RULE 23(B) AFTER *WAL-MART*: (RE) CONSIDERING A "UNITARY" STANDARD

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I. INTRODUCTION

For more than forty years, class certification questions in federal court have been governed by a straightforward structure. Rule 23 of the Federal Rules of Civil Procedure provides that a class may be certified if it satisfies the four requirements set forth in subsection (a) and falls within at least one of the three categories specified in subsection (b).[1] These categories,

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[1] Rule 23 states, in part:

> **(a)Prerequisites**. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
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> (1)The class is so numerous that joinder of all members is impracticable;

adopted in 1966, represented a significant departure from their predecessor classifications, which depended upon the rather imprecise process of characterizing the right involved in the action.[2] Unsurprisingly, the

> (2)There are questions of law or fact common to the class;
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> (3)The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4)The representative parties will fairly and adequately protect the interests of the class.
>
> **(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)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.

[2] Prior to 1966, Rule 23 divided class actions into three classifications—true, hybrid, and spurious. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 377 (1967). The Rule defined a true class as one in which the right involved was "joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it." FED. R. CIV. P. 23(a)(1) (repealed 1966). In hybrid class actions, the right

uncertainty attending the characterization of a right as "common" or "joint" or "several" tended to obscure rather than clarify the propriety of class certification or the determination of the proper scope of the judgment in a particular class action.[3]

The adoption of the (b)(1), (b)(2), and (b)(3) categories was intended to bring some clarity and certainty to the certification decision by articulating classifications that reflected the courts' experience and emphasizing functionality over formalism.[4] Foreswearing reliance on labels, these revised classifications directly identified types of situations in which there was a perceived cohesion in the interests of similarly situated persons.[5] Moreover, the amendments suggested a fit between the level of cohesion in those interests and the procedural protections owed the absent class members.[6] An alignment of the characterizations of each category with due process needs would, in turn, foster greater predictability with respect to the res judicata effect of a particular class action.[7]

In the decades since the 1966 amendments, the lower courts have expended considerable time and energy interpreting and applying each of the (b) categories. The Supreme Court has also weighed in on occasion by answering questions regarding (b)(1) and (b)(3) class actions and, more recently, with respect to the (b)(2) class action.[8] Yet the hoped for certainty

was "several" rather than "joint," "with the action directed to the adjudication of claims affecting specific property." Kaplan, *supra* at 377. The spurious class action also involved several rights, but in these actions there was a common question of law or fact affecting the rights, and common relief was sought. *Id.* Although the Rule did not specify the binding effect of such judgments, case law appeared to reflect the views of Professor Moore: judgments in true classes would bind members of the class; judgments in hybrid class actions would bind persons having claims with regard to specific property; only parties and privies to a spurious class action, however, would be bound by the judgment in such an action. *See* John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 330–31 (2005); *see also* 2 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 4:1 at 7 (4th ed. 2002).

[3] Kaplan, *supra* note 2, at 380–81.

[4] *Id.* at 386.

[5] *Id.* ("Approaching Rule 23 . . . the Committee strove to sort out the factual situations or patterns that had recurred in class actions and appeared with varying degrees of convincingness to justify treatment of the class *in solido*.").

[6] *Id.* at 380. Thus, in situations falling within the (b)(3) category, Rule 23 mandated notice and opt out rights for absent class members, while in class actions described by (b)(1) and (b)(2) categories, class members were deemed sufficiently protected by the adequate representation requirement set forth in subsection (a).

[7] *Id.*

[8] *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557–61 (2011) (discussing proper

and clarity have proven elusive. That some uncertainty remains is inevitable in an area such as this, given the discretionary nature of the certification decision.[9] In addition, some lack of certainty is predictable as both counsel and courts have experimented with the use (and abuse) of the class action device in addressing issues created by novel social questions.[10] Beyond that, however, there are questions regarding the categories—even fundamental questions—that surprisingly remain unresolved.

This article examines some of those questions and the controversy surrounding the (b) categories.[11] It suggests that the classification scheme adopted in 1966 may in fact impede and obscure the determination of the class certification question and the determination of those procedures necessary to protect the legitimate interests of absent class members.[12] While there may be short-term solutions to the problems created by the current categories, the article argues that the best long-term solution may be to abandon the classification system.[13]

Part I of this article will discuss the conflict and uncertainty characterizing case law regarding (b)(1) and (b)(2) class actions in "hybrid" cases—i.e., class actions in which the class seeks both injunctive (or declaratory) relief and monetary relief—as illustrative of the problems created by the current categories articulated in Rule 23 (b).[14] Part II of the article will discuss the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes* and its near-term implications for application of the (b) categories.[15]

scope of (b)(2) class action in context of class seeking both injunctive and monetary relief); Ortiz v. Fibreboard Corp., 527 U.S. 815, 832–48 (1999) (discussing proper scope of (b)(1)(B)); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619–22 (1997) (determining proper application of (b)(3) class action in settlement context).

[9] Califano v. Yamasaki, 442 U.S. 682, 702 (1979) (emphasizing the discretion of district courts in class certification decisions by stating: "[C]ertification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court.").

[10] *See Ortiz*, 527 U.S. 815; *Amchem*, 521 U.S. 591. These cases involved creative uses (or abuses) of the class action device to resolve some of the novel and pressing problems created by the massive asbestos litigation.

[11] *See infra* Parts I–II.

[12] *See infra* Part III.

[13] *See infra* Part III.

[14] *See infra* Part I.

[15] *See infra* Part II.

Part III argues that, in the long term, Rule 23 should be restructured to eliminate the classification system presently reflected in subsection (b).[16] In its stead, Rule 23 should employ a unitary standard that decouples the decision to certify a class from the decision regarding which protections must be provided in the event a class is certified.[17] The new standard would direct courts to assess and balance interests traditionally implicated by the certification and protection decisions: prejudice to the parties or absentee members of the class; efficiencies available from class treatment of the claims; the extent to which class treatment facilitates access to the courts; and the countervailing autonomy interests of the absentees.[18]

In making this assessment, the district court should determine the level of cohesiveness characterizing the class members' shared interests.[19] If the court concludes that class members' interests are sufficiently similar that class treatment would advance the interests supporting class certification, it may certify a class (or some portion thereof).[20] If a class is certified, the court should also determine whether this same balancing of interests warrants the addition of protections beyond the requirement of adequate representation.[21]

Adoption of such a standard would offer substantial advantages.[22] It would avoid the excessive investment of energy and costs sometimes required of courts deciding which category applies and which protections are required.[23] It would also avoid undue emphasis on the form of relief requested, which can distort the certification process.[24] Finally, by focusing the court's attention explicitly on the interests served by certification of a class, the standard would enhance the transparency of the decision-making process and thereby facilitate a more effective appellate review.[25]

[16] *See infra* Part III.

[17] *See infra* Part III.

[18] *See infra* Part III.

[19] *See infra* Part III.

[20] *See infra* Part III.

[21] *See infra* Part III.

[22] *See infra* Part III.

[23] *See infra* Part III.

[24] *See infra* Part III.

[25] *See infra* Part III.

II. MANDATORY CLASS ACTIONS PRIOR TO *WAL-MART*

A. (b)(2) class action

Rule 23 states that a class action may be certified under the (b)(2) category where "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."[26] In its inception, this category of class actions seemed relatively noncontroversial. Civil rights cases, typically involving allegations of unlawful discrimination against a group of similarly situated persons and seeking wide ranging injunctive and declaratory relief, seemed particularly well suited for (b)(2) treatment and were cited as "illustrative" of the types of actions for which (b)(2) was designed.[27]

Interestingly, however, this category has generated a number of issues that have not been fully resolved. There is, for example, a recurring argument that those seeking certification under (b)(2) must establish "need" as a condition of obtaining (b)(2) status.[28] Although the Rule nowhere articulates such a requirement, some courts have required a demonstration of need, at least where government defendants are involved.[29]

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

[27] *See* FED. R. CIV. P. 23(b)(2) advisory committee's note (1966) ("Illustrative [of (b)(2) actions] are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration."); s*ee also* Kaplan, *supra* note 2, at 389 ("[N]ew subdivision (b)(2) build[s] on experience mainly, but not exclusively, in the civil rights field."). Professor Marcus has argued that subsection (b)(2) was shaped to meet the needs of civil rights litigation. David Marcus, *Flawed But Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 702 (2011).

[28] *See, e.g.*, Craft v. Memphis Light, Gas, and Water Div., 534 F.2d 684, 686 (6th Cir. 1976), *aff'd*, 436 U.S. 1 (1978) (setting forth the argument that class certification is inappropriate where class treatment is not needed and providing a list of cases from multiple jurisdictions that follow such reasoning).

[29] *See, e.g.*, Green v. Williams, No. CIV-4-78-34, 1980 U.S. Dist. LEXIS 17881, at *5 (E.D. Tenn., Dec. 17, 1980) ("The rule in this circuit seems to be well settled that certification of an action as a class action under Rule 23(b)(2) . . . is inappropriate where the injunctive and declaratory relief sought, to the extent granted, would automatically accrue to the benefit of the class members."). In the context of private party defendants, *see, e.g.*, Gray v. Int'l Bhd. of Elec. Workers, 73 F.R.D. 638, 640 (D.D.C. 1977) ("[T]here exists no need for this case to be certified as a class action. This Court has consistently and emphatically adhered to the view that when, as here, the relief being sought can be fashioned in such a way that it would have the same purpose and effect as a class action, the certification of a class action is unnecessary and inappropriate.").

A second issue left unresolved is whether defendant classes may be authorized under subsection (b)(2). The Rule does not expressly address the issue, and the language of the Rule applies awkwardly, at best, to defendant classes.[30] In addition, most courts have been reluctant to certify a defendant class under (b)(2) because absent members have no ability to opt out, and the courts perceive greater due process concerns where defendant classes are at stake.[31] The Second Circuit, however, has recognized that there are definite benefits to be obtained from certification of (b)(2) defendant classes and has certified them under that subsection.[32]

The third and perhaps most significant issue relating to (b)(2) class actions, most recently addressed in *Wal-Mart*, is whether and when certification is appropriate under subsection (b)(2) when the class seeks monetary as well as injunctive (and/or declaratory) relief.[33] The text of subsection (b)(2) is silent on the availability of monetary relief; although, the Advisory Committee Note states that the subdivision "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[34] Consequently, it appeared to courts prior to *Wal-Mart* that a request for monetary relief did not preclude certification under (b)(2); however, *when* monetary relief predominated was left undefined.

For many years, this issue seemed to cause little concern. The courts often granted certification under (b)(2) in suits seeking broad injunctive

But see Ollier v. Sweetwater Union High Sch. Dist., 251 F.R.D. 564, 566 (S.D. Cal. 2008) (rejecting "need" as relevant to propriety of certification). The requirement has been justified on the ground that class actions should not be used when an award of injunctive relief on behalf of the individual plaintiff would inure to the benefit of those similarly situated. *Craft*, 534 F.2d at 686.

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

[31] *See* Tilley v. TJX Cos., 345 F.3d 34, 39–40 (1st Cir. 2003) (concluding that Rule 23(b)(2) does not contemplate defendant classes based on interpretation of text, drafting history, and reactions of courts and commentators).

[32] *See* Marcera v. Chinlund, 595 F.2d 1231, 1238–39 (2d Cir. 1979), *vacated on other grounds sub nom.*, Lombard v. Marcera, 442 U.S. 915 (1979). The Seventh Circuit has indicated that in some situations a defendant class could be appropriate. *See* Henson v. E. Lincoln Twp., 814 F.2d 410, 414 (7th Cir. 1987), *writ granted*, 484 U.S. 923 (1987), *appeal dismissed*, 506 U.S. 1042 (1993) (permitting debtor to sue defendant class of creditors where plaintiff sought declaratory relief because creditors were the real plaintiffs and debtor was the real defendant). The Supreme Court granted a writ of certiorari in *Henson* to consider the issue but later dismissed the case when the parties settled. Henson v. E. Lincoln Twp., 506 U.S. 1042, 1042 (1993).

[33] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).

[34] FED R. CIV. P. 23(b)(2) advisory committee's note (1966).

relief such as school desegregation or prison reform.[35] Where monetary relief was also sought, (b)(2) certification was justified as appropriate because the monetary relief was deemed "ancillary" or "incidental" to the injunctive relief requested.[36] The courts reached this conclusion because in civil rights cases the relief sought was typically backpay or frontpay and was considered equitable relief in the nature of the declaratory or injunctive relief requested.[37] The courts also spoke of the monetary relief as "flowing from" the injunctive or declaratory relief requested.[38] In these cases, courts often found that the monetary relief for each class member could be readily calculated on the basis of a formula or "principles uniformly applicable to the class."[39] On the other hand, courts found (b)(2) certification inappropriate where the request for apparently equitable relief was, in reality, a demand for money damages.[40]

The passage of the Civil Rights Act of 1991, however, prompted the courts to reexamine this apparently stable state of affairs and the role of the (b)(2) class action. The Act, intended to enhance enforcement of Title VII, provided additional remedies in the form of compensatory and punitive damages to victims of intentional discrimination.[41] The statute also provided the right to a jury trial on such claims.[42]

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[35] Bradley v. Harrelson, 151 F.R.D. 422, 427 (M.D. Ala. 1993) (relating to class certification in prison reform); *see, e.g.*, Thomas Cnty. Branch of the N.A.A.C.P. v. City of Thomasville Sch. Dist., 187 F.R.D. 690, 700 (M.D. Ga. 1999) (relating to class certification in the school desegregation context).

[36] *E.g.*, Probe v. State Teachers' Ret. Sys., 780 F.2d 776, 780 (9th Cir. 1986) (holding damages sought to be "incidental" to the primary claim for injunctive relief).

[37] *See* Meghan E. Changelo, *Reconciling Class Action Certification with the Civil Rights Act of 1991*, 36 COLUM. J.L. & SOC. PROBS. 133, 138–39 (2003) (noting that (b)(2) certification of Title VII cases had been "relatively uncontroversial" because the only available remedies, including backpay and frontpay, were deemed equitable, thereby eliminating the need for "complex individualized determinations" of damages and the need for a jury trial); Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After The Civil Rights Act of 1991*, 2001 BYU. L. REV. 305, 309–313 (2001) (asserting that (b)(2) certification had been uncontroversial because of the equitable nature of backpay and frontpay).

[38] Rice v. City of Phila., 66 F.R.D. 17, 20 (E.D. Pa. 1974).

[39] *Id.*

[40] *See In re* Sch. Asbestos Litig., 789 F.2d 996, 1008 (3d Cir. 1986) (upholding district court's determination that claims for injunctive relief were "essentially" claims for damages), *cert. denied sub nom.*, Celotex Corp. v. Sch. Dist. of Lancaster, 479 U.S. 852 (1986).

[41] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 2, 16, 29, and 42 U.S.C.).

[42] *Id.*

These changes triggered a judicial assessment of their impact on the propriety of certifying a (b)(2) class action in civil rights cases seeking hybrid relief. Additional questions were raised when courts confronted this issue in cases outside the civil rights context. The determination of when a court could properly certify a class seeking monetary relief under (b)(2) led, ultimately, to three articulated approaches, described below.

1. The Circuits Split

a. The Incidental Damages Approach

In 1998, the Fifth Circuit undertook to assess the impact of these changes on the propriety of certifying a (b)(2) class action in a Title VII case seeking hybrid relief.[43] In *Allison v. Citgo Petroleum Corp.*, plaintiffs alleged that defendant had engaged in class-wide race discrimination in hiring, promotion, and other policies at one of its manufacturing plants.[44] Arguing theories of disparate impact and systemic disparate treatment, plaintiffs sought injunctive, declaratory, and monetary relief.[45] The monetary relief included compensatory and punitive damages, as well as backpay and frontpay.[46] Plaintiffs also requested a jury trial and sought certification of a class of employees pursuant to Rule 23(b)(2).[47]

In determining whether (b)(2) certification was appropriate, the *Allison* court found no explicit guidance in the Rule or in circuit precedent.[48] As noted above, an Advisory Committee Note on (b)(2) suggested that a request for monetary relief would not preclude (b)(2) certification as long as that request was accompanied by a request for injunctive or declaratory relief and the latter form of relief was "predominant."[49] To provide content to that term, the court reviewed the purposes of class actions generally, including the purposes of mandatory classes, i.e., (b)(1) and (b)(2) classes.[50] The (b)(2) class, the court stated, was "intended to focus on cases where

[43] *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998).

[44] *Id.* at 407.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 407–08.

[48] *Id.* at 412.

[49] *See* FED R. CIV. P. 23(b)(2) advisory committee's note (1966).

[50] *Allison*, 151 F.3d at 412.

broad, class-wide injunctive or declaratory relief is necessary."[51] Given the "broad character" of such relief and the "group nature of the harm," the (b)(2) class was assumed to be a "homogenous and cohesive group with few conflicting interests among its members."[52] Thus, one factor in determining whether monetary relief "predominated" was to determine whether the safeguards of notice and opt out were necessary—that is, was the monetary relief in the nature of a group remedy, or did it require an assessment of the individualized circumstances and merits of each class member's claim?[53]

Interestingly, however, the court went on to assert that although it was necessary to determine whether notice and opt out rights were required, such a determination could not be the sole measure of "predominance."[54] Rather, the court must also look at "the need [for] and efficiency of a class action" because the predomination requirement in the (b)(2) context "serves the same function as the procedural safeguards *and* the predominance and superiority requirements of (b)(3) class actions."[55]

Having identified the relevant interests—"the legitimate interests of individual class members who might wish to pursue their monetary claims individually" and "the legal system's interest in judicial economy"—the court concluded that for (b)(2) purposes, monetary relief predominates unless it is "incidental" to the requested injunctive or declaratory relief.[56] "Incidental" damages were then defined as damages flowing from liability to the class as a whole on the injunctive relief claims.[57] Such damages should generally "be concomitant with, not merely consequential to," class-wide injunctive relief.[58] Elaborating, the court indicated that incidental damages should be capable of computation by reference to "objective standards" and "not dependent in any significant way on the intangible, subjective differences of each class member's circumstances."[59] Thus, additional hearings addressing "new and substantial legal or factual issues" or requiring "complex individualized determinations" should be

[51] *Id.*
[52] *Id.* at 413.
[53] *Id.*
[54] *Id.* at 414.
[55] *Id.* at 414–15 (emphasis added).
[56] *Id.* at 415.
[57] *Id.*
[58] *Id.*
[59] *Id.*

unnecessary.[60] In the case before it, the court concluded that plaintiffs' claims for compensatory and punitive damages did not meet the standard.[61] "Such damages," the court stated, "awarded on the basis of intangible injuries and interests, are uniquely dependent on the subjective and intangible differences of each class member's individual circumstances."[62]

Plaintiffs' alternative proposals were also deemed insufficient.[63] Hybrid certification—the certification of plaintiffs' declaratory and injunctive claims under (b)(2) and their damages claims under (b)(3)—could not be utilized because resolution of the damages claims required consideration of facts and issues specific to the individual class members; the predominance of such individual claims, in turn, suggested the lack of superiority.[64] As the court explained, "this action must be tried to a jury and involves more than a thousand potential plaintiffs spread across two separate facilities, represented by six different unions, working in seven different departments, and alleging discrimination over a period of nearly twenty years."[65]

With respect to plaintiffs' final argument, that the court should certify the disparate impact claim and the first stage of the pattern or practice claim, the court noted two problems.[66] Certifying the first stage of the pattern or practice claim would not accomplish any useful purpose since "there was no foreseeable likelihood that the claims for compensatory and punitive damages could be certified in the class action," and, in any event, would run afoul of circuit precedent prohibiting use of Rule 23(c)(4)(A) to manufacture predominance for Rule 23(b)(3) purposes.[67] Moreover,

[60] *Id.*

[61] *Id.* at 418.

