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Do the Second Circuit's Legal Standards on Class Certification Incentivize Forum Shopping?: A Comparative Analysis of the Second Circuit's Class Certification Jurisprudence

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DO THE SECOND CIRCUIT'S LEGAL STANDARDS ON CLASS CERTIFICATION INCENTIVIZE FORUM SHOPPING?: A COMPARATIVE ANALYSIS OF THE SECOND CIRCUIT'S CLASS CERTIFICATION JURISPRUDENCE

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The Class Action Fairness Act altered the jurisdictional landscape of class actions by relaxing the barriers to satisfying diversity jurisdiction in federal court. As a result, plaintiffs' attorneys frequently find themselves filing class actions in federal court, and face the critical question of where to initiate their lawsuit. Many plaintiffs' attorneys consider the favorability of legal standards when determining the forum in which to file their class action. Among other substantive and procedural considerations, the applicable class certification standards of the forum are an important forum selection factor.

The Second Circuit, in particular, is a forum that plaintiffs' attorneys might consider due to its novel class certification standards on a range of unique areas of certification. Plaintiffs seeking certification of very discrete class actions will be mindful of the Second Circuit's certification criteria when deciding on a forum for their class action. This Note details the Second Circuit's class certification jurisprudence on the standard of appellate review of interlocutory appeals, satisfaction of Federal Rule of Civil Procedure 23(b)(3)'s predominance requirement in Rule 23(c)(4) single issue class actions, and certification of defendant classes under Rule 23(b)(2). This Note assesses whether these certification standards encourage forum shopping in district courts within the Second Circuit in light of the contrasting standards that other circuits have adopted on these issues.

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INTRODUCTION

Attorney X is plaintiffs' counsel for a Federal Rule of Civil Procedure 23(b)(3) class of residents suing manufacturers for releasing waste in Alabama over an eighty-five year period.[1] Attorney X could file in state court, but, most likely, opposing counsel would successfully remove the action to federal court.[2] Rather than spending resources fighting removal, Attorney X decides to initially file his case in federal court to expedite the

1. This class description is similar to the class in an Eleventh Circuit opinion. *See* Evans v. Walter Indus., 449 F.3d 1159, 1161 (11th Cir. 2006).

2. As this Note later discusses, the Class Action Fairness Act (CAFA) has significantly expanded federal removal jurisdiction over class action lawsuits that begin in state court. *See* 28 U.S.C. § 1332(d) (2012); *infra* Part I.A.

process. However, he has an important decision to make that could shape the course of the litigation.[3] He has to choose which federal forum is most suitable to his class action: Forum A or Forum B?

On one hand, Forum A might be a reasonable option, but it has strict requirements for satisfying predominance in Rule 23(b)(3) class actions, which could defeat his action at the class certification stage.[4] Moreover, if certification is denied, it is unlikely that he will win an appeal because Forum A reviews certification decisions under the deferential "abuse of discretion standard."[5]

On the other hand, Forum B has adopted a more lenient approach to predominance, increasing the odds that Attorney X's class will be certified by the district court.[6] Additionally, Forum B's standard of appellate review is deferential to the district court *only* when the district court grants class certification.[7] Forum B provides no deference to denials of class certification by the trial court.[8] Therefore, if the trial court certifies the class, Attorney X can remain confident that the appellate court in Forum B will not reverse the trial court decision.[9] If, however, the trial court denies class certification, there is a probability that the trial court's certification denial will be reversed by the appellate court.[10]

All other things being equal, which forum does Attorney X choose? Common sense dictates that he will choose Forum B because it strategically gives his action the best chance to move past the significant hurdle of class certification.[11]

Attorneys considering various federal venues might likewise be incentivized to file their class actions in district courts within the Second Circuit because, like Forum B, it has legal standards that appear to favor class certification on several grounds.[12] The Second Circuit varies from other federal circuits on major issues in federal class action practice, ranging from the appropriate standard of appellate review in class certification appeals to the applicability of Rule 23(b)(2) to defendant class actions.[13] This is critical in light of the fact that class certification has become less frequent in federal court, with fewer than one-fifth of all

3. *See infra* Part I.B.

