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Class & Collective Action Group Newsletter

Federal Appellate Courts

Order Vacating Class Settlement Approval in *Berni v. Barilla* (Second Circuit)

Key Issue

Whether past purchasers of a product can maintain a class action for injunctive relief.

Background

In *Berni v. Barilla G. e R. Fratelli S.p.A.*, past purchasers of certain Barilla specialty pasta products brought a putative class action in the Eastern District of New York alleging that Barilla engaged in deceptive business conduct under New York law by including allegedly misleading empty space, or "slack fill," in its pasta packaging.[1] Plaintiffs initially sought compensatory and punitive damages and an injunction requiring Barilla to modify the packaging of its specialty pastas.[2]

While Barilla's motion to dismiss was pending, the named plaintiffs and Barilla reached a settlement agreement.[3] The agreement provided no damages to class members; instead, Barilla agreed to modify the packaging of the specialty pastas to include a minimum-fill line and a disclaimer noting that its pasta was sold by weight and not by volume.[4] Because the agreement only provided injunctive relief to the putative class, the parties moved for certification of the class under Rule 23(b)(2), which governs injunctive class actions. The district court granted preliminary certification of the class and preliminary approval of the proposed settlement.[5]

A putative class member who is also an attorney with the Center for Class Action Fairness objected to the proposed settlement. The objector argued, among other things, that the proposed settlement class did not satisfy Rule 23(b)(2), which requires that injunctive or declaratory relief must be "appropriate respecting the class as a whole," and therefore the proposed injunction or declaration must "provide relief to each member of the class."[6] The objector argued that injunctive relief in the form of modifications to packaging would not benefit the class as a whole because not "all class members will again purchase Barilla products in the future."[7]

[1] *Berni v. Barilla G. e R. Fratelli S.p.A.*, 332 F.R.D. 14 (E.D.N.Y. 2019).

[2] *Id.* at 19.

[3] *Id.* at 19-20.

[4] *Id.* Barilla also agreed not to contest class counsel's application for a fee award of up to $450,000, nor the four named plaintiffs' application for incentive awards of $1,500 each. *Id.*

[5] *Id.* at 19.

[6] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011).

[7] *Berni*, 332 F.R.D. at 25 (citation omitted).

The court acknowledged that district courts in the Second Circuit have reached conflicting conclusions as to whether past purchasers may obtain an injunction requiring a labeling change "even if there is no clear evidence that they will purchase the product again."[8] Some courts have concluded that past purchasers lack standing to pursue injunctive relief because they "already know of the deception" and thus cannot be deceived by the allegedly misleading labeling in the future.[9] Other courts have concluded that a past purchaser *must* have standing to pursue injunctive relief, because otherwise no party could seek to enjoin the use of misleading advertisements or labels.[10] In other words, only those who have been deceived in the first place would know to seek injunctive relief. The district court adopted this reasoning and concluded that the past purchasers of Barilla specialty pastas could seek injunctive relief.[11]

With respect to class certification, the district court reasoned that, while "the class is technically defined by the past rather than the future activity of its members, it is not feasible to define a class based on consumers' prospective future purchases."[12] The district court reasoned that a group of past purchasers "would seem to be more likely" to purchase the products in the future than would be any other ascertainable class of persons. And even if a past purchaser knows a product's advertising is defective, she would still suffer harm from purchasing that deceptive product in the future, according to the district court.

For these reasons, the district court overruled the objections and certified the proposed settlement class. The court granted final approval of the settlement based on its finding that the terms of the agreement were fair, reasonable, and adequate. The objector appealed the court's order granting final approval of the class settlement.