[62] *Id.*

[63] *Id.* at 420.

[64] *Id.* at 419.

[65] *Id.* The court further noted that the "likelihood of bifurcated proceedings before multiple juries" increased the potential for Seventh Amendment problems. *Id.* at 419–20.

[66] *Id.* at 420–21.

[67] *Id.* at 421–22. In *Castano v. American Tobacco Co.*, 84 F.3d. 734, 745 n.21 (5th Cir. 1996), the Fifth Circuit had rejected the use of Rule 23(c)(4) to "manufacture" the predominance necessary to satisfy the requirements of (b)(3). Following *Castano*, the *Allison* court rejected such "sever[ing] [of] issues until the remaining common issue predominates over the remaining individual issues" since that practice "would eviscerate" the predominance requirement. *Allison*, 151 F.3d at 422. The *Allison* court characterized plaintiffs' attempt to have the first stage of their pattern or practice claim certified under (b)(2) or (b)(3)—without dropping their claims for class-wide compensatory and punitive damages—as a similar effort to manufacture predominance, a result forbidden by *Castano*. *Id.*

although certification of the disparate impact claim under (b)(2) would seem appropriate and beneficial, the court pointed out that certification of the claim in the absence of the pattern and practice claim was ultimately precluded by the Seventh Amendment.[68] The existence of factual issues common to the two claims meant that the Seventh Amendment would prohibit a bench trial of the disparate impact claim prior to a jury trial of the damages claims.[69] Moreover, given the adjudication of the disparate impact claim, the damages claims would be barred by res judicata or collateral estoppel if advanced in a subsequent class action.[70]

b. The Ad Hoc Approach

Allison's "bright-line"[71] rule was subsequently considered and rejected by the Second Circuit in *Robinson v. Metro-North Commuter Railroad Co.*[72] The plaintiffs in *Robinson*, employees of the defendant, alleged that the defendant had engaged in race discrimination against them and a class of African-American employees in violation of Title VII.[73] The plaintiffs' allegations included both pattern-or-practice disparate treatment claims and disparate impact claims.[74] Plaintiffs sought injunctive relief, backpay, and frontpay.[75]

Like the *Allison* court, the Second Circuit found that neither Rule 23 nor circuit precedent definitively addressed the issue of when a class action seeking hybrid relief could properly be certified under (b)(2).[76] The court also agreed with *Allison*'s identification of the relevant interests.[77] But the incidental approach, characterized in *Robinson* as essentially barring the (b)(2) certification of a class seeking compensatory and/or punitive

[68] *Allison*, 151 F.3d at 422–25.

[69] *Id.* at 423.

[70] *Id.* at 425.

[71] *Id.* at 428 (Dennis, J., dissenting); Robinson v. Metro-N. Commuter R.R. Co., 267 F.3d 147, 163–64 (2d Cir. 2001).

[72] 267 F.3d 147 (2d Cir. 2001).

[73] *Id.* at 155.

[74] *Id.*

[75] *Id.* Plaintiffs also sought compensatory damages for "individual members of the class who were allegedly the victims of individual acts of intentional discrimination." *Id.*

[76] *Id.* at 162–63.

[77] *Id.*

damages, was unnecessarily narrow and inappropriately invasive of the district court's legislatively conferred discretion.[78]

Proper respect for that authority suggested the adoption of an "ad hoc" approach to the determination of "predominance."[79] Pursuant to that approach, a district court was to look to "the 'relative importance of the remedies sought, given all of the facts and circumstances of the case.'"[80] Certification of a (b)(2) class that sought even non-incidental monetary relief could be appropriate if the district court determined that: "(1) 'the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed', and (2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy."[81] At a minimum, the district court was to satisfy itself that:

> (1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits. Insignificant or sham requests for injunctive relief should not provide cover for (b)(2) certification of claims that are brought essentially for monetary recovery.[82]

This standard would preserve the full measure of the district court's discretion and produce better certification results tailored to the specific circumstances of each case.[83]

Unlike the *Allison* court, the *Robinson* court was untroubled by the possible infringement of the absentees' due process rights.[84] In those portions of the class action where the underlying presumption of cohesion

[78] *Id.* at 164–65.

[79] *Id.* at 164.

[80] *Id.* (quoting Hoffman v. Honda of Am. Mfg., Inc., 191 F.R.D. 530, 536 (S.D. Ohio 1999)).

[81] *Id.* (quoting partially from *Allison*, 151 F.3d. at 430 (Dennis, J., dissenting) (citation omitted)).

[82] *Id.*

[83] *Id.* at 165 ("[P]ermitting district courts to assess issues of judicial economy and class manageability on a case-by-case basis is superior to the one-size-fits-all approach of the incidental damages standard.").

[84] *See id.*

"falter[ed]," the district court had available to it a number of procedural tools to protect those interests, including bifurcation of liability and damages stages, the provision of notice and opt out rights, and hybrid certification.[85]

c. The Ninth Circuit: Molski *and* Wal-Mart

In *Molski v. Gleich*, the Ninth Circuit indicated its agreement with the idea of an ad hoc approach to the predominance question.[86] Although previous courts in the Ninth Circuit had used the term "incidental" in addressing the predominance issue, the *Molski* court stated that the term was only intended to indicate that monetary relief sought by the class should be "secondary" to the injunctive relief requested.[87] Like the Second Circuit, the *Molski* court found the incidental approach troubling because it "nullif[ied]" the district court's discretion and created disturbing implications "for the viability of future civil rights actions."[88] Curiously, however, the *Molski* court did not adopt the Second Circuit standard.[89] Instead, in deciding the predominance question, district courts were directed to consider the circumstances of the case, the language of Rule 23 (b)(2), and "the intent of the plaintiffs in bringing the suit."[90]

This singularly vague standard was subsequently rejected in *Dukes v. Wal-Mart Stores, Inc.*, a case addressing the propriety of the certification of a nationwide class of women employed by Wal-Mart.[91] Class members claimed they were subjected to discriminatory pay and promotion policies.[92] They sought injunctive and declaratory relief, as well as backpay and punitive damages.[93] Certification was sought and granted under subsection (b)(2).[94] On appeal, Wal-Mart claimed, among other things, that (b)(2)

[85] *Id.* at 166.
[86] 318 F.3d 937, 950 (9th Cir. 2003).
[87] *See id.* n.14.
[88] *Id.* at 950.
[89] *Id.*
[90] *Id.*
[91] 603 F.3d 571 (9th Cir. 2010).
[92] *Id.* at 577–78.
[93] *Id.* at 578.
[94] *Id.* at 615.

certification could not be justified since the class claims for money damages clearly predominated.[95]

The Ninth Circuit disagreed, upholding the (b)(2) certification.[96] In doing so, however, the court articulated a new standard for the predominance determination—one that began with the dictionary.[97] Turning to *Webster's*, the court noted that "predominant" was defined as "having superior strength, influence, or authority . . . ."[98] Neither the incidental damages standard nor its own standard, the court concluded, properly captured the essence of the predominance requirement.[99] The *Molski* standard was "subjective," and as such unhelpful.[100] Requiring courts to focus on plaintiffs' intent in bringing a lawsuit necessitated a "nebulous and imprecise inquiry" and led to a failure to consider those factors actually relevant to the predominance determination.[101]

The incidental damages approach, while objective in nature, was also flawed.[102] First, the court noted, "predominant" was not the equivalent of "more than incidental," and thus the *Allison* standard was unduly restrictive because it prohibited certification of types of classes that the drafters of the Rule appeared to allow.[103] In addition, the court agreed with *Robinson* and *Molski* that the *Allison* standard "'usurp[ed] the district court's authority to . . . exercise its own discretion.'"[104]

Rather, an appropriate standard would look to "the objective 'effect of the relief sought' on the litigation."[105] In determining that effect, the court should consider a number of factors (no single factor being dispositive), including, "whether the monetary relief sought determines the key

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[95] *Id.*

[96] *Id.* at 577. The court upheld (b)(2) certification of a class of current employees and their claims for injunctive and declaratory relief and backpay. *Id.* Claims for punitive damages were remanded to the district court for its consideration under (b)(2) or (b)(3). *Id.* In addition, the court remanded the claims of class members who no longer worked for Wal-Mart at the time the complaint was filed. *Id.* On remand, the court was directed to consider whether these claims might be certified under Rule 23(b)(3). *Id.*

[97] *Id.* at 616.

[98] *Id.* (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 978 (11th ed. 2004)).

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *See id.*

[103] *Id.*

[104] *Id.* at 616–17 (quoting *Allison*, 151 F.3d at 431 (Dennis, J., dissenting)).

[105] *Id.* at 617 (quoting *Allison*, 151 F.3d at 416).

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 . . . ."[106]

2. Development and Divergence: Judicial Activity after the Split

In the years after *Robinson* and *Molski*, the courts struggled to apply the predominance standard adopted by their circuit. That they struggled, especially in circuits adopting an ad hoc approach, was probably unsurprising. As was later acknowledged by the Ninth Circuit in *Dukes*, *Molski* provided virtually no guidance to district courts trying to assess the propriety of (b)(2) certification in a hybrid context.[107] District courts were to consider the circumstances of the case and the intent of the plaintiffs, with the objective of ascertaining whether the injunctive relief sought was "primary."[108]

The *Robinson* standard, on the other hand, appeared to offer a more structured approach with more substantial guidance.[109] District courts were to look to the relative importance of the remedies sought, ascertain whether class treatment would be efficient and manageable, and determine whether the "positive weight or value" of the injunctive relief was "predominant."[110] At a minimum, the court was to ensure that the injunctive relief was not "sham" or "insignificant."[111] Apparently, this was to be tested by determining whether a reasonable plaintiff would seek injunctive or declaratory relief even if damages relief were unavailable and whether success on the merits would warrant the granting of the requested injunctive or declaratory relief.[112]

Yet, in reality, this standard offered little additional direction. While courts are familiar with the process of assessing the potential efficiencies of class treatment, *Robinson* did not explain how the courts were to determine the relative importance of the remedies or that the positive weight or value

[106] *Id.*

[107] *See id.*

[108] Molski v. Gleich, 318 F.3d 937, 950 (9th Cir. 2003). *See* discussion *supra* notes 89–90.

[109] Robinson v. Metro-N. Commuter R.R. Co., 267 F.3d 147 (2d Cir. 2001).

[110] *Id.* at 164.

[111] *Id.*

[112] *Id.*

of the injunctive relief was predominant.[113] Similarly, the two-pronged test added little or nothing to the inquiry courts already undertook under (b)(2)—whether the requested injunctive or declaratory relief was merely a disguised request for monetary relief.[114]

Beyond the fact of struggle, the courts' application of the relevant standard was notable for several reasons. First, and predictably, courts adopting an ad hoc approach were very receptive to the certification of civil rights cases under (b)(2). In the Second Circuit, as long as the court was convinced that the requested injunctive relief was not a sham remedy, the court was likely to grant (b)(2) certification.[115] Inclusion of non-incidental

[113] *See Robinson*, 267 F.3d 147.

[114] This lack of substantial guidance was reflected, in part, in the courts' "cafeteria" approach to both the standard's articulation and to its application. *Compare, e.g.*, Matyasovszky v. Hous. Auth. of Bridgeport, 226 F.R.D. 35, 44–45 (D. Conn. 2005) (citing *Robinson* standard and concluding that plaintiffs would probably bring suit for injunctive relief even in the absence of monetary recovery; that injunctive relief should be awarded if plaintiffs' allegations were established; and that certification would avoid duplicate litigation) *with In re* Nig. Charter Flights Contract Litig., 233 F.R.D. 297, 304 (E.D.N.Y. 2006) (stating and applying *Robinson*'s admonition against (b)(2) certification in cases of "insignificant" or "sham" requests for injunctive relief (quoting *Robinson*, 267 F.3d at 164)). In a few instances, the court failed to cite or apply any part of the *Robinson* standard. *See* Bolanos v. Norwegian Cruise Lines, Ltd., 212 F.R.D. 144, 152–54, 157 (S.D.N.Y. 2002) (citing *Robinson* but not its standard for predominance); Marriott v. Cnty. of Montgomery, 227 F.R.D. 159, 172 (N.D.N.Y. 2005) (citing *Robinson*, but only for the proposition that presumption of cohesion arising from request for class-wide injunctive relief "'continues where incidental damages are also sought because entitlement to such damages does not vary based on the subjective consideration of each class member's claim . . . .'" (quoting *Robinson*, 267 F.3d at 165)).

[115] Typically, in those cases, the courts would state the applicable standard as one or both prongs of the minimum threshold test. If the court concluded that the test was satisfied, it would grant (b)(2) certification without further consideration of the significance of the injunctive relief relative to the requested monetary relief. *See* EEOC v. Local 638, No. 71 Civ. 2877 (RLC), 2004 U.S. Dist. LEXIS 21682, at *26–29 (S.D.N.Y. Oct. 28, 2004); Spinner v. City of New York, No. CV-01-2715, 2003 U.S. Dist. LEXIS 19298, at *18–19 (E.D.N.Y. Oct. 6, 2003); Hilton v. Wright, 235 F.R.D. 40, 50–53 (N.D.N.Y. 2006). Indeed, some courts indicated with approval the position of some commentators: "'If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2).'" Cokely v. N.Y. Convention Ctr. Operating Corp., No. 00 Civ. 4637 (CBM), 2004 U.S. Dist. LEXIS 9264, at *32 (S.D.N.Y. May 21, 2004) (quoting Gelb v. Am. Tel. & Tel. Co., 150 F.R.D. 76, 78 (S.D.N.Y. 1993)). In some cases, judicial economy was cited or discussed as a relevant factor in the decision, but it was generally treated as a supporting matter rather than as a primary factor in the decision. *See* D.D. v. N.Y. City Bd. of Educ., No. CV-03-2489, 2004 U.S. Dist. LEXIS 5189, at *39 (E.D.N.Y. Mar. 30, 2004); Latino Officers Ass'n. N.Y. v. City of New York, 209 F.R.D. 79, 92–93 (S.D.N.Y. 2002). In those few civil rights cases in which the

damages relief was no obstacle to (b)(2) certification.[116] To the extent the courts found that non-incidental damages implicated due process or efficiency interests, they typically determined, with little discussion, that devices such as bifurcation, hybrid certification, or issues certification could be utilized if necessary.[117] On the other hand, where plaintiffs sought (b)(2) certification in cases not alleging discrimination or other civil rights violations, (b)(2) certification was largely denied.[118] Although the reasons given for the decisions varied somewhat, denial ultimately rested on the court's conclusion that the injunctive or declaratory relief sought was not a valid or significant remedy.[119]

court denied (b)(2) certification, it did so on the basis of its conclusion that the usual requirements of (b)(2) had not been satisfied, either because injunctive relief was unavailable or because the defendant had not acted on grounds applicable to the entire class. *See* McBean v. City of New York, 228 F.R.D. 487, 501–02 (S.D.N.Y. 2005) (concluding that injunctive relief was not reasonably necessary or appropriate because defendants had changed their allegedly unconstitutional policy); Morgan v. Metro. Dist. Comm'n, 222 F.R.D. 220, 235 (D. Conn. 2004) (concluding that plaintiffs had failed to produce sufficient evidence of a general pattern or practice of discrimination with regard to the proposed class).

[116] *See Robinson*, 267 F.3d at 164.

[117] *See Matyasovszky*, 226 F.R.D. at 45 (concluding that (b)(2) certification was appropriate because class members' interests were identical in liability phase, and, therefore, due process rights of absent members were protected; noting also that the court could decertify damages phase or require plaintiffs to afford notice and opt-out right if damages claims proved too divergent). *See also EEOC*, 2004 U.S. Dist. LEXIS 21682, at *29 (noting the availability of (c)(4)(A) if problems arise later); Wright v. Sterns, Nos. 01 Civ. 4437 (DC), 02 Civ. 4699 (DC), 2003 U.S. Dist. LEXIS 11589, at *22 (S.D.N.Y. July 9, 2003) (holding that individualized determinations are not a concern at liability stage; if need for individualized relief at remedial stage, court can provide notice and opt out).

[118] *See* Dobson v. Hartford Life & Accident Ins. Co., No. 99cv2256 (JBA), 2006 U.S. Dist. LEXIS 14922, at *34 (D. Conn. Mar, 31, 2006); *In re* Nig. Charter Flights Contract Litig. 233 F.R.D. at 304; Vega v. Credit Bureau Enters., No. 02-CV-1550, 2005 U.S. Dist. LEXIS 4927, at *13–15 (E.D.N.Y. Mar. 29, 2005); *In re* Rezulin Prods. Liab. Litig., 224 F.R.D. 346, 350–53 (S.D.N.Y. 2004).

[119] In some cases this conclusion was unexceptional—the requested declaratory or injunctive relief was unavailable or no longer a factor in the case, or the court concluded that the requested injunction or declaration served no independent remedial purpose, but merely served to establish a basis for obtaining monetary relief. S*ee* Vengurlekar v. Silverline Techs., Ltd., 220 F.R.D. 222, 229 n.5 (S.D.N.Y. 2003) (deeming claim for injunctive relief a "non-issue" in light of defendant's petition for bankruptcy); Cashman v. Dolce Int'l/Hartford Inc., 225 F.R.D. 73, 94 (D. Conn. 2004) (holding that statute allows damages relief only); Petrolito v. Arrow Fin. Servs., LLC, 221 F.R.D. 303, 312 (D. Conn. 2004) (holding that Fair Debt Collection Practices Act does not authorize equitable relief; which bars FDCPA class certification under (b)(2)); Presbyterian Church of Sudan v. Talisman Energy, Inc., 226 F.R.D. 456, 468 (S.D.N.Y. 2005) ("plaintiffs clothe[d] their

The Ninth Circuit courts under *Molski* were similarly hospitable to (b)(2) certification of cases alleging civil rights violations. Their conclusion that injunctive or declaratory relief was the "primary"[120] or "essential"[121] goal of the litigation was typically based on the court's apparent conviction that the requested injunctive relief was significant, particularly in light of the seriousness of the allegations made.[122] Unlike the Second Circuit, Ninth

claim for relief in the vestments associated with equitable claims" but the "obvious form of injunctive relief" plaintiffs would be expected to seek was no longer relevant because defendant had ceased oil exploration in Sudan). But in other cases the court made its decision regarding predominance with little or no explanation and without suggesting that the equitable relief sought was in any way sham or unreasonable. *See* Bolanos, 212 F.R.D. at 157 (S.D.N.Y. 2002); *In re* Ski Train Fire in Kaprun, Austria on November 11, 2000, 220 F.R.D. 195, 211 (S.D.N.Y. 2003); *see also In re* Worldcom, Inc. ERISA Litig., 33 Empl. Benefits Cas. (BNA) 2281, 2283 (S.D.N.Y. 2004). In the few cases in which (b)(2) certification was granted, the monetary relief requested was restitutionary in nature (*see* Richards v. Fleetboston Fin. Corp., 235 F.R.D. 165, 174–76 (D. Conn. 2006)), or the damages relief was deemed incidental (*see* DeMarco v. Nat'l Collector's Mint, Inc., 229 F.R.D. 73, 81 (S.D.N.Y. 2005)).

