NOTES

CLASS PROBLEM!: WHY THE INCONSISTENT APPLICATION OF RULE 23'S CLASS CERTIFICATION REQUIREMENTS DURING OVERBREADTH ANALYSIS IS A THREAT TO LITIGANT CERTAINTY

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Rule 23 of the Federal Rules of Civil Procedure is home to the class action device. It is well-documented that this rule significantly impacts our legal system. As a result, the need for its effective utilization has been apparent since its introduction. Despite this, federal courts have inconsistently applied the rule during their analyses of overbroad class definitions at the class certification stage. Consequently, parties involved in such litigation have been exposed to unnecessary costs and the potential for forum shopping.

Nonetheless, this judicial inconsistency has gone largely unrecognized because it does not implicate the results of class certification. Hence, courts here must first recognize the general need for uniformity before a precise standard for overbreadth analysis may be chosen. Only then, this Note argues, may the aforementioned detrimental consequences be avoided.

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INTRODUCTION

On April 20, 2010, the Deepwater Horizon oil rig exploded in the Gulf of Mexico.[1] This catastrophe caused deaths, injuries, and a massive discharge of oil into the Gulf Coast.[2] BP, which leased the oil rig at the time, faced potential legal claims from numerous victims who were desperate for immediate relief.[3] Facing such obvious and dramatic harm, the victims could

1. *See In re* Deepwater Horizon, 739 F.3d 790, 795–96 (5th Cir. 2014).
2. *See id.*
3. *See, e.g.*, Rachel Guillory, *Remembering the Victims and Survivors of Deepwater Horizon*, OCEAN CONSERVANCY (Oct. 1, 2016), https://oceanconservancy.org/blog/2016/10/

have filed a motion in federal court to certify a class action suit against BP for the company's negligence with regard to this incident.[4]

However, had they done so, a district court may have then denied their motion on the grounds that the proposed class definition included a substantial number of individuals without legitimate causes of action.[5] Specifically, a court may have felt that sufficient commonalities did not exist among the class members or that it could not identify the injured class members from the class definition.[6] Nevertheless, the plaintiffs would have been able to successfully appeal the decision if this district court had demonstrated imprecise analysis in its decision.

Ultimately, if many illegitimate claimants were indeed included in the class definition, a district court's denial of class certification may very well have been the just result. The victims would have been able to bring individual claims against BP and the courts would have been better able to deal with their individualized suits.[7] Still, if the district court had erred in this analysis, the plaintiffs would have been extensively delayed in obtaining their relief if they decided to appeal the decision.[8] Under this scenario, such an unnecessary delay would have been avoided if the district court had initially applied appropriate scrutiny.

While courts must make correct decisions, this example illustrates the need for courts to, at least, make *consistent* decisions if legal disputes are to be effectively managed.[9] Justice John Marshall Harlan, for one, particularly commanded that the implementation of a clear set of rules enables individuals to "settle their differences in an orderly, predictable manner."[10] He added that "social organization and cohesion" are unattainable without such a system.[11] Hence, as he framed it, the key to a legal system's effectiveness is the uniform application of its rules.[12] Consequently, the 1938 enactment of the Federal Rules of Civil Procedure (FRCP) and their subsequent adoption

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01/remembering-the-victims-and-survivors-of-deepwater-horizon/ [https://perma.cc/2RYD-KAFM].

4. The following hypothetical is based on procedural events that occurred in *Byrd v. Aaron's, Inc.*, No. 11-101, 2017 WL 4326106 (W.D. Pa. Aug. 4, 2017), *adopted by* 2017 WL 4269715 (W.D. Pa. Sept. 26, 2017).

5. Motions for class certification will be denied where proposed class definitions include a substantial number of uninjured members. *See infra* text accompanying notes 202–09.

6. See, for example, *infra* Part II.A.1.a for an analogous instance of improper class certification analysis.

7. *See infra* text accompanying notes 205–08.

8. *See generally* Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507, 511 (1987).

9. *See generally* Aleardo Zanghellini, *The Foundations of the Rule of Law*, 28 YALE J.L. & HUMAN. 213 (2016).

10. Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

11. *Id.*

12. *See* Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 86–87 (1997).

demonstrates our society's enthusiasm for this societal model of consistent and uniform application of rules.[13]

Rule 23's class certification requirements, as alluded to above, encapsulate the importance of consistently applied FRCP.[14] Specifically, the Rule is home to a powerful procedural tool known as the class action.[15] As evidenced, the class action device serves as a method of representative litigation that enables people to join together to adjudicate their similar claims.[16] In turn, this consolidation promotes efficiency by preserving scarce judicial resources and fairness by ensuring consistent legal determinations.[17] However, such efficient and fair outcomes only result where class members sufficiently share common interests.[18] The Rule calls this requirement "predominance."[19] Likewise, class definitions must refer to objective criteria for parties to discern who will be bound by the potential judgments.[20] Courts have called this requirement "ascertainability."[21] The consistent application of the Rule's predominance and ascertainability requirements helps ensure its effectiveness.[22]

Alarmingly, despite the Rule's seeming clarity, courts have not uniformly utilized these requirements during analysis of overbroad class definitions, which has become a major roadblock for plaintiffs seeking class certification.[23] Overbroad class definitions contain too many individuals with illegitimate claims for liability.[24] While courts consistently deny certification where substantial overbreadth exists, some do so by way of predominance analysis[25] while others do so through an analysis of

13. *See Federal Rules of Civil Procedure Establish Uniformity*, FED. JUD. CTR., https://www.fjc.gov/history/timeline/federal-rules-civil-procedure-establish-uniformity [https://perma.cc/TXA5-6SNZ] (last visited Aug. 24, 2018).

14. *See* FED. R. CIV. P. 23(b)(3).

15. 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 1:1 (5th ed. 2011). This Note will focus on Rule 23(b)(3) plaintiff class actions.

16. *See* Daniel Luks, Note, *Ascertainability in the Third Circuit: Name That Class Member*, 82 FORDHAM L. REV. 2359, 2362 (2014).

17. *See generally id.*

18. *See generally* Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013).

19. *See* 2 RUBENSTEIN, *supra* note 15, § 4:47; Myriam Gilles, Note, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 311 (2010).

20. *See* 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 4:2 (14th ed. 2017).

21. *See* Gilles, *supra* note 19, at 312.

22. *See supra* text accompanying notes 18–19.

23. *Compare In re* Petrobras Sec., 862 F.3d 250, 257 (2d Cir. 2017), Webb v. Exxon Mobil Corp., 856 F.3d 1150, 1155 (8th Cir. 2017) (analyzing overbreadth under the predominance requirement), *and* Mazza v. Am. Honda Motor Co., 666 F.3d 581, 588 (9th Cir. 2012), *with* Brecher v. Argentina, 806 F.3d 22, 24–25 (2d Cir. 2015) (analyzing overbreadth under the ascertainability requirement), EQT Prod. Co. v. Adair, 764 F.3d 347, 359 (4th Cir. 2014), *and* Walewski v. ZeniMax Media, Inc., 502 F. App'x 857, 861 (11th Cir. 2012).

24. *See* Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 YALE L.J. 2354, 2383 (2015). Here, "illegitimate" means claimants with no injury and claimants that, while otherwise injured, do not have an injury contemplated by the scope of the proposed class definition.

25. *See, e.g.*, *Mazza*, 666 F.3d at 596; *see also* Circle Click Media LLC v. Regus Mgmt. Grp. LLC, No. 3:12-CV-04000-SC, 2015 WL 6638929, at *12 (N.D. Cal. Oct. 30, 2015).

ascertainability.[26] Irrespective of how this distinction may impact the substantive elements of class certification, the mere existence of inconsistency causes confusion for litigants.[27] Moreover, this same confusion results in unnecessary litigation costs and the potential for forum shopping.[28] Rule 23's significant impact on our legal system[29] and on the economy exacerbates such concerns.[30] Accordingly, this Note details a sparsely acknowledged judicial inconsistency issue that must be fixed to promote Rule 23's effectiveness.

Part I of this Note illustrates the background of the FRCP to show why their effectiveness depends on their consistent application. This Part then focuses on Rule 23 and the associated overbreadth issue to demonstrate how inconsistent analysis creates the potential for litigant uncertainty. Part II presents conflicting cases to show why overbreadth may be analyzed under either the predominance or ascertainability requirement. In doing so, Part II details the litigation issues that arise from this divergence and explains how exactly this ensuing inconsistency inevitably produces detrimental consequences for litigants. Finally, Part III explains that overbreadth should be consistently analyzed under the Rule's predominance requirement to promote analytic clarity.

I. RULE 23 AND THE NEED FOR JUDICIAL CONSISTENCY

The depths of this procedural landscape must be dissected to comprehend the importance of this analytic clarity issue. Part I.A describes the background of the FRCP and the general need for uniformity in civil procedure to contextualize the concerns associated with inconsistent overbreadth analysis. Next, Part I.B provides necessary context regarding Rule 23 and its class certification requirements. Finally, Part I.C discusses why and how the overbreadth issue presents problems at the class certification stage.

A. The FRCP Need to Be Consistently Applied

The FRCP, like any set of procedural rules, must be consistently applied in the courts for each rule to be effective.[31] This is because procedural rules aim to ensure predictable process[32] and certainty for litigants.[33] Hence, consistently applied procedural rules enable litigants to efficiently structure

26. *See, e.g.*, Carter v. PJS of Parma, Inc., No. 1:15 CV 1545, 2016 WL 3387597, at *2 (N.D. Ohio June 20, 2016); *see also* Diacakis v. Comcast Corp., No. C 11-3002 SBA, 2013 WL 1878921, at *4 (N.D. Cal. May 3, 2013).

27. *See* Shaw, *supra* note 24, at 2385.

28. *See infra* Part II.

29. *See* 1 RUBENSTEIN, *supra* note 15, § 1:16.

30. *See id.* § 1:17.

31. *See supra* text accompanying note 12.

32. *See generally* Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 780 (1995).

33. *See* Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 693 (2014).

their expectations of how courts will treat subsequent proceedings.[34] As a result, parties ideally do not need to learn multiple interpretations of the same rule.[35] This allows parties to save time, money, and effort.[36] Conversely, litigation costs can vary drastically where courts' applications of procedural rules diverge.[37] This can happen when a court indicates that a party incorrectly interpreted a procedural rule due to the party's reliance on inconsistent precedent[38]—for example, if the court has applied inconsistent overbreadth analysis during class certification.[39]

Likewise, consistently applied FRCP promote fairness by encouraging resolutions based solely upon the merits of claims.[40] Thus, when uniformly applied, the FRCP place desirable limits on forum shopping, which is the practice of seeking a litigation advantage by choosing a particular forum over another.[41] Forum shopping exposes similarly situated parties to varying litigation opportunities solely because of how the different jurisdictions or judges interpret their respective or common procedural rules.[42] This limits parties' opportunities to construct the same claims and defenses.[43] Of course, litigants should not be subjected to such arbitrary idiosyncrasies.[44] Simply, this phenomenon is detested because of a ubiquitous "inchoate sense" against litigation results and costs that turn solely on the choice of forum.[45]

Unsurprisingly, before the adoption of the FRCP, nonuniform procedural rules produced many problems for litigants.[46] In particular, efficiency and fairness issues ensued as the federal courts adhered to the procedural rules of their respective states.[47] This nonconformity wasted litigants' resources and fortified an unjustifiably complicated system of rules.[48] Lawyers who represented multistate corporations, for example, had difficulties practicing law due to persistent procedural inconsistencies.[49] Predictably, this discord

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34. *See id.* at 691.

35. *See id.* at 702.

36. *See id.*

37. For a discussion on whether state courts should follow the FRCP, see generally Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311 (2001).

