

2013

## The Fail-Safe Class as an Independent Bar to Class Certification

Erin L. Geller

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Erin L. Geller, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 Fordham L. Rev. 2769 (2013).

Available at: <https://ir.lawnet.fordham.edu/flr/vol81/iss5/18>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# THE FAIL-SAFE CLASS AS AN INDEPENDENT BAR TO CLASS CERTIFICATION

Erin L. Geller\*

*In 2012, the Fifth Circuit became the first circuit court to explicitly reject an argument that a fail-safe class—a class defined in terms of the defendant’s liability—was barred from class certification under Federal Rule of Civil Procedure 23. Drawing on previous cases in which it had rejected challenges that class definitions were circular, the Fifth Circuit in *In re Rodriguez* outright disclaimed a prohibition against fail-safe classes. This decision diverged from the Sixth and Seventh Circuits’ proscription against certifying fail-safe classes, creating a split among the circuits.*

*This Note explores this circuit split and argues that fail-safe classes must be proscribed because they allow class members to escape the bar of *res judicata*. This Note concludes that characterizing a class as fail-safe should provide independent justification for denying class certification.*

## TABLE OF CONTENTS

INTRODUCTION.....	2770
I. THE FAIL-SAFE CLASS AS AN ASCERTAINABILITY PROBLEM.....	2771
A. <i>Class Certification</i> .....	2772
1. <i>Class Actions As Representative Litigation</i> .....	2772
2. <i>The Motion for Class Certification</i> .....	2773
B. <i>The Ascertainability Requirement</i> .....	2775
1. <i>The Requirement</i> .....	2775
2. <i>Origins of the Requirement</i> .....	2778
3. <i>Three Categories of Ascertainability Cases</i> .....	2779
C. <i>Fail-Safe Classes</i> .....	2782
1. <i>A Primer</i> .....	2782
2. <i>Judicial Responses to Fail-Safe Classes</i> .....	2784
3. <i>Justifications for Denying Class Certification to Fail-Safe Classes</i> .....	2785
a. <i>Fail-Safe Classes Evade the Bar of Res Judicata</i> .....	2785

---

\* J.D. Candidate, 2014, Fordham University School of Law; B.S., 2011, New York University, Leonard N. Stern School of Business. I would like to thank Professor Howard M. Erichson for his enthusiasm and invaluable guidance in writing this Note.

<i>b. Fail-Safe Classes Prevent Notice and the Ability To Opt Out</i> .....	2788
II. THE CIRCUITS ADDRESS THE FAIL-SAFE PROBLEM .....	2788
A. <i>The Sixth Circuit</i> .....	2789
1. <i>Randleman v. Fidelity National Title Insurance Co.</i> .....	2789
2. <i>Young v. Nationwide Mutual Insurance Co.</i> .....	2790
B. <i>The Seventh Circuit</i> .....	2791
1. <i>Dafforn v. Rousseau Associates, Inc.</i> .....	2792
2. <i>Messner v. Northshore University HealthSystem</i> .....	2793
C. <i>The Fifth Circuit</i> .....	2794
1. <i>Forbush v. J.C. Penney Co.</i> .....	2795
2. <i>Mullen v. Treasure Chest Casino</i> .....	2796
3. <i>In re Rodriguez</i> .....	2797
D. <i>The Ninth Circuit</i> .....	2798
1. <i>Vizcaino v. U.S. District Court for the Western District of Washington</i> .....	2798
2. <i>Kamar v. RadioShack Corp.</i> .....	2799
3. <i>Heffelfinger v. Electronic Data Systems Corp.</i> .....	2800
III. FAIL-SAFE CLASSES ARE BARRED FROM CLASS CERTIFICATION ...	2802
A. <i>Fail-Safe Classes Violate Res Judicata</i> .....	2802
1. <i>Fail-Safe Class Members Are Not Claim Precluded</i> .....	2802
2. <i>Fail-Safe Classes Reinstate One-Way Intervention</i> .....	2803
B. <i>The Fifth and Ninth Circuits Incorrectly Analyzed the Fail-Safe Problem</i> .....	2804
1. <i>The Fifth Circuit</i> .....	2804
2. <i>The Ninth Circuit in Vizcaino</i> .....	2807
C. <i>Fail-Safe Classes Independently Preclude Class Certification</i> .....	2808
CONCLUSION .....	2809

#### INTRODUCTION

“All individuals wrongfully denied Z by XY Corporation.” This class definition creates the paradigmatic fail-safe class, where the defendant’s liability must be established before class membership can be ascertained.<sup>1</sup> If XY Corporation wrongfully denied individuals Z, the individuals are class members bound by the favorable judgment against XY Corporation.<sup>2</sup> However, if XY Corporation did not wrongfully deny individuals Z, then the

---

1. See *Kamar v. RadioShack Corp.*, 375 F. App’x 734, 736 (9th Cir. 2010) (“The fail-safe appellation is simply a way of labeling the obvious problems that exist when the class itself is defined in a way that precludes membership unless the liability of the defendant is established.”); see also John H. Beisner, Jessica D. Miller & Jordan M. Schwartz, *Courts Search for Class Certification “Fail Safe” Factor*, NAT’L L.J., Apr. 4, 2011, at 12.

2. See *Dafforn v. Rousseau Assocs., Inc.*, No. F 75-74, 1976 WL 1358, at \*1 (N.D. Ind. July 27, 1976).

individuals are defined out of the class and are not bound by the judgment.<sup>3</sup> A fail-safe class thus creates a “heads I win, tails you lose” situation, where class members either receive a favorable judgment or are defined out of the class.<sup>4</sup>

Defendants contend that fail-safe classes categorically cannot be certified.<sup>5</sup> The Sixth and Seventh Circuits agree with this argument and have held that fail-safe classes are precluded from class certification.<sup>6</sup> However, the Fifth Circuit recently rejected a prohibition against certifying fail-safe classes by relying on prior Fifth Circuit cases that had addressed circular class definitions.<sup>7</sup> Further, while the Ninth Circuit has not explicitly prohibited fail-safe classes, it has applied Fifth Circuit case law to reject a challenge that the originally certified class definition was circular.<sup>8</sup> This Note examines the conflicting analyses these courts have used in determining whether a fail-safe class is barred from class certification.<sup>9</sup>

Part I introduces the class action device and the motion for class certification, describes the ascertainability requirement, and casts the issue of whether courts must bar fail-safe classes from class certification as an ascertainability problem. Part II examines the split among the circuits over whether a fail-safe class can be certified. Part III argues that fail-safe classes must be proscribed because certifying a fail-safe class violates *res judicata*, a consideration that the Fifth and Ninth Circuits have failed to address. Finally, this Note concludes that fail-safe classes independently bar class certification due to their failure to satisfy the ascertainability requirement.

### I. THE FAIL-SAFE CLASS AS AN ASCERTAINABILITY PROBLEM

Part I.A presents the class action as a form of representative litigation and provides an overview of the motion for class certification. Next, Part I.B explains the ascertainability requirement for class certification and the origins of the requirement. Part I.C describes fail-safe classes as one

---

3. See *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012).

4. Beisner, Miller & Schwartz, *supra* note 1; Drew Campbell, *Heads I Win, Tails You Lose: Fail-Safe Class Definitions*, BRICKER (Sept. 8, 2011), <http://www.bricker.com/publications-and-resources/publications-and-resources-details.aspx?Publicationid=2248>.

5. See, e.g., *Dafforn*, 1976 WL 1358, at \*1 (agreeing with the defendants’ challenge that the amended class definition was fail-safe).

6. See, e.g., *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012); *Messner*, 669 F.3d at 825; *Randleman v. Fid. Nat’l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011); *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980).

7. See *In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012); *Mullen v. Treasure Chest Casino*, 186 F.3d 620, 624 n.1 (5th Cir. 1999); *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1105 (5th Cir. 1993), *abrogated on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); Wystan M. Ackerman, *Rule 23(b)(2) and Fail-Safe Classes Addressed by Fifth Circuit*, INS. CLASS ACTIONS INSIDER (Sept. 19, 2012), <http://www.insuranceclassactions.com/class-certification-standards/rule-23b2-and-fail-safe-classes-addressed-by-fifth-circuit/>.

8. See *Vizcaino v. U.S. Dist. Court for W. Dist. of Wash.*, 173 F.3d 713, 722 (9th Cir. 1999), *amended*, 184 F.3d 1070 (9th Cir. 1999).

9. See *infra* Part II.

category of classes failing to satisfy the ascertainability requirement and explains that courts have prohibited fail-safe classes because fail-safe classes circumvent the bar of *res judicata* and prevent class members from notice and the opportunity to opt out of the action.

### A. Class Certification

This section introduces the purposes of the class action device and details the procedural requirements for class certification under Rule 23 of the Federal Rules of Civil Procedure.<sup>10</sup>

#### 1. Class Actions As Representative Litigation

Class actions are a form of representative litigation in which one or more named class representatives litigate on behalf of a defined group of similarly situated persons, referred to as absent class members.<sup>11</sup> If a court certifies the proposed class, the absent class members will be bound by a judgment as long as they were adequately represented by the class representatives.<sup>12</sup> The absent class members are not required to hire an attorney or appear before the court and play a passive role in the class litigation.<sup>13</sup> To ensure that the interests of absent class members are represented, the class representative and class counsel have a duty to fairly and adequately represent the interests of the absent class members.<sup>14</sup>

Class actions provide an opportunity for individuals with small monetary claims to pursue litigation collectively and bring claims that they could not otherwise afford to litigate.<sup>15</sup> Also, by enabling litigation that could not

---

10. FED. R. CIV. P. 23. Many states have mirrored their procedural requirements off of Rule 23 and similarly require that a class be adequately defined at the class certification stage. *See* THOMAS A. DICKERSON, CLASS ACTIONS: THE LAW OF 50 STATES § 6.02 (2012). While this Note focuses on federal cases that address the fail-safe issue, many states have also dealt with fail-safe classes under state law. *See, e.g.,* LaBrenz v. Am. Family Mut. Ins. Co., 181 P.3d 328, 335–36 (Colo. App. 2007) (recognizing that fail-safe classes were impermissible but finding that the proposed class was not fail-safe); Dale v. DaimlerChrysler Corp., 204 S.W.3d 151, 178–80 (Mo. Ct. App. 2006) (finding that generally a fail-safe class was not ascertainable but that the proposed class was not fail-safe as there would still be class members if there was a judgment for the defendant); Intratex Gas Co. v. Beeson, 22 S.W.3d 398, 402–05 (Tex. 2000) (finding that the trial court abused its discretion by certifying a fail-safe class including natural gas producers that sold natural gas to the defendant in quantities less than their ratable proportions); Russell T. Brown, Comment, *Class Dismissed: The Conservative Class Action Revolution of the Texas Supreme Court*, 32 ST. MARY'S L.J. 449, 471–73 (2001).

11. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (“The class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’” (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979))).

12. *See* *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 810 (1985).

13. *See id.*

14. *See* FED. R. CIV. P. 23(a)(4), (g)(1)(B).

15. *See* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997))); *Phillips Petrol. Co.*, 472 U.S. at 809 (“Class actions also may permit the plaintiffs to pool claims which

otherwise be brought, class actions prevent defendants from avoiding liability and serve as a deterrent for future wrongdoing.<sup>16</sup> By consolidating claims into a single adjudication that binds each class member, class actions also conserve judicial resources<sup>17</sup> and promote consistency.<sup>18</sup>

## 2. The Motion for Class Certification

Class certification is a crucial point in class action litigation.<sup>19</sup> From the plaintiff's perspective, the denial of class certification "may sound the 'death knell'" of the class action.<sup>20</sup> From the defendant's perspective, the granting of class certification may create pressure to settle nonmeritorious claims to avoid the costs of defending a class action and the risk of highly damaging liability.<sup>21</sup>

Under Rule 23(c)(1)(A),<sup>22</sup> the district court has broad discretion to determine whether to certify the class.<sup>23</sup> If the court certifies the proposed class, the certification order must outline the scope of the class bound by judgment by defining the class and the class claims, issues, or defenses.<sup>24</sup> Following certification, a party may seek interlocutory review of the order

---

would be uneconomical to litigate individually."); Miriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 306–07 (2010) (arguing that the class action device facilitates small claims class actions).

16. See BRIAN ANDERSON & ANDREW TRASK, *THE CLASS ACTION PLAYBOOK* 15 (2d ed. 2012); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 48–49 (1975) (explaining that one policy advanced for the expansion of class action litigation is the deterrence of wrongful conduct).

17. See *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 647 (C.D. Cal. 1996) (finding that one of the primary purposes of class litigation was judicial economy by avoiding multiple suits); ANDERSON & TRASK, *supra* note 16, at 14–15.

18. See *Mitchell-Tracey v. United Gen. Title Ins. Co.*, 237 F.R.D. 551, 559 (D. Md. 2006) (finding that class litigation was an effective method of adjudicating the class members' claims because it avoided inconsistent outcomes); ANDERSON & TRASK, *supra* note 16, at 15–16.

19. See *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167 (3d Cir. 2001) ("Irrespective of the merits, certification decisions may have a decisive effect on litigation."); Jason Steed, *On "Ascertainability" As a Bar to Class Certification*, 23 APP. ADVOC. 626, 626 (2011) (describing class certification as the "make-or-break" moment for a class action).

20. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008) (quoting *Newton*, 259 F.3d at 162).

21. *See id.*

22. FED. R. CIV. P. 23(c)(1)(A). Prior to the 2003 amendments to Rule 23, Rule 23(c)(1)(A) directed courts to decide the class certification issue "as soon as practicable." FED. R. CIV. P. 23 advisory committee's note (2003 amendment). The 2003 amendment now directs the courts to decide whether to certify the class at "an early practicable time," giving courts greater flexibility in timing the class certification decision. *Id.*

23. See *Hamilton v. Accu-tek*, 935 F. Supp. 1307, 1331–32 (E.D.N.Y. 1996); *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 380 (D. Colo. 1993); 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1785 (3d ed. 2005).

24. FED. R. CIV. P. 23(c)(1)(B).

granting or denying class certification, although it is within the discretion of the appellate court to decide whether to permit the appeal.<sup>25</sup>

To determine whether to certify the class, the court must conduct a “rigorous analysis”<sup>26</sup> to decide whether the Rule 23(a) and (b) requirements are satisfied.<sup>27</sup> A party seeking to certify a class must meet all four prerequisites under Rule 23(a) and fit into one of the categories under Rule 23(b).<sup>28</sup> To satisfy the Rule 23(a) prerequisites: (1) the class must be so numerous that joinder of all members is impracticable (numerosity); (2) there must be questions of law or fact common to the class (commonality); (3) the claims or defenses of the class must be typical of the claims or defense of the class (typicality); and (4) the representative parties must fairly and adequately represent the interests of the class (adequacy of representation).<sup>29</sup>

After satisfying the four prerequisites under Rule 23(a), the party seeking class certification must also fall under one of the categories of class actions maintainable under Rule 23(b).<sup>30</sup> A class can be certified under Rule 23(b)(1) if the prosecution of separate actions would create a risk of inconsistent judgments or would prejudice individual claimants.<sup>31</sup> Rule 23(b)(2) certification is appropriate for injunctive or declaratory relief if “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”<sup>32</sup> And to certify a class under Rule 23(b)(3), the court must find that common questions of law or fact predominate over questions affecting only individual members (predominance) and that a class action is superior to other methods of fairly and efficiently adjudicating the controversy (superiority).<sup>33</sup> Whether the predominance and superiority requirements are met under Rule 23(b)(3) depends on the class members’ interests in individually controlling the action, the extent and nature of litigation concerning the controversy already begun by or against class members, the desirability of concentrating the litigation in the particular forum, and the manageability difficulties.<sup>34</sup>

If a court grants class certification under Rule 23(b)(3), it *must* notify the class members in the most practicable way under the circumstances—this includes providing individual notice to class members who can be identified

---

25. FED. R. CIV. P. 23(f).

26. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982). The Supreme Court recently held that Rule 23 sets forth more than a pleading standard and requires a party seeking class certification to “affirmatively demonstrate . . . compliance” with Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

27. *See* 7AA WRIGHT, MILLER & KANE, *supra* note 23, § 1785.

