THE SUPREME COURT'S 2011 CLASS ACTION DECISIONS:
THEIR IMPACT ON INSURANCE CLASS ACTIONS

by Wystan Ackerman

I. INTRODUCTION

During its 2010-2011 term, the United States Supreme Court issued three new decisions on class actions. Most prominently, in Wal-Mart Stores, Inc. v. Dukes, the Court addressed a host of class action issues. It fundamentally reinvigorated and redefined the commonality requirement, and also addressed consideration of the merits on class certification, scrutiny of expert testimony, whether statistical sampling may be used to prove classwide damages, and under what circumstances monetary relief can be obtained under Rule 23(b)(2). Wal-Mart raised the bar for plaintiffs to obtain class certification in a number of ways, and the case undoubtedly will be cited in nearly every brief and decision on class

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2 131 S. Ct. 2541 (2011).
certification for years to come. Wal-Mart will substantially aid insurers not only in defending themselves from putative class actions but in defending class actions brought against their insureds.

Two other opinions of the Court also addressed important class action issues. In AT&T Mobility, LLC v. Concepcion, the Court upheld the use of arbitration provisions in consumer contracts that bar class action arbitrations, holding that state law rendering such provisions unconscionable was preempted by the Federal Arbitration Act. Concepcion will be particularly important for insurers in class actions where their policies have appraisal or arbitration provisions. It also provides a potential opportunity for insurers to reduce their class action exposure by expanding their use of arbitration. In Smith v. Bayer Corp., the Court held that, under the federal Anti-Injunction Act, a federal court, after denying class certification, could not enjoin a state court from adjudicating a putative class action on the very same issue. While the Court failed to resolve this issue the way that class action defendants had hoped it would be resolved, the Court raised important questions for the future regarding the problem of serial re-litigation of class certification. New solutions will be needed to remedy this problem.

This article will analyze Wal-Mart, Concepcion and Smith, with a focus on how they will impact class actions brought against insurance companies. The article will attempt to predict how these decisions will affect new class action filings and discuss how they impact defense strategy in insurance class actions.

II. WAL-MART STORES, INC. v. DUKES

A. Background

Wal-Mart involved what the Court described as “one of the most expansive class actions ever,” with the class consisting of all of the current and former female employees of Wal-Mart — the country’s largest private employer — a class of approximately 1.5 million women. The plaintiffs brought Title VII claims, asserting gender discrimination in both pay and promotion. The allegations were that pay and promotion decisions made by Wal-Mart’s local managers, who had substantial discretion in making these decisions, had an unlawful disparate impact against women, despite Wal-Mart’s strong anti-discrimination policy. The plaintiffs claimed that Wal-Mart’s headquarters was purportedly aware of this disparate impact and improperly failed to take steps to restrict local managers’ authority. The plaintiffs also claimed that Wal-Mart had a “corporate culture” that was conducive to bias against women.

The plaintiffs relied heavily on expert testimony of a sociologist, Dr. William Bielby, who concluded that Wal-Mart’s culture made it “vulnerable” to gender bias, but “he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.” The plaintiffs also relied on expert testimony from a statistician showing disparities in pay and promotion at Wal-Mart between men and women, and expert testimony from a labor economist asserting that Wal-Mart purportedly promotes a lower percentage of women than other

5 Wal-Mart, 131 S. Ct. at 2547.
6 Id. at 2547-48.
7 Id. at 2548.
8 Id. at 2553 (quoting district court opinion).
similar companies do. The plaintiffs also offered anecdotal evidence, through 120 affidavits of members of the putative class regarding specific instances of alleged discrimination.

The Northern District of California certified the class, and the Ninth Circuit, after going en banc, affirmed certification on a 6-5 vote. The Ninth Circuit en banc majority concluded, inter alia, that the commonality requirement was satisfied because there was a common issue of whether women working for Wal-Mart were subjected to a discriminatory set of corporate policies. It also concluded that certification of a Rule 23(b)(2) class (seeking injunctive and declaratory relief) was proper because the backpay that the class was seeking did not predominate over the injunctive and declaratory relief being sought. Certification of a Rule 23(b)(2) class avoided the problem of establishing the much more onerous requirement of predominance of common issues of law and fact that would be required for certification under Rule 23(b)(3).

The Supreme Court reversed the Ninth Circuit and found class certification improper, on two grounds: (1) the commonality requirement of Rule 23(a) was not met; and (2) the claims for backpay were improperly certified under Rule 23(b)(2) because certification of individual monetary claims can only be sought under Rule 23(b)(3), with its notice and opt-out provisions (and also a more onerous standard for certification). The commonality ruling was 5-4, with Justice Scalia writing for himself, Chief Justice Roberts, and Justices Kennedy, Thomas and Alito. The Rule 23(b)(2) portion of the decision, however, was unanimous with the entire Court joining that portion of Justice Scalia’s opinion.

B. Commonality

1. The Court’s Holding and Rationale

Under Rule 23(a)(2)’s commonality requirement, the plaintiff must show that “there are questions of law or fact common to the class . . . .” Prior to the Supreme Court’s decision in Wal-Mart, the lower courts had generally found commonality a relatively easy threshold to satisfy. For example, a Third Circuit opinion described the commonality requirement as “easily met,” explaining that “[t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.” Before Wal-Mart, often all a plaintiff needed to do was reiterate the basic questions of law and fact presented in the complaint, and the identification of those questions would suffice to show commonality. In a significant number of cases, defendants even would concede commonality.

The Supreme Court fundamentally altered the commonality requirement in Wal-Mart. First, the Court explained that merely reciting common questions raised in the complaint would not do:

The crux of this case is commonality—the rule requiring a plaintiff to show that “there are questions of law or fact common to the class.” Rule 23(a)(2). That language is easy to misread, since “[a]ny competently crafted class complaint literally raises common ‘questions.’ ” Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L.Rev. 97, 131–132 (2009). For example: Do all of us plaintiffs indeed work for Wal–Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting

9 Id. at 2555.
10 Id. at 2556.
11 Id. at 2549.
12 Id. at 2549-50.
14 Baby Neal for and by Kanter v. Casey, 43 F. 3d 48, 56 (3d Cir. 1994).
these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to 
demonstrate that the class members have suffered the same injury.15

The Court went on to explain that, in order to satisfy the commonality requirement, the putative 
class members’ claims “must depend upon a common contention—for example, the assertion of 
discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of 
such a nature that it is capable of classwide resolution—which means that determination of its truth or 
falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”16 The 
Court also quoted from an article by Professor Nagareda asserting that “[w]hat matters to class 
certification . . . is not the raising of common ‘questions’—even in droves—but, rather the capacity of a 
classwide proceeding to generate common answers apt to drive the resolution of the litigation.”17

This decision is a game changer for class action litigation. The commonality requirement, which 
was previously a relatively easy, sometimes conceded, element of Rule 23, is now much more difficult for 
plaintiffs to satisfy. Commonality is now much closer to predominance, although still the plaintiff need 
only show at least one common question of law or fact. As Justice Ginsburg’s dissent explains, “[t]he 
Court blends Rule 23(a)(2)’s threshold criterion with the more demanding criteria of Rule 23(b)(3), and 
thereby elevates the (a)(2) inquiry so that it is no longer ‘easily satisfied.’”18 In order to satisfy 
commonality, a plaintiff must show essentially that there is one predominant issue common to the entire 
class that can be decided in a classwide manner and, when answered, will drive the resolution of the 
litigation as a whole.

