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## Class Actions a Thing of the Past ... Or Are They? A Look at the Circuit Courts' Application of Comcast v. Behrend, 48 J. Marshall L. Rev. 335 (2014)

Christine Frymire

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CLASS ACTIONS A THING OF THE PAST . . .  
OR ARE THEY? A LOOK AT THE CIRCUIT  
COURTS' APPLICATION OF *COMCAST V.*  
*BEHREND*

CHRISTINE FRYMIRE\*

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## I. INTRODUCTION

What's that smell?

Gina Glazer says that the smelly mold started growing in her Whirlpool front-loading washing machine about six months after she bought it. Glazer scrubbed. She left the machine's door open when she wasn't using it. The mold wouldn't go away and neither would the smell. Glazer called Whirlpool to complain.<sup>1</sup>

Glazer then became one of many who joined a class action lawsuit against Whirlpool.<sup>2</sup> The class was subsequently certified<sup>3</sup> despite the fact that "97 percent of the class members had never complained about any problem with their washers."<sup>4</sup> These suits are commonly referred to as "overbroad" and "no injury" class action lawsuits.<sup>5</sup> The Supreme Court has been taking steps to eliminate these overbroad class actions,<sup>6</sup> yet a misapplication of

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\* J.D., The John Marshall Law School, January 2015. The author of this comment would like to thank the members of THE JOHN MARSHALL LAW REVIEW, especially Paul Mosser for his help as the lead editor of this comment. The author would also like to thank her friends and family for their continuing love and support. This comment is dedicated to Danny Walsh, without whose loving affection this comment would have been finished in half the time.

1. Emily Bazelon, *The Case of the Moldy Washing Machines: The Laundry Litigation that Could Determine the Future of Class-Action Lawsuits*, Slate (July 26, 2013), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/07/whirlpool\\_s\\_moldy\\_washing\\_machines\\_america\\_s\\_most\\_important\\_class\\_action.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/07/whirlpool_s_moldy_washing_machines_america_s_most_important_class_action.html).

2. See *Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, No. 1:08-WP-65000, 2010 WL 2756947, at \*1 (N.D. Ohio July 12, 2010), *aff'd*, 678 F.3d 409 (6th Cir. 2012), *cert. granted*, *Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013), *aff'd*, 722 F.3d 838 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014) (stating that "[p]laintiffs Gina Glazer and Trina Allison move to certify . . . this multidistrict products liability litigation based on Defendant Whirlpool's allegedly defective front-loading washing machines").

3. See *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838, 846 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014) (certifying a class of plaintiffs).

4. John H. Beisner, Jessica D. Miller & Geoffrey M. Wyatt, *Supreme Court Vacates No-Injury Consumer Class Action*, SKADDEN (April 1, 2013), [http://www.skadden.com/sites/default/files/publications/Supreme\\_Court\\_Vacates\\_No-Injury\\_Consumer\\_Class\\_Action.pdf](http://www.skadden.com/sites/default/files/publications/Supreme_Court_Vacates_No-Injury_Consumer_Class_Action.pdf).

5. "No Injury" and "Overbroad" Class Actions After Comcast, *Glazer and Butler: Implications for Certification*, STRAFFORD, <http://www.straffordpub.com/products/no-injury-and-overbroad-class-actions-after-comcast-glazer-and-butler-implications-for-certification-2014-04-01> (last visited Nov. 17, 2014).

6. See D. Matthew Allen & Amanda Arnold Sansone, *Certification: The Rigorous Analysis' Overlay on Current Class Action Jurisprudence*, BLOOMBERG BNA (Sept. 20, 2013), <http://www.bna.com/the-rigorous-analysis-overlay-on-current-class-action-jurisprudence> (discussing how recent Supreme Court decisions show a "natural progression of the slow evolution of the class action device"); see also Robert H. Klonoff, *Reflections on the Future of Class Actions*, 44 LOY. U. CHI. L. J. 533, 533 (2012) (asserting that in "recent years

precedent by the circuit courts has been rendered the Supreme Court's efforts futile.<sup>7</sup> The question remains, has the Supreme Court limited class actions lawsuits? Or are the lower courts correct in finding that the Supreme Court's rulings are fact specific and do not indicate an intent to drastically limit the breadth of class action suits?

This Comment addresses recent developments in the law of class action waivers and certification. Specifically, it looks at three cases—*Comcast*,<sup>8</sup> *Concepcion*,<sup>9</sup> and *Wal-Mart*<sup>10</sup>—in which the Supreme Court limited class action litigation and class arbitration.<sup>11</sup> This Comment also addresses how the circuit courts are hesitant to follow the Supreme Court's precedent.<sup>12</sup>

Section II of this Comment looks at the background of class action waivers and class certification. Section III argues that the circuit courts are attempting to preserve class action litigation in spite of the Supreme Court's recent limiting decisions. Section IV addresses how class action litigation is unfavorable from a public policy standpoint and proposes that the Supreme Court should pass down another decision, further limiting the application of class action lawsuits.

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courts have cut back sharply on the ability to bring class action lawsuits"); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 731 (2013) (stating that "[n]umerous courts have become skeptical about certifying class actions").

7. See Jessica Dye, *7th Circuit stands by washing-machine classes despite Comcast*, REUTERS LEGAL (Aug. 26th, 2013), [https://a.next.westlaw.com/Document/I79492b900e3911e3a438c00abe04d1f6/View/FullText.html?transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://a.next.westlaw.com/Document/I79492b900e3911e3a438c00abe04d1f6/View/FullText.html?transitionType=CategoryPageItem&contextData=(sc.Default)) (addressing how the circuit courts have restored classes for class action lawsuits even after the Supreme Court's ruling in *Comcast*, notwithstanding the Supreme Court's order that "vacated and remanded the case with instruction to reconsider in light of *Comcast*").

8. *Comcast v. Behrend*, 133 S. Ct. 1426 (2013).

9. *Wal-Mart Stores, Inc. v. Dukes et al.*, 131 S. Ct. 2541 (2011).

10. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

11. See *Comcast*, 133 S. Ct. at 1432–33 (declining to certify a class and finding that Rule 23(b)(3) was not satisfied because individual questions of damages would predominate over questions common to the class); *AT&T Mobility*, 131 S. Ct. at 1752–53 (finding that a California state law that classifies most class action waivers as unconscionable was preempted by the FAA); *Wal-Mart*, 131 S. Ct. at 2552 (finding that a common question for all plaintiffs will not suffice to meet the commonality standard because there must be a common answer for all of the plaintiffs).

12. See *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014) (certifying a class after receiving an order from the Supreme Court to rule in light of *Comcast*); *Whirlpool*, 722 F.3d at 846 (restoring a class of plaintiffs after the Supreme Court ordered the Court to rule in light of *Comcast*); *Leyva v. Medline Indus.*, 716 F.3d 510, 511 (9th Cir. 2013) (applying *Comcast* and still finding that the class should be certified).

## II. CLASS ACTIONS: THE FAA, CERTIFICATION REQUIREMENTS, AND RECENT TRENDS IN SUPREME COURT CASE LAW

Class actions are a way for a few plaintiffs to join together and litigate a claim on behalf of both themselves—that is, the named plaintiffs—and class members who do not join as plaintiffs.<sup>13</sup> Class actions provide an avenue for plaintiffs to litigate a claim that would otherwise be economically infeasible to pursue by allowing litigation costs to be shared by and claim values to be aggregated for class members.<sup>14</sup> This background section addresses how the Supreme Court is limiting class action litigation by strengthening the requirements for certification and enforcing class action waivers and arbitration agreements.

### A. *Arbitration and Class Action Waivers* *Limit Class Actions*

Arbitration agreements and class action waivers limit class action litigation.<sup>15</sup> Arbitration agreements are contracts where the parties agree to “submit any disagreements to an arbitrator rather than pursue relief through the judicial system.”<sup>16</sup> Similarly, a class action waiver is a contract in which the parties agree to “only bring individual claims and . . . not assert claims on behalf of a class of similarly situated plaintiffs, either in an arbitration proceeding or in court.”<sup>17</sup> Thus, these agreements can serve a dual purpose: they can require the parties to arbitrate their claims and to waive their right to bring a class action lawsuit.<sup>18</sup> These two provisions are commonly joined in an arbitration clause that includes a class action waiver.<sup>19</sup>

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13. 12 ROBERT M. LANGER, ET AL, CONN. PRAC. SERIES, UNFAIR TRADE PRACTICES § 8.4 (2013) (stating that “the class action is a procedural mechanism enabling representative parties to litigate on behalf of a class of unnamed persons who are not joined in the action”).

14. See 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS, § 4:87 (5th ed. 2013) (stating that the purpose of a class action is “to enable the litigation of claims that would otherwise be infeasible to litigate because the value of the claim is dwarfed by the costs of adjudicating it”).

15. See generally Gesina M. Seiler, *Arbitration Provisions Limiting Class Actions—The Continuing Saga*, 20 No. 5 WIS. EMP. L. LETTER 4 (discussing the Supreme Court case, *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, which addresses how arbitration agreements can limit class action lawsuits).

16. 2 William B. Rubenstein, *Newberg on Class Actions*, § 6:63 (5th ed. 2013).

17. *Id.*

18. See *id.* (discussing how arbitration clauses have “two procedural provisions: an agreement to arbitrate and a class action waiver”).

19. See J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1749 (2006)

Despite the advantages of arbitration agreements,<sup>20</sup> federal courts were initially unwilling to enforce them.<sup>21</sup> Courts displayed hostility towards arbitration agreements by finding the agreements revocable at the will of either party.<sup>22</sup> In effect, courts have made arbitration clauses unenforceable.<sup>23</sup> In 1925, however, Congress passed the Federal Arbitration Act, or the “FAA,”<sup>24</sup> “which created a federal policy favoring the enforcement of arbitration agreements.”<sup>25</sup> The FAA was designed to combat the courts’ “hostility toward arbitration agreements.”<sup>26</sup>

The FAA affirmatively states that arbitration agreements are enforceable and irrevocable unless grounds exist in law or equity to find them unenforceable.<sup>27</sup> While the Act certifies the

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(discussing how companies have been advised to “include class action waivers in arbitration agreements”).