4. Forum A's predominance standard mirrors the Fifth Circuit approach in single issue class actions. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996).

5. Abuse of discretion is deferential to the trial court. *See infra* Part II.A.2; *see also In re* Deepwater Horizon, 739 F.3d 790, 798 (5th Cir. 2014).

6. Forum B's predominance standard mirrors the Second Circuit's approach in single issue class actions. *See In re* Nassau Cty. Strip Search Cases, 461 F.3d 219, 226 (2d Cir. 2006).

7. This is the Second Circuit's standard of appellate review on class certification. *See* Parker v. Time Warner Entm't Co., 331 F.3d 13, 18 (2d Cir. 2003).

8. *See id.*

9. *See id.*

10. *See infra* Part III.A.1.

11. *See infra* Part III.

12. *See infra* Part II.

13. *See infra* Part II.

classes getting certified.[14] Thus, the Second Circuit's approach warrants further scrutiny to see whether it actually incentivizes attorneys to choose it as a forum.

This Note analyzes the Second Circuit's class certification jurisprudence to determine whether its legal standards favor class certification. It then compares the Second Circuit's approach to other forums, emphasizing the differences that make the Second Circuit's standards favorable to certification. Ultimately, this Note evaluates the notion that the Second Circuit's legal standards incentivize attorneys to file there to get class certification.[15]

Part I of this Note provides background on class action practice in federal court, including how the Class Action Fairness Act (CAFA) expanded federal jurisdiction over class actions and the factors that attorneys consider when making decisions on choice of forum for class action litigation. Part II discusses the Second Circuit's approach on three areas of certification: (1) the standard of appellate review of interlocutory appeals,[16] (2) satisfaction of the Rule 23(b)(3) predominance requirement in Rule 23(c)(4) single issue class actions,[17] and (3) certifying a Rule 23(b)(2) defendant class.[18] Part II then compares the Second Circuit's approach on these issues to the approach of other forums. Next, Part III assesses whether the Second Circuit's standards on class certification encourage attorneys to file their class actions in the Second Circuit. Finally, this Note answers that question in the affirmative, concluding that the Second Circuit's applicable legal standards entice attorneys to file their class actions within the circuit.

I. A TREND TOWARD HORIZONTAL FORUM SHOPPING IN FEDERAL COURT

Before analyzing whether the Second Circuit encourages forum shopping, it is important to explain the state of class action certification jurisprudence today. Part I.A discusses the 2005 enactment of CAFA and its impact on federal jurisdiction over class actions. Part I.B then surveys the factors that attorneys consider when making forum selection decisions in light of CAFA.

14. *See* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 605 (2006); *see also* 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 1:18, at 50 (5th ed. 2011).

15. It is important to note that the Ninth Circuit has similar standards in some areas of class certification jurisprudence. *See, e.g.*, Parsons v. Ryan, 754 F.3d 657, 673 (9th Cir. 2014). This Note focuses on the Second Circuit.

16. *See* FED. R. CIV. P. 23(f).

17. *See id.* 23(b)(3), (c)(4).

18. *See id.* 23(b)(2).

A. CAFA and the Expansion of Federal Jurisdiction over Class Actions

CAFA supplements Rule 23 of the Federal Rules of Civil Procedure in federal court.[19] CAFA was enacted as a part of the tort reform movement to eliminate forum shopping in state courts and reduce attorney's fees in class action settlements.[20] It sought to accomplish this by expanding diversity and removal jurisdiction in class action lawsuits.[21] In essence, the legislative intent behind CAFA was to prevent forum shopping from plaintiffs' attorneys in state court by giving defendants the ability to forum shop "horizontally"—meaning among the federal courts only and not the state system—in federal court through removal jurisdiction.[22]