Decision

A Second Circuit panel vacated the district court's order approving the settlement and remanded for further proceedings.[13] The panel held that the putative class of pasta purchasers here, and past purchasers of products in general, are not entitled to class certification under Rule 23(b)(2) because not all class members' injuries are remediable by prospective injunctive relief.[14]

To start, the panel examined the general Article III standing requirements for plaintiffs seeking injunctive relief. Such prospective relief is only proper when plaintiffs show "a likelihood that [they] will be injured in the future."[15] This threat of future harm must be "actual and imminent."[16] Mere allegations of past injury, or "conjectural or hypothetical" prospective injury, are insufficient to show standing.[17] Therefore, in order to show that "a single injunction or declaratory judgment would provide relief to each member of the class" in accordance with Rule 23(b)(2),[18] plaintiffs needed to show "each of the pasta purchasers [were] likely to be harmed by Barilla in the imminent future absent

[8] *Id.*

[9] *Id.* at 26.

[10] *Id.* at 25 (collecting cases).

[11] *Id.* (citing, *e.g.*, *In re Amla Litig.*, 282 F. Supp. 3d 751, 769 (S.D.N.Y. 2017)).

[12] *Id.* at 26.

[13] *Berni v. Barilla S.p.A.*, 964 F.3d 141 (2d Cir. 2020).

[14] *Id.* at 147.

[15] *Id.* at 147 (quoting *Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998)).

[16] *Id.* (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)).

[17] *Id.*

[18] *Id.* at 146 (quoting *Wal-Mart*, 564 U.S. at 360).

injunctive relief."[19] According to the panel, plaintiffs could not do so.

The panel discussed two general reasons why past purchasers of a product are unlikely to face an imminent threat of future harm sufficient to warrant injunctive relief. First, past purchasers do not necessarily have an ongoing relationship with the manufacturer of a product, and once they realize they have been deceived, they are unlikely to purchase the same product again. Second, even if past purchasers buy the same product again, they would likely not suffer a new harm, because they can account for the alleged deception when making future purchasing decisions—*e.g.,* the past purchasers no longer would "be under the illusion" created by the allegedly misleading packaging.[20]

The panel acknowledged that some district courts in the Second Circuit have reached the opposite conclusion. Those courts expressed concern about the availability of injunctive relief for past purchasers, as consumers could only seek to enjoin deceptive conduct upon gaining awareness of that conduct, but by that point, would likely not wish to purchase the product at issue again, and would therefore not face an imminent threat of future injury. In order to avoid this "Catch-22," these courts have, according to the panel, "attempted to carve out an exception to the strictures of our law on injunctions" by certifying classes under Rule 23(b)(2) when an injunction would not provide relief for each class member.[21] But such a carve-out, even if "commendable" in its policy objectives, directly conflicts with Article III and Rule 23(b)(2).[22]

Thoughts & Takeaways

Berni is notable because it resolves a split within the Second Circuit as to the availability of class actions under Rule 23(b)(2) in the Second Circuit in claims alleging deceptive consumer products.

Berni also reflects a less forgiving approach to Article III standing requirements than a recent opinion by the Ninth Circuit in *Davidson v. Kimberly-Clark Corp.*, which considered whether a past purchaser of "flushable" sanitary wipes could sue for injunctive relief that would require the manufacturer to stop claiming its wipes were flushable.[23] The Ninth Circuit panel reversed the district court's dismissal of the plaintiff's injunctive relief claims. The court reasoned that previously-deceived consumers might face imminent future harm, and thus might have standing to seek an injunction, if they plausibly allege that: (1) they will be unable to confidently rely on future representations and therefore will not purchase the product again although they would like to; or (2) they might purchase the product again in the future under the incorrect assumption that the product has been improved.[24] The Ninth Circuit panel recognized that other circuits have held that a past purchaser lacks standing to seek injunctive relief, but the panel found it significant that the plaintiffs in those cases, unlike the plaintiff in *Davidson*, did not "sufficiently allege their intention to repurchase the product at issue."[25]

Davidson and *Berni* are in theory reconcilable in that *Davidson* concerned dismissal of an individual plaintiff's claim for failure to state a claim, whereas *Berni* concerned certification of a Rule 23(b)(2) settlement class. The court in *Berni* acknowledged

[19] *Id.* at 147.

