
Randy D. Gordon
# Table of Contents

I. Introduction ........................................................................................................................................ 1

II. An Overview of Class Action Procedure ..................................................................................... 2

III. The Scope of Rule 23(b) Class Actions ...................................................................................... 7

   A. Are There More Appropriate or Efficient Ways to Litigate the Claims Alleged? .................. 12

      1. Should the Case Be a Derivative Action? ........................................................................ 12
      2. Is a Class Action Necessary? .................................................................................... 15

   B. Is the Subject Matter of the Case Appropriate for Litigation at All? ................................. 18

   C. Is a Mandatory Class Appropriate on the Facts Alleged? .................................................. 18

      1. Is the Defendant’s Conduct “Generally Applicable” to the Class? ................................. 19
      2. There Are Conflicts Among the Class and, Therefore, it Fails for Lack of Cohesiveness ........ 22
      3. Is the Principal Dispute “Political”?  ........................................................................... 24
      4. Is Injunctive or Declaratory Relief Appropriate? ......................................................... 28
      5. Do Class Conflicts Preclude Certification? ................................................................. 33

IV. Conclusion and Recommendations ............................................................................................. 43

Randy D. Gordon*

Abstract

Although the United States Supreme Court in its most recently completed term sharply curtailed the scope of class actions brought under Rule 23(b)(2) of the Federal Rules of Civil Procedure, questions under that Rule still abound. One of the open issues is how a court should treat a request to certify a class seeking declaratory or injunctive relief where members of the putative class disagree as to the desirability or efficacy of the requested relief. This Article develops a rubric for analyzing this type of scenario and determining whether alleged conflicts amongst members of a putative class are sufficient to defeat certification.

I. Introduction

Almost since the birth of modern class action procedure in 1966, the device has attracted champions, who laud it as “one of the most socially useful remedies in history, and critics, who pillory it as “legalized blackmail.”1 As with most concepts that elicit such pointed disagreement,  

* © 2011 Randy D. Gordon. Ph.D., University of Edinburgh; LL.M., Columbia University School of Law; J.D., Washburn University School of Law; Ph.D., M.A., B.A., University of Kansas. Partner with the firm of Gardere Wynne Sewell LLP, adjunct faculty member in law and English at Southern Methodist University. The author wishes to thank Tate L. Hemingson, Ph.D., his research assistant and a 2011 graduate of the Dedman School of Law at SMU, for his considerable contribution to the authorities cited below. And thanks also to Mark Bayer and Craig Florence, firm colleagues, for their helpful insight regarding many of the issues discussed below. The views expressed in this Article are the author’s alone and do not necessarily represent those of the firm or its clients.

the truth lies somewhere in the middle. At its best, a class action facilitates the vindication of small claims that otherwise would go unredressed merely because of their small size in relation to litigation costs. But this move towards convenience and economy comes at a price: “the ability to aggregate large numbers of litigants tends to shift the focus from the client to the lawyer, from actual damages to attorneys’ fees, and from actual litigation to settlement.”

Perhaps nowhere is this tension more evident than in the discussions and decisions surrounding Rule 23(b)(2) of the Federal Rules of Civil Procedure, which provides for class actions seeking declaratory or injunctive relief. This Article is concerned to examine this type of class action and the associated conflicts that arise when the relief sought is a matter of taste or belief—i.e., a matter that cannot be resolved with reference to neutral and objective criteria. Along the way, we will consider the impact that the United States Supreme Court’s most recent class-action decision, *Wal-Mart Stores, Inc. v. Dukes*, is likely to have on practice under Rule 23(b)(2).^3^

II. An Overview of Class Action Procedure

Class actions gain their legitimacy from principles of judicial economy and efficiency. These principles animate Rule 23, but—as with all abstract statements of purpose—disagreements abound over their application in concrete instances. Nonetheless, Rule 23 is

---

^2 Id. at 546-47.


^4 E.g., Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159 (1982) (denying class certification when the named plaintiff’s claim of intentional employment discrimination was not typical of the class and thus maintenance of a bifurcated suit on liability for the class and the named plaintiff would not “advance ‘the efficiency and economy of litigation which is a principal purpose of the procedure’”) (quoting Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974)); see also 5 MOORE’S FEDERAL PRACTICE § 23.02 (3d ed. 1997).

^5 Compare Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997) (“The policy at the very core of the class action mechanism” aims to solve “the problem that small recoveries do not
loaded with standards that provide at least some guidance. Specifically, a court may not certify a class unless it finds that the prerequisites set out in Federal Rule of Civil Procedure 23(a) and at least one subsection of Rule 23(b) have been met. The requirements of Rule 23(a) are commonly referred to as numerosity, commonality, typicality and adequacy. The requirements of 23(b) are not so easily captured in shorthand, and because at least some of the requirements of subsections (a) and (b) will figure in our more particular discussion, an overview of both will aid that effort.

Rule 23(a) requires that:

- “the class [be] so numerous that joinder of all members is impracticable.”

Practicality of joinder depends on the size of the class, ease of identifying its members and determining their addresses, facility of making service on them if joined, and their geographic dispersion. To satisfy Rule 23(a)(1), joinder of all parties need only be impractical, not impossible.

6 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) (denying certification of a class settlement for asbestos-related injuries because common issues did not predominate when class members suffered different types of injuries and a broad range of symptoms).

7 Id. at 613.

8 FED. R. CIV. P. 23(a)(1).

9 Compare Garcia v. Gloor, 618 F.2d 264, 267 (5th Cir. 1980) (denying certification in employment discrimination suit since the class was not numerous and joinder was not impracticable when the proposed class consisted of only thirty-one persons whose identities were readily ascertainable and who lived in a compact geographical area), with Murillo v. Musegades, 809 F. Supp. 487, 502 (W.D. Tex. 1992) (certifying class in civil liberties suit because joinder was not practicable when the putative class consisted of over two thousand, geographically dispersed members and potentially more prospective members whose identities were, by definition, unascertainable).

• “there [be] questions of law or fact common to the class.”¹¹ Commonality is satisfied when there is “at least one issue where resolution will affect all or a significant number of the putative class members.”¹² For this reason, the threshold of “commonality” is not high.¹³

• “claims or defenses of the representative parties [be] typical of the claims or defenses of the class.”¹⁴ Although the inquiry into typicality is case-specific, its test often has more bite than that used to assess commonality.¹⁵ This is so


¹² Forbush v. J.C. Penney Co., 994 F.2d 1101, 1106 (5th Cir. 1993) (quoting Stewart v. Winter, 669 F.2d 328, 335 (5th Cir. 1982)) (certifying ERISA class and finding common issues as to whether defendant violated ERISA’s nonforfeiture provisions); see also Durrett v. John Deere Co., 150 F.R.D. 555, 558 (N.D. Tex. 1988) (certifying the class and finding common issues arising out of a single type of contract that was virtually identical in each transaction); Republic Nat’l Bank, 68 F.R.D. at 215 (inquiry as to predominance of common question is not whether the common issues outnumber the individual issues, but instead whether common or individual issues will be the object of most of the efforts of the litigants in the court).

¹³ Forbush, 994 F.2d at 1106; Jenkins v. Raymark Indus., 782 F.2d 468, 4721 (5th Cir. 1986) (commonality met when defense would be raised in almost all cases and making its resolution effective on all class members); Durrett, 150 F.R.D. at 558.


¹⁵ Compare Forbush, 994 F.2d at 1106 (noting that “The test for typicality, like commonality, is not demanding” and finding commonality and typicality met for ERISA claims based on defendant’s general practice of overestimating social security benefits) (quoting Shipes v. Trinity Indus., 987 F.2d 311, 316 (5th Cir. 1993), cert. denied, 510 U.S. 991 (1993) (“Allegations of similar discriminatory employment practices . . . satisfy the commonality and typicality requirements of Rule 23(a).”), and Durrett, 150 F.R.D. at 558 (finding commonality and typicality met for claims arising out of the same form contract), with Byes v. Telecheck Recovery Servs., Inc., 173 F.R.D. 421, 424-25 (E.D. La. 1997) (denying certification even though common questions existed based on identical letters sent by defendant to the plaintiffs because typicality and adequacy of representation requirements were not met since violations differed between letters and not all class members received all the letters); see also 1 Newberg on Class Actions §§ 3:13 (4th ed. 2011) (remarking that commonality and typicality overlap but noting that where a finding of typicality necessarily entails commonality, a finding of commonality only probably entails typicality).
because the typicality requirement cannot be satisfied unless a plaintiff’s claims arise out of the same event or course of conduct as the class members’ claims and are based on the same legal theories. 16 “At a minimum,” then, “typicality requires that the proposed representatives be part of the class and possess the same interest and suffer the same injury as the class members.”17

- “the representative parties will fairly and adequately protect the interests of the class.”18 “The adequacy requirement mandates an inquiry into the zeal and competence of the representative’s counsel and into the willingness and ability of the representative to take an active role in and control the litigation and to protect the interests of the absentees.”19 This entails two inquiries, one focused on the named plaintiff, one on counsel:

  o The primary issue in determining whether a named class representative is adequate is “whether any antagonism exists between the interests of the named plaintiffs and those of the remainder of the class.”20 The

16 Durrett, 150 F.R.D. at 558 (“To meet the typicality requirement, the putative class representatives must establish the bulk of the elements of each class members’ claims when they prove their own.”)

17 Id. (finding typicality when the putative class representative’s claims as based on form contracts used in sales transactions were “typical, if not identical” to those that would be asserted by other class members) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982)); see also E. Tex. Motor Freight v. Rodriguez, 431 U.S. 395, 403-04 (1977) (finding that the representatives of class of truck drivers who claimed discriminatory practices were not typical of the class because they were not qualified to be drivers and thus could not have suffered any injury).


19 Horton v. Goose Creek I.S.D., 690 F.2d 470, 484 (5th Cir. 1982), cert. denied, 463 U.S. 1207 (1983) (finding that the zeal of the representative’s counsel was adequate based on his actions in prosecuting the appeal and that the representative was able and willing when he demonstrated a “commendable familiarity with the complaint and with the concept of a class action”).

