4. Antitrust Class Actions

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Topics

- What is a class action?
- What is the role of class actions in antitrust litigation?
- What criteria must a putative class action satisfy to be certified?
- What requirements for class certification are most vulnerable to attack in putative antitrust class actions?
- What is the role of economic evidence in antitrust class actions?
- What are the mechanics of class action settlements?
- How are class actions financed?

Class actions

- Usual rule for claim preclusion (res judicata)
  - An entity will be bound by a judgment only if the entity —
    - was a party to the action or in privity with a party to the action, *and*
    - was subject to the personal jurisdiction of the court[1]
- Class action exception—
  - permits one or more representative plaintiffs
  - to aggregate in a single lawsuit
  - the claims of similarly situated persons not parties before the court, *and*
  - to bind both the representatives and the represented persons with any resulting judgment (favorable or unfavorable)
- Theory
  - Congruence of interests among the members of the class *and*
  - Adequate representation by the named plaintiff
  - Substitutes for individual control[2]

[1] Hansberry v. Lee, 311 U.S. 32, 40 (1940); Pennoyer v. Neff, 95 U.S. 714 (1878).
[2] Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625-26 & n.20 (1997); *Hansberry*, 311 U.S. at 41-43.

Public policy for party/privity exception

- Aggregates small claims to provide incentive to litigate[1]
  - Provides a means of aggregating small claims where the individual incentives to litigate are too small to justify individual actions
  - Provides redress for the injured parties who otherwise would not have practical access to the courts
  - Deters wrongdoing by the defendant by internalizing the costs that the wrongdoer imposes on its victims
- Promotes judicial economy[2]
  - Avoids multiple actions on essentially the same claim, so that class members, defendants, and the court all are spared the costs and burdens of multiple actions.
- Protects against conflicts in judicial resolutions
  - Assures that the defendant's obligations, if any, will be consistent across class members

[1] Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997).
[2] General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 155 (1982).

Antitrust class actions

- Significance
  - Fixture of modern private antitrust litigation
    - Outside of criminal prosecution, the class action is the antitrust challenge that defendants fear the most
    - Overcomes “small claims” problems, especially in consumer cases
    - Reduces search costs and information asymmetries problems among class members
    - Spreads notoriously high costs of antitrust litigation over multiple claimants
      - Voluminous discovery
      - Economic and industry expert costs
      - Extensive motion practice
    - Once aggregated, the potential recovery is often large enough to attract not only representation but also financing from plaintiffs’ lawyers
  - Promotes dual public purposes of the antitrust laws[1]
    - Provide compensation to those injured by antitrust violations
    - Create “private attorneys general” whose presence will deter future antitrust violations

[1] Hawaii v. Standard Oil Co. of Calif., 405 U.S. 251, 261 (1972).

Adequacy of representation

- Theory
  - Congruence of interests among the members of the class *and*
  - Adequate representation by the named plaintiff
  - Substitutes for individual control
    - The idea is that–at least in principle–the class representatives would make the same decisions as the absent class members reasonably would have made had they been parties to the action will be made by the named class plaintiffs and class counsel
- Source of requirement
  - Constitutional due process
  - Policy embodied in the law of procedure
  - Inherent discretion of the court in the exercise of the judicial power
- Rules: Class representative—
  1. Must be a member of the class it seeks to represent
  2. Must be a vigorous representative in advocating the interests of the class
  3. Must not have interests that are antagonistic to the interests of other class members

Absent class members

- Bound by class action judgment
  - Receive whatever benefits, if any, resulting from litigation, *but*
  - Precluded from pursuing their individual claims against the defendants in a subsequent lawsuit
- Not parties to litigation
  - Neither parties nor in privity with a named plaintiff by virtue of their class membership
  - *But* may appeal adverse judgment as if a party (without intervening)
- No requirement for personal jurisdiction
  - Need not be subject to the personal jurisdiction of the court in order to be bound by the class action judgment
- Likely to have—
  - No say in the choice of class counsel
  - No individual contact with class counsel notwithstanding an apparent attorney-client relationship between them
  - No input into class counsel's strategy for the litigation, including settlement

Economics of class actions

- Lawyer-financed
  - Antitrust class actions are almost always financed by law firms operating on judicially recognized contingency fee principles
    - The law firms, in turn, can obtain financing from various litigation financing firms
    - Drives antitrust class action litigation almost exclusively to actions that have the potential for substantial damage awards
  - Attractive litigation attributes
    - Factually and legally simple (to reduce costs)
    - Easy to evaluate (to make a return on investment more predictable)
    - High payoff in the event of success (to compensate for risk in financing litigation)

Economics of class actions

- Implications for antitrust class actions
  - Almost always are grounded in simple per se claims
  - Almost always contain a claim of horizontal price-fixing
    - The per se rule applies
    - Proof of liability is among the simplest in antitrust law, *and*
    - Aggregate damages can be enormous even if class members individually sustain only negligible injuries
  - Rarely used to challenge mergers, price discrimination, or non-per se violations (such as non-price vertical restraints)
    - Proof is usually complex
    - Litigation costs are likely to be higher
    - The outcome is less predictable
  - Rarely used in actions where the restraint is something less than industry-wide
    - Split practice complicates proof
    - Limits aggregate damages

FRCP 23

- FRCP 23 governs class actions in federal court
  - 1938—Originally adopted as part of the original FRCP
    - Origin in long-standing equity practice as a device to prevent a multiplicity of suits
    - Because the 1938 revisions also eliminated the distinction between law and equity and created a single civil action, class actions became available in actions for damages as well as equitable relief
    - But technicalities of the rule all but eliminated it in practice
  - 1966—Completely rewritten in essentially modern form
    - Redefined the classes in terms of the nature of the underlying cause of action and the relief sought
    - Clarified the binding effect of resulting judgments whether or not favorable to the class
    - Specified new prerequisites to the maintenance of a class action to ensure adequate representation of the class by the named plaintiffs
    - Provided for certain forms of notice to class members
    - Provided an unusually large role for courts in—
      - The qualification of law suit as a class action
      - The conduct of the litigation
      - In any settlement or dismissal of the class action

FRCP 23

- Purpose of Rule 23:

> The purpose of Rule 23 is "'to select the metho[d] best suited to adjudication of the controversy fairly and efficiently.'" Consequently, class certification is not summary judgment by another name. The plaintiffs' burden is to present enough evidence to warrant adjudication of their claims on a class basis, not to win their case.[1]

- Amendments
  - 1997—Added a new Section 23(f) to provide for permissive interlocutory appeals of class certification decisions
  - 2003—Amended to improve the class action administration
  - 2007—Amended as part of the general restyling of the Civil Rules
    - These changes are intended to be stylistic only
  - 2018—Amended settlement approval process

[1] *In re* Capacitors Antitrust Litig. (No. III), No. 14-CV-03264-JD, 2018 WL 5980139, at *3 (N.D. Cal. Nov. 14, 2018) (quoting Alcantar v. Hobart Serv., 800 F.3d 1047, 1053 (9th Cir. 2015), in turn quoting Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 460 (2013) (alteration in original)).