38. *See* Meinders v. Emery Wilson Corp., No. 14-CV-596-SMY-SCW, 2016 WL 3402621, at *4 n.4 (S.D. Ill. June 21, 2016) (discussing how the defendant incorrectly analyzed the predominance and ascertainability requirements).

39. *See id*.

40. *See* Chemerinsky & Friedman, *supra* note 32, at 781.

41. *See id.* at 782.

42. *See* Markus Petsche, *What's Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of a Controversial Practice*, 45 INT'L LAW. 1005, 1027 (2011).

43. *See* Effron, *supra* note 33, at 693.

44. *See id.* at 691.

45. *See* Shrey Sharma, Note, *Do the Second Circuit's Legal Standards on Class Certification Incentivize Forum Shopping?: A Comparative Analysis of the Second Circuit's Class Certification Jurisprudence*, 85 FORDHAM L. REV. 877, 884 (2016).

46. *See* Subrin, *supra* note 12, at 100.

47. *See* Chemerinsky & Friedman, *supra* note 32, at 780.

48. Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2002 (1989).

49. *See id.*

led to the early twentieth-century enactment of the uniform system of procedural rules that govern civil proceedings in United States federal courts: the FRCP.[50]

Today, the FRCP aim for "the just, speedy, and inexpensive determination of every action."[51] Certainly, the importance of predicable application is heightened in the context of Rule 23.[52] Like other claim-determinative devices, the Rule's consistent application safeguards litigants' capacities to assert their claims and defenses.[53] Thus, risks of litigant confusion, unnecessary litigation costs, and the potential for forum shopping remain heightened when courts inconsistently apply the Rule's class certification requirements.[54] As referenced, these risks also mirror those that existed before the enactment of the FRCP.[55] The next section describes how Rule 23's impressive impact has intensified this need for judicial consistency.

B. The Background of Rule 23

Rule 23 exemplifies prototypical representative litigation:[56] the device ensures that sizable groups of people with common interests may enforce their legal rights.[57] The Rule consolidates claims so that class representatives litigate on behalf of absent members.[58] In turn, the parties, including the absent class members, are bound by the litigation.[59] The device's lure is evident as it prevents multiplicative actions that may result in inconsistent dispositions.[60]

However, the Rule does produce risks via its mode of vicarious representation.[61] Absent members, for example, may be inadequately represented where too many dissimilarities exist among proposed classes.[62] Equally troublesome is the potential for defendants to be adversely bound to claimants with feeble actions.[63] Therefore, Rule 23 can operate as an exception to the "maxim" of personal litigation only by virtue of its

50. *See* Subrin, *supra* note 12, at 80.
51. FED. R. CIV. P. 1.
52. *See* Effron, *supra* note 33, at 693.
53. *See id.* A claim-determinative rule either allows or disallows claims to move forward. Thus, the denial of class certification may be the "death knell" for plaintiffs' claims. *See* Erin L. Geller, Note, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 FORDHAM L. REV. 2769, 2773 (2013). For defendants, the grant of class certification may produce pressure to "settle nonmeritorious claims" to evade the potential for transactional costs. *See id.*
54. *See supra* text accompanying notes 27–28.
55. *See supra* note 49 and accompanying text (discussing the litigation problems that led to the creation of the FRCP).
56. *See* 1 RUBENSTEIN, *supra* note 15, § 1:1.
57. *See* Luks, *supra* note 16, at 2362.
58. *See* 1 RUBENSTEIN, *supra* note 15, § 1:1.
59. *See id.*
60. *See id.* § 1:15.
61. *See id.* § 1:1; *infra* text accompanying notes 139–42.
62. *See* 1 RUBENSTEIN, *supra* note 15, § 1:1.
63. *See supra* text accompanying note 53; *infra* Part I.C.

procedural safeguards.[64] Accordingly, the Rule's requirements compel consistency[65] to ensure its effectiveness—a point underscored by the drafters of the 1966 amendment.[66]

Rule 23's impressive impact on the courts[67] and on the economy[68] further highlights the importance of consistency. To elucidate this point, consider that class actions compose a significant portion of annual federal court filings,[69] that the device enables thousands of claims per year,[70] and that Rule 23 actions sweep across an array of subject matters.[71] Moreover, these claims may take years to complete[72] and involve numerous hours of motion practice and brief writing.[73] Thus, even though the number of certified class actions remains small due to the Rule's associated risks, Rule 23 suits result in billions of dollars being redistributed annually within the American economy.[74]

Indeed, large financial settlements and judgments have led to extraordinary transaction costs for litigants as well.[75] Plaintiffs' attorneys, for example, are usually paid on contingencies that may reach 25 to 35 percent of a class action's gross recovery.[76] This makes their time quite valuable.[77] And defendants' lawyers, who often represent corporations, may bill thousands of dollars per hour working on Rule 23 matters.[78] Thus, a Rule

64. *See* 1 RUBENSTEIN, *supra* note 15, § 1:1.

65. *See supra* text accompanying notes 61–64.

66. *See* FED. R. CIV. P. 23 advisory committee's note to 1966 amendment (explaining how the Rule previously did not "provide an adequate guide to the proper extent of judgments").

67. *See* Erin Coe, *Federal Courts See Huge Rise in Class Actions*, LAW360 (Apr. 16, 2008, 12:00 AM), https://www.law360.com/articles/53273 [https://perma.cc/467T-HLEL].

68. *See* 1 RUBENSTEIN, *supra* note 15, § 1:17.

69. *See id.* § 1:18.

70. *See* Coe, *supra* note 67.

71. *See* 1 RUBENSTEIN, *supra* note 15, § 1:18; *see also* Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 818 (2010) (explaining that Rule 23 actions involve claims ranging from securities fraud to civil rights).

72. *See* Fitzpatrick, *supra* note 71, at 820.

73. *See, e.g.*, Jason Grant, *Judge Slashes Fees, Offers Primer on Billing, in Cookbook Case*, N.Y.L.J. (Sept. 12, 2017, 4:02 PM), http://www.newyorklawjournal.com/id=1202797828979/Judge-Slashes-Fees-Offers-Primer-on-Billing-in-Cookbook-Case [https://perma.cc/MK7D-TPP8]; *Will You Take My Case for a Flat Fee?*, LAW OFFICES JOHN L. DODD & ASSOCIATES, http://www.appellate-law.com/Questions/FlatContinFee.htm [https://perma.cc/4L9M-3N6N] (last visited Aug. 24, 2018) (noting how an appeal may take over 120 billable hours to complete).

74. *See* 1 RUBENSTEIN, *supra* note 15, § 1:17 (noting that in recent years class action recovery has totaled over $33 billion, much of which was through settlements).

75. *See id.* § 1:18; Fitzpatrick, *supra* note 71, at 814 (demonstrating that such plaintiffs' attorneys annually received $5 billion from 2006 through 2009); Coe, *supra* note 67 (noting how corporate law firm partners may bill over $1000 per hour); Doug Greene, *The Root Cause of Skyrocketing Class Action Defense Costs*, LANE POWELL (Sept. 9, 2014), http://www.dandodiscourse.com/2014/09/09/the-root-cause-of-skyrocketing-securities-class-action-defense-costs/ [https://perma.cc/555Y-MADS] (noting how a corporate defense law firm could collect over $20 million in fees during a Rule 23 action).

76. *See* 1 RUBENSTEIN, *supra* note 15, § 1:18.

77. *See id.*

78. *See, e.g.*, Greene, *supra* note 75.

23 suit may be simultaneously quite lucrative or expensive depending on the party.[79] Naturally, however, these costs dramatically increase when judicial inconsistencies cause litigant uncertainty.[80]

The Rule's significant impact has even led the U.S. Supreme Court to strive for increased analytic clarity.[81] Nevertheless, such uniformity has been elusive when courts have analyzed overbreadth at the class certification stage.[82] So, Rule 23's class certification requirements must be broken down individually to better gauge this issue and to further comprehend how much confusion arises.

1. The Rule 23 Class Certification Requirements

The existence of broad judicial discretion at the class certification stage furthers the risk of inconsistent analysis.[83] And yet, such discretion is necessary due to Rule 23's broad scope.[84] As a result, it is vital to fully understand the class certification requirements[85] to determine how such discretion may be properly exercised.[86]

For courts to grant class certification, plaintiffs must satisfy all relevant Rule 23 requirements.[87] The first hurdle is Rule 23(a).[88] Specifically, Rule 23(a) requires (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy.[89] Once the plaintiff class meets the Rule 23(a) requirements, it must then fit into one of Rule 23(b)'s three subcategories.[90]

Certainly, the class action best serves its intended function when the consolidated claims would otherwise have been too numerous to be individually litigated or joined together.[91] Thus, Rule 23(a)(1) mandates a sufficiently numerous class.[92] The requirement, however, does not provide a clear formula or "magic number."[93] Nonetheless, proposed classes of fewer than twenty members ordinarily do not satisfy Rule 23(a)(1).[94]

Like Rule 23(a)(1), the Rule 23(a)(2) commonality requirement focuses on ensuring the protection of absent class members.[95] Rule 23(a)(2) requires

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79. *See supra* text accompanying note 78.
80. *See supra* text accompanying note 34.
81. *See generally* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).
82. *See infra* Part I.C.
83. *See generally* Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PA. L. REV. 1897 (2014).
84. *See id.* at 1947.
85. *See* Luks, *supra* note 16, at 2394.
86. *See* Wolff, *supra* note 83, at 1897.
87. *See* 3 RUBENSTEIN, *supra* note 15, § 7:1.
88. *See* Luks, *supra* note 16, at 2366.
89. *See* FED. R. CIV. P. 23(a).
90. *See* Luks, *supra* note 16, at 2366.
91. *See* 1 RUBENSTEIN, *supra* note 15, § 1:2.
92. *See* Luks, *supra* note 16, at 2366.
93. *See* Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 591 (3d Cir. 2012); 1 RUBENSTEIN, *supra* note 15, § 3:11.
94. *See* 1 RUBENSTEIN, *supra* note 15, § 3:11.
95. *See id.* § 1:2.

that a common question of law or fact exist among the class.[96] Hence, analysis of this requirement demands quantitative assessments of common versus individualized questions.[97] Justice Antonin Scalia excogitated this point in *Wal-Mart Stores, Inc. v. Dukes*.[98] To satisfy Rule 23(a)(2), he noted, claims "must depend upon a common contention of such a nature that it is capable of class wide resolution."[99] Thus, the commonality requirement is rarely contentious.[100]

Alternatively, the final two requirements under Rule 23(a)—typicality and adequacy—address essential qualifications for class representatives.[101] To satisfy Rule 23(a)(3), a representative's claims and defenses must be typical of those of the class.[102] This is needed so that the representative's interests align with the interests of those who he or she aims to litigate on behalf of.[103] Similarly, Rule 23(a)(4) requires that a class representative adequately represents the interests of his or her class.[104] This adequacy requirement legitimatizes Rule 23's binding effect in the absence of class members litigating individually.[105] Here, class representatives are mandated to pursue the class's interests.[106]

As stated, classes must fit into one of Rule 23(b)'s three subcategories once the Rule 23(a) prerequisites are satisfied.[107] Rule 23(b)(1), an infrequently invoked provision, deems classes appropriate where separate actions would likely produce inconsistent adjudications.[108] In turn, Rule 23(b)(2) creates a remedy in the form of injunctive relief.[109] Rule 23(b)(2) classes may be certified where "the party opposing the class has acted or refused to act on grounds that apply generally to the class."[110] Notably, due to these distinctive characteristics, Rule 23(b)(1) and 23(b)(2) actions contain mandatory classes[111] that absent members may not opt out of.[112] Alternatively, Rule 23(b)(3) actions are not mandatory and potential claimants may opt out.[113] This distinction in opt-out rights exists because individualized monetary relief—the remedy offered by Rule 23(b)(3)—