20 Dresser Indus., Inc. v. Snell, 847 S.W.2d 367, 373 (Tex. Ct. App.—Fort Worth 1990, no pet.) (no antagonism when common lease interest exists between representatives and class members); see also Murillo v. Musegades, 809 F. Supp. 487, 502 (W.D. Tex. 1992) (representative adequate when treated similarly as class members and no conflicts with class ); Gibb v. Delta Drilling Co., 104 F.R.D. 59, 75, 79 (N.D. Tex. 1984) (no antagonism in a securities class action between current and former shareholders since liability issues were identical regardless of shareholder status at time of suit); Parker v. Bell Helicopter Co., 78 F.R.D. 507, 512 (N.D. Tex. 1978) (potential antagonism between representatives in employment discrimination action and other class members as to remedies resolved by bifurcating trial when issue of liability based on discriminatory practices applies to all members).
typicality and adequacy analyses for class certification overlap in this area.\textsuperscript{21} Specifically, to the extent that the named plaintiff satisfies the typicality requirement by demonstrating that his claims are the same as those of the putative class, he takes some steps towards establishing a lack of conflict between himself and the putative class.\textsuperscript{22} But, as we will see below, the analysis does not end here.\textsuperscript{23}

- The named plaintiff must also show that he has employed counsel able to prosecute the action vigorously to a successful conclusion.\textsuperscript{24} And plaintiff’s counsel must have no conflicts with the interests of the class and have the resources to devote to prosecution of the class action, so that the due process rights of the class members are protected.\textsuperscript{25}

Rule 23(b) provides in pertinent part:

**(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

\textsuperscript{21} \textit{Horton}, 690 F.2d at 485 n.27 (noting the overlap of analyzing antagonism under either typicality or adequacy but expressing a preference for analysis under adequacy); \textit{Longden v. Sunderman}, 123 F.R.D. 574, 557 (N.D. Tex. 1988) (finding that since the interests of the class representatives and the other members coincided and were typical, there was no antagonism); see also \textit{NEWBERG} § 3:13, supra note 15 (discussing the overlap and citing additional sources).

\textsuperscript{22} Forbush v. J.C. Penney Co., 994 F.2d 1101, 1106 (5th Cir. 1993) (representative in ERISA class action adequate even though she was covered under a different plan than other members because her claim was based on defendant’s general practices such as to be applicable to all class members); \textit{Longden}, 123 F.R.D. at 557-58 (finding class representatives adequate despite factual differences among them because the defendant’s alleged conduct was uniformly fraudulent and all representatives and members suffered financial losses).

\textsuperscript{23} See discussion \textit{infra} Part III.C.

\textsuperscript{24} \textit{Horton}, 690 F.2d at 484 (counsel’s zeal and competence, even if questionable at outset, established through prosecution of appeal); Boos v. AT&T, Inc. 252 F.R.D. 319, 323 (W.D. Tex. 2008) (counsel who represented class in a different class with virtually identical claim adequate).

\textsuperscript{25} \textit{Horton}, 690 F.2d at 484; \textit{Longden}, 123. F.R.D. at 558 (finding counsel met adequacy requirement, despite arguments that it dropped claims against some defendants, since such decisions are within the counsel’s discretion).
(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy . . .

This Article focuses on the second of these three options: viz., class actions primarily seeking injunctive or declaratory relief and, even more tightly, on those actions in which the efficacy and desirability of the requested relief is matter of debate amongst members of the putative class.

III. The Scope of Rule 23(b) Class Actions

The textual simplicity of Rule 23(b)(2) belies its underlying complexity. History helps explain this. “Rule 23(b)(2) class actions were designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons . . .” A paradigmatic case of this type might turn, for example, on

26 FED. R. CIV. P. 23(b)(1), (2), and (3). If the court determines that an action fulfills the requirements of all three subsections of Rule 23(b), it in most instances should order that the suit be maintained as a class action under Rules 23(b)(1) and/or (b)(2), rather than under (b)(3): “[A] mandatory class action is seen as preferable because there is no risk that individual members will opt out of the class and pursue separate litigation that might prejudice other class members or the defendant.” MOORE’S § 23.40[2], supra note 4.

27 2 NEWBERG § 4:11, supra note 15; see also Allen v. Holiday Universal, 249 F.R.D. 166, 189 (E.D. Pa. 2008) (quoting NEWBERG, supra); Compaq Computer Corp. v. LaPray, 135 S.W.3d
a claim that a public facility unlawfully discriminated on the basis of race. In such a case, it likely would be impossible to identify everyone who had actually suffered past injury, and the true aim of the suit would be to ensure future non-discriminatory access to the facility via injunctive or declaratory relief. The language of the Rule is not, however, limited to claims of this sort, and much of the case law may be seen as (often conflicting) efforts to stake its bounds.

According to a leading commentator, two forces have contributed to (b)(2)’s popularity and expansion. First, the possibility of (often substantial) attorney’s fees awards has encouraged counsel to “act as private attorneys general in advancing important public policy.” Second, many courts enlarged the conceptual scope of (b)(2) classes by allowing classes to seek monetary relief that is “ancillary” to the claimed injunctive or declaratory relief. For these and

657, 670 (Tex. 2004) (“The members of a (b)(2) class are generally bound together through ‘preexisting or continuing legal relationships’ or by some significant common traits such as race or gender.”)


29 E.g., Willie, 202 F. Supp at 551 (suit claiming racial discrimination against African-American residents of county in use of public park sought injunctive relief to stop the discriminatory practices).

30 NEWBERG § 4:11, supra note 15.

31 Id.; see also id. § 4:14.

32 Id. § 4:11 & n.25; see also id. § 4:14.

33 Id. § 4:11.
perhaps other reasons, (b)(2) class actions are now the most commonly brought. But this expansion in scope has come at an associated theoretical cost: namely, that there are very few (if any) bright-line rules to guide courts and litigants as they assess the certifiability of many contested class actions. This Article examines this problem and develops a few standard tools for separating certifiable sheep from uncertifiable goats.

As a threshold matter, we must pause to consider the United States Supreme Court’s most recent pronouncements on the subject. In Wal-Mart Stores, Inc. v. Dukes, the Court was called upon to consider whether a class action can be so large that it smothers typical notions of justice and due process of law. Specifically, the case took up the question whether hundreds of thousands of female Wal-Mart employees could pursue a class-action discrimination suit. As it stood after certification by the district court (and affirmance by the Ninth Circuit), the case was, according to the Supreme Court “one of the most expansive class actions ever.” At the outset, the Court emphasized the unwieldy nature of the class by drawing attention to Wal-Mart’s different store types, scores of national and regional divisions, thousands of stores, and over one million employees spread over many job classifications. As a technical matter of procedure, the Court examined the record facts and the theories of recovery advanced within the framework of Rule 23(a) and (b)(2).
The Court made two broad pronouncements. First, the Court held that the named plaintiffs failed to raise even a single common question that was significant for purposes of Rule 23(a).\textsuperscript{40} According to Justice Scalia, the author of the majority opinion, the plaintiffs had to show that every class member “suffered the same injury,” which entails claims that depend on a “common contention.”\textsuperscript{41} “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.”\textsuperscript{42} In the context of the Wal-Mart case, the Court held that proof that one woman suffered discrimination would prove nothing as to the next, thus evincing a lack of commonality.\textsuperscript{43} This holding—although hotly disputed on the facts—should not prove terribly controversial as a definitional statement because most courts and observers have always opined that a truly “common” question is one that, when answered for one class member, is answered for all.\textsuperscript{44}

For purposes of our discussion, the Court’s unanimous holding that the Wal-Mart plaintiffs’ claims could not be certified under (b)(2) is the more important, especially given the majority and concurring opinions’ differing approaches to the issues presented.\textsuperscript{45} All the Justices

\textsuperscript{40} Id. at 2551-52.

\textsuperscript{41} Id. at 2551.

\textsuperscript{42} Id.

\textsuperscript{43} Id. at 2552.

\textsuperscript{44} See, e.g., Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157-159 (1982) (finding no common question existed for a claim of intentional employment discrimination claim by the employee-plaintiff when the proposed class members’ claims would be based on a disparate impact theory); 1 Newberg § 3:10-12, supra note 15.

\textsuperscript{45} See Wal-Mart, 564 U.S. at ___, 131 S. Ct. at 2555 (majority), 2565-67 (Ginsburg, J., dissenting in part).
agreed that a b(2) class cannot be certified where the plaintiffs are seeking monetary relief that is not purely incidental to the entry of an injunction or declaration.\footnote{Id. at 2557-59 (majority), 2561 (Ginsburg, J., concurring in part)} This is so because (b)(2) “does not authorize class certification when each class member would be entitled to an individualized award of money damages.”\footnote{Id. at 2557 (majority).} The open question, post-Wal-Mart, is what level of commonality will be required in all class actions, including especially (b)(2). As discussed below, some courts have required (b)(2) classes to be “cohesive,” which some have argued is akin to the “predominance” requirement of (b)(3).\footnote{See infra, Part III.C.2.} The Wal-Mart majority did not take this precise tack, but it did state that “[d]issimilarities within the proposed class” can “impede the generation of common answers.”\footnote{Id. at 2551 (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. REV. 97, 132 (2009)).} In so doing, according to Justice Ginsburg, the majority essentially smuggled (b)(3)’s predominance and superiority standards into (a)(2), which works as a practical matter to collapse all class actions into a common framework.\footnote{Id. at 2566-67 (Ginsburg, J., dissenting in part)} It thus remains to be seen whether the lower courts will all migrate to a fairly robust standard of commonality in all class actions and adopt some version of the cohesiveness test that we will soon examine.

In addition to the matters of scope put to rest in Wal-Mart, we must also consider matters of subject: viz., is a class action appropriate—or the most appropriate—method of resolving a particular dispute. To that subject we now turn.

\footnotesize

\footnote{Id. at 2557-59 (majority), 2561 (Ginsburg, J., concurring in part)}

\footnote{Id. at 2557 (majority).}

\footnote{See infra, Part III.C.2.}

\footnote{Id. at 2551 (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. REV. 97, 132 (2009)).}

\footnote{Id. at 2566-67 (Ginsburg, J., dissenting in part)}
A. Are There More Appropriate or Efficient Ways to Litigate the Claims Alleged?