This part of the Wal-Mart opinion is particularly significant because it will make Rule 23(b)(1) 
and (b)(2) classes more difficult to certify. In cases proceeding under those subsections of Rule 23(b), 
there is no need to satisfy the demanding requirement of predominance of common issues of law and fact, 
which is often the turning point in decisions on class certification under (b)(3). After Wal-Mart, however, 
plaintiffs seeking to certify classes under (b)(1) and (b)(2) will have to satisfy the more demanding 
commonality requirement articulated in Wal-Mart. The barrier for certification under (b)(1) and (b)(2) 
has been raised.

2. State Court Impact

It will be interesting to see to what extent state courts follow Wal-Mart on commonality. While 
many states have class action rules modeled on Federal Rule 23, they do not all adhere to federal case law 
construing the federal rule. Two prominent outlying jurisdictions are Arkansas and West Virginia, where 
the state supreme courts have rejected federal precedent in certain respects.19 In order for a state to adopt 
Wal-Mart’s holding on commonality, it may require a change in the law in some state courts, if the state 
supreme or appellate court previously has applied a lighter standard for commonality, consistent with 
federal circuit precedent prior to Wal-Mart. But in states that have expressly chosen to largely or entirely 
adopt federal precedent, it seems likely that Wal-Mart’s holding on commonality will be applied.

15 Wal-Mart, 131 S. Ct. at 2550-51 (internal quotation and citation omitted).
16 Id. at 2551 (emphasis added).
17 Id. (quoting Nagareda, 84 N.Y.U. L. Rev. at 132) (bold face added).
18 Id. at 2565 (Ginsburg, J., dissenting) (quoting 5 J. Moore et al., MOORE’S FEDERAL PRACTICE § 23.23[2], at 23-72 
(3d ed. 2011)).
In one recent state court decision citing *Wal-Mart*, the Florida Third District Court of Appeal followed the commonality holding. In *Tire Kingdom, Inc. v. Dishkin*, a case involving alleged misrepresentations in coupons for automobile services, the court found no commonality because the plaintiff offered nothing more than an incantation of ultimate legal issues in the case. In another case, a Michigan state trial court decertified a class that had previously been certified. This was a toxic tort case involving the release of a chemical into the ground. Relying heavily on *Wal-Mart*, the court found a lack of commonality because of individualized issues of injury and causation.

3. Insurance Industry Impact

This ruling certainly gives insurers another arrow in their quiver of defenses against class certification in suits brought against insurers and against their insureds. It is likely that some class actions brought against insurers will not satisfy the commonality requirement as redefined by *Wal-Mart*. For example, property insurance class actions often involve issues on which claims adjusters have substantial discretion. One example of this is the issue of general contractor overhead and profit, which has been a significant focus of class actions involving homeowners’ insurance in recent years. General contractor overhead and profit is the fee charged by a general contractor who selects, coordinates and supervises trade contractors on repair jobs. Courts have recognized that a general contractor is needed when the nature and extent of the repairs are sufficiently complicated that coordination and supervision of various trades is needed. The plaintiffs’ bar, however, has taken the position that the insurance industry purportedly has a “three trade rule” under which general contractor overhead and profit must be included whenever three or more “trades” are needed for a particular job, even if the job is small and uncomplicated or no coordination is needed. Federal courts have uniformly denied certification, chiefly on predominance grounds, while a few state courts have granted certification. This is the type of issue on which commonality may not be satisfied in federal courts after *Wal-Mart*, because every claim must be evaluated individually to determine if a general contractor is needed or, even if a “three trade rule” were applicable, to determine the number of “trades” or tradespersons needed for a particular repair job.

Class actions involving underwriting practices of insurers frequently focus on cancellation and nonrenewal of policies, and allege that an insurer failed to follow technical requirements of a state statute or regulation. Where these decisions involve individual discretion of underwriters, taking into account the circumstances of particular insureds and their claims and premium payment history, that type of issue likely will not satisfy the new commonality requirement. If the cancellations or nonrenewals, however, are issued by operation of a computer system with little or no human involvement, that may be a closer question on whether commonality is satisfied, depending on the circumstances.

A hot issue in auto insurance class actions in recent years has been the use of computer databases by insurers to assist in determining whether medical bills are reasonable in connection with claims under medical payments or personal injury protection coverages. Insurance policies typically provide for payment of “reasonable and necessary” expenses. This type of issue may not satisfy the new commonality requirement under Wal-Mart for the same reason that the Illinois Appellate Court recently found that predominance was not satisfied in one of these cases—“whether the usual and customary charge for a class member's reasonable and necessary medical expenses went unpaid is not a common question but is an individual question that will have to be answered for each claimant.”

In life insurance class actions, a hot issue recently has been the use of “checkbook” accounts to pay policy proceeds. Plaintiffs’ attorneys have challenged whether insurance policies and other relevant legal documents allow life insurers to use this method of paying premiums. In a recent but pre-Wal-Mart decision on this issue, commonality was conceded and a Massachusetts federal court certified a class. The court found predominance satisfied because the predominant issue was whether there was an ERISA violation based on the defendants’ practices, and a statute of limitations issue could be addressed by the use of sub-classes. Whether this type of life insurance class action satisfies Wal-Mart’s commonality requirement is probably a closer question than the others described above.

The first decision on class certification in an insurance case post-Wal-Mart came in a title insurance case. In Corwin v. Lawyers Title Insurance Company, the plaintiff alleged that she was overcharged for a title insurance policy when she bought the policy as part of a “short sale” transaction (owing more than her property was worth, she sold it to the bank). She claimed, for herself and a putative class of Michigan property owners, that under rate manuals she was entitled to a discounted rate because she had bought a prior policy on the same property. She claimed that, although she had not presented evidence of the prior policy, the insurer had the burden of determining whether prior insurance existed. She claimed the insurer could do this through a title search. This kind of issue is a hot issue in recent title insurance class actions.

The district judge who decided this case had previously found, in an essentially identical case, that all of the class certification elements, except for adequacy of representation by the named plaintiff, were satisfied. He changed his mind in Corwin, however, based substantially on Wal-Mart:

“[T]he Court [in Wal-Mart] quoted this language: “What matters to class certification... is not the raising of common ‘questions’—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.”

In this case, the plaintiff’s proposed class consists of all individuals who purchased title insurance during specified time periods and were charged the basic rate. No absent class member can recover under the unjust enrichment theory, however, unless he or she can establish that there was a previous title policy issued on the specific property in question.

28 Id. at *1-4.
29 Id. at *5.
Such proof is uniquely individualized; it cannot be established on a classwide basis. Therefore, instead of liability being established “in one stroke,” it would take an assessment of each transaction to determine if the absent class member qualified for the discount rate. ... As a consequence, the plaintiff cannot satisfy the requirement of Rule 23(a)(2) because, although there are questions common to the absent class members and the plaintiff that must be decided before liability is established, the critical inquiry without which liability cannot attach requires individualized determination.32

Corwin highlights how Wal-Mart has fundamentally changed the law on class certification. Because there was a key issue that required individual determination, the basic requirement of commonality was not satisfied, let alone predominance.

4. Impact on Settlements

The new standard for commonality will also affect class action settlements. The Supreme Court held in Amchem Products v. Windsor33 that manageability need not be evaluated for purposes of certifying a settlement class, but commonality still must be established. In seeking approval of a class action settlement, the parties will need to establish that there is at least one common question that meets Wal-Mart’s new, more stringent standard for commonality. That may not be easy in class actions where the plaintiffs’ entire theory does not present a common question that will resolve an issue central to all of the putative class members’ claims. Although it is rare that an insurer is eager to settle a putative class action that is unlikely to meet this commonality standard, there are instances where settlement makes sense, and it may become more difficult, in some instances, to get these settlements approved.