[20] *Id.* at 148.

[21] *Id.* at 148-49.

[22] *Id.*

[23] 889 F.3d 956 (9th Cir. 2018).

[24] *Id.* at 969-70.

[25] *Id.* at 969 n.5 (citing *Conrad v. Boiron, Inc.*, 869 F.3d 536 (7th Cir. 2017); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016); *McNair v. Synapse Grp. Inc.*, 672 F.3d 213 (3d Cir. 2012)).

(albeit skeptically) that there might be individual plaintiffs who could sustain standing for injunctive relief, but it rejected class certification because there will be many more class members who could not and for whom the proposed injunctive relief would be meaningless and ineffectual.[26] Nonetheless, *Berni* is likely to make it more difficult for individual past purchasers to sustain claims for individual injunctive relief in the Second Circuit. In fact, drawing largely from the panel's reasoning in *Berni*, one district court has already held that past purchasers could not seek injunctive relief—either for themselves or on behalf of a class—because plaintiffs alleged only that they would purchase the same products in the future if the misleading labeling were changed.[27] Accordingly, the district court concluded that "there is no likelihood" the plaintiffs would be harmed in the future by "the *current* allegedly misleading labeling."[28]

At bottom, *Berni* and *Davidson* appear to reflect different conceptions about the role of injunctive relief in relation to a consumer deception claim. *Berni* was animated by the notion that "past purchasers are not bound to purchase a product again" and, in that respect "[p]ast purchasers do not have the sort of perpetual relationship with the producer of a consumer good that is typical of plaintiffs and defendants in Rule 23(b)(2) class actions."[29] In contrast, the Ninth Circuit seems to view the consumer marketplace as a form of perpetual relationship in which an individual consumer (in addition to state consumer protection agencies) may claim a right not only to damages for past deception, but to bind the seller to offer the product on specified terms in the future. These conflicting conceptions may eventually require resolution by the Supreme Court.

Read the opinion here.

Decision in *In re Allstate Corporation Securities Litigation* (Seventh Circuit)

Key Issues

(1) Whether a district court should consider evidence of price impact at the class certification stage of a securities fraud case, and (2) Whether the applicable statute of limitations barred the addition of a new class representative.

Background

In 2013, Allstate announced that it was "softening" underwriting standards as part of a growth strategy to attract new customers.[30] Allstate also acknowledged that this new policy might attract riskier customers who would file more auto claims, but Allstate's CEO said that the company was aware of this potential and would monitor this and adjust its business practices accordingly.[31] Two years later, in August 2015, Allstate announced that it was "tightening some of [its] underwriting parameters" after it had experienced higher claims rates, due at least in part to this growth strategy.[32] Immediately after this announcement, Allstate's stock price dropped by more than ten percent.[33]

Two plaintiff investors then brought a putative securities fraud class action in the Northern District

[26] *Berni*, 964 F.3d at 147-48.

[27] *Kennedy v. Mondelēz Glob. LLC*, No. 19-CV-302-ENV-SJB, 2020 WL 4006197, at *3-5 (E.D.N.Y. July 10, 2020).

[28] *Id.* at *5 (emphasis added).

[29] *Berni*, 964 F.3d at 147. The panel contrasted such consumers with civil rights claimants who are presumed to have more perpetual relations with the defendants and are more prototypical Rule 23(b)(2) plaintiffs. *See id.* at 147 n.29 (citing *Wal-Mart*, 564 U.S. at 361).

[30] *In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 601 (7th Cir. 2020).