Initiating a class action

- The class action complaint
  - A plaintiff initiates a class action by filing a complaint with adequate class action allegations:
    - The complaint must allege that it is a class action
      - Typical opening sentence: "[Plaintiff], *on behalf of itself and all others similarly situated*, by its attorneys, brings this action for treble damages and injunctive relief under the antitrust laws of the United States . . . . " (emphasis added)
      - Some local rules require a putative class action to be identified as such in the caption of the complaint or in the title of the pleading
    - The complaint must define the putative class
    - The complaint must allege that the putative class—
      - Satisfies the four requirements of Rule 23(A)—numerosity, commonality, typicality, and adequacy of representation
      - Fits with one of the three categories of class action defined in Rule 23(b)

Initiating a class action

- The class action complaint
  - Testing the sufficiency of the class action allegations on the pleadings
    - Rule 23(d)(1)(D) provides that the court may "require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly"[1]
      - In addition, Rule 12(f) provides that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."
    - Some courts have entertained a motion on the pleading to strike the class actions in the complaint under Rules 23(d)(1)(D) or 12(f)
      - The courts are split on whether class allegations must be supported by sufficient factual allegations to make it plausible under *Twombly* that the requirements of Rule 23(a) and (b) are satisfied
      - In any event, If the class allegations fail the *Twombly* test, then, as in the usual case, the court should provide the plaintiffs with leave to amend the complaint to cure the deficiency unless it appears that any effort to cure would be futile

[1] Fed. R. Civ. P. 23(d)(1)(d).
[2] *Id*. 12(f).

Initiating a class action

- Interim class counsel and precertification case management
  - Observations
    - Prior to ruling on class certification, the court will enter one or more initial case-management orders to guide the parties in presenting the judge with the information necessary to make the certification decision and permit the orderly and efficient development of the case
    - When multiple class action suits are consolidated before the court in the same matter, the need to coordinate on the plaintiffs' side is especially important to ensure the interests of the putative class(es) are protected, eliminate redundancies in pretrial certification trial practice, and promote judicial efficiency
  - Interim class counsel
    - Rule 23(g)(3) provides for the appointment of interim class counsel to provide any necessary precertification coordination:

> *Interim Counsel*. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.[1]

    - In complex antitrust matters, court will often appoint multiple firms as co-class counsel

[1] Fed. R. Civ. Proc. 23(g)(3).

Rule 23 requirements for a class action

1. Must have a well-defined class that—
2. Satisfies each of four requirements of FRCP 23(a)
   a. Numerosity
   b. Commonality
   c. Typicality
   d. Adequacy of representation
3. PLUS falls into one of the three FRCP 23(b) categories:
   a. Rule 23(b)(1) class
      - Inconsistent adjudications establishing incompatible standards, *or*
      - Adjudications that would be dispositive of the interests of similarly situated persons
   b. Rule 23(b)(2) class for injunctive relief
   c. Rule 23(b)(3) class for damages

1. Well-defined class ("ascertainability")

- Necessary in order to—
  1. Identify those entities that will be bound by any final judgment
  2. Test whether the Rule 23 requirements are satisfied
  3. Provide sufficient notice to absent class members when required
- Requirements
  - Must be sufficiently precise so that an entity's inclusion or exclusion can be ascertained by reference to objective criteria using reasonable effort
  - MCL: Class definition must be "precise, objective, and presently ascertainable"[1]
- Example of a class definition: *Ready-Mix Concrete*

> All individuals, partnerships, corporations, limited liability companies, or other business or legal entities who purchased ready-mixed concrete directly from any of the Defendants or any of their co-conspirators, which was delivered from a facility within the Counties of Boone, Hamilton, Hancock, Hendricks, Johnson, Madison, Marion, Monroe, Morgan, or Shelby in the State of Indiana, at any time from July 1, 2000 through May 25, 2004, but excluding Defendants, their co-conspirators, their respective parents, subsidiaries, and affiliates, and federal, state, and local government entities and political subdivisions.

[1] Manual for Complex Litigation (Fourth) § 21.222. The manual is prepared by the Federal Judicial Center.

1. Well-defined class ("ascertainability")

- Mechanics of defining the class
  - The complaint
    - A named plaintiff seeking to represent a class must allege a class definition and factual allegations sufficient to make plausible that the alleged class satisfies the requirements of Rule 23
    - If amended complaints are filed, the named plaintiff may change the definition of the alleged class
  - The motion for class certification
    - As a matter of practice, the alleged class does not bind the named plaintiff in its motion for class certification
    - Named plaintiffs frequently alter the complaint's class definition—typically narrowing the class—in the class certification motion
      - Indeed, although not common, there are cases in which the plaintiffs narrowed the class definition in their *reply* in support of class certification to obviate objections made by defendants in their class opposition papers[1]
  - Class certification order
    - Must "define the class and the class claims, issues, or defenses"[2]

[1] *See, e.g.*, *In re* Aluminum Warehousing Antitrust Litig., 336 F.R.D. 5, 24 (S.D.N.Y. 2020).
[2] Fed. R. Civ. P. 23(c)(1)(B).

1. Well-defined class ("ascertainability")

- Fail-safe classes
  - *The problem*: Class membership cannot depend on winning the merits
    - Rule 23 requires the class to be defined by objective criteria, not by the legal conclusion the plaintiff seeks to prove
    - A class is not ascertainable if membership cannot be determined without first deciding whether the defendant is liable
  - "Fail-safe" classes
    - *Definition*: *A fail-safe class is one defined so that a person is a member only if that person has a valid claim*
    - *Examples*:
      - "All purchasers injured by defendants' unlawful conspiracy"
      - "All persons overcharged by defendants' illegal conduct"
      - *Compare with*: "All persons who purchased product X from defendants in the United States from [date] to [date]" (not fail-safe—membership determined by objective criteria, not the merits)
  - Why courts object
    - Courts object to fail-safe classes because, if plaintiffs lose, the putative members are defined out of the class and are not bound by the adverse judgment[1]

[1] *See* Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 677-78 (7th Cir. 2009).