28. FED. R. CIV. P. 23(a)–(b).

29. FED. R. CIV. P. 23(a)(1)–(4).

30. *See* FED. R. CIV. P. 23(b)(1)–(3).

31. *See* FED. R. CIV. P. 23(b)(1).

32. FED. R. CIV. P. 23(b)(2).

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

34. FED. R. CIV. P. 23(b)(3)(A)–(D).

through reasonable effort.<sup>35</sup> The named plaintiffs must also provide all class members in a class certified under Rule 23(b)(3) with an opportunity to opt out or exclude themselves from the class.<sup>36</sup> If the court certifies the class under Rule 23(b)(1) or Rule 23(b)(2), it *may* direct notice to the class, as it deems appropriate; and class members may not opt out of the class.<sup>37</sup>

### B. The Ascertainability Requirement

This section defines the ascertainability requirement and details the purposes it serves in the motion for class certification. It then examines the origins of the ascertainability requirement, showing that while some courts find it implicit in Rule 23(a), other courts find that the 2003 amendment to Rule 23(c)(1)(B) codified the ascertainability requirement. Finally, it outlines three different categories of recent ascertainability jurisprudence.

#### 1. The Requirement

Class definitions are playing an increasingly decisive role in class certification decisions and are gaining more attention in legal scholarship.<sup>38</sup> Courts have recognized that class definitions are inadequate when the definition does not allow for an ascertainable class, finding it “axiomatic” that for a class action to be certified a class must exist.<sup>39</sup> Moreover, several circuits have acknowledged that there is an ascertainability requirement for class certification.<sup>40</sup> While no circuit has explicitly held that failing to

---

35. FED. R. CIV. P. 23(c)(2)(B); *see also* *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314–15 (1950) (finding that the means employed to give notice must be the means that one desirous of actually informing the absentee might reasonably adopt).

36. FED. R. CIV. P. 23(c)(2)(B)(v); *see also* *Mullane*, 339 U.S. at 314–15 (finding that notice must be reasonably calculated under the circumstances to afford interested parties the opportunity to present their objections to the action).

37. FED. R. CIV. P. 23(c)(2)(A)–(B).

38. *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. (forthcoming 2013) (manuscript at 34–41), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2038985](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038985); Steed, *supra* note 19, at 626; John H. Beisner, Jessica D. Miller & Jordan M. Schwartz, *Ascertainability: Reading Between the Lines of Rule 23*, 12 Class Action Litig. Rep. 253 (BNA) (Mar. 25, 2011), *available at* [http://www.skadden.com/sites/default/files/publications/Publications2371\\_0.pdf](http://www.skadden.com/sites/default/files/publications/Publications2371_0.pdf); Joel S. Feldman, Sarah Hughes Newman & Anna C. Schumaker, *Ascertainability: An Overlooked Requirement for Class Certification*, 10 Class Action Litig. Rep. 607 (BNA) (June 29, 2009), *available at* [http://www.sidley.com/files/Publication/b226a9d1-b7a6-4f79-8264-19695367ca62/Presentation/PublicationAttachment/04c766c6-5676-4f1e-9809-2037146a9ce0/BNA\\_Feldman\\_Newman\\_Schumaker\(2\).pdf](http://www.sidley.com/files/Publication/b226a9d1-b7a6-4f79-8264-19695367ca62/Presentation/PublicationAttachment/04c766c6-5676-4f1e-9809-2037146a9ce0/BNA_Feldman_Newman_Schumaker(2).pdf).

39. *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981); *see, e.g.*, *Jermyn v. Best Buy Stores, L.P.*, 256 F.R.D. 418, 432 (S.D.N.Y. 2009) (“Although Rule 23(a) does not expressly require that a class be definite in order to be certified, a requirement that there be an identifiable class has been implied by the courts.” (quoting *Fogarazzao v. Lehman Bros., Inc.*, 232 F.R.D. 176, 181 (S.D.N.Y. 2005))).

40. *See, e.g.*, *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, 592–93 (3d Cir. 2012); *Romberio v. UnumProvident Corp.*, 385 F. App’x 423, 431 (6th Cir. 2009); *John v. Nat’l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 30 (2d Cir. 2006); *Simer*, 661 F.2d at 669.

satisfy the ascertainability requirement is independent grounds for denying class certification,<sup>41</sup> district courts have denied class certification for exactly this reason.<sup>42</sup> Commentators similarly feel that a class's lack of ascertainability should be enough to justify denying certification.<sup>43</sup> Consequently, along with satisfying the Rule 23(a) and (b) requirements, the plaintiff must plead a sufficiently ascertainable class.<sup>44</sup>

While some courts treat ascertainability as a threshold prerequisite prior to analyzing the Rule 23 requirements,<sup>45</sup> others intertwine the two analyses.<sup>46</sup> The ascertainability requirement can work congruously with the Rule 23 requirements<sup>47</sup> because an ascertainable class can either demonstrate that the Rule 23 requirements are satisfied or expose problems with satisfying Rule 23(a) and (b).<sup>48</sup>

The ascertainability requirement has been described in different ways, all of which are substantively indistinguishable.<sup>49</sup> While some courts have described ascertainability as requiring that the class must be "precise,

---

41. Steed, *supra* note 19, at 628 (noting that while the circuits have relied on ascertainability to affirm the dismissal of class allegations, the circuits have not explicitly held that the lack of an ascertainable class is independent grounds for denying class certification). However, the Fifth Circuit has held that if the absence of an ascertainable class is facially apparent from the pleadings, a district court may dismiss the class allegations on the pleadings. *John*, 501 F.3d at 445.

42. *See, e.g.*, *Jones-Turner v. Yellow Enter. Sys., LLC*, No. 3:07CV-218-S, 2011 WL 4861882, at \*3-4 (W.D. Ky. Oct. 13, 2011) (denying plaintiffs' motion for class certification of a state wage and hour class because the class was not ascertainable); *Kissling v. Ohio Cas. Ins. Co.*, No. 5:10-22-JMH, 2010 WL 1978862, at \*2-3 (E.D. Ky. May 14, 2010) (dismissing the class allegations because determining class membership would require "mini-hearings" for each potential member of the class).

43. *See* 1 JOSEPH M. McLAUGHLIN, *McLAUGHLIN ON CLASS ACTIONS* § 4:2 (4th ed. 2007); Steed, *supra* note 19, at 629-30.

44. *See Jermyn*, 256 F.R.D. at 432 (recognizing that there is an implied ascertainability requirement for class certification); 1 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 3:1 (5th ed. 2012) (explaining that the ascertainability requirement directs plaintiffs to propose a definite class). *But see* *Blain v. Smithkline Beecham Corp.*, 240 F.R.D. 179, 184 (E.D. Pa. 2007) (holding that the sufficiency of the class definition can be addressed under the Rule 23(a) analysis without having to engage in a "redundant exercise").

45. *See* *ANDERSON & TRASK*, *supra* note 16, at 25; *see, e.g.*, *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537-41 (6th Cir. 2012) (rejecting the defendant's ascertainability arguments prior to addressing whether the class satisfied the Rule 23(a) and (b) requirements); *Randleman v. Fid. Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011) (discussing ascertainability as independent grounds for denying class certification before addressing predominance, the district court's basis for decertifying the class).

46. *See, e.g.*, *Romberio v. UnumProvident Corp.*, 385 F. App'x 423, 431-32 (6th Cir. 2009) (explaining that the problem with the class definition carried over into problems with typicality); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513-15 (7th Cir. 2006) (finding that the same analysis applied to both ascertainability and typicality).

47. Madeleine Fischer, *Class Definition*, in *A PRACTITIONERS GUIDE TO CLASS ACTIONS* 47 (Marcy Hogan Greer ed., 2010).

48. *Id.* ("The class definition provides the measuring stick against which other requirements of Rule 23 are evaluated."); Donald Frederico, *Why Class Definitions Matter*, *PIERCE ATWOOD LLP* (Oct. 29, 2012), <http://www.pierceatwood.com/35247>.

49. 1 RUBENSTEIN, *supra* note 44, § 3:3.

objective, and presently ascertainable,”<sup>50</sup> other courts have found that a class is ascertainable where it is defined with reference to “objective criteria.”<sup>51</sup> A few courts have also articulated that the ascertainability standard requires the class to be “adequately defined and clearly ascertainable.”<sup>52</sup>

This third formulation of the ascertainability requirement demonstrates the interrelationship between an adequate class definition and ascertainability, showing that a class is not adequately defined if the class definition does not allow for an ascertainable class.<sup>53</sup> Piecing together these different iterations of the ascertainability requirement, a class is not adequately defined if the class definition does not allow for an ascertainable class, and a class is not ascertainable if an identifiable class does not exist.<sup>54</sup> But “identifiable” does not mean that a court must be able to identify each member of the class before class certification.<sup>55</sup> To establish ascertainability, a court only needs to be able to identify class members at some stage of the class action proceeding.<sup>56</sup>

Courts and commentators have identified different purposes for the ascertainability requirement. First, the ascertainability requirement alerts both the court and parties to the potential burdens of class certification.<sup>57</sup> If the ascertainability requirement is not satisfied because individualized determinations are necessary to identify members of the class, failure to satisfy the ascertainability requirement indicates problems of administrative feasibility and manageability in class certification.<sup>58</sup> Second, the ascertainability requirement ensures that the individuals bound by a judgment for or against the class can be identified.<sup>59</sup> An ascertainable class also identifies which individuals are entitled to relief, ensuring that the individuals actually harmed by the defendant’s wrongful conduct are the

---

50. O’Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 319 (C.D. Cal. 1998) (citing MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.14 (1995)).

51. Agostino v. Quest Diagnostics, Inc., 256 F.R.D. 437, 478 (D.N.J. 2009); *see also* Fletcher v. ZLB Behring LLC, 245 F.R.D. 328, 335 (N.D. Ill. 2006); Intratex Gas Co. v. Beeson, 22 S.W.3d 398, 403 (Tex. 2000).

52. DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970); Heffelfinger v. Elec. Data Sys. Corp., No. CV 07-00101 MMM (Ex), 2008 WL 8128621, at \*5 (C.D. Cal. Jan. 7, 2008), *aff’d*, 492 F. App’x 710 (9th Cir. 2012).

53. *See DeBremaecker*, 433 F.2d at 734.

54. 1 MCLAUGHLIN, *supra* note 43, § 4:2.

55. 7A WRIGHT, MILLER & KANE, *supra* note 23, § 1760.

56. *See id.*

57. *See* Intratex Gas Co. v. Beeson, 22 S.W.3d 398, 403 (Tex. 2000). While *Intratex* is a Texas case not governed by the Federal Rules of Civil Procedure, the case provides a persuasive analysis of the fail-safe problem. *See id.*; *supra* note 10 and accompanying text.

58. *See* Bledsoe v. Combs, No. NA 99-153-CH/G, 2000 WL 681094, at \*4-5 (S.D. Ind. Mar. 14, 2000) (holding that it was not administratively feasible to determine which individuals were a member of the class because it would require individualized determinations on the merits of each person’s claim).

59. Eversole v. EMC Mortg. Corp., No. 05-124-KSF, 2007 WL 1558512, at \*5 (E.D. Ky. May 29, 2007).

recipients of the awarded relief.<sup>60</sup> Further, in a Rule 23(b)(3) action, an ascertainable class identifies the individuals who are entitled to notice, allowing those individuals the opportunity not to be bound by the judgment.<sup>61</sup> Because of this right to opt out of the class, some courts find that the ascertainability inquiry requires more precision for Rule (23)(b)(3) suits than for Rule 23(b)(1) or (b)(2) suits.<sup>62</sup>

## 2. Origins of the Requirement

While ascertainability is widely considered a requirement for class certification,<sup>63</sup> courts have cited different sources for its origin. Prior to 2003, when the rule was amended, courts found that the ascertainability requirement was implicit in Rule 23(a).<sup>64</sup> Although this reading is still prevalent, some courts now believe that the 2003 amendment to Rule 23(c)(1)(B) codified the ascertainability requirement.<sup>65</sup>

Courts that find ascertainability to be an implicit requirement of Rule 23(a) have explained that the term “class” in Rule 23(a) means a definite or ascertainable class.<sup>66</sup> Thus, these courts have held that a class must be ascertainable for the Rule 23(a) requirements to apply,<sup>67</sup> and that if a class is not ascertainable, then there is no reason to address the numerosity, commonality, typicality, or adequacy of representation requirements under Rule 23(a).<sup>68</sup>

---

60. *Id.* (holding that proper identification of the class ensured that those individuals actually harmed by the defendant’s wrongful conduct would be the recipients of the awarded relief); Gilles, *supra* note 15, at 311–12 (explaining that the doctrinal foundation of the ascertainability requirement is to ensure the manageability of a subsequent distribution of damages).

61. *See In re Fosamax Prods. Liab. Litig.*, 248 F.R.D. 389, 396 (S.D.N.Y. 2008) (“Identifying class members is especially important in Rule 23(b)(3) actions, in order to give them the notice required by Rule 23(c)(4) so that they may decide whether to exercise their right to opt out of the class.”); *Dafforn v. Rousseau Assocs., Inc.*, No. F 75-74, 1976 WL 1358, at \*2 (N.D. Ind. July 27, 1976) (finding that the proposed class was not capable of ascertainment for purposes of providing notice to class members).

62. *See, e.g., Agostino v. Quest Diagnostics Inc.*, 256 F.R.D. 437, 479 (D.N.J. 2009).

63. *See, e.g., Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537–38 (6th Cir. 2012); *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980).

64. 1 RUBENSTEIN, *supra* note 44, § 3:2; *see, e.g., Robinson v. Gillespie*, 219 F.R.D. 179, 184 (D. Kan. 2003); *White v. Williams*, 208 F.R.D. 123, 129 (D.N.J. 2002); *Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 346 (S.D. Ga. 1996).

65. 1 McLAUGHLIN, *supra* note 43, § 4:2; 1 RUBENSTEIN, *supra* note 44, § 3:2; *see, e.g., Benito v. Indymac Mortg. Servs.*, No. 2:09-CV-001218-PMP-PAL, 2010 WL 2089297, at \*2 (D. Nev. May 21, 2010).