[31] *Id.*

[32] *Id.*

[33] *Id.*

of Illinois, alleging that Allstate violated Section 10(b) of the Exchange Act and Rule 10b-5. Plaintiffs alleged that Allstate had first failed to disclose a significant increase in claim frequency, and later, when it was clear to the market that claim frequency *had* increased, that Allstate mischaracterized the claim spike by falsely attributing it to uncontrollable events (*e.g.*, increased precipitation and miles driven by claimants), rather than to its previously announced growth strategy.[34] In response, Allstate argued that increased claims are a natural and well-known byproduct of relaxed underwriting standards, and that the market therefore was aware of and understood the risks of its growth strategy when Allstate transparently announced that strategy in 2013.[35]

Plaintiffs moved for class certification, and also sought leave to amend their complaint to add a new class representative, both of which were granted by the district court.[36]

To establish Rule 23(b)(3)'s predominance requirement with respect to class-wide reliance upon the alleged misrepresentations, plaintiffs invoked the "fraud-on-the market" presumption of reliance established in *Basic Inc. v. Levinson*.[37] In opposing class certification, Allstate claimed that the *Basic* presumption should not apply because the market knew about Allstate's growth strategy, which led to the increased claims frequency, and that there was a lack of price impact.[38] Allstate had submitted an expert report in support of its argument that there was no price impact.[39] The district court admitted the expert report but declined to engage with this evidence, concluding that the price impact issue was tied too closely to the merits and should not be decided on class certification.[40] The district court certified the plaintiff class.[41] Allstate appealed to the Seventh Circuit.[42]

Decision

On July 16, 2020, a Seventh Circuit panel vacated the district court's class certification order and remanded with guidance to consider price impact evidence at the certification stage.[43] The panel also affirmed the addition of a new class representative.[44]

First, the panel addressed the price impact issue through the lens of the recent *Halliburton/Amgen* trilogy of cases. In *Halliburton I*, the Supreme Court held that securities fraud plaintiffs need not prove loss causation at the class certification stage, and in *Amgen*, the Supreme Court held that the defense was not entitled to litigate materiality at the class certification stage.[45] However, the *Basic* presumption is nonetheless rebuttable at the class certification stage by "any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price."[46] Accordingly, in *Halliburton II*, the Supreme Court stated that defendants can offer evidence of a lack

[34] *Id.*

[35] *Id.* at 601-02.

[36] *Id.* at 601-02, 614.

[37] *Id.* at 602; *see also Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

[38] *In re Allstate Corp. Sec. Litig.*, No. 16 C 10510, 2019 WL 1512268, at *1-2 (N.D. Ill. Mar. 26, 2019).

[39] *In re Allstate*, 966 F.3d. at 600.

[40] *Id.*

[41] *Id.* at 600, 602.

[42] *Id.*

[43] *Id.* at 609-14.

[44] *Id.* at 616.

[45] *Id.* at 606-07; *see also Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 568 U.S. 455, 459 (2013); *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 813 (2011) ("*Halliburton I*").

[46] *In re Allstate*, 966 F.3d. at 605 (quoting *Basic*, 485 U.S. at 248).

of price impact at the class certification stage, to show that the *Basic* presumption does not apply.[47] To do so, defendants can introduce evidence that demonstrates that the market knew about the allegedly concealed information or evidence that such information otherwise entered the market.[48] Reading *Halliburton I*, *Amgen*, and *Halliburton II* together, the Seventh Circuit panel concluded that "[a] district court deciding whether the *Basic* presumption applies must consciously avoid deciding materiality and loss causation" but at the same time "must be willing to consider evidence offered by the defense to show that the alleged misrepresentations did not actually affect the price of the securities," even if that evidence may overlap with the merits issues of materiality and loss causation.[49] The panel therefore vacated the class certification decision and remanded the case to the Northern District of Illinois for further consideration of evidence relevant to price impact.[50]