20. See *id.* at 1738 (alleging that critics of the adversarial system agree that arbitration, as a form of alternative dispute resolution, has many advantages, such as being a “cost-effective, and specialized alternative to formal, public litigation”). This article also notes that parties who arbitrate are better able to utilize flexible procedures that result in swifter adjudication than civil litigation. *Id.* at 1739. The arbitration process is also quicker because the arbitrator typically does not publish the opinion; therefore, the time between the hearing and the final result is shorter. *Id.*; see also Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 22 (2000) (stating that the parties to a dispute are able to choose an arbitrator that may be a technical expert in a certain field; therefore, the parties will be able to discuss complex issues without having to take the time out to explain these issues to a judge who may not be familiar with them).

21. Glover, *supra* note 19, at 1739 (discussing how the federal courts were not eager to enforce arbitration agreements (citing *Kulukundis Shipping Co., S/A, v. Amtorg Trading Corp.*, 126 F.2d 978 (2d. Cir. 1942); *U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006 (1915)).

22. See *Kulukundis Shipping Co.*, 126 F.2d at 981–84 (holding that a mandatory arbitration agreement is revocable at the will of either party and therefore unenforceable); *U.S. Asphalt Ref. Co.*, 222 F. at 1008 (finding that a mandatory arbitration agreement is revocable).

23. See *Kulukundis Shipping Co.*, 126 F.2d at 981–84 (finding the mandatory arbitration agreement revocable and unenforceable); *U.S. Asphalt Ref. Co.*, 222 F. at 1008 (holding that the mandatory arbitration agreement is revocable, and therefore unenforceable).

24. 9 U.S.C. § 2 (2009).

25. Keith N. Hylton, *Agreement to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 215 (2000); see *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983) (stating that section 2 of the FAA is a “congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary”); see also *Concepcion*, 131 S. Ct. 1740, 1745 (2011) (stating that “[t]he FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements”).

26. Hylton, *supra* note 25, at 215.

27. 9 U.S.C. § 2 (2009). Section 2 of the FAA states that “an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any

enforceability of arbitration agreements, litigants still attempt to use state-law unconscionability doctrines to invalidate arbitration and waiver agreements.<sup>28</sup> Such invalidation attempts still can be advanced because, in 1996, the Supreme Court found that “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2” of the FAA.<sup>29</sup> Unconscionability arguments typically run as follows: “the inclusion of class action waivers in standard adhesion contracts renders the agreements so one-sided as to satisfy the common law contract doctrine prohibiting unconscionable agreements.”<sup>30</sup> Despite Congress’ clear intention to promote arbitration agreements through the FAA, some courts have still found this argument appealing and held arbitration agreements and class action waivers unenforceable under the state law doctrine of unconscionability.<sup>31</sup> But “the majority of courts analyzing class action waivers have upheld their validity against claims that they are unconscionable.”<sup>32</sup>

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contract.” *Id.*

28. See Frank A. Luchak, *Consumer Contracts and Class Actions: U.S. Supreme Court to Decide Whether State Unconscionability Law Bars Mandatory Individual Arbitration of Claims*, N.J. LAWYER MAG., 1, 9–10 (2011), available at [http://www.duanemorris.com/articles/static/luchak\\_njlawyer\\_0411.pdf](http://www.duanemorris.com/articles/static/luchak_njlawyer_0411.pdf) (stating that many states have “refused to enforce class action waivers because they are deemed unconscionable under state law”).

29. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

30. Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility V Concepcion*, 79 U. CHI. L. REV. 623, 632 (2012) (internal quotation marks omitted).

31. See *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1090 (9th Cir. 2009) (holding that “the agreement’s class action waiver [was] substantively unconscionable and therefore unenforceable under Oregon law”); see also *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1104–05 (W.D. Mich. 2000) (finding a class action waiver unconscionable under Michigan law); *Luna v. Household Fin. Corp.*, 236 F. Supp. 2d 1166, 1178 (W.D. Wash. 2002) (finding a class action waiver unconscionable, and therefore unenforceable under Washington law); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 574 (Fla. Dist. Ct. App. 1999) (“[a]pplying general principles of contract law,” and holding that the arbitration clause was “unconscionable and therefore unenforceable”); *Muhammad v. Cnty. Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 100 (N.J. 2006) (holding that the arbitration agreement was unconscionable as against public policy); *State ex rel. v. Berger*, 567 S.E.2d 265, 284–85 (W. Va. 2002) (finding that an agreement that prohibited class action relief was unconscionable and void); see generally William M. Howard, *Validity of Arbitration Clause Precluding Class Actions* 13 A.L.R. 6th 145 (2006) (citing and analyzing state and federal cases that have considered whether a class action waiver renders an agreement unconscionable and unenforceable); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 78 n.13 (2004) (citing cases that found class action waivers to be unconscionable and unenforceable).

32. Glover, *supra* note 19, at 1751; see *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003) (finding an arbitration agreement that

However, there is still reason for concern. States and federal courts that have adopted the minority rule, specifically Illinois, California, and the Ninth Circuit Court, have not waived; they continue to find class actions waivers as unenforceable and unconscionable.<sup>33</sup> There is a concern that these minority courts

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specifically precludes class actions enforceable); *Lloyd v. MBNA Am. Bank, N.A.*, 27 F. App'x. 82, 84 (3d Cir. 2002) (stating that “an arbitration agreement barring class wide relief for claims brought under the TILA is not unconscionable”); *see also Snowden v. CheckPoint Check Cashing, Inc.*, 290 F.3d 631, 638 (4th Cir. 2002) (finding that an arbitration agreement was not unconscionable even though the individual plaintiff only had a small amount of individual damages); *Tsadilas v. Providian Nat'l Bank*, 786 N.Y.S.2d 478, 480–81 (N.Y. App. Div. 2004) (affirming lower court's decision and holding that a clause in the contract that waives the right to a class action is not unconscionable).

33. *Glover, supra* note 19, at 1752; *see Ingle v. Circuit City Stores*, 328 F.3d 1165, 1175–76 (9th Cir. 2003) (finding a class action waiver unconscionable and stating that under California law, “the coverage of the arbitration agreement is substantively unconscionable” because the “prohibition of class action proceedings in its arbitral forum is manifestly and shockingly one-sided”); *Ting v. AT&T*, 319 F.3d 1126, 1152 (9th Cir. 2003) (finding certain provisions of an arbitration agreement unconscionable). The court here specifically looked at a clause that prohibited class actions, noting that the customers were never given an opportunity for “negotiation, modification, or waiver” and the customers were given the contract “on a take-it-or-leave-it basis.” *Id.* at 1149. In determining that the clause was unconscionable the Court stated that the decision was in line with the “FAA's particular rule . . . [that] generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.” *Id.* at 1152 (internal quotation marks omitted); *see also ACORN v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1174 (N.D. Cal. 2002) (holding a class action prohibition unconscionable and unenforceable due to the numerous one-sided aspects of the contract); *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1175–76 (N.D. Cal. 2002) (finding that the FAA did not preempt their decision that a class action waiver was unconscionable stating that, “while California's consumer protection statutes cannot prevent enforcement under the FAA of a prohibition on collective actions as such, a federal court properly may consider whether such a prohibition in combination with other provisions and circumstances renders an agreement substantively unconscionable as a matter of state law”); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002) (holding that a class action waiver in a credit card consumer contract was unconscionable and unenforceable and stating that the “manifest one-sidedness” of the clause was unconscionable because it was intended to bar suits and relief for customers with small claims, therefore giving the defendant a “virtual immunity” from class action litigation); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 575–76 (Fla. Dist. Ct. App. 1999) (finding a class action waiver unconscionable because a class action would be the most economically feasible avenue for the plaintiffs' claim when each claim was individually a small sum of money); *Kinkel v. Cingular Wireless, LLC*, 828 N.E.2d 812, 819–21 (Ill. App. Ct. 2005) (rejecting the defendant's motion to compel arbitration and finding the class action waiver unconscionable because the clause was one-sided and it effectively prevented plaintiff from being able to bring their individual claims), *aff'd*, 857 N.E.2d 250 (2006); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1008 (Wash. 2007) (finding an arbitration clause unconscionable and stating that “[a] clause that



will become “magnets”<sup>34</sup> for class action litigation. Plaintiffs looking to bring a class action lawsuit will flock to these “magnet” jurisdictions and pursue nation-wide class litigation that includes class members from states where the claims could not be brought as a class.<sup>35</sup> Effectively, a small minority of jurisdictions could set the law for the entire nation and hear a majority of class action litigation. However, as this Comment will soon address, recent Supreme Court decisions support the enforceability of class action waivers in arbitration agreements.<sup>36</sup> Therefore, the concern of magnet states and hostility towards class action waivers may become immaterial.

### B. Class Certification through Federal Rule of Civil Procedure 23

Besides limiting class actions through enforcement of class action waivers, courts can also limit class action lawsuits by denying certification of the class.<sup>37</sup> If a court does not certify a class, then the group of plaintiffs cannot proceed with class action litigation.<sup>38</sup> “Under Rule 23 [of the Federal Rules of Civil Procedure], a court may choose to certify a class to resolve . . . issues” that involve many different plaintiffs.<sup>39</sup> This rule grants

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unilaterally and severely limits the remedies of only one side is substantively unconscionable under Washington law”); *State ex rel. Dunlap v. Berer*, 567 S.E.2d 265, 278–79 (W. Va. 2002) (finding a class action waiver unconscionable because the waiver effectively gave the companies immunity from class action suits). The *Dunlap* court found that a class action was needed in this type of a case because the case was “precisely the sort of small-dollar/high volume (alleged) illegality that class action claims and remedies are effective at addressing.” *Id.* at 278.