96. *See id.* § 3:18.
97. *See* 6 THOMAS SMITH & ELIZABETH WILLIAMS, CYCLOPEDIA OF FEDERAL PROCEDURE § 23:17 (3d ed. 2015).
98. 564 U.S. 338, 342 (2011).
99. *See id.* at 338, 350.
100. *See* 1 RUBENSTEIN, *supra* note 15, § 3:18.
101. *See id.* § 1:2.
102. *See id.* § 3:28.
103. *See id.*
104. *See id.* § 3:18.
105. *See id.* § 3:50.
106. *See id.*
107. *See id.* § 1.3.
108. *See* FED. R. CIV. P. 23(b)(1). This Note does not focus on Rule 23(b)(1).
109. *See* Luks, *supra* note 16, at 2367.
110. FED. R. CIV. P. 23(b)(2).
111. *See* 1 RUBENSTEIN, *supra* note 15, § 1:3.
112. *See id.*
113. *See id.*

produces the potential for claimants to be unjustly forced into such litigation.[114]

Alas, the need for an opt-out provision is just one example of the unique concerns associated with Rule 23(b)(3)'s remedy.[115] The overbreadth issue represents another.[116] Generally, this issue does not relate to Rule 23(b)(2) suits because the existence of uninjured claimants is largely irrelevant where class-wide injunctive relief is sought.[117] Only in Rule 23(b)(3) actions, where heightened class cohesion is required for certification, does the overbreadth problem truly manifest.[118] These concerns with respect to class cohesion for Rule 23(b)(3) class certification led to the addition of supplementary procedural protections[119] in the form of predominance and ascertainability.[120] Oddly, though, the predominance and ascertainability requirements often remain intertwined.[121]

2. The Predominance Requirement

Understanding the predominance requirement is essential to comprehending the problems associated with its inconsistent application during overbreadth analysis. To satisfy Rule 23(b)(3), common questions of law or fact must predominate over individualized inquiries such that the class action is superior to separate actions.[122] Thus, this predominance requirement demands qualitative analysis.[123] Common issues must not merely exist in a Rule 23(b)(3) class as is required by Rule 23(a)(2).[124] Rather, common issues must outweigh individualized issues.[125] Consequently, the commonality and predominance requirements may be analyzed congruently.[126]

The hallmark of this predominance question is whether a common form of liability exists among the proposed class members.[127] Indeed, the

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114. *See id.*
115. *See id.*
116. *See* 1 MCLAUGHLIN, *supra* note 20, § 4:2.
117. *See generally* Catherine M. Chiccine, *Ascertainability Not Required in 23(b)(2) Class Action, Says Court*, A.B.A. (Jan. 20, 2017), https://apps.americanbar.org/litigation/litigationnews/top_stories/012017-ascertainability-class-action.html [https://perma.cc/AR28-HYWY].
118. *See* Andrew Trask, *Countering Injunctive-Relief Classes: The Cohesiveness Requirement*, MCGUIREWOODS (Apr. 6, 2010), http://www.classactioncountermeasures.com/2010/04/articles/certification/countering-injunctive-relief-classes-the-cohesiveness-requirement/ [https://perma.cc/V8QM-AEAX].
119. *See* Geller, *supra* note 53, at 2774–75.
120. *See id.*
121. *See supra* text accompanying note 23.
122. *See* FED. R. CIV. P. 23(b)(3); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 607 n.10 (1997).
123. *See* 6 SMITH & WILLIAMS, *supra* note 97, § 23:17.
124. *See id.*
125. *See id.*
126. *See id.*
127. *See* Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1439 (2013) (noting that a common form of liability "generally" satisfies the predominance requirement).

requirement may be satisfied even where individualized damage calculations are necessary.[128] But no exact equation exists.[129] So, while some courts have held that damage variances may predominate over common liability issues,[130] others have held that variations in applicable law may outweigh relevant commonalities.[131]

To ease such tension, courts have applied a two-step predominance test.[132] First, the "characterization" step distinguishes common questions from individualized questions[133] by sorting the issues that are "susceptible to class-wide proof."[134] Second, these courts then loosely compare the relevant evidence to determine which issues predominate.[135] However, this test remains imperfect as it is conducted by judges exercising their own discretion.[136] And, as alluded to, because judges utilize discretion when analyzing class certification, fewer factors to analyze may actually produce more consistent results.[137]

In sum, predominant common issues effectively establish a class-wide right to recovery.[138] Take, for example, two potential suits brought by the female employees of a retail store.[139] These suits generally allege that the employer paid its male employees more than its female employees in similar positions. Suit one involves a proposed Rule 23(b)(3) class[140] in which the female employees seek damages from the employer to remedy their salary disparity. Suit two involves a proposed Rule 23(b)(2) class[141] that seeks injunctive relief to halt the employer's discriminatory practices.

In suit one, the class members must be similarly situated for the consolidation of their claims to be effective.[142] Otherwise, many class members may be granted unwarranted damages.[143] This occurrence would also potentially subject the defendant to unjust liability.[144] However, in suit two, major dissimilarities between the class members could prove irrelevant.[145] Here, due to the absence of individualized relief, a class-wide

128. *See id.*
129. *See* 6 SMITH & WILLIAMS, *supra* note 97, § 23:17.
130. *See, e.g.*, Ibe v. Jones, 836 F.3d 516, 521 (5th Cir. 2016); Corder v. Ford Motor Co., 283 F.R.D. 337, 342 (W.D. Ky. 2012).
131. *See* Johnson v. Nextel Commc'ns Inc., 780 F.3d 128, 140 (2d Cir. 2015).
132. *See, e.g.*, Wilkins v. Just Energy Grp., 308 F.R.D. 170, 185 (N.D. Ill. 2015).
133. *See* 2 RUBENSTEIN, *supra* note 15, § 4:50.
134. *See id.*
135. *See id.*
136. *See generally* Wolff, *supra* note 83, at 1940.
137. *See id.* at 1897, 1940.
138. *See* Morangelli v. Chemed Corp., 275 F.R.D. 99, 105 (E.D.N.Y. 2011).
139. This hypothetical is based on the facts from *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 348 (2011).
140. *See* FED. R. CIV. P. 23(b)(3).
141. *See id.* r. 23(b)(2).
142. *See supra* text accompanying note 122.
143. *See Wal-Mart Stores, Inc.*, 564 U.S. at 351.
144. *See* FED. R. CIV. P. 23(b)(3) advisory committee's note to 1966 amendment.
145. *See supra* text accompanying note 117.

injunction with respect to the employer's discrimination would likely not induce injustice.[146]

Accordingly, common questions must predominate in Rule 23(b)(3) classes to ensure the existence of similarly situated members.[147] The mere existence of a common fact, like employment at the same retail store, is insufficient to cure these associated risks.[148] Nevertheless, the satisfaction of the predominance requirement is useless where class members remain unascertainable.[149] Litigants must be able to identify the claimants from the class definition with certainty.[150] Precise class definitions based on reference to objective criteria bridge the gap between cohesive classes in theory and cohesive classes in reality.[151]

3. The Ascertainability Requirement

The ascertainability requirement is the leading alternative to predominance for framing overbreadth analysis at the Rule 23(b)(3) class certification stage.[152] However, ascertainability is not explicitly within Rule 23's class certification requirements.[153] Instead, it developed from the needs of both courts and litigants.[154] As for courts, they particularly require plaintiffs to satisfy the ascertainability requirement to secure their ability to identify the potential class members.[155] Naturally, courts only grant certification for objectively workable classes.[156]

For claimants, a need for the ascertainability requirement flowed from abovementioned opt-out provision.[157] Judge Richard Posner explained that the reason "for allowing opting out in [23(b)(3)] class action[s] is that even though one class member's claim may overlap [with] another's (common issues), it may be different in respects that makes [class members] want to bring [their] own suit."[158] As a result, class members who do not opt out of

146. *See* FED. R. CIV. P. 23(b)(2).

147. *See supra* text accompanying note 122.

148. *See* FED. R. CIV. P. 23(b)(3) advisory committee's note to 1966 amendment. These risks include the potential for unwarranted relief and finality concerns. *See supra* text accompanying notes 143–45.

149. *See* Geller, *supra* note 53, at 2775.

150. *See* 1 MCLAUGHLIN, *supra* note 20, § 3:2.

151. *See id.*

152. *See* Shaw, *supra* note 24, at 2384.

153. *See* Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012); Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 592 (3d Cir. 2012); Mazza v. Am. Honda Motor Co., 666 F.3d 581, 596 (9th Cir. 2012); Romberio v. UnumProvident Corp., 385 F. App'x 423, 431 (6th Cir. 2009). The linguistic construction of the ascertainability requirement varies due to its implicit nature. *See* Luks, *supra* note 16, at 2372. Nevertheless, courts find the meaning of the requirement is the same. *See* FED. PRACTICE MANUAL FOR LEGAL AID ATT'YS § 7.2 (Jeffrey S. Gutman et al. eds., 2017), http://www.federalpracticemanual.org/chapter7/section2 [https://perma.cc/TZ5A-MBGM].

154. *See* Gilles, *supra* note 19, at 311.

155. *See* Geller, *supra* note 53, at 2775.

156. *See In re* Nexium Antitrust Litig., 777 F.3d 9, 21–22 (1st Cir. 2015); Chiang v. Veneman, 385 F.3d 256, 271 (3d Cir. 2004).

157. *See* FED. R. CIV. P. 23(c)(2)(B).

158. Berger v. Xerox Corp., 338 F.3d 755, 764 (7th Cir. 2003).

the litigation are bound by its proceedings.[159] However, these individuals are not bound when inadequately notified.[160]

Of course, adequate notice is impossible where a claimant is unsure whether he or she is included in a class definition.[161] Consequently, class representatives need to be able to identify the class members from the proposed class definition with certainty.[162] Ideally, the ascertainability requirement alleviates the risk that claimants will be unknowingly forced into litigation.[163]

Likewise, this requirement protects defendants.[164] For them, unclear class definitions generate concerns of finality as claimants may be subsequently released from the results of the litigation[165] and therefore free to bring similar individual actions.[166] This potential for inconsistent liability contravenes Rule 23's purpose.[167] Accordingly, Rule 23(b)(3) class certification fundamentally requires the satisfaction of the ascertainability requirement.

Rule 23's advisory committee[168] even consented to this implicit requirement.[169] Courts have also widely demonstrated their approval since the requirement's introduction.[170] But, there is no "universally agreed upon" documented source for its authority.[171] While some find ascertainability to be implicit within Rule 23(a),[172] others find authority for this requirement in Rule 23(c)(1)(b)'s demand for classes to be sufficiently defined.[173] Unsurprisingly, this incongruence has produced a controversial circuit split.[174]

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159. *See, e.g.*, *id.* at 763.

160. *See id.*

161. *See id.* at 764. Where a class definition is so subjective or amorphous, for example, an individual may not have the ability to sufficiently determine whether he or she is a legitimate class member. Obviously, a potential class member is not provided with adequate notice in such instances because it is impossible for him or her to fully analyze the legal ramifications of the suit (including the ability to opt out). For further discussion, see *infra* notes 187–202 and accompanying text.

162. *See id.*

163. *See id.*

164. *See* Luks, *supra* note 16, at 2361.

165. *See* FED. R. CIV. P. 23(c)(2)(B) advisory committee's note to 1966 amendment.

166. *See* Jordan Elias, *The Ascertainability Landscape and the Modern Affidavit*, 84 TENN. L. REV. 1, 10 (2016).