The panel also issued guidance for remand. The court advised that because the district court effectively held that plaintiffs had made at least a *prima facie* showing sufficient to invoke the *Basic* presumption, "the burdens of production and persuasion" will shift to Allstate to rebut the *Basic* presumption.[51] The panel instructed the district court to consider Allstate's proffered economic expert evidence—which claimed that (i) there was no "statistically significant" increase in the stock price following any of the alleged misrepresentations, and (ii) that the alleged misrepresentations could not have impacted the stock price because Allstate had disclosed its growth strategy to the public—along with any evidence supplied by plaintiffs through rebuttal.[52] Acknowledging some skepticism about the strength and pertinence of Allstate's evidence, the panel emphasized that "the question at class certification is not the truthfulness or materiality of any of Allstate's representations . . . but whether they are susceptible of common proof, and the level of specificity of the information the market would have understood the price of Allstate's common stock to transmit."[53]

Second, the panel turned to the issue of adding a new class representative. Allstate argued that under the Supreme Court's reasoning in *China Agritech, Inc. v. Resh*[54] and *American Pipe & Construction Co. v. Utah*,[55] the statute of limitations is tolled at the filing of the class action complaint only to allow unnamed class members to join the action individually or to later file individual claims if the class fails—not to allow for the tolling of class claims.[56] The panel disagreed with Allstate's position, finding that although *China Agritech* bars successive attempts to file entirely new class actions, it did not prohibit the addition or substitution of a new class representative within the original class action.[57] According to the panel, *American Pipe* established that "the timely filing of a class action tolls the applicable statutes of limitations for all persons within the scope of the class alleged in the complaint"—including for new class representatives later added to the action—and the Supreme Court's holding in *China Agritech*

[47] *See id.* at 607-09; *see also Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 283-84 (2014) ("*Halliburton II*").

[48] *In re Allstate*, 966 F.3d. at 607-09.

[49] *Id.* at 608.

[50] *Id.* at 609.

[51] *Id.* at 610-11.

[52] *Id.*

[53] *Id.* at 614.

[54] 138 S. Ct. 1800 (2018).

[55] 414 U.S. 538 (1974).

[56] *In re Allstate*, 966 F.3d. at 614-15.

[57] *Id.* at 615.

did not alter that.[58] The panel characterized the addition of the new class representative as a "routine application of Rule 15 [which generally provides for amending and supplementing pleadings] and an essential step in managing a class action."[59] The court further stated that the addition of a new class representative would not prejudice Allstate because it already knew it was facing this class action before the end of the statute of limitations period, and that to prohibit this addition would instead "undermine [*American Pipe*'s] goals of efficiency and economy" in class actions.[60] The panel thus affirmed the district court's addition of a new class representative.[61]

Thoughts & Takeaways

Although the Seventh Circuit panel held that district courts must evaluate price impact evidence at the class certification stage, it agreed with the Second Circuit that once a plaintiff makes a *prima facie* showing sufficient to invoke the *Basic* presumption, a defendant seeking to rebut the presumption has the burden of persuasion by a preponderance of the evidence, and not merely the burden of production.[62] The panel also highlighted that the "crucial challenge" for the district court in applying this decision will be "to decide only the issues the Supreme Court has said should be decided for class certification, while resisting the temptation to draw what may be obvious inferences for the closely related issues that must be left for the merits."[63]

The decision also makes clear that the Seventh Circuit will permit additions and substitutions to the pool of class representatives, considering such changes to merely "rearrange the seating chart within a single, ongoing action," and thus "amount[] to an ordinary pleading amendment" governed by Rule 15.[64]

Read the opinion here.

Federal District Courts

Order Granting Class Certification in *Toomey v. Arizona* (D. Ariz.)

Key Issue

Whether plaintiff satisfied Rule 23(a)'s numerosity requirement with his flawed approximation of class size.

Background

Plaintiff, Russell Toomey, is a professor at the University of Arizona and a transgendered man.[65] He receives health insurance from a self-funded healthcare plan provided by the State of Arizona.[66] That healthcare plan generally covers medically necessary care, but it excludes coverage for gender reassignment surgery.[67]

[58] *Id.*

[59] *Id.* at 614.