1. Well-defined class ("ascertainability")

- "Administrative feasibility"
  - While ascertainability is an implied requirement of Rule 23, most circuits to address the issue reject *administrative feasibility* as a separate part of ascertainability
    - "Administrative feasibility" means that the court must have a *practical* means of identifying whether a given person is a member of the class
    - *Query*:
      - Administrative feasibility in this context appears to address whether there is a practical means of proving membership in the class; ascertainability more generally addresses whether the class is defined by objective criteria.
      - *WDC*: Objective criteria is necessary to ensure due process in barring claims. If administrative feasibility only goes to proof of whether objective criteria are satisfied, then the allocation of the burden of proof should handle any constitutional problem

1. Well-defined class ("ascertainability")

- "Administrative feasibility"
  - Circuit split
    - Accepts administrative feasibility as a necessary part of ascertainability
      - *First Circuit:*
        - *In re* Nexium Antitrust Litig., 777 F.3d 9, 19 (1st Cir. 2015) ("At the class certification stage, the court must be satisfied that, prior to judgment, it will be possible to establish a mechanism for distinguishing the injured from the uninjured class members. The court may proceed with certification so long as this mechanism will be 'administratively feasible,' *see Carrera*, 727 F.3d at 307, and protective of defendants' Seventh Amendment and due process rights[.]")
      - *Third Circuit*: Byrd v. Aaron's Inc., 784 F.3d 154, 162-63 (3d Cir. 2015)
        - Marcus v. BMW of North America, LLC, 687 F.3d 583, 593 (3d Cir. 2012) ("The ascertainability requirement serves several important objectives. First, it eliminates "serious administrative burdens that are incongruous with the efficiencies expected in a class action" by insisting on the easy identification of class members. Second, it protects absent class members by facilitating the "best notice practicable" under Rule 23(c)(2) in a Rule 23(b)(3) action. Third, it protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable.") (internal citations omitted); *accord In re* Niaspan Antitrust Litig., 67 F.4th 118, 132 (3d Cir. 2023) (detailed analysis reaffirming administrative feasibility as part of ascertainability)
        - Carrera v. Bayer Corp., 727 F.3d 300, 307-08 (3d Cir. 2013) (requiring putative class representatives prove that the identification of class members will be "a manageable process that does not require much, if any, individual factual inquiry") (internal quotation marks omitted)
      - *Fourth Circuit*: EQT Prod. Co. v. Adair, 764 F.3d 347, 358-59 (4th Cir. 2014)

1. Well-defined class ("ascertainability")

- "Administrative feasibility"
  - Circuit split
    - Rejects administrative feasibility as an independent requirement
      - *Second Circuit:* In re Petrobras Sec., 862 F.3d 250, 267 (2d Cir. 2017)
      - *Sixth Circuit*: Rikos v. Procter & Gamble Co., 799 F.3d 497, 525 (6th Cir. 2015)
      - *Seventh Circuit*: Mullins v. Direct Digital, LLC, 795 F.3d 654, 662-63 (7th Cir. 2015)
      - *Eight Circuit*: Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc., 821 F.3d 992, 995-96 (8th Cir. 2016)
      - *Ninth Circuit*: Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1124 n.4 (9th Cir. 2017)
      - *Tenth Circuit*: *Cline v. Sunoco, Inc. (R&M)*, 159 F.4th 1171, 1196 (10th Cir. 2025)
      - *Eleventh Circuit*: Cherry v. Dometic Corp., 986 F.3d 1296, 1302-04 (11th Cir. 2021)
      - *D.C. Circuit (district courts only)*: In re McCormick & Co., Inc., Pepper Prod. Mktg. & Sales Practices Litig., 422 F. Supp. 3d 194, 242 (D.D.C. 2019)
    - Fifth Circuit remains unclear

1. Well-defined class ("ascertainability")

- "Administrative feasibility"
  - Example: *Briseno v. ConAgra Foods, Inc.*[1]
    - In 2017, the Ninth Circuit found that no separate "administrative feasibility" exists in Rule 23.
    - *Alleged class definition*: "All persons who reside in [certain named states] who have purchased Wesson Oils within the applicable statute of limitations periods established by the laws of their state of residence . . . "
    - *Defendants*: Class certification must be denied because no administratively feasible way to identify class members since consumers typically do not save their grocery receipts and so would not be able to reliably identify themselves as class members.
      - NB: This objection goes to the administrative feasibility of providing proof of class membership, not to whether the class is objectively defined
    - *Ninth Circuit*: Rejected separate administrative feasibility requirement: To the extent concerns arise about the identification of class members, those concerns are subsumed in Rule 23's superiority analysis, which considers whether the class is defined clearly with objective criteria and is manageable.[1]

[1] *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017).
[2] *Id*. at 1124 n.4, 1127

2. FRCP 23(a)(1): Numerosity

- General rules
  - Requires that the class must be so numerous that joinder of all members is impracticable
    - Does not require that joinder is impossible
    - Only requires that joinder of all class members would pose a strong litigation hardship or inconvenience in the particular circumstances of the case
  - Establishes the need for the class action device
    - Without a multiplicity of potential parties there is no need to employ a representative action

2. FRCP 23(a)(1): Numerosity

- No absolute numerical thresholds
  - General rule
    - There are no absolute numerical thresholds in determining whether the numerosity requirement is satisfied
    - That said, the first step in a numerosity analysis is to estimate the number of members in the putative class
      - Defendants often have sales records, which can be discovered
      - Experts also can be used to estimated the number of class members
  - Judicial tendencies
    - But classes with 40 or more putative members typically meet the requirement with no other showing of difficulty of joinder
      - Some circuits rebuttably presume numerosity with putative classes of 40 or more[1]
    - Class with 20 or fewer members almost always rejected because joinder is deemed practicable
    - Classes with between 20 and 30 members are mixed, but frequently rejected

[1] *See, e.g.*, *In re* Modafinil Antitrust Litig., 837 F.3d 238, 250-51 (3d Cir. 2016); Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995); *In re* Namenda Direct Purchaser Antitrust Litig., 331 F. Supp. 3d 152, 202 (S.D.N.Y. 2018) *see also* Mulvania v. Sheriff of Rock Island Cty., 850 F.3d 849, 859 (7th Cir. 2017) ("While there is no magic number that applies to every case, a forty–member class is often regarded as sufficient to meet the numerosity requirement."); *In re* Loestrin 24 FE Antitrust Litig., 410 F. Supp. 3d 352, 397 (D.R.I. 2019) (same)