66. 1 RUBENSTEIN, *supra* note 44, § 3:1.

67. *See Robinson*, 219 F.R.D. at 184 (“Absent a cognizable class, determining whether Plaintiffs or the putative class satisfy the other Rule 23(a) and (b) requirements is unnecessary.” (quoting *Davoll v. Webb*, 160 F.R.D. 142, 146 (D. Colo. 1995))); 1 RUBENSTEIN, *supra* note 44, § 3:1.

68. 1 RUBENSTEIN, *supra* note 44, § 3:2; *see, e.g., In re Teflon Prods. Liab. Litig.*, 254 F.R.D. 354, 361 n.11 (S.D. Iowa 2008); *Robinson*, 219 F.R.D. at 184.

Some courts now cite Rule 23(c)(1)(B) as authority for the idea that the ascertainability requirement has been codified.<sup>69</sup> Rule 23(c)(1)(B) states that “[a]n order that certifies a class action must *define the class* and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).”<sup>70</sup> Thus, in addition to discussing what must be included in the certification order, these courts have found that Rule 23(c)(1)(B) also requires that the class be ascertainable.<sup>71</sup>

### 3. Three Categories of Ascertainability Cases

Whether recognized as an implicit or explicit requirement, ascertainability is generally considered a requirement of class certification.<sup>72</sup> As for when the ascertainability issue arises, the types of classes that require ascertainability analysis are often grouped into three different categories: the overbroad class, the difficult-to-identify or individualized inquiry class, and the fail-safe class, which will be addressed subsequently in Part I.C.<sup>73</sup> In practice, a court may identify more than one ascertainability problem in finding that a proposed class definition is inadequate.<sup>74</sup>

Courts have held that a proposed class is overbroad and not ascertainable if it encompasses a substantial number of class members that cannot recover on the class claims.<sup>75</sup> The overbroad class definition often arises in situations where the class is defined as all users of a product or service, irrespective of whether the users have suffered an injury from the defendant’s alleged wrongdoing.<sup>76</sup> For example, in *Oshana v. Coca-Cola*

---

69. See, e.g., *Benito*, 2010 WL 2089297, at \*2 (finding that although the ascertainability requirement was not expressly stated in Rule 23, Rule 23(c)(1)(B) provided persuasive authority for maintaining the implicit ascertainability requirement).

70. FED. R. CIV. P. 23(c)(1)(B) (emphasis added).

71. See, e.g., *Riedel v. XTO Energy Inc.*, 257 F.R.D. 494, 506 (E.D. Ark. 2009) (finding that Rule 23 required that any order certifying the class must define the class and then address the ascertainability requirement).

72. See 1 McLAUGHLIN, *supra* note 43, § 4:2; 1 RUBENSTEIN, *supra* note 44, § 3:1; 7A WRIGHT, MILLER & KANE, *supra* note 23, § 1760.

73. See generally Beisner, Miller & Schwartz, *supra* note 1; Beisner, Miller & Schwartz, *supra* note 38; Feldman, Newman & Schumaker, *supra* note 38.

74. See, e.g., *Ind. State Emps. Ass’n, Inc. v. Ind. State Highway Comm’n*, 78 F.R.D. 724, 725–26 (S.D. Ind. 1978) (analyzing the proposed class under both a fail-safe and individualized inquiry analysis).

75. See *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) (finding that a proposed class definition was too broad if it included persons who could not have suffered an injury from the defendant’s conduct); Beisner, Miller & Schwartz, *supra* note 1, at 2–3; Feldman, Newman & Schumaker, *supra* note 38, at 2.

76. Beisner, Miller & Schwartz, *supra* note 38, at 2; see, e.g., *Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009) (holding that because the proposed class definition included individuals who did not actually purchase their iMac, individuals who were not subject to the allegedly deceptive advertisements, and individuals who were not injured by the defendant’s conduct, the class was impermissibly overbroad); *In re McDonald’s French Fries Litig.*, 257 F.R.D. 669, 671–72 (N.D. Ill. 2009) (holding that the proposed class was overly inclusive because it was not limited to persons who necessarily

*Co.*,<sup>77</sup> the named plaintiff alleged that Coca-Cola tricked consumers into believing that fountain Diet Coke did not contain artificial saccharin and sought to certify a class of all individuals in Illinois who had purchased fountain Diet Coke from March 12, 1999, onward.<sup>78</sup> The Seventh Circuit upheld the district court's decision not to certify the proposed class,<sup>79</sup> holding that the class could include millions of consumers who might not have been deceived by Coke's marketing because some of Coke's advertisements contained a disclaimer.<sup>80</sup> However, an interest in avoiding overinclusive class definitions that include some individuals that cannot recover against the defendant must be balanced against an interest in avoiding fail-safe class definitions that include only those individuals that have a valid claim against the defendant.<sup>81</sup>

The difficult-to-identify class arises where determining membership in the proposed class would be administratively burdensome because it would require an individualized inquiry into the facts to determine class membership.<sup>82</sup> Even if a class definition is defined in terms of objective criteria, the definition may still be found inadequate if factual determinations must be made prior to deciding whether an individual is a member of the class.<sup>83</sup> *Solo v. Bausch & Lomb, Inc.*<sup>84</sup> dealt with the prototypical difficult-to-identify class. In *Solo*, plaintiffs filed a class action suit against the defendant manufacturer of a contact lens solution, alleging that the plaintiffs had suffered economic losses by paying for a defective product and discarding it after a recall, because the defendant did not fully reimburse plaintiffs for the discarded product.<sup>85</sup> The court held that the

---

saw or knew of the alleged representations regarding the defendant's potato products' ingredients).

77. 472 F.3d 506 (7th Cir. 2006).

78. *Id.* at 509.

79. *Id.* at 515.

80. *Id.* at 513–14; *see also* Frederico, *supra* note 48 (using *Oshana* to exemplify the problems with an overly broad class).

81. *See* Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 825 (7th Cir. 2012) (“Defining a class so as to avoid, on one hand, being over-inclusive and, on the other hand, the fail-safe problem is more of an art than a science.”).

82. Beisner, Miller & Schwartz, *supra* note 1; Feldman, Newman & Schumaker, *supra* note 38, at 4. Rule 23(b)(3) classes failing to satisfy the ascertainability requirement because identifying class members would require too many individualized determinations often also fail to satisfy the predominance and superiority requirements. *See, e.g.,* Melton *ex rel.* Dutton v. Carolina Power & Light Co., 283 F.R.D. 280, 293–95 (D.S.C. 2012).

83. Fischer, *supra* note 47, at 51 (explaining that a class definition may be independent of the merits and still inadequate when the definition creates minitrials to determine the identity of the class members). A class definition requiring individual factual determinations related to the ultimate legal question in the case is distinguishable from the fail-safe class, which is actually defined in terms of the ultimate legal questions in the case. *See* Nudell v. Burlington N. & Santa Fe Ry. Co., No. A3-01-41, 2002 WL 1543725, at \*3 (D.N.D. July 11, 2002) (finding that the class definition required individual determinations related to the ultimate question of liability but did not create the “classic” fail-safe class).

84. Nos. 2:06-MN-7777-DCN, 2:06-CV-02716-DCN, 2009 WL 4287706 (D.S.C. Sept. 25, 2009).

85. *Id.* at \*1–2.

class was not ascertainable, as it would require the court to make too many individualized determinations, including whether an individual purchased the contact lens solution between September 1, 2004, and April 10, 2006, how much was purchased and at what price, whether the individual discarded the solution, when the solution was discarded, and how much was discarded.<sup>86</sup>

While courts may analyze a class defined in terms of the merits of the plaintiff's claim as a fail-safe class, courts may also analyze a class requiring individual merits determinations as a difficult-to-identify class.<sup>87</sup> For instance, in *Romberio v. UnumProvident Corp.*,<sup>88</sup> the Sixth Circuit reversed the district court's grant of class certification, finding that the class was inadequately defined.<sup>89</sup> The plaintiffs alleged that the defendant "devised and implemented a corporate-wide scheme to illegally deny or terminate the long-term disability claims of thousands" of people, violating the Employee Retirement Income Security Act<sup>90</sup> (ERISA). The district court had certified a class of all plan participants and beneficiaries insured under ERISA-governed long-term disability insurance policies—issued by the defendant and its subsidiaries—who had long-term disability claims denied, terminated, or suspended on or after June 30, 1999, "after being subjected to any of the practices alleged in the Complaint."<sup>91</sup> Because individualized merits determinations were necessary to determine whether an individual was a member of the class, the Sixth Circuit held that the class was inadequately defined.<sup>92</sup>

Class definitions that turn on subjective criteria, such as a class member's state of mind, are often grouped into the difficult-to-identify category because of the administrative burden the criteria poses in determining class membership.<sup>93</sup> For example, in *Biediger v. Quinnipiac University*,<sup>94</sup>

---

86. *Id.* at \*6.

87. See Feldman, Newman & Schumaker, *supra* note 38, at 3–4 (grouping class definitions that require individual inquiries into the merits with cases requiring individual factual inquiries, as both create administrative feasibility problems); see, e.g., *Ostler v. Level 3 Commc'ns, Inc.*, No. IP 00-0718-C H/K, 2002 WL 31040337, at \*2 (S.D. Ind. Aug. 27, 2002) (finding the proposed class fail-safe and virtually unmanageable when it included all Indiana landowners whose property rights were violated by the defendant's installation of fiber optic cable); *Bledsoe v. Combs*, No. NA 99-153-C H/G, 2000 WL 681094, at \*4–5 (S.D. Ind. Mar. 14, 2000) (finding that the class was unmanageable where individualized inquiries on the merits of each individual's claim were necessary to determine class membership); *Ind. State Emps. Assoc., Inc. v. Ind. State Highway Comm'n*, 78 F.R.D. 724, 725 (S.D. Ind. 1978) (denying class certification after finding that the court would have to make individual merit determinations and stage a "mini-trial" on the threshold issue of the constitutionality of the defendant's challenged practice before identifying the class members).

88. 385 F. App'x 423 (6th Cir. 2009).

89. *Id.* at 433.

90. *Id.* at 425.

91. *Id.* at 427 (quoting *In re UnumProvident Corp. ERISA Benefits Denial Actions*, 245 F.R.D. 317, 322 (E.D. Tenn. 2007)).

92. *Id.* at 431.

93. Feldman, Newman & Schumaker, *supra* note 38, at 2–3 (finding that subjective class definitions fail to satisfy the ascertainability requirement because the court must spend

plaintiffs sought to certify two groups of female athletes whose rights under Title IX were allegedly violated.<sup>95</sup> The court held that the second group definition, “women who have not and will not enroll at Quinnipiac because of Quinnipiac’s allegedly discriminatory athletic programming,”<sup>96</sup> was not ascertainable as it contained subjective criteria requiring individual determinations.<sup>97</sup>

### C. Fail-Safe Classes

This section frames fail-safe classes as one category of classes failing to satisfy the ascertainability requirement. First, it describes fail-safe classes and provides examples where courts have held that a class definition creates a fail-safe class. It then shows that courts have responded to fail-safe classes by denying class certification, modifying the class definition, or granting class certification. Finally, this section explains that courts have justified a prohibition against certifying fail-safe classes because fail-safe classes evade the bar of *res judicata* and prevent class members from receiving notice and the opportunity to opt out of the action.

#### 1. A Primer

A class definition creates a fail-safe class when the class definition bases membership in the class on the validity of the plaintiff’s claims.<sup>98</sup> Stated differently, for a class definition to create a fail-safe class, the definition must be framed in terms of the defendant’s ultimate liability or the central legal issue in the plaintiff’s claims.<sup>99</sup> Courts have held that a class definition is framed in terms of the defendant’s liability and thus creates a fail-safe class when there is statutory language embedded in the class definition,<sup>100</sup> when the verdict is embedded in the class definition,<sup>101</sup> or

---

considerable time and expense to evaluate whether potential class members fall within the class definition).

94. No. 3:09cv621 (SRU), 2010 WL 2017773 (D. Conn. May 20, 2010).

95. *Id.* at \*1; *see also* Zapka v. Coca-Cola Co., No. 99 CV 8238, 2000 WL 1644539, at \*3 (N.D. Ill. Oct. 27, 2000) (finding that a class defined as all individuals who consumed Diet Coke from the fountain and were deceived by the marketing practices employed by Coca-Cola Co. into believing that fountain Diet Coke did not contain saccharin was inadequate because it was contingent on the state of mind of the putative class members).

96. *Biediger*, 2010 WL 2017773, at \*3.

97. *Id.* at \*3–5.

98. *See* Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 825 (7th Cir. 2012); Ostler v. Level 3 Commc’ns, Inc., No. IP-00-0718-C H/K, 2002 WL 31040337, at \*2 (S.D. Ind. Aug. 27, 2002); Beisner, Miller & Schwartz, *supra* note 38, at 5; Feldman, Newman & Schumaker, *supra* note 38, at 4.

99. *See* Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 538 (6th Cir. 2012); Ind. State Emps. Ass’n, Inc. v. Ind. State Highway Comm’n, 78 F.R.D. 724, 725 (S.D. Ind. 1978); *see also* Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1772 (2000).

100. *See, e.g.,* Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162, 1169 (S.D. Ind. 1997) (finding that the class definition would require the court to address the central issue of liability because the class included all persons or entities who received or were currently

when there is a reference to a legal right or entitlement.<sup>102</sup> The fail-safe issue frequently arises in title insurance and wage-and-hour cases, in which the class definition often includes “entitled to” or “qualified for” language.<sup>103</sup>

The fail-safe appellation derives from the notion that the class members are not bound by an adverse judgment because they either win or, if they lose, are no longer part of the class.<sup>104</sup> Members of a fail-safe class are defined out of the class if the court enters judgment for the defendant because the class is defined such that membership in the class is contingent on the validity of the class members’ claims.<sup>105</sup>

There are two contexts in which the fail-safe problem can arise: (1) where the class is defined in terms of the defendant’s liability with respect to the class as a whole, and (2) where the class is defined in terms of the validity of an individual class member’s claim.<sup>106</sup> In the first instance, a determination in favor of the defendant means that the class does not exist, and thus no class member is bound by the adverse judgment.<sup>107</sup> In the second instance, a determination in favor of the defendant against that individual class member means that the individual is defined out of the class.<sup>108</sup> The defendant may still be liable to the individual defined out of

receiving a publication from the defendant via telephone facsimile machine without the prior expressed permission of that person or entity).

101. *See, e.g.*, *Kirts v. Green Bullion Fin. Servs.*, No. 10-20312-CIV, 2010 WL 3184382, at \*2 (S.D. Fla. Aug. 3, 2010) (denying class certification to a class composed of “[a]ll individuals who submitted jewelry to [the defendant] and were damaged because [the defendant] broke its promised . . . procedures to handle the jewelry with a high standard of care, or fairly appraise the jewelry, or provide an adequate return period”).