C. Consideration of the Merits

1. The Court’s Holding and Rationale

Wal-Mart also addresses the important question of whether, and to what extent, the merits of the case can be considered on class certification. Prior to Wal-Mart, there was a long-standing debate within the lower courts on this issue. The debate stemmed from a statement by the Court in Eisen v. Carlisle & Jacquelin,34 back in 1974, that “We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”35 The issue presented in Eisen, however, was whether a district court could make a preliminary inquiry into which party was likely to prevail on the merits in order to decide which party should bear the costs of providing notice to class members. Lower courts debated whether the dicta in Eisen was intended to bar all inquiries into the merits in deciding class certification, or if it was limited to the circumstances in Eisen, where the district court had attempted to predict the likelihood of success on the merits in shifting the costs of notice.

Prior to Wal-Mart, fairly recent decisions from the Second and Third Circuits had recognized that the statement in Eisen regarding consideration of the merits was dicta limited to the circumstances of that case. Both circuits held that the merits should be considered where a class certification issue overlaps with a merits. In In re Initial Public Offering Securities Litigation,36 the Second Circuit concluded that

32 Corwin, 2011 U.S. Dist. LEXIS 84232, at *16-18 (citation omitted; emphasis added).
35 Id. at 177.
36 471 F.3d 24 (2d Cir. 2006).
“there is no reason to lessen a district court’s obligation to make a determination that every Rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue.”37 The court held that the district court must resolve factual disputes relevant to Rule 23 requirements, even where “a merits issue . . . is identical with a Rule 23 requirement . . . .”38 Similarly, the Third Circuit, in In re Hydrogen Peroxide Antitrust Litigation,39 had held that a district court “must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action.”40 The Third Circuit further explained that “[a]n overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met.”41

In contrast, the Sixth Circuit had concluded, based on Eisen, that a district court “should not ‘conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.’”42 The Ninth Circuit panel in Wal-Mart had concluded that most of Wal-Mart’s contentions “related not to the Rule 23(a) requirement of commonality but to the ultimate merits of the case and thus should properly be addressed by a jury considering the merits rather than a judge considering class certification.”43 The en banc court further explained that “[a] district court must sometimes resolve factual issues related to the merits to properly satisfy itself that Rule 23’s requirements are met, but the purpose of the district court’s inquiry at this stage remains focused on, for example, common questions of law or fact under Rule 23(a)(2), or predominance under Rule 23(b)(3), not the proof of answers to those questions or the likelihood of success on the merits.”44 This set the stage for the Supreme Court to address the issue.

The Supreme Court ruled that the merits must be considered, and rigorously analyzed, where the merits overlap with Rule 23 requirements:

[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23 have been satisfied. Frequently that rigorous analysis will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped. The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action. Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, e.g., jurisdiction and venue, is a familiar feature of litigation.45

This was a particularly strong statement. On an issue of jurisdiction, for example, the judge has the power to resolve the merits of factual disputes necessary to ascertain whether jurisdiction exists. On class certification, it now appears clear that a district court must decide merits issues where a merits issue overlaps with a class certification issue.

The Supreme Court also strongly rebuked any reliance on the dicta from Eisen, explaining that the sentence from Eisen often quoted by plaintiffs’ lawyers, to the effect that a preliminary inquiry into the merits was inappropriate at class certification, was “the purest dictum and is contradicted by our other

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37 Id. at 41.
38 Id.
39 552 F.3d 305 (3d Cir. 2009).
40 Id. at 307.
41 Id. at 316.
43 Dukes v. Wal-Mart, Inc., 509 F. 3d 1168, 1177-78 (9th Cir. 2007).
44 Dukes v. Wal-Mart Stores, Inc., 603 F. 3d 571, 591 (9th Cir. 2010) (en banc).
45 Wal-Mart, 131 S. Ct. at 2551-52 (internal quotations and citations omitted).
cases."\^{46} The Court further explained that where there is overlap between a class certification issue and a merits issue, such as where plaintiffs in a securities fraud case must establish they purchased stock in an efficient market, that issue must be proven \textit{twice}—first on the motion for class certification, and a second time at trial.\^{47} In light of this, it seems that defendants almost always should demand a jury trial in a putative class action. Otherwise, if they lose on class certification, they would have the difficult task of changing the mind of the very same finder of fact on the very same merits issue at trial.

It is also particularly significant how deeply the Supreme Court itself delved into the merits in deciding the commonality issue. The Court examined essentially whether there was sufficient proof of a pattern and practice of gender discrimination at Wal-Mart. It rejected the testimony of the plaintiff’s expert, Dr. Bielby, because he was unable to determine whether 0.5\% or 95\% of the employment decisions at Wal-Mart were motivated by stereotyping, and thus it was “worlds away from ‘significant proof’” that Wal-Mart “operated under a general policy of discrimination.”\^{48} The Court also rejected the statistical evidence of disparity in pay and promotion between men and women at Wal-Mart on a regional and national level, because that did not “establish the uniform, store-by-store disparity upon which the plaintiffs’ theory of commonality depends.”\^{49} The Court also rejected anecdotal evidence of discrimination because only 120 affidavits were provided out of approximately 1.5 million class members, and more than half of the affidavits came from only six states.\^{50}

The \textit{Wal-Mart} opinion as a whole demonstrates that not only the quality but also quantity of evidence is relevant to certification. Ultimately the Court concluded that “[b]ecause respondents provide \textit{no convincing proof} of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question.”\^{51} The Supreme Court itself decided the merits of the central issues in the case, in the course of deciding whether commonality was satisfied. The opinion provides plenty of support for parties to argue that the merits of the central issues in the case should be squarely decided on a motion for class certification where class certification issues overlap with the merits.

\section*{2. Insurance Industry Impact}

One interesting issue that arises from the \textit{Wal-Mart} decision and is common in insurance class actions is whether a district court, in ruling on class certification, can decide a merits issue that does not exactly overlap with a class certification requirement, but is a preliminary, background issue that may be necessary to resolve in order to frame the issues presented on class certification. This type of issue arose in \textit{Kartman v. State Farm Mutual Automobile Insurance Company},\^{52} where the plaintiffs claimed that State Farm improperly applied inconsistent standards in adjusting hail damage claims, and sought injunctive relief requiring State Farm to conduct reinspections. The Seventh Circuit concluded that the plaintiffs’ claims for injunctive relief were not “cognizable” because there is no contractual or tort duty requiring an insurer to use a particular methodology in evaluating hail damage.\^{53} A petition for \textit{certiorari} has been filed in the Supreme Court, arguing that the Seventh Circuit’s decision in this respect was

\begin{itemize}
\item[\textit{Id.} at 2552 n.6.]
\item[\textit{Id.}]
\item[\textit{Id.} at 2554.]
\item[\textit{Id.} at 2555.]
\item[\textit{Id.} at 2556.]
\item[\textit{Id.} at 2556-57 (emphasis added).]
\item[634 F.3d 883 (7th Cir. 2011).]
\item[\textit{Id.} at 886.]
\end{itemize}
equivalent to a motion to dismiss or summary judgment ruling, and was not sufficiently tied to one of the elements of Rule 23, and therefore was an improper merits ruling.54

Class actions filed against insurers often seek to litigate legal issues involving coverage or statutory interpretation. In some instances these central legal issues may satisfy the new standard for commonality. Often, but not always, the district court can and will decide the coverage or statutory interpretation issue on a Rule 12 motion, long before certification. But if the issue is not resolved before certification, can it be resolved as part of the certification ruling, or would that be an improper merits ruling? It is difficult to generalize here because whether the issue is appropriate for resolution on class certification may depend on the specifics of the issue presented. Wal-Mart, however, strongly supports an argument that at least where a merits issue can be tied to class certification issues in some respect, or forms a backdrop for consideration of class certification, it can and should be decided at class certification.