2. FRCP 23(a)(1): Numerosity

- General rules
  - Joinder
    - One means by which additional persons become parties to an existing action
    - FRCP 19: Compulsory joinder of "necessary" parties
      - Requires joinder of parties whose presence in the case is necessary, for example, if—
        - Absence would prevent the court from giving complete relief to the existing parties
        - Absence would prevent impair that person's ability to protect its interests
        - Absence could subject an existing party to a substantial risk of duplicative damages or inconsistent injunctive relief
      - Court may order joinder of necessary parties
        - Subject to personal jurisdiction and venue requirements
        - If a necessary party cannot be joined, then court must consider whether the action should proceed or be dismissed
    - FRCP 20: Permissive joinder
      - Court may permit joinder of other persons if—
        - As a putative plaintiff, they (a) assert a right to relief jointly, severally, or in the alternative arising out of the same transaction or occurrence, and (b) there is a common question of law or fact to all plaintiffs in the action
        - As a putative defendant, they (a) have asserted against them a right to relief jointly, severally, or in the alternative arising out of the same transaction or occurrence, and (b) there is a common question of law or fact to all defendants in the action

2. FRCP 23(a)(1): Numerosity

- General rules
  - Considerations whether joinder is impracticable[1]
    - Number of members of the putative class
    - Judicial economy
    - Claimants' ability and motivation to litigate as joined plaintiffs[2]
    - Financial resources of class members
    - Geographic dispersion of class members
    - Ability to identify future claimants
    - Whether the claims are for injunctive relief or for damages
    - Requests for relief that could affect future class members
    - Knowledge of the names and existence of potential class members
    - Whether potential class members have already joined in other actions

Most important factors

[1] For a good discussion, see *In re* Modafinil Antitrust Litig., 837 F.3d 238, 249-60 (3d Cir. 2016); *In re* Zetia (Ezetimibe) Antitrust Litig., 7 F.4th 227, 239-41 (4th Cir. 2021) (Niemeyer, J., concurring); *see also* *In re* Namenda Direct Purchaser Antitrust Litig., 331 F. Supp. 3d 152, 202 (S.D.N.Y. 2018) (noting some additional factors).

[2] The fact that some putative class members are not economically motivated to litigate via joinder is not dispositive. Rather, it is only one of the factors to be considered in making an impracticability of joinder consideration. *See In re* Zetia (Ezetimibe) Antitrust Litig., 7 F.4th 227, 236 n. 7 (4th Cir. 2021).

2. FRCP 23(a)(1): Numerosity

- General rules
  - Considerations whether joinder is impracticable
    - Where failure to certify class would introduce multiple new plaintiffs in the existing multiple-defendant action, making the action less efficient than if the putative class was certified[1]
    - *Note*: When a putative class that just satisfies numerosity contains some members with sufficiently large damages to make an individual action attractive to them, the class still satisfies numerosity if the remaining class members lack the incentive to pursue individual their small claims[2]

[1] *See In re* Opana ER Antitrust Litig., No. 14 C 10150, 2021 WL 3627733, at *3 (N.D. Ill. June 4, 2021) (in a reverse payment action with an end-user payor class and individual plaintiffs, failure to certify a class of 36 direct purchasers—presumably drug wholesalers—that otherwise satisfies the Rule 23 requirements would introduce multiple new plaintiffs into the action, further complicating the action and making joinder impracticable).

[2] *See In re* Ranbaxy Generic Drug Application Antitrust Litig., 338 F.R.D. 294, 304 (D. Mass. 2021) (finding a class of 36 drug wholesalers members satisfied numerosity even though three members dominated the class claims)

2. FRCP 23(a)(1): Numerosity

- Application to antitrust cases
  - Almost never contested by defendants
  - There are exceptions
    - In re Zetia (Ezetimibe) Antitrust Litig., 7 F.4th 227 (4th Cir. 2021)
      - The court of appeals vacated class certification and remanded in a pay-to-delay case that involved a putative class of 35 sophisticated drug wholesalers with large claims--including three firms that accounted for 97 percent of all class purchases
      - The court of appeals held, among other things, that the district court committed legal error and therefore abused its discretion by looking to impracticability of individual suits, rather than impracticability of joinder in a single litigation (which allows the plaintiffs to spread the costs of litigation), in determining that the class satisfied numerosity
      - Distinction:
        - *Impracticability of individual suits*: Whether each class member would find it economically rational to pursue individual litigation (focuses on claim size)
        - *Impracticability of joinder*: Whether joining all plaintiffs in single action would be impracticable (focuses on litigation management)
      - Significance
        - In cases with sophisticated purchasers and large individual claims, numerosity requires showing that joinder itself (not individual litigation) is impracticable

2. FRCP 23(a)(2): Commonality

- Rule 23(a)(2)
  - Requires that "there are questions of law or fact common to the class"[1]
- Common vs. individual questions
  - *Tyson Foods*:

> An individual question is one where "members of a proposed class will need to present evidence that varies from member to member," while a common question is one where "the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof."[2]

  - Other judicial observations
    - "If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question."[3]

[1] Fed. R. Civ. P. 23(a)(2).
[2] Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016) (citation omitted).
[3] Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 815 (7th Cir. 2012).

2. FRCP 23(a)(2): Commonality

- Purpose
  - Commonality is the "glue" which holds the class together and makes it meaningful to try the claims of class members in a single action
    - Key to judicial efficiency
- General rules
  - One question of law or fact common to the class is sufficient[1]
  - Does not require that common questions predominate individual questions
  - Permits some variation in the details of individual claims
    - Especially on damages sustained
- Older cases
  - State that it is *sufficient* for commonality if—
    a. there are shared legal issues notwithstanding divergent factual predicates, *or*
    b. when there is a "common core of salient facts" or a "common nucleus of operative facts" notwithstanding a request for different legal remedies within the class

[1] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 359 (2011) ("Even a single [common] question will do.").

2. FRCP 23(a)(2): Commonality

- But *Wal-Mart* put an important gloss on these rules:
  - The Rule 23(a)(2) "language is easy to misread, since '[a]ny competently crafted class complaint literally raises common 'questions.'"[1]
    - "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."[2]
  - The *Wal-Mart* gloss:

> [C]laims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.
>
> > "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."[3]

[1] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011) (citation omitted).
[2] *Id*. at 350 (citation omitted).
[3] Id. at 350 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–132 (2009)); *applied* Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 663 (9th Cir. 2022) (en banc).