34. Glover, *supra* note 19, at 1754.

35. *Id.*; see also *Discover Bank v. Super. Ct.*, 113 P.3d 1100, 1118 (Cal. 2005) (Baxter, J., concurring in part and dissenting in part) (stating that if California dishonors “class action waivers that are perfectly valid under the governing law selected by the parties themselves, California—which now takes a minority position on this issue—might well become the magnet for countless nationwide consumer class action lawsuits that could not be maintained elsewhere”).

36. See *Stolt-Nielsen SA v. Animal Feeds Int’l Corp.*, 130 S. Ct. 1758, 1774 (2010) (holding that parties cannot be compelled to class arbitration when the contract is silent as to whether the parties agree to class litigation as opposed to individual litigation).

37. Fed. R. Civ. P. 23.

38. See Bryant G. Garth, *Studying Civil Litigation Through the Class Action*, 62 IND. L.J. 497, 500–01 (1987) (stating that “[i]n the federal courts or state courts with rules analogous to Federal Rule 23, a lawsuit cannot proceed as a class action unless it is certified under one of the three subdivisions of 23(b)”).

39. Heather M. Johnson, *Resolution of Mass Product Liability Litigation Within the Federal Rules: A Case for the Increased Use of Rule 23(b)(3) Class Actions*, 64 *FORDHAM L. REV.* 2329, 2333 (1996).

courts the authority to certify a vast array of class actions, so long as the classification fits within the Rule 23's requirements.<sup>40</sup> Certification of a class of plaintiffs allows the class to pursue a lawsuit as an "aggregate unit," rather than each plaintiff pursuing his or her claims in a separate lawsuit.<sup>41</sup>

Certification mandates that the class meet all four requirements of Rule 23(a) and fit into one of the three types of classes under Rule 23(b).<sup>42</sup> The four requirements of Rule 23(a) are numerosity, commonality, typicality, and adequacy of representation.<sup>43</sup>

The first requirement, numerosity, is met when the court determines that the class is "so numerous that joinder of all members is impracticable."<sup>44</sup> Under this requirement, if the parties are sparse enough to join together under the procedural law of joinder, then a class action is not needed to sufficiently litigate the claim.<sup>45</sup> The second requirement, commonality, requires a showing that "there are questions of law or fact common to the class."<sup>46</sup> The requirement of commonality confirms that class action litigation will be an efficient and useful mechanism to ensure the common questions at issue are addressed.<sup>47</sup> The third requirement, typicality, requires that the class representative's claims or defenses be "typical of the claims or defenses of the class."<sup>48</sup> The typicality requirement ensures that the class representatives, whom are pursuing their own interests, are adequately representing the interests of the other class members.<sup>49</sup> The last requirement, adequacy of representation,

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40. Fed. R. Civ. P. 23.

41. Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 99 (2009).

42. FED. R. CIV. P. 23; *see also* Cyrus Mehri & Michael D. Lieder, *Onward and Upward After Wal-Mart v. Dukes*, JUSTICE (2013), <http://www.justice.org/cps/rde/justice/hs.xsl/20503.htm> (stating that "[a] class action in federal court must satisfy the four requirements of Federal Rule of Civil Procedure 23(a) and one of the three alternative conditions of Rule 23(b)").

43. Sarah Dale, *Reconsidering the Approach to 23(b)(2) Employment Discrimination Class Actions in Light of Dukes v. Wal-Mart*, 38 CONN. L. REV. 967, 972 (2006).

44. FED. R. CIV. P. 23(a)(1); *see also* FED. R. CIV. P. 20 (addressing the requirements for joinder of parties). This rule states that plaintiffs can join together as long as their claim arises "out of the same transaction, occurrence, or series of transactions or occurrences; and . . . any question of law or fact common to all plaintiffs will arise in the action." *Id.*

45. *See* Johnson, *supra* note 40, at 2336 (stating that "[t]he rationale underlying this first requirement is that if joinder is possible, the class action device is not necessary to achieve a unified resolution of the litigation").

46. Fed. R. Civ. P. 23(a)(2).

47. *See* Johnson, *supra* note 40, at 2336 (stating that the second "requirement ensures that the class action device serves to advance convenient and uniform resolution of common issues at once").

48. Fed. R. Civ. P. 23(a)(3).

49. *See* Johnson, *supra* note 40, at 2336 (stating that the third requirement

demands that “the representative parties will fairly and adequately protect the interests of the class.”<sup>50</sup> This last requirement ensures that the representatives do not have a conflict of interest with other members of the class.<sup>51</sup> After all requirements of Rule 23(a) have been met, a court then determines if the class will fit into one of the three types of classes under Rule 23 (b).<sup>52</sup>

The first two types of classes are certified under Rule 23(b)(1) and 23(b)(2), respectively, and are appropriate when the “claims demand a single adjudication that binds all class members.”<sup>53</sup> A Rule 23(b)(3) class is appropriate when the class action “is superior to other methods available to adjudicate the controversy and if common questions predominate over individual issues in the litigation.”<sup>54</sup> While a court must certify Rule 23(b)(1) and (2) classes if they meet the requirements, a court has discretion whether or not to certify a (b)(3) class.<sup>55</sup> When a class is certified under Rule 23(b)(3), all potential class members must be given notice of the class proceeding and an option to “opt out” of the binding result of the suit.<sup>56</sup> This notification process can be

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“seeks to ensure that the interests of class representatives and members are sufficiently aligned so that the court can rely on the self-interest of the class representatives to drive them to pursue the interests of all class members”).

50. Fed. R. Civ. P. 23(a)(4).

51. See Johnson, *supra* note 40, at 2336 (stating that the adequacy of representation requirement “is intended to ensure that the named plaintiffs do not have any conflicts of interest with class members that would temper their prosecution of other class members’ interests”).

52. Fed. R. Civ. P. 23.

53. Johnson, *supra* note 40, at 2336.

54. *Id.* at 2336–37. The author describes the categories of classes that will be certified under Rule 23 (b) as follows:

Rule 23(b)(1) mandates certification of classes if individual actions would prejudice the defendant or absent class members. Under Rule 23(b)(2), a court must certify a class when the defendant has acted or refused to act on grounds generally applicable to the class and injunctive relief is proper. A court may certify a Rule 23(b)(3) class action if it is superior to other methods available to adjudicate the controversy and if common questions predominate in the litigation over individual issues.

*Id.*

55. See *id.* at 2337 (discussing how the court has discretion whether or not to certify a class under Federal Rule of Civil Procedure 23 (b)(3)).

56. *Id.*; see also Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974) (holding that all class members must be notified of the class proceeding and the option to opt out if they “can be identified through reasonable effort”); 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, & RICHARD L. MARCUS, FED. PRAC. & PROC. CIV. § 1778 (3d ed. 2013) (stating that the interests of the class members need to be similar otherwise a ruling would be a “binding judgment in an action in which the absentee’s interests were not presented effectively”). Author also posits that there is a sound rationale for requiring that questions of law or fact predominate individual questions,

expensive, especially when numerous potential plaintiffs are involved.<sup>57</sup>

As previously discussed, Rule 23 allows the courts to certify three different types of classes. However, this Comment only addresses recent Supreme Court cases that have rejected certification attempts under Rule 23(b)(3).<sup>58</sup> Therefore, the following section will provide more information about 23(b)(3) classes.

### C. Class Certification through Rule 23(b)(3)

When a class is certified under Rule 23(b)(3), the certification signifies a determination by the court that “the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”<sup>59</sup> Unlike the commonality requirement, in which a court determines if common questions exist, Rule 23(b)(3) requires a court to look at the relationship between the common and individual questions.<sup>60</sup> To help

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because the members who do not opt out of the class will be bound by the judgment. Therefore, “it is essential that their interests be connected closely.” *Id.*

57. See 2 BUS. & COM. LITIG. FED. CTS. § 19:38 (3d. ed. 2012) (stating that “[t]he notice requirements of Rule 23(c)(2) for 23(b)(3) class actions are mandatory and may not be waived at the discretion of the district court”); see also *Eisen*, 417 U.S. 175–79 (holding that individual notice to each 2,250,000 class members that were easily identifiable was required and could not be waived by the district court despite the fact serving such notice would be expensive).

58. See *Comcast*, 133 S. Ct. at 1432–33 (finding that the class should not be certified because the plaintiffs could not prove that the class met the requirement of Rule 23(b)(3)).

59. FED. R. CIV. P. 23; see also WRIGHT, *supra* note 57, at § 1778 (stating that “[e]xactly what is meant by ‘predominate’ is not made clear in the rule . . . [n]or have the courts developed any ready quantitative or qualitative test for determining whether the common questions satisfy the rule’s test”).

60. See WRIGHT, *supra* note 57, at § 1778 (stating that “it is not sufficient that common questions merely exist, as is true for purposes of Rule 23(a)(2)”). The authors then address how the “court is under a duty to evaluate the relationship between the common and individual issues in all actions under Rule 23(b)(3). *Id.*; see also 59 AM. JUR. 2D PARTIES § 74 (2014) (stating that determining if common questions predominate “involves a qualitative assessment of common and individual questions rather than a mere mathematical quantification of whether there are more of one than the other”). The report goes on to state that the “[t]est for predominance of common issues is not whether the common issues outnumber the individual ones, but whether common or individual issues will be the object of most of the efforts of the litigants and the court. *Id.*; see also *Lee v. Carter-Reed Co., L.L.C.*, 4 A.3d 561, 575 (N.J. 2010) (stating that “to establish predominance, plaintiff does not have to show that there is an absence of individual issues”). The *Lee* court then discusses how the plaintiffs do not have to show that they have been

determine whether this requirement is satisfied, Rule 23(b)(3) provides the court with four factors to consider when determining if a class should be certified.<sup>61</sup>

Courts apply Rule 23 and the four factors to assess whether common questions of law predominate over any questions affecting only individual members.<sup>62</sup> Of course, courts routinely find that common questions of law and fact do not predominate over individual questions.<sup>63</sup> For example, in *Babineau v. Federal Exp. Corp.*, the Eleventh Circuit refused to certify a class of plaintiffs

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injured in precisely the same way or show that they have the exact same issues, but there must be some inquiry into the “significance of the common questions” and find that they outweigh individual questions. *Id.*

61. FED. R. CIV. P. 23. The four factors listed in this rule are as follows:

(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.