The practical impact of Wal-Mart’s ruling with respect to consideration of the merits is likely to be that putative class actions will become more expensive to litigate for both plaintiffs and defendants. Some plaintiffs’ firms undoubtedly will be more cautious in bringing cases in federal court, but will invest more time and money in the cases they file, in order to have a better chance of prevailing on merits issues at the class certification stage. In battles over the proper scope of class discovery, and bifurcation of class and merits discovery, plaintiffs’ lawyers will argue that they need more discovery because the merits will be decided on class certification, and merits issues overlap with class certification issues. There are still circumstances, however, where the discovery needed for certification can and should be separated from the discovery that will be needed later if a class is certified. In insurance cases involving claim handling or underwriting, for example, a statistically-significant sample of claim or underwriting files for putative class members should be adequate for both sides to prove what they seek to prove on class certification. To require production of every single file prior to certification should still be inappropriate.

Because the cost of class discovery is likely to increase, insurers and other defendants may want to consider filing motions to strike class allegations more frequently. Unless the case can be resolved on a Rule 12(b)(6) motion to dismiss, the motion to strike class allegations may be the defendant’s only hope for avoiding costly class discovery. In this regard, the Supreme Court’s decisions in Bell Atlantic v. Twombly55 and Ashcroft v. Iqbal,56 although they focus on Rule 12(b)(6) standards, strongly support defendants’ arguments that district courts should evaluate early in the case whether the claims as alleged are potentially appropriate for certification, before the parties embark on expensive and time-consuming discovery. In Twombly, the Court expressed a serious concern that, without more rigorous scrutiny of allegations at the motion to dismiss stage, “a plaintiff with a largely groundless claim [may] be allowed to take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value.”57 The Court remarked that “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”58 The same should be true with respect to the adequacy of class allegations in a putative class action where discovery will be quite costly.

57 Twombly, 550 U.S. at 558.
58 Id. (quoting Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528 n.17 (1983)).
Similarly, in *Iqbal*, the Court emphasized that “[b]ecause respondent’s complaint is deficient under Rule 8, *he is not entitled to discovery*, cabined or otherwise.”59 The Seventh Circuit has read these decisions to mean “that a defendant should not be forced to undergo costly discovery unless the complaint contains enough detail, factual or argumentative, to indicate that the plaintiff has a substantial case,” and “the defendant should not be put to the expense of big-case discovery on the basis of a threadbare claim.”60 While some district court judges are reluctant to take up the viability of class action allegations on the pleadings, *Twombly* and *Iqbal* provide substantial support for seeking an early ruling on the propriety of class allegations and staying discovery until the court rules on a motion to strike. One approach defendants might take is to focus on commonality in the motion to strike, and save the predominance issue for the opposition to certification, if the case reaches that stage.

D. *Daubert* Motions at the Class Certification Stage

Prior to *Wal-Mart*, courts of appeals had disagreed to some extent regarding whether a motion to exclude an expert witness under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 61 must be heard prior to a ruling on class certification and, if so, whether a lighter standard for admissibility of the evidence should be applied at the class certification stage than would be applied at trial. In 2010, the Seventh Circuit held, in *American Honda Motor Co. v. Allen*, that “when an expert’s report or testimony is critical to class certification . . . a district court *must conclusively rule* on any challenge to the expert’s qualifications or submissions prior to ruling on a class certification motion.”62 The Eleventh Circuit, in 2011, also held, albeit in an unpublished opinion, that a district court erred in not considering a *Daubert* challenge at the class certification stage.63 In *Wal-Mart*, the district court had concluded that *Daubert* was not fully applicable at the class certification stage, but rather the only question was “whether the expert evidence is sufficiently probative to be useful in evaluating whether class certification requirements have been met.”64 The Ninth Circuit majority concluded that Wal-Mart had not actually challenged the methodology of the plaintiff’s experts, but was only challenging the persuasiveness of the testimony on the merits, and therefore a *Daubert* analysis was unnecessary.65

The Supreme Court did not directly address the applicability of *Daubert* at class certification, but noted that “[t]he District Court concluded that *Daubert* did not apply to expert testimony at the class certification stage of class-action proceedings. *We doubt that is so*, but even if properly considered, Bielby’s testimony does nothing to advance respondents’ case.”66

While Supreme Court *dicta* is often given substantial weight, an Eighth Circuit panel did not follow this *dicta* in a decision issued shortly after *Wal-Mart* was decided. In *In re Zurn Pex Plumbing Products Liability Litigation*, the Eighth Circuit, in a 2-1 decision, held that only a lighter *Daubert* standard should apply at the class certification stage of a case. In this products liability case involving alleged defects in plumbing systems, the majority held that “the district court did not err by conducting a focused *Daubert* analysis which scrutinized the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence,” but did not make a definitive ruling on the admissibility of the plaintiffs’ expert testimony at trial.68 The dissenting judge would have followed the

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59 *Id.* at 1954 (emphasis added).
60 *Limestone Dev. Corp. v. Village of Lemont*, 520 F.3d 797, 802-03 (7th Cir. 2008).
63 *Sher v. Raytheon Co.*, 419 Fed. Appx. 887, 890-91 (11th Cir. 2011).
65 *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 602 (9th Cir. 2010) (en banc).
66 *Wal-Mart*, 131 S. Ct. at 2553-54 (citation omitted; emphasis added).
68 *Id.* at *19.
Seventh and Eleventh Circuit decisions and the Supreme Court’s dicta, and would have required a full Daubert analysis at the class certification stage.69

In light of Zurn Pex, the issue of what type of Daubert analysis is required at the class certification stage is not yet fully resolved, but insurers and their insureds clearly have plenty of authority to rely upon in making a Daubert challenge together with an opposition to class certification. Even Zurn Pex instructs district courts to perform a focused, albeit somewhat limited Daubert analysis. One lesson that can be learned from Zurn Pex is to be careful in structuring the bifurcation of discovery between class and merits issues. In Zurn Pex, the district court and the court of appeals agreed that a full Daubert analysis was not appropriate because, due to bifurcation of discovery and limitations in the evidence provided by the defendant, the plaintiffs’ expert was not able to perform a complete analysis.70 In structuring bifurcation of discovery, defendants should be careful not to restrict the scope of discovery in a way that later handicaps the defendant on a Daubert challenge.

It is worth noting, however, that not all state courts will allow Daubert challenges at class certification. State courts do not all follow Daubert, and some that follow Daubert have different approaches to it. Many state appellate courts have not yet addressed whether Daubert rulings are appropriate before deciding class certification. The North Dakota Supreme Court, for example, has held that a Daubert analysis is improper at class certification, and that expert testimony should be considered as long as it is not “blatantly flawed.”71 In contrast, the Tennessee Court of Appeals has required a full Daubert analysis, while the South Dakota Supreme Court required a “light” Daubert analysis.72

In insurance class actions, expert testimony frequently plays a prominent role in class certification motion practice. Insurers will continue to mount Daubert challenges against opposing experts at the class certification stage, and Wal-Mart provides some additional support for that, albeit in dicta.

