financial District known as Occupy Wall Street, which opposed the extreme economic inequality in contemporary American society.[20] The Occupy Wall Street movement caught the attention of legal scholars nationwide, including one scholar who argued that a decline in class litigation by low-income consumers and employees was a substantial contributor to the persistence of the problem:[21]

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[16] Linda Sandstrom Simard & Jay Tidmarsh, *Foreign Citizens in Transnational Class Actions*, 97 CORNELL L. REV. 87, 88 (2011).

[17] *Id.* at 88. Judge Henry J. Friendly first raised the problem of involving foreign citizens in American class actions. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 996 (1975) ("[I]f defendants prevail against a class they are entitled to a victory no less broad than a defeat would have been."); *see also In re* Vivendi Universal, S. A. Sec. Litig., 242 F.R.D. 76, 95 (S.D.N.Y. 2007) ("[R]es judicata concerns have been appropriately grafted onto the superiority inquiry.").

[18] Simard & Tidmarsh, *supra* note 16, at 90–91 (explaining that class actions and similar procedural devices are used in numerous countries to resolve mass disputes, with many of these procedural devices accommodating foreign citizens).

[19] Rhonda Wasserman, Professor, Univ. of Pitt. Sch. of L. & Linda Sandstrom Simard, Professor, Suffolk Univ. L. Sch., Transnational Class Actions and Interjurisdictional Preclusion at the Our Courts and the World: Transaction Litigation and Civil Procedure Symposium at Southwestern Law School (Feb. 3, 2020).

[20] Bill Chappell, *Occupy Wall Street: From a Blog Post to a Movement*, NPR (Oct. 20, 2011), https://www.npr.org/2011/10/20/141530025/occupy-wall-street-from-a-blog-post-to-a-movement [https://perma.cc/8TNU-SQFU].

[21] Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1531 (2016) ("The implications of this wealth gap reverberate across the socio-legal landscape, but nowhere is the gap more glaring than in the civil docket, where litigation—particularly class actions brought by or on behalf of low-income consumers and employees—is on the verge of disappearing.").

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> [E]conomically disadvantaged groups are more susceptible to abusive practices in the marketplace and the workplace, suffering disproportionate instances of predatory lending, consumer fraud, unfair wages, and discrimination. Without a mechanism for aggregating these low-value claims, the rights of low-income individuals would simply slip through the legal cracks, unvindicated.[22]

Wasserman's scholarship on negative value class litigation illustrates the critical importance of this procedural tool in the fight to protect the least advantaged members of society. For example, in one article, Wasserman highlighted the systemic impact of secret class action settlements.[23] She asserted that when cases are not brought, or when they settle without a merits-based determination, judges fail to acquire the substantive knowledge that is developed through adversarial litigation, and the judicial system becomes less equipped to respond to such suits.[24] This cycle contributes to the persistence of economic inequality.

In another article, Wasserman zeroed in on an issue that increasingly arises in negative value class action lawsuits: how to treat monies reserved to settle a class that go unclaimed because class members cannot be identified or notified.[25] The article focused on a case before the Ninth Circuit Court of Appeals in which the district court had certified a settlement class involving Facebook users who alleged that Facebook revealed their personal information without permission.[26] The case

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[22] *Id.* at 1533–34 ("The financial crisis also generated turmoil within low-income groups relating to, among other things, consumer credit, housing, and employment—exacerbating existing economic disadvantages. For example, owing to the received wisdom (quite wrong as it happens) that lending to the poor was a primary cause of the recession, the credit markets available to low-income individuals came to a near-standstill by 2011. Accordingly, these groups became increasingly dependent upon unscrupulous and high-priced alternatives to traditional credit sources—i.e., payday lenders, check-cashing services, phone cards, and other predatory business practices. And escalating debt often creates problems for low-wage workers, as many employers have come to routinely run credit checks to eliminate applicants with credit problems from consideration. These successive calamities have created a downward spiral that has hampered the recovery of low-income populations, even as top income brackets have fully rebounded from losses suffered during the Great Recession.").

[23] Rhonda Wasserman, *Secret Class Action Settlements*, 31 REV. LITIG. 889 (2012).

[24] *Id.* at 919–20.

[25] Rhonda Wasserman, Cy Pres *in Class Action Settlements*, 88 S. CAL. L. REV. 97 (2014).