It is important to note the kind of forum shopping that occurs in federal class actions today. CAFA enables "horizontal" forum shopping among the federal courts.[23] CAFA makes "vertical" forum shopping, where attorneys have a choice between filing their class action in state or federal court, more difficult because the jurisdictional rules of CAFA are crafted in favor of federal jurisdiction.[24] A plaintiffs' attorney can only remand his case to state court if he is able to shape his class in a way that fits one of CAFA's exceptions by preserving the action as predominantly a statewide, rather than a nationwide, action.[25]

There has been an increase in federal class actions as a result of CAFA.[26] This can be explained, in part, by the relaxed diversity requirements for class actions in federal court.[27] Plaintiffs' lawyers who wish to file their class actions in federal court have to meet fairly minimal standards for diversity of citizenship and the amount in controversy requirement.[28] Therefore, they face few jurisdictional obstacles in filing their cases in federal court.[29]

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19. Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d) (2012).

20. *See* Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1597–602 (2008).

21. *See id.* at 1608.

22. *See id.* at 1607.

23. *See* Justin D. Forlenza, Note, *CAFA and* Erie*: Unconstitutional Consequences?*, 75 FORDHAM L. REV. 1065, 1085–86 (2006).

24. *See id.* at 1086.

25. *See id.*

26. *See* Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1562 (2008).

27. Prior to CAFA, diversity jurisdiction required complete diversity between the named plaintiffs and the defendants. *See* Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 365 (1921). Additionally, the amount in controversy for the class representative had to exceed $75,000, while class members could satisfy the amount in controversy by alleging claims less than $75,000 if they were added as tagalong claims under supplemental jurisdiction. *See* Snyder v. Harris, 390 F.2d 204, 205 (8th Cir. 1968). CAFA eased the requirements for diversity jurisdiction by requiring minimal diversity of citizenship, which demands only that any plaintiff in the case has to be diverse from any defendant. *See* 28 U.S.C. § 1332(d)(2)(A) (2012). CAFA also created a $5 million amount in controversy that needs to be satisfied only in the aggregate and not on an individual basis. *See* 28 U.S.C. § 1332(d)(2).

28. *See* 28 U.S.C. § 1332(d).

29. *See id.*

CAFA, however, also works to the benefit of defendants.[30] Defendants seeking to remove the case from state court to federal court likely can unless the class fits a number of jurisdictional exceptions that would remand the case to state court.[31] These exceptions include the "local controversy" exception,[32] "the home state" exception,[33] and the discretionary jurisdiction exception.[34] Federal district courts also cannot exercise jurisdiction over cases where the state is the primary defendant against whom the district court would be unable to order relief or where there were fewer than one hundred proposed plaintiff class members.[35] Although defendants have the burden of proof on removal, they only need to prove by a preponderance of the evidence that federal jurisdiction exists.[36]

The number of removals from state court to federal court has increased after the enactment of CAFA.[37] The data show that this increase applies to the exercise of both federal question and removal jurisdiction.[38] Indeed, the

30. *See id.*

31. *See id.*

32. The first exception to minimal diversity compels the district court to decline jurisdiction if more than two-thirds of the proposed class are citizens of the forum state where the action was originally filed and at least one of the defendants is one "from whom significant relief is sought by members of the plaintiff class; whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and who is a citizen of the State in which the action was originally filed." *See id.* § 1332(d)(4)(A)(i)(II). Remand to state court is also required if the "principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed," *id.* § 1332(d)(4)(A)(i)(III), and "during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons," *id.* § 1332(d)(4)(A)(ii). *See* Steven M. Puiszis, *Developing Trends with the Class Action Fairness Act of 2005*, 40 J. MARSHALL L. REV. 115, 134 (2006).

33. The second exception to minimal diversity requires that at least two-thirds of the proposed class members and the primary defendants are citizens of the forum state where the action was originally filed. *See* 28 U.S.C. § 1332(d)(4)(B); *see also* Puiszis, *supra* note 32, at 134.

34. The third exception to CAFA's minimal diversity exception is discretionary and allows a district court to decline jurisdiction over a class action where between one-third and two-thirds of the class members are citizens of the forum state where the action was originally filed. The district court can consider a number of factors pertinent to this determination, including

> (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction; (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants; (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and (F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

28 U.S.C. § 1332(d)(3)(C)–(F); *see also* Puiszis, *supra* note 32, at 141–42.

35. 28 U.S.C. § 1332(d)(5)(B).