E. The Rejection of “Trial By Formula”

Another very important part of the Wal-Mart decision is the rejection of what the Court described as “Trial by Formula.” The plaintiffs had proposed that damages (backpay) could be awarded by selecting a sample of class members, determining liability and damages for those class members, and then using the average award in the sample to determine damages for the entire class.73 This type of methodology for trying a class action had previously been approved by the Ninth Circuit in Hilao v. Estate of Marcos.74 In Wal-Mart, however, the Supreme Court unanimously ruled that “[w]e disapprove of that novel project.” The Court explained that, under the Rules Enabling Act, Rule 23 cannot be used to

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69 Id. at *58-69 (Gruender, J., dissenting).
70 Id. at *16.
71 Howe v. Microsoft Corp., 656 N.W.2d 285, 295-96 (N.D. 2003); see also Burgess v. Farmers Ins. Co., 151 P.3d 92, 100 (Okla. 2006) (suggesting that a Daubert challenge is inappropriate at class certification).
72 Government Employees Ins. Co. v. Bloodworth, 2007 WL 1966022, at *24 (Tenn. Ct. App. June 29, 2007) (concluding that on a motion for class certification “the trial court should make a preliminary assessment of whether the reasoning or methodology underlying the proffered expert testimony is scientifically valid and can be applied to the facts at issue. Otherwise, a certified class may, after considerable expense to the parties, be decertified after a Daubert hearing.”); In re South Dakota Microsoft Antitrust Litig., 657 N.W.2d 668, 675 (S.D. 2003) (concluding that a class certification hearing should not “be combined with a full blown Daubert hearing, but rather has been described as a 'lower Daubert standard’”).
73 Wal-Mart, 131 S. Ct. at 2561.
74 103 F.3d 767 (9th Cir. 1996).
alter any substantive rights, and “a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.”

This portion of *Wal-Mart* is particularly significant in insurance class actions because plaintiffs often propose that class actions involving insurance claims handling or underwriting issues can be dealt with by resolving a statistically-significant sample of putative class members’ cases and then extrapolating the result to the entire class. The Supreme Court has squarely rejected that as a method for trying a class action. Under this ruling, it appears that the only methods in which class actions could be tried would be: (a) if the trial of the named plaintiff’s claim would resolve all issues except for an administrative, clerical calculation of damages for the remainder of the class; (b) if, after completion of class proceedings, damages feasibly could be tried separately on an individual basis for each class member (which was impossible in *Wal-Mart* given the size of the class); or (c) if experts could review the individual evidence for the entire class and opine as to the damages on an individual basis for the entire class.

As a practical matter, this holding in *Wal-Mart* should substantially limit the types of cases that can be certified as a class, as long as district courts are thoroughly analyzing at the class certification stage how the case can be tried. Already one district court has decertified a class where the plaintiffs had proposed a “trial by formula” of the type that was rejected in *Wal-Mart*. It seems likely that more district courts will require plaintiffs to present a trial plan as part of their motion for class certification.

It is also possible that this portion of the *Wal-Mart* opinion may later become a constitutional requirement that applies in state court class actions as well. Defendants’ due process and Seventh Amendment rights may preclude a “trial by formula” of the type that was proposed in *Wal-Mart*. In insurance class actions, insurers and their counsel should thoroughly develop the defenses they would use in individual cases of putative class members, and argue that they have a due process and Seventh Amendment right to present each of those defenses to individual claims to the jury if the case is tried as a class action. This is often best presented, where possible, by identifying specific examples from the facts of putative class members’ claims where the defenses would apply.

**F. Rule 23(b)(2)**

In addition to the ruling on commonality, the second, unanimous part of the *Wal-Mart* opinion addresses Rule 23(b)(2). Rule 23(b)(2) permits certification where “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Lower courts had debated whether, and under what circumstances, monetary relief could be obtained in a Rule 23(b)(2) class action. The Fifth Circuit had held that monetary relief was available in a Rule 23(b)(2) class action only if it was “incidental” to the injunctive or declaratory relief, and that, as stated in an advisory committee note, Rule 23(b)(2) could not be used if money damages was the predominant form of relief being sought. The Ninth Circuit in *Wal-Mart* rejected the Fifth Circuit’s “incidental” test, and instead focused on a broader inquiry into what the impact of the monetary relief would be on the lawsuit as a whole, focusing on manageability.

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75 *Wal-Mart*, 131 S. Ct. at 2561.
78 *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998).
79 *Dukes*, 603 F.3d at 616-17.
The Supreme Court held that claims for monetary relief may not be certified under Rule 23(b)(2) “at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.”80 The Court further explained that Rule 23(b)(2) “does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.”81 The Court suggested that it might be the case that monetary relief claims can never be certified under Rule 23(b)(2), noting that a prior decision of the Court had “expressed serious doubt” on that question.82 The Court’s reasoning in finding a Rule 23(b)(2) class inappropriate focused on the fact that a Rule 23(b)(2) class is not entitled to notice and an opportunity to opt out, nor is the court required to find predominance and superiority. Those protections are thought to be unnecessary when the entire class is either entitled or not entitled to an injunction or declaratory relief. But when individual damage awards are at issue, the additional protections provided by Rule 23(b)(3) are necessary.83

In insurance class actions, this ruling should put an end to a common tactic used by plaintiffs’ attorneys of seeking declaratory or injunctive relief with respect to a particular coverage issue or business practice, as a means of attempting to avoid Rule 23(b)(3)’s predominance requirement, when the effect of the declaratory or injunctive relief would be essentially equivalent to an award of damages. Efforts to bring a monetary damages claim disguised or re-framed as a declaratory or injunctive relief claim after Wal-Mart are unlikely to succeed (and indeed they were rarely successful pre-Wal-Mart).

It remains to be seen, however, whether claims for automatic statutory penalties may still be certified under Rule 23(b)(2) when combined with requests for declaratory or injunctive relief. For example, suppose that a state statute imposes an automatic monetary penalty if an insurance claim is not either paid or denied within 30 days of the insured providing notice of the claim.84 An insured brings a putative class action seeking declaratory and injunctive relief with respect to an insurer’s technical violations of the statute, as well as the automatic penalty (which is small but, when aggregated over the entire putative class, is quite substantial). If monetary relief can never be sought under Rule 23(b)(2), then this class could not be certified under that rule. But if monetary damages claims can be certified if the monetary damages are “incidental,” the question will become whether “incidental” means simply that damages are easy to calculate or whether the monetary relief is really what is driving the litigation. That issue remains open after Wal-Mart.

G. The Standard of Appellate Review

Wal-Mart may have, sub silentio, altered the standard of review on class certification. Justice Scalia’s majority opinion does not mention the abuse of discretion standard that has been generally applied in appellate review of class certification rulings. The overall tenor of the opinion seems to be applying a standard of review much closer to a de novo review than an abuse of discretion standard. Justice Ginsburg’s dissent suggests that the majority went beyond the proper scope of review.85 Defendants at least have a new argument that the standard of appellate review should be heightened.

H. Potential Impact on New Class Action Filings

Following Wal-Mart, it is likely that plaintiffs’ attorneys will try to bring more of their cases in state court, framing the cases in a way that attempts to avoid federal jurisdiction under the Class Action

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80 Wal-Mart, 131 S. Ct. at 2557 (emphasis added).
81 Id.
82 Id. (citing Title Ins. Co. v. Brown, 511 U.S. 117 (1994)).
83 Id. at 2558-59.
84 See N.Y. Ins. Law § 5106(a). This statute was the basis for the putative class action in Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010).
85 Wal-Mart, 131 S. Ct. at 2564 n.5 (Ginsburg, J., dissenting).
Fairness Act (“CAFA”). They can avoid CAFA by suing an insurance company in the state where it is incorporated or has its principal place of business, and limiting the class to citizens of that state, such that minimal diversity is lacking. An insurer’s home state and state of incorporation frequently are not favorable venues for plaintiffs, but sometimes there is a domestic underwriting company that is incorporated in a state where class action law is unfavorable. Insurers should look carefully at where each of their underwriting companies are incorporated and consider the possibility of changing the state of incorporation, if possible, where the state courts are an unfavorable venue.

Another approach some plaintiffs’ attorneys have used, although it substantially reduces the value of the case, is to try to structure the case in a way that keeps the amount in controversy below $5 million. This potentially can be done by limiting the time period for the proposed class so that damages will be under $5 million and perhaps by stipulating that the amount in controversy is below $5 million. Federal appellate courts have not yet ruled on whether, or to what extent, this type of deliberate structuring of cases to avoid CAFA is permissible. The Sixth Circuit has rejected one form of structuring, holding that if several class actions are brought on the same issue, with the time periods for the proposed classes limited so that each putative class seeks under $5 million, the total amount in controversy may be aggregated, and removal to federal court is proper.