[26] Lane v. Facebook, Inc., 696 F.3d 811 (9th Cir. 2012), *cert. denied sub nom.* Marek v. Lane, 571 U.S. 1003 (2013) (challenging a Facebook program that shared information about Facebook members' online activities with their Facebook friends without obtaining consent). A named plaintiff bought a ring from Overstock.com for his wife and the program shared the information—including that the source of the ring was purchased from a discount website—with seven hundred Facebook friends. *Id.*

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settled for $9.5 million, but none of the monies went to the absent class members.[27] Instead, class counsel received approximately $3 million, and the remainder went to a freshly minted organization called the Digital Trust Foundation.[28] The settlement raised eyebrows,[29] in part because Facebook's Director of Public Policy was one of three directors of this new charity and because Facebook's lawyer and class counsel served on the board of legal advisors of the foundation created in the wake of the settlement.[30] Not one for mincing words, Wasserman asserted that the Facebook settlement created the appearance that "by paying a big chunk of money to class counsel and a bigger chunk of money to an organization over which it exerted significant control, Facebook was able to secure the release of *all of the claims against it arising out of the challenged . . . program*."[31] Although the Supreme Court denied certiorari in the case, Justice Roberts agreed with Professor Wasserman's sentiment, expressing "fundamental concerns" about *cy pres* remedies that pay unclaimed monies to organizations that apparently serve the interests of claimants and calling upon the Court "to clarify the limits on the use of [*cy pres*] remedies."[32]

Cy pres remedies are especially prevalent in consumer class litigation because they relieve the pressure to identify every class member or provide individual notice,[33] and *cy pres* remedies avoid problems associated with calculating and distributing low value awards to every individual who suffered harm.[34] Although Federal Rule of Civil Procedure 23 requires courts to evaluate if a proposed class

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[27] Lane v. Facebook, 696 F.3d at 817.

[28] *Id.* (noting that the Digital Trust Foundation was created to "educate users, regulators[,] and enterprises regarding critical issues relating to protection of identity and personal information online").

[29] The Facebook settlement is unusual because no effort was made to distribute any funds to absent class members. Typically, *cy pres* is used for unclaimed funds that remain after efforts to distribute funds. Wasserman, *supra* note 25, at 99–100.

[30] Lane v. Facebook, 696 F.3d at 817–18.

[31] Wasserman, *supra* note 25, at 100 (emphasis added).

[32] Marek v. Lane, 571 U.S. 1003, 1006 (2013).

[33] Wasserman, *supra* note 25, at 104–05 (explaining that unclaimed settlement funds may result when absent class members receive notice of a settlement but choose not to submit a claim for a variety of reasons, including the inability to produce a receipt for the purchased product or lack of motivation to complete a detailed claim form to recover a small amount. Moreover, unclaimed funds may result from interest accrued on the settlement fund or checks returned as undeliverable).

[34] *Id.* at 104 (citing a class action against AOL in which "each member of the class would receive about 3 cents [but t]he cost to distribute these payments would far exceed the maximum potential recovery") (quoting Nachshin v. AOL, LLC, 663 F.3d 1034, 1037 (2011)).

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settlement is "fair, reasonable and adequate,"[35] it is challenging to determine when a *cy pres* distribution meets this standard.[36] Potential alternatives to *cy pres* distributions include allowing unclaimed funds (1) to revert to the defendant, (2) to escheat to the government, or (3) to be distributed to those class members who successfully file claims.[37] Yet, these alternatives have significant drawbacks, leaving some courts to find *cy pres* remedies to be a superior means to distribute unclaimed settlement funds to the benefit of class members "as near as possible."[38]

Professor Wasserman urged courts to proceed with caution because the promise that a *cy pres* remedy is the next best alternative may be empty, particularly if the settlement funds are distributed to charities that have nothing to do with the subject of the litigation or serve geographic areas where few class members are located.[39] She offered a reform agenda to limit some of the risks associated with *cy pres* remedies: (1) reducing attorneys' fees when *cy pres* distributions are made, (2) requiring disclosures from class counsel explaining the necessity for *cy pres* distributions, (3) appointing devil's advocates to scrutinize *cy pres* remedies, and (4) requiring courts to make written findings of class action settlements, including *cy pres* awards.[40]

Nearly a decade after Professor Wasserman articulated this reform agenda, concerns about *cy pres* remedies still linger.[41] Indeed, in 2019, Justice Thomas questioned the adequacy of representation in a settlement class action involving *cy pres* distribution.[42] Focusing on the prerequisites for certification in Rule 23(a), rather than the superiority requirement of Rule 23(b)(3), he noted that when "class

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[35] FED. R. CIV. P. 23(e).