102. *See, e.g.*, *Randleman v. Fid. Nat’l Title Ins. Co.*, 646 F.3d 347, 350 (6th Cir. 2011) (affirming the district court’s decertification order of a class composed of all persons who were “entitled to receive the ‘reissue’ or ‘refinance’ rate for title insurance”); *Adashunas v. Negley*, 626 F.2d 600, 601, 605 (7th Cir. 1980) (affirming an order denying class certification to a class including all children within Indiana entitled to a public education who had learning disabilities who were not properly identified and/or who were not receiving such special instruction).

103. *See generally* *Jones-Turner v. Yellow Enter. Sys., LLC*, No. 3:07CV-218-S, 2011 WL 4861882 (W.D. Ky. Oct. 13, 2011); *Campbell v. First Am. Title Ins. Co.*, 269 F.R.D. 68 (D. Me. 2010); *Slapikas v. First Am. Title Ins. Co.*, 250 F.R.D. 232 (W.D. Pa. 2008); *Chesner v. Stewart Title Guar. Co.*, No. 1:06CV00476, 2008 WL 553773 (N.D. Ohio Jan. 23, 2008); *Heffelfinger v. Elec. Data Sys. Corp.*, No. CV 07-00101 MMM (Ex), 2008 WL 8128621 (C.D. Cal. Jan. 7, 2008), *aff’d*, 492 F. App’x 710 (9th Cir. 2012).

104. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012); *Randleman*, 646 F.3d at 352.

105. *See Kirts*, 2010 WL 3184382, at \*6 (holding that the court would have to make a determination that the defendant was liable to an individual before it could conclude that the individual was a member of the class).

106. *Feldman, Newman & Schumaker, supra* note 38, at 4–5.

107. *See, e.g.*, *Intratex Gas Co. v. Beeson*, 22 S.W.3d, 398, 405 (Tex. 2000) (finding the proposed class fail-safe because the existence of the entire class was dependent on whether the defendant took natural gas from the class members in quantities less than their ratable portions).

108. *See, e.g.*, *Genenbacher v. Centurytel Fiber Co. II*, 244 F.R.D. 485, 487–88 (C.D. Ill. 2007) (finding the class was fail-safe because an individual class member could be defined out of the class if the court found that the class member’s property was not subject to an

the class, although an adverse judgment may be entered against class members not defined out of the class.<sup>109</sup>

Because a fail-safe class requires the court to determine the defendant's liability prior to identifying class members,<sup>110</sup> the court and the parties must wait until a judgment on the merits of the case to determine if there are any class members.<sup>111</sup> But since an ascertainable class must be capable of identification at some stage of the class action prior to final judgment,<sup>112</sup> courts have held that fail-safe classes fail to satisfy the ascertainable requirement for class certification.<sup>113</sup>

## 2. Judicial Responses to Fail-Safe Classes

Courts take one of three actions after determining that a proposed class is fail-safe. First, some courts have denied class certification outright, either finding the fail-safe class definition to be an independent basis for the denial of class certification<sup>114</sup> or seeing no feasible way to modify the class definition.<sup>115</sup> Second, other courts have either exercised discretion to modify the class definition or have allowed the plaintiff to amend the class definition to avoid flatly denying class certification on the basis of the class definition.<sup>116</sup> Third, one court has explicitly allowed a fail-safe class to be

easement or that the class member gave permission to the defendant to install fiber optic cables).

109. See Feldman, Newman & Schumaker, *supra* note 38, at 5.

110. 1 McLAUGHLIN, *supra* note 43, § 4:2; see also Kirts, 2010 WL 3184382, at \*6 (holding that the proposed class definition was inadequate because it would require the court, prior to identifying members of the class, to determine with respect to each potential member whether the individual owned the jewelry in question, whether the individual sent jewelry to the defendant, and whether the defendant committed any of the misconduct described with respect to that individual's submitted jewelry).

111. See 1 McLAUGHLIN, *supra* note 43, § 4:2.

112. See *supra* notes 55–56 and accompanying text.

113. See Schilling v. Kenton Cnty, No. 10-143-DLB, 2011 WL 293759, at \*6 (E.D. Ky. Jan. 27, 2011); Velasquez v. HSBC Fin. Corp., No. 08-4592 SC, 2009 WL 112919, at \*4 (N.D. Cal. 2009) (“Fail-safe classes are defined by the merits of their legal claims, and are therefore unascertainable prior to a finding of liability in the plaintiffs’ favor.”).

114. See, e.g., Randleman v. Fid. Nat'l Title Ins. Co., 646 F.3d 347, 352 (6th Cir. 2011) (finding that the proposed fail-safe class was one ground to affirm the district court's decision to decertify the class).

115. See, e.g., Melton *ex rel.* Dutton v. Carolina Power & Light Co., 283 F.R.D. 280, 289 (D.S.C. 2012) (finding that it was unnecessary to attempt to revise the proposed class definitions because the proposed class also failed to satisfy the predominance and superiority requirements for class certification under Rule 23(b)(3)); Eversole v. EMC Mortg. Corp., No. 05-124-KSF, 2007 WL 1558512, at \*4–5 (E.D. Ky. May 29, 2007) (holding that the proposed class definition created a fail-safe class and that attempting to redefine the class would be futile). Attempting to redefine the class definition may be futile when the class definition is only a “symptom” of an inability to satisfy the requirements for class certification. Frederico, *supra* note 48.

116. See, e.g., Campbell v. First Am. Title Ins. Co., 269 F.R.D. 68, 73–74 (D. Me. 2010) (redefining the class to avoid the fail-safe problem by eliminating the “qualified for the refinancing rate” language); Slapikas v. First Am. Title Ins. Co., 250 F.R.D. 232, 250–51 (W.D. Pa. 2008) (modifying the class definition by replacing the “qualified for” language with objective criteria to overcome the fail-safe issue with the initially proposed class).

maintained as a class action, not recognizing the fail-safe class definition as a basis for denying class certification.<sup>117</sup>

A court's decision whether to modify a class definition after designating that the class definition creates a proscribed fail-safe class is a matter of broad judicial discretion.<sup>118</sup> Rule 23(c)(1)(C), which allows an order that grants or denies class certification to be altered or amended prior to final judgment,<sup>119</sup> has been used to support inherent flexibility in Rule 23 for judicial modification of class definitions.<sup>120</sup>

### 3. Justifications for Denying Class Certification to Fail-Safe Classes

This section outlines two reasons courts have offered for disallowing the certification of fail-safe classes. While many courts find that fail-safe classes violate *res judicata* by allowing class members to relitigate claims against the defendant, some courts also justify the denial of class certification due to a concern that fail-safe classes do not afford class members notice and the opportunity to opt out of a Rule 23(b)(3) class.

#### *a. Fail-Safe Classes Evade the Bar of Res Judicata*

One reason that courts deny class certification to a proposed fail-safe class is that certifying a fail-safe class allows the class to circumvent *res judicata*.<sup>121</sup> *Res judicata*,<sup>122</sup> or claim preclusion, bars future litigants from reasserting the same claim between the same parties that a court has already

---

Sometimes these modified classes nevertheless cannot be certified because they fail other requirements. *See, e.g., Ostler v. Level 3 Commc'ns, Inc.*, No. IP 00-0718-C H/K, 2002 WL 31040337, at \*2-3, \*9 (S.D. Ind. Aug. 27, 2002) (redefining the initially proposed fail-safe class but denying class certification because the modified class was unmanageable); *Dafforn v. Rousseau Assocs., Inc.*, No. F 75-74, 1976 WL 1358, at \*1-2, \*6-7 (N.D. Ind. July 27, 1976) (modifying the class definition to avoid the fail-safe problem but denying class certification because no classwide injury existed under the amended class definition).

117. *See In re Rodriguez*, 695 F.3d 360, 369-70 (5th Cir. 2012).

118. *Chesner v. Stewart Title Guar. Co.*, No. 1:06CV00476, 2008 WL 553773, at \*4 (N.D. Ohio Jan. 23, 2008) (redefining the class to avoid "entitlement" language and instead making class membership contingent on whether the property being financed was mortgaged during the look-back period); *Heffelfinger v. Elec. Data Sys. Corp.*, No. CV 07-00101 MMM (Ex), 2008 WL 8128621, at \*10 (C.D. Cal. Jan. 7, 2008) (exercising discretion to consider the class definition as defined in the complaint under the Rule 23 analysis as opposed to the ill-defined class set forth in the plaintiffs' motion), *aff'd*, 492 F. App'x 710 (9th Cir. 2012); *see also* 3 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 8:12 (4th ed. 2002).

119. FED. R. CIV. P. 23(c)(1)(C).

120. 3 CONTE & NEWBERG, *supra* note 118, § 8:12. Rule 23(c)(5) can also support inherent flexibility, stating that "[w]hen appropriate, a class may be divided into subclasses that are each treated as a class under this rule." FED. R. CIV. P. 23(c)(5).

121. *See Kissling v. Ohio Cas. Ins. Co.*, No. 5:10-22-JMH, 2010 WL 1978862, at \*2-3 (E.D. Ky. May 14, 2010); *Allen v. Holiday Universal*, 249 F.R.D. 166, 176 (E.D. Pa. 2008); *Eversole v. EMC Mortg. Corp.*, No. 05-124-KSF, 2007 WL 1558512, at \*4-6 (E.D. Ky. May 29, 2007); *Ostler*, 2002 WL 31040337, at \*2-3.

122. The term *res judicata* literally means, "a thing adjudicated." BLACK'S LAW DICTIONARY 1425 (9th ed. 2009).

determined in earlier litigation with a final judgment on the merits.<sup>123</sup> If the new claim arises from the same “common nucleus of operative fact” at issue in the earlier litigation, the new claim is barred.<sup>124</sup> While the general rule of *res judicata* is that a judgment is not binding on nonparties that have not been served with process,<sup>125</sup> one exception to this rule is that a judgment in a class action may bind absent parties if their interests are adequately represented.<sup>126</sup> In class actions, the claims brought on behalf of the class merge into the judgment for or against the class.<sup>127</sup>

There are limitations on the applicability of *res judicata* to absent class members due to the due process issues associated with binding absent class members to a judgment.<sup>128</sup> First, absent class members must have notice and the ability to opt out of a class certified under Rule 23(b)(3), or else preclusion of later actions would violate the class members’ due process rights.<sup>129</sup> Also, while a final judgment after class certification will be binding on absent class members, a decision to deny class certification is not *res judicata* against the absent class members.<sup>130</sup> Further, an absent class member is only bound by judgment with respect to classwide issues, not issues unique to the named plaintiffs.<sup>131</sup>

Prior to the 1966 amendment to Rule 23, the binding effect of a judgment in a class action depended on how the lawsuit was characterized.<sup>132</sup> A “true” class action involved “joint, common or secondary rights,” a “hybrid” class action involved “several” rights to “specific property,” and the “spurious” class action involved “several” rights affected by a common question and related to common relief.<sup>133</sup> While the judgment in a true class action was binding on all class members<sup>134</sup> and a judgment in a hybrid class action bound the class members with regard to the rights to the specific property in controversy,<sup>135</sup> a “spurious” class action bound only

---

123. See Fischer, *supra* note 47, at 605.

124. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966).

125. See *Pennoyer v. Neff*, 95 U.S. 714, 727 (1877).

126. See *Hansberry v. Lee*, 311 U.S. 32, 41–42 (1940); Debra Lyn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 BYU L. REV. 1079, 1088–89.

127. See *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984).

128. See *Hansberry*, 311 U.S. at 44–45.

129. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314–15 (1950).

130. See *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380–82 (2011) (holding that a grant of summary judgment entered against an uncertified class only bound the named class members).

131. See *Cooper*, 467 U.S. at 878 (holding the absent class members were not bound by the court’s ruling on unique issues raised by the named class members).

132. FED. R. CIV. P. 23 advisory committee’s note (1966 amendment) (recognizing that prior to the 1966 amendment to Rule 23, class actions were categorized based on the abstract nature of the rights involved); see also *Aggregation of Claims in Class Actions*, 68 COLUM. L. REV. 1554, 1555 (1968); Bassett, *supra* note 126, at 1084–86.

133. FED. R. CIV. P. 23 advisory committee’s note (1966 amendment).

134. See generally *Knowles v. War Damage Corp.*, 171 F.2d 15 (D.C. Cir. 1948); *Shipley v. Pittsburgh & L.E.R. Co.*, 70 F. Supp. 870 (W.D. Pa. 1947).

135. See generally *Dickinson v. Burnham*, 197 F.2d 973 (2d Cir. 1952).

those parties before the court.<sup>136</sup> In a spurious class action, if there was a judgment for the class, class members could opt in to get relief from the court.<sup>137</sup> However, if there was an adverse judgment, the class members were not bound by the decision and were free to relitigate the claims.<sup>138</sup> By allowing class members in a spurious class action to only obtain the benefits of a favorable judgment, spurious class actions allowed for one-way intervention.<sup>139</sup> The one-way intervention permitted in spurious class actions “undercut the central objectives of the class action device” by failing to adjudicate the rights of nonparties.<sup>140</sup>

The 1966 amendment to Rule 23 rejected the one-way intervention that had been allowed in spurious class actions.<sup>141</sup> Rule 23(c)(3) now states that whether favorable or not to the class, a judgment in a Rule 23(b)(1) or Rule 23(b)(2) class action must include and describe those whom the court finds to be members of the class.<sup>142</sup> A judgment in a Rule 23(b)(3) class action, whether or not favorable to the class, must specify those to whom notice was directed, those who have not opted out, and those whom the court finds to be class members.<sup>143</sup> Thus, under the 1966 amendment to Rule 23, a favorable or adverse judgment must bind all individuals the court finds to be class members.<sup>144</sup> While under Rule 23(c)(3) the court determines the extent of the judgment by specifying those bound by the judgment, the preclusive effect of a court’s judgment will be determined in the subsequent suit in which the claims are brought.<sup>145</sup>

Some courts have therefore found that certifying a fail-safe class allows the class to escape the bar of res judicata because class members are bound

---

136. See generally *Bronson v. Bd. of Educ.*, 525 F.2d 344 (6th Cir. 1975).

137. *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 588–89 (10th Cir. 1961) (characterizing spurious class actions as a permissive joinder device because such actions allowed the joinder of parties whose claims involve a common question of law or fact).

138. Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 348 (1988); see, e.g., *Fox v. Glickman Corp.*, 355 F.2d 161, 163 (2d Cir. 1965).

139. See 1 MCLAUGHLIN, *supra* note 43, § 1:1.

140. *Id.*; see also *supra* notes 11–18 and accompanying text (introducing the central objectives and features of class actions).

141. FED. R. CIV. P. 23 advisory committee’s note (1966 amendment); see also Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1261–62 (2002) (“[C]lass actions under the 1966 revision were all meant to have full res judicata effect. The 1966 Rule drafters made perfectly clear . . . that the entire point of the class action procedure was to adjudicate individual claims in one proceeding with full binding effect on each and every class member.”).

142. FED. R. CIV. P. 23(c)(3)(A); see also *Genenbacher v. CenturyTel Fiber Co. II*, 244 F.R.D. 485, 487–88 (C.D. Ill. 2007) (holding that because the class members would either win or not be in the class, the proposed class was fail-safe and violated Rule 23(c)(3)).