[120] Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 171 (N.D. Cal. 2004) ("Given all the above, the court is satisfied that Plaintiffs' claim for punitive damages is secondary to their primary goal of achieving equitable relief."), *aff'd*, 509 F.3d 1168 (9th Cir. 2011), *rev'd*, 131 S. Ct. 2541 (2011).

[121] Moeller v. Taco Bell Corp., 220 F.R.D. 604, 613 (N.D. Cal. 2004) (assessing plaintiffs' intent and concluding that monetary damages did not appear to be plaintiffs' "'essential goal'" (quoting Kanter v. Warner–Lambert Co., 265 F.3d 853, 860 (9th Cir. 2001))).

[122] In support of this conclusion, courts would sometimes cite general propositions to the effect that civil rights cases were particularly well-suited or illustrative of the type of cases for which (b)(2) certification was appropriate, or, that if injunctive relief was appropriate, (b)(2) certification should be granted. *See Dukes*, 222 F.R.D. at 170 (noting that (b)(2) was "written with employment discrimination specifically in mind"); *Moeller*, 220 F.R.D. at 613 (stating that civil rights suits are "'prime examples' of Rule 23(b)(2) classes" (partially quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997))); Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist., No. CIV 04-2510-PHX-EHC, 2006 U.S. Dist. LEXIS 1483, at *31 (D. Ariz. Jan. 12., 2006) (citing *Amchem*, 521 U.S. at 614); Amone v. Aveiro, 226 F.R.D. 677, 686–87 n.6 (D. Haw. 2005) (noting in discussion of predominance test commentator's suggestion that (b)(2) certification be granted as long as (a) requirements met and declaratory or injunctive relief sought; determining whether injunctive or monetary relief is primary not productive). In some cases, the court effectively minimized the significance of the damage relief sought because, for example, the damages available were more limited, or more speculative in nature, or because plaintiffs had not sought all the types of damages available. *See Moeller*, 220 F.R.D. at 610 (seeking only minimum statutory damages); *Dukes*, 222 F.R.D. at 171 (seeking punitive damages, which are inherently more speculative in nature); *Rodriguez*, 2006 U.S. Dist. LEXIS 1483, at *28, 33 (seeking damages only for emotional distress, not usual frontpay, backpay, or reinstatement). In some cases, the courts offered no explanation for their conclusion that the monetary relief was not primary. *See, e.g.*,

Circuit courts were also more likely to grant (b)(2) certification in non-civil rights cases.

Perhaps unsurprisingly, given the lack of guidance from *Molski*, there was often limited explanation of the basis for a particular conclusion.[123] When the courts did discuss their reasoning, they considered any number of potentially relevant factors. Thus, where certification was granted, courts relied on the intent of plaintiffs, plaintiffs' evidence that injunctive relief was appropriate, proof that the *Robinson* factors were certified, or even that the damages requested were "incidental."[124] Where certification was denied, the court's decision was based on its determination that the requested injunctive or declaratory relief was unavailable[125] or unnecessary,[126] or was, in reality, a request for monetary relief. [127]

Second, and perhaps more surprising, was the divergence and ambivalence characterizing the decisions of the courts adopting the incidental damages approach. *Allison* was viewed by many as establishing a rigid, bright line approach, one that would impede class resolution of

Satchell v. FedEx Corp., Nos. C 03-02659 SI, C 03-02878 SI, 2005 U.S. Dist. LEXIS 37354, at *29 (N.D. Cal. Sep. 28, 2005).

[123] *See, e.g.*, Gonzales v. Arrow Fin. Servs., LLC, 233 F.R.D. 557, 582–83 (S.D. Cal. 2006) (concluding that injunctive and declaratory relief clearly predominated over claimed damages because damages relief restricted to statutory damages).

[124] *See* Schwarm v. Craighead, 233 F.R.D. 655, 663 (E.D. Cal. 2006) (noting appropriateness of injunctive and declaratory relief with respect to class as a whole); Hansen v. Ticket Track, Inc., 213 F.R.D. 412, 416 (W.D. Wash. 2003) (noting appropriateness of injunctive and declaratory relief with respect to class as a whole); *Gonzales*, 233 F.R.D. at 582–83 (holding declaratory relief applicable to class as a whole); Westways World Travel, Inc. v. AMR Corp., 218 F.R.D. 223, 242 (C.D. Cal. 2003) (holding declaratory relief appropriate because there was value to plaintiff in obtaining injunctive relief; damages "flow directly" from declaratory relief needing no complex determinations so damages incidental); Wang v. Chinese Daily News, Inc., 231 F.R.D. 602, 612–13 (C.D. Cal. 2005) (considering appropriateness of injunctive relief and plaintiffs' intent and applying *Robinson*'s two-prong test), *aff'd*, 623 F.3d 743 (9th Cir. 2010), *vacated*, Chinese Daily News, Inc. v. Wang, 132 S.Ct. 74 (2011).

[125] *See* Palmer v. Stassinos, 233 F.R.D. 546, 552 (N.D. Cal. 2006) (holding injunctive relief unavailable to private plaintiffs under Fair Debt Collection Practices Act).

[126] *See In re* Paxil Litig., 218 F.R.D. 242, 247–48 (C.D. Cal 2003) (finding that defendant had ceased to make "some (perhaps most)" of the statements plaintiffs sought to enjoin).

[127] *See* Burton v. Mountain W. Farm Bureau Mut. Ins. Co., 214 F.R.D. 598, 610 (D. Mont. 2003); *see also* Robertson v. N. Am. Van Lines, Inc., No. C-03-2397 SC, 2004 U.S. Dist. LEXIS 7788, at *11–12 (N.D. Cal. Apr. 13, 2004) ("Indeed, the gist of Plaintiffs' grievance is that they were forced to pay more money for their move than was required under the law. The primary way to remedy such injuries is through restitution and compensatory damages.").

systemic discrimination.[128] The Fifth Circuit subsequently appeared to moderate this perceived rigidity, however, in *In re Monumental Life Insurance Co.*[129] Plaintiffs in *Monumental* claimed that defendants had engaged in decades-long race discrimination in the administration and sale of low-value life insurance policies.[130] They sought injunctive relief, repayment of premiums unlawfully charged, and payments improperly denied.[131] The district court concluded that a (b)(2) class could not be certified because the requested monetary relief did not "flow from" the requested injunctive relief.[132] The court cited the number of hearings necessary to determine each plaintiff's recovery in light of the variety of policies involved.[133]

The Fifth Circuit reversed.[134] It acknowledged that the monetary relief sought required consideration of the individual policies involved and "arguabl[y] . . . the sort of complex data manipulations forbidden by *Allison*."[135] It concluded, however, that certification did not run afoul of *Allison*'s strictures because damages could be determined by recourse to objective data.[136]

In the Seventh Circuit, the courts' routine recitation of the various means of managing hybrid relief issues (consideration of (b)(3) certification, hybrid certification, and treating a (b)(2) class as if it were certified under (b)(3), i.e., providing notice and opt-out rights) suggested a greater openness to certifying hybrid relief cases.[137] Yet, in many of those

[128] *See* Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 163 n.8 (2d Cir. 2001) (citing discussions by courts, practitioners and academic commentators regarding the *Allison* incidental damages approach).

[129] 365 F.3d 408 (5th Cir. 2004).

[130] *Id.* at 412.

[131] *Id.* at 412–13.

[132] *Id.* at 418.

[133] *Id.*

[134] *Id.* at 421.

[135] *Id.* at 419.

[136] *Id.* at 419–20. Defendants had argued that plaintiffs' proposed restitution grids were untenable given the large numbers necessary to account for the different types of policies. *Id.* at 419. The court agreed but found no basis for a "sweat-of-the-brow" exception to the predominance standard. *Id.* Instead, the court stated, it must be "guided by [the standard's] command that damage calculation 'should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations'" *Id.* (quoting Allison v. Citgo Petroleum Corp., 157 F.3d 402, 415 (5th Cir. 1998)).

[137] *See, e.g.*, Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 897 (7th Cir. 1999).

cases, the courts did not utilize those means and expressed their uneasiness with the potential due process and Seventh Amendment problems that these solutions presented.[138]

In contrast, the Sixth Circuit's attitude toward the predominance question was viewed by many as the most restrictive of the circuits.[139] In *Reeb v. Ohio Department of Rehabilitation & Correction,* a sex discrimination case, plaintiffs sought injunctive and monetary relief in the form of compensatory and punitive damages.[140] The court, adopting the incidental damages standard, denied (b)(2) certification.[141] Its holding appeared uncompromising: "[B]ecause of the individualized nature of damage calculations for Title VII plaintiffs and the ability of those plaintiffs to bring individual actions, claims for individual compensatory damages . . . are not recoverable by a Rule 23 (b)(2) class."[142] Yet, the court left open

[138] *See id.* This apparent unease has been reflected in the Seventh Circuit's opinions since its initial consideration of the hybrid issue. *See id.* at 897–98 (noting the possibility of divided certification or treating (b)(2) class as if it were a (b)(3) class by affording notice and opt-out rights, but also highlighting question of whether (b)(2) may ever be used where compensatory or punitive damages are sought without violating Seventh Amendment or due process requirements); Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, 216 F.3d 577, 581 (7th Cir. 2000) (indicating that where requested damages were not "incidental," the district court should consider three alternatives for handling the case, and also noting the Seventh Amendment implications of using divided certification); *In re* Allstate Ins. Co., 400 F.3d 505, 508 (7th Cir. 2005) (noting as alternatives to (b)(2) certification the possibility of an issues class or certifying a (b)(2) class with notice and opt-out protections, but expressing skepticism of the legitimacy of the latter option when (b)(3) is an available alternative); *see also* Randall v. Rolls-Royce Corp., 637 F.3d 818, 826 (7th Cir. 2011) (stating that "proper approach" in this discrimination case seeking injunctive and backpay relief would have been to seek certification under (b)(3) because (b)(2) certification is only appropriate where the money sought is "mechanically computable" and primary relief sought is injunctive ; in those circumstances, claims are "uniform" and "elaborate notice" is unnecessary).

[139] *See* Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 655 (6th Cir. 2006) (Keith, J., dissenting) ("Other circuits that have adopted the *Allison* standard, including this Circuit in *Coleman*, have not adopted an unduly restrictive standard like the majority does in the instant case."); Colindres v. Quietflex Mfg., 235 F.R.D. 347, 370–71 (S.D. Tex. 2006) (describing *Reeb* as adopting "a position similar to, but more stringent than," *Allison*'s because it excludes the possibility of seeking monetary damages in a Title VII case under Rule 23(b)(2), instead requiring plaintiffs to either forego monetary damages or meet the more stringent requirements of Rule 23(b)(3)).

[140] *Reeb*, 435 F.3d at 642.

[141] *Id.* at 651.

[142] *Id.* In reaching this conclusion, the court relied heavily on its reasoning in a prior case, *Coleman v. GMAC*, 296 F.3d 443 (6th Cir. 2002), where it had reversed the district court's certification of a (b)(2) class claiming race discrimination in violation of the Equal Credit

two avenues for class recovery of monetary damages pursuant to (b)(2): (1) backpay, which it characterized as an equitable remedy, not inconsistent with court precedent or the Rule;[143] and (2) compensatory and punitive damages "that inure to the group benefit."[144] Predictably, in cases following *Reeb*, the courts largely declined to certify hybrid cases—whether or not they involved civil rights claims.[145] On the other hand, a few courts justified

Opportunity Act ("ECOA") and for which the plaintiffs sought injunctive and compensatory damages relief. *Reeb*, 435 F.3d at 649. Looking to *Allison*, the *Coleman* court contrasted the homogeneity of interests among members of mandatory classes with the more divergent interests of members of a (b)(3) class and concluded that certifying a class under (b)(2) where monetary damages were sought required more caution because of the due process and Seventh Amendment concerns implicated. *Coleman*, 296 F.3d at 447–48. Requests for compensatory damages typically required individualized inquiries that undermined the assumption of cohesion underlying (b)(2) classes and, consequently, a class seeking compensatory damages for violations of the ECOA could not be certified under (b)(2). *Id.* at 449. The *Reeb* court noted that under the *Coleman* rationale the characteristics of Title VII litigation even more clearly warranted a conclusion that requests for compensatory damages should not be certified under (b)(2). 435 F.3d at 650.

[143] *See Reeb*, 435 F.3d at 650 (discussing *Coleman*'s conclusion that backpay could be reconciled with (b)(2) certification because it "'involve[d] less complicated factual determinations and fewer individualized issues'" and "backpay is an equitable remedy that does not implicate the procedural and constitutional issues that a damage award does." (quoting *Coleman*, 296 F.3d at 449–50)).

[144] *See id.* at 651 (explaining that its holding does not foreclose all Title VII class actions and that Title VII plaintiffs can pursue class actions under (b)(2) if plaintiffs seek only declaratory or injunctive relief, or seek such relief "in conjunction with compensatory and punitive damages that inure to the group benefit.").

[145] *See, e.g.*, Burkhead v. Louisville Gas & Elec. Co., 250 F.R.D. 287, 298 (W.D. Ky. 2008) (denying (b)(2) certification in environmental action in which plaintiff class sought monetary and injunctive relief; *inter alia*, monetary damages sought were "more than 'incidental'" (emphasis in original)); Gawry v. Countrywide Home Loans, 640 F. Supp. 2d 942, 960–61 (N.D. Ohio 2009) (Certification of a (b)(2) class was denied in this suit by mortgagors seeking declaratory and monetary relief against mortgagees that allegedly levied a usurious prepayment penalty. The denial was based in part on a conclusion that declaratory relief provided a basis for securing money damages and because a determination of damages required "highly fact-intensive" individualized treatment.), *aff'd*, 395 Fed. Appx. 152 (6th Cir. 2010); Armstrong v. Whirlpool Corp., No. 3:03-1250 2007 U.S. Dist. LEXIS 14635, at *25–29 (M.D. Tenn. Mar. 1, 2007) (Title VII case where class could not be certified under (b)(2) because claims for compensatory damages did not inure to the group benefit but were dependent on circumstances of individual plaintiffs); Curry v. SBC Commc'ns, Inc., 250 F.R.D. 301, 313 (E.D. Mich. 2008) (denying (b)(2) certification in race discrimination case because claim for compensatory and punitive damages required individualized analysis and thus predominated over the requested injunctive relief); *see also* Serrano v. Cintas Corp., No. 04-40132 2009 U.S. Dist. LEXIS 26606, at *30–31 (E.D. Mich. Mar. 31, 2009) (denying class certification in discrimination case because of failure to satisfy (a) requirements and because, with respect to disparate impact claim, (b)(2) certification was

(b)(2) certification on the basis of the exceptions articulated in *Reeb*—the monetary relief sought was in the form of backpay or damages "similar" to backpay, or the damages sought were allegedly those "that inure to the group benefit."[146]

The third development of interest from the courts' application of the predominance standards was the variety of "second layer" questions the application generated. For example, should backpay, a typical remedy requested in civil rights actions, be considered monetary damages and thus subject to analysis under the predominance standard? If deemed to be monetary relief, was backpay "incidental" to any injunctive relief requested? If properly considered "incidental," was the explanation that backpay is an equitable remedy? Should other equitable monetary relief then be deemed incidental?[147]

inappropriate where plaintiffs' claims for backpay, frontpay, and punitive damages required individualized determinations for each class member).

[146] *See* Sloan v. BorgWarner, Inc., 263 F.R.D. 470, 476 (E.D. Mich. 2009) (certifying class of retirees under (b)(1) and (b)(2) where requested damages—repayment of benefits denied by defendants—were viewed, in essence, as "back benefits" similar to backpay); s*ee also* Grant v. Metro. Gov't of Nashville & Davidson Cty., No. 3:04-0630, 2007 U.S. Dist. LEXIS 86042, at *3 (M.D. Tenn. Nov. 19, 2007) (The court denied a motion to decertify the Title VII action where the class sought injunctive and declaratory relief and only named plaintiffs sought compensatory damages. The court provided for a bifurcated trial, stating that if the jury found for plaintiffs and the class on the class issues, the jury could determine plaintiffs' compensatory damages. It further noted: "[t]the parties may wish to consider whether the jury should award the class compensatory and punitive damages that 'inure to the group benefit,'" although the court concluded that that option might require additional notice and an opt-out right. (quoting Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 651 (6th Cir. 2006)); Card v City of Cleveland, 270 F.R.D. 280, 297 (N.D. Ohio 2010) (concluding, in Title VII suit, that "compensatory and punitive damages that will inure to the benefit of the entire class" were monetary damages consistent with *Reeb*).

[147] *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415–16 n.10 (noting circuit precedent construing (b)(2) as permitting recovery of monetary relief where such relief was equitable in nature, characterizing backpay as an equitable remedy, and finding district court's application of incidental damages standard to backpay claims was "flawed"); *In re* Monumental Life Ins. Co., 365 F.3d 408, 418 (5th Cir. 2004) ("It would be mistaken to presume that because backpay—a remedy readily calculable on a class-wide basis—is compatible with a Rule 23(b)(2) class, any other remedy designated as equitable may automatically piggyback a claim for injunctive relief. . . . [E]quitable monetary remedies are less likely to predominate . . . but this has more to do with the uniform character of the relief . . . ."); *Coleman*, 296 F.3d at 449 (holding backpay recoverable pursuant to (b)(2) class action because "backpay generally involves less complicated factual determinations and fewer individualized issues" than the computation of compensatory damages, and because backpay is an equitable remedy and thus does not implicate procedural and constitutional issues of damage awards); c*f.* Randall v. Rolls-Royce Corp., 637 F.3d 818, 825 (7th Cir. 2011) (The court disagreed with plaintiffs' proposition that (b)(2) certification is appropriate

In addition, as courts engaged in more careful, in-depth analysis of the (b)(2) category, they were prompted to consider what factors might properly be seen as relevant to such certification decisions. For example, efficiency and manageability are considerations explicitly relevant to (b)(3) inquiries. Were they also proper factors in a (b)(2) analysis? If so, when and how should they be considered?[148] Similarly, cohesiveness had become a watchword of (b)(2) analysis in hybrid relief scenarios, but what was its specific role in the analysis? Was it simply a characteristic helping to define and distinguish among the categories, or was it a requirement of (b)(2) certification worthy of specific (or separate) analysis?[149]

Another set of questions was prompted by the suggested means of managing hybrid relief cases: (1) certification under (b)(3); (2) hybrid (or divided) certification; (3) certification of an issues class for injunctive issues only; and (4) the certification of the class under (b)(2), but with provision of notice and opt-out rights.[150] Courts and commentators worried

as long as only equitable relief is sought, even if the equitable relief is primarily monetary. The court cautions that "injunctive" relief is not the same as "equitable" relief and that monetary relief, whether legal or equitable, may make the case "unsuitable" for Rule 23(b)(2) treatment.); Thorn v. Jefferson–Pilot Life Ins. Co., 445 F.3d 311, 331–32 (4th Cir. 2006) (mirroring the idea just explained from *Randall* and adding: "But if the Rule's drafters had intended the Rule to extend to all forms of equitable relief, the text of the Rule would say so.").