167. *See supra* text accompanying note 64. Conversely, ascertainability is often not required in Rule 23(b)(2) actions. *See* Cole v. City of Memphis, 839 F.3d 530, 540 (6th Cir. 2016).

168. *See* FED. R. CIV. P. 23 advisory committee's note to 1966 amendment.

169. *See* Gilles, *supra* note 19, at 3110 (noting that the advisory committee has not altered Rule 23 with respect to ascertainability since courts introduced this requirement).

170. *See, e.g.*, Carrera v. Bayer Corp., 727 F.3d 300, 304 (3d Cir. 2013); DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970); Krueger v. Wyeth, Inc., 310 F.R.D. 468, 473 (S.D. Cal. 2015).

171. *See* Luks, *supra* note 16, at 2369.

172. *See* Geller, *supra* note 53, at 2778.

173. *See* FED. R. CIV. P. 23(c)(1)(B); Geller, *supra* note 53, at 2778.

174. *See* Elias, *supra* note 166, at 15.

Many circuits analyze the requirement through two prongs.[175] The first prong, which almost all circuits apply,[176] requires precise class definitions based on objective criteria.[177] The second prong calls for an administratively feasible method for the court to determine which exact individuals are members of the proposed class.[178] Unlike the first prong, courts do not unanimously apply the second prong.[179]

A recent class action illuminates this split.[180] In this New York case, a class of individuals alleged that the defendant falsely advertised a product that the class members had all recently purchased.[181] The first prong of the ascertainability requirement would have been satisfied because the class was objectively defined.[182] Yet, the ascertainability requirement would likely have not been met in jurisdictions that apply the second prong because many proposed claimants did not have receipts for the purchased products and, therefore, could not have definitively proven their membership in the class.[183]

The second prong's heightened ascertainability ideal attempts to guarantee the protection of litigants' rights.[184] Nonetheless, opponents feel that this prong goes "too far" as it may enable defendants to limit their purchaser records or otherwise circumvent potential liability.[185] The circuits do agree, however, that three types of classes fail this requirement's first prong: (1) "subjective" classes, (2) "vague" classes, and (3) "fail-safe" classes.[186] Inspecting these three types of classes may help demonstrate whether overbroad classes similarly fail ascertainability's first prong.

First, a subjective class definition[187] references its members' mental states.[188] This occurs, for example, where claimants are defined as "offended" or "deceived."[189] Such "subjective" members are, inherently, not objectively identifiable.[190]

Second, vague class definitions similarly fail the ascertainability requirement.[191] A class that defines its members as "bald," for example, is

175. *See* Karhu v. Vital Pharm., Inc., 621 F. App'x. 945, 948 (11th Cir. 2015); *Carrera*, 727 F.3d at 305.
176. *See* Elias, *supra* note 166, at 8.
177. *See* 1 MCLAUGHLIN, *supra* note 20, § 3:2.
178. *See id.* at 21–22.
179. *See* Elias, *supra* note 166, at 21.
180. *See generally In re* Scotts EZ Seed Litig., 304 F.R.D. 397 (S.D.N.Y. 2015).
181. *See id.* at 404.
182. *See id.* at 404–05.
183. *See id*. at 407.
184. *See* Luks, *supra* note 16, at 2361.
185. *See id.* at 2393.
186. *See* Mullins v. Direct Dig., LLC, 795 F.3d 654, 660 (7th Cir. 2015); Young v. Nationwide Mut. Ins., 693 F.3d 532, 537 (6th Cir. 2012); Chiang v. Veneman, 385 F.3d 256, 271 (3d Cir. 2004).
187. *See Chiang*, 385 F.3d at 271.
188. *See* Shaw, *supra* note 24, at 2378.
189. *See id.* at 2379.
190. *See id.* at 2364.
191. *See Mullins*, 795 F.3d at 660.

considered vague.[192] In this example, while one may think that one person has hair, another may consider that same person to be bald.[193] Thus, these classes remain potentially boundless.[194]

Third, fail-safe classes, those defined by their success on the merits, also fail ascertainability's first prong.[195] This type of definition may include all individuals who were "wrongfully" denied something by a defendant.[196] In this scenario, claimants were either "wrongfully" denied something, which guarantees them relief, or were not "wrongfully" denied something, which makes them unbound to the litigation.[197]

Accordingly, these three types of class definitions make adequate notice to relevant class members cumbersome.[198] Courts, however, may actually deny class certification in such instances because these definitions impede their ability to objectively identify the *injured* class members.[199] Remember, the chief purpose of the implicit ascertainability requirement is to provide the legitimate potential class members—those that are legally injured—with adequate notice as to who else is a legitimate member of the potential class. Only then may a legitimate class member be fully informed as to whether he or she intends to opt out of the class. Perhaps, for example, a legitimate class member does not want to be in a class with a certain group of individuals. So, while overbroad class definitions may be objectively defined such that the entire proposed class may be identified, it still presents the problem that the *legitimate* members, those that *will not* be rooted out at a later stage in the litigation, remain indistinguishable from the *illegitimate* members, those that *will* be rooted out at a later stage in the litigation. Hence, it may be argued that in this scenario the legitimate class members are not provided adequate notice from the class definition to make a reasoned decision with respect to their opt out rights.[200]

C. The Overbreadth Issue at Rule 23's Class Certification Stage

The existence of uninjured class members at Rule 23(b)(3)'s class certification stage causes many problems for litigants.[201] Classes defined too broadly include "a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct."[202] This manifestation, however, must be distinguished from classes that contain members who "could have been harmed, but arguably might not have been

192. *See* Shaw, *supra* note 24, at 2381.
193. *See id.*
194. *See Mullins*, 795 F.3d at 660.
195. *See* Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 825 (7th Cir. 2012). *But see In re* Rodriguez, 695 F.3d 360, 369 (5th Cir. 2012).
196. *See* Geller, *supra* note 53, at 2770.
197. *See id.* at 2771.
198. *See supra* text accompanying note 161.
199. *See supra* text accompanying note 162.
200. *See* Shaw, *supra* note 24, at 2383.
201. *See supra* text accompanying note 125.
202. Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 824 (7th Cir. 2012).

for one reason or another."[203] So, overbroad classes include the former: uninjured claimants who do not deserve the chance to recover.[204] The existence of these uninjured class members threatens to dilute relief for legitimate claimants and creates the potential for defendants to be unjustly found liable for meritless claims.[205] Additionally, such overbreadth inhibits a court's ability to objectively identify the rightful claimants.[206]

In practice, overbreadth arises in many types of Rule 23(b)(3) actions.[207] A claim involving the Telephone Consumer Protection Act (TCPA) is illustrative.[208] Under the TCPA, a consumer has a cause of action when he or she receives automated phone calls that he or she had not consented to.[209] Hence, a class definition that includes all persons who received automated phone calls from defendants[210] may, for example, be overbroad as any class member who consented to the phone calls had given up his or her right to sue.[211]

Courts split when adjudicating this narrow issue. Importantly, the Supreme Court has not provided guidance for lower courts and it recently punted on deciding whether Rule 23(b)(3) classes may be certified where some uninjured members exist.[212] Consequently, class certification may be warranted for marginally overbroad classes.[213] Class certification in these instances may encourage justice to the class's majority and only subject defendants to minimal illegitimate liability. Moreover, some circuits have indicated that marginally overbroad classes may be certified because the uninjured class members may be displaced at later stages of the litigation.[214]

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203. *See id.*

204. *See* Shaw, *supra* note 24, at 2383.

205. *See id.* at 2384–85.

206. *See* Geoff Wyatt & Jordan Schwartz, *Overbroad Class Actions: Here To Stay or Going Out of Style?*, A.B.A. (Sept. 9, 2015), http://apps.americanbar.org/litigation/committees/classactions/articles/summer2015-0915-overbroad-class-actions.html [https://perma.cc/4X73-5RUB] (explaining how injured class members are legitimate claimants). Overbreadth is not an issue in Rule 23(b)(2) class certification. *See supra* text accompanying note 117.

207. *See, e.g.*, Booth v. Appstack, Inc., No. C13-1533JLR, 2016 WL 3030256, at *6–7 (W.D. Wash. May 25, 2016); Jamison v. First Credit Servs., 290 F.R.D. 92, 103 (N.D. Ill. 2013).

208. *See, e.g.*, *Jamison*, 290 F.R.D. at 92–104.

209. *See id.* at 96–97.

210. *See id.* at 103.

211. *See supra* text accompanying note 208.

212. *See* Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1050 (2016) (noting that "the question [of] whether uninjured class members may recover" could not be answered here even though it "is one of great importance"). This Note does not focus on whether classes *should* be certified where marginal overbreadth exists.

213. *See, e.g.*, Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1136 (9th Cir. 2016) (indicating that class definitions may "[i]nevitably contain some individuals who have suffered no harm"). For further discussion, see Andrew J. Pincus, *What Does* Tyson Foods, Inc. v. Bouaphakeo *Mean for Class Actions?*, CLASS DEF. BLOG (Mar. 23, 2016), https://www.classdefenseblog.com/2016/03/what-does-tyson-foods-inc-v-bouaphakeo-mean-for-class actions/ [https://perma.cc/EBE4-PLF9].

214. *See Torres*, 835 F.3d at 1136; Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 823 (7th Cir. 2012).

This type of class action, while not perfect, may still be superior to other forms of litigation.[215] Other circuits disagree.[216] These courts contend that uninjured class members may not be included in certified classes[217] because, among other issues, such individuals have insufficient Article III standing.[218]

Nonetheless, every circuit denies class certification[219] for irreparably overbroad class definitions.[220] The actual analysis remains flexible[221] as many courts have inconsistently applied Rule 23's class certification requirements when this issue has arisen.[222] Some have treated overbreadth as a predominance issue because the requirement's hallmark is a common form of liability.[223] Others, however, have analyzed overbreadth under the ascertainability requirement due to concerns regarding an inability to identify legitimate claimants.[224] And, irrespective of past class certification *results*, this inconsistency has resulted in litigant confusion.[225] This veil of uncertainty, of course, is something the Rule 23 advisory committee sought to avoid.[226]

Consider recent class actions in the Seventh Circuit, where overbreadth is alternatively analyzed under predominance and ascertainability

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215. *See supra* text accompanying note 122.

216. *See, e.g.*, *In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252 (D.C. Cir. 2013); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 28 (1st Cir. 2008); Denney v. Deutsche Bank, 443 F.3d 253, 263–64 (2d Cir. 2006).

217. For further discussion on this split, see BakerHostetler, *Hospital Seeks Second Opinion on Certifying Class with Uninjured Members*, JD SUPRA (June 13, 2017), https://www.jdsupra.com/legalnews/hospital-seeks-second-opinion-on-35514/ [https://perma.cc/DJW2-ZDBJ].

218. Overbreadth may be treated as an Article III standing issue. *See generally* Theane Evangelis & Bradley J. Hamburger, *Article III Standing and Absent Class Members*, 64 EMORY L.J. 383 (2014).

219. *See, e.g.*, Mazza v. Am. Honda Motor Co., 666 F.3d 581, 596 (9th Cir. 2012); Carter v. PJS of Parma, Inc., No. 1:15 CV 1545, 2016 WL 3387597, at *2 (N.D. Ohio June 20, 2016).

220. Courts may amend class definitions where possible. *See* FED. R. CIV. P. 23(d)(4). Thus, a court may narrow an overbroad class definition to eliminate those who do not have legitimate claims. *See* Vincent v. Money Store, 304 F.R.D. 446, 453 (S.D.N.Y. 2015).