36. *See* Dart Cherokee Basin Operating Co. v. Owens, 135 S. Ct. 547, 553–54 (2014).

37. *See* 1 RUBENSTEIN, *supra* note 14, § 1:18, at 48.

38. *See id.*

number of diversity filings has increased by nearly 72 percent since CAFA was enacted.[39] Moreover, efforts to circumvent CAFA by plaintiffs' lawyers seeking to keep their class actions in state court have had varying results; the U.S. Supreme Court has explicitly rejected attempts to keep the amount in controversy under $5 million, while attempts to keep the number of plaintiffs under one hundred have found more success.[40]

Appellate courts have the power to exercise review over trial court decisions to grant removal.[41] It is unclear how frequently they choose to exercise this power. It is clear, however, that the nature of forum selection for plaintiffs has changed as a result of CAFA, largely shifting the emphasis of massive class actions from state forums to federal forums.[42]

B. Forum Shopping Decisions in Federal Court

Data show that federal class action filings have continued to increase in recent years.[43] While the expansion of removal jurisdiction likely accounts for a significant portion of this increase, it appears that a majority of diversity class actions now originate in federal court because attorneys wish to avoid delays that accompany removal from state court.[44] The jurisdiction in which a class action is filed becomes a central strategic decision for plaintiffs' attorneys who have options regarding the venue for the class action.[45] Forum selection plays a prominent role in class action strategy, particularly if plaintiffs choose to circumvent the removal process

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39. *See id.*

40. *See* 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 6:17, at 559–62 (5th ed. 2012).

41. *See id.* § 6:15, at 548–49.

42. *See* Erichson, *supra* note 20, at 1607–08.

43. *See* John C. Coffee, Jr. & Alexandra D. Lahav, *The New Class Action Landscape: Trends and Developments in Class Certification and Related Topics* 58 (Ctr. for Law & Econ. Studies, Columbia Univ. Sch. of Law, Working Paper No. 435, 2012); *see also* Erichson, *supra* note 20, at 1611. Securities class actions account for nearly half of all class actions. *See* JOHN C. COFFEE, JR. & DANIEL WOLF, CLASS CERTIFICATION: TRENDS AND DEVELOPMENTS OVER THE LAST FIVE YEARS (2004–2009), at 18 tbl. 1 (2009), http://www.gotofirm.com/content/uploads/2012/12/CLASS-CERTIFICATION-Developments-Over-the-Last-Five-Years-2009.pdf [https://perma.cc/E6L7-9XRQ]. According to recent data, more than sixty securities class actions were filed in the Second Circuit in 2014, while fifty were filed in the Ninth Circuit. *See* RENZO COMOLLI & SVETLANA STARYKH, NERA ECON. CONSULTING, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2014 FULL-YEAR REVIEW 10 (2015), http://www.nera.com/content/dam/nera/publications/2015/PUB_Full_Year_Trends_2014_0115.pdf [https://perma.cc/A78H-2PAH]. After these two circuits, no other circuit received more than twenty-six securities class action filings in 2014. *See id.* However, this data fails to explain whether the Second Circuit is actually a plaintiff-friendly forum—the Second Circuit naturally may see more securities filings because it encompasses all of New York City.

44. *See* Erichson, *supra* note 20, at 1611; *see also* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1759 (2008). Under CAFA, appellate judges may take sixty days to review a remand motion upon the filing of appeal and may extend this deadline under special circumstances or if the parties agree. *See* 28 U.S.C. § 1453(c) (2012).