[60] *Id.* at 615.

[61] *Id.* at 616.

[62] *Id.* at 610-11; *see also Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 955 F.3d 254 (2d Cir. 2020).

[63] *In re Allstate*, 966 F.3d. at 609.

[64] *Id.* at 616.

[65] *Toomey v. Arizona*, No. 4:19-cv-00035-RM-LAB, 2020 WL 2465707, at *1 (D. Ariz. May 12, 2020) ("R. & R.").

[66] *Id.*

[67] *Id.*

Mr. Toomey's treating physicians recommended that he receive a hysterectomy as a medically necessary treatment, but his healthcare plan denied him coverage for the procedure.[68] He then filed suit in January 2019 against the university's board and the State of Arizona, alleging that the healthcare plan's exclusion of coverage for gender reassignment surgery constitutes sex discrimination under Title VII of the Civil Rights Act of 1964 and violates the Equal Protection Clause of the Fourteenth Amendment.[69]

Mr. Toomey moved to certify two classes, one for each claim:

— For the Title VII claim, he proposed a class comprised of "[c]urrent and future employees of the Arizona Board of Regents who are or will be enrolled in the self-funded Plan controlled by the Arizona Department of Administration, and who have or will have medical claims for transition[-] related surgical care."[70]

— For the Equal Protection claim, he proposed a class comprised of "[c]urrent and future individuals (including Arizona State employees and their dependents), who are or will be enrolled in the self-funded Plan controlled by the Arizona Department of Administration, and who have or will have medical claims for transition-related surgical care."[71]

Lacking direct data for the size of the putative classes, Mr. Toomey argued that the classes satisfied Rule 23(a)'s numerosity requirement by extrapolating from demographic studies. First, he estimated that approximately 221 employees of Arizona's public universities and 854 individuals who receive health insurance from the State's self-funded healthcare plan identify as transgender by applying statistics from a study concluding that approximately 0.62% of Arizonans identify as transgender to the total number of employees and covered individuals.[72] Based on other studies, Mr. Toomey then estimated that 82% of individuals who identify as transgender either have had or want to have gender confirming surgery, and that the size of his Title VII and Equal Protection classes was approximately 181 and 700 individuals, respectively.[73]

The State opposed Mr. Toomey's motion in April, arguing primarily that he had failed to meet Rule 23(a)'s numerosity requirement.[74] Alternatively, the State asked the court to refuse to certify the class as a matter of discretion because the relief sought would produce the same result regardless of whether the case was brought by an individual or as a class action.[75]

Decision

A magistrate judge recommended that Mr. Toomey's motion for class certification should be granted, and the district court agreed—issuing its order adopting the Report and Recommendation on the same day that the Supreme Court held that Title VII covers sexual orientation and gender identity.[76]

At the outset, the magistrate judge cited two key governing legal principles: (1) a class of 40 or more members generally satisfies Rule 23(a)'s

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at *2.

[73] *Id.*

[74] *Id.* at *3.

[75] *Id.* at *4 (citing *James v. Ball*, 613 F.2d 180 (9th Cir. 1979)).

[76] *Toomey v. Arizona*, No. 4:19-cv-00035-RM-LAB, 2020 WL 3197647 (D. Ariz. June 15, 2020); *see also Bostock v. Clayton Cnty*, 140 S. Ct. 1731 (2020).

numerosity requirement;[77] and (2) at the class certification stage, it is enough if the court has "material sufficient to form a reasonable judgment on each Rule 23(a) requirement," which need not be admissible at trial to be considered.[78]