2. FRCP 23(a)(2): Commonality

- The *Wal-Mart* rule
  - So not any "common question" satisfies commonality, the common question must be one that is "central" to the validity of the class claims
  - Rule: Post-*Wal-Mart*, commonality is present only if —
    1. the claims of the class are based on a common contention [underlying set of facts],
    2. the common question is important in the sense that the "determination of its truth or falsity will resolve an issue that is central to the validity" of the class claims to redress that injury, *and*
    3. the common question is capable of resolution on a classwide basis at trial.[1]

[1] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (observing that what matters for the commonality inquiry "is not the raising of common 'questions' . . . but rather the capacity of a classwide proceeding to generate common answers"); accord Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022) (en banc) (applying *Wal-Mart's* "common answers" test in tuna price-fixing class action).

2. FRCP 23(a)(2): Commonality

- Application to antitrust cases
  - Typical "common questions" in a price-fixing action:
    - Whether defendants and their co-conspirators engaged in a conspiracy to raise, fix and maintain prices at supracompetitive levels
    - The duration and extent of defendants' alleged conspiracy
    - Whether each defendant was a participant in the conspiracy
    - Whether defendants' conspiracy violated Section 1 of the Sherman Act
    - The effect of defendants' alleged conspiracy upon prices actually charged to the putative class members
    - The appropriate measure of damages
  - Other frequent common questions in other types of antitrust cases:
    - The definition of the relevant markets
    - Whether the defendants had market power in the relevant market
    - Whether the defendants engaged in the same anticompetitive conduct toward the putative class members
    - Whether the defendants' conduct violated the antitrust laws
  - Almost never contested by defendants

2. FRCP 23(a)(3): Typicality

- General rules
  - Requires that "the claims or defenses of the representative parties must be typical of the *claims* or *defenses* of the class"
  - Purpose
    1. Ensures that the interests of the named plaintiff align with the interests of the class members *and*
    2. Named plaintiff's claims have the same essential characteristics as the claims of the class as a whole and suffer the same type of injury, *so that*
    3. Class representatives will work to the benefit of the entire class when pursuing their own individual goals in the litigation

    Aligns with adequacy of representation

2. FRCP 23(a)(3): Typicality

- General rules
  - Central inquiry
    - Whether the named plaintiff has the *incentive* to prove all the elements of the offense that would be presented by the individual members of the class if they had initiated their own individual actions and so adequately represents the class
  - *Presumption*: Named plaintiff's claims and defenses are typical if they—
    1. arise from the same event, practice, or course of conduct that forms the basis of the claims of the class as a whole, *and*
    2. are predicated on the same legal or remedial theory[1]
  - Distinguished from commonality
    - Typicality is broader than commonality since it looks at the relationship of the *claims* of the named plaintiffs and absent class members and not just whether a "common question"—which could only pertain to part of a claim—exists.

[1] *See, e.g.*, *In re* Warfarin Sodium Antitrust Litig., 391 F.3d 516, 532 (3d Cir. 2004); *In re* Broiler Chicken Antitrust Litig., No. 16 C 8637, 2022 WL 1720468, at *5 (N.D. Ill. May 27, 2022); *In re* Ranbaxy Generic Drug Application Antitrust Litig., 338 F.R.D. 294, 301 (D. Mass. 2021); *In re* Blue Cross Blue Shield Antitrust Litig., No. 2:13-CV-20000-RDP, 2020 WL 8256366, at *9 (N.D. Ala. Nov. 30, 2020); *In re* Ry. Indus. Emp. No-Poach Antitrust Litig., 395 F. Supp. 3d 464, 499 (W.D. Pa. 2019).

2. FRCP 23(a)(3): Typicality

- General rules
  - Aligns with adequacy of representation and often considered together—essentially two sides of the same coin
    1. *Typicality*: Focuses on the incentives of the named plaintiffs to prosecute and obtain relief align with the interests of the absent class members, and
    2. *Adequacy*: Focuses on whether the named plaintiffs have potential conflicts with the class members
  - Factual differences
    - Strong presumption that typicality is satisfied when the allegation is that the defendants engaged in a common illegal scheme with respect to all members of the class
    - Differences that usually will not defeat typicality—
      - Purchases across defendants or over time compared to other putative class members
      - Damages sustained by individual putative class members

2. FRCP 23(a)(3): Typicality

- Challenges to typicality
  - In challenging typicality, defendants have the burden of production that the atypical features of the named plaintiff's claim will—
    - become a major focus of the litigation, *or*
    - skew the named plaintiff's incentives to adequately prosecute the claims of absent class members
  - Example:
    - A purchaser with an assigned direct purchaser claim is a named plaintiff in a direct purchaser class action. Defendants challenge the validity of the assignment of the direct purchaser claim.
    - *Court*: Does not destroy typicality since the challenge will not be a major focus in the litigation[1]

[1] *In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 304-05 (E.D. Mich. 2001) ("It is only when the defense will 'skew the focus of the litigation' and create 'a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.'") (quoting Alaska v. Suburban Propane Gas Corp., 123 F.3d 1317, 1321 (9th Cir. 1997) (internal quotes and citation omitted))

2. FRCP 23(a)(3): Typicality

- Application in antitrust cases
  - Rarely contested where named plaintiff—
    1. is a member of the putative class
    2. has constitutional and prudential standing to pursue its individual claims
    3. has claims that are predicated on a legal theory generally applicable to the claims of absent class members, *and*
    4. is not subject to any unique defense that would "skew the focus of the litigation
  - Named plaintiff in a price-fixing action need not—
    - purchase from all of the alleged co-conspirators
    - purchase in precisely the same way as absent class members

2. FRCP 23(a)(3): Typicality

- Application in antitrust cases
  - Differences in state law in indirect purchaser actions
    - A number of courts have held that the slight variations that exist in the antitrust laws of various states do not make the named plaintiff's claims under the law of one state atypical[1]
  - Standing in indirect purchaser actions
    - Some courts have held that for each claim under a state law, a named plaintiff must exist with Article III standing to bring that particular claim[2]
      - For, for example, a putative class action invoking Minnesota antitrust law must have a named plaintiff with Article III standing to bring an individual claim under the Minnesota law

[1] *See, e.g.*, *In re* Namenda Indirect Purchaser Antitrust Litig., No. 115CV6549CMRWL, 2021 WL 509988, at *11 (S.D.N.Y. Feb. 11, 2021); *In re* Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig., 335 F.R.D. 1, 29-30 (E.D.N.Y. 2020) (certifying a class of end-payor plaintiffs whose claims arose from the antitrust laws of more than thirty states); *In re* Nexium (Esomeprazole) Antitrust Litig., 297 F.R.D. 168, 176 (D. Mass. 2013) (certifying a class of end payors whose claims arose under the antitrust laws of twenty-six states); *but see In re* Capacitors Antitrust Litig., No. 17-MD-02801-JD, 2020 WL 6462393, at *6 (N.D. Cal. Nov. 3, 2020) (finding material differences and denying class certification).