Following Wal-Mart, we also may see more attempts to bring classes limited to specific issues under Rule 23(c)(4). Plaintiffs also may bring more mass joinders instead of class actions. That approach was taken in Hurricane Katrina insurance litigation, after efforts to bring class actions failed to achieve certification. Plaintiffs’ lawyers aggregated dozens or hundreds of clients and attempted to use the large number of claims they brought as a bargaining chip in settlement negotiations.

III. AT&T MOBILITY, LLC v. CONCEPCION

A. Background

The Supreme Court’s opinion in AT&T Mobility, LLC v. Concepcion focuses on the enforceability of class action waivers in arbitration provisions. In this putative class action, the plaintiffs claimed that AT&T falsely advertised its cellular telephone services, by advertising that it was providing “free” cellular phones but charging sales tax on the retail value of the phone (as required by California law). The cellular phone contract included an arbitration clause that provided only for individual arbitrations and expressly prohibited class treatment. The arbitration clause, however, included various consumer-friendly provisions. It provided that AT&T would pay all costs of the arbitration if the claim was non-frivolous; that if an award was issued that was larger than AT&T’s last settlement offer, the claimant would receive a minimum payment of $7,500, plus double attorneys’ fees; and that arbitrations would be held where the claimant resided, and, for claims under $10,000, an arbitration could be held by telephone or on written submissions, at the claimant’s option.

89 The American Law Institute recently published a new set of principles applicable to this type of aggregate litigation. See American Law Institute, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010). For a discussion of the Hurricane Katrina litigation, see Wystan M. Ackerman and Seth A. Schmeeckle, Handling the Flood of Coverage Litigation: Lessons Learned from Katrina, COVERAGE, vol. 20, no. 3 (May/June 2010).
91 Id. at 1744.
92 Id.
93 Id.
The California Supreme Court, however, had held in *Discover Bank v. Superior Court*\(^{94}\) that an arbitration provision prohibiting class treatment in a consumer contract of adhesion generally was unconscionable. In *Concepcion*, the district court and Ninth Circuit both held that, under *Discover Bank*, AT&T’s class action waiver provision was unconscionable. The lower courts also rejected AT&T’s argument that the Federal Arbitration Act (FAA) preempted California law.\(^{95}\)

**B. The Supreme Court’s Holding and Rationale**

In an opinion authored by Justice Scalia and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, the Supreme Court held, 5-4, that the FAA preempted state law. Section 2 of the FAA requires the enforcement of arbitration provisions, “save upon such grounds as exist at law or in equity for the revocation of any contract.”\(^96\) The Court explained that “[t]his savings clause permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”\(^{97}\) The Court held that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”\(^{98}\)

The Court gave several reasons for its holding. First, arbitration is intended to be swift and informal, and class arbitrations are anything but swift or informal. Second, class arbitrations require an arbitrator to decide various procedural issues, such as class certification, notice to class members, etc. The Court concluded that Congress did not intend for these types of issues, which implicate due process concerns, to be decided by an arbitrator.\(^99\) Third, the lack of meaningful judicial review in arbitration makes class arbitrations undesirable. The Court found it “hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.”\(^{100}\)

Justice Thomas joined the majority opinion, but also wrote a concurring opinion explaining that, in his view, section 2 of the FAA permits challenges to arbitration agreements only if the defense relates to the formation of the agreement, such as fraud or duress.\(^{101}\)

Some state law defenses to arbitration provisions containing class action waivers will remain viable after *Concepcion*, although which defenses will remain viable remains to be seen. In a footnote, the Court indicated that “[o]f course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.”\(^{102}\) The Court, however, appeared to reject defenses based solely on the adhesive nature of consumer contracts, indicating that “the times in which consumer contracts were anything other than adhesive are long past.”\(^{103}\)

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\(^{94}\) 113 P.3d 1100 (Cal. 2005).

\(^{95}\) *Concepcion*, 131 S. Ct. at 1745.

\(^{96}\) 9 U.S.C. § 2 (emphasis added).

\(^{97}\) *Concepcion*, 131 S. Ct. at 1746.

\(^{98}\) *Id.* at 1748.

\(^{99}\) *Id.* at 1751-52.

\(^{100}\) *Id.* at 1752.

\(^{101}\) *Id.* at 1753 (Thomas, J., concurring).

\(^{102}\) *Id.* at 1750 n.6.

\(^{103}\) *Id.* at 1750.
An early decision interpreting *Concepcion* held that it bars a generalized adhesion contract defense to enforcement of an arbitration provision. In *Daugherty v. Encana Oil & Gas (USA), Inc.*,\(^{104}\) the plaintiffs entered into independent contractor agreements with the defendant, under which they worked as pumpers who serviced and maintained the defendant’s natural gas wells. The plaintiffs claimed that under the Fair Labor Standards Act they should have been treated as employees and paid overtime.\(^{105}\) The defendant sought to compel arbitration of the plaintiffs’ individual claims under an arbitration clause in the independent contractor agreements. The plaintiffs submitted affidavits stating that they were not aware of the arbitration clause, no one explained it to them, and they did not believe they had any ability to negotiate the contract terms.\(^{106}\) A Colorado federal judge concluded that, prior to *Concepcion*, he probably would have found the arbitration clause unconscionable under applicable Colorado law, but based on *Concepcion*, the arbitration clause was enforceable:

Plaintiffs are essentially arguing that the adhesive nature of the contracts at issue here (*i.e.*, standardized forms, lack of ability to negotiate, power disadvantage, etc.) makes the arbitration agreement unconscionable.

**In *Concepcion*, the Supreme Court rejected the idea that arbitration agreements are *per se* unconscionable when found in adhesion contracts.** The Court recognized that California's rule applied only to adhesion contracts and observed that "the times in which consumer contracts were anything other than adhesive are long past." The Court noted that states were "free to take steps addressing the concerns that attend contracts of adhesion - for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted" but ruled that "[s]uch steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their term."

The fact that the contract at issue in *Concepcion* was an adhesion contract did not affect the Supreme Court’s analysis and, indeed, the majority in *Concepcion* appeared to be little troubled by that fact. As a result, this Court has no alternative but to discount the weight to be attributed to the adhesive nature of the arbitration clause at issue here. Accordingly, the Court finds that the arbitration agreement contained within the ICAs is not unconscionable.\(^{107}\)

If *Daugherty*’s holding is followed by other courts, it seems unlikely that the plaintiffs’ bar will be able to mount successful challenges to class action waivers in arbitration provisions post-*Concepcion*.

**C. Insurance Industry Impact**

*Concepcion* will have a direct impact on insurance class actions where the insurance policy has an arbitration or appraisal provision that applies to the claims alleged. In that circumstance, the insurer can demand arbitration or appraisal of the named plaintiffs’ claims, and once the claims have been resolved by that mechanism, the named plaintiffs should not be able to pursue a class action. Automobile insurance policies often have arbitration provisions applicable to uninsured/underinsured motorist coverage. Property policies typically have an appraisal provision, which provides for a limited form of arbitration whereby a panel of appraisers decides disputes over the amount of loss (but not coverage disputes). (Some courts treat appraisal as a form of arbitration and others do not treat it as arbitration, but


\(^{105}\) *Id.* at *2-3, 7.

\(^{106}\) *Id.* at *25.