45. *See* BRIAN ANDERSON & ANDREW TRASK, CLASS ACTION PLAYBOOK § 3.04, at 86–88 (2014); Lee & Willging, *supra* note 44, at 1759.

and affirmatively decide to file their case in federal court.[46] This is because the choice of venue is left to the plaintiffs, who can choose from an assortment of federal forums and must weigh the favorability of the forum's procedural and substantive law to the class, the convenience of the location, and other factors.[47]

The factors that attorneys consider when choosing a federal forum are critical in understanding why the Second Circuit's class certification standards matter. One study demonstrates that the perceived favorableness of the applicable substantive or procedural federal law is an important forum selection factor for attorneys choosing a venue for their federal class actions.[48] This stems out of attorney perceptions of a judge's predispositions to rule for one side or the other.[49] The study indicates that among other considerations, these perceptions were based on attorneys' judgments regarding the receptivity of the court to the attorneys' claims.[50] This was measured by surveying 728 attorneys who filed class actions in federal court or had them removed to federal court by asking which factors were most important in their forum selection decision.[51] This factor was found to be a "primary" factor in the report generated from the study.[52]

For defendants removing the case from state to federal court, strict class certification standards are an important feature of a desirable federal forum.[53] In fact, 47 percent of the surveyed defendants who removed their class actions to federal court reported favorable class certification procedure as a reason for removal.[54] A small percentage of defense attorneys seeking class certification of a settlement considered the receptiveness of the court toward settlement, which necessarily entails certification.[55]

Plaintiffs are less likely to file their class action in federal court based on the applicable class certification standards in large part because federal courts are more likely to deny class certification motions than state courts.[56] However, this does not necessarily tell the whole story. Generally, plaintiffs' attorneys do not file their class actions in federal court by choice.[57] This study did not differentiate between plaintiffs' attorneys who filed in federal court to bypass the inevitable process of losing on a remand

46. *See* Erichson, *supra* note 20, at 1607; *see also* Rory Ryan, Note, *Uncertifiable?: The Current Status of Nationwide State-Law Class Actions*, 54 BAYLOR L. REV. 467, 468 (2002) (finding that state choice of law questions often defeat certification of nationwide class actions).

47. *See* Willging & Wheatman, *supra* note 14, at 613–14.

48. *See id.* at 612; *see also* Genevieve G. York-Erwin, Note, *The Choice-of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1794 (2009) (noting that choice of law issues frequently factor into state law class actions in federal court).

49. *See* Willging & Wheatman, *supra* note 14, at 624–25.

50. *See id.*

51. *See id.* at 601.

52. *See id.* at 611.

53. *See id.* at 618.

54. *See id.* at 617.

55. *See id.*; *see also* FED R. CIV. P. 23(e).

56. *See* Willging & Wheatman, *supra* note 14, at 635. State law is typically more favorable than federal law on class certification for plaintiffs. *See id.* at 637–38.

57. *See id.*

motion and plaintiffs' attorneys who filed in federal court because it conferred some advantage to the class action that could not be found in state court.[58] Regardless of the reason for filing in federal court, plaintiffs' attorneys are highly cognizant of the applicable substantive law that might favor their claims.[59]

One study indicates that the Second Circuit, in addition to the Ninth Circuit, is considered lenient relative to other federal courts in granting class certification, and thus plaintiffs' attorneys believe that their class is more likely to be certified in this jurisdiction.[60] Conversely, the Fifth and Seventh Circuits are perceived as being less lenient in granting class certification.[61] A detailed discussion on the Second Circuit's class certification jurisprudence in contrast to other federal forums is necessary to understand whether these perceived notions were formed due to leniency in granting certification.

II. THE SECOND CIRCUIT'S CLASS CERTIFICATION JURISPRUDENCE

The Second Circuit and the other circuits appear to be at odds with respect to class action jurisprudence. This split in judicial philosophy is prevalent in three main areas of class certification: the standard of appellate review of class certification, satisfaction of the Rule 23(b)(3) predominance requirement in single issue Rule 23(c)(4) class actions, and certification of defendant classes under Rule 23(b)(2).

Part II.A provides a comparative analysis between the Second Circuit's standard of appellate review of class certification decisions and those of the other circuits. Next, Part II.B contrasts the Second Circuit's standard on predominance in 23(b)(3) class actions, where single issues are receiving class treatment, to another approach. Then, Part II.C then analyzes the Second Circuit's unique approach toward 23(b)(2) defendant class actions, which varies from the approach of the other circuits.