[2] *See, e.g.*, *In re* Capacitors Antitrust Litig., 154 F. Supp. 3d 918, 923-27 (N.D. Cal. 2015); *accord In re* Glumetza Antitrust Litig., No. C 19-05822 WHA, 2021 WL 352059, at *2 (N.D. Cal. Feb. 2, 2021); *In re* Hard Disk Drive Suspension Assemblies Antitrust Litig., No. 19-MD-02918-MMC, 2020 WL 6270948, at *4 (N.D. Cal. Oct. 23, 2020) *In re* Packaged Seafood Prod. Antitrust Litig., 242 F. Supp. 3d 1033, 1095 (S.D. Cal. 2017).

2. FRCP 23(a)(3): Typicality

- Application in antitrust cases
  - Differences in purchase amounts
    - *Example*: Typicality requirement satisfied even through the named plaintiff—
      - did not purchase from all of the alleged co-conspirator defendants,
      - purchased only one of the five products alleged to be subject to price fixing,
      - purchased only $4632 of the product from one defendant, while other customers purchased millions of dollars of the product from the same defendant, *and*
      - made only a one-time spot purchase while other class members negotiated yearly supply agreements or tolling arrangements[1]

[1] *In re* Bromine Antitrust Litig., 203 F.R.D. 403, 411 (S.D. Ind. 2001).

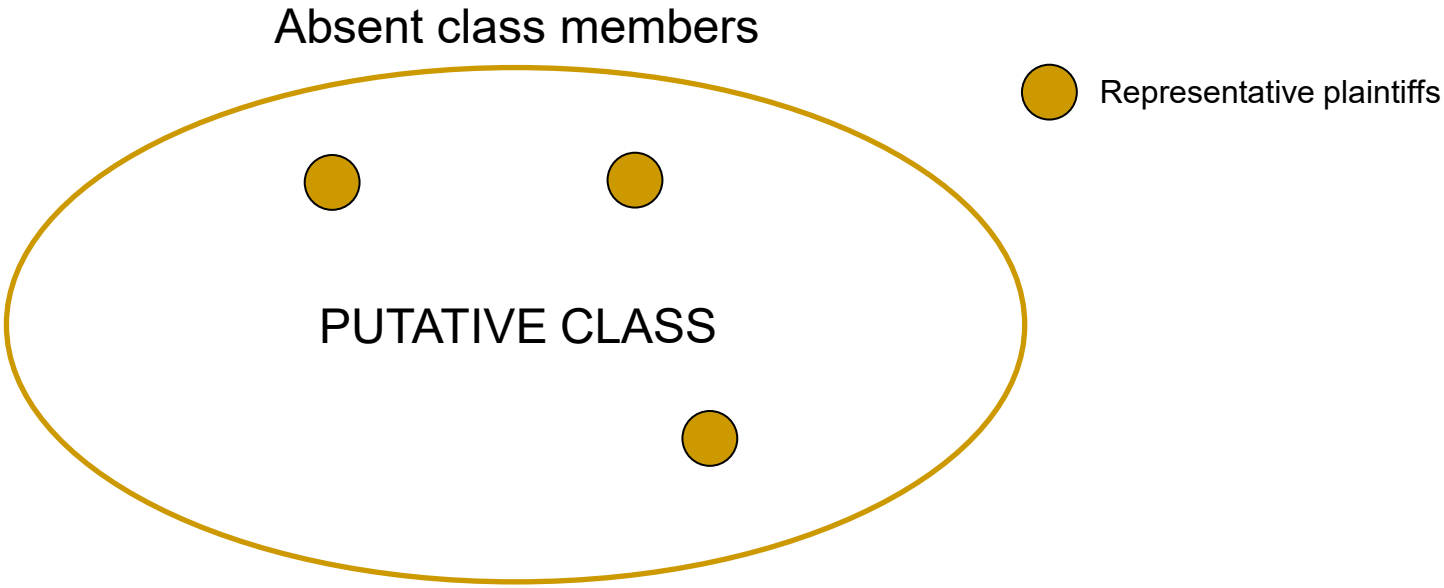
2. FRCP 23(a)(3): Typicality

- Application in antitrust cases
  - Differences in purchase amounts
    - *Counterexample*: Typicality requirement not satisfied when—
      - Named plaintiffs included only individuals and small businesses that purchased small numbers of computers, but the class also included large enterprise customers, which purchased larger volumes and different types of computers and which often negotiated multiyear purchase agreements for bundles for products and services, and so purchased in a "different competitive landscape" that the named plaintiffs[1]
    - Reconciliation
      - Where named plaintiffs purchased at retail on a "take it or leave it" basis, their claims are not typical of large purchasers who negotiated their purchase price[2]
      - Also, when the alleged conspiracy operated on restricting supply rather than setting prices, differences in purchaser bargaining power are not relevant to the claim so that typicality is satisfied[3]

[1] *In re* Intel Corp. Microprocessor Antitrust Litig., No. CV 05-485-LPS, 2014 WL 6601941,at *11-12 (D. Del. Aug. 6, 2014).
[2] *See In re* Broiler Chicken Antitrust Litig., No. 16 C 8637, 2022 WL 1720468, at *5 (N.D. Ill. May 27, 2022) (distinguishing *In re* Graphics Processing Units, 253 F.R.D. 478, 489 (N.D. Cal. 2008), and *In re* Optical Disk Drive, 303 F.R.D. 311, 317 (N.D. Cal. 2014)).
[3] *Broiler Chicken*, 2022 WL 1720468, at *5 ("Rather, Plaintiffs allege that Defendants restricted supply across the market in order to boost prices of a commodity. Bargaining power is not directly relevant to the claims.").

2. FRCP 23(a): Commonality and typicality

Commonality: Do the class members share a common question of law or fact? Goes to the *cohesiveness* of the class members as a group.



Typicality: Are the claims and defenses of the representative plaintiffs typical of those in the class as a whole? Goes to whether the named plaintiffs have the *incentives* to prove the elements of the claims of the absent class members.