If efficiency is the conceptual hallmark of the class action device, then a court must consider at the outset whether any particular case is likely to serve those ends in light of all available options. There are, of course, myriad ways to define and measure “efficiency,” but one ready shorthand is an evaluation of litigation costs. In other words, a court should ask whether (and the named plaintiff must show that) a class action would reduce litigation costs. And this evaluation should be made in light of other available options, two of which warrant detailed discussion.

1. Should the Case Be a Derivative Action?

Some (b)(2) class actions aim to modify corporate conduct or policies on behalf of shareholders. A threshold question thus emerges: are the claims derivative or direct? In a derivative action, a corporate shareholder sues on behalf of the corporation to redress a wrong

---

51 See Maddock v. KB Homes, Inc., 248 F.R.D. 229, 248 (C.D. Cal. 2007) (quoting Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996)) (“A class action may be superior where ‘class-wide litigation of common issues will reduce litigation costs and promote greater efficiency.’”)

52 Many courts have held that the plaintiff carries the certification burden. See, e.g., Fener v. Operating Eng’rs Const. Indus., 579 F.3d 401, 406 (5th Cir. 2009) (“The party seeking certification bears the burden of proof.”); In re Am. Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996) (citing Gen. Telephone Co. of Sw. v. Falcon, 457 U.S. 147, 157-159 (1982)) (same); In re Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 693 (Tex. 2003) (plaintiffs must meet “their burden under the rule.”).

53 Maddock, 248 F.R.D. at 248.

54 See sources cited and accompanying text infra notes 102-108.

55 E.g., Kayes v. Pac. Lumber Co., 51 F.3d 1449, 1461-62 (9th Cir. 1995) (addressing whether an ERISA claim should be maintained as a derivative suit or a class action).
committed against the corporation that the corporation’s management has not pursued. The gravamen of this type of claim is an injury to the corporation that causes “derivative” injury to the suing shareholder and all other shareholders. Thus, “the alleged injury must affect all the shareholders by virtue of their status as collective owners of the corporation.” Claims for waste or mismanagement provide a recurring example of this type of suit, especially given that one reason that a corporation would be unlikely to pursue such claims is that managers of the corporation necessarily participated in the alleged wrongdoing.

If the claims are derivative, then a class action is at least arguably a disfavored approach. This is so because derivative actions exist, in significant part, to prevent “strike suits” and weed out spurious claims (which are sometimes brought by a corporate shareholder with a personal ax to grind or a political agenda to advance) before the corporation is put to the enormous expense of litigation, especially class litigation. Accordingly, derivative rules typically require that the plaintiff—before suing derivatively—make demand on the corporation to sue directly, verify

56 See Moore’s § 23.1.02, supra note 4.

57 Id.

58 Id.

59 E.g., Hamid v. Price Waterhouse, 51 F.3d 1411, 1419-21 (9th Cir. 1995) (derivative action under RICO for gross mismanagement by defendant bank as brought by the bank’s depositors); In re Cray Inc., 431 F. Supp. 2d 1114, 1116-17 (W.D. Wa. 2006) (derivative claims of gross mismanagement and waste of corporate assets brought by shareholders harmed by loss in stock value).

60 See Moore’s § 23.1.02, supra note 4.

61 See, e.g., Smith v. Ayres, 977 F.2d 946, 949 (5th Cir. 1992) (derivative plaintiff must not have ulterior motives or be out to advance a person agenda); see also Moore’s § 23.1.05, supra note 4 (“The verification requirement was designed to discourage “strike suits,” in which complaints are filed without regard to their truth in order to coerce corporate managers to settle.”).
pleadings under oath, and plead certain aspects of its case with particularity. These rules also provide for neutral investigation, respect for the business judgment of officers and directors, and fee shifting. For example, a plaintiff might complain that a corporation’s election procedures are flawed. A court’s first order of business, then, would be to determine whether a class action or a derivative action best serves the ends of judicial and party economy.

To answer this question, a court should look at the various (sometimes conflicting) tests that courts have developed to distinguish direct from derivative claims. For example, for a member of a corporate entity “to assert a direct action against a corporate fiduciary, she must have been injured ‘directly or independently of the corporation’ . . . The test to distinguish between derivative and direct harm is whether the plaintiff suffered a ‘special injury.’” Under this line of thinking, a plaintiff cannot show “special injury” when complaining of election procedures unless her “individual vote[] w[as] invalidated,” because “[t]he right to fair and

---

62 There are two dimensions to these rules, one substantive, one procedural. The substantive aspects are usually found in state corporation laws. See, e.g., DEL. CH. CT. R. ANN. 23.1 West 2010) (following for the most part FED. R. CIV. PRO. 23.1); TEX. BUS. ORG. CODE §§ 21.551-.563 (2010) (following MODEL BUS. CORP. ACT. § 7.42 (2005)); In re Schmitz, 285 S.W.3d 451, 455-58 (Tex. 2009) (specifying what such a demand must include under Texas law). The procedural aspects are often contained in rules of civil procedure. See, e.g., FED. R. CIV. PRO. 23.1.

63 See TEX. BUS. ORG. CODE §§ 21.551-.563.

64 Compare Wixon v. Wyndam Resort Dev. Co., No. C 07-2361-CV, 2008 WL 1777494, at *3 (N.D. Cal. Apr. 18, 2008) (concluding that claims based on “actions to manipulate the election process” are derivative, not direct), with Lapidus v. Hecht, 232 F.3d 679, 683 (9th Cir. 2000) (finding that plaintiffs had standing to assert direct claims because under Massachusetts law a shareholder can assert individual claims if she adequately alleges that the defendant’s conduct harmed her contractual voting rights), and In re Gaylord Container Corp. S’holders Lit., 753 A.2d 462, 486 n.84 (Del. Ch. Ct. 2000) (although finding that defensive takeover measures taken by directors were reasonable, the directors were reasonable in noting that court had granted class certification in a prior opinion based solely on facts alleged in the complaint).

reasonable election procedures inures to the benefit of all members, and . . . a director’s interference with elections does not constitute a separate and distinct injury creating a right of direct action in an individual member.”\textsuperscript{66} Indeed, a plaintiff in such a case lacks “standing to assert a direct action on behalf of [others].”\textsuperscript{67}

2. Is a Class Action Necessary?

At least in theory, a declaratory judgment or injunction action by a single plaintiff could achieve the same result as a class action. And since the class device necessarily adds a layer of complexity and associated cost to any action, a court should at least consider whether a class action is indeed necessary.\textsuperscript{68} For example, if a plaintiff seeks broad, absolute injunctive relief

\begin{flushright}
\end{flushright}

\begin{flushright}
\textsuperscript{67} \textit{Id.} at 566-67. Another way to articulate this distinction is with resort to the “internal affairs” doctrine—i.e., claims that relate solely to the internal affairs of a corporation are derivative, not direct. \textit{See} Bagdon v. Bridgestone/Firestone, 916 F.2d 379, 383-84 (7th Cir. 1990) (applying internal affairs doctrine and finding claims derivative, not direct); \textit{see also} CLASS ACTION FAIRNESS ACT, 28 U.S.C. § 1332 (d)(9)(B) (excluding certain “internal affairs” cases from the expanded jurisdictional provision of CAFA).
\end{flushright}

\begin{flushright}
\textsuperscript{68} Ali v. Quarterman, No. 9:09-CV-52, 2009 WL 158669, at *1 (E.D. Tex. Jun. 4, 2009) (administrative closing of case proper when pending case was on the very same issue because injunctive relief in pending case regarding system-wide practice would have same effect as a class action even though the pending case was not a class action); Access Now Inc. v. Walt Disney World Co., 211 F.R.D. 452, 455 (M.D. Fla. 2001) (finding that the “complexity and expense of a class action is not necessary” in a suit for disability discrimination when the plaintiffs “may achieve by injunction all relief which would inure to similarly situated persons without the necessity of class certification”); Fairley v. Forrest Cnty., 814 F. Supp. 1327, 1329-30 (S.D. Miss. 1993) (class action unnecessary in suit for Fourteenth Amendment voting violation where declaratory and injunctive relief would have the same effect as a class action); \textit{see also} United Farmworkers v. City of Delray Beach, 493 F.2d 799, 812 (5th Cir. 1974) (class action not necessary in racial discrimination case since decree would run “to the benefit not only of the named plaintiffs but also for all persons similarly situated”). \textit{But see} Dominguez v. Schwarzenegger, 270 F.R.D. 477, 485 n.6 (N.D. Cal. 2010) (rejecting defendant’s argument that class certification is not necessary since the injunctive relief sought would benefit all class members, but noting that even though such may be true, “it does not make granting class certification of these claims improper”).
that affects numerous individuals, then certification of a class may be of little practical import.\textsuperscript{69} Suppose a plaintiff sues to block construction of a road through a swamp because it will interfere with his ability to fish. If the plaintiff is successful in the suit and blocks construction of the road, then not only he but all other fishermen will benefit, with or without certification of a class. (But, as we’ll see in a minute, the matter becomes rather more complicated when the number of competing interests begins to multiply.)

In analyzing whether certification is needed on the facts of any given case, the answers to several questions should guide the decision. First, would a declaration or an injunction obtained by a single plaintiff accrue to the benefit of all putative class members? This would seem to be the case whenever the challenged conduct is that of a government agency involving, for instance, a general policy or criteria for qualifying for a benefit.\textsuperscript{70} Second, will the defendant agree to comply with any judgment for declaratory of injunctive relief? Here again, the matter seems relatively straightforward with respect to a government agency or other stable organization.\textsuperscript{71}

\textsuperscript{69} See Bryant G. Garth, \textit{Conflict and Dissent in Class Actions: A Suggested Perspective}, 77 Nw. U. L. Rev. 492, 499 (1982) (“One person represented by a private attorney may seek broad injunctive relief affecting numerous individuals and the public interest.”).