[148] *See, e.g.*, Shook v. Bd. of Cnty. Comm'rs, 386 F.3d 963, 970 (10th Cir. 2004) (noting judicial disagreement over whether manageability may be considered in determining propriety of (b)(2) certification); *In re* Rezulin Prods. Liab. Litig., 210 F.R.D. 61, 75 (S.D.N.Y. 2002) (In denying (b)(2) certification in a products liability case for medical monitoring subclass, the court acknowledged that there is no predominance or superiority requirement for (b)(2) classes but argued that the class must be cohesive and states its concern that the proposed subclass will not be sufficiently manageable or efficient.); *In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., 209 F.R.D. 323, 343 (S.D.N.Y. 2002) (In denying (b)(2) certification in an environmental products liability lawsuit seeking mandatory injunctive relief, the court notes the importance of "'ensur[ing] that individual issues do not pervade the entire action because the suit could become unmanageable'" and concludes that the number of individualized issues in this case rebuts any presumption of cohesion suggested by the requested injunctive relief (quoting Barnes v. Am. Tobacco Co., 161 F.3d 127, 143 (3d Cir. 1998) (citations and brackets omitted))).

[149] *See, e.g.*, *In re* Welding Fume Prods. Liab. Litig., 245 F.R.D. 279, 315 nn.189–90 (discussing adoption in *Barnes*, 161 F.3d at 142–43, of implicit cohesion requirement for (b)(2) classes, noting the courts' disagreement regarding its existence, and terming the question "not settled" within the Sixth Circuit); *cf.* O'Connor v. Boeing N. Am. Inc., 197 F.R.D. 404, 411–12 (C.D. Cal. 2000) (refusing to adopt cohesiveness requirement for Rule 23(b)(2) that is "similar, if not more stringent" than the predominance requirement of Rule 23 (b)(3)).

[150] *See, e.g.*, Robinson v Metro-North Commuter R.R. Co, 267 F.3d 117, 166 (2d Cir. 2001); Lemon v. Int'l Unions of Oper. Eng'r, 216 F.3d 577, 581–82 (7th Cir. 2000).

that relegating hybrid relief cases to the (b)(3) category would substantially undermine the effectiveness of civil rights laws. The requirements of (b)(3) were deemed more difficult to satisfy than those of (b)(2), and thus victims of discrimination would not have access to the most effective means of eliminating systemic discrimination—the class action.[151] Divided certification and issues classes raised the question of the proper role of issues class actions and potential problems with the Seventh Amendment.[152] Finally, although the Rule authorizes a district court to use its discretion to order notice and opt out in mandatory class actions, courts wondered whether it made sense to treat a (b)(2) case as if it were a (b)(3) case.[153]

The last set of inquiries arises from the natural reaction of lawyers to the strictures imposed by the courts on the (b)(2) class action. If courts held that

[151] *See Reeb*, 435 F.3d at 653–55 (Keith, J., dissenting) (suggesting that alternatives to (b)(2) class action suggested by majority—individual actions or (b)(3) actions—provide inadequate protection for civil rights: "This holding eliminates the power of class actions to address systemic discrimination on a broad scale that is unparalleled to filing individual suits."); Molski v. Gleich, 318 F.3d 937, 950 (9th Cir. 2003) (noting troubling implications of *Allison* for viability of future civil rights actions); W. Lyle Stamps, Comment, *Getting Title VII Back on Track: Leaving* Allison *Behind for the* Robinson *Line*, 17 BYU J. PUB. L. 411, 435 (2003) (characterizing *Allison* as "infring[ing] on the substantive rights of legitimate Rule 23 (b)(2) classes that seek a full range of Title VII remedies in federal court"); Suzette M. Malveaux, *Fighting to Keep Employment Discrimination Class Actions Alive: How* Allison v. Citgo*'s Predomination Requirement Threatens to Undermine Title VII Enforcement*, 26 BERKELEY J. EMP. & LAB. L. 405, 425–27 (2005) (discussing problems with (b)(3) certification of Title VII claims).

[152] *See, e.g.*, *Allison*, 151 F.3d at 418–25; Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 898 (7th Cir. 1999) (noting that one can consider divided certification—certifying injunctive aspects of the suit under (b)(2) and damage aspects under (b)(3)—but it "would require the district judge to try the damages claims first to preserve the right to jury trial, a step that would complicate the management of separate classes . . . ."); discussion *supra* notes 65–85 and accompanying text; *cf.* Nelson v. Wal-Mart Stores, Inc., 245 F.R.D. 358, 380 (E.D. Ark. 2007) (agreeing to certify (b)(2) class on issues of liability, declaratory and equitable relief, and to sever issue of punitive damages while stating that this option "makes the best use of judicial resources and the efficiencies of the class-action devices . . . while . . . protecting the due process rights of individual class members.").

[153] *See In re* Allstate Ins. Co., 400 F.3d 505, 508 (7th Cir. 2005) (noting that circuit precedent had "carefully left open . . . whether th[at] procedure . . . is ever proper" and suggesting that "such an effort to restructure Rule 23(b)(2) would be complicated and confusing—unnecessarily so, given the ready availability of the Rule 23(b)(3) procedure"); *see also Nelson*, 245 F.R.D. at 378 (declining to certify punitive damages claims under (b)(2) in light of Eighth Circuit precedent indicating that opt out rights should be provided only in a Rule 23(b)(3) class); Burkhead v. Louisville Gas & Elec. Co., 250 F.R.D. 287, 297 n.8 (court concludes that where there are individual concerns, it is better not to certify under (b)(2) at all than to certify a (b)(2) class with notice and opt-out rights).

certification under (b)(2) required that any monetary relief be "incidental" or "secondary," lawyers would tailor class complaints accordingly. Prayers for relief would avoid requests for compensatory damages. Instead, class relief would be limited to punitive damages or backpay (or other monetary relief characterized as equitable in nature), or counsel would seek no class-wide monetary relief at all. These decisions, in turn, prompted the courts to ask whether limiting the requests for relief reflected adversely on the adequacy of representation by class representatives and class counsel.[154] After all, class members are bound by a determination of class claims, and it was at least possible that preclusion principles would dictate that class members would be unable to seek recovery of damages relief in subsequent suits.[155]

[154] *See* McLain v. Lufkin Indus., Inc., 519 F.3d 264, 283 (5th Cir. 2008) (upholding district court decision to deny (b)(2) certification of disparate treatment class where that court had concluded that monetary relief predominated and expressed concern about the putative representatives' decision not to press claims for monetary damages).

[155] *See id.* at 283 (Noting the potential bar to subsequent individual claims for damages, the appellate court stated: "[I]f the price of a Rule 23(b)(2) disparate treatment class both limits individual opt outs and sacrifices class members' rights to avail themselves of significant legal remedies, it is too high a price to impose."); Ammons v. La-Z-Boy Inc., No. 1:04-CV-67-TC, 2008 U.S. Dist. LEXIS 98728, at *42 (D. Utah Dec. 5, 2008) (The defendant charged that named plaintiffs' withdrawal of class claims for compensatory damages was contrary to the interests of the class members because the named plaintiffs had essentially waived the rights of the absentee class members to such damages; therefore, named plaintiffs were inadequate representatives. The court concluded that this potential conflict could be cured by allowing class members to opt out of an injunctive class.); *In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., 209 F.R.D. 323, 339–40 (S.D.N.Y. 2002) (The court concluded that named plaintiffs alleging claims seeking only injunctive relief for alleged contamination of private wells by toxic chemicals were inadequate representatives of a proposed class of private well users. The court noted that several cases had held that waiver or abandonment of personal injury or other claims rendered putative representatives inadequate and suggested to the court that it could not "ensure" the ability of absentees to bring subsequent damages actions.). Similar unease regarding class representatives' manipulation of requests for class relief is reflected in *McManus v. Fleetwood Enterprises, Inc.*, 320 F.3d 545, 554 (5th Cir. 2003). In *McManus*, the named plaintiffs alleged that defendant had misrepresented the towing capacity of its motor homes and sought class certification for injunctive relief under (b)(2) and, in the alternative, certification of a damages class under (b)(3). *Id.* at 546. The court stated that it was not required to determine which form of relief predominated but only "whether injunctive relief, to the *exclusion* of damages, is appropriate under (b)(2)." *Id.* at 553 (italics in original). The court pointed out that "the ordinary relief" for defendant's alleged misconduct would be monetary rather than injunctive in nature, and that class-wide injunctive relief was unavailable because defendant had no ongoing relationship with its purchasers and individual relief for each plaintiff would be required if plaintiffs prevailed. *Id.* The court concluded:

B. The (b)(1) Action

As with the (b)(2) class action, the proper scope of the (b)(1) category has been uncertain. Although the text of Rule 23 is susceptible of a liberal interpretation, courts have generally taken a cautious attitude toward its application. Section (b)(1)(B),[156] which is intended to protect the interests of class members whose interests would be impaired by individual adjudications, has been often regarded as relevant primarily to limited fund cases.[157] Section (b)(1)(A), which is aimed at protecting the party opposing

> [P]ermitting this lawsuit to continue as a Rule 23(b)(2) class would undo the careful interplay between Rules 23(b)(2) and (b)(3). That is, the class members would potentially receive a poor substitute for individualized money damages, without the corresponding notice and opt out benefits of Rule 23(b)(3); and defendants would potentially be forced to pay what is effectively money damages, without the benefit of requiring plaintiffs to meet the rigorous Rule 23(b)(3) requirements.

Id. at 554.

[156] Rule 23(b)(1)(B) provides, in relevant 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:
> >
> > . . .
> >
> > (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 . . . .

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

[157] This has been especially true since the Supreme Court decision in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), where the court rejected an ambitious attempt by an asbestos manufacturer to certify a settlement class of persons who were exposed to its asbestos products and had not yet filed suit (or settled a claim) against defendant; the manufacturer argued unsuccessfully that the settlement fund was a limited fund within the scope of (b)(1)(B). *See, e.g.*, Richards v. Fleetboston Fin. Corp., 238 F.R.D. 345, 354 (D. Conn. 2006) (certifying class under (b)(1)(A) and (b)(2), but not (b)(1)(B) because "Rule 23(b)(1) is typically applied in limited fund cases . . . [t]here is no such allegation of limited defendant resources here."); Heffelfinger v. Elec. Data Sys. Corp., No. CV07-00101 2008, U.S. Dist. LEXIS 5296, at *71 (C.D. Cal. Jan. 7, 2008) (noting that Supreme Court has held that to satisfy (b)(1)(B) there must be limited fund). Some courts, however, have certified classes under (b)(1)(B) even in the absence of a limited fund. *See, e.g.*, Hilton v. Wright, 235 F.R.D. 40, 53 (N.D.N.Y. 2006) (noting, in inmates' civil rights case,

the class from incompatible standards of conduct, has been hedged by a number of narrowing constructions or requirements.[158] Thus, for example, some courts have required that the plaintiff class establish that, absent certification, class members will prosecute a substantial number of individual actions.[159] Some courts have suggested that because the subsection protects the defendant's interest certification under (b)(1) is inappropriate where defendant chooses to waive that protection.[160] Some

that while certification of (b)(1)(B) classes is "typically" based on limited fund theory, classes of inmates seeking injunctive relief may be certified under that subsection).

[158] Rule 23(b)(1)(A) provides, in relevant 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 . . .

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

[159] *See, e.g.*, Eisen v. Carlisle & Jacquelin (*Eisen II*), 391 F.2d 555, 564 (2d Cir. 1968) (antitrust) ("Plaintiff . . . admits that individual actions could not be brought, as the small claimants who constitute the entire class could not, on an individual basis, afford the expense of lengthy anti-trust litigation. Under these circumstances there is little danger that individual suits establish 'incompatible standards of conduct' for the defendant."), *vacated*, 94 S. Ct. 2140 (1974); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 163 (D.D.C. 1976) (civil rights) (denying certification when no other suits had been brought, in action challenging army intelligence activities); Free World Foreign Cars, Inc. v. Alfa Romeo, S.p.A., 55 F.R.D. 26, 29 n.9 (S.D.N.Y. 1972) (antitrust); NEWBERG & CONTE, *supra* note 2 at 17 ("[T]here has been a paucity of decisions on whether 23(b)(1)(A) is subject to this restriction . . . .").

[160] *See, e.g.*, Corley v. Entergy Corp., 222 F.R.D. 316, 320 (E.D. Tex. 2004), *aff'd sub nom.* Corley v. Orangefield Indep. Sch. Dist., 152 Fed. Appx. 350 (5th Cir. 2005); s*ee also* Doiron v. Conseco Health Ins. Co., 240 F.R.D. 247, 254 n.12 (M.D. La. 2007) (stating that some courts have found certification under (b)(1)(A) improper when defendants have objected), *vacated*, 279 Fed. Appx.313 (5th Cir. 2008). *But see In re* First Am. Corp. ERISA Litig., 258 F.R.D. 610, 622 n.11 (C.D. Cal. 2009) (expressing doubt that a defendant can waive the protections of (b)(1)(A) because subsection protects other interests as well as defendant's); Humphrey v. United Way, No. H-05-0758, 2007 U.S. Dist. LEXIS 59557, at *38 (S.D. Tex. Aug. 14, 2007) ("Neither the text of Section (b)(1)(A) nor the accompanying Advisory Committee's Notes supports the creation of an express right to waive certification under [(b)(1)(A)]."); Casa Orlando Apartments, Ltd. v. Fed. Nat'l Mortg. Ass'n, 624 F.3d 185, 196–97 (5th Cir. 2010) (acknowledging "that several district courts outside of this Circuit have at least partially relied on the defendant's opposition in denying

courts have also held that certification under (b)(1)(A) is only warranted where defendant could not comply with the affirmative relief awarded by one court without violating that ordered by another.[161]

Perhaps most interesting is the preclusion of (b)(1)(A) certification where the class seeks monetary relief—either solely or "predominantly."[162] As has been noted, this restriction has no basis in the text of (b)(1) or in the Advisory Committee Notes.[163] It has, moreover, the disadvantage of making

(b)(1)(A) certification," but "find[ing] nothing in the plain text of Rule 23 that permits a defendant's veto over (b)(1)(A) certification").

[161] *See, e.g.*, Vulcan Golf, LLC v. Google, Inc., 254 F.R.D. 521, 537 (N.D. Ill. 2008) (stating that different results in individual actions "'do not trap [a defendant] in the inescapable quagmire of not being able to comply with one such judgment without violating the terms of another'" (quoting Walker v. City of Hous., 341 F. Supp. 1124, 1131 (S.D. Tex. 1971))); *see also* Alexander Grant & Co. v. McAlister, 116 F.R.D. 583, 589-90 (S.D. Ohio 1987) (finding (b)(1)(A) certification appropriate only where there is both a risk of inconsistent adjudications and "'where the nonclass party could be sued for different and incompatible affirmative relief'" (emphasis omitted) (quoting Emp'rs Ins. of Wausau v. Fed. Deposit Ins. Corp., 112 F.R.D. 52, 54 (E.D. Tenn. 1986))).

[162] Where the class seeks only monetary relief, courts have explained that (b)(1)(A) certification is inappropriate because multiple damages suits, although potentially resulting in defendants' paying damages to some but not others of the putative class, do not create the risk of conflicting obligations. *See, e.g.*, Cunningham Charter Corp. v. Learjet, Inc., 258 F.R.D. 320, 330–31 (S.D. Ill. 2009). More significantly, a number of courts have extended that conclusion, i.e., that (b)(1) certification is inappropriate, to cases in which class remedies include injunctive as well as monetary relief if the injunctive relief does not "predominate." *See* Allen v. Holiday Universal, 249 F.R.D. 166, 189 (E.D. Pa. 2008) (indicating that (b)(1)(A) certification is not appropriate where monetary relief predominates (citing Panetta v. SAP Am., Inc., No. 05-4511, 2006 U.S. Dist. LEXIS 17556, at *7 (E.D. Pa. Apr. 6, 2006))); *In re* First Am. Corp., 258 F.R.D. at 621-22 & n.10 (concluding that "controlling Ninth Circuit authority" would not permit certification under (b)(1)(A) where plaintiffs seek "primarily" money damages); Johnson v. GEICO Cas. Co., 673 F. Supp. 2d 255, 270 (D. Del. 2009) ((b)(1)(A) certification "generally inappropriate" where primary relief sought is money damages); *In re* Friedman's, Inc., 363 B.R. 629, 635 (Bankr. S.D. Ga. 2007) ("The majority position among the federal courts is that actions seeking primarily compensatory damages should not be certified pursuant to Rule 23(b)(1)(A)."); *see also Doiron*, 240 F.R.D. at 254 ("Federal courts are in disagreement as to whether certification under (b)(1)(A) encompasses cases where the relief sought is primarily monetary.").

[163] *See In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., 241 F.R.D. 185, 199–200 (S.D.N.Y. 2007) (applying Fourth Circuit law, court rejects "predominance" limitation: "'Such a limitation not only is unsupported in the language of [(b)(1)(A)] but also is contrary to the prevailing precedents which construe the various class categories of Rule 23(b).'" (quoting *In re* A.H. Robins, 880 F.2d 709, 716 n.8 (4th Cir. 1989) (quoting 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 4.04 at 276-77 (2d ed. 1985)))); Turner v. Bernstein, 768 A.2d 24, 34 n.26 (Del. Ch. 2000) (noting that predominance limitation is expressly articulated in the Advisory Committee Notes to Rule 23(b)(2), but not with regard to Rule 23(b)(1)).

the (b)(1)(A) category superfluous.[164] After all, if (b)(1)(A) can be used only when the relief sought by the plaintiff class is solely or predominantly injunctive in nature, it offers nothing more than the (b)(2) category.[165]

Of course, where the concern with the type of remedy requested by the class is consistent with the standards articulated in the Rule, this restriction is appropriate. Thus, as courts have correctly stated, where the class seeks only damages, the risk typically created by individual adjudications is that defendant must pay damages to some plaintiffs but not others.[166] While those adjudications may be inconsistent, defendant is not subject to incompatible standards of conduct.[167] Where injunctive relief is sought, however, the risk that defendant may be subject, legally or practically, to incompatible standards of conduct is much greater. In corporate merger actions, for example, if plaintiffs argue that defendant's actions in pursuing the merger are illegal and seek an injunction against implementation of the merger, defendant would prefer a single determination of whether the merger is legal; it would not want to litigate the merger's legality with each of its stockholders—regardless of whether plaintiffs also seek substantial damages.[168]

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[164] *See Humphrey*, 2007 U.S. Dist. LEXIS 59557, at *37 (rejecting application of predominance limitation; since the predominance limitation is express in (b)(2), its application to (b)(1)(A) would render (b)(1)(A) "'superfluous or redundant'" (quoting NEWBERG & CONTE, *supra* note 2, § 4:5)).