221. There are sporadic instances where the Rule 23(a) requirements have been utilized alongside the predominance or ascertainability requirement during overbreadth analysis. *See, e.g.*, Rodman v. Safeway, Inc., No. 11-CV-03003-JST, 2014 WL 988992, at *4–10 (N.D. Cal. Mar. 10, 2014); Loreto v. Procter & Gamble Co., No. 1:09-CV-815, 2013 WL 6055401, at *4–5 (S.D. Ohio Nov. 15, 2013). However, the denial of class certification based on irreparable overbreadth for Rule 23(b)(3) classes is indeed due to the failure to meet the predominance or ascertainability requirement. *See, e.g.*, Byrd v. Aaron's Inc., 784 F.3d 154, 168–69 (3d Cir. 2015); Walewski v. ZeniMax Media, Inc., 502 F. App'x 857, 861 (11th Cir. 2012).

222. *See supra* text accompanying note 23.

223. *See, e.g.*, *Mazza*, 666 F.3d at 596; Circle Click Media LLC v. Regus Mgmt. Grp. LLC, No. 3:12-CV-04000-SC, 2015 WL 6638929, at *12 (N.D. Cal. Oct. 30, 2015); *supra* text accompanying note 127.

224. *See, e.g.*, *Carter*, 2016 WL 3387597, at *2; PB Prop. Mgmt., Inc. v. Goodman Mfg., No. 3:12-CV-1366-HES-JBT, 2016 WL 7666179, at *19 (M.D. Fla. May 12, 2016); Vigus v. S. Ill. Riverboat/Casino Cruises, Inc., 274 F.R.D. 229, 234 (S.D. Ill. 2011).

225. *See, e.g.*, *PB Prop. Mgmt.*, 2016 WL 7666179, at *26 (referencing the defendant's arguments to analyze the overbreadth issue under both the ascertainability and predominance requirements).

226. *See supra* text accompanying notes 53, 66.

requirements.[227] In 2011[228] and 2013,[229] for example, courts there chose to analyze overbreadth under the ascertainability requirement. Alternatively, in 2015[230] and 2016,[231] the same courts insisted that these prior decisions were too stringent.[232] The Seventh Circuit even stipulated that the ascertainability requirement was "susceptible to misinterpretation" and clarified that only vague, subjective, and fail-safe classes should fail ascertainability's first prong.[233] Nonetheless, two separate district courts in the same circuit subsequently analyzed overbreadth under the ascertainability inquiry and held that the issue was indeed directly related to the implicit requirement's first prong.[234] Clearly, due in part to such inconsistency, litigants in the Seventh Circuit have been subjected to unpredictable overbreadth analysis.[235]

The next Part discusses the two distinct causes of inconsistent overbreadth analysis at the Rule 23(b)(3) class certification stage.[236] First, many courts prefer to analyze overbreadth under either predominance or ascertainability due to supported policy reasons.[237] Second, other courts merely acquiesce to how litigants frame their overbreadth arguments—whether under predominance or ascertainability—without explaining their reasoning.[238]

II. THE JUDICIAL DIVIDE ON OVERBREADTH ANALYSIS AND THE RESULTANT INEFFECTIVE LITIGATION

As detailed, the inconsistent application of Rule 23(b)(3)'s class certification requirements may produce uncertainty in litigation. This Part describes examples of case law that demonstrate how litigants may be adversely affected by this uncertainty. Part II.A focuses on examples that derive from divergent judicial preferences for either ascertainability or predominance; Part II.B spotlights examples that derive from seemingly blind judicial acquiescence to litigants' preferences.

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227. *Compare* Mullins v. Direct Dig., LLC, 795 F.3d 654, 659–61 (7th Cir. 2015) (indicating that overbreadth analysis does not belong within the ascertainability inquiry), *and* Meinders v. Emery Wilson Corp., No. 14-CV-596-SMY-SCW, 2016 WL 3402621, at *4 n.4. (S.D. Ill. June 21, 2016), *with* Wright v. Nationstar Mortg. LLC, No. 14 C 10457, 2016 U.S. Dist. LEXIS 115729, at *14–18 (N.D. Ill. Aug. 29, 2016), Bietsch v. Sergeant's Pet Care Prods., Inc., No. 15 C 5432, 2016 WL 1011512, at *11 (N.D. Ill. Mar. 15, 2016), Jamison v. First Credit Servs., 290 F.R.D. 92, 96 (N.D. Ill. 2013), *and Vigus*, 274 F.R.D. at 232.

228. *See Vigus*, 274 F.R.D. at 232–36.

229. *See Jamison*, 290 F.R.D. at 96, 108.

230. *See Mullins*, 795 F.3d at 659–60.

231. *See Meinders*, 2016 WL 3402621, at *4 n.4.

232. *See* Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 818–20 (7th Cir. 2012).

233. *See Mullins*, 795 F.3d at 659–60.

234. *See* Wright v. Nationstar Mortg. LLC, No. 14 C 10457, 2016 U.S. Dist. LEXIS 115729, at *14–18 (N.D. Ill. Aug. 29, 2016); Bietsch v. Sergeant's Pet Care Prods., Inc., No. 15 C 5432, 2016 WL 1011512, at *11 (N.D. Ill. Mar. 15, 2016).

235. *See infra* Part II.A.

236. *See infra* Parts II.A–B.

237. *See infra* Part II.A.

238. See *infra* Part II.B for examples of such cases.

A. Inconsistent Overbreadth Analysis That Derives from Divergent Judicial Preferences

There are genuine explanations for why courts analyze overbreadth under either the predominance or ascertainability requirement. Yet, these policy reasons are often contradictory. Notwithstanding the validity of these varying approaches, this inconsistency must be recognized to further understand its consequences.

1. The Predominance Preference

Three recent cases particularly illustrate why some courts prefer to analyze overbreadth under the predominance requirement: *Byrd v. Aaron's Inc.*,[239] *Circle Click Media LLC v. Regus Management Group LLC*,[240] and *Matamoros v. Starbucks Corp.*[241]

a. The Third Circuit: Byrd v. Aaron's Inc.

Crystal and Bryan Byrd rented a laptop computer from an Aaron's franchisee store, a consumer-electronics lessor, in the summer of 2010.[242] Five months later, an employee from the store went to the Byrds' home to repossess the laptop.[243] While at the house, the employee presented screenshots of Bryan Byrd's internet activity.[244] Unsurprisingly, the Byrds considered the screenshots to be an unauthorized invasion of their privacy.[245] They then brought a Rule 23(b)(3) action against Aaron's and its franchisee store for their alleged violations of the Electronic Communications Privacy Act (ECPA).[246] Parties are liable under the ECPA when they intentionally intercept the contents of an electronic communication.[247]

The store obtained these screenshots through spyware that it had installed on its computers.[248] The Byrds alleged that this spyware accessed their laptop 347 times and retrieved information from the computers of nearly 900 other customers.[249] As a result, the Byrds defined the class as all persons, and their household members, who "leased and/or purchased" computers from the defendants and who had not consented to the spyware installation.[250]

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239. 784 F.3d 154 (3d Cir. 2015).
240. No. 12-CV-04000-SC, 2015 WL 6638929 (N.D. Cal. Oct. 30, 2015).
241. 699 F.3d 129 (1st Cir. 2012).
242. *See* Byrd v. Aaron's, Inc., No. 11-101E, 2014 WL 1316055, at *1 (W.D. Pa. Mar. 31, 2014), *rev'd*, 784 F.3d 154.
243. *See Byrd*, 784 F.3d at 159.
244. *See id.*
245. *See id.*
246. *See Byrd*, 2014 WL 1316055, at *2.
247. *See id.* at *4.
248. *See id.*
249. *See id.*
250. *See id.* at *5.

The store then argued that the class definition was overbroad because many proposed members did not have their communications intercepted by the spyware.[251] The district court agreed[252] and denied class certification because the plaintiffs failed to satisfy the ascertainability requirement.[253] The court asserted that this requirement was not met, in part, due to its inability to "objectively" identify the injured class members.[254] Notably, it did not analyze Rule 23's explicit requirements because it felt that ascertainability was an "essential prerequisite."[255]

The class appealed, arguing that the district court should not have denied class certification on the basis of ascertainability.[256] On appeal, the Third Circuit did not refute that the class was overbroad.[257] However, it indicated that the district court erred in its analysis because the class definition "easily" met ascertainability's first prong.[258] It stated that all persons referenced in the class definition were readily identifiable, which alleviated any notice or finality concerns.[259] The Third Circuit also clarified that the ascertainability requirement does not ask whether the injured members may be objectively identified from the uninjured members.[260] It noted that "differences between the proposed class should be considered within the rubric of the relevant Rule 23 requirement" and not injected into the ascertainability evaluation.[261] Consequently, it remanded the case for the liability issue to be analyzed under the predominance requirement.[262]

On remand, the district court did not conflate the Third Circuit's interpretation of ascertainability with Rule 23's other requirements.[263] It found that the class sufficiently satisfied the ascertainability requirement.[264] Nonetheless, it held that individualized questions predominated over common ones.[265] According to the court, the essential element of the claim, injury under the ECPA, was not common among the class.[266] As a result, it found that certification was inappropriate because the liability issue presented "difficulties in managing [the] class action."[267] The *Byrd* litigation demonstrates some of the strongest arguments for courts to analyze overbreadth under the predominance inquiry.

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251. *See id.*
252. *See id.*
253. *See id.*
254. *See id.*
255. *See id.* at *3.
256. *See* Byrd v. Aaron's Inc., 784 F.3d 154, 158–59 (3d Cir. 2015).
257. *See id.* at 168.
258. *See id.* at 169–71.
259. *See id.*
260. *See id.*
261. *See id.* at 169.
262. *See id.* at 159.
263. *See generally* Byrd v. Aaron's, Inc., No. 11-101, 2017 WL 4326106 (W.D. Pa. Aug. 4, 2017), *adopted by* 2017 WL 4269715 (W.D. Pa. Sept. 26, 2017).
264. *See id.* at *7 n.6.
265. *See id.* at *14.
266. *See id.*
267. *See id.* at *17.

b. The Ninth Circuit: Circle Click Media LLC v. Regus Management Group LLC

Circle Click Media is another example of how a district court analyzed overbreadth under the predominance inquiry.[268] Regus, the defendant, operated as a lessor of commercial office space and offered fully equipped offices to consumers for an all-inclusive monthly price.[269] Regus made representations to the plaintiffs that its services were to be agreed to through a one-page Office Service Agreement (OSA).[270] The controversy here originated because the defendant's invoices allegedly exceeded the amount indicated in the OSA via "various mandatory fees disclosed in other documents."[271] For example, Circle Click, a plaintiff, finalized an OSA with Regus for two offices in San Francisco.[272] Circle Click alleged that it "relied on Regus's advertisements indicating Regus offered [office space] . . . for a single . . . price."[273] Yet, Circle Click stated that Regus charged "significantly more" via additional fees not listed in the OSA.[274] Consequently, Circle Click, and others similarly situated, alleged a myriad of claims involving Regus's fee structure.[275] The plaintiffs moved to certify two classes, a New York class and a California class, which were both defined to include "all persons" who executed agreements with Regus and who were exposed to mandatory fees not referenced in the OSA.[276]

Notwithstanding the legitimacy of some of the underlying claims, Regus argued that the proposed classes, as defined, were overbroad.[277] The district court agreed.[278] The court held that the plaintiffs failed to satisfy the predominance requirement even though Regus's website was "inherently applicable to the whole class."[279] In particular, it found that individualized questions regarding a common form of liability significantly outweighed common contentions.[280] Here, because many class members, albeit a minority, were not exposed to the allegedly illicit fees, the proposed class definitions caused unsalvageable manageability issues.[281] Accordingly, the court primarily focused on the existence of the illegitimate claimants in its predominance analysis.[282]

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268. *See* Circle Click Media LLC v. Regus Mgmt. Grp. LLC, No. 3:12-CV-04000-SC, 2015 WL 6638929, at *13 (N.D. Cal. Oct. 30, 2015).
269. *See id.* at *1.
270. *See id.*
271. *See id.*
272. *See id.* at *2.
273. *See id.*
274. *See id.*
275. *See id.* at *3.
276. *See id.* at *7.
277. *See id.* at *12.
278. *See id.* at *15.
279. *See id.* at *14.
280. *See id.* at *15.
281. *See id.* at *13–15.
282. *See id.*

c. The First Circuit: Matamoros v. Starbucks Corp.