*Id.*

62. *See In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 488 (W.D. Pa. 1999) (certifying a class stating that “the issues of conspiracy and fact of damage are common to the class and that, while the issues of damages and fraudulent concealment contain both common and individual questions, the common issues predominate with respect to those issues”); *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 300 (3d Cir. 2011) (finding that a class should be certified because common questions predominated over individual questions). Here, the Court looked at how the core of the claims and the injuries suffered were the same for all of the plaintiffs. *Id.* The Court focused on how each class member had a similar legal question that asked whether or not De Beers engaged in a broad conspiracy of fixing diamond prices in the United States. *Id.*

63. *See Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1031–32 (8th Cir. 2010) (finding that a class of purchasers in a breach of contract case could not be certified since individual questions unique to every plaintiff would predominate over common questions). The Court found that they would not certify the class because they would have to look at evidence of the surrounding circumstances when each individual plaintiff entered into the contract. *Id.*; *see also Babineau v. Federal Exp. Corp.*, 576 F.3d 1183, 1194 (11th Cir. 2009) (finding that a class of employees asking for payment for when they worked during their break could not be certified because common questions did not predominate over individual issues when the court would have to inquire into whether or not each individual plaintiff actually worked during their break); *Saltzman v. Pella Corp.*, 257 F.R.D. 471, 487 (N.D. Ill. 2009) (finding that certification of a class of window purchasers is not warranted because when calculating damages, the court would have to take an individualized look at what each purchaser paid for each window and discount that by how much each window had deteriorated); *Genenbacher v. CenturyTel Fiber Co. II*, 244 F.R.D. 485, 489 (C.D. Ill. 2007) (finding that a class of landowners alleging trespass should not be certified because the court would have to do an individualized analysis for every plaintiff and determine if the defendant had an easement on each plaintiff’s property).

who were suing their employer for unpaid wages because common questions did not predominate over individual issues.<sup>64</sup> The Court reasoned that certification was improper because it would have to inquire into whether or not each individual plaintiff actually worked during their break to determine if each individual plaintiff was not being paid for their work.<sup>65</sup> This case demonstrates how courts are able to use Rule 23(b)(3) to limit class actions by determining that common questions do not predominate over individual issues.<sup>66</sup>

#### *D. Recent Supreme Court Decisions Involving Class Actions*

Over the past several years, the Supreme Court has decided several significant cases addressing class action waivers, certification, and arbitration. In *Stolt-Nielson S.A. v. Animal Feeds Int'l Corp.*, the Supreme Court found that parties cannot be compelled to submit to class arbitration unless they agree to submit to class arbitration through contract.<sup>67</sup> In addition, in *AT&T Mobility v. Concepcion*, the Supreme Court held that the FAA preempted a California state law of unconscionability that barred enforcement of class action waivers.<sup>68</sup> The Court held that finding a class action waiver unenforceable because of the economic unfeasibility of individual litigation was a judge-made doctrine. Thus, it could not create an exception to the FAA, a federal statute.<sup>69</sup> The Court effectively rejected the idea that an

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64. *Babineau*, 576 F.3d at 1194.

65. *Id.*

66. See Jordon L. Kruse, *Appealability of Class Certification Orders: The "Mandamus Appeal" and A Proposal to Amend Rule 23*, 91 NW. U. L. REV. 704, 704–05 (1997) (stating that when common questions do not predominate over individual issues and a class is not certified, the plaintiff will have to bring an individual suit, which many times is impractical because it “would often be economically infeasible for the plaintiff to bring an individual action”).

67. See *Stolt-Nielson*, 130 S. Ct. at 1775 (stating that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so”).

68. *AT&T Mobility*, 131 S. Ct. at 1753 (stating that the FAA preempts California’s state doctrine “because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”) (quotations omitted).

69. *Id.* (rejecting the Second Circuit’s exception to the FAA that finds that a class action waiver can be unenforceable if individual litigation would be economically infeasible for the plaintiffs). The Court reasoned that if this rule were to stand the “federal court [would have to] determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success.” *Id.* The Court stated that “[s]uch a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to

arbitration agreement can be unenforceable if it would be expensive for the plaintiffs to litigate individually.<sup>70</sup>

More recently, the Supreme Court decided two cases concerning class certification. In *Wal-Mart v. Dukes*, the Court explained that to satisfy the commonality requirement, the class cannot merely show “that they have all suffered a violation of the same provision of law;” instead, the class must show that the claims “depend upon a common contention.”<sup>71</sup> The Court stated that the common contention or question must be “capable of a class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”<sup>72</sup>

After the Supreme Court decided *Dukes*, the Court held in *Comcast* that courts must conduct a “rigorous analysis” in determining if damages can be computed on a class-wide basis.<sup>73</sup> The plaintiffs in *Comcast* brought an anti-trust class action suit under Federal Rule of Civil Procedure 23(b)(3).<sup>74</sup> They argued that Comcast and other cable/satellite providers colluded “with professional sports leagues to limit the availability of most baseball, hockey, and football games to high-priced add-on packages like NHL Center Ice or MLB Extra Innings.”<sup>75</sup> The Court found that “certification was improper because respondents had failed to establish that damages could be measured on a class-wide basis.”<sup>76</sup> The Court reasoned that the plaintiffs were not able to “bridge the differences between . . . competitive prices in general and . . . competitive prices attributable to the [colluding].”<sup>77</sup>

These cases have changed the way courts look at class actions.<sup>78</sup> The next section will discuss how the circuit courts are

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secure.” *Id.*

70. *Id.*

71. *Dukes*, 131 S. Ct. at 2551, The Court explained that it was not enough that all the plaintiffs simply asserted a Title VII violation. *Id.* The Court gave an example and stated that the claim would meet the commonality requirement if the plaintiffs claimed that the same supervisor portrayed discriminatory bias. *Id.*

72. *Id.* at 2551.

73. *Comcast*, 133 S. Ct. at 1433. The Court used the “rigorous analysis” standard in *Wal-Mart* to determine if the class met the commonality requirements. *Id.* In *Comcast*, the Court expands that standard past the commonality requirement and applies it to the predominance test. *Id.* The Court in *Comcast* says that courts must conduct a “rigorous analysis” to determine if Rule 23 (b)(3)’s predominance test has been met. *Id.*

74. *Comcast*, 133 S. Ct. at 1432.

75. Christ Morran, *Comcast Lawsuit Shows Why Mandatory Binding Arbitration Is Just Plain Evil*, (August 22, 2013), <http://consumerist.com/2013/08/22/comcast-lawsuit-shows-why-mandatory-binding-arbitration-is-just-plain-evil>.

76. *Id.* at 1431 n.4.

77. *Comcast*, 133 S. Ct. at 1435.

78. See Klonoff, *supra* note 6, at 774 (stating that the Supreme Court’s *Dukes* decision appears to have given new meaning to commonality);

applying these Supreme Court decisions.

### III. HOW THE CIRCUIT COURTS ARE ATTEMPTING TO KEEP CLASS ACTION LAWSUITS ALIVE DESPITE THE SUPREME COURT'S ATTEMPTS TO LIMIT CLASS ACTION SUITS

Numerous legal commentaries have argued that class action lawsuits are on the decline.<sup>79</sup> An analysis of recent Supreme Court opinions shows that the Court is placing stricter limitations on class action lawsuits.<sup>80</sup> This section examines the Supreme Court decisions that address class action waivers and certification. Additionally, it argues that the Supreme Court is attempting to limit class actions. However, narrow application of this precedent by the Circuit Courts has been frustrating the Supreme Court's efforts.<sup>81</sup>

#### A. *The Circuit Courts Are Narrowly Interpreting the Supreme Court's Decisions Involving Arbitration Agreements and Class Action Waivers*

The Supreme Court is enforcing arbitration agreements, which limit class action suits by forcing plaintiffs to individually

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Catherine R. Hecker, *Wal-Mart Stores, Inc. v. Dukes: Taming "Too Big to Fail" Classes in the Battle Against Blackmail Actions and Frivolous Litigation*, 7 LIBERTY U.L. REV. 49, 63 (2012) (stating that the dissent in *Wal-Mart* found that the majority's opinion resulted in the commonality standard being a "greater hurdle than it was ever designed to be").

79. See Myriam Gilles, *Opting Out Of Liability: The Forthcoming, Near-Total Demise Of The Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005) (stating that "with a handful of exceptions, class actions will soon be virtually extinct"); Klonoff, *supra* note 6, at 729 (arguing that "in recent years courts have cut back sharply on plaintiffs' ability to bring class action lawsuits"). But see Andrew J. Trask, *Wal-Mart v. Dukes: Class Actions and Legal Strategy*, 2011 CATO SUP. CT. REV. 319, 355 (2010–2011) (arguing that recent Supreme Court decisions are not a threat to class action litigation by stating, "*Dukes* is an important opinion, but it has not doomed the class action, nor even changed it much.>").

80. See *Comcast*, 133 S. Ct. at 1432–33 (finding that because individual questions of damages would predominate over questions common to the class, Rule 23 (b)(3) was not satisfied and the class should not be certified); *AT&T Mobility*, 131 S. Ct. at 1752–53 (holding that a California state law that classifies most class action waivers as unconscionable is preempted by FAA); *Dukes*, 131 S. Ct. at 2552 (finding that a common question for all plaintiffs will not suffice to meet the commonality standard because there must be a common answer for all of the plaintiffs).