[36] Linda Sandstrom Simard, *"Fair, Reasonable, and Adequate" According to Who?* Cy Pres *Distributions that Result in Cheap Settlements and Generous Attorney Fees, But No Financial Benefit to Class Members*, 88 S. CAL. L. REV. POSTSCRIPT PS 55, 55–56 (2015) (this reply to Professor Wasserman takes her analysis one step further and asks how courts should determine "when, if ever, a settlement that distributes funds *cy pres* [is] 'fair, reasonable, and adequate' to the absent class members?").

[37] Wasserman, *supra* note 25, at 106–12 (discussing drawbacks of each option).

[38] *Id.* at 116.

[39] *Id.* at 118–19.

[40] *Id.* at 98.

[41] D. Brooks Smith, *Class Action and Aggregate Litigation: A Comparative International Analysis*, 124 PENN ST. L. REV. 303, 330 n.174, 333 nn.192 & 196, 334 n.198, 337 n.231, 340 n.242, 341 n.251 (2020) (citing Professor Wasserman's proposed reform agenda).

[42] Frank v. Gaos, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting).

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counsel and the named plaintiffs [are] willing to settle the class claims without obtaining any relief for the class—while securing significant benefits for themselves—[it] strongly suggests that the interests of the class were not adequately represented."[43] Relying upon Rule 23(a) to police the use of *cy pres* is too blunt a tool, however, and will likely result in denial of certification for many proposed negative value class actions that would satisfy the balancing test of Rule 23(b). Justice Thomas's analysis under Rule 23(a) would insulate scores of defendants from the threat of litigation and allow bad actors to continue their bad acts, perpetuating the cycle of poverty. Even conservative scholars see this as a mistake. For instance, Professor Brian Fitzpatrick, a self-identified conservative scholar,[44] believes that:

> [T]he conservative effort to dismantle the administrative state needs class actions. That is, I seriously doubt we can make any significant headway against federal agencies without an alternative means of holding companies accountable for misdeeds. And, at least for the small injuries that make up most market violations, the class action lawsuit is the only viable alternative.[45]

Professor Wasserman's reform agenda is appropriately nuanced, recognizing the role that negative value class actions play in policing the marketplace while simultaneously advancing checks and balances to prevent *cy pres* distributions from being abused.

Several years after her article on *cy pres* remedies, Professor Wasserman again focused her attention on negative value class actions. In an article titled *Ascertainability: Prose, Policy, and Process*,[46] Wasserman wades into the thicket of a hotly contested and complex question: when and how courts should ascertain the identities of individual class members. Wasserman explains that the inability to meet an ascertainability requirement often spells the end of negative value consumer class actions, leaving large groups of aggrieved individuals with no means to seek redress.[47] While other potential reformers have refused to address this complicated

[43] *Id.*

[44] Brian T. Fitzpatrick, *Deregulation and Private Enforcement*, 24 LEWIS & CLARK L. REV. 685, 685 (2020).

[45] *Id.* at 686.

[46] Wasserman, *supra* note 1.

[47] *Id.* at 698–99.

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issue—the Supreme Court has repeatedly denied certiorari in cases raising the issue,[48] Congress has failed to pass a bill addressing the issue,[49] and the Advisory Committee has not taken it up[50]—Professor Wasserman characteristically offers a thoughtful analysis.

The question of ascertainability "has provoked a vigorous debate among the lower federal courts, academics, and the practicing bar,"[51] yet no consensus has emerged on how and when to determine class membership. Rule 23 does not explicitly impose an ascertainability requirement. This omission has left courts without much textual guidance to answer the question and resulted in the circuit split that lies at the heart of Professor Wasserman's article. Ascertainability has long been considered an implicit requirement of Rule 23 in the sense that a "class" must be defined by reasonably clear outer boundaries to enable a court to evaluate numerosity, commonality, typicality, and adequacy of representation as required by Rule 23(a).[52] Notwithstanding the general consensus that some type of ascertainability requirement exists, courts are split on the approach for determining if a class is sufficiently ascertainable to be certified.

At the baseline, Professor Wasserman described a so-called traditional approach that requires a class definition with clear and objective criteria that would, in turn, provide conceptual clarity of the contours of the class.[53] The Seventh Circuit

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[48] Briseno v. ConAgra Foods, Inc., 844 F.3d 1121 (9th Cir. 2017), *cert. denied sub nom.* ConAgra Brands, Inc. v. Briseno, 138 S. Ct. 313 (2017); Rikos v. Procter & Gamble Co., 799 F.3d 497 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 1493 (2016); Mullins v. Direct Digit., LLC, 795 F.3d 654 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161, 1162 (2016); Martin v. Pac. Parking Sys., Inc., 583 Fed. Appx. 803 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 962 (2015).