The court in *Matamoros v. Starbucks Corp.* also chose to scrutinize overbreadth under the predominance requirement.[283] However, in *Matamoros*, the court granted the plaintiffs' motion for class certification.[284]

The Massachusetts Tips Act provides that "wait staff" employees are not required to share customer tips with non-"wait staff" employees.[285] Here, Starbucks's mandatory employee policy stated that its customer tips were to be distributed to both baristas and shift supervisors.[286] Under the Tips Act, "wait staff" employees, such as the Starbucks baristas, are defined as service providers who have "no managerial responsibility."[287] Here, the baristas alleged that the shift supervisors did not qualify as "wait staff" employees.[288] As a result, the baristas filed a Rule 23(b)(3) suit against the company for its alleged violation of the Tips Act.[289]

Starbucks stated that the shift supervisors performed more duties than the baristas and were actually "promoted from the ranks of baristas."[290] Due to this evidence, the district court ultimately found that the shift supervisors did not qualify as "wait staff" employees.[291] In doing so, it granted summary judgment for the plaintiffs.[292] Starbucks then appealed.[293] The company contended that the district court should not have certified the allegedly unascertainable class because "certain experienced baristas" included in the class definition had provided "coaching" to less experienced baristas.[294] Therefore, it argued that the class was overbroad because these experienced baristas did not qualify as "wait staff" employees.[295]

The First Circuit, however, vehemently disagreed.[296] It found this ascertainability argument to be "frivolous" and stressed that the plaintiffs satisfied the inquiry irrespective of the class's potential overbreadth because the class definition precisely defined its members based on objective criteria.[297] The First Circuit also indicated that this issue was actually better suited for the predominance inquiry.[298] And, as for this potential overbreadth, it held that the baristas who offered assistance did not maintain any managerial responsibilities.[299] Thus, it found that the plaintiffs satisfied

283. *See* Matamoros v. Starbucks Corp., 699 F.3d 129, 139 (1st Cir. 2012).
284. *See id.* at 129.
285. *See id.* at 133.
286. *See id.* at 132.
287. *See id.* at 133.
288. *See id.* at 132.
289. *See id.*
290. *See id.* at 133–34.
291. *See id.* at 132–33.
292. *Id.*
293. *See id.* at 133.
294. *See id.* at 138–39.
295. *See id.*
296. *See id.* at 141.
297. *See id.* at 139.
298. *See id.*
299. *See id.*

the predominance requirement because Starbucks's corporate policy, the alleged violations of a single statute, and the general job responsibilities of the baristas "greatly" outweighed individualized questions.[300]

Similar to the courts in *Byrd* and *Circle Click Media*, the *Matamoros* court referenced many significant justifications for analyzing overbreadth under the predominance requirement. Part II.A.1.d describes these arguments in detail.

d. Policy Reasons for the Predominance Preference

The predominance requirement, in particular, enables Rule 23(b)(3)'s effectiveness because it ensures that class members are sufficiently similar.[301] Naturally, this requirement's "hallmark" is the finding of a common form of liability.[302] But a finding of a common form of liability is not always dispositive for class certification as courts must balance all individualized and common issues.[303] While a common form of liability is the key to the predominance inquiry, the inquiry still mandates that all individualized and common issues must be balanced. The predominance requirement may actually be satisfied when minimal liability issues diverge. So, if the overbreadth issue becomes a per se failure under ascertainability analysis, then some marginally overbroad classes, which can satisfy the predominance requirement, may never get past the class certification stage.[304]

In practice, marginally overbroad classes may never even reach the predominance inquiry in jurisdictions that analyze overbreadth under the ascertainability requirement.[305] Hence, this type of ascertainability analysis essentially makes marginal overbreadth dispositive to the class inquiry.[306] Conversely, when marginal overbreadth is analyzed under the predominance inquiry and an objectively defined class definition has already satisfied the ascertainability requirement's first prong, courts will grant class certification.[307]

2. The Ascertainability Preference

Courts that do not choose to analyze overbreadth under the predominance requirement frequently scrutinize the issue under the ascertainability

300. *See id.* The court scrutinized overbreadth under the predominance inquiry because the three factors mentioned in the text involve the standard of liability for this statute. Hence, by analyzing overbreadth with respect to such factors, the court framed the predominance inquiry through the lens of a common form of liability among the class.

301. *See supra* text accompanying note 135.

302. *See supra* text accompanying note 127.

303. *See supra* text accompanying note 123. Alternatively, the ascertainability requirement may not permit this balancing. *See* Mullins v. Direct Dig., LLC, 795 F.3d 654, 657 (7th Cir. 2015).

304. *See supra* text accompanying note 260.

305. *See supra* text accompanying note 254.

306. *See supra* text accompanying note 254.

307. *See supra* text accompanying notes 136–38.

requirement.[308] When many illegitimate claimants exist, many courts prefer the ascertainability inquiry for such analysis because a broadly applied predominance requirement may actually increase the risk of judicial error by expanding courts' discretion at the class certification stage.[309]

a. The Seventh Circuit: Vigus v. Southern Illinois Riverboat/Casino Cruises, Inc.

In *Vigus*, the defendant company ("Casino Cruises") regularly called members of its loyalty program with prerecorded messages to alert them of special offerings.[310] The program had over 100,000 members at the time of the 2011 litigation.[311] As for the program members themselves, the defendant noted that only those who had affirmatively provided their telephone numbers were added to its call list.[312] Yet, Richard Vigus, the named plaintiff, stated that he received automated voice messages from Casino Cruises to which he had not consented.[313] Vigus maintained that he was never even a member of the program.[314] As noted above, a party is liable under the TCPA when it makes automated phone calls to individuals without their prior consent.[315] Consequently, Vigus brought a Rule 23(b)(3) action against Casino Cruises for its alleged violations of the TCPA.[316]

Vigus defined the class as all persons who received automated phone calls from Casino Cruises.[317] This definition, however, made no reference to whether its members had consented to the phone calls.[318] As a result, Casino Cruises argued that the class definition included too many illegitimate claimants.[319] While Vigus was not a member of the program, many potential members had affirmatively provided their telephone numbers to the defendant.[320] This, of course, eradicated their causes of action.[321] For this reason, the district court denied class certification.[322]

The district court analyzed this overbreadth issue under the ascertainability requirement.[323] It stated that the plaintiffs had not "sufficiently" crafted the class definition "so as to [produce an] identifiable . . . class."[324] The court

308. *See, e.g.*, Walewski v. ZeniMax Media, Inc., 502 F. App'x 857, 861 (11th Cir. 2012); Carter v. PJS of Parma, Inc., No. 15 CV 1545, 2016 WL 3387597, at *2 (N.D. Ohio June 20, 2016); Vigus v. S. Ill. Riverboat/Casino Cruises, Inc., 274 F.R.D. 229, 231–32 (S.D. Ill. 2011).
309. *See supra* text accompanying notes 136–38.
310. *See Vigus*, 274 F.R.D. at 231–32.
311. *See id.* at 232.
312. *See id.*
313. *See id.*
314. *See id.*
315. *See supra* text accompanying note 209.
316. *See Vigus*, 274 F.R.D. at 232–33.
317. *See id.*
318. *See id.* at 233.
319. *See id.* at 235.
320. *See id.*
321. *See supra* note 209 and accompanying text.
322. *See Vigus*, 274 F.R.D. at 238.
323. *See id.* at 235.
324. *See id.*

stated that "the process of determining who fell within such a class could not be determined by objective criteria applicable to the class as a whole."[325] In asserting this, the court placed great importance on its inability to identify the injured members from the class definition.[326]

Interestingly, the court continued on with its class certification analysis.[327] On the issue of predominance, it stated that individualized inquiries outweighed common ones.[328] But, it determined that whether the defendant had called any of the legitimate class members was just one factor in this analysis.[329]

b. The Eleventh Circuit: Walewski v. ZeniMax Media, Inc.

In *Walewski v. ZeniMax Media, Inc.*,[330] the court, alternatively, did not undergo any predominance analysis and instead denied class certification solely on the basis of ascertainability.[331]

Lawrence Walewski adored playing the video game *The Elder Scrolls IV: Oblivion*.[332] Walewski loved it so much that he spent roughly 450 hours playing during a four-month period.[333] At that point, the game allegedly malfunctioned so that he was "unable to open doors and gates, cast spells, or trigger numerous other animations that were essential."[334] As a result of these defects, Walewski felt that the defendants unlawfully represented how the game play could go on "indefinitely."[335] He also noted that these defects made the game substantially less valuable than the marked purchased price.[336] Consequently, Walewski filed a Rule 23(b)(3) action against the defendants, the game's developer and studio producer, for their alleged violations of consumer-protection laws.[337]

The district court held that the class definition, which included all persons who purchased the game,[338] was substantially overbroad because many claimants were never exposed to the alleged defects and the value of the game was never diminished for them.[339] Moreover, it stated that several claimants did not even directly purchase the game.[340] Thus, because the court could

325. *See id.*
326. *See id.* at 236–37.
327. *See id.*
328. *See id.*
329. *See id.*
330. 502 F. App'x 857 (11th Cir. 2012).
331. *Id.* at 861–62.
332. *See id.* at 859.
333. *See id.*
334. *Id.*
335. *See id.* at 859–60.
336. *See id.*
337. *See id.*
338. *See id.*
339. *See id.* at 861.
340. *See id.*

not identify the injured claimants from the class definition, it denied class certification on the basis of ascertainability.[341]

The Eleventh Circuit affirmed this decision.[342] Like the district court, the Eleventh Circuit asserted that the plaintiff failed to satisfy the ascertainability requirement due to the overbroad class definition.[343] Specifically, it held that to "cull" the injured class members from millions of other game owners was too cumbersome.[344] In doing so, it approved of how the district court applied the class certification requirements.[345]

c. The Sixth Circuit: Carter v. PJS of Parma, Inc.