81. See *Whirlpool Corp.*, 722 F.3d at 861 (re-certifying a class after the Supreme Court vacated and remanded the case for the court to rule in light of *Comcast*); *Butler*, 727 F.3d at 801 (reinstating the earlier decision that certified a class action despite the Supreme Court's ruling in *Comcast*, finding that the case at hand was significantly different than *Comcast*).



arbitrate instead of coming together as a class.<sup>82</sup> In *Stolt-Nielsen*, the Supreme Court drastically limited class action litigation by declaring that silence in an arbitration agreement is, in effect, a class arbitration waiver.<sup>83</sup> The dissent in *Stolt-Nielsen* pointed out the radicalness of the majority's decision and criticized it for "not persuasively justify[ing] judicial intervention so early in the game" and for "overturn[ing] the ruling of experienced arbitrators."<sup>84</sup>

Despite the Court's ruling in *Stolt-Nielsen*, circuit courts did not enthusiastically limit class actions. For example, the Supreme Court vacated and remanded the Second Circuit's ruling in *American Express Co. v. Italian Colors Restaurant* for reconsideration in light of *Stolt-Nielsen*.<sup>85</sup> On remand, the Second Circuit found that *Stolt-Nielsen* did not affect its earlier decision and held that the arbitration agreement unenforceable.<sup>86</sup>

Shortly after *Stolt-Nielsen*, the Supreme Court granted certiorari in *AT&T Mobility v. Concepcion* and held that the FAA preempted a California state law of unconscionability that barred enforcement of class action waivers.<sup>87</sup> When *American Express*

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82. See generally 1 MCLAUGHLIN ON CLASS ACTIONS § 2:14 (9th ed.) (addressing how arbitration agreements limit class actions). This article also looks at how arbitration agreements are a device companies use, or should use, to limit class action litigation since the Supreme Court ruled in *AT&T Mobility* that an "agreement requiring arbitration can also preclude a plaintiff from initiating or participating in a class action in court or in arbitration." *Id.* at ¶ 1.

83. See MCLAUGHLIN ON CLASS ACTIONS, *supra* note 83 at § 2:14 (stating that *Stolt-Nielsen* "held that class arbitration is impermissible unless parties affirmatively authorize class arbitration, and that silence on the issue is insufficient"); see also *Goodale v. George S. May Intern. Co.*, No-10C5733, 2011 WL 1337349, at \*2 (N.D. Ill. 2011) (stating that "*Stolt-Nielsen* protects a party from being compelled to arbitrate class claims where the arbitration agreement is silent with respect to such claims"); R. Bruce Allensworth, Andrew C. Glass, Robert W. Sparkes, III, & Roger L. Smerage, *Class Arbitration Waivers: Silence Reigns In Stolt-Nielsen, But The Courts Have More To Say*, K&L GATES (June 15, 2010), <http://www.klgates.com/class-arbitration-waivers-silence-reigns-in-stolt-nielsen-but-the-courts-have-more-to-say-06-15-2010> (quoting the Court in *Stolt-Nielsen* stating that "[i]n a five to three decision, the Court held that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so") (internal quotations omitted).

84. *Stolt-Nielsen*, 559 U.S. at 688.

85. *Am. Exp. Co. v. Italian Colors Rest.*, 130 S. Ct. 2401, 2401 (2010).

86. *In re Am. Express Merchants' Litig.*, 634 F.3d 187, 200 (2d Cir. 2011) (finding that *Stolt-Nielsen* did not affect its earlier decision that the arbitration agreement was unenforceable), *adhered to on reh'g sub nom.*, *In re Am. Exp. Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 594 (2012), and *rev'd*, *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013). The Court reasoned that a class action was the "only economically feasible means" for the plaintiffs to pursue their claims. *Id.* at 198. The Court also looked at how the "damages due to any single individual or entity [was] too small to justify bringing an individual action." *Id.* at 194.

87. *AT&T Mobility*, 131 S. Ct. at 1753 (holding that the FAA preempts California's state doctrine "because it stands as an obstacle to the

reached the Second Circuit for a third time, the circuit court found that neither *Stolt-Nielsen* nor *Concepcion* affected its prior decision that the class action waiver was still unenforceable.<sup>88</sup>

Because the Second Circuit was so hesitant to enforce the class action waiver, the Supreme Court granted certiorari again and reversing the Second Circuit's decision.<sup>89</sup> The Supreme Court adamantly held that the class action waiver was enforceable.<sup>90</sup> The Court declined to take a plaintiff friendly approach and forced plaintiffs to litigate individually even if litigation was economically infeasible.<sup>91</sup>

This step-by-step analysis of *American Express* shows how the Second Circuit was unwilling to enforce a class action waiver despite the Supreme Court's decisions.<sup>92</sup> The Supreme Court handed down three decisions addressing class action issues before ultimately taking the case out of the Second Circuits' hands to declare the class action waiver enforceable.<sup>93</sup> Despite the Second Circuit's reluctance, the Supreme Court was clear in holding that class action waivers and arbitration agreements are enforceable.<sup>94</sup>

In addition to limiting class actions by enforcing arbitration agreements and class action waivers, the Supreme Court also uses the rules of class certification as a means to limit class action litigation.<sup>95</sup>

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accomplishment and execution of the full purposes and objectives of Congress") (quotations omitted).

88. *Am. Exp. Merchants*, 667 F.3d at 206 (stating "our original analysis [is] unaffected by *Stolt-Nielsen*"). The Court went on to state, "*Concepcion* does not alter our analysis, and we again reverse the district court's decision and remand for further proceedings." *Id.* The Court again found that the class action waiver was unenforceable stating that it was "financially impossible" for the plaintiffs to litigate individually. *Id.* at 219.

89. *See Am. Exp. Co.*, 133 S. Ct. at 2312 (reversing the Court's decision in *In re Am. Exp. Merchants' Litig.*).

90. *See AT&T Mobility*, 131 S. Ct. at 1753 (finding a class action waiver enforceable even if individual litigation would be economically infeasible for the plaintiffs).

91. *Id.*

92. *Am. Exp. Co.*, 133 S. Ct. 2304 (reversing the Circuit Court's decision and finding the class action waiver enforceable).

93. *Id.* at 2312 (finding a class waiver enforceable even though it may be expensive for the plaintiffs to sue individually); *see also AT&T Mobility*, 131 S. Ct. at 1752–53 (finding a class action waiver enforceable because the FAA preempts a state law that disfavors class action waivers); *Stolt-Nielsen*, 130 S. Ct. at 1774–75 (finding that a party cannot be compelled to arbitrate class claims where the arbitration agreement does not address the issue).

94. *Am. Exp. Co.*, 133 S. Ct. at 2312 (finding an arbitration agreement enforceable).

95. *See Comcast*, 133 S. Ct. at 1435 (rejecting the certification of a class, thereby denying the plaintiffs the ability to bring a class action lawsuit); *Dukes*, 131 S. Ct. at 2549 (finding that a common question for all plaintiffs will not suffice to meet the commonality standard because there must be significant proof that there will be a common answer for all of the plaintiffs).

### B. *The Supreme Court Is Using Federal Rule of Civil Procedure 23 to Limit Class Action Litigation*

For years courts have found that classes do not meet the requirements of Rule 23.<sup>96</sup> The Supreme Court has recently made it even harder for plaintiffs to meet Rule 23's requirements.<sup>97</sup> In *Dukes*, the Supreme Court took a narrow approach to the commonality requirement of Rule 23.<sup>98</sup> By modifying the commonality requirement, the Court made it more difficult for plaintiffs to be certified as a class.<sup>99</sup> The Court increased the certification standard by finding that the class' problem must be "capable of a class-wide resolution."<sup>100</sup> Therefore, to meet the commonality requirement, *Dukes* made it mandatory for class members to show that there is a common answer to their common contention.<sup>101</sup> In essence, the Supreme Court communicated to the lower courts that a common question is no longer sufficient to meet Rule 23's commonality requirement.

Before the Court's decision in *Dukes*, the commonality requirement was easy to satisfy and rarely an obstacle for class

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96. See *Williams v. Veolia Transp. Servs., Inc.*, 379 F. App'x 548, 549 (9th Cir. 2010) (finding that a class should not be certified under Rule 23 (b)(3) because "individual issues predominated"); *Weigle v. FedEx Ground Package Sys., Inc.*, 267 F.R.D. 614, 625 (S.D. Cal. 2010) (denying certification of a class by finding that Rule 23(b)(3) was not met because a class action was not a superior method for adjudicating the plaintiffs' claims); *Rattray v. Woodbury Cnty., IA*, 614 F.3d 831, 836 (8th Cir. 2010) (finding that the class could not be certified under Rule 23 because the plaintiffs could not prove the adequacy of the representation requirement); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 425 (5th Cir. 1998) (finding that a class should not be certified because it did not meet the requirements of 23(b)(2) or 23(b)(3), stating "issues common to the proposed class do not predominate over those affecting only individual plaintiffs and . . . a class action would not be a fair and efficient method for adjudicating these claims").

97. *Dukes*, 131 S. Ct. at 2549 (finding that there must be a showing of a common answer for all of the plaintiffs because a common question for all plaintiffs will not suffice to meet the commonality standard).

98. Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, 60 UCLA L. REV. 1652, 1675 (2013).

99. *Dukes*, 131 S. Ct. at 2551. The Court explained that no longer can a class merely show "that they have all suffered a violation of the same provision of law," but instead the class must show that the claims "depend upon a common contention" to be certified. *Id.*

100. *Id.* at 2551.