While the court found that Mr. Toomey's efforts at approximating the size of his proposed classes were "generally reasonable," it identified a flaw in his methodology.[79] Specifically, the court found that Mr. Toomey had not estimated how many individuals who identify as transgender have had or will have gender confirming surgery *while being covered by the State healthcare plan*.[80] But the flaw was not fatal to his class certification motion. The court concluded that, even if Mr. Toomey was "overestimating the size of his class by a factor of four," he would still meet Rule 23(a)'s numerosity requirement.[81]

The court also rejected the State's alternative argument. In particular, the court noted that certification was appropriate to prevent the case from becoming moot should Mr. Toomey's medical or employment situation change and because a final class judgment would be more easily enforceable by others.[82]

Thoughts & Takeaways

Though this case is relatively simpler than typical class action cases—with only one of Rule 23(a)'s prerequisites disputed—it raises larger issues about the type of evidence that will satisfy the numerosity requirement, as well as the court's discretion to refuse to certify a class that otherwise meets all of Rule 23's requirements.

Numerosity is not typically a disputed issue in many class action cases. Rule 23(a) merely requires that the class be sufficiently numerous that joinder is impracticable.[83] While courts hesitate to give a "magic number," the general standard in multiple circuits is 40 putative class members.[84] But the key to numerosity may lie in more than numbers alone because many circuits analyze other factors, including the geographic dispersion of class members, the ease of identifying them, and the ability of claimants to bring individual suits.[85] In some cases, courts have concluded on the basis of

[77] R. & R. at *2 (citing *Perez v. First Am. Title Ins. Co.*, No. CV-08-1184-PHX-DGC, 2009 WL 2486003, at *2 (D. Ariz. 2009)).

[78] *Id.* (citing *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1004-05 (9th Cir. 2018)).

[79] *Id.*

[80] *Id.* at *3.

[81] *Id.*

[82] *Id.* at *5.

[83] Fed. R. Civ. P. 23(a)(1).

[84] *See, e.g., Pa. Pub. Sch. Emps. Ret. Sys. v. Morgan Stanley & Co.*, 772 F.3d 111, 120 (2d Cir. 2014); *Mielo v. Steak 'n Shake Operations, Inc.*, 897 F.3d 467, 486 (3d Cir. 2018); *Orr v. Shicker*, 953 F.3d 490, 498 (7th Cir. 2020).

[85] *See, e.g., Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 131-32 (1st Cir. 1985) (assessing numerosity based on the facts and circumstances of each case, such as geographic dispersion and ease of identifying class members); *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993) (identifying multiple relevant factors in the numerosity analysis, including "judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members" (citations omitted)); *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 252-54 (3d Cir. 2016) (factors relevant to a numerosity analysis include "judicial economy, the claimants' inability and motivation to litigate as joined plaintiffs, the financial resources of class members, the geographic dispersion of class members, the ability to identify future claimants, and whether the claims are for injunctive relief or for damages" (citation omitted)); *Ibe v. Jones*, 836 F.3d 516, 528 (5th Cir. 2016) (noting other factors, aside from class size, that may be relevant to the numerosity question, such as "geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim" (citation omitted)); *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986) (considering factors such as "size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined and their geographic dispersion" when assessing practicability of joinder for purposes of meeting the numerosity requirement (citation omitted)); *see also Baltimore v. Laborers' Int'l Union of N. Am.*, No. 93-1810, 1995 WL 578084, at *1 (4th Cir. Oct. 2, 1995) (citing *Kilgo*'s factors for assessing numerosity).

these factors that a class of fewer than 40 members satisfies the numerosity requirement,[86] and that a class of more than 40 does not.[87] Thus, size matters—but it is not *all* that matters—to assessing numerosity.