A. Standard of Appellate Review for Class Certification

As a general principle, appellate courts review lower court rulings on class certification under the abuse of discretion standard.[62] The abuse of discretion standard is extremely deferential, and an appellate court will

58. *See id.*
59. *See id.* at 616.
60. *See* Erichson, *supra* note 20, at 1612.
61. *See id.*
62. *See* 4 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 14:19, at 557 (5th ed. 2014). In fact, every circuit other than the Second, Seventh, and Ninth applies this standard. *See, e.g.*, *In re* Deepwater Horizon, 739 F.3d 790, 798 (5th Cir. 2014); Day v. Persels & Assocs., 729 F.3d 1309, 1316 (11th Cir. 2013); Rodriguez v. Nat'l City Bank, 726 F.3d 372, 377 (3d Cir. 2013); *In re* Dry Max Pampers Litig., 724 F.3d 713, 717 (6th Cir. 2013); *In re* Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig., 716 F.3d 1057, 1063 (8th Cir. 2013); *In re* Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 30 (1st Cir.), *cert. denied*, 133 S. Ct. 338 (2012); Vallario v. Vandehey, 554 F.3d 1259, 1264 (10th Cir. 2009); Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 424 (4th Cir. 2003).

normally affirm the trial judge's decision unless that decision "rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact."[63] The Second Circuit has tweaked the abuse of discretion standard of review so that greater deference is given to *grants* of class certification than to *denials*.[64] The Seventh Circuit has altered the abuse of discretion standard in a way that emphasizes careful compliance with the "rigorous analysis" doctrine outlined by the Supreme Court.[65] Part II.A.1 provides in-depth analysis of the Second Circuit's standard of appellate review of class certification decisions. Part II.A.2 assesses the abuse of discretion standard adopted by the other circuits generally. Finally, Part II.A.3 sheds light on the standard adopted by the Seventh Circuit.

1. The Second Circuit's Approach: Greater Deference for Grants of Class Certification

The Second Circuit has adopted a novel approach regarding the standard of review of grants and denials of class certification. One commentator has gone so far as to take aim at the Second Circuit, alleging that its standard of appellate review disproportionately favors plaintiffs.[66] This approach follows a long line of case law stemming from a decision in 1983.[67]

As the Second Circuit noted in a recent holding, it provides greater deference to the district court if the district court grants class certification but applies a "noticeably less deferential standard" to denials of class certification.[68] It is critical to not only understand what the Second Circuit's standard of review is but how the court has applied it in class certification decisions spanning several decades. The facts of each case help color how the Second Circuit has handled issues for plaintiff class certification in areas ranging from antitrust to labor violations.[69]

The Second Circuit's flexibility in applying the abuse of discretion standard surfaced in *Abrams v. Interco Inc.*,[70] a 1983 antitrust action alleging price fixing on the part of an apparel manufacturer.[71] The case was filed by a class action attorney on behalf of all purchasers of Interco

63. *Rodriguez*, 726 F.3d at 377.

64. *See* Roach v. T.L. Cannon Corp., 778 F.3d 401, 405 (2d Cir. 2015). The Ninth Circuit also applies this approach. *See* Parsons v. Ryan, 754 F.3d 657, 673 (9th Cir. 2014).

65. *See* CE Design Ltd. v. King Architectural Metals, Inc., 637 F.3d 721, 723 (7th Cir. 2011). The Supreme Court ruled that a class "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982).

66. *See* Jonah Knobler, *Class Actions in the Second Circuit: Do Plaintiffs Have an Unfair Advantage?*, 253 N.Y. L.J. 46 (2015).

67. *See Roach*, 778 F.3d at 405; Parker v. Time Warner Entm't Co., 331 F.3d 13, 18 (2d Cir. 2003); *see also* Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp., 993 F.2d 11, 14 (2d Cir. 1993); Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993); Abrams v. Interco Inc., 719 F.2d 23, 25 (2d Cir. 1983).