101. See Klonoff, *supra* note 6, at 775 (stating that "under the *Dukes* formulation, it is not enough that the question is common; rather, the question must be essential to the outcome of the case"); Mark Perry & Joe Sellers, *Class Actions in the Wake of Dukes v. Wal-Mart*, 8 J.L. ECON. & POL'Y 367, 368 (2011) (stating that in order to meet the commonality requirement, the *Dukes* Court found that "you have to have a common question, and the common question must have a common answer, one that can be adjudicated on behalf of the class as a whole").

certification.<sup>102</sup> *Dukes* narrowed the application of the commonality standard and changed the way courts examine the requirement.<sup>103</sup> Courts now regularly cite *Dukes* in finding that a class should not be certified.<sup>104</sup>

### C. Comcast v. Behrend: *Further Supreme Court Limitation on Plaintiffs' Access to Class Actions*

After *Dukes*, the Supreme Court continued to constrain class actions by requiring courts to conduct a “rigorous analysis” in determining if damages can be computed on a class-wide basis.<sup>105</sup> The Supreme Court’s decision in *Comcast* is an instruction to the “federal courts to scrutinize class actions more zealously before certification, including weighing damage theories carefully.”<sup>106</sup> After *Comcast*, the Court vacated and remanded three other cases instructing the lower courts to rule in light of its decision.<sup>107</sup> In

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102. See *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1356 (11th Cir. 2009) (stating that Rule 23’s commonality requirement is a “low hurdle”); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 19 (1st Cir. 2008) (stating that the commonality requirement is a “low bar, and courts have generally given it a permissive application”) (internal quotation marks omitted); *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999) (purporting that meeting the commonality requirement is “not demanding”); *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) (stating that the commonality requirement is “easily met”); Klonoff, *supra* note 6, at 773 (stating “prior to the Supreme Court’s 2011 opinion in *Dukes*, commonality, like numerosity, was rarely an impediment to class certification”).

103. See Klonoff, *supra* note 6, at 774 (stating that [t]he Supreme Court’s *Dukes* decision appears to have given new meaning to commonality); Catherine R. Hecker, *Wal-Mart Stores, Inc. v. Dukes: Taming “Too Big to Fail” Classes in the Battle Against Blackmail Actions and Frivolous Litigation*, 7 LIBERTY U. L. REV. 49, 63 (2012) (stating that the dissent in *Dukes* found that the majority’s opinion resulted in the commonality standard being a “greater hurdle than it was ever designed to be”).

104. See *Cruz v. Dollar Tree Stores, Inc.*, No. 07-2050, 2011 WL 2682967, at \*2 (N.D. Cal. July 8, 2011) (stating that “[t]he Supreme Court’s recent decision in *Wal-Mart Stores, Inc. v. Dukes* . . . has since heightened the Court’s concerns . . . and recent developments in the law of class actions, [warrant] decertification of the class”); see also *Rodriguez v. Nat’l City Bank*, 726 F.3d 372, 386 (3d Cir. 2013) (applying *Dukes v. Dukes* and finding that the class of plaintiffs should not be certified because they did not meet the burden of demonstrating that the commonality requirement was met).

105. *Comcast*, 133 S. Ct. at 1433

106. John Campbell, *Special Section: Consumer Protection Law: Article: Unprotected Class: Five Decisions, Five Justices, And Wholesale Change To Class Action Law*, 13 WYO. L. REV. 463, 465 (2013).

107. See *Butler*, 133 S. Ct. at 2768 (vacating the judgment and remanding the case “to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Comcast*”); see also *Whirlpool Corp.*, 133 S. Ct. at 1722 (vacating the lower court’s ruling and remanding the case “to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Comcast*”); see also *RBS Citizens, N.A. v. Ross*, 133 S. Ct. 1722, 1722

doing so, the Court was sending a message to the lower courts to set a higher standard for meeting Rule 23's requirements.<sup>108</sup>

#### D. Supreme Court Intent: Actual Limitation or Simply a Narrow Limitation?

Even though the Supreme Court decertified the classes in *Dukes* and *Comcast*, some commentaries suggest that that the “Court did not put an end to the class action[,] . . . [i]nstead, it recognized that certain tactics . . . did not comport with the requirements of due process.”<sup>109</sup> In an article, Andrew Trask states that “*Dukes* is hardly a revolutionary decision” and he argues that “*Dukes* is an important opinion, but it has not doomed the class action, nor even changed it much.”<sup>110</sup>

*Dukes* and *Comcast* both produced 5–4 split decisions, signaling that the issues were widely disputed. The dissent in *Comcast*, written by Justices Ginsburg and Breyer and joined by Justices Sotomayor and Kagan, states, “The Court’s ruling is good for this day and this case only.”<sup>111</sup> Some did not find this case to be groundbreaking and questioned “why the Court granted certiorari in the first place or issued any decision ultimately.”<sup>112</sup> Despite these arguments as to the weight of the decisions, the repeated stream of recent cases show that the Supreme Court majority is effectively limiting class action litigation by producing opinions that decertify classes or enforce class action waivers.<sup>113</sup> While these cases standing alone may not prove the Court’s intention to limit class actions, viewing the cases as an aggregate unit shows

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(2013) (vacating and remanding the case “to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Comcast*”).

108. See Schwartz, *supra* note 99, at 1694 (stating that “[t]he restrictive view of commonality in *Wal-Mart* and the rigorous assessment of merits and damages models encouraged by *Wal-Mart* and *Comcast* will undoubtedly lead to fewer classes certified”); see also Klonoff, *supra* note 6, at 756 (stating that the fact that the Supreme Court decided *Comcast* “might signal to lower courts that the safest approach in most cases is to reject class certification”).

109. Trask, *supra* note 80, at 355.

110. *Id.*

111. *Comcast*, 133 S. Ct. at 1437.

112. Bryan J. Schwartz & Michael D. Thomas, *Comcast v. Behrend: Supreme Court Conservative Majority Reaches to Strike Down Class Action, with Holdings of Limited Weight*, BRYAN SCHWARTZ LAW (March 27, 2013), <http://bryanschwartzlaw.blogspot.com/2013/03/this-morning-supreme-court-issued-its.html/>.

113. See *Comcast*, 133 S. Ct. at 1433 (holding that a class cannot be certified because damages could be measured on a class-wide basis); *Dukes*, 131 S. Ct. at 2552 (finding that a class of plaintiffs cannot be certified); *Concepcion*, 131 S. Ct. at 1753 (finding that the FAA preempts California’s state doctrine of unconscionability that barred enforcement of class action waivers); *Stolt-Nielsen*, 130 S. Ct. at 1775 (finding that the defendant could not be compelled under the FAA to submit to class arbitration).

that the Court is restricting plaintiffs' access to class actions.<sup>114</sup>

### *E. The Circuit Courts Narrow Applications of Comcast v. Behrend*

The circuit courts, in applying *Comcast*, continue to certify class actions despite the Supreme Court's ruling.<sup>115</sup> In *Butler v. Sears*, a class of plaintiffs sued a manufacturer for selling faulty washing machines.<sup>116</sup> Judge Posner stated in the Seventh Circuit opinion: "Sears argues that most members of the plaintiff class did not experience a mold problem. But if so, that is an argument not for refusing to certify the class but for certifying it and then entering a judgment that will largely exonerate Sears."<sup>117</sup> After *Comcast* was decided, the Supreme Court remanded *Butler* for reconsideration in light of *Comcast*.<sup>118</sup> On remand the defendants cited *Comcast* and argued that the plaintiffs did not suffer the same damages because "most members of the plaintiff class had not experienced any mold problem."<sup>119</sup> The defendants urged the Court to find that individual issues, including damage calculations, would predominate over common issues.<sup>120</sup> However, the Seventh Circuit rejected this argument and restored the class of plaintiffs after finding that *Comcast* did not affect its earlier decision to certify the class action.<sup>121</sup>

The Seventh Circuit stated that "[i]t would drive a stake through the heart of the class action device . . . to require that every member of the class have identical damages."<sup>122</sup> Therefore, the Court recognized that "[i]f the issues of liability are genuinely common issues, and damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages

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114. Klonoff, *supra* note 6, at 730 (stating that "the overall impact of [the Supreme Court] case law trends has been to curtail substantially the ability of plaintiffs to obtain class treatment"); Margaret Cronin Fisk, *Comcast Follows Wal-Mart in High Court Lawsuit Attack*, BLOOMBERG BUSINESSWEEK (Nov. 5, 2012), <http://www.businessweek.com/news/2012-11-05/comcast-follows-wal-mart-in-high-court-lawsuit-attack> (stating that "[t]he Wal-Mart decision is making it more and more difficult to certify class actions") (internal quotations omitted).

115. See *Butler*, 727 F.3d at 801 (restoring a class of plaintiffs despite the Supreme Court's ruling in *Comcast*); *Whirlpool Corp.*, 722 F.3d at 861 (restoring a class action after the Supreme Court's decision in *Comcast*).

116. *Butler*, 727 F.3d at 798.

117. *Butler*, 702 F.3d at 362.

118. *Butler*, 133 S. Ct. at 2768.

119. *Butler*, 727 F.3d at 799.

120. *Id.*; see also Dye, *supra* note 7 (stating that the defendant argued that "not all customers suffered the same alleged problems, and that, like in *Comcast*, there were too many individual issues to justify class certification").

121. *Id.* at 800–01.

122. *Id.*

are not identical across all class members should not preclude class certification.”<sup>123</sup> In deciding *Butler*, the Court could have broadly applied *Comcast* and easily held that the class was not certifiable because damages could not be measured on a class-wide basis.<sup>124</sup> Instead, the Seventh Circuit found *Comcast* fact-specific and applied it narrowly.<sup>125</sup>

The Seventh Circuit asserted that its *Butler* decision was consistent with the Sixth Circuit’s decision in *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*.<sup>126</sup> In *Whirlpool*, the Sixth Circuit certified a class of plaintiffs alleging that they purchased defective washing machines.<sup>127</sup> The court distinguished *Comcast* because the issues of liability and damages were “bifurcated” in *Whirlpool*.<sup>128</sup> The Sixth Circuit reasoned that “[w]here determinations on liability and damages have been bifurcated, . . . the decision in *Comcast*—to reject certification of a . . . class because plaintiffs failed to establish that damages could be measured on a class-wide basis—has limited application.”<sup>129</sup> The Sixth Circuit only certified the class for litigation of liability issues and noted that *Comcast* would be applied when the issues of damages is addressed.<sup>130</sup> The Court’s refusal to use *Comcast* to decertify the class at this stage<sup>131</sup> reflected a narrow application of *Comcast* that mirrored the Seventh Circuit’s approach.<sup>132</sup>

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123. *Id.*

124. See John H. Beisner, Jessica D. Miller, & Geoffrey M. Wyatt, *BNA Insights: From Cable TV to Washing Machines: The Supreme Court Cracks Down on Class Actions*, (May 8, 2013), <http://www.bna.com/from-cable-tv-to-washing-machines-the-supreme-court-cracks-down-on-class-actions> (stating that the Supreme Court’s ruling in *Comcast* could “prompt additional scrutiny of the lack of injury for the majority of class members, since any damages evidence would have to take account of differences within the class”). This article was published before the Seventh Circuit’s decision in *Butler*, and the author states that if the lower courts “read between the lines” of *Comcast*, then the *Comcast* ruling could “portend the end of *Butler*.” *Id.*

125. See *Butler*, 727 F.3d at 801 (applying *Comcast* narrowly and finding that the Supreme Court’s decision did not affect the earlier decision to certify a class action).