\textsuperscript{71} E.g., Ruiz v. Blum, 549 F. Supp. 871, 878 & n.34 (S.D.N.Y. 1982) (certification unnecessary when the court assumed that the defendants, as public officials, would apply the determination to all persons equally); see also Johnson v. City of Opelousas, 658 F.2d 1065, 1069 n.5 (5th Cir. 1981) (noting that a disagreement exists between circuits as to whether a “need” standard exists in determining class certification in such situations); NEWBERG § 4:19, \emph{supra} note 15. But see Disability Rights Council of Greater Wa. v. Wa. Metro. Transit Auth., 239 F.R.D. 9, 23-24 (D.D.C. 2006) (noting that no “necessity” requirement exists under Rule 23 and finding that even
Third, would a declaration or injunction by itself fully resolve the matter and provide full relief, or would matters inevitably require individual attention? For instance, a single-plaintiff declaration that a policy is illegal might resolve that matter in theory and on a going-forward basis, but if full relief would require ancillary disgorgement or restitution on a case-by-case basis, then the balance might well tip in favor of certification.\footnote{E.g., Nehmer v. U.S. Veterans’ Admin., 118 F.R.D. 113, 119-20 (N.D. Cal. 1987) (class certification needed where relief requested would allow class members to reapply for and obtain benefits denied under currently challenged policy); \textit{see also} \textit{Newberg} § 4:19, \textit{supra} note 15.}

The answers to several other questions may also weigh in the balance. Would collateral estoppel preclude a defendant from contesting the facts established in an individual action?\footnote{See \textit{Newberg} § 4:29, \textit{supra} note 15 (noting that the use of offensive collateral estoppel without mutuality of parties has affected certification determinations).} If so, the importance of the binding effect of a class-wide judgment will be diminished. Would a single plaintiff be able to recover her attorney’s fees? (Some declaratory judgment acts provide for the award of attorneys’ fees to a successful movant.)\footnote{\textit{E.g.}, \textit{Tex. Civ. Prac. & Rem. Code.} § 37.009 (2010).} Is the class action lawyer driven, with the recovery of attorney’s fees the principal object of the case?\footnote{In re St. Jude, 425 F.3d 1116, 1122 (8th Cir. 2005) (class action seeking medical monitoring must not be driven by lawyer’s desire for fees but by whether plaintiff suing alone would have sought monitoring); Bilodeau v. Webb, 170 S.W.3d 904, 915 (Tex. App.—Corpus Christi 2005, pet. denied) (“Generally, conflicts of interest arise amidst concerns that class counsel has been tempted to further its own interest in securing exorbitant fees as against the interests of the class members.”) (citing \textit{Gen. Motors Corp. v. Bloyed}, 916 S.W.2d 949, 953 (Tex. 1996));} Finally, is the delay and (if it did, it would not be proper in the present case to adequately protect the putative class); \textit{7A Wright, Miller & Kane, Federal Practice and Procedure} § 1785.2 (3d ed. 2006) (discussing the doctrine).
additional expense associated with the class device worthwhile?\textsuperscript{76} None of these questions should be considered as a way to determine the outcome in every case, but they are nonetheless valuable heuristics.

**B. Is the Subject Matter of the Case Appropriate for Litigation at All?**

Even in cases not involving the government, some institutional disputes have an obvious air of “politics” about them. Indeed, the “business judgment rule” tacitly recognizes this fact and, accordingly, bars judicial inquiry into the good-faith acts of corporate directors.\textsuperscript{77} There are no bright lines to be drawn here, but the following sections aim to lay out a few markers to help courts steer clear of cases that aren’t really justiciable, as well as those that—though over the justiciability line—give rise to so many conflicts amongst members of the putative class that certification is inappropriate.

**C. Is a Mandatory Class Appropriate on the Facts Alleged?**

Even if a court determines that an action is appropriate for litigation and need not be adjudicated individually or derivatively, further inquiry is needed to determine whether certification is appropriate. Two questions typically emerge. First, is the defendants conduct

\textsuperscript{76} Apart from the delay and expense associated with the class procedure itself, many procedural rules provide for interlocutory appeals and (sometimes) mandatory stays of the entire litigation. \textit{E.g.}, \textit{Fed. R. Civ. P. 23(f)}; \textit{Tex. Civ. Prac. & Rem. Code § 51.014(b)}.

\textsuperscript{77} Zapata Corp. v. Maldonado, 430 A.2d 779, 782 (Del. 1981) (business judgment rule “presumes propriety . . . in a board’s decision” once a decision has been made). Although not of course directly applicable, the “political-question” doctrine is at least roughly analogous. Under that doctrine a court will find no justiciable controversy if it cannot make a decision without making a policy choice of a sort that is clearly within the discretion of another government branch. \textit{See, e.g.}, Flast v. Cohen, 392 U.S. 83. 95-100 (1968) (discussing history of the doctrine of nonjusticiable political questions).
“generally applicable” to all members of the putative class?78 Second, is there “adversity” amongst members of the putative class and, if so, is that a good reason to deny certification?79 The first of these questions is relatively easy to resolve, but the second presents some of the most nettlesome difficulties in all of complex litigation. We now take these questions in turn, with particular attention to the second.

1. **Is the Defendant’s Conduct “Generally Applicable” to the Class?**

   The “generally applicable” standard assures that a plaintiff with a particularized grievance or individualized claim for relief cannot successfully invoke the class device as a litigation tactic. This does not mean, however, that a defendant’s acts must be directed at each member of the class; rather, the issue is whether those acts similarly affected each member of the class.80 A somewhat tougher question arises when not all members of the class have been harmed by the conduct alleged. One can easily find decisions on either side of the issue.81

---

78 See, e.g., Heastie v. Cmty. Bank of Greater Peoria, 125 F.R.D. 669, 679-80 (N.D. Ill. 1989) (all class members signed loan documents with the same clause, so bank’s acts generally applicable to the class); see also Moore’s § 23.43[2][a], supra note 4.

79 See, e.g., Mayfield v. Dalton, 109 F.3d 1423, 1427 (9th Cir. 1997) (certification not proper when some members of class might approve of policy challenged by named plaintiffs making them inadequate representatives); see also Moore’s § 23.25[2][b][i], supra note 4.

80 Boles v. Earl, 601 F. Supp. 737, 745 (W.D. Wis. 1985) (allegation that government improperly withheld benefit generally affected all class members even though claims of named plaintiffs not identical to class members); see also Moore’s § 23.43[2][a], supra note 4.

81 Compare Pella Corp. v. Saltzman, 606 F.3d 391, 394 (7th Cir. 2010) (narrowly defined class certified in consumer fraud action despite the inevitable possibility that some in the class will not have been harmed by the defendant’s conduct), and Arnold v. United Artists Theatre Circuit, 158 F.R.D. 439, 454-55 (N.D. Cal. 1994) (claims by disabled persons involving appropriate access to movie theaters certified, even though not all class members sought to attend theaters); Moore’s § 23.43[2][a], supra note 4, with Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 677 (7th Cir. 2009), cert. denied, 130 S. Ct. 1504 (U.S. 2010) (“a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant”), and Oshana v. Coca-Cola Co., 472 F.3d 506, 514 (7th Cir. 2006) (no certification in consumer
are nonetheless two commonsense limitations to help maintain order here, one qualitative, one quantitative. First, if all members of the class have suffered metaphysical injury (even if they have suffered no actual damages), then the class may be certifiable. An example of this would be an “access” case like *Arnold v. United Artists Theatre Circuit*, in which the named plaintiffs sued a theater chain for violating the California Disabled Persons Act. The court certified the class, even though the class definition was not limited to patrons of the chain and, thus, contained many members who had no injury. This fact would not seem to work any great mischief because someone who was not a current patron might be one in the future and, in any event, the cost of compliance with respect to unharmed class members would be de minimis, probably nil. And even in a case involving some equitable monetary relief (e.g., disgorgement, restitution), the presence of some class members who could show no loss in a suit for damages (because of, for example, prior recovery from a third party), this should prove no obstacle in the fraud action for class that comprised of all purchasers of a product regardless of whether they were deceived).

82 *Arnold*, 158 F.R.D. at 443.

83 This raises the question of whether a case of this type would be equally well served by a single plaintiff seeking injunctive or declaratory relief. See, e.g., Access Now Inc. v. Walt Disney World Co., 211 F.R.D. 452, 455 (M.D. Fla. 2001) (finding that the “complexity and expense of a class action is not necessary” in a suit for disability discrimination when the plaintiffs “may achieve by injunction all relief which would inure to similarly situated persons without the necessity of class certification”); Fairley v. Forrest County, Mississippi, 814 F. Supp. 1327, 1329-30 (S.D. Miss. 1993) (class action unnecessary in suit for Fourteenth Amendment voting violation where declaratory and injunctive relief would have the same effect as a class action); see also discussion and sources cited, supra Part III.A.2. In fact, the *Arnold* court openly acknowledged the “extraordinary degree of homogeneity” encountered in dealing with this type of suit involving a common pattern of discrimination. *Arnold*, 158 F.R.D. at 452.
certification and liability phases of the case, assuming that these members are entitled to declaratory and injunctive relief.84

Second, and more problematic, are cases in which the class—as defined—contains a large percentage of members who have suffered neither injury nor damages (or who cannot be determined ab initio to have suffered injury and damages). Commentators have identified at least three variations on this theme.85 First, there is the “overbroad” class, which is a class defined to include members who would lack standing to sue on an individual basis.86 Second, there is the “difficult-to-identify” class, which is a class defined with reference to an act or state of mind of each putative class member.87 Finally, there is the “fail-safe” class, which is a class

---

84 See, e.g., George v. Kraft Foods Global, Inc., 251 F.R.D. 338, 353 (N.D. Ill. 2008) (monetary relief in the form of restitution of excessive fees related to ERISA benefit plan resulting from breach of fiduciary duty does not prevent certification); Williams v. Empire Funding Corp., 183 F.R.D. 428, 436 (E.D. Pa. 1998) (class certified for declaratory and injunctive relief even though some members may be eligible to seek statutory damages on an individual basis); see also 1 NEWBERG § 2:4, supra note 15.


86 E.g., Oshana v. Coca-Cola Co., 472 F.3d 506, 513-14 (7th Cir. 2006) (class overbroad when it included all purchasers including those not allegedly deceived); In re McDonald’s French Fries Litig., 257 F.R.D. 669, 671-72 (N.D. Ill. 2009) (consumer fraud class overbroad since it included all purchases regardless of exposure to misrepresentations). But see Pella Corp. v. Saltzman, 606 F.3d 391, 394 (7th Cir. 2010) (“While it is almost inevitable that a class will include some people who have not been injured by the defendant’s conduct . . . this possibility does not does not preclude class certification.”). The issue here seems to be quantitative: the Pella court seemed unconcerned because the class definitions in that case did not “include a great many people who have suffered no injury.” Id. See also Beisner et al., supra note 85.