143. FED. R. CIV. P. 23(c)(3)(B).

144. FED. R. CIV. P. 23(c)(3) advisory committee’s note (1966 amendment); see also *Premier Elec. Constr. Co. v. Nat’l Elec. Contractors Ass’n*, 814 F.2d 358, 364 (7th Cir. 1987) (“The revision of Rule 23 in 1966 does away with one-way intervention in class actions. . . . Whether class members should get the benefit of a favorable judgment, despite not being bound by an unfavorable judgment, was considered and decided in 1966.”).

145. FED. R. CIV. P. 23(c)(3) advisory committee’s note (1966 amendment); see also *Harrison v. Lewis*, 559 F. Supp. 943, 947 (D.D.C. 1983).

only by a favorable judgment.<sup>146</sup> If there is a judgment for the defendant, class members defined out of the class can relitigate their claims against the defendant.<sup>147</sup> Some courts have taken this argument one step further and asserted that certifying a fail-safe class reinstates one-way intervention by allowing class members to seek a remedy without ever being bound by an adverse judgment.<sup>148</sup>

*b. Fail-Safe Classes Prevent Notice and the Ability To Opt Out*

Some courts have denied class certification to fail-safe classes because fail-safe classes prevent absent class members from receiving the requisite notice<sup>149</sup> and ability to opt out of the class<sup>150</sup> prior to final judgment, as required for classes certified under Rule 23(b)(3).<sup>151</sup> Since a fail-safe class definition is framed in terms of the defendant's ultimate liability, class members cannot be identified until there is a final determination on the merits.<sup>152</sup> And if class members cannot be identified until a final judgment, then the absent class members cannot be provided with notice or the opportunity to opt out prior to that final judgment.<sup>153</sup> Because fail-safe classes are not capable of ascertainment, they prevent class members in a Rule 23(b)(3) class from receiving notice and the opportunity to opt out, which are required to safeguard the rights of absent class members in a class action.<sup>154</sup>

## II. THE CIRCUITS ADDRESS THE FAIL-SAFE PROBLEM

Part I presented fail-safe classes as one category of cases held to fail the ascertainability requirement for class certification. Part II examines the conflicting treatment of fail-safe classes by the Sixth and Seventh Circuits

146. See, e.g., *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980) (citing *Dafforn v. Rousseau Assocs., Inc.*, No. F 75-74, 1976 WL 1358, at \*1 (N.D. Ind. July 27, 1976)); *Heffelfinger v. Elec. Data Sys. Corp.*, No. CV 07-00101 MMM (Ex), 2008 WL 8128621, at \*10 (C.D. Cal. Jan. 7, 2008), *aff'd*, 492 F. App'x 710 (9th Cir. 2012).

147. See *Dafforn*, 1976 WL 1358, at \*1.

148. See *Kissling v. Ohio Cas. Ins. Co.*, No. 5:10-22-JMH, 2010 WL 1978862, at \*2-3 (E.D. Ky. May 14, 2010); *Allen v. Holiday Universal*, 249 F.R.D. 166, 175 (E.D. Pa. 2008) (finding that fail-safe classes violated the rule against one-way intervention but that the proposed class was not fail-safe); *Eversole v. EMC Mortg. Corp.*, No. 05-124-KSF, 2007 WL 1558512, at \*4-6 (E.D. Ky. May 29, 2007); *Ostler v. Level 3 Commc'ns, Inc.*, No. IP 00-0718-C H/K, 2002 WL 31040337, at \*2-3 (S.D. Ind. Aug. 27, 2002).

149. See *supra* notes 35-37 and accompanying text.

150. See *supra* note 36 and accompanying text.

151. See *Kamar v. RadioShack Corp.*, 375 F. App'x 734, 736 (9th Cir. 2010) (finding that fail-safe classes were problematic because notice could not be directed to members of a fail-safe class); *Wanty v. Messerli & Kramer, P.A.*, No. 05-CV-0350, 2006 WL 2691076, at \*3 (E.D. Wis. Sept. 19, 2006) (finding the class definition inadequate because the court wanted to avoid a final determination on the merits before the class members had the ability to opt out of the class); *supra* notes 35-36 and accompanying text.

152. See *Schilling v. Kenton Cnty.*, No. 10-143-DLB, 2011 WL 293759, at \*6 (E.D. Ky. Jan. 27, 2011).

153. See *id.* (citing *Kamar*, 375 F. App'x at 735).

154. See *id.*

as compared to the Fifth and Ninth Circuits. Parts II.A–C show that while the Sixth and Seventh Circuits have prohibited fail-safe classes from class certification, the Fifth Circuit has held that a fail-safe class is not outright barred from class certification. Part II.D explains that while the Ninth Circuit has not explicitly prohibited fail-safe classes, it has applied Fifth Circuit case law to reject a challenge that the originally certified class definition was circular.

#### A. *The Sixth Circuit*

Two recent cases illustrate the Sixth Circuit’s view that fail-safe classes are categorically precluded from being certified, albeit in different ways: *Randleman v. Fidelity National Title Insurance Co.*<sup>155</sup> and *Young v. Nationwide Mutual Insurance Co.*<sup>156</sup> This section addresses each in turn.

##### 1. *Randleman v. Fidelity National Title Insurance Co.*

*Randleman* was the first Sixth Circuit case to explicitly address whether a proposed fail-safe class could be certified.<sup>157</sup> The plaintiffs appealed the district court’s decision to decertify the class in an action against the defendant title insurance company.<sup>158</sup> The plaintiffs alleged that the defendant failed to provide the required discount rate when issuing title insurance to homeowners who had purchased a policy for the same property from any other insurer within the previous ten years.<sup>159</sup> The Sixth Circuit affirmed the district court’s decertification order, holding that the initially certified class was an improper fail-safe class.<sup>160</sup>

The initially certified class included all persons who had paid for title insurance issued by the defendant in connection with the refinancing of a residential mortgage loan who were “entitled to receive the ‘reissue’ or ‘refinance’ rate for title insurance.”<sup>161</sup> The Sixth Circuit held that this was a fail-safe class, as it only included those entitled to relief, thereby shielding the class members from receiving an adverse judgment.<sup>162</sup> The court stated that the fail-safe nature of the class provided an “independent” justification

---

155. 646 F.3d 347 (6th Cir. 2011).

156. 693 F.3d 532 (6th Cir. 2012).

157. See *Randleman*, 646 F.3d at 349; Campbell, *supra* note 4.

158. *Randleman*, 646 F.3d at 349. While this case also discussed other plaintiffs—the Hickmans, who filed similar claims against the defendant—this analysis is exclusively confined to the Randlemans because the Hickmans’ proposed class did not include the proscribed entitlement language. See *id.* at 351.

159. *Id.* at 349.

160. *Id.* at 352 (finding the fail-safe class was one of two grounds for denying class certification).

161. *Id.* at 350.

162. *Id.* at 352; cf. *Chesner v. Stewart Title Guar. Co.*, No. 1:06CV00476, 2008 WL 553773, at \*4 (N.D. Ohio Jan. 23, 2008) (modifying the proposed class definition, which was defined in terms of whether an individual was entitled to the reissue or refinance rate to avoid the denial of class certification). *But see* *Alberston v. Commonwealth Land Title Ins. Co.*, 264 F.R.D. 203, 206–07 (E.D. Pa. 2010) (finding that a class including individuals who were not charged the reissue or refinance rate was not fail-safe).

for denying class certification,<sup>163</sup> even though it also analyzed the class's ability to meet the predominance requirement<sup>164</sup>—which was the basis for the district court's decertification decision.<sup>165</sup>

The Sixth Circuit found that the district court did not abuse its discretion in finding that common issues did not predominate.<sup>166</sup> Since substantial individual inquiries were necessary to determine liability, the predominance requirement was not satisfied.<sup>167</sup> Because the originally certified class was a “flawed” fail-safe class and the class failed to satisfy the predominance requirement, the Sixth Circuit affirmed the district court's decertification order.<sup>168</sup>

## 2. *Young v. Nationwide Mutual Insurance Co.*

*Young*, the most recent Sixth Circuit case to address whether a fail-safe class can be certified, rejected the defendants' challenge that the class definition created a fail-safe class.<sup>169</sup>

Insurance policyholders brought an action against their insurers, alleging that the insurers charged them a local government tax on the premiums the insurers collected when either the tax was not owed to the local governments or when the amount owed was less than what the insurer billed the insureds.<sup>170</sup> The district court subdivided the plaintiffs into ten subclasses, each comprising one of the remaining ten defendants, and severed the subclasses into separate actions.<sup>171</sup> The district court then certified the subclasses, defined as all persons in Kentucky who purchased insurance from or were underwritten by the defendant and who were charged local government taxes on their payment of premiums that were either not owed or owed at rates higher than permitted.<sup>172</sup>

On appeal, the defendants argued that the class definition created an impermissible fail-safe class and was not administratively feasible,<sup>173</sup>

---

163. *Randleman*, 646 F.3d at 352.

164. *Id.* at 352–55; *see also supra* note 33 and accompanying text.

165. *Randleman*, 646 F.3d at 352.

166. *Id.* at 355; *see also* Schilling v. Kenton Cnty., No. 10-143-DLB, 2011 WL 293759, at \*9 (E.D. Ky. Jan. 27, 2011) (finding that the proposed fail-safe class failed to meet the commonality requirement as each class members' claim necessitated an individualized determination of liability); Eversole v. EMC Mortg. Corp., No. 05-124-KSF, 2007 WL 1558512, at \*13–14 (E.D. Ky. May 29, 2007) (finding that the proposed fail-safe class definition failed to meet the commonality and predominance requirements as individual actions heavily predominated over common issues).

167. *Randleman*, 646 F.3d at 355.

168. *Id.* at 352, 356.

169. *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012).

170. *Id.* at 535.

171. *Id.* at 536.

172. *Id.*

173. *See supra* notes 87–92 and accompanying text (discussing how classes are often challenged on both fail-safe and administrative feasibility grounds). In *Young*, the Sixth Circuit found that the administrative feasibility argument was really an argument related to fulfilling the definiteness requirement and held that the criteria in the class definition was objective and not determinative of the ultimate issue of liability. 693 F.3d at 538.

because the determination of whether premium taxes were charged that were not owed or were charged at rates higher than permitted went to the heart of the class claims.<sup>174</sup> The defendant argued that the class was fail-safe because it required the Sixth Circuit to determine the ultimate legal issue of whether the individual insureds were charged too much, which was the same question necessary to identify the class members.<sup>175</sup>

The Sixth Circuit acknowledged that fail-safe classes were prohibited under *Randleman*<sup>176</sup> because members of a fail-safe class either won or, as a result of losing, were defined out of the class.<sup>177</sup> The court also articulated that fail-safe classes should not be certified because they do not allow for the “final resolution of the claims of *all* class members that is envisioned in class action litigation.”<sup>178</sup> However, the court held that, in this instance, the proposed class was not fail-safe.<sup>179</sup> A fail-safe class must include “*only* those who are *entitled* to relief,” and the present class included both those entitled and not entitled to relief—an insight the court gleaned from the defendants arguing that they were not ultimately liable to many of the class members.<sup>180</sup>

The Sixth Circuit also rejected the defendants’ argument that the class definition revealed the fundamental flaw in the case, which was that claims for individual tax overcharges lack the predominant common issues necessary for class certification.<sup>181</sup> While the defendants argued that there was no uniform institutional policy that affected the tax jurisdiction assignment of each policyholder,<sup>182</sup> the Sixth Circuit found that common proof of causation was a predominant issue for all the plaintiffs’ claims.<sup>183</sup> After finding that the proposed subclasses met the Rule 23(a) and (b) requirements for class certification, the Sixth Circuit affirmed the district court’s grant of class certification.<sup>184</sup>

### B. The Seventh Circuit

The Seventh Circuit has also barred the certification of fail-safe classes but has not definitively addressed whether fail-safe classes independently bar class certification. It has, however, articulated that courts should work to amend fail-safe class definitions to avoid flatly denying class

---

174. *Young*, 693 F.3d at 538.

175. *Id.*; see also Reply Brief for Appellant at 3–9, *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532 (6th Cir. 2012) (No. 11-5015), 2011 WL 2191625.

176. *Young*, 693 F.3d at 538. However, the court stopped short of saying, as it did in *Randleman*, that the fail-safe class was an independent reason to bar class certification. *Id.*

177. *Id.* (citing *Randleman v. Fid. Nat’l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011)).

178. *Id.*; see also *supra* notes 17–18 and accompanying text (describing how the class action device enables consistency in judgments and conserves judicial resources).

179. *Young*, 693 F.3d at 538.

180. *Id.*

181. *Id.*; see also Reply Brief for Appellant at 1, *Young*, 693 F.3d 532 (No. 11-5015), 2011 WL 2191625.

182. See *Young*, 693 F.3d at 538.

183. *Id.* at 544–45.

184. *Id.* at 546.

certification on fail-safe grounds. These views can be collectively found in *Dafforn v. Rousseau Associates, Inc.*<sup>185</sup> and *Messner v. Northshore University HealthSystem*.<sup>186</sup>

1. *Dafforn v. Rousseau Associates, Inc.*

In *Dafforn*, the court modified the class definition to avoid denying class certification for failing to propose an ascertainable class but ultimately rejected class certification after finding that the amended class failed to meet the requirement of a “classwide injury.”<sup>187</sup> While it is a district court case, *Dafforn* has informed the Seventh Circuit’s own views, as is evident from Part II.B.2.<sup>188</sup>

The plaintiffs in *Dafforn*—sellers of single-family, previously occupied dwellings—brought a private antitrust action against the defendants, real estate brokers who offered brokering services for single-family, previously occupied homes.<sup>189</sup> The plaintiffs alleged that the defendants fixed or agreed to fix the rates that they charged for their brokerage services<sup>190</sup> and moved to certify an amended class, including all sellers of previously occupied single-family dwellings located in Allen County, Indiana, who obtained, purchased, or used the service of the defendants, compensating the defendants by paying an artificially fixed and illegal brokerage fee.<sup>191</sup> As defined in the complaint, the class was comprised of all sellers of previously occupied single-family dwellings located in Allen County who obtained, purchased, or used the service of the defendants, compensating the defendants for their services.<sup>192</sup>

The court held that the addition of the “an artificially fixed and illegal brokerage fee” language in the amended definition created a “fail-safe class,” only bound by a judgment favorable to the plaintiffs.<sup>193</sup> Finding that fail-safe classes were impermissible, the court noted that a class must be defined such that all members—except those who opt out—were bound by either a favorable or adverse judgment.<sup>194</sup> The added language to the class definition created a fail-safe class because a jury determination that the defendants did not charge illegal fees would mean that no class existed and absent class members would be free to relitigate the legality of the

---

185. No. F 75-74, 1976 WL 1358 (N.D. Ind. July 27, 1976).

186. 669 F.3d 802 (7th Cir. 2012).

187. *Dafforn*, 1976 WL 1358, at \*4.

188. *See also* *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980) (relying on *Dafforn* to affirm the denial of class certification to a fail-safe class but failing to address whether proposing a fail-safe class independently barred class certification).