[49] Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 1718 (2017) (bill imposing a strict ascertainability requirement, passed by the House and referred to the Senate Committee on the Judiciary on Mar. 13, 2017).

[50] Wasserman, *supra* note 1, at 695.

[51] *Id.* at 699–700.

[52] *Id.* at 702 ("[C]ourts have relied upon Rule 23(a)'s use of the word 'class,' noting that '[c]lass certification presupposes the existence of an actual "class."'"); *Mullins*, 795 F.3d at 657; *Briseno*, 844 F.3d at 1123; *see also In re* Petrobras Sec., 862 F.3d 250, 264–66 (2d Cir. 2017) ("Rule 23 contains an implicit threshold requirement" that a proposed class be ascertainable). Some courts also relied upon Rule 23(c)(1)(B) to support an ascertainability requirement. *See* Wasserman, *supra* note 1, at 703.

[53] Wasserman, *supra* note 1, at 706–07 (noting that courts will reject a class definition that includes vague terms such as "nearby," "prompt," "older," and "heavy"); *see, e.g.*, *Mullins*, 795 F.3d at 659–60 (providing that ascertainability requires a class to be defined clearly, by objective criteria, rather than by, for example, a class member's state of mind).

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has noted that "class definitions generally need to identify a particular group, harmed during a particular time frame, in a particular location, in a particular way."[54] For example, a class comprised of Massachusetts residents who smoked at least one pack of a particular brand of cigarettes a day during a particular timeframe would meet the traditional ascertainability requirement even though challenges would likely arise concerning how individual class members would be identified. On the other hand, a class comprised of Massachusetts residents who are "heavy" smokers would not be considered an ascertainable class because "heavy" is vague and ambiguous.[55] Similarly, a class action filed against a title insurance company that proposed a class comprised of "all persons who had purchased title insurance from the defendant in connection with mortgage refinancings and were entitled to a reduced rate under state law but did not receive it" would fail the traditional ascertainability requirement because the class is not conceptually clear—if the class wins, the defendant is bound to the judgment; if the defendant wins, the class members are not bound because they lack a meritorious claim and therefore are omitted from the class.[56]

The traditional approach is juxtaposed to a so-called strict approach, which requires a clear and objective definition of the class (i.e., the traditional approach) plus a "reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition."[57] The added requirement for a reliable and administratively feasible method for determining class membership seeks to ensure that defendants have an opportunity to challenge the evidence proffered to prove class membership, just as they have an opportunity to challenge the evidence proffered to prove the elements of the claim or a defense.[58]

Professor Wasserman asserts that the added requirement of administrative feasibility heightens the demands of ascertainability in four important ways: (1) by

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[54] *Mullins*, 795 F.3d at 660.

[55] Wasserman, *supra* note 1, at 707–08 (citing Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 YALE L.J. 2354, 2382 (2015)).

[56] Wasserman, *supra* note 1, at 712. Note that a "fail safe" class is improper because it shields the class members from an adverse judgment, as class members either win or they are excluded from the class by virtue of losing. *Id.*

[57] *Id.* at 712–13; City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc., 867 F.3d 434, 439–41 (3d Cir. 2017).

[58] Wasserman, *supra* note 1, at 714 (describing the rationale articulated by the Third Circuit that just as a defendant has "a due process right to raise individual challenges and defenses to claims," the defendant deserves "a similar, if not the same, due process right to challenge the proof used to demonstrate class membership").

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requiring proof that the proposed method of identifying class members will be successful; (2) by requiring such proof at the outset of the case rather than later during the claims administration process; (3) by requiring such proof as an independent certification prerequisite under Rule 23(a), rather than as part of the Rule 23(b)(3) analysis; and (4) by rejecting class members' affidavits as stand-alone evidence of class membership.[59]

To illustrate the strict approach, Professor Wasserman analyzed a class action against Bayer Corp. alleging false advertising which stated that its One-A-Day Weight Smart vitamin had metabolism-enhancing effects.[60] Bayer argued against class certification because there was no administratively feasible method to identify class members who purchased the product.[61] Consumers were unlikely to have retained documentary proof of purchase and Bayer lacked evidence of individual sales because it sold the product to retail stores rather than directly to consumers.[62] The Third Circuit refused to consider individual affidavits as proofs of purchase and ultimately reversed the district court's decision to certify the class, notwithstanding the plaintiff's assertion that under the Florida deceptive practices statute, the defendant's liability would not increase or decrease based upon class membership because liability would be determined by the quantity of product the defendant sold in the state.[63]

To date, this debate has not been resolved. Most recently, the Eleventh Circuit weighed in on the circuit split in a case in which owners of allegedly defective refrigerators made for use in RVs sought to certify a class of "all persons who purchased in selected states certain models of Dometic refrigerators that were built since 1997."[64] To identify the class members, plaintiffs proposed using DMV records, manufacturer's records, and class member affidavits.[65] The defendant manufacturer argued that the proposed class failed the ascertainability requirement because these records could not accurately identify whether an RV included the allegedly defective refrigerator and because class member affidavits supporting class

[59] *Id.* at 713.