87 E.g., Oshana v. Coca-Cola Co., 255 F.R.D. 575, 580-81 (N.D. Ill. 2005) (certification denied since class members would have to know when they purchased the item at issue); see also Beisner et al., supra note 85.
defined with reference to a legal conclusion. 88 There are many ways to analyze these scenarios, but—for purposes of our discussion of Rule 23(b)(2)—the common thread is that each is an instance in which there may be no rule-required “conduct generally applicable to the class.”

2. There Are Conflicts Among the Class and, Therefore, it Fails for Lack of Cohesiveness

As noted above, the Wal-Mart Court articulated a rigorous standard of “commonality” that is designed to assure that “common” questions are truly so in the sense of generating common answers to legally significant questions. 89 At some level of generality, there is a conceptual overlap between this standard and the idea that a (b)(2) class should be “cohesive.” An important aspect of the cohesiveness inquiry has been to insure not just commonality of questions and answers but to insure that the interests of the putative class members are not adverse to each other or to those of the named plaintiffs. In Amchem Products, Inc. v. Windsor, the Supreme Court opined that a class should be “sufficiently cohesive to warrant adjudication by representation.” 90 And although the Court made this pronouncement in connection with a discussion of Rule 23(b)(3)’s predominance requirement, many courts apply the cohesiveness

88 E.g., Campbell v. First Am. Title Ins. Co., 269 F.R.D. 68, 73 (D. Me. 2010) (noting proposed class definition as “problematic because it creates a ‘fail-safe class,’ which ‘impermissibly determines membership based upon a determination of liability’”); Brazil v. Dell, 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008) (denying certification when proposed class of purchasers of “falsely advertised” product would required a legal determination and thus was “fail safe”). Words in the class definition like “wrongfully,” “negligently,” or “illegally” signal the presence of a fail-safe class. See Beisner et al., supra note 85 (providing further examples). This tactic is disapproved because one does not know who is in the class until after a merits determination. Id. Thus, if the defendant prevails, no one is in the class and no one is bound by the judgment, which completely undermines the efficiencies associated with the class device. See id.

89 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. ___, 131 S. Ct. 2541, 2548-52 (2011); see also supra notes 35-50 and accompanying text.

criterion to (b)(2) classes. As the Eighth Circuit, for example, has stated, “[a]lthough Rule 23(b)(2) contains no predominance or superiority requirements, class claims thereunder must still be cohesive.” Other courts have questioned this standard, noting that the courts that demand cohesiveness have “[i]n effect . . . imported the (b)(3) predominance requirement into the (b)(2), despite the fact that the Rule itself contains no such language.” At the end of the day, this intercourt dispute may amount to nothing more than a disagreement over nomenclature. Here’s why.

One need look no further than the text of Rule 23(b)(2) to confirm that it does not use the “questions of law or fact common to class members predominate” terminology employed in Rule

---

91 E.g., Romberio v. Unumprovident Corp., 385 Fed. App’x 423, 433 (6th Cir. 2009) (noting “the well-recognized rule that Rule 23(b)(2) classes must be cohesive”); Lemon v. Int’l Union of Operating Eng’rs, 216 F.3d 577, 580 (7th Cir. 2000) (“Rule 23(b)(2) operates under the presumption that the interests of the class members are cohesive and homogeneous.”); Barnes v. Am. Tobacco Corp., 161 F.3d 127, 142-43 (3d Cir. 1998) (“[w]hile 23(b)(2) class actions have no predominance or superiority requirements, it is well established that the class claims must be cohesive”).


93 Donovan v. Philip Morris USA, Inc., 268 F.R.D. 1, 11 (D. Mass. 2010); see also Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998) (“Although common issues must predominate for class certification under Rule 23(b)(3), no such requirement exists under 23(b)(2).”); Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972) (“the existence of ‘predominating’ questions and the availability of other methods of resolution which might be superior to a class action are not criteria of a subdivision (b)(2) class, but again of a (b)(3) class.”); Davis v. Homecomings Fin., No. C05-1466RSL, 2006 WL 2927702, at *7 (W.D. Wash. Oct. 10, 2006) (“[T]he Ninth Circuit has never held that ‘cohesiveness’ is required for a Rule 23(b)(2) class. The inquiry is not whether common issues predominate but whether defendant has acted on grounds generally applicable to the class.”)
23(b)(3).\footnote{Compare FED. R. CIV. P. 23(b)(2), with FED. R. CIV. P. 23(b)(3) (text available supra, Part II).} But just as clearly, Rule 23(b)(2) requires that (1) the defendant has “acted ... on grounds that apply generally to the class,” (2) “so that final injunctive relief ... is appropriate” (3) “respecting the class as a whole.”\footnote{FED. R. CIV. P. 23(b)(2).} And as one court has explicitly conceded, “[t]his three part-inquiry will often look similar to a ‘cohesiveness’ determination ... .”\footnote{Donovan, 268 F.R.D. at 12 n.5.} Two lessons emerge here. First, no matter what test is used, a putative class may not be certified if the members are so disparately situated that injunctive relief would need to be customized to the needs of individual members.\footnote{See supra Part III.C.1; see also Wal-Mart Stores, Inc. v Dukes, 564 U.S. ___, 131 S. Ct. 2541, 2551 (2011).} Second, even if an injunction would apply across the board, genuine adversity among members of the class will defeat certification under an “adequacy” analysis—\textit{i.e.} without resort to a vigorous formulation of “cohesiveness.”\footnote{See supra notes 18-23 and accompanying text. Again, some courts do require a rigorous analysis of cohesiveness and a predicate “assumption of homogeneity.” Compaq Computer Corp. v. LaPray, 135 S.W.3d 657, 670 (Tex. 2008). Or, put differently, they require a “common concern” among members of the proposed class. Thorogood v. Sears, 547 F.3d 742, 747 (7th Cir. 2008), cert. denied, 130 S. Ct. 90 (2009).}

3. \textbf{Is the Principal Dispute “Political”?}

Although much class-action litigation is brought in good faith to achieve salutary ends, sometimes litigation is brought by a litigant attempting to force a personal preference on an organization and—by virtue of the class device—on all others similarly situated to him.\footnote{See, e.g., Issen v. GSC Enters., Inc., 508 F. Supp. 1278 (N.D. Ill. 1981); Pico v. Bd. of Educ., Island Trees Union Free School Dist. No. 26, 474 F. Supp. 387 (E.D.N.Y. 1979) \textit{rev’d on other grounds}, 638 F.2d 404 (2d Cir. 1980), \textit{aff’d} 457 U.S. 853 (1982).} In this

---
type of case there is neither a clean legal issue (i.e., an issue in which the question of whether some members of the class oppose the litigation is irrelevant, as in a civil rights case) nor an ultimate fact of the matter (i.e., as in a case in which members of the class have differing opinions as to whether the litigation will confer benefits or cause harm). There are myriad factual situations that could give rise to a case of this sort, but there are at least two familiar patterns. In the first, a corporate shareholder challenges a corporate decision (often a decision to merger or sell or acquire assets).\(^\text{100}\) In the second, a plaintiff challenges the acts of an institutional body (e.g., a decision of a school board).\(^\text{101}\) We will examine each scenario in turn.

The named plaintiff in *Issen v. GSC Enterprises, Inc.* sued a host of defendants for alleged securities violations committed in the course of a “going private” merger.\(^\text{102}\) The threshold question in this case—an issue we have previously discussed—is whether these claims are derivative or direct.\(^\text{103}\) The court found that—because the plaintiff claimed constructively to have sold his shares (he did this so as to have standing to sue as a “seller” of securities under Section 10 of the Securities Exchange Act)—he was not a “shareholder” entitled to sue derivatively.\(^\text{104}\) But he fared no better with respect to the putative class, which the court declined

---

\(^\text{100}\) *See* sources cited *infra* note 108.

\(^\text{101}\) *E.g.*, Boucher v. Syracuse Univ., 164 F.3d 113, 116 (2d Cir.1999) (affirming the district court’s decision not to certify a class of students for two women’s sports because of inherent intra-class conflicts involving two distinct sports); *Pico*, 474 F. Supp. 387.

\(^\text{102}\) 508 F. Supp. at 1282. Under this type of merger, the minority shareholders can be paid for their shares without an opportunity to vote on the merger.

\(^\text{103}\) *Id.* at 1295-96.

\(^\text{104}\) *Id.* at 1295.
to certify.\textsuperscript{105} To reach its decision the court balanced, on the one hand, the plaintiff’s requested relief (rescission) against, on the other hand, the fact that over 80% of the putative class members had exchanged their shares under the terms of the merger.\textsuperscript{106} Thus, although recognizing “the strong policy favoring class actions in securities fraud cases,” the court found that the named plaintiff’s claim was not typical and that his interests did not “coincide with the bulk of his proposed class as required by one arm of the adequacy of representation requirement embodied in Rule 23(a)(4).”\textsuperscript{107} The fatal flaw, according to the court, was that the named plaintiff’s preference for rescission was not universal: “It is unlikely that those minority shareholders who tendered their shares nearly three years ago would now want to rescind the merger and resume their position as minority shareholders of [the merged corporation].”\textsuperscript{108}

\textsuperscript{105} Id. at 1296

\textsuperscript{106} Id.

\textsuperscript{107} Id.