189. *Dafforn*, 1976 WL 1358, at \*1.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

defendants' fees.<sup>195</sup> Moreover, the court noted that the inadequacy of the class definition made the requisite notice under Rule 23 impossible because the class members could not be identified until there was a determination on the merits.<sup>196</sup> Based on the amended class definition, the Seventh Circuit would not certify the class as defined in the amended class definition.<sup>197</sup>

Because the court found that the parties assumed that the operative class definition consisted of all homeowners who utilized the defendants' services in the sale of a single-family home, the court chose to use this "neutral" class definition.<sup>198</sup> Finding that this modified class definition avoided the ascertainability problems inherent in the proposed class definition, the court proceeded under Rule 23 analysis.<sup>199</sup> The court ultimately denied class certification after engaging in Rule 23 analysis because there was not the requisite common injury-in-fact and the court would have had to make an individual inquiry into each member's injury.<sup>200</sup>

## 2. *Messner v. Northshore University HealthSystem*

In *Messner*, the Seventh Circuit addressed whether a proposed fail-safe class must be denied class certification in the context of a challenge that the proposed class was overbroad.<sup>201</sup> While the Seventh Circuit held that class definitions that created fail-safe classes were "improper," the court did not explicitly state whether fail-safe classes independently precluded class certification.<sup>202</sup>

The plaintiffs alleged that a merger between the defendant and Highland Park Hospital violated federal antitrust law, and sought certification of a class of individual patients and third-party payors who allegedly paid higher prices for hospital care as a result of the merger.<sup>203</sup> The district court denied the plaintiffs' motion for class certification, finding that, because there was a lack of uniformity in price increases affecting the class members to the same degree, the predominance requirement could not be met.<sup>204</sup>

On appeal, the defendant objected to class certification on the grounds that the class was overbroad.<sup>205</sup> The defendant argued that the class contained individuals who could not have been harmed by any postmerger price increase, including those who met their annual plan out-of-pocket

---

195. *Id.* ("Rule 23 was never meant to be an exception to the rules of res judicata or to provide a risk-free method of litigation.").

196. *Id.* at \*2.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at \*3.

201. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012).

202. *See id.*

203. *Id.* at 808.

204. *Id.*

205. *Id.* at 824; *see also supra* notes 75–81 and accompanying text (describing the overbroad class as an ascertainability problem).

maximum or their deductible regardless of any price increases and those whose contracts protected against price increases.<sup>206</sup> The Seventh Circuit held that the class was not so overly broad as to require denial of class certification.<sup>207</sup>

The Seventh Circuit also addressed the problem of fail-safe classes, recognizing that fail-safe classes are “improper” because a class member “either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment.”<sup>208</sup> The court distinguished the problem of the overbroad class from the fail-safe class: while the overbroad class included class members whose claims might fail on the merits for individual reasons, a fail-safe class was defined so that whether a person qualified as a member depended on whether the person had a valid claim.<sup>209</sup> However, while the Seventh Circuit held that fail-safe classes were problematic, it noted that such claims should be dealt with by amending the class definition because “[d]efining a class so as to avoid, on one hand, being over-inclusive and, on the other hand, the fail-safe problem is more of an art than a science.”<sup>210</sup>

The Seventh Circuit found that the district court’s conclusion that a lack of uniform price increases required a denial of class certification was an abuse of discretion, and thus vacated the decision and remanded the case.<sup>211</sup>

### C. The Fifth Circuit

In contrast with the Sixth and Seventh Circuits, the Fifth Circuit has explicitly rejected a prohibition against fail-safe classes. While in *Forbush v. J.C. Penney Co.*<sup>212</sup> and *Mullen v. Treasure Chest Casino*<sup>213</sup> the Fifth Circuit rejected challenges that the class definitions were circular,<sup>214</sup> in *In re Rodriguez*,<sup>215</sup> the Fifth Circuit interpreted *Forbush* and *Mullen* as having rejected a prohibition against fail-safe classes and explicitly disclaimed a prohibition against certifying fail-safe classes.<sup>216</sup>

---

206. *Messner*, 669 F.3d at 824.

207. *Id.* at 825–26.

208. *Id.* at 825 (citing *Adashunas v. Negley*, 626 F.2d 600 (7th Cir. 1980)).

209. *Id.*; cf. *Genenbacher v. CenturyTel Fiber Co. II*, 244 F.R.D. 485, 488 (C.D. Ill. 2007) (denying class certification because the proposed class was fail-safe, as the court could not enter an unfavorable judgment enforceable against at least some of the proposed class members).

210. *Messner*, 669 F.3d at 825; see also *Melton ex. rel. Dutton v. Carolina Power & Light Co.*, 283 F.R.D. 280, 289 (D.S.C. 2012) (recognizing that *Messner* held that courts should attempt to redefine the class when practicable before flatly denying class certification but holding that an attempt at redefinition was unnecessary when the proposed class also failed to satisfy predominance and superiority).

211. *Messner*, 669 F.3d at 808.

212. 994 F.2d 1101 (5th Cir. 1993), *abrogated on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

213. 186 F.3d 620 (5th Cir. 1999).

214. *Id.* at 624 n.1; *Forbush*, 994 F.2d at 1103–05.

215. 695 F.3d 360 (5th Cir. 2012).

216. *Id.* at 369–70.

1. *Forbush v. J.C. Penney Co.*

In *Forbush*, the Fifth Circuit reversed the district court's order denying class certification, overruling an argument that the class definition required liability determinations before class members could be identified.<sup>217</sup> While the defendant in *Forbush* did not challenge the proposed class for being fail-safe, the Fifth Circuit later held that the *Forbush* court had rejected a prohibition against fail-safe classes.<sup>218</sup>

The plaintiff filed a class action suit against her former employer alleging that the defendant's plan of estimating Social Security benefits violated ERISA.<sup>219</sup> The plaintiff moved to certify a class under Rule 23(b)(2) of all of the defendant's former and current employees who were employed by the defendant before January 1, 1976, who had or might obtain a vested right to benefits under the pension plan, and whose pension benefits had been or would have been reduced or eliminated as a result of the plan's overestimation of their Social Security benefits.<sup>220</sup> Finding the proposed class problematic, as individualized issues would have to be resolved in each case before the class members would have been entitled to relief, the district court denied the plaintiff's motion for class certification.<sup>221</sup>

On appeal, the defendant argued that the proposed class definition was "hopelessly 'circular,'"<sup>222</sup> as the court had to first determine whether an employee's pension benefits were improperly reduced before that person could be identified as a member of the class.<sup>223</sup> The Fifth Circuit found that the defendant's argument was without merit and, if sustained by the court, would preclude certification of any class alleging injury from a particular action.<sup>224</sup> Moreover, the Fifth Circuit found that the proposed class was linked by a common complaint and "the possibility that some may fail to prevail on their individual claims will not defeat class membership."<sup>225</sup>

---

217. *Forbush*, 994 F.2d at 1103–06.

218. *See In re Rodriguez*, 695 F.3d at 370 (noting that the *Forbush* court had rejected a prohibition against fail-safe classes).

219. *Forbush*, 994 F.2d at 1103.

220. *Id.*

221. *Id.* at 1103–04.

222. *Id.* at 1105; *see also In re Rodriguez*, 695 F.3d at 370 (finding that the Fifth Circuit had rejected a rule against fail-safe classes by dismissing the defendant's challenge that the class was "hopelessly 'circular'"); *Mims v. Stewart Title Guar. Co.*, 254 F.R.D. 482, 486 (N.D. Tex. 2008) (using "fail-safe" and "circular" interchangeably to describe class definition framed in terms of a liability determination), *rev'd and remanded on other grounds*, 590 F.3d 298 (5th Cir. 2009).

223. *Forbush*, 994 F.2d at 1105.

224. *Id.* *But see* *Heffelfinger v. Elec. Data Sys. Corp.*, No. CV 07-00101 MMM (Ex), 2008 WL 8128621, at \*10 n.57 (C.D. Cal. Jan. 7, 2008) (finding that the Fifth Circuit in *Forbush* only addressed whether a poorly drafted class definition should be denied class certification outright and failed to consider the underlying problem raised by fail-safe classes), *aff'd*, 492 F. App'x 710 (9th Cir. 2012).

225. *Forbush*, 994 F.2d at 1105.

The court held that the defendant's argument regarding the specificity of the class definition was really a commonality argument.<sup>226</sup> It nevertheless rejected that argument, holding that the common issue was whether the defendant's alleged overestimation of social security benefits violated ERISA's nonforfeiture provisions.<sup>227</sup> Finding that the Rule 23(a) and (b) requirements were satisfied, the Fifth Circuit reversed the district court's order denying class certification.<sup>228</sup>

## 2. *Mullen v. Treasure Chest Casino*

In *Mullen*, the Fifth Circuit relied on *Forbush* to reject the defendant's challenge on appeal that the class was not capable of objective identification prior to class certification.<sup>229</sup> Years later, *Rodriguez* held that the *Mullen* court had rejected a prohibition against fail-safe classes.<sup>230</sup>

In *Mullen*, former employees of the defendant alleged that they suffered respiratory illness purportedly caused by the defendant's defective air conditioning and ventilating system.<sup>231</sup> The plaintiffs moved to certify a class of all members of the defendant's crew who were stricken with occupational respiratory illness caused or exacerbated by the defective ventilation system in place aboard the defendant's boat.<sup>232</sup> The district court certified the class under Rule 23(b)(3).<sup>233</sup>

On appeal, the defendant argued that the class was not ascertainable because being a member of the class was contingent upon the ultimate issue of causation: whether the class member's illness was caused or exacerbated by the defective ventilation system.<sup>234</sup> The Fifth Circuit rejected this claim, holding that this argument was dismissed in *Forbush*, where the Fifth Circuit held that if persons were linked by a common complaint, a class defined with reference to the ultimate issue in the case did not prevent class certification.<sup>235</sup> Finding that the class was similarly linked by a common complaint, the Fifth Circuit did not reject class certification on the basis of the class definition.<sup>236</sup> The Fifth Circuit subsequently affirmed the district court's grant of class certification, finding that certification requirements were satisfied.<sup>237</sup>

---

226. *Id.* at 1105–06.

227. *Id.* at 1106.

228. *Id.*

229. *Mullen v. Treasure Chest Casino*, 186 F.3d 620, 624 n.1 (5th Cir. 1999).

230. *In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012).

231. *Mullen*, 186 F.3d at 623.

232. *Id.*

233. *Id.*

234. *Id.* at 624 n.1.

235. *Id.*

236. *Id.*

237. *Id.* at 629.

### 3. *In re Rodriguez*

The Fifth Circuit addressed the fail-safe issue most recently in *Rodriguez*, interpreting prior Fifth Circuit case law as having rejected a prohibition against certifying fail-safe classes.<sup>238</sup> In *Rodriguez*, former Chapter 13 debtors brought a class action against a mortgage loan servicer, alleging that the loan servicer's fee collection practices violated Federal Rule of Bankruptcy Procedure 2016(a) by threatening foreclosure on their homes if they did not pay unauthorized fees that were charged while their bankruptcy cases were still pending.<sup>239</sup> The plaintiffs moved to certify a Rule 23(b)(2) and a Rule 23(b)(3) class.<sup>240</sup>

While the bankruptcy court granted narrow class certification for the plaintiffs' injunctive relief claim, it redefined the class to include individuals who owed funds on a defendant-serviced note; who had not fully paid the relevant mortgage note, fees, or costs owed to the defendant; who filed a Chapter 13 proceeding in the U.S. Bankruptcy Court for the Southern District of Texas; and to whom the defendant assessed a fee after the filing of a bankruptcy petition and before the individual received a Chapter 13 discharge.<sup>241</sup>

The defendant challenged the bankruptcy court's certification of the class, arguing that the bankruptcy court certified a fail-safe class whose membership could only be ascertained by a determination of the merits of the case because the class was defined in terms of the defendant's ultimate liability.<sup>242</sup> After noting that the defendant failed to cite a case where the Fifth Circuit had rejected a fail-safe class, the Fifth Circuit held that it had actually rejected a rule against fail-safe classes in both *Mullen* and *Forbush*.<sup>243</sup> The court cited the proposition in *Forbush* on which *Mullen* later relied: that if persons were linked by a common complaint, then the possibility that some may fail to prevail on their individual claims would not preclude class membership.<sup>244</sup> Finding that Fifth Circuit precedent rejected an outright prohibition against fail-safe classes, the court rejected the defendant's argument that the bankruptcy court adopted an improper class definition.<sup>245</sup> It affirmed the bankruptcy court's certification of the

---

238. *In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012).

239. *Id.* at 362–63.

240. *Id.* at 363.

241. *Id.* at 363–64.

242. *Id.* at 369–70.

243. *Id.* at 370. District court cases in the Fifth Circuit following *Forbush* and *Mullen* have not recognized Fifth Circuit precedent as rejecting a prohibition against fail-safe classes. *See, e.g.*, *Mims v. Stewart Title Guar. Co.*, 254 F.R.D. 482, 486 (N.D. Tex. 2008) (rejecting the defendant's challenge that the proposed class was fail-safe, while recognizing that the problem with fail-safe classes was that they required the court to determine the ultimate issue of liability with regard to potential class members at the outset), *rev'd and remanded on other grounds*, 590 F.3d 298 (5th Cir. 2009).

244. *In re Rodriguez*, 695 F.3d at 370 (citing *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1105 (5th Cir. 1993)).

245. *Id.*

injunctive class, the bankruptcy court's class definition, and the denial of the defendant's motion for reconsideration.<sup>246</sup>

#### D. *The Ninth Circuit*

The Ninth Circuit has neither explicitly prohibited nor rejected a prohibition against certifying fail-safe classes. In *Vizcaino v. U.S. District Court for the Western District of Washington*,<sup>247</sup> the Ninth Circuit relied on Fifth Circuit case law to reject a challenge that a certified class was circular.<sup>248</sup> However, subsequent case law—*Kamar v. RadioShack Corp.*<sup>249</sup> and *Heffelfinger v. Electronic Data Systems Corp.*<sup>250</sup>—has created uncertainty over whether the Ninth Circuit has precluded fail-safe classes from class certification.<sup>251</sup>

##### 1. *Vizcaino v. U.S. District Court for the Western District of Washington*

Although the Ninth Circuit did not explicitly reject a fail-safe class definition in *Vizcaino*, it rejected the district court's position that the class definition was "circular" because it was framed in terms of the common legal issue linking the class members' claims.<sup>252</sup> In finding that the class definition as originally certified was permissible, the Ninth Circuit relied on Fifth Circuit cases that were later interpreted by the Fifth Circuit as rejecting a prohibition against fail-safe classes.<sup>253</sup>

In *Vizcaino*, former independent contractors brought an action on behalf of persons employed by the defendant who met the definition of employees under common law but who were denied employment benefits because the defendant considered them independent contractors or employees of third-party employment agencies.<sup>254</sup> The district court originally certified a class of all persons employed by the defendant who were denied employee benefits because they were considered independent contractors or employees of third-party employment agencies, but who met the definition of employees under common law.<sup>255</sup>

Following denial of relief by the district court and subsequent reversal and remand by the Ninth Circuit, the district court revised its prior class

---

246. *Id.* at 371.