2. FRCP 23(a)(4): Adequacy of representation

- General rules
  - Requires that the *representative parties* "will fairly and adequately protect the interests of the class"
    - Focus is on uncovering *conflicts of interest* between named parties and the class they seek to represent
    - Given the binding effect of a final judgment in a class action, adequacy of representation is required by due process[1]
    - Must be continuous throughout the litigation
    - Named plaintiff acts as a fiduciary to absent class members in the prosecution of the class claims
  - Historical note
    - Until Rule 23 was amended in 2003, Rule 23(a)(4) addressed both the adequacy of representation by—
      - The representative plaintiffs, *and*
      - Class counsel
    - Afterwards, adequacy of class counsel was moved into a new Rule 23(g)
      - Many modern courts, however, continue to analyze the adequacy of the named plaintiffs and class counsel under Rule 23(a)(4).[2]

[1] Hansberry v. Lee, 311 U.S. 32 (1940).

[2] See below for a discussion of adequacy of class counsel.

2. FRCP 23(a)(4): Adequacy of representation

- General rules
  - Named plaintiff requirements
    1. Must be a member of the class it seeks to represent
    2. Must be a vigorous representative in advocating the interests of the class, *and*
       - But requires only a "minimal degree of knowledge" about the case[1]
    3. Must not have interests that are antagonistic to the interests of other class members
       - Operationally, the absence of conflicts with absent class members is the most frequently litigated Rule 23(a)(4) issue
       - But only "fundamental conflicts" will defeat adequacy of representation[2]
       - Moreover, unlike the usual non-class action case, the named representatives do not control or instruct class counsel
         - Class counsel have a fiduciary obligation to the class as a whole and cannot act contrary to interest of the class even if instructed by a named plaintiff

[1] *See, e.g.*, *In re* Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig., 967 F.3d 264, 272 (3d Cir. 2020); In re Capacitors Antitrust Litig., (No. III), No. 17-MD-02801-JD, 2018 WL 5980139, at *10 (N.D. Cal. Nov. 14, 2018) ("While some of the corporate designees may have made deposition statements that reflected a rather general understanding of the litigation, none were so 'startlingly unfamiliar with the case' that they vitiated the possibility of serving as a class representative.") (citation omitted).

[2] *See Suboxone*, 967 F.3d at 272.

2. FRCP 23(a)(4): Adequacy of representation

- General rules
  - Knowledge of named plaintiffs
    - Courts recognize and accept that, in antitrust class actions, most of the information about the basis of the suit will come from counsel, not the personal knowledge of the named plaintiff
  - Typical adequacy findings:

> Second, [monopolization defendant] Reckitt's claim that Burlington [the named plaintiff] has ceded control of this litigation to class counsel, and that this creates a risk of conflicts, does not render Burlington an inadequate representative. Reckitt cites no precedent from this Court for its argument that a class representative must "control" the litigation. Indeed, we have observed that "it is counsel for the class representative and not the named parties ... who direct and manage [class] actions. Every experienced federal judge knows that any statements to the contrary [are] sheer sophistry." *In re Cmty. Bank of N. Va.*, 622 F.3d 275, 292 (3d Cir. 2010) (alterations and omission in original) (quoting *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 n.9 (3d Cir. 1973)). Moreover, Burlington is not a disengaged representative. *The record shows that Burlington is aware of its role as a fiduciary, understands the basis for the claimed injury, has an incentive to recover its proportionate share of damages, monitors the litigation, produced documents, and has the requisite interest in and knowledge about the case to satisfy the adequacy requirement*.[1]

[1] *See, e.g.*, *In re* Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig., 967 F.3d 264, 273 (3d Cir. 2020) (emphasis added).

2. FRCP 23(a)(4): Adequacy of representation

- Separate class solutions to Rule 23(a)(4) problems
  - To avoid antagonistic interests, any fundamental conflict must be addressed with a "structural assurance of fair and adequate representation for the diverse groups and individuals" among the plaintiffs[1]
  - To achieve this structural solution, courts must create homogenous subclasses under Rule 23(c)(4)(B) to ensure that each group of class members has separate named representative(s) and subgroup counsel that are dedicated to protecting the interest of the respective subclass members
- Class action settlements
  - Adequacy must be determined independently of the general fairness review of the settlement
  - The fact that the settlement may have overall benefits for all class members is not determinative of adequacy, since there remains the question of the allocation of the benefits among class members

[1] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997); *see* Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999).

2. FRCP 23(a)(4): Adequacy of representation

- Common problem areas
  - Failure of the named plaintiff to vigorously prosecute the action
  - Abandonment of particular remedies to the detriment of some or all putative class members
    - Claim or issue preclusion may prevent class members from pursuing foregone remedies in a subsequent action
  - Intraclass conflicts
    - Pitting a named representative against some absent class members (or absent class members against each other)
    - With potentially antagonistic class members being represented by the same class counsel
  - Collusive settlements
    - Named plaintiffs–and the named plaintiffs' counsel–attempt to use the class action as leverage to obtain a settlement favorable to themselves but unfavorable to absent class members
    - That is, in return for a settlement favorable to themselves, the named plaintiffs will champion a class settlement that provides absent class members will little or no relief but exhausts their claims

2. FRCP 23(a)(4): Adequacy of representation

- Application in antitrust cases
  - Some other possible problem areas
    - Former franchisee with no on-going business relationship with a defendant seeks to represent a class containing current franchisees with continuing business relationships with the defendant
    - Named plaintiff advocates a legal theory or a particular measure of damages that disadvantages some members of the class relative to other members
    - Named plaintiff seeks a form of relief not likely to be favored by some members of the class
  - Usually not problems
    - Named plaintiff is a competitor with absent class members
    - Named plaintiff purchases different products, different mixes of products, different amounts, or over different time periods than some of the absent class members
    - Named plaintiff did not purchase from each of the named defendants
    - Named plaintiff differs in its strategy in approaching the litigation from some absent class members

2. FRCP 23(a)(4): Adequacy of representation

- *Example*: *In re* Payment Card Interchange Fee and Merchant Discount Antitrust Litigation[1]
  - Background
    - Class action representing 12 million merchants that challenged Visa and MasterCard network rules prohibiting merchants from imposing surcharges on credit card transactions or from steering customers to a card with lower fees
    - After nearly ten years of litigation, parties agreed to a settlement that released all claims in exchange for disparate relief to each of two classes:
      - A Rule 23(b)(3) covering merchants that accepted Visa and/or MasterCard from January 1, 2004, to November 28, 2012, which would receive up to $7.25 billion
      - A Rule 23(b)2) class covering merchants that accepted (or will accept) Visa and/or MasterCard from November 28, 2012, onwards forever, which would receive injunctive relief
    - Two classes represented by the same counsel

[1] No. 12-4671-cv(L) (2d Cir. June 30, 2016).