\textsuperscript{108} Id. at 1296. Many other courts have denied certification in this type of situation. \textit{See}, e.g., Birnberg v. Milk St. Residential Assoc. Ltd. P’ship, No. 02 V 0978, 2003 WL 21995177, at *2 (N.D. Ill. Aug. 20, 2003) (certification denied in suit to rescind sale of shares since two-thirds of partners “might not wish to have [the transaction] undone”); Hastings-Murtagh v. Texas Air Corp., 119 F.R.D. 450, 457 (S.D. Fla. 1988) (“[I]n cases of minority stockholders challenging a consummated merger, conflicts among tendering and nontendering shareholders are commonplace” and “center around the requested remedies.”); Kas v. Fin. Gen. Bankshares, Inc., 105 F.R.D. 453, 462-63 (D.D.C.1985) (certification denied where named plaintiff not an adequate representative of the class since many of the class members “may” not want merger declared void); Weisfeld v. Spartans Industries, Inc., 58 F.R.D. 570, 581-82 (S.D.N.Y. 1972) (conflict between named plaintiff seeking rescission of merger and proposed class member who no longer hold shares or have since exchanged them); Guttmann v. Braemer, 51 F.R.D. 537, 538-39 (S.D.N.Y. 1970) (potential for disagreement among the proposed class members over rescission as proper form of relief prevented certification); Maynard, Merel & Co. v. Carcioppolo, 51 F.R.D. 273, 277-78 (S.D.N.Y. 1970) (certification not proper because the harm suffered by the named plaintiff differed from many of the class members and these other class members would likely not want rescission of the merger); Pomierski v. W.R. Grace & Co., 282
Pico v. Board of Education, Island Trees Union Free School District No. 26 presents an example of the second sort: *i.e.*, one growing out of a clash of belief systems and attendant preferences.\(^{109}\) The case arose after a self-identified “conservative” school board directed the district’s superintendent to remove a number of “objectionable” books from the district’s libraries.\(^{110}\) The school board ultimately conceded that the books were not obscene but rather that they were “in bad taste.”\(^{111}\) Setting aside the *substantive* issue of how far school boards and administrators may go in restricting student speech and access to library works without running afoul of the First Amendment (an issue that continues to bedevil courts to this day),\(^{112}\) the *procedural* issue is whether a class can be certified where members of the class have differing views as to whether something is “vulgar, immoral, and in bad taste.”\(^{113}\) In the face of “reason to believe” that the named plaintiffs and at least some members of the putative class sharply disagreed whether the school district should restrict access to the subject books, the court held

---

\(^{109}\) F. Supp. 385, 392 (N.D. Ill. 1967) (named plaintiff’s interest antagonistic to class members because many of the class members would not want the deal undone).


\(^{111}\) *Id.* at 389-92. The “objectionable” books included: (1) *Slaughterhouse Five* (Kurt Vonnegut, Jr.); (2) *The Naked Ape* (Desmond Morris); (3) *Down These Mean Streets* (Piri Thomas); (4) *Best Short Stories by Negro Writers* (Langston Hughes, ed.); (5) *Go Ask Alice* (Anonymous); (6) *Laughing Boy* (Oliver La Farge); (7) *Black Boy* (Richard Wright); (8) *A Hero Ain’t Nothing But a Sandwich* (Alice Childress); (9) *Soul on Ice* (Eldridge Cleaver); (10) *A Reader for Writers* (Jerome Archer, ed.); and (11) *The Fixer* (Bernard Malamud). *Id.* at 390 n.5.

\(^{112}\) *Id.* at 392.

\(^{113}\) *See, e.g.*, Morse v. Frederick, 551 U.S. 393 (2007) (in 5-4 decision, holding that administrator could discipline student for displaying “Bong Hits for Jesus” banner).
that the named plaintiffs’ claims were not typical and that, therefore, certification was not appropriate.\textsuperscript{114}

4. Is Injunctive or Declaratory Relief Appropriate?

A court must also ask at the threshold whether the asserted claims are amenable to injunctive or declaratory relief. That is, is the named plaintiff complaining about something reasonably specific and, if so, can an injunction be crafted that would satisfy the requirement of Rule 65(d) that every injunction “state its terms specifically; and describe in reasonable detail . . . the acts restrained or required.”\textsuperscript{115} If the answer is not an unequivocal “yes,” this may signal the presence of a class that is not cohesive and that may be brimming with different or competing (even if not directly adverse) interests. \textit{Shook v. Board of County Commissioners of County of El Paso (Shook II)} serves as a good example.\textsuperscript{116} In this case, the named plaintiffs brought an Eighth Amendment challenge against a county jail, alleging that the conditions there with respect to prisoners with mental health issues constituted cruel and unusual punishment.\textsuperscript{117} The district court held that the plaintiffs had not carried their burden to show that the defendants had acted on grounds generally applicable to the class to make declaratory and injunctive relief appropriate.\textsuperscript{118}

\footnote{114} Id. at 393. The court also held that a class action was unnecessary: “A disposition either way would be as effective without the procedural complexities that attend class certification.” \textit{Id.; see also supra} Part III.A.2.

\footnote{115} \textsc{Fed. R. Civ. P.} 65(d)(B)-(C). Subsections (a) \& (b) of Rule 65 grant the court power to impose preliminary injunctions after notice and hearing or \textit{ex parte} temporary injunctions. \textit{Id.} Subsection (d) details the required contents and permitted scope of injunctions or restraining orders issued under subsections (a) \& (b). \textit{Id.}

\footnote{116} 543 F.3d 597 (10th Cir. 2008).

\footnote{117} \textit{Id.} at 602.

\footnote{118} \textit{Id.}
“In particular, the district court noted the factual differences between the individual named plaintiffs’ situations, suggesting that because some plaintiffs were asserting claims for denial of medication, some for lack of supervision, and others for use of excessive force, there was no simple policy or procedure to which all were subject.” The Tenth Circuit was thus called upon to decide whether the factual differences did indeed weigh against certification.

To answer this question, the court approached from a “cohesiveness” angle, opining that cohesiveness has at least two aspects. First, the class must be sufficiently cohesive that any classwide injunctive relief can satisfy the limitations of Federal Rule Civil Procedure 65(d)—namely, the requirement that it “state its terms specifically; and describe in reasonable detail . . . the act or acts restrained or required.” Second, “[a] class action may not be certified under Rule 23(b)(2) if relief specifically tailored to each class member would be necessary to correct the allegedly wrongful conduct of the defendant.”

So, the court concluded, “if redressing the class members’ injuries requires time-consuming inquiry into individual circumstances or characteristics of class members or groups of class members, ‘the suit could become unmanageable and little value would be gained in proceeding as a class action.’” Indeed, “individual issues cannot be avoided simply by formulating an injunction at a stratospheric level of abstraction; as we have explained before, ‘injunctions

119 Id. at 602-03.
120 Id. at 603.
121 Id. at 604 (quoting 5 MOORE’S § 23.43(2)(b)).
122 Id. (citing Shook v. El Paso County (Shook I), 386 F.3d 963, 973 (10th Cir. 2004) (also noting that “it is precisely these types of manageability issues—relating to the district court’s ability to provide injunctive relief to the class framed in the complaint, a textually authorized consideration—that we held permissible in Shook I”) (internal citations omitted); see also Shook I, 386 F.3d at 973 (“Elements of manageability and efficiency are not categorically precluded in determining whether to certify a 23(b)(2) class.”).
simply requiring the defendant to obey the law are too vague to satisfy Rule 65.”123 Cast in these terms, “under Rule 23(b)(2) the class members’ injuries must be sufficiently similar that they can be addressed in an single injunction that need not differentiate between class members.”124

In the actual case before it, the Shook II court registered that “plaintiffs seek to have seven acts enjoined, . . . but a review of these acts illustrates how the district court could (and did) reasonably conclude that the putative class fails to satisfy Rule 23(b)(2)’s standards.”125 The court further remarked that “[t]he chief difficulty the district court identified is that much of the relief plaintiffs seek would require the district court to craft an injunction that distinguishes—based on individual characteristics and circumstances—between how prison officials may treat class members, rather than prescribing a standard of conduct applicable to all class members.”126

As an example, the court noted that

plaintiffs ask for an injunction compelling defendants to “cease using restraints, pepper spray, and electro-shock weapons (‘tasers’) against prisoners exhibiting signs of mental illness in circumstances that pose a substantial risk of serious harm to such prisoners.” But by its very terms, this prayer for relief asks the district court to craft an injunction that takes into account the specific circumstances of individual inmates’ plights. What specific mental illnesses place a prisoner at an inordinate risk from the use of the named implements? And under what circumstances is this risk exacerbated? Presumably the “circumstances that pose a substantial risk of serious harm” depend on the nature and severity of the individual's illness, but where a practice may only be enjoined by reference to circumstances that vary among class

123 Shook II, 543 F.3d at 604.
124 Id.
125 Id. at 604-05.
126 Id. at 605.
members—such as whether an individual inmate is both showing signs of mental illness and at particular risk from the use of tasers—class-wide relief may be difficult to come by. Instead, different injunctions would be required to establish the appropriate behavior towards different groups of class members.\(^{127}\)

This difficulty was not an anomaly. Many of plaintiffs’ claims either required “downstream,”\(^{128}\) individualized evidence or attempted to impose a standard of conduct so vague and fluid as to be no standard at all:

For example, plaintiffs seek an order requiring defendants to “provide safe and appropriate housing for prisoners with serious mental health needs.” But, as the district court observed, what is “safe and appropriate” depends on the nature and severity of an individual’s mental illness, not simply on the fact that he is mentally ill. What is safe for Ms. Mosby, who is suicidal, may not be the same as for Mr. Shook, who merely requires delivery of his medication. Similarly, “adequate screening and precautions to prevent self-harm and suicide,” does not address a cohesive injury suffered by the class. Not all mentally ill people are suicidal, and so this form of relief is overly broad relative to the class as defined, and what constitutes “adequate” precautions against self-harm will necessarily turn on how and in what ways individual inmates are predisposed to harm themselves.\(^{129}\)

The court went on to concede that some of the requested relief would not require individual adjudication.\(^{130}\) For example, plaintiffs “seek an injunction aimed at requiring

\(^{127}\) Id.

\(^{128}\) In the context of class actions, an “upstream” case is one in which the focus is on the conduct of the defendants; a “downstream” case is one in which the focus is on the individual situations of the plaintiffs themselves. See Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 831-32 (1997). As a general proposition, an upstream case is more susceptible to certification than is a downstream case because it is less likely to require individualized inquiries. *Id.* at 832. A price-fixing case is an example of the former, a mass tort case of the latter.

\(^{129}\) Shook II, 543 F.3d at 605 (internal citations omitted).

\(^{130}\) Id.
increased staffing levels, for example, as well as screening procedures to identify at-risk inmates. They also seek an ‘adequate’ system to provide ‘appropriate’ medication to inmates and to monitor the effects of that medication.”