[60] *Id.* at 715 (reviewing the class certification of Carrera v. Bayer Corp., 727 F.3d 300, 304 (3d Cir. 2013)).

[61] *Id.*

[62] *Id.*

[63] *Id.* at 715–16.

[64] Cherry v. Dometic Corp., 986 F.3d 1296, 1300 (11th Cir. 2021).

[65] Brief for Appellant at 5–8, Cherry v. Dometic Corp., 986 F.3d 1296, 1300 (11th Cir. 2021).

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membership would be unreliable.[66] Rejecting the defendant's argument, the Eleventh Circuit stated that "a proposed class is ascertainable if it is adequately defined such that its membership is capable of determination."[67] This decision places the Eleventh Circuit in line with the Second,[68] Sixth,[69] Seventh,[70] and Ninth[71] Circuits, while rejecting the strict approach advanced most forcefully by the Third Circuit.[72]

An important distinction between the strict approach and the traditional approach is the timing of the administrative feasibility inquiry under Rule 23(a) or Rule 23(b).[73] At first blush, this may seem like a trivial question. But Wasserman argues that by considering administrative feasibility as a stand-alone prerequisite under Rule 23(a), the strict approach unduly forecloses class certification in many situations because administrative feasibility is considered in a vacuum rather than in relation to the overall benefits and burdens of class action treatment.[74] This analytical

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[66] *Dometic*, 986 F.3d at 1300.

[67] *Id.* at 1304.

[68] *In re* Petrobas Sec. Litig., 862 F.3d 250, 264–65, 268–69 (2d Cir. 2017) ("The ascertainability requirement, as defined in this Circuit, asks district courts to consider whether a proposed class is defined using objective criteria that establish a membership with definite boundaries. This modest threshold requirement will only preclude certification if a proposed class definition is indeterminate in some fundamental way. If there is no focused target for litigation, the class itself cannot coalesce, rendering the class action an inappropriate mechanism for adjudicating any potential underlying claims. In other words, a class should not be maintained without a clear sense of who is suing about what. Ascertainability does not directly concern itself with the plaintiffs' ability to offer proof of membership under a given class definition, an issue that is already accounted for in Rule 23.").

[69] Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 537–38 (6th Cir. 2012) (holding that class definition was sufficiently definite to determine whether a particular individual is a member of class using geocoding software and manual review after certification).

[70] Mullins v. Direct Digit., LLC, 795 F.3d 654, 672 (7th Cir. 2015) (rejecting heightened ascertainability requirement adopted by the Third Circuit).

[71] Briseno v. ConAgra Foods Inc., 844 F.3d 1121, 1123 (9th Cir. 2017) ("A separate administrative feasibility prerequisite to class certification is not compatible with the language of Rule 23. Further, Rule 23's enumerated criteria already address the policy concerns that have motivated some courts to adopt a separate administrative feasibility requirement, and do so without undermining the balance of interests struck by the Supreme Court, Congress, and the other contributors to the Rule.").

[72] Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012) (explaining that the heightened ascertainability requirement "eliminates 'serious administrative burdens[,]'" facilitates "best notice practicable[,]" and protects defendants' due process rights by identifying those persons who will be bound by final judgment).

[73] Wasserman, *supra* note 1, at 719.