\(^{107}\) *Id.* at *26-27 (emphasis added; citations omitted).
for the purpose of resolving the named plaintiffs’ claim prior to certification, that distinction should not matter. Some title insurance policies also have arbitration provisions. The first insurance case to cite Concepcion was a title insurance case in which the court compelled arbitration of the named plaintiffs’ claims.108

One example of a case where an insurer invoked appraisal under a homeowners’ policy in a putative class action was Moore v. Travelers Cos.,109 where the plaintiffs claimed that the defendant insurer improperly failed to include general contractor overhead and profit in estimates on homeowners’ insurance claims. General contractor overhead and profit is a fee paid for the services of a general contractor to select, coordinate and supervise tradespersons who perform repairs. A general contractor is necessary on complex repair jobs but unnecessary on uncomplicated jobs that do not require coordination or supervision of trade contractors. The plaintiff claimed that a general contractor was always needed when three or more “trades” were involved in a particular loss, and that the issue of whether general contractor overhead and profit was owed was a “coverage” issue inappropriate for resolution by appraisal. The district court dismissed the case because the named plaintiff failed to comply with the appraisal provision, and the Eleventh Circuit affirmed. The Eleventh Circuit concluded that “[t]here is no question that the dispute here is a fight about the dollar amount of the loss. The amount of that loss may or may not include costs of brick, mortar, timber, and, perhaps ‘general contractor costs.’”110 The Eleventh Circuit thus held that appraisal was required, and the putative class action was properly dismissed. The issue of general contractor overhead and profit is an issue on which some courts, including the Oklahoma Supreme Court, have held that class certification is appropriate.111 In Moore, however, the insurer was able to obtain dismissal very early in the case by invoking the appraisal provision. Appraisal and arbitration are thus substantial defenses to putative class actions.

Concepcion substantially strengthens insurers’ positions when they demand arbitration or appraisal of named plaintiffs’ claims in a putative class action. Plaintiffs’ arguments that the demand for arbitration or appraisal is an improper attempt to “pick off” class representatives, or that the arbitration or appraisal provision is unconscionable by failing to allow for class treatment are unlikely to succeed after Concepcion. But not every insurance class action raises issues that fall within the scope of the limited arbitration and appraisal provisions typically found in homeowners and automobile insurance policies.

An important issue that appears not to be fully resolved after Concepcion is under what circumstances an arbitration agreement that does not expressly provide for class arbitration can be construed by an arbitrator to provide for class arbitration. The Second Circuit recently addressed this issue in Jock v. Sterling Jewelers, Inc.112 In that case, an employment contract provided for arbitration, and a claimant sought to pursue a class arbitration for gender discrimination under Title VII. The arbitration agreement did not make any mention of a class arbitration, but the arbitrator found that a class arbitration was permissible, construing the contract against the employer because the employer had drafted the contract. The arbitrator also noted that the agreement gave the arbitrator “the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction,” which would include class treatment.113 The district court held that the arbitrator’s decision was contrary to the Supreme Court’s opinion in Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.,114 which had held

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109 321 Fed. Appx. 911 (11th Cir. 2009). The author was counsel for the defendants in Moore.
110 Id. at 913.
113 Id. at *8-9.
114 130 S. Ct. 1758 (2010).
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.”

The Second Circuit reversed, in a 2-1 decision. The majority extensively analyzed the *Stolt-Nielsen* opinion, focusing intently on the parties’ stipulation in that case that the arbitration clause was “silent” with respect to class arbitration, and what that stipulation meant. The court found that in *Stolt-Nielsen* there was a stipulation not only that the arbitration clause did not mention class arbitration, but also that the parties did not intend to reach any agreement, expressly or implicitly, with respect to class arbitration. According to the Second Circuit majority, the Supreme Court did not hold in *Stolt-Nielsen* that an arbitration agreement must expressly provide for class arbitration; rather, it is possible for class arbitration to be permissible if there was an implicit agreement to class arbitration which somehow can be inferred from the terms of the contract. The Second Circuit further held that the arbitrator did not exceed her authority in deciding that the arbitration agreement in *Jock* implicitly permitted class arbitration, explaining that the arbitrator’s decision was not contrary to *Stolt-Nielsen*, and in any event the arbitrator’s decision was made prior to the Supreme Court’s opinion and an intervening change in controlling law by itself is not grounds to vacate an arbitration award.

Judge Winter dissented, describing *Stolt-Nielsen* as “binding precedent on all fours.” He read the Court’s reference to “silence” in *Stolt-Nielsen* as simply referring to the fact that the arbitration clause did not expressly allow or bar a class arbitration. Judge Winter noted that if the Supreme Court’s decision were as narrowly focused on the parties’ stipulation in *Stolt-Nielsen* as the Second Circuit majority suggests, the Court would not have granted *certiorari* to address such a narrow, idiosyncratic issue. He further read *Stolt-Nielsen* as barring an inference that an arbitration agreement allows class arbitration based on the absence of an express bar on class arbitrations; otherwise, there would have been a remand in *Stolt-Nielsen*. Judge Winter also interpreted the arbitrator’s decision as finding that class arbitration was allowable because the arbitration agreement did not prohibit it, not because the parties implicitly agreed to it. He would have found this to be a manifest disregard of the law.

In light of *Jock*, it appears that *Stolt-Nielsen* may not have fully resolved whether an arbitration agreement that is silent with respect to class arbitration (in the sense that it does not expressly provide for or prohibit it) may allow an arbitrator to find that class arbitration is appropriate. Thus, insurance companies and their insureds, when seeking to take advantage of *Concepcion*, should be cautious in seeking to enforce arbitration provisions that might be interpreted to implicitly permit class arbitrations. Although it would be quite difficult to indirectly infer an intent to permit class treatment in arbitration provisions in insurance policies, if the decision of whether there was an implicit agreement to allow class treatment is left in the hands of an arbitration panel with only limited court review, there will be some risk. In drafting new policy provisions, insurers would be wise to include an express bar on class treatment if feasible (and if regulatory approval can be obtained).

Insurers might be able to capitalize on the holding in *Concepcion* by broadening arbitration clauses in insurance policies, adding them to policies that currently do not include them, and including class action waiver provisions in the arbitration clauses. A change in policy forms that requires

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115 Id. at 1775.
117 Id. at *19-20.
118 Id. at *32-33.
119 Id. at *41 (Winter, J., dissenting).
120 Id. at *43.
121 Id. at *45 n.2.
122 Id. at *46.
123 Id. at *56.
arbitration of coverage disputes, however, also would shift many insurance coverage disputes that are currently litigated into an arbitration forum; it would fundamentally change the way insurance coverage disputes under homeowners’ and auto insurance policies are resolved. Arbitration provisions typically do not provide for any type of appellate review, so insurers may not be comfortable with critical coverage issues being resolved in arbitration. Moreover, insurers might find themselves facing arguments that, after they lost a coverage issue once in an arbitration with no mechanism for appellate review, they are barred by collateral estoppel from re-litigating that issue. The risks of broadening the use of arbitration (even if permissible under state law and approved by insurance departments) may not outweigh the benefits for insurers in reducing or eliminating class action exposure. One approach that could be taken to limit the scope of an arbitration provision would be to limit the dollar value of disputes that are required to be arbitrated to a relatively low dollar value (e.g., $10,000). This would be intended to capture the types of smaller disputes that often lead to class actions, while leaving larger disputes for litigation in court.

Some states also have statutes that prohibit arbitration of certain types of insurance disputes. Although one might expect the FAA to preempt state law in such a circumstance, both the Fifth and Eleventh Circuits have held that, under the McCarran-Ferguson Act, a state statute prohibiting arbitration provisions in certain insurance policies effectively overrode the FAA, through what is called “reverse preemption.”