But that would not save plaintiffs’ certification bid because “it is here that plaintiffs run into the horn of Rule 65(d)’s specificity requirement. At the class certification stage, the injunctive relief sought must be described in reasonably particular detail such that the court can at least ‘conceive of an injunction that would satisfy [Rule 65(d)’s] requirements,’ as well as the requirements of Rule 23(b)(2).” Ultimately, the problem was one of proof and burden:

[T]o satisfy Rule 65(d), the levels of services must ultimately be capable of description in a sufficiently objective way that both the defendant and the court can determine if the former is complying, and a class certification motion requesting injunctive relief that simply prescribes “adequate” or “appropriate” levels of services fails to indicate how final injunctive relief may be crafted to “describe[ ] in reasonable detail ... the acts ... required.”

Finally, the court cautioned that plaintiffs’ difficulties would be compounded over time because “the proposed class includes not only current inmates but future ones as well.” Thus, “to craft an enforceable injunction aimed at ensuring ‘adequate’ staffing levels or medication delivery procedures, the district court would have to be able to ascertain the aggregate characteristics of the class as whole, and enforcing the injunction would require monitoring changes to those characteristics over time.”

\[\text{131 Id.}\]

\[\text{132 Id. at 605-06.}\]

\[\text{133 Id. at 606.}\]

\[\text{134 Id.}\]

\[\text{135 Id.}\]
information about the class not necessary in many other Rule 23(b)(2) class actions.”

For example, a court called upon to enforce an injunction would need to ask—and have answered—questions like these:

How many inmates suffer from serious mental illness at any particular time? What specific illnesses are represented in the class, and in what numbers? What type of staffing and training is necessary to provide “adequate” care for the range of illnesses existing (or likely to exist) in the Jail population at any given time? At this point, all efficiencies typically inherent in class actions would be off the table.

5. Do Class Conflicts Preclude Certification?

It is a commonplace of class certification law that intra-class conflicts can defeat certification. But one need review no more than a handful of cases to discover that only certain types of conflicts actually do defeat certification. This section aims to uncover the deep—yet often unarticulated—logic at work here. A few examples will set the stage.

The issue of class adversity is usually framed in one of two ways: standing and/or divergent interests. As we will see, though, the first is really just an instantiation of the

---

136 Id.
137 Id.
138 7A WRIGHT & MILLER, FED. PRACT. & PROC. CIV. § 1768 (3d ed.) (“It is axiomatic that a putative representative cannot adequately protect the class if the representative’s interests are antagonistic to or in conflict with the objectives of those being represented.”)
139 See 1 NEWBERG § 2:5, supra note 15 (remarking that while standing is a separate threshold inquiry, “the meeting of such individual standing tests does not automatically entitle the plaintiff to maintain a class action unless the additional qualifications of a class representative under Rule 23 [for typicality and adequacy] are also met”). But see Ramirez v. STI Prepaid LLC, No. 08-1089, 2009 WL 737008, at *7 (D. N.J. Mar. 18, 2009) (quoting In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 306-07, (3d Cir. 1998)) (finding class representatives to have individual standing, but in challenging standing, defendants seem to “conflate the issue of whether the named Plaintiffs have standing to bring their individual claims
second. In any event, the standing argument arises when a putative class representative has a status different from at least some of the putative class members.\textsuperscript{140} An example of this would be a case in which former employees seek to represent a class containing current employees.\textsuperscript{141} The real inquiry should not be whether there are status differences among class members but, rather, whether those differences matter—\textit{i.e.}, whether the differences amount to genuine adverse interests and, even then, whether those adverse interests are legally cognizable.\textsuperscript{142}

For example, in \textit{In re Fed Ex Ground Package System, Inc. Employment Practices Litigation}, the court was called upon to decide whether—in the context of a case alleging that FedEx had “misclassified” its drivers as independent contractors instead of as employees—“former drivers have significantly different interests than do . . . current contractors . . . .”\textsuperscript{143} The defendants argued that they did because “[c]urrent contractors have a long-term interest in whether they are classified as contractors or employees, and whether they can obtain what they believe is a more favorable relationship with FedEx Ground, whereas former contractors have no such interest.”\textsuperscript{144} In other words, it might be that current drivers would prefer to leave well

\begin{flushright}
with the secondary issue of whether they can meet the requirements to certify a class under Rule 23”).
\end{flushright}

\textsuperscript{140} \textit{See, e.g.}, Hardin v. Harshbarger, 814 F. Supp. 703, (N.D. Ill. 1993) (class representative lacked standing to seek injunctive relief on behalf of class when representative had already personally achieved such relief); \textit{see also} NEWBERG § 2:5, \textit{supra} note 15.

\textsuperscript{141} \textit{See, e.g.}, Cross v. Nat’l Trust Life Ins. Co., 553 F.2d 1026, 1030-31 (6th Cir. 1977) (“That plaintiffs are no longer employees of the defendant does not deprive them of standing to represent a class consisting of current and prospective employees.”).

\textsuperscript{142} \textit{See id.} at 1031.


\textsuperscript{144} \textit{Id.} at 438.
enough alone because the relief sought, if granted, would not inure to their benefit and could even harm them. The court made short work of this argument:

All Tennessee plaintiffs signed the same standard Operating Agreement and were classified as independent contractors. The Tennessee plaintiffs were subject to the same regulations regarding their appearance, trucks, delivery methods, and working hours. Whether they were improperly classified as independent contractors affects all of them equally, as it entitles both former and current drivers to additional benefits and compensation as well as entitling the current drivers to proper classification in the future. FedEx Ground asserts that current contractors, unlike former contractors, have a long-term interest in their classification, and whether they can obtain what they believe is a more favorable relationship with FedEx Ground. If the Tennessee plaintiffs are being treated as FedEx Ground employees, however, the law requires them to be classified as such. Current contractors don’t have the option to be classified as one type and treated as another.\(^{145}\)

Although perhaps stated a bit obliquely, the court’s point is an important one: adversity arising because some class members might choose an illegal status quo over a legal remedy is not “adversity” in any legally significant sense.\(^{146}\)

A slightly different—though ultimately related—problem arises when there is a question of fact concerning the benefits of a class-wide injunction or declaration. In re Motor Fuel Temperature Sales Practices Litigation offers a particularly good example of this issue and a possible (though somewhat question-begging) solution.\(^ {147}\) Plaintiffs brought class claims for, among other things, injunctive relief against motor fuel retailers.\(^ {148}\) The gist of plaintiffs’ claims was “that because defendants sell motor fuel for a specified price per gallon without disclosing

\(^{145}\) Id. (emphasis added).

\(^{146}\) See id.

\(^{147}\) 271 F.R.D. 221 (D. Kan. 2010).

\(^{148}\) Id. at 226-27.
or adjusting for temperature expansion, they are liable under state law theories which include breach of contract, breach of warranty, fraud, and consumer protection. 149

To analyze the certification issues presented by these allegations, the court engaged in a nested two-part analysis, beginning with a focus on “two independent but related requirements.” 150 Under this rubric, “first, plaintiffs must show that defendants’ actions or inactions are based on ‘grounds generally applicable to all class members.’ Second, plaintiffs must demonstrate that the injunctive relief which they request is ‘appropriate for the class as a whole.’” 151 Taken together, “these requirements demand ‘cohesiveness among class members with respect to their injuries[,]’” 152 which entails a further two-part evaluation:

First, plaintiffs must show that the proposed class is sufficiently cohesive that any class-wide injunctive relief will satisfy the requirement of Rule 65(d) that every injunction “state its terms specifically; and describe in reasonable detail . . . the act or acts restrained or required.” 153 Second, plaintiffs must show that class members’ injuries are “sufficiently similar” that they can be

149 Id. at 223.

150 Id. at 224.

151 Id. at 224-25 (quoting Shook v. Board of Cnty. Comm’rs of Cnty. of El Paso (Shook II), 543 F.3d 597, 604 (10th Cir. 2008)) (internal citations omitted).

152 Id. at 225.

153 Id. (quoting FED. R. CIV. P. 65(d)(1)). The pertinent portion of Rule 65(d) states as follows:

(1) Contents. Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.
remedied in a single injunction without differentiating between class members.\textsuperscript{154}

All told, then, “to satisfy Rule 23(b)(2) at the class certification stage, plaintiffs must describe in reasonably particular detail the injunctive relief which they seek so that the Court can at least conceive of an injunction which would satisfy the requirements of Rule 65(d) and Rule 23(b)(2).”\textsuperscript{155}

Against this legal framework, the defendants set facts suggesting that the putative class was hopelessly conflicted “because not every purported class member wants temperature adjustment of retail motor fuel sales.”\textsuperscript{156} More specifically, the defendants asserted “that because class members may disagree whether they would benefit from injunctive relief requiring mandatory ATC [automatic temperature correction] at retail, plaintiffs cannot adequately represent the class.”\textsuperscript{157} The court thus correctly saw that it faced a potential question of intra-class conflict and that, consequently, its principal task was to determine whether this conflict was merely apparent or actually real.\textsuperscript{158}

Lurking in the background of the court’s analysis was a potentially controlling Tenth Circuit precedent, \textit{Albertson’s, Inc. v. Amalgamated Sugar Co.}\textsuperscript{159} In that case, the named

\textsuperscript{154} Id. (quoting DG ex rel. Stricklin v. Devaughn, 594 F.3d 1188, 1199 (10th Cir.2010)).

\textsuperscript{155} Id.

\textsuperscript{156} Id. at 231.

\textsuperscript{157} Id. at 232.

\textsuperscript{158} See id. at 231-33.

\textsuperscript{159} 503 F.2d 459 (10th Cir. 1974).
plaintiffs sought to represent a class of direct purchasers of beet sugar in an antitrust action.\textsuperscript{160} As relief, the plaintiffs prayed, in part, for an injunction regarding the method that defendants used to calculate freight charges.\textsuperscript{161} The district court declined to certify a class as to this question and the appellate court affirmed.\textsuperscript{162} Both Albertson courts reasoned that although a “mere disparity” in benefits to class members is not a bar to certification, members of the putative class were business competitors, and the requested injunction would alter the competitive position of these members.\textsuperscript{163} In short, the court identified the case as one presenting a “winners and losers” scenario, which is often found to be a good reason to deny certification.\textsuperscript{164}

So the question that the Motor Fuel case faced resolved into this: is the case one in which the requested injunctive relief would create winners and losers?\textsuperscript{165} To answer this question, the court first distinguished Albertson’s, finding that the putative class was not made up

\textsuperscript{160} Id. at 460.