[74] *Id.*; *see, e.g.*, *Mullins*, 795 F.3d at 663 ("When administrative inconvenience is addressed as a matter of ascertainability, courts tend to look at the problem in a vacuum, considering only the administrative costs

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flaw is particularly acute in the context of negative value class actions because without class certification, many disputes will be unlikely to be adjudicated at all.[75] Professor Wasserman concludes the article with a call to action and urges the Advisory Committee to further study the issue.[76]

Interestingly, this debate has been ongoing for over a decade[77] and to date, very little attention has been paid to the structure of Rule 23. In fact, the structure of the rule provides important telltale signs that may resolve the debate once and for all. The requirements of Rule 23(a) are intended to apply to all class actions because these four prerequisites—numerosity, commonality, typicality and adequacy of representation—provide the glue that justifies binding absent class members to the outcome of litigation controlled by another if, and only if, the absent class members will receive fair and adequate representation.[78] If a court is not convinced the class representatives will adequately represent the absent class members, the court must deny class certification. Indeed, certification must be denied regardless of the type of relief sought.[79] Even if the Rule 23(a) requirements are satisfied, the certification analysis is not complete.[80] The court must also determine whether the proposed class satisfies the criteria for one of the types of class actions identified in Rule 23(b).[81] Notably, Rule 23(b) identifies several specific scenarios that justify representative litigation.[82] In the following analysis, I suggest that while the administrative feasibility of identifying individual class members is highly relevant to class actions

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and headaches of proceeding as a class action. . . . But when courts approach the issue as part of a careful application of Rule 23(b)(3)'s superiority standard, they must recognize both the costs and benefits of the class device.").

[75] Wasserman, *supra* note 1, at 720–21.

[76] *Id.* at 766 (discussing that because the Advisory Committee possesses subject matter expertise, has access to empirical data, has the ability to solicit input from the public, and maintains control over its agenda, it is better positioned to craft a comprehensive solution when compared to the Supreme Court or Congress).

[77] *Marcus*, 687 F.3d at 593 (discussing benefits of heightened ascertainability requirement); Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 537–38 (6th Cir. 2012) (rejecting heightened ascertainability requirement but noting that a class definition must be sufficiently definite so that it is administratively feasible for courts to determine whether a particular individual is a member of class).

[78] FED. R. CIV. P. 23(a).

[79] FED. R. CIV. P. 23(a)(4).

[80] FED. R. CIV. P. 23(b).

[81] *Id.*

[82] *Id.*

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that seek to distribute money to members of the class, it is not relevant to most classes that seek equitable relief.

Class action litigation is an exception to the traditional rule that litigation is conducted by the named parties—those who have skin in the game.[83] Because class action litigation is an exception to this normative preference for party autonomy, Federal Rule of Civil Procedure 23 is designed to "ensure fair and adequate protection of the interests of absentee class members."[84] Each of the requirements of Rule 23(a) serves a specific purpose in justifying an exception to the norm of party autonomy. Numerosity requires the class to be "so numerous that joinder of all members is impracticable."[85] The purpose of this requirement is to ensure that representative litigation is reserved for exceptional situations when the normative preference for party autonomy is not workable.[86] Commonality of questions of law or fact seeks to ensure that the interests of all of the absent class members are sufficiently aligned with each other to conclude that decisions made on behalf of the class will deliver fair representation to the entire class.[87] Similarly, typicality requires the class representative's interests to be aligned with the common interests of the class.[88] Finally, Rule 23(a) requires adequacy of representation, a catch-all requirement that emphasizes the demands of due process in protecting the interests of the absent class members.[89] Notably, none of the Rule 23(a) prerequisites depend upon the identity of the absent class members or the availability of an

[83] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348 (2011) ("The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'") (internal citations omitted); *see also* Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 155 (1982).

[84] Hansberry v. Lee, 311 U.S. 32, 42–43 (1940) (citing due process concerns for absent class members).

[85] *Id.*

[86] 5 DANIEL R. COQUILLETTE ET AL., MOORE'S FEDERAL PRACTICE: CIVIL § 23.22 (3d ed. 2022). In evaluating if numerosity is satisfied, courts consider a number of factors in addition to the sheer size of the class, including judicial economy, geographic distance between class members, financial resources available to class members, ability and motivation of class members to litigate individually, and requests for prospective relief that may impact future class members. *Id.*

[87] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (clarifying the commonality requirement in *Wal-Mart v. Dukes* by stating that the claims must depend upon a common contention that is "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").

[88] COQUILLETTE ET AL., *supra* note 86, § 23.24.

[89] *Id.* § 23.25.

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administratively feasible method to identify those class members.[90] As long as the class is defined by reasonably clear outer boundaries, a court is capable of evaluating if the proposed class meets each of the Rule 23(a) requirements without knowledge of the individual members of the class.

If the requirements of Rule 23(a) are satisfied, a court must then consider if the proposed class fits into one of the sanctioned scenarios that justify class action treatment in Rule 23(b).[91] Rule 23(b) approves several different types of class actions, each of which serves a distinct purpose.[92] One type of class action, defined by Rule 23(b)(1)(A), seeks to avoid separate adjudications by individual class members that are likely to result in "incompatible standards of conduct" for the party opposing the class.[93] The requirements for this type of class are not satisfied by the

[90] *See* FED. R. CIV. P. 23(a).