[165] *Id.*; *Turner*, 768 A.2d at 33-34 (rejecting proposition that (b)(1)(A) cannot be used in cases involving claims for compensatory damages because this would render (b)(1) "largely redundant" of (b)(2)).

[166] *See, e.g.*, Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 897 (7th Cir. 1999).

[167] *See, e.g.*, *Cunningham*, 258 F.R.D. at 330–31.

[168] *See Turner*, 768 A.2d at 24. In *Turner*, plaintiffs sought to certify a class of shareholders in a post-merger action alleging defendants had breached their fiduciary duties in conjunction with the merger. *Id.* at 27. The court had previously determined that defendants had, in fact, breached their duties and defendants opposed (b)(1) certification on the ground that (b)(1) certification was inappropriate where the relief then available to the class was monetary in nature (quasi appraisal rights or rescissory damages). *Id.* at 28. The court rejected this argument, concluding that challenges to corporate mergers "involve[d] a challenge to a single course of conduct by the defendants that affects the stockholder class equally in proportion to their ownership interest in the enterprise." *Id.* at 33. As the court explained:

> None of the legal or factual issues at stake in this case turns on issues individual to class members. Rather, all of the issues affect class members equally. It would be wasteful and illogical to have this tried several times, so that different courts could reach irreconcilable decisions about identical issues such as the adequacy of the disclosures

The basis for a restrictive interpretation of the (b)(1) category appears to have its roots, in part, in the judicial concern that an expansive interpretation of the classification would encroach improperly upon the (b)(3) category, with the consequent failure to provide class members the due-process protections required by that provision.[169] The resulting tendency toward caution in utilizing (b)(1) has been encouraged by two factors. The first is the 1999 decision of the United States Supreme Court in *Ortiz v. Fibreboard Corp.*[170] In *Ortiz*, the Court addressed the propriety of certifying a (b)(1)(B) settlement class in a mass tort action where certification was justified on the alleged existence of a limited fund.[171] The Court concluded that the fund at issue was not the kind of limited fund contemplated by the Rule and thus could not support (b)(1)(B) certification.[172] An expansive approach to the limited fund concept, the Court suggested, was inconsistent with the function of the (b)(1) category envisioned by the Advisory Committee.[173] Citing the likelihood of abuse in the event such an approach were adopted, the Court concluded that the "presum[ption]" should be that limited funds sufficient to justify (b)(1)(B) certification would "stay close to the historical model."[174] Speaking more generally about the (b)(1) category, the Court contrasted the approach of the Rule's drafters toward the (b)(1) and (b)(3) categories respectively, noting that "the [Advisory] Committee was consciously retrospective with intent to codify pre-Rule categories under Rule 23 (b)(1)" while viewing the (b)(3) category as more "forward-looking" as to which "innovations" were "anticipated."[175]

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made to GenDerm stockholders by the defendant-directors and the fair value of GenDerm on the date of the Merger.

Id. at 34. *See also* Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867, 901-02 (S.D.N.Y. 1975) (in actions challenging, inter alia, proposed merger of ABA and NBA, court certifies class of past, present and future players seeking injunctive relief and treble damages under (b)(1)); *see generally Turner*, 768 A.2d at 30–34 (discussing Delaware cases and other decisions using similar reasoning).

[169] *Id.* at 34.

[170] 527 U.S. 815 (1999).

[171] *Id.* at 815–16.

[172] *Id.* at 848.

[173] *Id.* at 842.

[174] *Id.* In support of this presumption, the Court cited the potential for conflict with the Rules Enabling Act and constitutional concerns such as the Seventh Amendment right to jury trial and due process. *Id.* at 845–48.

[175] *Id.* at 842.

The second factor influencing the courts' application of (b)(1) is the long unresolved question of in what circumstances due process requires an opt-out right for class members seeking money damages. The Supreme Court first raised the issue, without deciding it, in *Phillips Petroleum Co. v. Shutts.*[176] In that case, the Court considered whether, as a predicate to a state's right to assert personal jurisdiction over absent plaintiff class members, due process required minimum contacts between those members and the forum.[177] Although the Court concluded that minimum contacts were not required, it stated that some "minimal" procedural protections, in the form of adequate representation, notice, and opt-out rights, must be provided.[178] In a brief footnote, the Court explicitly limited those requirements to class actions asserting claims "wholly or predominately" for "money judgments."[179] While the Court has since had the opportunity to address the question more fully, it has not yet done so.[180]

This open question had been highlighted in the controversy over the proper application of the (b)(2) category in cases where the class seeks

[176] 472 U.S. 797 (1985).

[177] *Id.* at 802.

[178] *Id.* at 812.

[179] *Id.* at 811-12 n.3.

[180] The Court has granted certiorari in two cases that addressed the question of a constitutional right to opt out in a class action seeking money damages, but it decided the issue in neither. *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117 (1994), involved a price-fixing class action in which the class requested both injunctive relief and damages. The class had been certified under (b)(1) and (b)(2), with no opportunity to opt out. *Id.* at 389. A settlement of the action was approved and injunctive relief was granted, although no damage relief was provided. *Id.* Members of the class objecting to the mandatory certification subsequently sued on the basis of the same allegations, and the question was whether they were precluded from doing so by the prior judgment. *Id.* at 389–90. The Ninth Circuit concluded that the objectors had not been accorded due process because the court did not provide an opt-out right. *Id.* at 392. Therefore, plaintiffs in the new suit were not precluded from pursuing their claims for monetary relief. *Id.* Although the Supreme Court granted certiorari, it later dismissed the case because it concluded that certiorari had been improvidently granted; the question was only of import to the petitioner and on the day certiorari was granted petitioners had settled the case. *Ticor v. Ticor Title Ins. Co.*, 511 U.S. 117, 125 (1994). Three justices dissented, arguing that the open question created substantial uncertainty among the lower courts. *Id.* (O'Connor, J., dissenting). The Court again granted certiorari in *Adams v. Robertson*, 520 U.S. 83, 85 (1997), to determine whether "the Alabama courts' approval of the class action and the settlement agreement in this case, without affording all class members the right to exclude themselves from the class or the agreement, violated the Due Process Clause of the Fourteenth Amendment." Certiorari was again dismissed as improvidently granted, however, because the issue was not raised to or addressed by the Alabama Supreme Court *Id.* at 86, 92.

hybrid relief. As *Allison* had explained, the premise of (b)(2) certification is that the class interests are sufficiently cohesive that class treatment may be given without the protection of an opt-out right.[181] In contrast, the lack of cohesion characterizing individual claims for money damages suggests that, as a matter of due process and the Rule's requirements, such claims are properly treated under (b)(3), where notice and opt-out protections are required.[182]

As some courts saw it, the mandatory nature of (b)(1) classes raised similar due process concerns and required a similar conclusion where hybrid relief was sought.[183] That is, (b)(1) certification was only appropriate if monetary relief did not predominate.[184]

At the present time, courts have most consistently granted (b)(1) certification in cases prosecuted under ERISA.[185] In the typical case, a plaintiff class consisting of participants and beneficiaries of a statutorily defined pension plan sues a plan administrator and/or other fiduciaries of the plan, asserting that the defendants have breached their fiduciary duties.[186] Plaintiffs allege that the defendants' breach has caused losses to the plan and seek as remedies for that conduct an injunction against the

[181] *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 412 (5th Cir. 1998); discussion *supra* notes 43–70 and accompanying text.

[182] *See Allison*, 151 F.3d at 413.

[183] *See* Langbecker v. Elec. Data Sys. Corp., 476 F.3d 299, 318 (5th Cir. 2007).

[184] *See id.* (reversing trial court's certification decision for failure to satisfy Rule 23(a) requirements, but stating that if on remand the district court were to apply Rule 23(b) "it should consider the extent to which the due process concerns inherent in *Allison* apply to a (b)(1)(A) class and whether a (b)(1)(A) class can be maintained if damages are the primary remedy sought"); *see also* Doiron v. Conseco Health Ins. Co., 240 F.R.D. 247, 255 (M.D. La. 2007) (citing *Langbecker* regarding due process concerns in (b)(1)(A) context); Caruso v. Allstate Ins. Co., No. 06-2613 2007 U.S. Dist. LEXIS 56760, at *12 (E.D. La. Aug. 3, 2007) (same); *In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., 241 F.R.D. 185, 200 n.108 (S.D.N.Y. 2007) (noting in course of determining propriety of certifying class under (b)(1)(A), that whether absent members of class have a constitutional right to opt out of a class action where money damages are sought, is an "open question"). As noted previously, some courts imported the predominance requirement into the (b)(1)(A) analysis on the basis of the general principle that damages suits do not create the risk of inconsistent obligations. *See* cases cited *supra* note 159.

[185] *See* Tatum v. R.J. Reynolds Tobacco Co., 254 F.R.D. 59, 67 (M.D.N.C. 2008) ("Indeed, numerous courts have held that "'ERISA litigation [involving a claim for breach of fiduciary duty] presents a paradigmatic example of a (b)(1) class.'" (quoting *In re* Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 453 (S.D.N.Y. 2004))); Kanawi v. Bechtel Corp., 254 F.R.D. 102, 112 (N.D. Cal. 2008) (same).

[186] *See* Stanford v. Foamex L.P., 263 F.R.D. 156, 173 n.21 (E.D. Pa. 2009).

continued illegal conduct and payment of monetary damages to the plan for the losses inflicted.[187]

The relative confidence reflected by the courts in certifying these cases under (b)(1) has been explained by the fact that these actions are characteristically brought in a representative capacity, and fiduciary duties are recognized by statute as running to all participants and beneficiaries in the same fashion.[188] Similarly, the basis for the cause of action is injury to the plan, and the remedy is for the losses inflicted on the plan.[189] Thus, both cause of action and remedy are often seen as group or class-wide in nature rather than as claims requiring inquiry into individualized circumstances and seeking individualized relief for the plan's participants.[190]

Even in this context, however, there has been some uncertainty. In *Langbecker v. Electric Data Systems Corp*., an ERISA breach of fiduciary lawsuit, the Fifth Circuit concluded that the class could not be certified under (b)(1) because the "principal goal" of the lawsuit was monetary—

[187] *Id.* Some (b)(1) cases have been certified outside the ERISA context. *See* Pathfinders Motorcycle Club v. Prue, No. 1:05CV330, 2007 U.S. Dist. LEXIS 22730, at *4-5 (D. Vt. Mar. 28, 2007) (concluding (b)(1)(A) appropriate because right allegedly violated shared by every proposed class member and alleged financial harm is de minimus); *Methyl*, 241 F.R.D. at 200 (certifying subclass of property owners claiming chemical contamination while finding "substantial risk that defendants will face incompatible standards of conduct" and that juries may reach different conclusions on the factual issues); Smith v. Tower Loan of Miss., Inc., 216 F.R.D. 338, 371-72 (S.D. Miss. 2003) (certifying class under (b)(1)(A) in case involving alleged fraud on borrowers by defendant lender class because of potentially conflicting court-ordered obligations regarding defendant's future business practices), *aff'd*, Smith v. Crystian, 91 Fed. Appx. 952 (5th Cir. 2004).

[188] *See Langbecker*, 476 F.3d at 325 (Reavley, J., dissenting) ("[M]uch of today's ERISA litigation is maintained on a class action basis. The fiduciary duty of prudence at issue is owed to the entire class and separate actions would create the risk of establishing inconsistent standards under ERISA."); *In re* Citigroup Pension Plan ERISA Litig., 241 F.R.D. 172, 179 (S.D.N.Y. 2006) ("The language of subdivision (b)(1)(A) . . . speaks directly to ERISA suits, because the defendants have a statutory obligation, as well as a fiduciary responsibility, to 'treat the members of the class alike.'" (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997))).

[189] *See* Tittle v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & ERISA Litig.), No. H-01-3913, 2006 U.S. Dist. LEXIS 43145, at *64-65 (S.D. Tex. June 7, 2006).

[190] *See Tittle*, 2006 U.S. Dist. LEXIS 43145, at *64-66 (noting representational nature of ERISA claim for breach of fiduciary duty, plan-wide nature of relief, and consequent potential for incompatible demands on defendants where claims asserted by more than one plan participant); *see also Kanawi*, 254 F.R.D. at 111 (noting statute's concern with plan-wide remedies, representative nature of ERISA breach of fiduciary duty suits, and their status as "paradigmatic example[s]" of a (b)(1) class (quoting *Global Crossing*, 225 F.R.D. at 453)).

rather than injunctive—relief.[191] Although it acknowledged that the class also requested equitable relief, the court was uneasy about certifying a mandatory class where it also found "undeniable intraclass conflicts" regarding the monetary relief.[192] Similarly, in some cases in the Ninth Circuit, the courts concluded that they were precluded from certifying (b)(1) classes in ERISA breach of fiduciary cases because the money damages sought by the plaintiff class were the "focus" of the lawsuit.[193]

III. THE IMPACT OF *WAL-MART V. DUKES*: SOME INITIAL COMMENTS

In 2011, the Supreme Court entered the (b)(2) fray. In *Wal-Mart v. Dukes*, a sex discrimination case involving a class of 1.5 million women challenging Wal-Mart's pay and promotion practices, the Court addressed the issue of whether the class's claims for backpay had been properly certified under (b)(2).[194] Attacks on the Ninth Circuit's decision upholding certification focused on both the satisfaction of the Rule 23(a) requirement of commonality and the propriety of (b)(2) certification of the backpay

[191] 476 F.3d at 318.

[192] *Id.* The *Langbecker* court criticized the district court's certification decision, expressing concern about the impact of these conflicts on satisfaction of the adequacy of representation requirement. *Id.* The court also noted the "cursory" nature of the district court's (b)(1) analysis and directed it on remand to "consider the extent to which the due process concerns inherent in *Allison* apply to (b)(1)(A) class and whether a (b)(1)(A) class can be maintained if damages are the primary remedy sought." *Id.*

[193] Although these courts believed that the circumstances otherwise warranted (b)(1) certification, they concluded that they were constrained from doing so by Ninth Circuit precedent. *See In re* First Am. Corp. ERISA Litig., 258 F.R.D. 610, 621 (C.D. Cal. 2009) ("[T]he Court finds that controlling Ninth Circuit authority precludes class certification under Rule 23 (b)(1)(A) to the extent that the Plan Participants primarily seek monetary relief."); *In re* Syncor ERISA Litig., 227 F.R.D. 338, 346 (C.D. Cal. 2005) ("Given the Ninth Circuit's ruling in *Zinser*, this Court is constrained to DENY certification under Rule 23 (b)(1)(A)."") (emphasis in original).

Zinser v. Accufix Research Institute, Inc., 253 F.3d 1180 (9th Cir. 2001), *amended by* 273 F.3d 1266, was a products liability case in which plaintiffs sought, among other things, certification of a medical monitoring subclass. *Id.* at 1185. The court contrasted the request for a medical monitoring fund in *Zinser* with the request for implementation of a medical monitoring program. *Id.* at 1193–94. The former, the Court asserted, was merely a request for monetary relief; because (b)(1)(A) certification required more than the prospect of paying damages to some but not others, (b)(1)(A) certification would be inappropriate in damages actions. *Id.* at 1193. The Court explained that, were class members to pursue separate actions, any differences in medical monitoring programs that might arise could be accommodated without subjecting defendant to incompatible standards of conduct. *Id.* at 1194–95.

[194] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547–48 (2011).

claims, and the bulk of the Court's decision dealt with plaintiffs' failure to meet the commonality requirement.[195] The Court also unanimously concluded, however, that plaintiffs' backpay claims could not be certified under (b)(2).[196]

Justice Scalia set the tone for the Court's analysis, noting that the Court had earlier asked whether claims for monetary relief could be certified under (b)(2) [197] and stating: "We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief."[198] Although the Court did not define what it meant by incidental damages, it emphasized that the backpay claims before it were claims for individualized relief.[199] Certifying such claims under (b)(2), it concluded, would be inconsistent with the Rule's structure and history.[200]

The Court first described the essential nature of the (b)(2) class as one in which the remedy sought was "indivisible"—i.e., one in which the requested injunctive or declaratory relief was available to all or none of the

[195] In *Wal-Mart*, the Court explained the commonality requirement, stating: "[A] common contention, moreover, must be of such a nature that it is capable of class wide resolution . . . which means that determination of its truth or falsity will resolve an issue that that is central to the validity of each one of the claims in one stroke." *Id.* at 2551. Although plaintiffs offered expert, statistical, and anecdotal evidence, the Court found that evidence insufficient to supply the necessary "significant proof" of a companywide policy of discrimination *Id.* at 2553. The evidence established only an explicit corporate policy forbidding discrimination and a "policy" of allowing discretion by local supervisors over employment matters. *Id.* at 2553–54. What was missing was "a common mode of exercising discrimination that pervades the entire company." *Id.* at 2554–55. Even establishing that Wal-Mart's policy resulted in gender-based disparity was insufficient; instead, plaintiffs must identify a specific employment practice that tied the class members' claims together and to Wal-Mart. *Id.* at 2555. *See also* Jermyn v. Best Buy Stores, L.P., 276 F.R.D. 167, 171–72 (S.D.N.Y. 2011) (describing Court's conclusion on this point).

The Court's holding regarding commonality has been seen by courts and commentators as imposing a clearly higher standard than that previously governing the commonality requirement. *See, e.g.*, M.D. v. Perry, 675 F.3d 832, 839 (5th Cir. 2012) (referring to "heightened" standard established for commonality); *see also* Georgene Vairo, Wal-Mart v. Dukes: Whither Class Actions? 2011 Emerging Issues 5873 (Sept. 1, 2011) (discussing the Wal-Mart majority's commonality analysis: "The majority opinion is important because it significantly raises the bar to establishing commonality for class certification purposes.").

[196] *Wal-Mart*, 131 S. Ct. at 2561.

[197] *Id.* at 2557 (noting that in *Ticor*, the court had expressed "serious doubt" on that point).

[198] *Id.*

[199] *Id.*

[200] *See id.* at 2558.

class members.[201] Then, as it had in *Ortiz*, the Court looked to the historical models on which the Rule was based and contrasted the (b)(1) and (b)(2) categories with the (b)(3) category.[202] The former were intended to capture cases where individual adjudication would be impossible or unworkable (in the case of (b)(1)) or would "perforce affect the entire class at once" (in the case of (b)(2)).[203] The (b)(3) category encompassed a "wider set of circumstances" in which class treatment was not so clearly warranted.[204] Thus, innovation was the province of the (b)(3) category while tradition was the province of the (b)(1) and (b)(2) categories.[205] Given the potential use (or abuse) of the class action device under (b)(3), the Rule provided the additional requirements of predominance and superiority, as well as the protections of notice and opt-out rights.[206] Unlike the (b)(3) situation involving individualized claims, these requirements were unnecessary in the (b)(2) context.[207] When the requested injunctive relief would benefit all class members at once, predominance and superiority were "self-evident."[208] Similarly, in this context, notice was thought unnecessary and the absence of an opt-out right constitutional.[209] Consequently, the Court concluded that the Rule's structure indicated that class treatment of individualized monetary claims was properly assessed under (b)(3).[210]

In light of the Rule's structure, the Court was unpersuaded by plaintiffs' argument that their backpay claims could be certified under (b)(2) because they did not predominate over claims for injunctive relief.[211] This predominance standard, a "mere negative inference" from the Advisory Committee statement,[212] could not support (b)(2) certification since it had

[201] *Id.* at 2557 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

[202] *See id.* at 2557–58.