As opposed to *Walewski*, *Carter v. PJS of Parma, Inc.*[346] involved a Rule 23(b)(3) action that pled claims of unjust enrichment.[347] The defendants in *Carter*, PJS of Parma and Lorraine Stancato, owned and operated Stancato's Italian Restaurant in Ohio.[348] They also maintained an off-site catering service and hired banquet servers—the plaintiffs—to staff the events.[349] For catering payments, the restaurant charged its customers for food and drinks as well as a "banquet service charge."[350] These service charges did not constitute tips.[351] However, customers often provided additional tips to the restaurant, which it was then required to distribute to the servers.[352] Several of the servers alleged that the restaurant had not distributed many of the due tips.[353] In turn, the plaintiffs defined their proposed class as all banquet servers who worked for the defendants.[354]

A district court subsequently denied class certification in part because the proposed class definition was substantially overbroad.[355] This particular class was overbroad because many of the included servers were not the intended recipients of certain customer tips.[356] Thus, as the court indicated, the defendants could not have been "unjustly enriched" at the expense of these uninjured class members.[357] As for the class certification requirements, the court stated that the plaintiffs failed to satisfy the ascertainability inquiry

341. *See generally* Walewski v. ZeniMax Media, Inc., No. 11-CV-1178-ORL-28DAB, 2012 WL 834125 (M.D. Fla. Jan. 30, 2012), *adopted by* 2012 WL 847236 (M.D. Fla. Mar. 13, 2012), *aff'd*, 502 F. App'x 857.
342. *See Walewski*, 502 F. App'x at 862.
343. *See id.* at 861.
344. *See id.*
345. *See id.*
346. No. 15 CV 1545, 2016 WL 3387597 (N.D. Ohio June 20, 2016).
347. *See id.* at *1.
348. *See id.*
349. *See id.*
350. *See id.*
351. *See id.*
352. *See id.*
353. *See id.*
354. *See id.*
355. *See id.* at *3–6.
356. *See id.* at *2.
357. *See id.*

because the class definition included too many uninjured members.[358] The court further noted that the requirement failed because this definition inhibited its ability to identify the legitimate claimants.[359]

The court also held that the class "easily" failed to satisfy the predominance requirement because fact-specific questions outweighed common contentions.[360] But, it did not frame this inquiry as an overbreadth problem.[361] Rather, the court focused on other individualized inquiries—such as which severs worked at which banquets, if many customer tips were intended for individual banquet servers, and which factors motivated the customer tips.[362] Accordingly, *Vigus*, *Walewski*, and *Carter* exemplify why many courts analyze overbreadth under the ascertainability requirement.

d. Policy Reasons for the Ascertainability Preference

The ascertainability requirement is where courts query the suitability of class definitions for pending Rule 23(b)(3) litigation.[363] Of course, a substantially overbroad class definition is particularly unsuitable for such litigation due to the inevitable necessity for individualized inquiries.[364] The ascertainability requirement also helps to ensure that class definitions enable adequate notice for litigants.[365] And, as stated above, overbroad class definitions impair such notice.[366] Thus, many feel that claimants may be unknowingly forced into litigation and defendants may be subjected to possible interminable liability when the overbreadth issue is not scrutinized under this requirement.[367] So, perhaps, overbreadth scrutiny under the ascertainability inquiry may ensure that legitimate claimants remain objectively identifiable throughout the course of litigation.[368]

There are, however, deficiencies in this line of reasoning.[369] First, the appearance of conflating the explicit requirements of Rule 23(a) with the implicit requirement of ascertainability is inherently troublesome.[370] Second, this broad interpretation of ascertainability may lead to the disposal of many actions where marginal overbreadth exists.[371] Third, perhaps overbreadth alone does not inhibit adequate notice.[372] Overbreadth, in fact,

358. *See id.*
359. *See id.*
360. *See id.* at *5–6.
361. *See id.*
362. *See id.* at *5.
363. *See supra* text accompanying note 155.
364. *See supra* text accompanying note 325.
365. *See supra* text accompanying notes 157–68.
366. *See supra* text accompanying note 165.
367. *See supra* text accompanying notes 157–68.
368. *See supra* text accompanying notes 157–68.
369. *See, e.g.*, *supra* text accompanying note 261.
370. *See supra* text accompanying note 261.
371. *See supra* text accompanying note 306.
372. *See supra* text accompanying note 162.

may only hamper a litigant's ability to categorize the injured members from an otherwise objectively identifiable class.[373]

3. The Resultant Unnecessary Litigation Costs and the Potential for Forum Shopping

Further examination of two of the cases analyzed above—*Byrd* and *Walewski*—illustrates how divergent analytical preferences for overbreadth analysis may expose litigants to unnecessary litigation costs and the potential for forum shopping.[374]

a. The Unnecessary Litigation Costs

Revisiting the *Byrd* and *Walewski* litigations is necessary to comprehend how the overbreadth issue leads to unnecessary costs for litigants. In *Byrd*, the district court denied class certification on the basis of ascertainability due to irreparable overbreadth.[375] Then, following the plaintiffs' appeal, the circuit court remanded the case for the overbreadth issue to be analyzed under the predominance requirement.[376] Finally, after three years of litigation, a district court once again denied class certification.[377] This time, however, the court did so under the predominance inquiry.[378]

All parties were subjected to more than three years of avoidable motion practice and briefing.[379] In 2014, for example, after class certification was initially denied, the plaintiffs were forced to explain how the district court erred in its ascertainability analysis.[380] In this brief, the plaintiffs primarily detailed how the district court misinterpreted its circuit's precedent regarding the requirement's satisfaction.[381] They noted that "the implicit requirement of ascertainability [had been] met" when similarly situated plaintiffs had objectively defined their classes.[382] In sum, they argued that whether they could have recovered on the merits of the claims was "not an appropriate inquiry in the context of evaluating" ascertainability.[383]

Following this, the defendants asserted that the district court had indeed *correctly* denied class certification on the basis of ascertainability because the proposed class definition was "overbroad."[384] Though, in response, the plaintiffs countered that the defendants had likewise misinterpreted the

373. *See supra* text accompanying notes 157–68.
374. *See, e.g.*, *supra* Parts II.A.1.a, II.A.2.b.
375. *See supra* text accompanying notes 253–59.
376. *See supra* text accompanying notes 256–64.
377. *See supra* text accompanying notes 263–70.
378. *See supra* text accompanying notes 263–70.
379. *See infra* Part IV.
380. *See* Brief of Appellants at 38, Byrd v. Aaron's Inc., 784 F.3d 154 (3d Cir. 2015) (No. 14-3050).
381. *See id.* at 24–35.
382. *See id.* at 30.
383. *Id.* at 34.
384. *See* Brief for Appellee-Defendant at 8, 28, *Byrd*, 784 F.3d 154 (No. 14-3050).

ascertainability requirement.[385] Here, the plaintiffs cited another case from within the Third Circuit that indicated that the inquiry generally does not involve an examination of a common form of liability.[386] They next directed that this problem should have instead been analyzed under the predominance requirement because their class definition did not need to "include elements" of their claims.[387] Accordingly, this prolonged back and forth exhibits just some of the preventable litigation that has resulted from this circuit's inconsistency in overbreadth analysis.[388]

Like in *Byrd*, *Walewski* involved preventable litigation over the overbreadth issue.[389] However, unlike in *Byrd*, the circuit court affirmed the denial of class certification.[390] In *Walewski*, a magistrate judge initially recommended that class certification be denied because the proposed class was overbroad and unascertainable.[391] Walewski, the plaintiff, immediately objected to this report and cited several cases from within the same circuit to dispute the judge's reasoning.[392] Among many challenges, he argued that his class definition satisfied the ascertainability requirement because "the Court can readily and objectively ascertain whether any individual is a member of the proposed class through a single inquiry: whether the consumer purchased a copy [of the game]."[393] Correspondingly, he noted that the potential overbreadth should have instead been analyzed under the predominance requirement.[394]

The defendants, of course, agreed with the magistrate judge's preliminary recommendation.[395] Their initial brief similarly consisted of several pages devoted to applicable precedent.[396] However, as opposed to *Walewski*, they cited cases from within the circuit to demonstrate that the ascertainability requirement is not met when substantial overbreadth exists because such class definitions inhibit a court's ability to identify injured claimants.[397] Later on, unfortunately for Walewski, the circuit court agreed with the defendants' reasoning and affirmed the denial of class certification.[398]

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385. *See* Reply Brief of Appellants at 1, 9, *Byrd*, 784 F.3d 154 (No. 14-3050).

386. *See id.* at 6–7.

387. *See id.* at 8.

388. *See supra* text accompanying notes 263–70.

389. *See, e.g.*, Brief for Plaintiff-Appellant at 38, Walewski v. ZeniMax Media, Inc., 502 F. App'x 857 (11th Cir. 2012) (No. 12-11843); Joint Brief of Defendants-Appellees at 22, *Walewski*, 502 F. App'x 857.

390. *See Walewski*, 502 F. App'x at 861–62.

391. *See* Walewski v. ZeniMax Media, Inc., No. 11-CV-1178-ORL-28DAB, 2012 WL 834125, at *4–6 (M.D. Fla. Jan. 30, 2012), *adopted by* 2012 WL 847236 (M.D. Fla. Mar. 13, 2012), *aff'd*, 502 F. App'x 857.

392. *See* Plaintiff's Objections to the Magistrate Judge's January 30, 2012 Report and Recommendation at 1, 8–10, *Walewski*, 2012 WL 847236 (No. 11-cv-01178), ECF No. 55.

393. *Id.* at 9.

394. *See id.*

395. *See* Defendants' Opposition to Plaintiff's Objection to the Magistrate Judge's Report and Recommendation at 1, *Walewski*, 2012 WL 847236 (No. 11-cv-01178), ECF No. 57.

396. *See id.* at 3–7.

397. *See id.* at 4.

398. *See* Walewski v. ZeniMax Media, Inc., 502 F. App'x 857, 861 (11th Cir. 2012).

Rule 23 litigation is very expensive for litigants.[399] Yet, as just described, the *Byrd* and *Walewski* cases present examples when this litigation may be *unnecessarily* costly.[400] The plaintiffs' attorneys, for example, squandered their time litigating the overbreadth issue.[401] And their time is valuable because these attorneys typically work on contingencies.[402] Similarly, the defendants were likely excessively billed for this same preventable litigation. So, these examples plainly demonstrate how inconsistent overbreadth analysis materializes in needless costs. These added litigation costs may also create a potential for forum shopping.[403]

b. The Potential for Forum Shopping

Forum shopping is unfair because similarly situated parties should not be subjected to inconsistent opportunities and costs in litigation based on the forum.[404] For an illustration of this point, consider the plaintiffs in *Byrd* and *Walewski*. They may have only been able to bring their suits in one jurisdiction.[405] If so, then these parties had to remain in forums that had wavered on overbreadth.[406] Conversely, other, similarly situated plaintiffs may have been able to choose between multiple forums. These other plaintiffs would have presumably chosen forums that had consistently analyzed overbreadth to avoid this potential for preventable litigation.[407] Thus, under this scenario, the *Byrd* and *Walewski* plaintiffs would have been subjected to disproportionate costs merely because of procedural technicalities.[408]

It is understandable why plaintiffs would forum shop under these circumstances.[409] Though, as the next section explains, other courts have not demonstrated one specific preference for where overbreadth should be analyzed at the class certification stage.[410] Instead, many courts have blindly acquiesced to litigants' analytical structures.[411]

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399. *See supra* text accompanying notes 73, 78.
400. *See, e.g.*, *supra* text accompanying notes 379, 388.
401. *See supra* text accompanying notes 76–77.
402. *See generally* 1 RUBENSTEIN, *supra* note 15, § 1:18.
403. *See supra* text accompanying note 14.
404. *See supra* text accompanying notes 44–45.
405. There are many reasons why a named plaintiff in this scenario would be unable to choose between multiple forums. *See, e.g.*, 2 RUBENSTEIN, *supra* note 15, § 6:28 (discussing the role of personal jurisdiction in Rule 23 actions).
406. *See, e.g.*, *supra* text accompanying notes 381–93, 389–98.
407. *See* Sharma, *supra* note 45, at 844.
408. *See supra* Part II.A.3.a.
409. *See supra* text accompanying note 44.
410. *See* PB Prop. Mgmt., Inc. v. Goodman Mfg., No. 12-CV-1366-HES-JBT, 2016 WL 7666179, at *20 (M.D. Fla. May 12, 2016); Jamison v. First Credit Servs., 290 F.R.D. 92, 108 (N.D. Ill. 2013).
411. *See PB Prop. Mgmt.*, 2016 WL 7666179, at *20; *Jamison*, 290 F.R.D. at 108.