247. 173 F.3d 713 (9th Cir. 1999), *amended*, 184 F.3d 1070 (9th Cir. 1999).

248. *Id.* at 722.

249. 375 F. App'x 734 (9th Cir. 2010).

250. No. CV 07-00101 MMM (Ex), 2008 WL 8128621, at \*1 (C.D. Cal. Jan. 7, 2008), *aff'd*, 492 F. App'x 710 (9th Cir. 2012).

251. *Kamar*, 375 F. App'x at 736; *Heffelfinger*, 2008 WL 8128621, at \*10 n.57, \*11.

252. *Vizcaino*, 173 F.3d at 721–22.

253. *See id.*; *Heffelfinger*, 2008 WL 8128621, at \*10 n.57 (recognizing that the Ninth Circuit's reliance on *Forbush* in *Vizcaino* may have called into question whether there was a "blanket prohibition" against fail-safe classes).

254. *Vizcaino*, 173 F.3d at 716–18.

255. *See Vizcaino v. Microsoft Corp.*, No. C93-178D, 1993 WL 1622929, at \*6 (W.D. Wash. July 21, 1993) (granting the plaintiffs' motion for class certification).

definition.<sup>256</sup> The revised definition limited the class to all of the defendant's workers who, like the named plaintiffs, worked as independent contractors and whose positions were reclassified as employee positions after the defendant reviewed them.<sup>257</sup> The plaintiffs petitioned the Ninth Circuit to vacate the district court's orders reducing the plaintiff class and to reinstate the original class definition.<sup>258</sup>

In finding that the Ninth Circuit's prior mandate to the district court did not leave room for the district court to redefine the class definition, the Ninth Circuit held that the district court's position that "unusual circumstances" permitted redefinition was baseless.<sup>259</sup> The Ninth Circuit noted that the "unusual circumstances" arose from the district court's perception that the class as originally defined was "circular."<sup>260</sup> However, the Ninth Circuit held that the original class definition was not circular, as success of a claim hinging on the resolution of a disputed legal issue did not make a class definition circular.<sup>261</sup> Comparing the case to *Forbush*, where the Fifth Circuit rejected an argument that the class was "hopelessly 'circular,'" the Ninth Circuit found that defining a class of employees as linked by the common claim of having been denied benefits to which they were entitled was no more circular than defining a class of employees by the common claim of having been injured by their employer's unlawful actions.<sup>262</sup> The Ninth Circuit therefore rejected the district court's position that the class definition was circular and needed modification.<sup>263</sup>

## 2. *Kamar v. RadioShack Corp.*

In *Kamar*, the Ninth Circuit found that the class was adequately defined and affirmed the district court's grant of class certification.<sup>264</sup> While the court rejected a challenge that the proposed class was "fail-safe" or "circular,"<sup>265</sup> it did not determine whether proposing a fail-safe class barred certification.<sup>266</sup> In rejecting the fail-safe challenge, the Ninth Circuit acknowledged the deficits of fail-safe classes and did not cite to, or recognize, *Vizcaino* as establishing a precedent that fail-safe classes are not precluded from class certification.<sup>267</sup>

---

256. *Vizcaino*, 173 F.3d at 716–18.

257. *Id.* at 717.

258. *Id.* at 718. Thus the issue on appeal in *Vizcaino* is not whether a proposed class could be certified, but whether a district court may redefine the class after the class has already been certified. *See id.*

259. *Id.* at 721–22.

260. *Id.* at 722.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Kamar v. RadioShack Corp.*, 375 F. App'x 734, 736–37 (9th Cir. 2010).

265. *Id.* at 736; *see also supra* note 222.

266. *See Kamar*, 375 F. App'x at 736.

267. *See id.* *But see* Reply Brief for Appellant at 11, *Kamar*, 375 F. App'x 734 (No. 09-55674), 2009 WL 6811090 (arguing that the Ninth Circuit's consideration of whether the

In *Kamar*, former employees filed a class action against the defendant, alleging that the defendant failed to compensate hourly nonexempt employees for reporting time pay for mandatory meetings and for split shift premium pay.<sup>268</sup> The district court certified a class of California employees who were instructed to work a Saturday meeting and/or a split shift without receiving the full amount of mandated premium pay.<sup>269</sup> On appeal, the defendant argued that the district court had erroneously certified a fail-safe class because class membership depended on whether class members were entitled to the mandated pay.<sup>270</sup>

First, the Ninth Circuit noted that defining a class that precluded membership unless the liability of the defendant was established was “palpably unfair” to the defendant and “unmanageable.”<sup>271</sup> However, the Ninth Circuit disagreed with the defendant that the class definition created a fail-safe class where class membership was predicated on the validity of the class claims and where the defendant was not protected against liability if a class member was not legally wronged.<sup>272</sup> Instead, the class definition merely narrowed the class to employees within the reporting time and split-shift classifications “without actually distinguishing between those who may and those who may not ultimately turn out to be entitled to premium pay.”<sup>273</sup> After finding the class was adequately defined, the Ninth Circuit affirmed the district court’s grant of class certification.<sup>274</sup>

### 3. *Heffelfinger v. Electronic Data Systems Corp.*

While not a Ninth Circuit case, this Central District of California case later affirmed by the Ninth Circuit modified the class definition to avoid certifying a proposed fail-safe class.<sup>275</sup> Although the court recognized that the Ninth Circuit’s reliance on *Forbush* in *Vizcaino* casted doubt over whether there was a prohibition against certifying fail-safe classes,<sup>276</sup> the court exercised its broad discretion to redefine the class to avoid denying class certification.<sup>277</sup>

In *Heffelfinger*, the plaintiffs filed a class action against the defendant, alleging that the defendant had failed to pay overtime to certain information

---

initially certified class in *Vizcaino* was “circular” was dicta and thus “inapposite” to the decision in *Kamar*).

268. *Kamar*, 375 F. App’x at 735.

269. *Id.*

270. *Id.* at 735–36.

271. *Id.* at 736.

272. *Id.*

273. *Id.*

274. *Id.* at 736–37.

275. *Heffelfinger v. Elec. Data Sys. Corp.*, No. CV 07-00101 MMM (Ex), 2008 WL 8128621, at \*1 (C.D. Cal. Jan. 7, 2008), *aff’d*, 492 F. App’x 710 (9th Cir. 2012).

276. *Id.* at \*10 n.57; *see also In re Autozone, Inc., Wage & Hour Emp’t Practices Litig.*, No. 3:10-md-02159-CRB, 2012 WL 6679983, at \*20 (N.D. Cal. Dec. 21, 2012) (recognizing that it was not clear that the Ninth Circuit has forbidden fail-safe classes based on *Vizcaino*, *Kamar*, and *Heffelfinger*).

277. *Heffelfinger*, 2008 WL 8128621, at \*11.

technology workers in its California facilities because the defendant had improperly classified members of the overtime class as exempt from state overtime laws.<sup>278</sup> The plaintiffs brought the action on behalf of two classes: an overtime class and a break class.<sup>279</sup> The overtime class, as defined in the complaint, consisted of all of the defendant's current and former California employees—specifically, those employed as Data Base Administrators, Senior Systems Administrators, Systems Engineers, and Information Analysts—who, within four years of filing the complaint until the date of judgment, performed work in excess of eight hours in one day and/or forty hours in one week and did not receive overtime.<sup>280</sup>

The court found that the plaintiffs defined the overtime class differently in the motion for class certification than in the complaint.<sup>281</sup> In the motion, the class was defined as all information technology workers employed in California who were entitled to, but were not paid, overtime.<sup>282</sup> The court held that the class as defined in the motion was an “impermissible ‘fail-safe’ class” whose members would be bound only by favorable judgment.<sup>283</sup> The class definition in the motion created a fail-safe class because, if the court determined that the defendant's information technology workers were not entitled to overtime, the information technology workers would not be class members.<sup>284</sup> Consequently, if the information technology workers were class members, the workers could relitigate the claims against the defendant in a separate case.<sup>285</sup>

Although the court found that the class definition in the motion was problematic, the court noted that it was not apparent that the plaintiffs intended to seek certification of a class of information technology workers entitled to overtime.<sup>286</sup> Rather, the plaintiffs' central claim was that all information technology workers employed by the defendant were entitled to overtime.<sup>287</sup> Recognizing that the class definition in the motion was likely the result of imprecise drafting, the court chose to analyze whether the overtime class, as defined in the complaint, met the Rule 23(a) and (b) requirements for class certification.<sup>288</sup> Finding those requirements met, the court certified the modified class.<sup>289</sup>

---

278. *Id.* at \*1–2.

279. *Id.* at \*1. Because the court did not engage in a fail-safe analysis with the break class, the break class will not be addressed. *See id.* at \*10–12.

280. *Id.* at \*1.

281. *Id.* at \*10.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at \*11.

287. *Id.*

288. *Id.*; *see also* *Dodd-Owens v. Kyphon, Inc.*, No. C 06-3988 JF (HRL), 2007 WL 420191, at \*3 (N.D. Cal. Feb. 5, 2007) (striking “who have experienced gender discrimination” from the class definition to avoid creating a fail-safe class).

289. *Heffelfinger*, 2008 WL 8128621, at \*28.

### III. FAIL-SAFE CLASSES ARE BARRED FROM CLASS CERTIFICATION

Part III.A contends that courts must preclude fail-safe classes from certification because they circumvent the doctrine of res judicata by allowing class members to relitigate claims against the defendant and by reinstating one-way intervention. Part III.B argues that the Fifth and Ninth Circuits, which have not prohibited the certification of fail-safe classes, erroneously relied on prior Fifth Circuit case law that did not address whether a fail-safe class could be maintained. Finally, Part III.C concludes that fail-safe classes independently preclude class certification because failing to satisfy the ascertainability requirement must be treated as an independent bar to class certification.

#### A. *Fail-Safe Classes Violate Res Judicata*

This section maintains that fail-safe classes must be understood as a problem of res judicata. First, it contends that fail-safe classes must be precluded from class certification because, in the case of an adverse judgment, fail-safe class members are defined out of the class and may relitigate their claims against the defendant. It then argues that fail-safe classes reinstate the one-way intervention eradicated by the 1966 amendment to Rule 23 by permitting class members to benefit from and be bound only by a favorable judgment.

##### 1. Fail-Safe Class Members Are Not Claim Precluded

Fail-safe classes must be proscribed because fail-safe classes create a res judicata problem where class members are not precluded from relitigating the same claims against the defendant.<sup>290</sup> Because membership in a fail-safe class is contingent on the validity of the class members' claims against the defendant,<sup>291</sup> class members held not to have valid claims against the defendant are defined out of the class.<sup>292</sup> When the court enters judgment against the class as defined in the certification order,<sup>293</sup> class members that have been defined out of the class are not subject to the judgment of the court.<sup>294</sup> If class members defined out of the class are not subject to the court's judgment, then those class members can relitigate their claims against the defendant in a subsequent action.<sup>295</sup> Fail-safe classes thus violate res judicata by allowing class members to relitigate a claim that has been fully adjudicated against the defendant, such that a final judgment on the merits in favor of the defendant does not prevent the defendant from liability against future claimants.<sup>296</sup>

---

290. *See supra* notes 122–24 and accompanying text.

291. *See supra* notes 98–102 and accompanying text.

292. *See supra* note 105 and accompanying text.

293. *See supra* note 24 and accompanying text.

294. *See supra* notes 104–09 and accompanying text.

295. *See supra* notes 121, 146–48 and accompanying text.

296. *See supra* notes 146–47 and accompanying text.

The Sixth Circuit recognized that fail-safe classes must be precluded from class certification for this reason.<sup>297</sup> In *Randleman*, although the Sixth Circuit did not explicitly state that individuals defined out of a fail-safe class could relitigate claims against the defendant, the court held that fail-safe classes shielded the class members from receiving an adverse judgment.<sup>298</sup> More recently in *Young*, while the Sixth Circuit held that the proposed class was not fail-safe, the court recognized a proscription against fail-safe classes because such classes include only those entitled to relief,<sup>299</sup> such that a class member either won or was defined out of the class.<sup>300</sup> Moreover, the *Young* court explicitly recognized that allowing members of a fail-safe class to be defined out of the class in the case of an adverse judgment failed to provide the final resolution of the claims of all class members.<sup>301</sup>

The Seventh Circuit has also proscribed fail-safe classes on the grounds that they allow individuals defined out of the class to relitigate their claims.<sup>302</sup> In *Dafforn*, later relied on by the Seventh Circuit in *Adashunas*,<sup>303</sup> the court held that the amended class definition created a fail-safe class because a finding that the defendants did not charge illegal fees would mean that no class existed and that the class members could relitigate the illegality of the defendant's fees.<sup>304</sup> The Seventh Circuit thus held that fail-safe classes were impermissible, as Rule 23 was not meant to be an exception to the rules of res judicata by allowing class members to relitigate claims upon receiving an adverse judgment.<sup>305</sup>

## 2. Fail-Safe Classes Reinstate One-Way Intervention

The res judicata argument can be taken one step further.<sup>306</sup> Fail-safe classes must be barred from class certification because allowing fail-safe classes to be certified reinstates the one-way intervention that the 1966 amendment to Rule 23 was designed to abrogate.<sup>307</sup> Under the 1966 amendment, the court's judgment—whether or not favorable to the class—must include all individuals that the court finds to be class members.<sup>308</sup> Fail-safe classes thus violate the amendment by allowing class members to benefit from a favorable judgment but to be defined out of the class in the case of an adverse judgment.<sup>309</sup> Fail-safe classes can be analogized to the

---

297. See *supra* notes 162, 178 and accompanying text.

298. See *supra* note 162 and accompanying text.

299. See *supra* notes 176–80 and accompanying text.

300. See *supra* note 177 and accompanying text.

301. See *supra* note 178 and accompanying text.

302. See *supra* note 195 and accompanying text.

303. See *supra* note 188 and accompanying text.

304. See *supra* note 195 and accompanying text.

305. See *supra* note 195 and accompanying text.

306. See *supra* note 148 and accompanying text.

307. See *supra* notes 132–45 and accompanying text.

308. See *supra* notes 142–44 and accompanying text.

309. See *supra* notes 138–40 and accompanying text.

spurious class actions<sup>310</sup> the amendment eliminated by removing the tripartite characterizations of class actions.<sup>311</sup> Much like the spurious class action in which class members could intervene to receive the benefit of a favorable judgment but were not bound by an adverse judgment, fail-safe class members are only bound by a favorable judgment.<sup>312</sup>

While the Sixth Circuit has recognized that fail-safe classes must be precluded from class certification because they are subject only to an adverse judgment,<sup>313</sup> it has failed to acknowledge that fail-safe classes actually reinstate one-way intervention.<sup>314</sup> In *Randleman*, it held that the class was fail-safe but failed to acknowledge that the reason it was impermissible for a class to be bound only by a favorable judgment was that, under the 1966 amendment to Rule 23, a class cannot intervene only to benefit from a favorable judgment.<sup>315</sup> Similarly in *Young*, while the Sixth Circuit acknowledged that fail-safe classes were proscribed because class members could seek a remedy but not be bound by an adverse judgment, the court also failed to correlate fail-safe classes with one-way intervention.<sup>316</sup>

The Seventh Circuit's analysis suffers from the same shortcoming.<sup>317</sup> In *Messner*, it noted that the problem posed by fail-safe classes was that a class member either won or, by virtue of losing, was defined out of the class; but it failed to take the argument one step further and assert that fail-safe classes restore the historically proscribed one-way intervention.<sup>318</sup>

#### B. *The Fifth and Ninth Circuits Incorrectly Analyzed the Fail-Safe Problem*

This section argues that the Fifth Circuit in *Rodriguez* recognized *Forbush* and *Mullen* as rejecting a bar against certifying fail-safe classes even though *Forbush* and *Mullen* never addressed whether a fail-safe class could be maintained or the justifications for denying class certification to a fail-safe class. This section then contends that, while the Ninth Circuit in *Vizcaino* improperly relied on Fifth Circuit precedent in *Forbush*, Ninth Circuit and district court jurisprudence following *Vizcaino* has created ambiguity over whether the Ninth Circuit has rejected a prohibition against fail-safe classes.