\textsuperscript{161} Id. at 462-63.

\textsuperscript{162} Id.

\textsuperscript{163} Id. at 464.

\textsuperscript{164} See id.; see also Campbell v. City of Chicago, No. 83-C-3884, 1984 WL 21980, at * 3-4 (N.D. Ill. Aug. 29, 1984) (denying certification since some members might have a competitive interest in abolishing the challenged licensing system and other might not and subdividing the class is not possible); Plekowski v. Ralston Purina Co., 68 F.R.D. 443, 452-53 (M.D. Ga. 1975) (denying certification in part because in class of both past and present customers, present customers had an interest in a continued harmonious relationship with defendants that past customers did not). But see Sollenbarger v. Mountain States Tel. & Tel. Co., 121 F.R.D. 417, 430 (D. New Mex. 1988) (distinguishing Alberton’s and certifying the class since there would be no disparate effect on competition and no disparity in benefits).

\textsuperscript{165} See Valley Drug Co. v. Geneva Pharm., Inc., 350 F.3d 1181, 1190 (11th Cir. 2003) (certification improper where some class members benefit from conduct that named plaintiff deems illegal).
of business competitors and that defendants had not argued “that differing circumstances would cause some class members to benefit at the expense of others.”\textsuperscript{166} Rather, according to the court, the defendants asserted no more than “that class members hold differing opinions as to whether [the injunction] would benefit the class as a whole.”\textsuperscript{167} But this is not a class-phase issue: “the alleged difference of opinion goes to the ultimate merits of the case. Before plaintiffs may obtain injunctive relief requiring defendants to install ATC, they must prove that the requested relief will benefit the class as a whole.”\textsuperscript{168} In other words, there is a fact of the matter, and that fact (\textit{i.e.}, whether ATC at retail would result in higher or lower fuel prices) is a common question of fact.\textsuperscript{169} Accordingly, the court held that there were no conflicts that would (1) render the named plaintiffs inadequate under Rule 23(a)(4) or (2) show the class to lack “cohesiveness” of the sort that would make certification inappropriate under Rule 23(b)(2).\textsuperscript{170}

But, as noted at the outset, this really begs the question. For if the class members disagree about the efficacy of the requested relief, then there is adversity in the class. What the court tacitly found, then, is that essentially uninformed differences of “opinion” are not

\textsuperscript{166} \textit{In re Motor Fuel Temperature Sales Practices Litig.}, 271 F.R.D. 221, 233 (D. Kan. 2010).

\textsuperscript{167} \textit{Id}. (emphasis added).

\textsuperscript{168} \textit{Id}. (explaining that “If the evidence shows that mandating ATC would actually harm the class, plaintiffs will not prevail in their request for injunctive relief”).

\textsuperscript{169} \textit{Id}. The defendants also argued that class members who regularly purchased fuel at cool temperatures would be harmed by the injunction and thus object to ATC. \textit{Id}. at 233 n.21. But they offered this objection as a hypothetical, so the court was able to brush it aside as speculation. \textit{Id}. Even with actual evidence in support of this objection, it is likely the court would still have certified the class based on its earlier finding that any “difference of opinion goes to the ultimate merits of the case,” namely whether an injunction would benefit the class as a whole. \textit{Id}. at 233.

\textsuperscript{170} \textit{Id}. at 233, 235.
cognizable as adverse interests. In other words, disagreement over how the facts will turn out
doesn’t mean that the facts are not common—i.e., they are what they are, and they will
ultimately be found by the ordinary workings of the judicial process.

Sometimes, though, there is not a fact of the matter—or at least not one that can be
readily discovered with reference to objective, neutral criteria. Two threads emerge here. First,
there are the relatively easy cases in which a defendant alleges that there is widespread
disagreement amongst the class as to the desirability of an action that the defendant has taken.\textsuperscript{171}
But that argument is a red herring. A common example of this arises when a union raises its
members’ dues and a member challenges that act on behalf of himself and all other members.\textsuperscript{172}
In one recurring pattern, the defendant argues that many members would prefer not to have their
dues raised, but the gist of the plaintiff’s claim is that the dues increase resulted from an illegal
vote.\textsuperscript{173} This tactic confounds a question of whether the class members have different
preferences (e.g., whether they think a dues increase is a good idea) with a question of legality.
As we have seen before, courts must disregard class disagreements where those disagreements
exist because some members would prefer the result of an illegal act.\textsuperscript{174} But, as we’ve seen
before in cases like \textit{Pico}, there are other cases in which the class adversity actually is the result
of divergent preferences.\textsuperscript{175}

\textsuperscript{171} \textit{E.g.}, Stolz v. United Bhd. of Carpenters & Joiners, 620 F. Supp. 396, 405 (D. Nev. 1985)
(disagreement between class members over whether to favor or oppose dues increase immaterial
when suit claimed statutory violations of the voting process).

\textsuperscript{172} See, \textit{e.g.}, Gates v. Dalton, 67 F.R.D. 621, 630 (E.D.N.Y. 1975).


\textsuperscript{174} \textit{See supra} Part III.C.3.

\textsuperscript{175} \textit{See supra} notes 109-14 and accompanying text.
Even in a case in which the central dispute is one over the legality of an act, courts often show sensitivity to the divergent interests of class members. This is particularly so where the alleged conduct presents a debatable question of classification.\textsuperscript{176} \textit{Horton v. Goose Creek Independent School District} is often cited as representative of this type.\textsuperscript{177} In this case, the named plaintiffs sued a school district, alleging that the district’s use of contraband-sniffing dogs violated the civil rights of students.\textsuperscript{178} The Fifth Circuit conceded “the chance that some class members support the canine search program” and the attendant “possibility of antagonistic interests,” as well as “good authority for denying class certification on the basis of significant disagreement within the class.”\textsuperscript{179} To wire around these factual and legal impediments, the court made three moves. First, the court found that “[t]hough some members may disagree with the named plaintiffs, their position has been asserted energetically and forcefully by the defendant, which has argued that the school administration must be able to use these searches to combat a serious drug problem.”\textsuperscript{180} Second, the court opined that denial of certification would be of little substantive impact because “the stare decisis effect of our decision that the sniffing procedures as they relate to the students are unconstitutional will, as a practical matter, put an end to all

\textsuperscript{176} \textit{See generally}, Neil MacCormick, \textit{Rhetoric and the Rule of Law: A Theory of Legal Reasoning} 141 (2005) (discussing “the question whether a given situation counts as belonging in a relevant category for purposes of applying a legislative text” (or any legal rule)).

\textsuperscript{177} 690 F.2d 470 (5th Cir. 1982).

\textsuperscript{178} \textit{Id.} at 473.

\textsuperscript{179} \textit{Id.} at 485.

\textsuperscript{180} \textit{Id.} at 487.
Third, in an explicit nod to “disagreement among over appropriate relief,” the court ordered “certification on the issue of liability only . . .”

These justifications seem small beer in the face of genuine conflicts. For example, it is odd to certify a named plaintiff as adequate to “protect the interests of the class” by ceding that responsibility to the defendant. And the stare decisis argument is—ironically enough—one typically deployed to demonstrate that a class action is unnecessary. Finally, that the class could be certified as to only a single issue often signals that the class device will not lead to the efficiencies that are the raison d’être of the device. Of course, the court was no doubt seeking a pragmatic solution to a difficult problem, and its approach is unlikely to work much mischief in cases in which the defendant is a government agency. Nonetheless, as the Horton court confirmed, courts should be reluctant to extend this approach to ordinary civil litigation, in which the defendant cannot necessarily be counted on vigorously to defend the positions of dissenting class members.

181 Id. at 487 n.32.

182 Id. at 488 n.33.

183 Yet courts still employ this procedure in certifying such cases. See, e.g., Curley v. Brignoli, Curley & Roberts Assoc., 915 F.2d 81, 86 (2d Cir.1990) (“When the interests of antagonistic class members are adequately represented by the class’ opponents, the requirements of due process are satisfied such that a class can be certified.”); Horton v. Goose Creek I.S.D., 690 F.2d 470, 487 (5th Cir. 1982), cert. denied, 463 U.S. 1207 (1983) (finding that defendant could adequately represent views of the dissenting class members when defendant has vigorously opposed certification and there is possibility of collusion).

184 See supra Part III.A.2.


186 See 690 F.2d at 487 (“In many cases, we would hesitate to rely on the opponent of the class to represent the views of dissenting class members.”). Compare Reese v. Miami-Dade Cnty., 209
IV. Conclusion and Recommendations

No single heuristic device can settle, once and for all, the question whether any particular case is suitable for class-action treatment under Rule 23(b)(2). That requires a decisive act of judgment by a judge. But such a device can, and this Article argues should, guide this decisive act. To sum up: When faced with a motion to certify a class under Rule 23(b)(2) involving a request for declaratory or injunctive relief, a court should consider seven (somewhat overlapping) questions:

1) Should the case be a derivative action rather than a class action?
2) Will an individual action achieve the same ends?
3) Is the defendant’s conduct generally applicable to everyone in the class?
4) Are these conflicts among members of the class?
5) Is the dispute “political” rather than “legal”?
6) Is injunctive or declaratory relief appropriate?
7) If there are disagreements among members of the class, are they of a character that renders certification inappropriate?

If the court is convinced that the answers to these questions are no, no, yes, no, no, yes, and no, then it can move forward more or less assured that it is not wading into a morass of competing belief systems, personal political preferences, or matters of nothing so much as taste. Cast in reverse, the court can rest easy that—whatever the ultimate outcome—it is taking up a case on a

F.R.D. 231, 233 (S.D. Fla. 2002) (following Horton and certifying class since “interests of the dissenting class members are sufficiently intertwined with the interests of the governmental Defendants such that their views will be adequately safeguarded”), with Forsyth v. Lake LBJ Investment Corp., 903 S.W.2d 146 (Tex. App.—Austin 1995, writ dismissed w.o.j) (declining to endorse plaintiffs argument that defendants “would adequately represent the interests of any dissident absentee class members” by distinguishing Horton on grounds it involved actual intra-class antagonism rather than the mere possibility of it).
classwide basis that squares with what Rule 23(b)(2) intends: redressing claims based on facts which—if proven—have legal significance that is beyond debate.