B. Inconsistent Overbreadth Analysis That Derives from Judicial Acquiescence

This Note describes how litigant confusion persists where courts analyze overbreadth in divergent ways. Naturally, this same confusion also persists when courts acquiesce to defendants' imprecise overbreadth arguments. *Jamison v. First Credit Services*[412] and *PB Property Management Group LLC v. Goodman Manufacturing*,[413] described below, demonstrate how such confusion likewise leads to unnecessary litigation costs and the potential for forum shopping.

1. The Resultant Unnecessary Litigation Costs

Jamison presents another example where a district court denied class certification for an action under the TCPA, in part, due to an overbroad class definition.[414] The court in *Jamison*, however, addressed many of the issues "as they were framed" by the defendant because it agreed that there was a "substantial overlap" between the ascertainability and predominance requirements.[415] As a result, the court acquiesced to the defendant and exclusively analyzed overbreadth under the ascertainability inquiry.[416]

Following this denial of class certification, the plaintiffs asked the court to reconsider.[417] They particularly asserted that the court "misapprehended the facts"[418] because the proposed class was indeed ascertainable.[419] They also cited cases within the circuit to show that the potential overbreadth should have been analyzed under the predominance requirement.[420] In turn, the plaintiffs extensively detailed how these two inquiries are meant to be quite distinct.[421]

Still, the court denied this request for reconsideration.[422] It did not explain why the predominance and ascertainability requirements "overlapped" so as to allow for interchangeable overbreadth analysis.[423] Instead, the court similarly repeated the defendant's ascertainability arguments without addressing many of the plaintiffs' main objections.[424] Consequently, the plaintiffs may have been inhibited from properly asserting their predominance arguments solely because of the apparent deference.[425] Courts

412. 290 F.R.D. 92.
413. 2016 WL 7666179.
414. *See Jamison*, 290 F.R.D. at 108–09.
415. *See id.* at 108.
416. *See id.* at 108–09.
417. *See* Motion for Reconsideration at 1, Jamison v. First Credit Servs., No. 12-C-4415, 2013 WL 3872171 (N.D. Ill. July 29, 2013), ECF No. 105.
418. *See id.*
419. *See* Reply in Support of Motion for Reconsideration at 2–3, *Jamison*, 2013 WL 3872171 (No. 12-C-4415), ECF No. 111.
420. *See id.* at 2–5.
421. *See id.* at 2–7.
422. *See Jamison*, 2013 WL 3872171, at *8–10; *supra* text accompanying note 420.
423. *See Jamison*, 2013 WL 3872171, at *8–10.
424. *See id.*
425. *See, e.g.*, *supra* text accompanying note 379.

that demonstrate such unconcern towards precision have enabled superfluous litigation in the long run.[426]

PB Property Management presents another example.[427] Like in *Jamison*, the plaintiffs in *PB Property Management* filed a motion to certify a Rule 23(b)(3) action.[428] The plaintiffs alleged that the defendant, a manufacturer of air conditioning and heating system components, knew of several defects in its products that regularly led to leakage and necessary repairs.[429] Yet, notwithstanding this potential deception, a district court ultimately denied the motion.[430] It did so by way of acceding to the defendant's claims regarding the ascertainability and predominance requirements.[431] Specifically, the court held that the plaintiffs failed to satisfy both of these requirements because the proposed class definition was substantially overbroad.[432] The court, however, did not explain why it felt that the defendant had correctly framed the overbreadth issue in this duplicative manner.[433]

In its opposition to the motion for class certification, the defendant had argued overbreadth under the ascertainability requirement.[434] It noted that the existence of a substantial number of claimants who had never been exposed to the alleged defects mandated a denial of class certification.[435] In support of this ascertainability assertion, it cited *Walewski* and several other cases.[436] Next, the defendant devoted almost a dozen pages to the predominance inquiry.[437] Both arguments equally consisted of contentions regarding the existence of the uninjured class members.[438] As for the requirement itself, the defendant asserted that "individualized inquiries" regarding a common form of liability "overwhelm[ed] any common questions."[439] While the word "overbroad" was not used here as it was within the ascertainability section, the arguments remained practically identical.[440]

Following these repetitious contentions, the plaintiffs responded by noting that the defendant was "simply wrong" because whether "some members did not experience the [alleged] problem" was no reason to deny class

426. *See* PB Prop. Mgmt., Inc. v. Goodman Mfg., No. 12-CV-1366-HES-JBT, 2016 WL 7666179, at *18 (M.D. Fla. May 12, 2016); Jamison v. First Credit Servs., 290 F.R.D. 92, 108 (N.D. Ill. 2013).

427. *See PB Prop. Mgmt.*, 2016 WL 7666179, at *18–21 (showing how the court framed its overbreadth analysis through the defendant's analytical structure).

428. *See id.* at *4.

429. *See id.* at *2–3.

430. *See id.* at *29.

431. *See id.* at *18–20, *27–28.

432. *See id.*

433. *See generally id.*

434. *See* Defendant's Opposition to Plaintiffs' Motion for Class Certification at 20, *PB Prop. Mgmt.*, 2016 WL 7666179 (No. 12-CV-1366-HES-JBT), ECF No. 89.

435. *See id.*

436. *See id.* at 20–21.

437. *See id.* at 22–34.

438. *See id.*

439. *See id.* at 22.

440. *See id.*

certification under the ascertainability requirement.[441] Instead, they suggested that these liability questions were best evaluated under the predominance inquiry.[442] Nevertheless, many of these assertions proved needless as the court subsequently demonstrated its support of the defendant's imprecise arguments[443] at the expense of succinct analysis.[444]

The overbreadth issue in this case and in *Jamison* could have been sufficiently framed under one Rule 23 requirement.[445] Because these courts chose not to, the plaintiffs' attorneys wasted their valuable time and the defendants were likely exposed to unnecessary monetary costs.[446]

2. The Resultant Potential for Forum Shopping

As demonstrated above, these unnecessary litigation costs may lead to forum shopping.[447] To illustrate, consider that the plaintiffs in *Jamison* and *PB Property Management* may have been unable to choose between multiple forums for their respective Rule 23(b)(3) suits.[448] If true, then these plaintiffs were forced to litigate in courts that had demonstrated imprecise overbreadth analysis.[449] Alternatively, similarly situated plaintiffs may have been able to select separate forums that had not previously acquiesced to defendants' imprecise analytical structures. Thus, in this scenario, the *Jamison* and *PB Property Management* plaintiffs would have been subjected to redundant overbreadth litigation and unnecessary costs solely due to their inability to forum shop.[450] Conversely, the latter plaintiffs would not have been exposed to these superfluous costs if they had chosen to forum shop in this manner.[451]

Accordingly, it is clear that the overbreadth issue results in inefficient and unfair consequences for involved litigants.[452] Fortunately, as Part III next describes, a feasible solution exists: courts must consistently apply the predominance requirement during overbreadth analysis at the class certification stage in Rule 23(b)(3) suits.

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441. *See* Plaintiffs' Reply Brief in Support of Motion for Class Certification at 6–8, PB Prop. Mgmt., Inc. v. Goodman Mfg., No. 12-CV-1366-HES-JBT, 2016 WL 7666179 (M.D. Fla. May 12, 2016), ECF No. 107.

442. *See id.* (noting that this is the predominance inquiry's ultimate question).

443. *See* Defendant's Opposition to Plaintiffs' Motion for Class Certification, *supra* note 434, at 20–24.

444. *See* Plaintiffs' Reply Brief in Support of Motion for Class Certification, *supra* note 441, at 6–16 (showing how the plaintiffs redundantly responded to the defendant's objections due to the prior inconsistent holdings and analysis).

445. *See supra* text accompanying note 441.

446. *See supra* text accompanying note 402.

447. *See supra* text accompanying note 403.

448. *See, e.g.*, *supra* text accompanying note 405.

449. *See supra* Part II.B.1.

450. *See supra* text accompanying note 403.

451. *See supra* Part II.A.1.a.

452. *See supra* text accompanying notes 69–80.

III. COURTS SHOULD CONSISTENTLY APPLY THE PREDOMINANCE REQUIREMENT DURING OVERBREADTH ANALYSIS AT RULE 23'S CLASS CERTIFICATION STAGE

This Note centers on an often-overlooked issue within the federal courts and exposes its resultant detrimental consequences for litigants. A solution is highly attainable. Consider the current circuit split on ascertainability.[453] That issue implicates judicial *disagreements* as to the result of Rule 23 class certification.[454] Alternatively, courts unanimously *agree* that irreparably overbroad classes should be denied class certification.[455] Here, the issue simply exists due to differing rationales for class certification analysis.[456] Thus, due to the issue's nature, courts have the ability to harmonize their actions to avoid the aforementioned ineffective litigation.

To further this point, it is important to revisit the issue's context. First, this Note explained how Rule 23's class certification requirements need to be consistently applied for effectiveness.[457] Then, Part II presented examples of the overbreadth issue to show how inconsistent analysis at the class certification stage may indeed result in unnecessary litigation costs and the potential for forum shopping.[458] In doing so, this Note displayed why courts need to adopt one standard for overbreadth analysis irrespective of which class certification requirement is the "correct" one.

Regardless of this general need for uniformity, the predominance inquiry is the optimal analytical approach as each requirement under Rule 23 fulfills distinct goals.[459] The explicit predominance requirement, for example, ensures that sufficient similarities exist between class members to ensure that the consolidation of claims remains superior to alternate forms of litigation.[460] Of course, the hallmark of similarities between claimants is a common form of liability—as individualized inquiries inherently do not predominate where class members share the same injury.[461] Thus, it is apparent that overbreadth scrutiny falls neatly within the requirement's framework and actually encourages analytic clarity.[462]

In contrast, the ascertainability requirement does not truly relate to this overbreadth concern. As stated, it simply mandates objective class definitions so that proposed members may be identified.[463] This implicit requirement ensures that people are properly protected from potentially duplicative litigation.[464] In particular, a plaintiff's satisfaction of this

453. *See supra* text accompanying note 174.
454. *See supra* text accompanying notes 174–78.
455. *See supra* text accompanying note 220.
456. *See supra* Part II.
457. *See supra* text accompanying note 12.
458. *See supra* text accompanying note 12.
459. *See, e.g.*, *supra* text accompanying note 115.
460. *See supra* text accompanying note 122.
461. *See supra* text accompanying note 127.
462. *See supra* text accompanying notes 202–09, 268.
463. *See supra* text accompanying note 176.
464. *See supra* text accompanying note 163.

requirement allows for adequate notice.[465] As explained above, objectively defined classes that are overbroad may still satisfy the requirement when *all* class members remain identifiable.[466] Hence, overbreadth analysis is not within ascertainability's scope. Accordingly, to fix the issue, the predominance requirement must be *uniformly* adopted and *consistently* applied. It is also fundamental that courts appreciate the need for uniformity when applying the FRCP.

CONCLUSION

The inconsistency of overbreadth analysis at Rule 23's class certification stage can be attributed to a variety of causes.[467] This general inconsistency has resulted in widespread ineffective litigation.[468] And, as explained in this Note, the Rule's large footprint on society has only intensified such negative ramifications. To remedy this inconsistency, courts should unanimously apply the predominance requirement to promote the Rule's effectiveness. The failure to fix this issue further creates litigant uncertainty and, as explored above, can subject parties to superfluous legal costs and unnecessary delays at the class certification stage. These sorts of potential problems could be avoided if courts uniformly adopt one form of analysis. Although this issue has only a limited effect on class certification results, it is vital to capitalize on any opportunity that helps encourage efficiency and fairness within our legal system.

465. *See supra* text accompanying note 365.
466. *See supra* text accompanying note 260.
467. *See supra* Part II.
468. *See supra* Part II.