##### 1. The Fifth Circuit

In *Rodriguez*, the Fifth Circuit interpreted its precedent in *Forbush* and *Mullen* as rejecting a rule against certifying fail-safe classes, therefore

---

310. See *supra* notes 136–40 and accompanying text.

311. See *supra* notes 141–45 and accompanying text.

312. See *supra* notes 104–05, 146–47 and accompanying text.

313. See *supra* note 162 and accompanying text.

314. See *supra* note 148 and accompanying text.

315. See *supra* notes 141–44 and accompanying text.

316. See *supra* notes 177–78 and accompanying text.

317. See *supra* note 208 and accompanying text.

318. See *supra* note 208 and accompanying text.

insinuating that the proposed classes in *Forbush* and *Mullen* were fail-safe.<sup>319</sup> However, in neither case did the Fifth Circuit assert that the proposed classes were fail-safe, and in both cases the court rejected the argument that the class was defined in a circular fashion.<sup>320</sup> Because the Fifth Circuit failed to recognize that the proposed class was fail-safe in both *Forbush* and *Mullen*, it failed to address the underlying res judicata implication by certifying fail-safe classes.<sup>321</sup> By relying on *Forbush* and *Mullen* to explicitly reject a prohibition against fail-safe classes, *Rodriguez* also failed to address the underlying res judicata concern of maintaining a fail-safe class.<sup>322</sup>

In *Forbush*, the Fifth Circuit held that the class definition was not circular<sup>323</sup> because the possibility that certain class members could fail to prevail on their individual claims would not defeat class membership when the class was linked by a common complaint.<sup>324</sup> However, the problem with the proposed class was not that some class members might fail to prevail on their claims, but rather that the class included only individuals entitled to relief.<sup>325</sup> Likewise, whether the class members were linked by a common complaint was an issue of commonality and should not have prevented the court from assessing whether the proposed class was ascertainable.<sup>326</sup> If a proposed class is not ascertainable, then the fact that the class is linked by a common complaint does not allow the class to circumvent the ascertainability requirement.<sup>327</sup>

The proposed class in *Forbush* was fail-safe because the class was defined such that membership in the class depended on the validity of the class members' claims.<sup>328</sup> If a court held that a class member's employee benefits were not improperly reduced, the class member would be defined out of the class and would not be bound by an adverse judgment.<sup>329</sup> By failing to recognize that the class in *Forbush* was fail-safe, the Fifth Circuit also failed to address the res judicata problems implicated by fail-safe class definitions<sup>330</sup> and instead focused on whether a poorly drafted class definition required the district court to outright deny class certification.<sup>331</sup> If the Fifth Circuit in *Forbush* had found that the class was fail-safe, the court would have had to address whether a fail-safe class could be certified despite the fact that the class members would be bound only by a favorable

---

319. See *supra* notes 230, 238–45 and accompanying text.

320. See *supra* notes 224–25, 234–36 and accompanying text.

321. See *supra* notes 222–25, 224–36 and accompanying text.

322. See *supra* notes 243–45 and accompanying text.

323. See *supra* notes 224–25 and accompanying text.

324. See *supra* note 225 and accompanying text.

325. See *supra* notes 180, 25 and accompanying text.

326. See *supra* notes 39–43, 225–26 and accompanying text.

327. See *supra* notes 39–43 and accompanying text.

328. See *supra* notes 98–102 and accompanying text.

329. See *supra* notes 105, 223 and accompanying text.

330. See *supra* notes 146–48 and accompanying text.

331. See *supra* notes 224–25 and accompanying text.

judgment and could relitigate claims against the defendant if the class members were defined out of the class.<sup>332</sup>

While the *Forbush* court also rejected the argument that the class definition was circular because accepting that argument would preclude class certification from any class of persons alleging injury from a particular action,<sup>333</sup> this point misconstrued the ascertainability requirement.<sup>334</sup> Requiring that a class not be defined in terms of the validity of the class members' claims does not preclude any class of persons from alleging injury from a particular action;<sup>335</sup> rather, it ensures that there is a class capable of identification prior to final judgment.<sup>336</sup>

In *Mullen*, the Fifth Circuit acknowledged that in *Forbush* it had allowed the class to be certified even though the class was defined in terms of an ultimate issue in the case.<sup>337</sup> Relying on *Forbush*, the Fifth Circuit held that the class could be certified even though the class definition in *Mullen* referenced the ultimate issue of causation.<sup>338</sup> The court in *Mullen*, however, never identified the class in either *Forbush* or *Mullen* as fail-safe.<sup>339</sup> By allowing a class to be certified even though the class definition referenced the ultimate issue of causation, the Fifth Circuit in *Mullen* allowed a fail-safe class to be certified.<sup>340</sup> After all, a fail-safe class is, by definition, a class that references the defendant's liability, including the ultimate issue of causation.<sup>341</sup> Yet, because the Fifth Circuit in *Mullen* failed to recognize that the class was fail-safe, it also failed to address the problems associated with allowing class members to be bound only by a favorable judgment and to be able to relitigate claims after being defined out of the class.<sup>342</sup>

In *Rodriguez*, the Fifth Circuit interpreted its prior decisions in *Forbush* and *Mullen* as rejecting a prohibition against fail-safe classes even though the prior decisions did not even recognize that the proposed classes were fail-safe.<sup>343</sup> Relying on *Forbush* and *Mullen* as precedent, the Fifth Circuit in *Rodriguez* held that the bankruptcy court did not adopt an improper class definition despite the admittedly fail-safe nature of the class.<sup>344</sup> In relying on *Forbush* and *Mullen*, *Rodriguez* explicitly rejected a prohibition against fail-safe classes based on prior cases that had neither professed to reject a prohibition against fail-safe classes nor addressed the implications of

---

332. See *supra* notes 121, 146–48 and accompanying text.

333. See *supra* note 224 and accompanying text.

334. See *supra* notes 39–44, 50–56 and accompanying text.

335. See *supra* note 224 and accompanying text.

336. See *supra* notes 54–56 and accompanying text.

337. See *supra* notes 235–36 and accompanying text.

338. See *supra* notes 235–36 and accompanying text.

339. See *supra* notes 229, 235–36 and accompanying text.

340. See *supra* notes 98–103, 235–36 and accompanying text.

341. See *supra* notes 98–103, 235–36 and accompanying text.

342. See *supra* notes 121, 146–48 and accompanying text.

343. See *supra* notes 238, 243–45 and accompanying text.

344. See *supra* notes 242–45 and accompanying text.

adopting such a rejection.<sup>345</sup> Furthermore, even when the Fifth Circuit in *Rodriguez* was explicitly rejecting the prohibition against fail-safe classes, it failed to recognize the res judicata implications of certifying the proposed fail-safe class.<sup>346</sup> While the Fifth Circuit noted that a fail-safe class precludes the possibility of an adverse judgment against class members, the Fifth Circuit failed to recognize that allowing class members to be bound only by a favorable judgment violates res judicata because it not only allows class members to relitigate claims in the case of an adverse judgment but also reinstates one-way intervention.<sup>347</sup>

## 2. The Ninth Circuit in *Vizcaino*

The Ninth Circuit applied Fifth Circuit case law to reject a challenge that the class definition was circular and failed to recognize that fail-safe classes circumvent the bar of res judicata.<sup>348</sup> It remains unclear whether fail-safe classes are precluded in the Ninth Circuit, because subsequent case law has failed to recognize *Vizcaino* as expressly rejecting a prohibition against fail-safe classes.<sup>349</sup>

In *Vizcaino*, the court held that the originally certified class was not circular, citing the proposition from *Forbush* that success of a claim hinging on the resolution of a disputed legal issue did not make a class definition circular.<sup>350</sup> The Ninth Circuit also compared the class in *Vizcaino* to the class in *Forbush*, finding that the class in the former was no more circular than that in the latter.<sup>351</sup> Given that *Rodriguez* later interpreted *Forbush* as rejecting a rule against fail-safe classes, the class in *Forbush* was arguably fail-safe.<sup>352</sup> If the class in *Forbush* was fail-safe, then the class definition was also circular in nature, as the courts have used the terms interchangeably to describe a class that is defined in terms of the validity of the plaintiff's claims.<sup>353</sup> Thus, using *Forbush* as a benchmark for lack of circularity is ineffective.<sup>354</sup>

The originally certified class in *Vizcaino* was fail-safe and required redefinition because the class was defined in terms of the defendant's ultimate liability.<sup>355</sup> Under the originally proposed class definition, if the court held that the class member was not denied employee benefits because

---

345. See *supra* notes 238, 243–45 and accompanying text.

346. See *supra* notes 146–48, 243–45 and accompanying text.

347. See *supra* notes 146–48 and accompanying text.

348. See *supra* notes 261–63 and accompanying text. *But see supra* notes 265–67, 275–77 and accompanying text (noting that both a subsequent Ninth Circuit case as well as federal district court case law in the Ninth Circuit have not recognized *Vizcaino* as rejecting a prohibition against certifying fail-safe classes).

349. See *supra* note 267 and accompanying text.

350. See *supra* note 261 and accompanying text.

351. See *supra* note 262 and accompanying text.

352. See *supra* notes 243–45 and accompanying text.

353. See *supra* notes 222, 265 and accompanying text.

354. See *supra* note 262 and accompanying text.

355. See *supra* notes 99, 257 and accompanying text.

the class member was considered an independent contractor or an employee of a third-party employment agency, then the individual would be defined out of the class and would not be bound by an adverse judgment.<sup>356</sup> Yet, because the Ninth Circuit did not recognize that the proposed class was fail-safe, the Ninth Circuit also failed to address the res judicata implications of allowing the originally certified class to proceed absent redefinition.<sup>357</sup> Had the Ninth Circuit recognized that the class was fail-safe, it would have had to confront whether fail-safe classes must be proscribed on those grounds.<sup>358</sup>

### C. *Fail-Safe Classes Independently Preclude Class Certification*

This section concludes that a fail-safe class, if unmodified, is an independent basis for denying class certification. Moreover, it argues that courts must inquire whether the class definition creates a fail-safe class before addressing the Rules 23(a) and (b) requirements for class certification.

While the Sixth Circuit in *Randleman* explicitly held that a fail-safe class is independent grounds for denying class certification,<sup>359</sup> the Seventh Circuit has not yet decided whether a fail-safe class independently bars class certification.<sup>360</sup> However, the Seventh Circuit in *Messner* suggested that a fail-safe class should not be treated as independent grounds for denying class certification, stating that courts should often resolve the fail-safe problem by refining the class definition as opposed to denying class certification.<sup>361</sup>

The *Randleman* approach—recognizing that fail-safe classes independently bar class certification—is the better conception of the problem with fail-safe classes. The reason fail-safe classes are grounds for denying class certification is that fail-safe classes fail to satisfy the widely recognized ascertainability requirement for class certification.<sup>362</sup> Simply put, fail-safe classes are not ascertainable because they are not capable of identification prior to final judgment, as a judgment on the defendant's liability is necessary to determine class membership.<sup>363</sup>

Until the circuits determine whether ascertainability is an independent basis to deny class certification,<sup>364</sup> failing to satisfy the ascertainability requirement should also be treated as independent grounds for denying class certification analogous to the failure to satisfy one of the Rule 23(a) or (b) requirements for class certification.<sup>365</sup> Not only is it “axiomatic” that a

---

356. *See supra* notes 104–05, 257 and accompanying text.

357. *See supra* notes 146–48 and accompanying text.

358. *See supra* notes 146–48 and accompanying text.

359. *See supra* note 163 and accompanying text.

360. *See supra* notes 195–96, 202, 210 and accompanying text.

361. *See supra* note 210 and accompanying text.

362. *See supra* notes 110–13 and accompanying text.

363. *See supra* notes 110–13 and accompanying text.

364. *See supra* note 41 and accompanying text.

365. *See supra* note 43 and accompanying text.

class must be capable of identification prior to a final judgment on the merits,<sup>366</sup> but failure to satisfy the ascertainability requirement prevents courts and parties from understanding the burdens of class certification,<sup>367</sup> creates problems of administrative feasibility<sup>368</sup> at odds with the efficiency rationale for class actions,<sup>369</sup> and hinders the ability of the court to identify those entitled to notice and the opportunity to opt out of the action.<sup>370</sup> Considering the strong reasons why ascertainability should be treated as an independent requirement for class certification, a fail-safe class that fails to satisfy the ascertainability requirement is an independent justification for denying class certification.<sup>371</sup>

However, like the Seventh Circuit articulated in *Messner*, courts do have the discretion to modify the class definition to avoid denying class certification.<sup>372</sup> Prior to addressing the Rule 23(a) and (b) requirements, courts must first analyze whether the class definition creates a fail-safe class.<sup>373</sup> If the class definition creates a fail-safe class, it is within the court's discretion to modify the class definition to avoid denying class certification on the basis of the ill-defined fail-safe class.<sup>374</sup> If it is futile to redefine the class because the fail-safe class was a guise for a deficiency in satisfying the Rule 23(a) and (b) prerequisites,<sup>375</sup> or if the court chooses not to exercise its discretion to redefine the class,<sup>376</sup> then a court must deny class certification.

#### CONCLUSION

The ascertainability requirement must continue to play a decisive role in class certification decisions. Courts must determine at the outset of the class certification proceedings whether the class definition creates a fail-safe class. If the class definition creates a fail-safe class because the class definition references the defendant's liability, then certification should be rejected unless the court can somehow modify the class definition out of fail-safe status.

---

366. See *supra* note 39 and accompanying text.

367. See *supra* note 57 and accompanying text.

368. See *supra* note 58 and accompanying text.

369. See *supra* note 17 and accompanying text.

370. See *supra* note 61 and accompanying text.

371. See *supra* note 43 and accompanying text.

372. See *supra* notes 118–20, 210 and accompanying text.

373. See *supra* note 45 and accompanying text.

374. See *supra* notes 118–20 and accompanying text.

375. See *supra* note 115 and accompanying text.

376. See *supra* notes 118–20 and accompanying text.