68. *Roach*, 778 F.3d at 405.

69. *See id.*; *Abrams*, 719 F.2d at 25.

70. 719 F.2d 23 (2d Cir. 1983).

71. *See id.* at 25.

products over a four-year period.[72] The theory was that Interco had entered into an agreement to fix prices with more than seven thousand independent retail stores across the country.[73]

After the district court denied class certification, the plaintiffs appealed the denial and argued that abuse of discretion should be applied only under limited circumstances, such as when adequacy of representation is not met.[74] The Second Circuit ruled that the abuse of discretion is the proper standard of appellate review in class certification decisions, with the caveat that the standard must be applied flexibly.[75] As such, it blurred the lines between the abuse of discretion and de novo standards, holding a "judge's discretion is not boundless and must be exercised within the applicable rules of law or equity."[76] Ultimately, the court upheld the district court ruling denying class certification, in large part because providing notice to class members would be tedious, rendering the lawsuit unmanageable.[77]

Ten years later, the court elucidated its standard of appellate review on class certification decisions in *Robidoux v. Celani*,[78] laying the foundation for the standard that is still used today.[79] *Robidoux* dealt with a class action lawsuit by individuals applying for public assistance in Vermont suing for unlawful delays by the Vermont Department of Social Welfare in determining eligibility for the assistance.[80] The plaintiffs contended that the defendant's failure to process their applications within the thirty-day guideline mandated by federal law constituted hardship because these individuals relied on public assistance as their sole source of income.[81]

The plaintiffs moved to certify a class of all current and future recipients of public assistance in Vermont.[82] The district court denied class certification because the class size failed the numerosity requirement of Rule 23(a)(1).[83] The court reasoned that the class consisted of only three actual plaintiffs, and the other members of the class were an undetermined number based on speculation.[84] The court also ruled that the class failed the typicality requirement of Rule 23(a)(3) because recipients of a fuel assistance program did not suffer any delay or refusal.[85]

On appeal, the Second Circuit modified the standard of appellate review in class certification decisions.[86] The court began its opinion by noting that

72. *Id.*
73. *Id.*
74. *See id.* at 27–28.
75. *See id.* at 28.
76. *Id.* (quoting Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 193 (4th Cir. 1977)).
77. *Id.* at 30–34.
78. 987 F.2d 931 (2d Cir. 1993).
79. *See id.* at 935.
80. *See id.* at 933.
81. *See id.*
82. *See id.* at 934.
83. *See id.*
84. *See id.*
85. *See id.*
86. *See id.* at 935.

district courts should receive tremendous deference in determinations of the facts of a case but deserve little deference on the legal conclusions forming the basis of their rulings on class certification.[87] The court further stated that abuses of discretion occur more frequently in class certification denials than in other areas of the law, though it declined to say why.[88]

Applying this standard, the Second Circuit held that the class should have been certified even though it consisted of only three plaintiffs.[89] It determined that the numerosity requirement only necessitates a finding that joinder of all class members is "impracticable," not "impossible."[90] Moreover, there is no exact number or class size to satisfy the requirement, and the preliminary evidence that there were delays in 22 to 133 cases per month was sufficient.[91] Finally, the court held that the typicality element was met, even though the class definition was overly broad, because the district court needed to determine as a matter of fact whether there were at least some recipients of the fuel assistance program who suffered from delay or refusal.[92]

This holding set a standard that was subsequently modified in *Lundquist v. Security Pacific Automotive Financial Services Corp.*,[93] which was decided shortly after *Robidoux*.[94] The case dealt with a consumer class action alleging violations of the Consumer Leasing Act by the defendant.[95] The complaint included violations of federal consumer protection law, state common law, and "unfair and deceptive acts and practices" statutes.[96] Plaintiff Betty Lundquist sought to certify a class consisting of all persons who signed leases with the defendant similar to the one she signed: her automobile lease held her in default and liable if she decided to terminate it early.[97]

The district court declined to certify the class for failure to satisfy the commonality and typicality requirements.[98] On appeal, the Second Circuit remodeled the abuse of discretion standard, following its previous rulings that had loosened the standard.[99] It concluded from the holdings in *Abrams* and *Robidoux* that the court is "noticeably less deferential to the district court when that court has denied class status than when it has certified a

87. *See id.* ("Except to the extent that the ruling is based on determinations of fact . . . or where the trial judge's experience in the instant case or in similar cases has given him a degree of knowledge superior to that of appellate judges, as often occurs, review of class action determinations for 'abuse of discretion' does not differ greatly from review for error." (citation omitted)).