[91] FED. R. CIV. P. 23.

[92] FED. R. CIV. P. 23(b) provides:

> 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
>
> (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. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

[93] FED. R. CIV. P. 23(b)(1)(A).

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mere possibility that the party opposing the class may prevail against an individual class member in one case and lose against another individual class member in a second case.[94] Rather, Rule 23(b)(1)(A) requires a risk of inconsistent judgments where compliance with one judgment would result in violation of another judgment.[95] Thus, Rule 23(b)(1)(A) certification "*is* appropriate in a case in which the class seeks injunctive or declaratory relief to alter an ongoing course of conduct that is either legal or illegal as to all members of the class."[96] Notably, since Rule 23(b)(1)(A) applies to classes that seek injunctive or declaratory relief, as opposed to damages,[97] it is unnecessary to identify the members of this type of class or evaluate if there is an administratively feasible means to do so. Indeed, because injunctive or declaratory relief is indivisible, these remedies apply either to the entire class or none of the class.[98] The individual identity of class members is largely irrelevant to class certification.

Another scenario that justifies class action treatment, described in Rule 23(b)(1)(B), seeks to avoid individual adjudications that would "be dispositive of the interests" of other similarly situated individuals or would "substantially impair or impede" similarly situated individuals from protecting their interests.[99] While this type of class is often employed in a "limited fund" situation—where a fixed pool of assets is the sole source of recovery for claims that are likely to exceed the available assets[100]—it is possible to certify a class pursuant to Rule 23(b)(1)(B) seeking declaratory or injunctive relief when individual adjudication would prejudice other potential class members.[101] Given the nature and purpose of this type of class,

[94] *In re* Dennis Greenman Sec. Litig., 829 F.2d 1539, 1545 (11th Cir. 1987); McDonnell Douglas Corp. v. U.S. Dist. Ct. for the C.D. of Cal., 523 F.2d 1083, 1086 (9th Cir. 1975); Westman v. Textron, Inc., 151 F.R.D. 229, 231 (D. Conn 1993); Fowlkes *ex rel.* Davenport v. Gerber Prods. Co., 125 F.R.D. 116, 120 (E.D. Pa. 1989); *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 724–25 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

[95] COQUILLETTE ET AL., *supra* note 86, § 23.41.

[96] *Id.*

[97] Casa Orlando Apartments, Ltd. v. Fed'n Nat'l Mortg. Ass'n, 624 F.3d 185, 197 (5th Cir. 2010); *In re* Dennis Greenman Sec. Litig., 829 F.2d 1539, 1545 (11th Cir. 1987).

[98] Shelton v. Bledsoe, 775 F.3d 554, 560–61 (3d Cir. 2015).

[99] FED. R. CIV. P. 23(b)(1)(B).

[100] Specialty Cabinets & Fixtures, Inc. v. Am. Equitable Life Ins. Co., 140 F.R.D. 474, 477 (S.D. Ga. 1991); *In re* First Commodity Corp. Customer Accts. Litig., 119 F.R.D. 301, 311 (D. Mass. 1987).

[101] COQUILLETTE ET AL., *supra* note 86, § 23.42(3)(a).

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administrative feasibility of identifying class members and distributing damages depends upon the nature of the relief requested, and consequently, courts should consider administrative feasibility on a case-by-case basis.

A third type of class, described in Rule 23(b)(2), may be certified when "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."[102] This type of class typically seeks injunctive or declaratory relief that applies to the entire class.[103] In light of the indivisible nature of the relief, administrative feasibility of identifying class members is typically not a necessary consideration to class certification.

The final type of class action, frequently referred to as a damages class action, is defined in Rule 23(b)(3). Unlike the other types of class actions defined in Rule 23(b), this section of Rule 23(b) allows a court to certify a class that seeks solely monetary damages.[104] Pursuant to Rule 23(b)(3), a damages class may be certified when common issues predominate over individual issues and class action treatment is superior to other means of adjudicating the dispute.[105] The rule articulates factors that may inform a court's evaluation of predominance and superiority, including "the likely difficulties in managing a class action."[106] In light of the purpose of the rule, one would conclude that the administrative feasibility of identifying class members is highly relevant to certification of the class. If the goal of the litigation is to distribute damages to individual class members, the administrative feasibility of identifying those class members should be considered.