A more conservative, more limited step insurers could take following Concepcion would be to add class action waiver clauses into the arbitration and appraisal provisions that are currently in use. This may be unnecessary given that it does not appear any court has ever interpreted an arbitration or appraisal clause in an insurance policy as allowing class treatment. One risk to doing that would be that policyholders might argue that prior policy forms, which did not include a class action waiver, implicitly allowed class treatment. This type of argument, however, is made whenever policy forms change, and is often unpersuasive to courts.

IV. Smith v. Bayer Corp.

A. Background

The third opinion issued by the Supreme Court this past term involving class actions is Smith v. Bayer Corp., which addressed whether a federal court, after denying class certification, could enjoin relitigation of the class certification issue in state court. This case arose from a prescription drug sold by Bayer known as Baycol, a cholesterol-reducing medication that was withdrawn from the market after deaths were allegedly linked to it. A Minnesota federal district court, hearing a Multi-District Litigation proceeding, denied certification of a putative class of West Virginia consumers asserting state law claims. When the federal district court denied certification, a motion for class certification also was pending in a West Virginia state court case raising the same issues. The West Virginia state court case had been filed prior to the effective date of CAFA and was not removable to federal court. The named plaintiffs in the state court case were not named parties to the federal case, but they had fallen within the scope of the putative class in the case in which the federal court had denied certification. Bayer asked the federal district court to enjoin the relitigation of class certification in the state court. The district court issued the injunction, and the Eighth Circuit affirmed. The Supreme Court granted certiorari, and

124 See Am. Bankers Ins. Co. v. Inman, 436 F.3d 490, 494 (5th Cir. 2006) (under McCarran-Ferguson Act, Mississippi statute prohibiting arbitration in uninsured/underinsured motorist coverage reverse preempted the FAA); McKnight v. Chicago Title Ins. Co., 358 F.3d 854, 858 (11th Cir. 2004) (similar result under Georgia statute).
125 131 S. Ct. 2368 (2011).
126 Id. at 2374.
reversed in a unanimous opinion authored by Justice Kagan, finding that the injunction was barred by the Anti-Injunction Act.\textsuperscript{127}

\section*{B. The Supreme Court’s Holding and Rationale}

The issue before the Supreme Court was whether the injunction was proper under the relitigation exception to the federal Anti-Injunction Act. The Anti-Injunction Act bars a federal court from enjoining state court proceedings “except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”\textsuperscript{128} The third, italicized exception, is known as the relitigation exception. Application of the relitigation exception involves an issue preclusion analysis, focusing on: (1) whether the issue presented to the state court is the same as the issue previously decided by the federal court; and (2) whether the plaintiff in the state court case was a party to the federal case or a nonparty that properly can be bound, such as a nonparty in privity with the party to the federal case.\textsuperscript{129}

The Court emphasized that “issuing an injunction under the relitigation exception is resorting to heavy artillery,” and “an injunction can issue only if preclusion is clear beyond peradventure.”\textsuperscript{130} The Court held first that the issue of class certification was not the same in federal court as it was in the state court because, although West Virginia has a Rule 23 that is textually nearly identical to the federal rule, the state supreme court applies the rule differently. The Court explained that “[i]f a State’s procedural provision tracks the language of a Federal Rule, but a state court interprets that provision in a manner federal courts have not, then the state court is using a different standard and thus deciding a different issue.”\textsuperscript{131} Because West Virginia had disapproved the approach that the Eighth Circuit had taken with respect to analyzing predominance, the issue presented in state court was not the same as the issue previously decided by the federal court.\textsuperscript{132}

Second, the Court held that a putative class member in an uncertified class action is not a party to the suit, and also is not the type of nonparty that can be bound by a court’s judgment. The Court explained that “[n]either a proposed class action nor a rejected class action may bind nonparties.”\textsuperscript{133} Given this second holding in \textit{Smith}, it appears that there are no circumstances under which a denial of class certification can be binding on any putative class members who are not named parties.

The Court noted that Bayer’s strongest argument was its effort to highlight the problem of serial relitigation of class certification, in which plaintiffs’ attorneys repeatedly try to certify a class on the same issue in various courts, hoping that they eventually will find a judge who will agree with them.\textsuperscript{134} The Court suggested several potential solutions to this problem: (1) the doctrine of \textit{stare decisis} and comity among courts should mitigate the problem; (2) by enacting CAFA, Congress brought “any sizeable class action involving minimal diversity of citizenship” into federal court; and (3) if necessary, a new statute or amendment to the Federal Rules of Civil Procedure could restrict relitigation of class certification.\textsuperscript{135}

\textsuperscript{127} \textit{Id.}
\textsuperscript{128} 28 U.S.C. § 2283 (emphasis added).
\textsuperscript{129} \textit{Smith}, 131 S. Ct. at 2376.
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.} at 2377.
\textsuperscript{132} \textit{Id.} at 2378.
\textsuperscript{133} \textit{Id.} at 2380.
\textsuperscript{134} \textit{Id.} at 2381.
\textsuperscript{135} Id. at 2382 n.12.
C. Impact on Insurance Class Actions

*Smith* was not decided the way class action defendants had hoped it would be. The Court maintained the status quo, which permits the relitigation of the issue of class certification, and rejected some creative efforts by the lower federal courts to address the relitigation problem with injunctions. Insurance companies, like other corporate defendants, will continue to be subjected to repetitive class action litigation, absent a viable solution to that problem. The solutions suggested by the Supreme Court, except for the enactment of a new statute or amendment to the Federal Rules of Civil Procedure, seem inadequate to solve the problem. *Stare decisis* is of little value in a state court that has rejected the prevailing federal standards for class certification, and adopted standards much more favorable to certification of classes. The Supreme Court also appears to have overstated the benefit that CAFA provides, given the recent efforts of the plaintiffs’ bar to find end-runs around CAFA jurisdiction, including framing cases to keep the amount in controversy below $5 million.

Another potential solution to this problem that it appears has never been attempted would be for the defendant to file a declaratory judgment action against a putative class of would-be plaintiffs in federal court, seeking one final, binding resolution of the issue of class certification. After certification of a defendant class, the declaratory judgment would be binding on everyone who might want to bring a class action, and thus would achieve the goal of one final decision on class certification. But the risks would be significant for both sides.

Another potential solution might be for the Supreme Court to constitutionalize some aspects of the federal class action standards. The federal Due Process Clause might place some limitations on how far state courts can go in certifying classes, and how state courts conduct class action proceedings. This is an area of law that is not well-developed because only the Supreme Court, on an appeal from a state court, is in a position to develop such law. There was one case raising this type of issue in which a petition for certiorari was filed this past term, and Justice Scalia (as circuit justice) had stayed the state court judgment, but the Court ultimately denied certiorari. A due process issue involving state court class actions seems likely to reach the Court in the coming years, particularly given the pressure that *Wal-Mart* puts on the plaintiffs’ bar to try to shift more cases to state courts in states that have more plaintiff-friendly class action law. If the Court imposes due process limitations on state court class certifications, that may, at least in part, reduce relitigation of class certification.

V. CONCLUSION

Corporate America won two of the three major class action cases decided by the Supreme Court this past term, although two of them were 5-4 decisions either entirely (*Concepcion*) or in substantial part (*Wal-Mart*), and thus might be subject to modification or perhaps even overruling in the event of a major shift in the Court’s membership. *Wal-Mart* will be of substantial benefit to insurers in defending class actions in federal court in a number of ways, and it is likely to shift the battleground somewhat to state courts. *Concepcion* poses an interesting opportunity for insurers that wish to reduce their class action exposure by expanding the use of arbitration. Such a change, however, would fundamentally alter the way individual insurance disputes have been resolved for decades, would come with significant risk, and would need to overcome regulatory hurdles. Finally, *Smith* failed to solve the problem of relitigation of class certification. Solving that problem likely will require action by Congress or the Rules Committee, or a strong opinion by the Court imposing due process boundaries on state court class actions.

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