126. *Whirlpool Corp.*, 722 F.3d at 844.

127. *Id.* at 860–61.

128. *Id.* The court states that the class was “certified for liability purposes only, leaving individual damages calculations to subsequent proceedings.” *Id.* at 861 (quotations omitted).

129. *Id.* at 860.

130. *Id.* at 861.

131. *Whirlpool Corp.*, 722 F.3d at 861.

132. *Id.*

*F. The Circuit Courts Refusal to Limit Class Actions  
Counteracts the Supreme Court's Efforts to Limit  
Class Action Litigation*

The recent cases demonstrate that the Supreme Court is taking a closer look at class actions. The Court allows certification only after there has been a “rigorous analysis” confirming that the requirements of Rule 23 have been met.<sup>133</sup> However, when the Supreme Court ordered the circuit courts to rule in light of *Comcast*, they applied *Comcast* narrowly and found that *Comcast* did not affect their decisions to certify a class of plaintiffs.<sup>134</sup> The circuit courts are limiting *Comcast*'s application, just as the Second Circuit attempted to limit *American Express*' application.<sup>135</sup> The circuit courts are not finding *Comcast* novel enough to change their earlier decisions.<sup>136</sup> Therefore, as the Seventh Circuit puts it, the question remains: “why did the Supreme Court remand the case for reconsideration in light of [*Comcast*]?”<sup>137</sup>

IV. PROPOSAL: A BROADER APPLICATION  
OF *COMCAST V. BEHREND*

Recent cases show that the Supreme Court is trying to limit class actions, but the circuit courts are applying *Comcast* narrowly in an attempt to restore and preserve class action litigation.<sup>138</sup> While there are advantages to class action lawsuits,<sup>139</sup> class action

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133. See *Comcast*, 133 S. Ct. at 1433 (stating that “courts must conduct a rigorous analysis” when determining if all the requirements of Rule 23 have been met) (quotations omitted); *Dukes*, 131 S. Ct. at 2551 (stating that a class cannot be certified until it has been determined, “after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied”) (quotations omitted).

134. *Butler*, 727 F.3d at 801 (applying *Comcast* but still restoring a class of plaintiffs); *Whirlpool Corp.*, 722 F.3d at 861 (restoring a class action after applying the Supreme Court's decision in *Comcast*).

135. See *Am. Exp. Merchants*, 667 F.3d at 206 (stating that “our original analysis [is] unaffected by *Stolt-Nielsen*” or *AT&T Mobility*); *Butler*, 727 F.3d at 801 (holding that *Comcast* has limited application); *Whirlpool Corp.*, 722 F.3d at 861 (finding that *Comcast* has limited application).

136. *Butler*, 727 F.3d at 801 (stating that *Comcast* does not change the Court's earlier ruling); *Whirlpool Corp.*, 722 F.3d at 861 (finding *Comcast* does not affect the Court's earlier decision to certify a class).

137. *Butler*, 727 F.3d at 800.

138. See *Whirlpool Corp.*, 722 F.3d at 861 (applying the Supreme Court's decision in *Comcast*, but still restoring a class action suit); *Butler*, 727 F.3d at 800 (holding that *Comcast* does not prevent the Court from certifying a class of plaintiffs).

139. See generally Katie Melnick, In Defense of the Class Action Lawsuit: An Examination of the Implicit Advantages and A Response to Common Criticisms, 22 ST. JOHN'S J. LEGAL COMMENT. 755, 788 (2008) (discussing the benefits of class action lawsuits and arguing that class actions should be



suits have many disadvantages as well.<sup>140</sup> This section will propose that the Supreme Court should clarify the classification standards set forth in *Comcast*. Additionally, the Court should expressly state that class actions must be used in only a small number of circumstances. Finally, the Attorney General should regulate businesses and corporations in lieu of private attorneys attempting to use class action litigation as a means of regulating businesses.

### A. *The Supreme Court Must Clarify Comcast*

On October 7, 2013, the defendants in *Butler* petitioned the Supreme Court for certiorari for review.<sup>141</sup> The case has generated substantial interests as several amici have filed briefs.<sup>142</sup> These briefs address and support the contention that efficiency concerns cannot override a courts determination of whether Rule 23(b)(3) is satisfied.<sup>143</sup> They also discuss the importance of conducting a rigorous analysis as to whether common liability and damages issues dominate.<sup>144</sup> Several of these briefs argue that the circuit courts incorrectly applied *Comcast* and ignored the requirements of Rule 23(b)(3).<sup>145</sup>

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upheld despite common criticisms).

140. See NEWBERG ON CLASS ACTIONS § 18:22 (4th ed.) (listing the disadvantages of class action lawsuits from both a defendant and plaintiff perspective).

141. *Sears, Roebuck and Co. v. Butler (II)*, U.S. CHAMBER OF COMMERCE, <http://www.chamberlitigation.com/sears-roebuck-and-co-v-butler-ii> (last visited Nov. 19, 2014).

142. See *Sears, Roebuck and Company Docket*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-430.htm> (last visited Nov. 19, 2014) (listing off the numerous briefs amici curiae filed for *Butler v. Sears*).

143. See *Sears, Roebuck and Co. v. Butler*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/sears-roebuck-and-company-v-butler/> (last visited Nov. 19, 2014) (framing the issues presented to the Supreme Court in *Sears v. Butler*). The brief frames the issues presented to the Court as follows:

1. Whether the predominance requirement of Rule 23(b)(3) is satisfied by the purported 'efficiency' of a class trial on one abstract issue, without considering the host of individual issues that would need to be tried to resolve liability and damages and without determining whether the aggregate of common issues predominates over the aggregate of individual issues.
2. Whether a product liability class may be certified where it is undisputed that most members did not experience the alleged defect or harm.

*Id.*

144. *Id.*

145. See Brief of Amicus Curiae DRI in Support of Petitioners at 4–5, *Butler v. Sears, Roebuck, & Co.*, 727 F.3d 796 (7th Cir. 2013) (No. 13-430)

The Supreme Court should have granted certiorari and found that the Seventh Circuit erred in certifying the class action. Judge Posner's opinion, finding that the class should be certified, directly defies the Supreme Court's decision in *Comcast*, which stated that a class cannot be certified if it cannot establish that "damages could be measured on a class-wide basis."<sup>146</sup> Granting certiorari in *Butler* would have provided the Supreme Court with a case in which to demonstrate the broad application of *Comcast*.<sup>147</sup> Because *Comcast* is "a case that no one can quite figure out what it stands for,"<sup>148</sup> the Supreme Court must hand down another decision to clarify its meaning and give the decision weight.

### B. The Supreme Court Should Be Limiting Class Actions

The Supreme Court should affirmatively state that *Comcast* must be applied broadly so that class actions may only be utilized in a limited number of circumstances. Despite the advantages of class action litigation,<sup>149</sup> the true benefits of class action litigation are not passed on to society as a whole.<sup>150</sup> In general, the attorney

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(stating that "[d]espite [the Supreme Court's] order to reconsider their prior opinions in light of *Comcast*, . . . the *Glazer* and *Butler* courts failed to rigorously analyze the predominance requirement of Rule 23(b)(3)"). The brief also goes on to argue that had the *Butler* court "properly exercised their duty under Rule 23(b)(3), they would have necessarily concluded that common questions did not predominate." *Id.*

146. *Comcast*, 133 S. Ct. at 1431 n.4.

147. Colin E. Flora, *7th Circuit Again Certifies Butler v. Sears, Roebuck, & Co. Class*, HOOSIER LITIG. BLOG (Aug. 23, 2013) <http://www.pavlacklawfirm.com/blog/2013/08/23/7th-circuit-again-certifies-butler-133084> (stating that "if *Comcast* truly did stand for the requirement of class-wide damages evidence, then it will take another Supreme Court decision to once more elevate *Comcast* to that position").

148. *Id.*

149. See NEWBERG ON CLASS ACTIONS, *supra* note 141 (listing off the advantages to class action litigation). Here some of these advantages from a plaintiff's perspective:

- (1) The opportunity to share expenses with other class members;
- (2) Increased deterrent value;
- (3) More powerful litigational posture;
- (4) The availability of broader discovery rights;
- (5) In patent class actions, avoidance of the need for multiple suits by a patent holder;
- (6) The tolling of the statute of limitations;
- (7) Increased potential attorney's fees;
- (8) The nonfeasibility of other means of litigation;
- (9) Public awareness and organizing potential.

*Id.*

150. See Anne Bloom, *From Justice to Global Peace: A (Brief) Genealogy of the Class Action Crisis*, 39 LOY. L.A. L. REV. 719, 720 (2006) (stating that the

representing the class is the one soliciting the client, not the other way around.<sup>151</sup> The class action relationship turns into one “in which the attorney becomes the principal and the unsophisticated client becomes the agent, with minimal ability to monitor the behavior of the class action counsel.”<sup>152</sup> Plaintiff’s lawyers solicit these class action plaintiffs because the lawyers class actions often lead to large settlements or judgments and, therefore, large attorney’s fees.<sup>153</sup> The lawyers are usually the only ones really benefiting from such lawsuits because the lawyers receive high contingency fees while the individual plaintiffs dividing the judgment receive little or no monetary gain.<sup>154</sup>

Another disadvantage of class action lawsuits is that they are often used as a form of “legalized blackmail.”<sup>155</sup> The cost of litigating a class action lawsuit is so high that companies are pressured into settlement, even if the claim is frivolous.<sup>156</sup> Therefore, plaintiffs, or better yet, the plaintiff’s attorneys, benefit

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critics of class action litigation believe that “class action litigation enriches lawyers without providing any real benefit to society”).