[203] *Id.* at 2558.

[204] *Id.*

[205] *See id.*

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.* at 2559.

[210] *Id.* at 2558.

[211] *Id.* at 2559.

[212] The Advisory Committee Note to Rule 23(b)(2) provides that the subsection "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23(b)(2) advisory committee's note (1966).

no basis in the text of the Rule and did "obvious violence" to the Rule's structure.[213] Establishing that injunctive relief was predominant in no way fulfilled the function of the predominance and superiority requirements, the Court asserted, and the procedural protections of (b)(3) should not be eliminated because plaintiffs chose to combine requests for monetary relief with a request for injunctive relief.[214] Moreover, the Court worried that this predominance standard created "perverse incentives" for class representatives.[215] Those representatives could strategically choose to forego available damages claims in order to meet the requirements of (b)(2).[216] In so doing, however, they would risk jeopardizing the rights of absentee members to pursue subsequent claims for damages, since an adverse determination of class claims could have collateral estoppel effect on those claims.[217]

The Court was also dismissive of the argument that (b)(2) certification was appropriate for backpay claims because backpay was an equitable remedy.[218] Its character as an equitable remedy was "irrelevant," the Court stated.[219] In brief, Rule 23 spoke of injunctions and declaratory relief, not equitable relief.[220]

Finally, the Court noted that it need not decide whether any form of "incidental damages" would be consistent with the Rule or due process because certification of these claims for backpay was not.[221] Under Title VII, Wal-Mart was entitled to an individualized determination of each class member's right to backpay.[222] The court could not, consistent with the Rules Enabling Act, substitute a "[t]rial by [f]ormula"[223] for the required

[213] *Wal-Mart*, 131 S. Ct. at 2559.

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.* at 2560.

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.* at 2560–61.

[223] Justice Scalia used the term "trial by formula" to describe the process suggested by the Ninth Circuit for determining backpay awards:

> A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be

individual hearings. Consequently, because of the necessity of individualized determinations, backpay could not be deemed "incidental" to the requested injunctive relief—even if "incidental" monetary relief could ever be awarded in a (b)(2) class action.[224]

The *Wal-Mart* decision is instructive for a number of reasons. First, while the Court resolved the (b)(2) issue before it, it did not do so by adopting one of the predominance standards articulated by the lower courts.[225] Indeed, it rejected the relevance of *any* predominance standard.[226] Confronted with a text that neither authorized nor precluded the (b)(2) certification of claims for monetary relief in the hybrid context, the lower courts had turned to the Advisory Committee Note for guidance.[227] In that Note, they perceived an apparent willingness to permit the certification of some monetary claims; as the courts saw it, their job was to determine which of those claims fell within the category's scope.[228]

The *Wal-Mart* majority, on the other hand, found nothing in the Note that could overcome the absence of authorization in the text of the Rule or the conclusions one should reach from the Rule's structure.[229] As the Court saw it, the Rule distinguished between the (b)(2) category, which was intended to encompass claims in which all class members were entitled to the same group remedy or no member was entitled to the remedy, and the (b)(3) category, which encompassed additional claims where class treatment might be appropriate despite the fact that entitlement to relief might require some individualized determinations.[230] With regard to the latter category, requirements (such as predominance and superiority) and

> applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings.

Id. The Ninth Circuit had suggested that by employing this procedure (which it had previously approved in *Hilao v. Estate of Marcos*, 103 F.3d 767, 786–87 (9th Cir. 1996)), the trial court could avoid manageability problems consistent with due process. *See* Dukes v. Wal-Mart Stores, 603 F.3d at 625–27. The Supreme Court rejected this "novel project" as inconsistent with the Rules Enabling Act. *Wal-Mart*, 131 S. Ct. at 2561.

[224] *Wal-Mart*, 131 S. Ct at 2560–61.

[225] *See id.* at 2561.

[226] *See id.* at 2559.

[227] *See, e.g.*, *Dukes*, 603 F.3d at 615–16.

[228] *Id.* at 616.

[229] *See Wal-Mart*, 131 S. Ct. at 2559.

[230] *See id.* at 2558.

protections (such as notice and opt out) were added to protect the interests of the class members. In the former category, the nature of the (b)(2) class made such requirements and protections unnecessary.[231] Thus, asking in the hybrid context whether injunctive or monetary relief predominated missed the point because the answer to that question did not address the distinction between the categories.[232] If plaintiffs' claims for monetary relief required individualized determinations, the Court asked, why should plaintiffs forfeit the Rule's protections simply because those claims were combined with a request for injunctive relief?[233]

Second, the Court offers answers to some of the corollary issues generated by the hybrid relief scenario.[234] For example, the Court validated the concerns expressed by several courts regarding the manipulation of requests for class relief to achieve (b)(2) certification and the consequences of such manipulation for satisfaction of the adequate representation requirement.[235] The Court also briefly, but decisively, dismissed the proposition that claims for monetary relief might be certified under Rule 23(b)(2) as long as they could be characterized as "equitable" in nature.[236] More significantly, the Court concluded that claims for backpay were not automatically encompassed within the (b)(2) category.[237] Previously, courts applying a predominance standard—of whatever stripe—had determined that certification of claims for backpay fell within the scope of (b)(2).[238] As justification, courts variously cited precedent, the equitable nature of the relief, and the consequent absence of the complicating need for jury trials.[239] Those courts that explicitly acknowledged that backpay claims involved monetary relief and required individualized treatment, distinguished backpay claims on the ground that they involved less complicated factual questions and fewer individual issues.[240] As one court

[231] *See id.* at 2558–59.

[232] *See id.* at 2559.

[233] *See id.*

[234] *See id.* at 2559–61.

[235] *See id.*

[236] *Id.* at 2560.

[237] *See id.*

[238] *See, e.g.*, Allison v. Citgo Petroleum Corp., 151 F.3d 402, 422 (5th Cir. 1998).

[239] *See, e.g.*, *id.* at 415–16 n.10 (discussing circuit precedent and backpay as equitable remedy).

[240] *See, e.g.*, Coleman v. Gen. Motors Acceptance Corp., 296 F.3d 443, 449 (6th Cir. 2002); *see also In re* Monumental Life Ins. Co., 365 F.3d 408, 418 (5th Cir. 2004) (acknowledging the

recently described the backpay holding in *Wal-Mart*: "In so holding, a unanimous Supreme Court reduced to rubble more than forty years of precedent in the Courts of Appeal . . . ."[241]

Finally, the Court's opinion expresses an attitude of extreme skepticism toward the certification of claims for monetary relief under (b)(2).[242] As it did in *Ortiz*, the Court suggests that the intended scope of the (b)(2) category was that of the cases traditionally certified under (b)(2) at the time of the 1966 amendments.[243] Also, as it did in *Ortiz*, the Court cautions that

compatibility of equitable monetary relief with (b)(2), but cautioning that such relief is limited to Title VII backpay and noting that backpay is "unique" because it is an "integral component" of Title VII's remedial scheme). *Monumental* also quotes *Coleman* for its "less complicated" rationale. *Id.*

[241] United States v. New York City, 276 F.R.D. 22, 33 (E.D.N.Y. 2011).

[242] *See Wal-Mart*, 131 S. Ct. at 2557, 2559.

[243] *See id.* at 2557–58 (stating Court's practice of looking at "historical models" in interpreting Rule 23 and noting that cases cited by the Advisory Committee as examples of (b)(2) cases do not include any instances in which claims for individualized relief were combined with requests for class wide injunction).

Interestingly, the Court's heightened standard for the commonality requirement, in conjunction with its (b)(2) analysis, may lead to increased difficulties in certifying class actions attacking systemic discrimination or seeking other structural reform—the types of actions apparently contemplated by the drafters of (b)(2). *See* Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 NW. U.L. REV. COLLOQUY 34, 52 (2011) (discussing the Court's interpretation of the commonality standard and of (b)(2) with regard to backpay, and concluding: "In sum, Dukes has redefined the class certification requirements for Title VII in ways that jeopardize potentially meritorious challenges to systemic employment discrimination."); *see also* M.D. v. Perry, 675 F.3d 832 (5th Cir. 2012) (class action seeking injunctive and declaratory relief for alleged systemic deficiencies in Texas's administration of its long-term foster care program); Aguilar v. Immigration & Enforcement Div., 2012 U.S. Dist. LEXIS 53367 (S.D.N.Y. Apr. 16, 2012) (class action seeking injunctive relief for class of Latino persons allegedly subject to unconstitutional home raids by defendant's agents). In both *M.D.* and *Aguilar*, the courts noted that prior to *Wal-Mart*, plaintiffs' allegations of systemic misconduct may have been sufficient to satisfy the commonality requirement. *See M.D.*, 675 F.3d at 839 (acknowledging that the district court's analysis may have been "a reasonable application of pre *Wal-Mart* precedent"); *Aguilar*, 2012 U.S. Dist. LEXIS 53667, at *13 ("It is possible that had the plaintiffs here moved for class certification prior to the issuance of *Wal-Mart*, and long before 2012, that the outcome here would be different."). The link between the inability to satisfy the stricter commonality requirement and the failure to satisfy the (b)(2) requirements, even when only injunctive relief is sought, has also been recognized. *See, e.g.*, *M.D.*, 675 F.3d at 848 ("The common thread running through the proposed class's current deficiencies under both Rule 23(a) and Rule 23(b)(2) is that it had attempted to aggregate a plethora of discrete claims challenging aspects of Texas's [long-term foster care program] into one 'super-claim.'" (emphasis in original)).

expansive use of the category may run afoul of constitutional limitations.[244] Consequently, prudence would dictate a more limited construction of the (b)(2) category.[245]

The Court does leave open a narrow door for certification of monetary claims by stating that perhaps (but only perhaps) claims for "incidental damages" may be consistent with the Rule and requirements of due process.[246] The Court does not state precisely what it believes the term "incidental damages" to include.[247] The Court does quote *Allison*'s description of the standard, and the critical factor in its decision, as in *Allison*, is the need for substantial individualized determinations.[248] Yet the Court's definition of "incidental damages" is presumably narrower, since *Allison*'s interpretation of (b)(2) explicitly accommodates claims for backpay, while the Supreme Court's interpretation clearly does not.[249]

In the near-term, the Court's decision is likely to provoke a number of reactions as judges and lawyers sort out its implications. For example, lawyers may seek (and judges may be more likely to approve) certification of smaller, more cohesive classes.[250] In addition, parties and lower courts

[244] *See Wal-Mart*, 131 S. Ct. at 2559 (stating that the "serious possibility" that certifying monetary claims without notice and opt-out rights may violate due process "provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here").

[245] *See id.*

[246] *Id.* at 2560.

[247] *See id.*

[248] *Id.* (quoting Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998)).

[249] *See Allison*, 151 F.3d at 409; *Wal-Mart*, 131 S. Ct. at 2561.

[250] *See, e.g.*, Morrow v. Washington, 277 F.R.D. 172, 192 (E.D. Tex. 2011) (distinguishing this case from the *Wal-Mart* scenario: "Plaintiffs allege that there was a specific, city-wide policy in Tenaha of targeting racial and ethnic minorities for traffic stops and then illegally detaining and/or arresting them or conducting illegal searches and seizures of their property . . . ."); *cf.* Jeffrey E. Crane, *A New Battleground in Class Actions: Rule 23(a)(2)'s Commonality Requirement*, 12 CLASS ACTIONS LITIG. REP. (BNA) 853 (Sept. 9, 2011) (suggesting that the heightened standard for commonality articulated in *Wal-Mart* may prompt plaintiffs to "opt for a reduced class size and scope"); Vairo, *supra* note 159 (noting that "plaintiffs will have to proffer smaller classes" in the employment discrimination context). Indeed, since the *Wal-Mart* decision, complaints have been filed on behalf of state-wide classes of female Wal-Mart employees in California and Texas. *See, e.g.*, Andrew Martin, *Female Wal-Mart Employees File New Bias Case*, N.Y. TIMES (Oct. 27, 2011), http:// www.nytimes.com /2011/10/28/business/women-file-new-class-action-bias-case-against-wal-mart.html; Margaret Cronin Fisk & Karen Gullo, *Wal-Mart Discriminated Against Women Workers in Texas, Suit Says*, BLOOMBERG BUSINESSWEEK (Nov. 11, 2011), http://www.Businessweek.com/news/2011-11-02/wal-mart-discriminated-against-women-workers-in-texas-suit-says.html.

will undoubtedly seek to explore the parameters of the Court's possible exception regarding incidental damages relief.[251] The Court has indicated that the real determinant in defining the scope of the (b)(2) action is whether the relief sought is an indivisible remedy, or conversely, whether it implicates individualized treatment.[252] Consequently, to the extent damages may be determined by reference to some objective standard or formula, (b)(2) certification may continue to be extended even though damages are sought.[253]

The courts may further react by taking a (much) harder look at devices such as hybrid certification[254] or partial certification under Rule 23 (c)(4).[255]

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[251] *See Wal-Mart*, 131 S. Ct. at 2559.

[252] *See id.* at 2557–58.

[253] *See* Delarosa v. Boiron, Inc., 275 F.R.D. 582, 591–92 (C.D. Cal. 2011) (concluding that actual and punitive damages sought for violation of a state statute were "incidental" and thus properly certified under (b)(2)). Interestingly, the court in *Delarosa* declared that in determining whether it could certify a (b)(2) class where the class sought injunctive relief, actual damages, punitive damages, statutory damages, and other proper equitable or legal relief, it was without guidance from the Supreme Court—except that the Ninth Circuit's predominance standard had been found inadequate. *Id.* Without direction from the Supreme Court or post-*Wal-Mart* Ninth Circuit precedent, the *Delarosa* court concluded that it should apply the incidental standard from *Zinser*. *Id.* at 592; *see also Morrow*, 277 F.R.D. at 203 (stating that the Supreme Court "left open the more specific question of whether damages that are merely 'incidental' to the injunctive or declaratory relief can be awarded to a 23(b)(2) class as outlined in the Fifth Circuit's decision in *Allison*," but concluding that even if such relief were recoverable in a (b)(2) action, damages requested by the class were not incidental) (citation to *Allison* omitted).

In a subsequent case, *Ellis v. Costco Wholesale Corp*., 657 F.3d 970, 986 (9th Cir. 2011), the Ninth Circuit stated that in *Wal-Mart* the Court had "called into doubt" the Ninth Circuit's predominance standard, identified by the *Ellis* court as whether money damages were "merely incidental" to the litigation. Despite this conclusion, the appellate court suggested that on remand the district court could, if it determined that a (b)(2) class was proper, consider whether that class could seek punitive damages. *Id.* at 986–87. Whether the relief could be considered incidental would be determined on the basis of whether such claims required individual treatment. *Id.* at 987–88. Curiously, as in *Delarosa*, the court did not mention the predominance standard articulated in *Dukes*.

[254] *See* Seekamp v. It's Huge, Inc., No. 1:09-CV-00018 (LEK/DRH), 2012 U.S. Dist. LEXIS 33295 (N.D.N.Y. Mar. 13, 2012) (certifying a (b)(2) class for declaratory relief and a damages class under (b) (3)); Jermyn v. Best Buy Stores, L.P., 276 F.R.D. 167, 168–69 (S.D.N.Y. 2011) (*Wal-Mart* did not require decertification of certified classes because court had certified separate classes for injunctive and damages relief).

[255] *See* McReynolds v. Merrill Lynch, 672 F.3d 482, 491 (7th Cir. 2012) (reversing denial of class certification under (b)(2) and (c)(4) on ground that whether defendant's business practices cause disparate impact on African-American brokers are common issues "most efficiently determined on a class-wide basis."); U.S. v. New York City, 276 F.R.D. 22, 33–35 (E.D.N.Y.

This is especially true in civil rights cases where courts may be concerned about the ability of the class to satisfy the (b)(3) requirements.[256] As previously discussed, courts prior to *Wal-Mart* had acknowledged the possible use of (c)(4) in the certification of a (b)(2) class.[257] The typical context in which (c)(4) was raised was that in which bifurcation of the liability and damage phases of the trial and certification of the liability issues under (b)(2) was proposed.[258] Use of the issues class action in this manner, however, raises the question of whether that can be accomplished without creating due process or Seventh Amendment problems.[259] Moreover, as the Supreme Court highlighted, courts considering the certification of injunctive-only classes must assess whether and what res judicata or collateral estoppel effects are generated when a court approves certification of injunctive issues where monetary relief is also available to absent members of the class.[260] Are class members subsequently precluded from seeking individual damages relief?[261]

2011) (The court concluded that *Wal-Mart* did not require it to decertify a class of African-American firefighters in a race discrimination case. The court had bifurcated the case into liability and remedial phases and certified the liability issues under (b)(2) and (c)(4). The court noted that, in *Wal-Mart*, the Supreme Court had not addressed the use of Rule 23 (c)(4) in (b)(2) actions; thus, the district court would be guided by *Robinson*'s "broad reading" of (c)(4)—an interpretation the court found "consistent" with *Wal-Mart*'s interpretation of (b)(2)); *see also* Jessica Kokrda Kamens, *Experts Say Recent Seventh Circuit Ruling May Not Make 'Issue Certification' Trendy*, 13 CLASS ACTION LITIG. REP. (BNA) 284 (Mar. 9, 2012) (discussing impact of McReynolds as providing one way to overcome the hurdles imposed by *Wal-Mart*, but noting experts' expression of caution that other circuits (and even the Seventh Circuit itself) may be unwilling to embrace more liberal use of the issue class action).

[256] *See supra* note 255.

[257] *See supra* notes 67, 117.

[258] *See* Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 167–69 (2d Cir. 2001) (discussing plaintiffs' argument that the district court should have bifurcated the pattern-or-practice claims and certified the liability stage under (b)(2)); Allison v. Citgo Petroleum Corp. 151 F.3d 402, 420–26 (discussing plaintiffs' argument that court should certify disparate impact claim and first stage of pattern or practice claim).

[259] *See, e.g.*, *Allison*, 151 F.3d at 422–26 (discussing Seventh Amendment issues and concluding that the Seventh Amendment precluded trial of disparate impact claims in a class action severed from non-equitable claims); *cf. Robinson*, 267 F.3d at 169 n.13 (rejecting Seventh Amendment challenge to (b)(2) certification of liability stage in pattern or practice disparate treatment claim).

[260] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559–60 (2011).