2. FRCP 23(a)(4): Adequacy of representation

- *Example*: *In re* Payment Card Interchange Fee and Merchant Discount Antitrust Litigation[1]
  - Second Circuit: Vacated settlement for inadequate representation

> "The conflict is clear between merchants of the (b)(3) class, which are pursuing solely monetary relief, and merchants in the (b)(2) class, defined as those seeking only injunctive relief. The former would want to maximize cash compensation for past harm, and the latter would want to maximize restraints on network rules to prevent harm in the future."[1]
>
> "Moreover, many members of the (b)(3) class have little to no interest in the efficacy of the injunctive relief because they no longer operate, or no longer accept Visa or MasterCard, or have declining credit card sales. By the same token, many members of the (b)(2) class have little to no interest in the size of the damages award because they did not operate or accept Visa or MasterCard before November 28, 2012, or have growing credit card sales. Unitary representation of separate classes that claim distinct, competing, and conflicting relief create unacceptable incentives for counsel to trade benefits to one class for benefits to the other in order somehow to reach a settlement."[2]
>
> "Class counsel stood to gain enormously if they got the deal done. The (up to) $7.25 billion in relief for the (b)(3) class was the 'largest-ever cash settlement in an antitrust class action. For their services, the district court granted class counsel $544.8 million in fees. The district court calculated these fees based on a graduated percentage cut of the (b)(3) class's recovery; thus counsel got more money for each additional dollar they secured for the (b)(3) class. But the district court's calculation of fees explicitly did not rely on any benefit that would accrue to the (b)(2) class, and class counsel did not even ask to be compensated based on the size or significance of the injunctive relief."[3]

[1] 827 F.3d 223, 233 (2d Cir. 2016). [2] *Id*. at 234. [3] *Id*. (internal citations omitted).

2. FRCP 23(a)(4): Adequacy of representation

- General rules
  - Adequacy of class counsel
    - Prior to the 2003 amendments, adequately of class counsel was an element of the Rule 23(a)(4) adequacy of representation requirement
      - So pre-2003 cases will discuss adequacy of class counsel along with adequacy of the named plaintiffs in the Rule 23(a)(4) analysis
    - The 2003 amendments moved adequacy of class counsel into a new Subsection 23(g), which governs both the substantive and procedural requirements in appointing class counsel
    - Policy concerns
      - Settlements may be driven by class counsel's interest in obtaining a fee award and not by the best interests of the class

> We and other courts have often remarked the incentive of class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judge approve a settlement involving a meager recovery for the class but generous compensation for the lawyers—the deal that promotes the self-interest of both class counsel and the defendant and is therefore optimal from the standpoint of their private interests.[1]

- This is of "particular significance" where class members "lack both the monetary stake and the sophistication in legal and commercial matters that would motivate and enable them to monitor the efforts of class counsel on their behalf."[2]

[1] Creative Montessori Learning Centers v. Ashford Gear LLC, 662 F.3d 913, 918 (7th Cir. 2011) (collecting cases). [2] *Id*. at 917-18.

2. FRCP 23(a)(4): Adequacy of representation

- General rules
  - Adequacy of class counsel (con't)
    - Anything "pertinent to counsel's ability to fairly and adequately represent the interests of the class" bears on the class certification decision.1
    - Rule 23(g) also requires the following factors specifically to be considered in appointing class counsel:
      - The work counsel has done in identifying or investigating potential claims in the action;
      - Counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
      - Counsel's knowledge of the applicable law; and
      - The resources that counsel will commit to representing the class2

[1] Fed. R. Civ. P. 23(g)(1)(B).
[2] *Id*. 23(g)(1)(A).

2. FRCP 23(a)(4): Adequacy of representation

- General rules
  - Adequacy of class counsel (con't)
    - Typical grounds for challenging adequacy of counsel representations
      - Class counsel represented named or absent class members with conflicting interests
      - Class counsel (to date) failed to vigorously prosecute the action
      - Class counsel abandoned remedies to the detriment of the class
      - Class counsel lacks expertise in class action matters
        - This is rare because, in the usual case, multiple attorneys seek to represent the class and the court will select one with the requisite expertise and experience
      - Class counsel participated in a collusive settlement
        - At one time, it was common in settlement cases to challenge counsel's adequacy when counsel negotiated a large fee in the settlement. Courts resolved this by refusing to approve settlements that allocated funds for attorneys' fees. Today, courts insist on a separate proceeding where the court awards attorneys' fees from the total settlement amount.

2. FRCP 23(a)(4): Adequacy of representation

- General rules
  - Adequacy of class counsel (con't)
    - Inadequate representation/conflict of interest with the class on litigation strategy
      - *Example*: *McDonald's* "no-hire" case (denying class certification)

Note: In deciding an earlier motion to dismiss, the court held that the per se rule did not apply and that the quick look *might* apply depending on the evidence later produced. The plaintiff declined the invitation to amend the complaint to include a rule of reason count.

> Even were it not the case that individual issues will predominate, the Court would be hesitant to certify the proposed class. One unusual aspect of this case is that, while plaintiffs cannot prevail as class, they could lose as one. That owes to the fact that counsel for the named plaintiff made a strategic decision early in this case not to amend the complaint to add a claim under the rule of reason. If the Court certified a nationwide class (which, again, would not be appropriate for the reasons outlined above), it would be to the great detriment of the class. The class members would lose on a rule-of-reason claim, because their attorneys waived it. Dr. Singer, plaintiffs' expert, calculated aggregate class damages at $2.74 billion. It is no surprise, then, that attorneys might take a shot at a nationwide-class jackpot (of which they might hope to collect a third, which is about $913,000,000.00) rather than propose a small, local class under the rule of reason. The reward to any given plaintiff would likely be quite similar whether he proceeded as part of a small, local class or a massive nationwide class. Only the lawyers had something to gain by foregoing a claim under the rule of reason, which makes one wonder whether the attorneys were looking out mostly for themselves when they chose not to amend to add a claim under the rule of reason. Perhaps these attorneys took a gamble, choosing not to pursue a rule-of-reason claim in the hopes of the huge reward of certifying a nationwide class under quick-look analysis. Such a self-interested decision would not instill confidence that the attorneys would adequately represent the class.[1]

[1] DeSlandes v. McDonald's USA, LLC, No. 17 C 4857, 2021 WL 3187668, at *14 (N.D. Ill. July 28, 2021) (record citation omitted).