151. See Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 405–06 (2003) (noting that the “customary principal-agent relationship between attorney . . . and the client . . . fails to exist in the typical class action”).

152. *Id.* at 406.

153. See Melnick, *supra* note 140, at 763 (stating that the critics of class action lawsuits allege that lawyers who take these cases begin to argue “for nothing more than their own monetary gain” and forget that they are representing a class of injured plaintiffs). The author also lays out a typical scenario of how an attorney soliciting a client in the class action context plays out: An “attorney gets word that a drug has been taken off the market or that complications have been reported in those who have ingested the drug. He subsequently begins to advertise, encouraging people to contact him if they have (or anyone in their family has) ever taken the medicine.” *Id.* at 759–60.

154. See *Fact Sheet: Securing Our Economic Future* (Dec. 15, 2004) <http://www.presidency.ucsb.edu/ws/?pid=81509> (discussing how in the class action context, “injured parties often receive awards of little or no value while lawyers receive large fees”); see also RICHARD A. MICHAEL, 4 ILL. PRAC., CIVIL PROCEDURE BEFORE TRIAL § 30:1 (2nd ed.) at n.2 (2012) (illustrating this problem as follows: “If for a class of 50,000 people, each class member recovers \$10 of which \$3 goes to pay attorney’s fees, each class member obtains \$7 while the attorney receives fees of \$150,000.”).

155. F. Ehren Hartz, *Certify Now, Worry Later: Arkansas’s Flawed Approach to Class Certification*, 61 ARK. L. REV. 707, 717 (2009).

156. See Steven B. Hantler, Mark A. Behrens, & Leah Lorber, *Is the “Crisis” in the Civil Justice System Real or Imagined?*, 38 LOY. L. REV. 1121, 1136–37 (2005) (arguing that class actions are analogous to poker because “potential costs of losing often force companies to fold their hands and settle rather than call the plaintiffs’ lawyer’s bluff”); see also Callan Edquist, *The Status of Environmental Class Action Post Wal-Mart v. Dukes*, 43 TEX. ENVTL. L.J. 51, 52 (2012) (discussing how class action lawsuits threaten extremely high litigation costs). This article exemplifies the high cost of class action litigation and uses the *Dukes* case as an example. The article states that in *Dukes*, “with a class of 1.5 million women, Wal-Mart faced a minimum of a multi-billion dollar award if the class was certified.” *Id.*

from the simple threat of frivolous claims.<sup>157</sup> For example, in *Butler*, the court's certification decision may have pressured the defendants to settle even though a majority of the plaintiffs did not experience a mold problem. If class actions are restricted, corporations and businesses will be able and encouraged to use the money they once reserved for settling these class actions suits to stimulate the economy.<sup>158</sup>

### C. *The Other Side of the Coin: The Benefits of Class Action to Society*

Several commentaries claim that class action litigation has several advantages that make it worthwhile.<sup>159</sup> They argue that class actions should not be limited because such litigation provides relief for plaintiffs when individualized litigation would be too inefficient and expensive.<sup>160</sup> This contention suggests that when the value of the plaintiff's claim is "so low as to remove any financial incentive to either litigate or arbitrate alone, but where the collective corporate deterrent value of many similarly-situated plaintiffs would be quite high, class actions remain the most efficient weapon that consumers have in their litigation arsenal."<sup>161</sup> Class action advocates also assert that class litigation helps regulate and redress corporate wrongdoing.<sup>162</sup> As the prevalence of class action waivers grows,<sup>163</sup> however, class actions

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157. See Sheila Birnbaum, *Class Certification—The Exception, Not the Rule*, 41 N.Y. L. SCH. L. REV. 347, 350 (1997) (arguing that class action litigation is a form of legalized blackmail and rejecting the contention that defendants only settle meritless claims).

158. See Jessie Kokrda Kamens, *'Dramatic Halo Effect' of Wal-Mart Ruling Seen Spurring Change in Workplace Suits*, BLOOMBERG LAW (Jan. 18, 2013) (stating that "[t]he top 10 settlements [in employment discrimination litigation] in 2012 totaled \$48.65 million, a sharp decline from 2010, the year prior to *Dukes*, when the total was \$346.4 million").

159. See generally Melnick, *supra* note 140, at 755 (defending class actions despite the common criticisms associated with class action litigation).

160. See *id.* at 756 (stating that class action lawsuits give plaintiffs the "ability to raise actionable claims despite the fact that damages suffered by the individuals themselves were relatively small and outweighed by the hefty expense and burden of individual litigation") (internal quotation marks omitted).

161. Charles Gibbs, *Consumer Class Actions After AT&T v. Concepcion: Why the Federal Arbitration Act Should Not Be Used to Deny Effective Relief to Small-Value Claimants*, 2012 U. ILL. L. REV. 1345, 1381 (2012) (internal quotation marks omitted).

162. See Ilana T. Buschkin, *The Viability of Class Action Lawsuits in A Globalized Economy—Permitting Foreign Claimants to Be Members of Class Action Lawsuits in the U.S.* FEDERAL COURTS, 90 CORNELL L. REV. 1563, 1565 (2005) (stating that when corporate wrongdoing results in small financial losses, the class action is "only cost-effective method of litigating claims").

163. Gibbs, *supra* note 162, at 1346 (stating that a "high percentage of the contracts that consumers enter into on a day-to-day basis appear to contain

may fail to perform either deter or redress.<sup>164</sup>

Fortunately, there are other means to address corporate wrongdoing. Each state attorney general could use his or her *parens patriae* power to remedy the type of corporate wrongdoing that class actions are supposedly attempting to redress.<sup>165</sup> Currently, class action plaintiff's lawyers act as private attorneys general by pursuing corporations for engaging in illegal conduct.<sup>166</sup> The state, acting as *parens patriae*, can also sue to redress injury to sovereign and "quasi-sovereign" interests.<sup>167</sup> The states' attorneys general should step into this role and represent the common interests of the citizens of their states in situations where corporate actions need to be redressed or corporations need to be deterred from wrongful conduct.<sup>168</sup> A recent Supreme Court decision found that *parens patriae* lawsuits filed by a state attorney general are not subject to the Class Action Fairness Act of 2005.<sup>169</sup> Commentators suggest that this decision "will incentivize state [a]ttorney[s] [g]eneral[] to bring more of these types of lawsuits in the future."<sup>170</sup> States' attorneys general should take advantage of this leeway and step in to protect the consumers that do not have an incentive or means to individually litigate, thereby decreasing the need for class action litigation.<sup>171</sup>

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mandatory arbitration clauses . . . and [a] sizable portion of those arbitration clauses contain class-action waiver provisions that prevent consumers from joining together to pursue their claims as a class"); *see also Am. Exp. Co.*, 133 S. Ct. at 2312 (finding a class waiver enforceable despite the fact that it may be expensive for the plaintiffs to litigate individually); *AT&T Mobility*, 131 S. Ct. at 1752–53 (declaring that the FAA preempts a state law that disfavors class action waivers); *Stolt-Nielsen*, 130 S. Ct. at 1774–75 (finding that a party cannot be compelled to class arbitration if the arbitration agreement does not expressly permit class arbitration).

164. *Id.*

165. *See Gilles & Friedman, supra* note 30, at 630 (discussing how the attorney general could use its *parens patriae* role to address corporate wrongdoing).

166. *Id.* at 630.

167. Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General As the Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57, 100 (2005). The author explains that the "state's sovereign interest is its interest in seeing that its laws are obeyed and enforced, and that the health and well-being, both physical and economic, of its residents is protected." *Id.* at 101.

168. *See id.* (stating that the attorney general should step in to "represent the interests of their citizens in the very consumer, antitrust, wage-and-hour, and other cases that have long provided the staple of class action practice").

169. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 746 (2014).

170. John H. Beisner, Paul M. Eckles, James A. Keyte, & Karen Hoffman Lent, *Supreme Court Decides Parens Patriae Suits Must Remain in State Court*, SKADDEN (Jan. 15, 2014), <http://www.skadden.com/insights/supreme-court-decides-parens-patriae-suits-must-remain-state-court>.

171. *See* James R. Copland, *On the Supreme Court cert docket: Glazer and Butler*, POINTOFLAW (Jan. 9, 2014), <http://www.pointoflaw.com/archives/2014/>

## V. CONCLUSION

The Supreme Court's recent decisions are affirmatively pro class action waivers. It seems as though the Supreme Court is attempting to limit class actions by making it harder for classes to become certified. Because of the enactment of the FAA, the recent decisions of the Supreme Court, and the widespread use of class action waivers, class actions are on the decline. However, the circuit courts still are certifying classes by narrowly interpreting the Supreme Court's ruling in *Comcast*. Hence, class action litigation remains alive and well.

Class actions hinder society by taking money out of the hands of businesses and putting it in the pockets of lawyers. They represent a form of legalized blackmail that forces companies to settle for large sums. Although class actions still thrive in today's court system,<sup>172</sup> a decrease in the number of class actions would benefit the entire legal system and, most important, society as a whole. To achieve these benefits, the Supreme Court should hand down another class action decision giving the circuit courts no choice but to take a more restrictive approach when determining if a class should be certified.

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01/on-the-supreme-court-cert-docket-glazer-and-butler.php (discussing how a petition for certiorari has been filed for *Butler* and stating the Supreme Court should take the case to "clarify the reach of *Wal-Mart v. Dukes* and *Comcast v. Behrend*").

172. See Trask, *supra* note, 80 at 319 (stating that "[n]otwithstanding the Private Securities Litigation Reform Act, which curbed some of the worst abuses by plaintiffs' lawyers in securities cases, securities class actions are still thriving").