[261] In Morrow v. Washington, 277 F.R.D. 172, 203 (E.D. Tex. 2011), the court considered, *inter alia*, "whether the claims of individual class members for monetary damages may be extinguished if the Court certifies only an injunctive class." The Court ultimately concluded that

Wal-Mart also has some implications for the (b)(1) category. The Court's references to *Ortiz*, the distinction of (b)(3) classes from "mandatory classes," and the due process questions presented in the hybrid context serve to reinforce the suggestion that the (b)(1) category is narrow and limited to cases close to the historical model.[262] In addition, the Court's rejection of a predominance standard as relevant to assessing the content of the (b)(2) category indicates its similar irrelevance to a determination of the propriety of certifying a (b)(1) class.[263] Thus, courts that had adopted the standard in assessing whether a (b)(1) class could be certified when monetary relief was sought are left to determine whether such relief is "incidental"—as the Court defines it.[264] As a result, courts will be even less likely to certify class actions under (b)(1) where the class seeks monetary as well as injunctive relief. [265]

no individual claims for monetary damages based on the individual circumstances of racially motivated stops of the class members would be barred. *Id.* The court had certified a class issue involving whether defendants had engaged in a pattern or practice of targeting racial or ethnic minorities for selective enforcement of traffic laws in violation of the Fourteenth Amendment. *Id.* at 177–78. Trial of that issue would not, the court reasoned, foreclose individual suits for damages based on the individual circumstances of a particular stop. *Id.* at 203–04. *See also* Cholakyan v. Mercedes-Benz USA, LLC, 281 F.R.D. 534, 542-43 (C.D. Cal. 2012) (discussing class counsel's decision to drop any claims for compensatory damages and the significance of that decision for adequacy of representation, as well as potential preclusive effects on subsequent claims for damages by class members).

[262] *Wal-Mart*, 131 S. Ct. at 2557–59; *see* Donovan v. St. Joseph Cnty. Sheriff, NO.: 3:11-CV-133-TLS, 2012 U.S. Dist. LEXIS 63847, at *16-17 (N.D. Ind. May 3, 2012) (The court indicated its reluctance to certify a (b)(1)(A) class in light of the class's claims for money damages, citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845–46 (1999), for the proposition that certification of a mandatory class that includes money damages "potentially compromises the Seventh Amendment and due process rights of individual claimants.").

[263] *Wal-Mart*, 131 S. Ct. at 2545–46.

[264] *See id.*; *see also* Penn. Chiropractic Ass'n v. Blue Cross Blue Shield Ass'n, 2011 U.S. Dist. LEXIS 148689, at *52-53 (N.D. Ill. Dec. 28, 2011) (indicating that in *Wal-Mart* the Supreme Court left open the possibility that claims for "incidental" monetary relief could be certified under (b)(2), but that monetary relief sought in this case was not '"mechanically computable'" (quoting Randall v. Rolls-Royce Corp., 637 F.3d 818, 826 (7th Cir. 2011))).

[265] *See* Altier v. Worley Catastrophe Response, LLC, No. 11-241 c/w 11-242 pertains to no. 11242, 2011 U.S. District LEXIS 85696, at *40–42 (E.D. La. July 26, 2011) (refusing to certify class under (b)(1) in light of circuit precedent and *Wal-Mart* given due process concerns); *see also Penn. Chiropractic Ass'n*, 2011 U.S. Dist. LEXIS 148689 at *54. The courts have continued, generally, although not uniformly, to certify ERISA cases under (b)(1). *See, e.g.*, Adams v. Anheiser-Busch Co. No. 2: 10-cv-826, 2012 U.S. Dist. LEXIS 42364 (S.D. Ohio Mar. 28, 2012).

IV. CONSIDERING THE CATEGORIES: A MODEST PROPOSAL

In the long term, one must ask whether the (b) categories serve the function for which they were adopted. The goal of the 1966 amendments was to bring some clarity and certainty to the certification process.[266] But the activity of the courts in the last several years suggests that courts remain unclear about the proper scope of the individual categories.[267] As discussed in Part I, the courts split sharply over the use of the (b)(2) category in the hybrid context. In addition, their attempts to discern whether (b)(2) certification was appropriate in a particular case generated a number of corollary and subsidiary questions.[268]

The scope of the (b)(1) category is similarly a subject of uncertainty. Especially after *Ortiz*, the courts have tended to regard the (b)(1)(B) section as largely applicable to limited fund scenarios—and a restrictive vision of the limited fund concept at that.[269] With respect to (b)(1)(A), the courts have struggled to determine what cases fall within the "incompatible standards" context. In addition, some courts' imposition of a predominance requirement on the (b)(1)(A) category seemed to render that category redundant.[270]

Wal-Mart does not cure these problems. The Court does offer some answers to lower court questions regarding (b)(2) class actions and some general guidance in distinguishing between mandatory and (b)(3) classes.[271] But, it also leaves open the opportunity for further interpretation, manipulation, and confusion. Moreover, it does not suggest why (b)(1) has any separate utility outside the limited fund context. If both (b)(1)(A) and (b)(2) are largely limited to injunctive classes, litigants and judges will look to certify classes under (b)(2) because it is far easier to seek certification under (b)(2) than to persuade courts of the propriety of (b)(1) certification.

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[266] *See* American Bar Association Section of Litigation, *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195, 203–04, Committee Commentary (1986) (discussing rationale for amendments of Rule 23).

[267] *See* Linda S. Mullenix, *No Exit*: *Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177, 243 ("One wonders whether the Rule 23(b) class categories have continuing meaning, vitality, and jurisprudential coherence, and whether the trend to ignore or blur these categories is a problem worthy of attention.").

[268] *See supra* Part I.

[269] *See supra* Part IB.

[270] *See supra*,Part IB. and notes 164–65.

[271] *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2558–59 (2011).

If it is unclear that the classification system serves its intended function, it may be time to reconstruct the categories, or more radically, to eliminate them. But if the system doesn't work, one must first ask, why not? As the case law suggests, problems arise because of the structure of the classification system, the way in which the categories are described, and arguably because the Rule uses a categorical approach.

As currently structured, the Rule requires that a court determine whether a class should be certified by determining that it fits within one of the three described categories.[272] A decision that a class should be certified, however, is also a decision regarding what protections should be provided.[273] A conclusion that a proposed class fits within the (b)(1) or (b)(2) category is, at least preliminarily, also a decision that the class is sufficiently protected if it is adequately represented. A conclusion that the class fits within the (b)(3) category is both a decision that class treatment is warranted and that the additional protections of notice and opt out must be provided.[274]

This simultaneous treatment of the certification and protection questions works if the class appears to fit clearly within one (and only one) of the categories. But it complicates and confuses the certification decision when this is not the case. Prior to *Wal-Mart*, a court assessing whether a class should be certified under (b)(2) when the class sought both monetary and injunctive relief faced a difficult task.[275] If it believed both forms of relief were significant, it was directed by the appellate courts to determine which was "predominant."[276] If injunctive relief predominated, (b)(2) certification was permitted, and no further protection for class members was mandated. If monetary relief predominated, the class must be certified, if at all, under the criteria specified in (b)(3), and the attendant requirements of notice and opt out came into play.[277] Similarly, a court deciding that the requirements of both (b)(2) and (b)(3) were satisfied must determine under which of the

[272] *See id.* at 2548 ("[S]econd, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b).").

[273] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 592–93 (1997) (generally describing requirements for certification under Rule 23).

[274] *See id.*

[275] *See supra* Part IA.; Mullenix, *supra* note 267, at 217.

[276] *See, e.g.*, Allison v. Citgo Petroleum Corp., 151 F.3d 402, 413 (5th Cir. 1998).

[277] *Id.*

categories to certify the class—for that determination dictates whether notice and opt-out rights must be provided.[278]

As these examples illustrate, the Rule's description of the categories contributes to the confusion. The explicit focus in (b)(2) on the injunctive nature of the relief sought; the widespread belief that claims for monetary relief should generally be addressed under the criteria of (b)(3); and the courts' conclusions in (b)(1)(A) cases that claims for money damages do not implicate incompatible standards all conduced to direct the courts' attention in certification inquiries to the nature of relief requested. But, as the cases make clear, this focus on the nature of the relief is an incomplete substitute for the questions the district court must resolve—should a class be certified and, if so, what protections should be afforded absentee class members?

Certainly the nature of the remedy is relevant to answering the certification question, but it is not dispositive. Requests for injunctive relief often—but not always—indicate cohesive class interests in a group-wide remedy.[279] Similarly, requests for money damages usually—but not always—suggest divergent interests in individual relief for which a consideration of individual circumstances is required.[280] Moreover, as is obvious from the recent circuit split, neither generalization has been helpful in deciding the certification issue when both monetary damages and injunctive relief are sought, and where both are important components of the requested remedy. Courts believed they were required to determine which form of relief "predominated"—a term they first had to define.[281] And, to perform that task, the courts had to disinter the interests represented

[278] *Cf.* Mullenix *supra* note 267, at 217 (noting preference for certification of class under mandatory subsection where certification was sought under (b)(1) or (b)(2) and (b)(3)).

[279] *See In re* Allstate Ins. Co., 400 F.3d 505, 507 (7th Cir. 2005) (concluding that (b)(2) certification was inappropriate even though the damages requested would be "incidental" because the effect of the declaratory relief sought would vary with the individual circumstances of the individual class members); *see also* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011) ("In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant.").

[280] A good example of this is *In re* Monumental Life Ins. Co., 365 F.3d 408, 418 (5th Cir. 2004), in which plaintiff class members sought damages and injunctive relief; amounts recovered by individual class members were likely to be low, and could be computed by recourse to formulas.

[281] *See Wal-Mart*, 131 S. Ct. at 2559–50 (discussing 9th Circuit's predominance analysis).

by the labels and general conclusions articulated by prior courts and rulemakers, create standards that embody the interests identified, and apply them.

A third factor in the confusion surrounding the application of Rule 23(b) may simply be the use of a categorical approach. The concept behind the three-category structure is that each category describes a type of case worthy of certification.[282] While the courts have recognized the potential for overlap in the types of cases described, they have also, in interpreting the categories, been cognizant of the need to provide individual content for each category.[283] Thus, in interpreting the proper scope of (b)(1), (b)(2), and (b)(3), the courts have struggled to define the domain of each category in a way that recognized the independent purpose each purports to serve.[284] This struggle is reflected both in the courts' treatment of the hybrid relief scenario in the certification of (b)(2) classes and in the attempt to determine the proper scope of (b)(1)— especially (b)(1)(A).[285]

One might, as was done in 1966, reformulate the categories with stated criteria that better identify when a mandatory or opt-out class should be certified.[286] A better alternative, however, may be to amend the Rule in a way that eschews a category system.

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[282] *See* 2 NEWBERG & CONTE, *supra* note 2, § 4:4, at 12–14.

[283] *See id.*

[284] *See id.*

[285] As one prominent commentator has stated, the (b)(1) category is susceptible of a broader interpretation than the courts have generally given it, but courts have been conscious of the need to avoid inappropriate incursions into the area better addressed by (b)(3). *See* 2 NEWBERG & CONTE, *supra* note 2, at § 4:4, at 12–14. As was noted earlier, this tension has led many courts to impose a predominance gloss on the (b)(1)(A) category—a result that would seem to render the (b)(1) category superfluous. *See supra*, notes 162–65 and accompanying text; 2 NEWBERG & CONTE, *supra* note 2, at § 4:5, at 19.

[286] *See* Roger H. Transgrud, *James F. Humphreys Complex Litigation Lecture: The Adversary System and Modern Class Action Practice*, 76 GEO. WASH. L. REV. 181, 191 (2008) (asserting that: "Just as we abandoned the antiquated concepts of true, hybrid, and spurious class actions in 1966, it is time to replace the current categories of class actions . . . with a more functional definition of permissible class actions and a more pragmatic set of criteria for judging whether a given class action should be certified."). In the American Law Institute's recent project on aggregate litigation, the authors state that a court may authorize class treatment of common issues concerning an indivisible remedy without an opt-out right. AM. LAW INST § 2.04 (c) (Am. Law. Inst. 2010). Indivisible remedies are defined as "those such that the distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants." *Id.* at § 2.04(b). The authors note that indivisible remedies are "those handled primarily under Rules 23(b) (1) and (b) (2) of the Federal Rules of Civil Procedure." *Id.* at cmt. a.

Such an amendment could substitute for the category system a standard that would direct the courts to consider separately—but directly—two questions: (1) Should a class be certified? (2) If so, what protections must absentee class members be afforded? In answering those questions, the courts would consider, explicitly, the interests implicated in a class certification decision: whether class treatment of the claims would generate efficiencies for courts and parties; whether class treatment would permit access to the courts which would be unavailable to class members who prosecuted their claims individually; whether class treatment of the claims would avoid prejudice to the class members or to the party opposing the class; and whether class treatment would undermine valid autonomy interests of potential class members in individually pursuing their claims.[287] If, on balance, the court considered class treatment appropriate, it could certify the class. The court would then consider what protections beyond adequate representation must be provided individual class members (either as a matter of prudence or due process).[288]

There have been previous attempts to substitute a "unitary" standard for the current (b) categories.[289] In 1986, citing the "enormous amounts of energy and money" involved in the "characterization battle" resulting from the significant consequences attending the selection of the relevant category

[287] The dissent in *Allison* identified a fifth interest, "to enhance access to the courts 'by spreading litigation costs among numerous litigants with similar claims.'" Allison v. Citgo Petroleum Corp., 151 F.3d 402, 427 (5th Cir. 1998) (Dennis, J., dissenting) (quoting Philips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (citing U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 402–03 (1980))).

[288] Under Rule 23 both subsections (a) and (b) address whether a class should be certified. *See* FED. R. CIV. P. 23.I do not propose to eliminate the requirements of subsection (a), but to substitute an assessment of the relevant interests for the current categorization process under subsection (b).

[289] Indeed, the idea of collapsing Rule 23 categories in favor of "open-ended discretion" to the court had been rejected by the Advisory Committee in 1963. *See* Rabiej *supra* note 2.

> It was felt that [the elimination of all categorizations] would remit to the courts, without specific guidance, the problem among others of drawing the line between class actions looking to a judgment extending to the whole class, and class actions having more limited effect; it might also tend toward the indiscriminate use of the class action device in 'mass-tort' situations, a result surely to be avoided.

Rabiej, *supra* note 2, at 347 n.104 (quoting Memorandum from Reporter Professor Benjamin Kaplan to the Advisory Committee on Civil Rules, "Modification of Rule 23 on Class Actions, EE-1 (Feb. 21–23, 1963)) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

and the all too common difficulty of fitting civil actions into one of the three "predefined procedural compartments," the Special Committee on Class Action Improvements proposed a standard that tied certification to a finding of superiority.[290] That is, a class could be certified if the court concluded that a class action was "superior to other available methods for the fair and efficient adjudication of the controversy."[291] In making its superiority decision, the court was directed to consider seven factors which, in large part, reflected the language of (b)(1), (b)(2), and (b)(3).[292] The Committee was careful to note, however, that the court could weigh other factors and that class certification ultimately depended on the court's

[290] *See* American Bar Association Section of Litigation, *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195, 203–04 (1986).

[291] *Id.*at 201.

[292] The proposed text of the Rule provided (in relevant part):

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of sub-division (a) are satisfied, and if in addition:
>
> > The court finds that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to this finding include: (A) the extent to which questions of law and fact common to members of the class predominate over any questions affecting only individual class members; (B) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (C) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (D) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (E) the difficulties likely to be encountered in the management of a class action that would be eliminated or significantly reduced if the controversy was adjudicated by other available means; (F) the extent to which the prosecution of separate actions by or against individual members of the class would create a risk of (1) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (2) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; (G) the extent to which the relief sought would take the form of injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Id. at 200–01. In its report, the Committee stated that in "plac[ing] a premium on pleading distinctions" the current trifurcated system came "uncomfortably close to the resurrection of the forms of action abolished by Rule 2." *Id.* at 204.

finding of superiority.[293] The proposal failed to gain sufficient support for adoption. Subsequent efforts, animated apparently by the same concerns, were put forward for consideration but fared no better.[294]

Objections to the proposal appeared to center largely on three related ideas: first, that the (b) categories presented no problem in application; second, that even if the classification system created some problems, they were easily resolved by recourse to existing procedural devices; and third, even if some problems did exist and further curative measures were warranted, the proposed standard's multifactor approach was overbroad and created undue uncertainty.[295] Thus, it was asserted that there was nothing conceptually wrong with the (b)(1) and (b)(2) categories.[296] Rather, the problem arose because judges attempted to "squeeze" actions into a single category when they could sensibly utilize their ability under Rule 23 (c)(4)(A) to certify equitable issues under (b)(2) and damages issues under (b)(3).[297] In addition, if the proposal was driven by a perceived problem with the "predominance" requirement under (b)(3) then that problem should be directly addressed.[298] Finally, by listing a number of factors for

[293] *See id.*

[294] This proposal became the basis of a revised proposal prepared in 1992 by the Advisory Committee on Civil Rules of the Judicial Conference of the United States in the course of its study of mass tort litigation. *See* Rabiej, *supra* note 2, at 347–48; 15 NO. 1 CLASS ACTION REPORTS ART. 2 (1992). In explaining the proposal, the Advisory Committee again noted the "time-consuming and lengthy procedural battles" resulting from the failure of the proposed class to fit "neatly" into one of the categories and the impact the selection of the category would have on the "practicality of the case proceeding as a class action." 15 NO. 1 CLASS ACTION REPORTS ART. 2, *supra*, at 3; *see also* Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13 (1996) (discussing February 1995 draft of proposed amendments to Rule 23, including revised subsection (b) adopting unitary standard as described *supra* note 286, and notice provision permitting ad hoc judgments regarding notice and the right to opt out or a requirement to opt in).

[295] 15 NO. 1 CLASS ACTION REPORTS ART. 2, *supra* note 294, at 5–6.

[296] *Id.*

[297] *Id.*

[298] *Id.* at 6–7. Commentary on the proposal speculated that the suggested reform was prompted by the interest in certification of mass tort class actions. *Id.* at 6. More specifically, the argument was that such classes had not been certified because they could not satisfy the "easier" (b)(1) or (b)(2) criteria, and thus, were subject to the more demanding (b)(3) criteria. *Id.* at 5 (quotes in original). Criticizing this justification, the commentary asserted that if the predominance criterion impeded appropriate certification, that requirement should be addressed directly. *Id.* at 6. Moreover, no additional modification of the rule was required to resolve the predominance issue, because that resolution was already available through a proper interpretation

consideration in determining the class action's superiority, the proposal would increase uncertainty as courts struggled to determine the relevant weight of each factor in that determination.[299]

The experience of the courts over the last several years does not support the validity of the first two objections. As detailed above, the courts have clearly had problems applying the categories.[300] In addition, while it is true that courts have access to resources such as hybrid and issue class actions, whether and when these devices should be used has not always been clear to the courts.[301]

One might argue that after *Wal-Mart* courts will have less trouble applying the (b) categories. Where a class seeks monetary relief, the courts will probably be significantly less likely to certify such suits under (b)(2), or by extrapolation, (b)(1). However, the Court's guidance as to which type

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of Rule 23 (c)(4). *Id.* at 6–7.

[299] "At best we could go through another 20 years of developing judicial precedent as to how each of these factors should be weighted in relation to the others." 1 *Id.* at 5.

[300] *See supra* Part I.

[301] Neither device has been free from controversy. On one hand, the hybrid class has been touted as a means of managing the competing interests presented by a hybrid relief case. *See, e.g.*, Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 898 (7th Cir. 1989); *see also* Jon Romberg, *The Hybrid Class Action as Judicial Spork: Managing Individual Rights in a Stew of Common Wrong*, 39 J. MARSHALL L. REV. 231, 233 (2006). On the other hand, the hybrid class has been criticized as "analytically incoherent," *Mullenix*, *supra* note 267, at 213, and problematic from both practical and constitutional perspectives. *See id.* at 215–17; Piar, *supra* note 37 at 332–41. Of course, for those concerned about the detrimental impact of *Allison* on class certification of civil rights cases, the hybrid class appeared to offer only an incomplete solution. To the extent the existence of individual damages determinations precluded certification under (b)(2), such determinations would likely create a similar obstacle to certification of damages issues under (b)(3).