Looking at the structure of Rule 23, it is apparent that administrative feasibility is not a consideration that belongs under Rule 23(a) for one simple reason: administrative feasibility is not relevant to all class actions. Indeed, even courts in circuits that have adopted the heightened ascertainability standard do not require administrative feasibility for classes that seek equitable relief.[107] Classes that seek

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[102] FED. R. CIV. P. 23(b)(2).

[103] COQUILLETTE ET AL., *supra* note 86, § 23.43.

[104] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614–15 (1997) ("Rule 23(b)(3) added to the complex-litigation arsenal class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded.").

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

[106] *Id.*

[107] Shelton v. Bledsoe, 775 F.3d 554, 560–61 (3d Cir. 2015) (reasoning that a Rule 23(b)(3) class must satisfy predominance and superiority, as well as provide notice and an opportunity for members to opt-

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equitable relief do not require individualized notice, do not require class members to have opt-out rights, and do not raise issues of individual damage assessments. Defendants are required to comply with equitable relief regardless of who is in the class. This is precisely why Rule 23 separately articulates the requirements for class actions that seek monetary relief and equitable relief. The needs of these classes are very different. It would make no sense to incorporate administrative feasibility into Rule 23(a), which demands satisfaction of the expressly articulated prerequisites by all proposed class actions, when administrative feasibility is only relevant to some types of class action—typically those class actions that seek damages. Instead, administrative feasibility belongs under Rule 23(b).

The analytical sequence of Rule 23 is intentional, and courts do not have discretion to interchange the requirements of one section of the rule with another section of the rule because "[c]ourts are not free to amend [the Federal Rules of Civil Procedure] outside the process Congress has ordered."[108] Indeed, the requirements of Rule 23(a) and Rule 23(b) are no more interchangeable than the requirements of compulsory counterclaims under Rule 13(a), permissive counterclaims under Rule 13(b), or crossclaims under Rule 13(g). The Federal Rules of Civil Procedure provide ample opportunity for judicial discretion, but discretion may not overrule intentional precision in a rule's requirements. Each subsection of Rule 23 seeks to accomplish a specific goal. Courts are obligated to grant class certification in "each and every case" where the conditions of Rule 23(a) and (b) are satisfied.[109]

One may argue that the circuit split is inconsequential because courts are only considering administrative feasibility in damages class actions anyway. Yet, this

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out, whereas a Rule 23(b)(2) class seeking injunctive or declaratory relief is indivisible because the defendant's conduct will be enjoined or declared unlawful as to all of the class members or as to none of them); *see also* Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012) (providing that ascertainability requirement facilitates "best notice practicable" required for all 23(b)(3) class actions pursuant to Rule 23(c)(2) and protects the defendant's due process rights by identifying those persons who will be bound by final judgment); *see also In re* Processed Egg Prods. Antitrust Litig., 312 F.R.D. 171 (E.D. Pa. 2015); Gonzalez v. Corning, 317 F.R.D. 443 (W.D. Pa. 2016).

[108] *Amchem*, 521 U.S. at 620; *see also* Elizabeth J. Cabraser, *The Class Abides: Class Actions and the "Roberts Court,"* 48 AKRON L. REV. 757, 761 (2015) ("[I]ndifference to the structural constraints of Rule 23 itself in transporting the requirement for predominance of common issues from Rule 23(b)(3) to Rule 23(b)(2).").

[109] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398–400 (2010); *see also* COQUILLETTE ET AL., *supra* note 86, § 23.03 ("[C]ertification is proper only when the court is satisfied, after a 'rigorous analysis,' that all the requirements of Rule 23 have been established by the party seeking certification.") (citation omitted).

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conclusion misses a significant point: the administrative feasibility of identifying class members does not have bearing on the question of adequate representation.[110] If this additional requirement is transmuted into an implicit prerequisite for certification, it will serve as a superfluous ground for denying certification to a class that otherwise would provide fair and adequate representation. Some may argue that this aggressive interpretation of Rule 23(a) is harmless because if a class is not certified potential class members can still rely upon traditional litigation. Yet, this argument is not persuasive in a negative value situation because many such potential class members will be precluded from filing individual suits if the magnitude of the individual harm is less than the cost to litigate a suit individually. Thus, the true beneficiary of this aggressive interpretation of Rule 23(a) is the defendant who avoids certification of the class and effectively avoids the obligation to answer to allegations of wrongful conduct.

[110] Cherry v. Dometic Corp., 986 F.3d 1296, 1303 (11th Cir. 2021) ("[N]either foreknowledge of a method of identification nor confirmation of its manageability says anything about the qualifications of the putative class representatives, the practicability of joinder of all members, or the existence of common questions of law or fact.").

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