Perhaps the starkest difference between courts' standards for assessing numerosity, however, is whether inadmissible evidence suffices to demonstrate it. In some circuits, including the Ninth, admissible evidence is not required at the class certification stage;[88] in other circuits, it is.[89] The Supreme Court has not yet considered the issue. Until it does, class certification can in some circuits be granted based on inadmissible evidence. And yet, there is little logic behind allowing a class to be certified based on inadmissible evidence when class actions rarely go to trial and plaintiff—in all likelihood—will never have to present admissible evidence. This may be why the magistrate judge in this case—though not *required* to do so under governing Ninth Circuit law—evaluated Mr. Toomey's expert evidence and found that it was both based on sound methodology and reliable.[90]

The final takeaway from this case concerns the State's alternative argument that the court may, as a matter of discretion, refuse to certify a class that meets all of Rule 23's requirements where there is simply no need for the case to proceed as a class action. The Ninth Circuit case on which the State relied, *James v. Ball*, concluded that the class action device was superfluous where a plaintiff challenges the constitutionality of a statute, because the court can decide the constitutional question—and strike the statute if appropriate—whether or not the case proceeds as a class action. Other circuits have followed a similar approach, upholding trial courts' refusals to certify class actions where relief awarded to the individual plaintiff would similarly benefit all putative class members.[91] These cases may be a useful tool for class action defendants to remind courts of the discretion they wield in certifying class actions—and encourage them to give teeth to the principle that class actions are the exception to the rule that our courts provide a forum for *individuals* seeking relief for particularized claims.

Read the magistrate judge's Report and Recommendation here, and the district court's decision adopting it here.

[86] *See, e.g., Kilgo*, 789 F.2d at 878 (holding that the district court did not abuse its discretion in concluding that a class of 31 members satisfied the numerosity requirement); *Tompkins v. Farmers Ins. Exch.*, No. 5:14-cv-3737, 2017 WL 4284114, at *4 (E.D. Pa. Sept. 27, 2017) (finding the numerosity requirement was met for each subclass, even though three of the six proposed subclasses contained fewer than 40 members and one subclass had only 12 members); *Bridgeview Health Care Ctr. v. Clark*, No. 09 C 5601, 2015 WL 1598115, at *9 (N.D. Ill. Apr. 8, 2015) (asserting that there is "ample authority in this district for maintaining class actions" with fewer than 40 members (citing *McCabe v. Crawford & Co.*, 210 F.R.D. 631, 644 (N.D. Ill. 2002) and *Riordan v. Smith Barney*, 113 F.R.D. 60, 62 (N.D. Ill. 1986))); *see also In re IndyMac Mortg.-Backed Sec. Litig.*, 286 F.R.D. 226, 232-33 (S.D.N.Y. 2012) (finding the numerosity requirement satisfied even though a 39-member subclass and a 22-member subclass existed in the overall class of 714 members).

[87] *See, e.g., Pa. Pub. Sch. Emps. Ret. Sys.*, 772 F.3d at 120 (noting that, although numerosity is presumed for classes larger than 40 members, the district court did not abuse its discretion in concluding that a class of more than 100 members did not satisfy numerosity because joinder was practicable); *see also Ibe*, 836 F.3d at 528 (finding no error in the district court's determination that a subclass of 42 members did not satisfy numerosity); *Andrews*, 780 F.2d at 131-32 (concluding that a subclass of 49 members did not satisfy numerosity because its members "came from the same small geographic area" and that joinder of all members was therefore practicable).

[88] *See Sali*, 909 F.3d at 1004; *see also In re Zurn Pex*, 644 F.3d 604, 612-13 (8th Cir. 2011) (describing the limited inquiry into the admissibility of evidence, including expert evidence, at the class certification stage).

[89] The Fifth Circuit requires admissible evidence at the class certification stage. *See Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005). The Third, Seventh, and Eleventh Circuits have required that expert evidence be admissible. *See In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015); *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 813-14 (7th Cir. 2012); *Sher v. Raytheon Co.*, 419 F. App'x 887, 890-91 (11th Cir. 2011).

[90] R. & R. at *2-3.

[91] *See Johnson v. City of Opelousas*, 658 F.2d 1065, 1070 n.5 (5th Cir. 1981) (collecting cases).

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