With regard to issue class actions, it has been argued that such actions are illegitimate attempts to avoid the requirements of Rule 23 (b)(3). *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 745–46 n.21 (5th Cir. 1996) (discussed *supra* note 67; Laura Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709 (2003), [hereinafter Hines, *End-Run*]. *But see In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219 (2d Cir. 2006). Courts and commentators have suggested partial certification also raises both due process and Seventh Amendment problems. Note that problems may arise in the context of actions for which (b)(3) certification is sought and in (b)(2) class actions where the presence of damages claims would ordinarily require resort to (b)(3) (i.e., where partial certification of injunctive issues under (b)(2) is sought in lieu of (b)(3) certification). For a thorough discussion of the issues raised regarding certification of issue class actions *see* Hines, *End-Run*, *supra*; Laura Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L. J. 567 (2004), [hereinafter Hines, *Dangerous Allure*]; Jon Romberg, *Half a Loaf is Predominant and Superior to None: Class Certifications of Particular Issues Under Rule 23 (c)(4)(A)*, 2002 UTAH L. REV. 249 (2002).

of class should be placed into the (b)(2) box and which class should be put into the (b)(3) box does not end the uncertainty. Counsel are certain to explore the avenues left open to them by the Court; thus, there will be a push to determine the parameters of the incidental damages exception, and there will probably be more expansive efforts to urge the use of hybrid certification and issues class actions. In addition, *Wal-Mart* does not preclude possible manipulation of the classification system. Counsel may still attempt to fit a class action into the (b)(2) box by deliberately choosing not to seek monetary relief for the class or by seeking only damages that can be cast as incidental.[302]

The more significant question raised by the advocacy of a "unitary" standard is one that arises whenever one proposes to substitute a balancing test (or multi-factor standard) for "bright-line" criteria. Does the more flexible standard yield better results (in terms of accuracy or fairness), thereby justifying the greater uncertainty generated by that standard?[303]

[302] This does not mean, of course, that a judge will accept this characterization where, for example, the requested injunctive relief is individual in nature or the court views the strategy as contrary to the best interests of the class and thus suggestive of inadequate representation.

[303] The basic arguments are readily illustrated in two contexts in tort law: the economic loss doctrine and the tort of negligent infliction of emotional distress. In *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985), the court was required to determine whether one might recover in maritime tort for economic loss in the absence of physical damage. The court did not allow recovery, refusing to abandon the "bright line rule" requiring the presence of damage to a proprietary interest as a predicate to recovery for economic loss—a rule, it stated, had the virtue of predictability. *Id.* at 1029. Acknowledging that the rule had the "vice of creating results in cases at its edge that are said to be 'unjust' or 'unfair,'" the court stated that "when lines are drawn sufficiently sharp in their definitional edges to be reasonable and predictable, [sometimes perverse results] are the inevitable result—indeed, decisions are the desired product." *Id.* The dissent asserted that the rule should be rejected in favor of using conventional tort principles of foreseeability and proximate cause. *Id* at 1035. While such an approach would require a case-by-case analysis, the dissent argued that such an approach would "comport[ ] with the fundamental idea of fairness that innocent plaintiffs should receive compensation and negligent defendants should bear the case of their tortious acts. *Id.* (Wisdom, J., dissenting). "Such a result is worth the additional costs of adjudicating these claims and this rule of liability appears to be more economically efficient. Finally, this result would relieve courts of the necessity of manufacturing exceptions . . . ." *Id.* at 1035–36 (Wisdom, J., dissenting).

California had quite a workout in determining the appropriate analytical framework for liability in negligent infliction cases in the bystander context. In *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968), the California Supreme Court overruled its decision in *Amaya v. Home Ice, Fuel, & Supply Co.*, 379 P.2d 513 (Cal. 1963). In *Amaya*, the Court held that persons outside the zone of danger could not receive damages for negligently induced fright or shock. *Amaya*, 379 P.2d. at 513. In *Dillon*, the court adopted foreseeability of the injury as the test of liability refusing to deny

To ask this question is to assume, of course, that such a standard—in this case, one that decouples the certification and protection decisions and explicitly directs the court to address and weigh the interests implicated by class certification—is beneficial. Certain advantages of this standard can be quickly enumerated. First, the standard avoids the investment of time and energy courts currently expend in attempting to discern in which category the class belongs. Second, to the extent courts must explicitly consider and balance the implicated interests, the certification process can be more transparent and thus more readily subject to any necessary correction through appellate review.

In addition, the proposed standard avoids the potentially misleading focus on the nature of relief requested. As some lower courts earlier recognized, in discerning the propriety of (b)(2) certification, it is not enough to characterize the relief as monetary or injunctive, or to declare that one or the other form is "predominant." For even when a class seeks only injunctive relief, it does not satisfy the requirements of (b)(2) if awarding that relief requires individualized treatment of class claims.[304]

Lastly, the proposed standard provides a response to questions raised by lower courts in attempting to discern the intended scope of (b)(2) in the hybrid context. Should courts assessing (b)(2) certification consider issues of manageability or efficiency, or were these factors only relevant to (b)(3) certification? What is the role of cohesion in class certification? Should the courts take a permissive view of (b)(2) certification in civil rights cases because (b)(2) was intended to facilitate certification in such cases and relegating certification of those cases to the "more demanding" (b)(3) criteria is likely to result in fewer civil rights cases being certified?[305]

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recovery because of the difficulty of determining appropriate limits for liability. At the same time the court recognized the potential for limitless liability and articulated guidelines to help lower courts define the parameters of the tort. The expected greater certainty did not develop, and in *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989), the court concluded that bystander liability would be extended only where specified criteria were satisfied. The court stated: "Experience has shown that . . . there are clear judicial days on which a court can foresee forever and thus determine liability, but none on which that foresight alone provides a socially and judicially acceptable limitation on recovery of damages for that injury." *Id*. For a general discussion of the rule versus approaches debate, *see* Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

[304] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011).

[305] *Cf.* Randall v. Rolls-Royce Corp., 637 F.3d 818, 825 (7th Cir. 2011) ("class action lawyers like to sue under [Rule 23(b)(2)] because it is less demanding . . . than Rule 23(b)(3) suits . . . ."); Malveaux, *supra* note 151, at 425 (referring to (b)(3) standard as "more rigorous").

Such questions suggest that the rationale underlying Rule 23(b)'s category structure is sometimes lost in the shuffle of the certification process. For example, as noted previously, courts and commentators worried about the future of civil rights class actions because they feared that if such actions could not be certified under (b)(2) then they would not be certified at all.[306] Classes seeking the full panoply of damage remedies under the Civil Rights Act could not meet the "more demanding" criteria of (b)(3).[307]

This reasoning, however, turns the conceptual framework of Rule 23 on its head. The (b)(1) and (b)(2) categories presuppose a close alignment of class interests that warrants class certification and protection through adequate representation alone. As Justice Scalia pointed out in *Wal-Mart*, predominance and superiority are not specified as requirements for (b)(2) classes because their existence in a (b)(2) class is "self-evident."[308] Consequently, the criteria for (b)(3) classes are more demanding only because such classes fail from the start to satisfy the premise of the close alignment of interests that supports class treatment in the (b)(1) and (b)(2) contexts and that renders unnecessary the additional protections afforded through notice and opt-out rights. Therefore, in situations in which the (b)(3) requirements cannot be satisfied, it should be untenable to argue that a (b)(2) class could be certified.[309] In similar fashion, if a class action is one truly involving a group-wide remedy, class treatment is both manageable and efficient. Again, separate inquires on those factors would be unnecessary. Thus, a standard that contemplates the explicit assessment of all relevant interests has the advantage of avoiding the misdirection that can occur in the current category analysis.

If there are benefits to a unitary standard, there remain the questions of whether such a standard invests the court with "too much" or insufficiently guided discretion and whether, on balance, the resulting uncertainty and potential inaccuracy is too high a price to pay.[310] There are several responses to these objections. In brief, they are: (1) the (b) categories have not eliminated uncertainty from the certification decision and, more

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[306] *Id.*

[307] *Wal-Mart*, 131 S. Ct. at 2565.

[308] *Id.* at 2558.

[309] *Cf.* Kaplan, *supra* note 2, at 390 n.130 ("it will be found that cases satisfying (b)(1) or (b)(2) will also pass muster under (b)(3) . . . . [T]he cases should then ordinarily be treated under the former provisions than the latter.").

[310] *See supra* note 309.

importantly, have in some cases obscured the process; (2) the class certification decision is already an explicitly discretionary decision; and (3) a standard expressly tied to a balancing of the relevant interests implicated in the class certification decision does not invest the court with unguided discretion.[311]

This last point is worthy of further discussion. The proposed unitary standard does not invest the courts with any significant additional discretion. It simply asks the courts to do what they have always done—decide whether a class should be certified and, if so, determine what protections must be (or should be) provided. It does require that the decisions be made directly by focusing on the specific interests implicated without the distraction of determining the particular category into which the class must be slotted. However, it is difficult to argue that directness is a detriment.

Nor is it sensible to argue that the discretion afforded by the standard is unguided. The interests specified by the proposed standard are ones familiar to the courts—ones that they have assessed for years, even if that assessment has not always been explicit. Prejudice, efficiency, autonomy, and access to the courts have been considered (and balanced) as the courts have sought to determine whether or not the alleged class claims fit within one of the (b) categories.[312] There is no reason to believe that courts will jettison more than forty years of experience in determining whether a class should be certified.

Similarly, courts have experience in determining what protections should be provided in particular circumstances—even when those protections apply to absentee members of a mandatory class. For example, courts that believe (b)(2) certification is appropriate, but that strong autonomy interests exist with respect to some portion of the class claims, may require that notice, or notice and opt-out rights, be provided.[313]

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[311] *Id.*

[312] *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 427 (5th Cir. 1998) (Dennis, J., dissenting) (discussing the "fundamental aims" of class actions: to promote judicial efficiency: to afford aggrieved persons a remedy where individual actions are not feasible, to enhance access to the courts by cost-sharing; to protect the defendant from inconsistent adjudications; and to protect the interests of absentee class members).

[313] *See, e.g.*, Molski v. Gleich, 318 F.3d 937, 951 n.16 (9th Cir. 2003) (concluding that the district court had properly certified class under (b)(2), but erred in failing to provide notice and opt-out pursuant to its discretionary authority under Rule 23 (d)(2)).

Moreover, if there is one benefit to the controversy generated by the certification of hybrid classes, it is that many courts have been prompted to engage in rigorous analysis to ascertain the appropriate content of the categories. In so doing, they have identified and/or utilized cohesiveness—that is, the extent to which members of the putative class have similar interests—as the touchstone of the certification and protection decisions.

There is nothing mystical or abstract about the courts' assessment of cohesion. Instead, the courts have determined the level of cohesiveness by reference to the nature and extent to which the class claims must be individually considered. This determination, in turn, helps in discerning whether any of the interests relevant to the class certification would be advanced by class treatment of the claims. Thus, the greater the level of individual treatment required, the more unlikely that class treatment would serve efficiency interests and the more likely autonomy interests may be implicated. Conversely, if group-wide treatment is necessary—i.e., if an action would necessarily affect the interests of others—class treatment would promote efficient decision of the issues involved and avoid the prejudice to others arising from individual lawsuits.

The hard cases however, are those in which there exist apparently clashing interests. Take, for example, the hybrid context which has generated the current debate: plaintiffs allege that defendant has engaged in an illegal course of conduct as a result of which they claim they have been injured. They seek injunctive relief forbidding defendant from engaging in such conduct in the future and compensatory damages for the harm they have suffered. To the extent the damages sought are significant and require individual determination of the right of each class member to those damages, autonomy interests are implicated and fewer efficiencies generated. On the other hand, substantial efficiencies may be available if the liability issue is treated on a class basis. In addition, if defendant is required or expected to treat class members in the same way, it may have a valid interest in avoiding prejudice from multiple and potentially inconsistent determinations of the legality of its conduct. How should a judge balance those interests? Does the proposed standard yield a clear or uniform answer?

Under an interest-based standard, the court would first determine that the apparent clash was real rather than theoretical. Are there common questions (yielding common answers) that suggest a similarity of interests and thus efficiencies from class treatment? Are autonomy interests real and significant? To what extent will defendant actually be prejudiced by

individual decisions of the legality of its conduct? To the extent the court decides that the clash is real, it then has several options. It could determine that class certification is unwarranted. It could decide that a class (or some portion thereof) should be certified. And, if some class treatment is deemed appropriate, it would determine what protections beyond adequate representation should be provided.

Admittedly, the interest standard does not dictate which option a trial court must select. But it does require the court to consider the right questions. Moreover, the uncertainty created by such a standard originates not from the fact that it employs an interest analysis rather than a category system, but from the fact that the decision is a discretionary one. One might, of course, provide some fixed points to inform that exercise of discretion by resolving important existing questions. For instance, courts or rule drafters could determine the proper role of issue class actions. Not only would courts then know how and when an issue class might be utilized, but they would also know at what level cohesiveness should be assessed. In addition, the Supreme Court might finally resolve the issue of when, as a constitutional matter, opt-out rights must be provided. Most importantly, there must be greater agreement on the larger question of what values justify a court's override of the autonomy interest one has in deciding for oneself whether to file suit.[314]

In the end, as long as we believe it appropriate to entrust certification decisions to judges' discretion, we leave room for different, though reasonable, judgments. While this lack of uniformity leads to some uncertainty and the risk of inaccurate decisions, we traditionally tolerate these disadvantages for increased flexibility and individual justice. Perhaps the real concern in the certification area is not that courts and parties will

[314] Traditionally, class treatment under the mandatory provisions of Rule 23 was justified on the ground that it was "necessary"—individual adjudication was infeasible or unworkable or necessarily affected all similarly situated persons. This is not to say that putative class members had no autonomy interests (after all, one may, for example, have an individual interest in complete recovery from a limited fund), but that those autonomy interests should be subordinated to the group interest.

Class treatment in the (b)(3) context has been permitted on the ground that it produces benefits such as efficiencies or allows individuals access to courts when it was otherwise unavailable. Autonomy interests are explicitly recognized in the right to opt out. Is class treatment justified on the basis of consent (inferred from a failure to opt out)? Would available efficiencies alone justify class treatment? If so, when? *Cf.* Hines, *Dangerous Allure*, *supra* note 301 at 588–603 (discussing proper role of issue class action and concluding that (b)(3) class action is justified on the basis of inferred consent).

not know how to apply a non-categorical standard, but that courts will use such a standard to inappropriately expand use of the class action, with attendant costs and infringement on autonomy interests. But an interest-based standard does not increase the amount of uncertainty attending the certification decision because it asks the courts to make the same types of determinations they have always made and to consider and balance interests with which they are already familiar. It has, moreover, the benefit of specifying a direct and explicit assessment of interests, thereby avoiding the current indirect process in which courts attempt to discern the applicable category by first discerning which interests are implicated and which interests a particular category is intended to serve.

There is, of course, always the chance that individual courts will make the wrong decision with respect to class certification or provide inadequate protection for absentees. There is even the possibility that courts will generally adopt an expansive attitude toward class certification under an interest standard. But those possibilities are no different than those available under the current Rule 23 or, indeed, with any discretionary decision. As always, the cure for abuse of discretion is correction by the appellate courts. Indeed, if past is prologue,[315] we can be confident that those courts will

[315] The courts' experience with mass torts is instructive. Although the courts were initially wary of utilizing class actions in the mass torts area, in the 1990s some lawyers attempted (and district courts accepted) use of the class action device in more ambitious fashion to address mass tort litigation. In *Castano v. Am. Tobacco Co.*, 160 F.R.D. 544, 548, 560 (E.D. La. 1995), the district court certified a nationwide class of all nicotine dependent persons including current, former, and deceased smokers since 1943. Plaintiffs argued nine state-law causes of action and sought wide-ranging relief, including equitable relief, compensatory and punitive damages, and attorneys' fees. *Id.* at 548. Commenting that the case before it encompassed "what may be the largest class action ever attempted in federal court," the Fifth Circuit reversed the district court's certification decision. Castano v. Am. Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996). In reaching this decision, the appellate court criticized the lower court for failing to engage in rigorous analysis of the Rule 23 requirements, including the failure to consider how variations in state laws affected satisfaction of (b)(3) requirements and how the case might actually be tried. *Id.* at 740. Appellate decisions in the Sixth and Seventh Circuits reflected a similar negative reaction to district court efforts deemed inappropriately expansive. *See In re* Medical Systems, Inc., 75 F.3d 1069, 1074 (6th Cir. 1996) (reversing certification of a nationwide class of recipients of penile implants and concluding that trial judge's analysis of Rule 23 compliance was seriously inadequate, particularly in its failure to address how applications of different state laws would affect handling of class claims); *In re* Rhone-Poulenc Rorer, 51 F.3d 1293, 1299–1303 (7th Cir. 1995) (reversing certification of issues class in nationwide class action by hemophiliacs infected with HIV due to tainted blood solids; appellate court was troubled by the district court's failure to acknowledge application of different state laws and by substantial pressure for settlement resulting from certification, especially where previous trials of individual cases suggested that plaintiffs

provide any attitude adjustment they deem necessary to ensure compliance with Rule 23.

V. CONCLUSION

The Rule 23(b) category system created in 1966 sought to provide clarity in the class certification process by looking to function rather than formalism. The experience of the courts over the last forty years indicates that this system has not promoted clarity or certainty. While Wal-Mart offers the courts some guidance in determining what types of cases fit within a particular category, there remains potential for manipulation and confusion. The larger question is why courts should be required to make this assessment in the first place.

This Article proposes that the current classification system be eliminated in favor of a standard that asks the court to answer, directly, two separate but related questions—whether a class should be certified, and, if so, what protections should be provided. Under the proposed standard, the courts would be directed to consider interests implicated by class certification and to weigh those interests in light of the particular circumstances of the case. In determining whether and which of those interests would be advanced by class treatment, courts would assess to what extent the putative class interests are cohesive.

This standard does not purport to address all the outstanding questions regarding class actions or even all those within the hybrid context. Of immediate interest, for example, is the determination of what role issue class actions may properly play in the class certification process. In the long term there must also be greater consensus regarding what values can justify any use of the class action device.

But the standard does offer flexibility and individualized justice without creating additional uncertainty or excessive or unguided discretion. Courts are asked only to consider interests with which they are already familiar and to evaluate a factor they have identified as critical—the level of cohesion characterizing class interests. Moreover, they will undoubtedly do so against the background of their considerable experience in making the certification and protection decisions. Finally, an interest-based standard not only avoids the unnecessary expenditure of time and energy currently invested in the classification determination itself, but it also requires courts

would likely lose on the merits). With the passage of Rule 23(f) (allowing appeals of class certification divisions), the ability to correct any abuses has been substantially improved.

to make these decisions directly and explicitly, thereby enhancing appellate review.