88. *See id.*

89. *See id.* at 935–36.

90. *Id.* at 935.

91. *See id.*

92. *See id.* at 936–37.

93. 993 F.2d 11 (2d Cir. 1993).

94. *See id.* at 14.

95. *See id.* at 12.

96. *Id.* at 14.

97. *See id.* at 12–14.

98. *See id.* at 14.

99. *See id.*

class."[100] Applying this standard, the court concluded that the district court did not abuse its discretion, and it affirmed the lower court's ruling.[101]

While the *Lundquist* Court did not rule in the plaintiff's favor, it crafted the modern standard for the Second Circuit to apply in subsequent decisions.[102] The standard seemed to flow naturally from the prior decisions in *Abrams* and *Robidoux*.[103] This new standard was applied in a 2003 decision pertaining to a consumer class action against Time Warner Entertainment, *Parker v. Time Warner Entertainment Co*.[104] In *Parker*, two cable subscribers sued Time Warner for violating federal and state consumer protection law by disclosing consumer information to third parties.[105]

The plaintiffs moved to certify a class including subscribers to Time Warner's cable package whose privacy interests were violated by the disclosure.[106] The district court denied certification on the grounds that the class failed predominance and superiority under Rule 23(b)(3)(D) due to the manageability concerns of handling a class with more than twelve million people.[107]

The Second Circuit reversed under the clarified abuse of discretion standard and remanded the case to the district court.[108] On the Rule 23(b)(3) issue, the circuit court reasoned that, without further discovery, the district court could not deny class certification because it was unclear how many individuals actually were a part of the class or how many would opt-out.[109] Moreover, the district court prematurely applied the "incidental" standard in the 23(b)(2) analysis when the Second Circuit had, in fact, adopted a broader "ad hoc" approach.[110] Therefore, the court granted a victory to plaintiffs in a major class action lawsuit.[111]

The most recent Second Circuit decision applying its modified standard of appellate review occurred in early 2015 in *Roach v. T.L. Cannon Corp.*[112] *Roach* featured a lawsuit by four Applebee's employees against T.L. Cannon Corp., which owned the franchises where they were employed, for federal and state labor law violations.[113] The plaintiffs alleged that staff had to subtract time for statutorily mandated work breaks (rest break claim), and that they did not receive extra payment when working more than ten

100. *Id.*
101. *See id.* at 14–15 (finding that the plaintiff failed to show that the other class members defaulted under similar circumstances or were harmed by the illegality of the lease).
102. *See id.*
103. *See id.* at 14; Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993); Abrams v. Interco Inc., 719 F.2d 23, 25 (2d Cir. 1983).
104. 331 F.3d 13 (2d Cir. 2003).
105. *See id.* at 15.
106. *See id.*
107. *See id.* at 17.
108. *See id.* at 18–21.
109. *See id.* at 21–22.
110. *Id.* at 20.
111. *See id.* at 22–23.
112. 778 F.3d 401 (2d Cir. 2015).
113. *See id.* at 403.

hours (spread of hours claim), as required by New York law.[114] The plaintiffs moved to certify a class consisting of Applebee's employees, "subclassed" into the two claims.[115]

The district court denied class certification, holding that the plaintiffs' failure to "offer a damages model that [is] 'susceptible of measurement across the entire class'" prevented class certification.[116] The district court reasoned that the damages in the individual case were too individualized for class treatment, thereby failing the predominance requirement of Rule 23(b)(3).[117] It strictly construed the ruling in *Comcast Corp. v. Behrend*,[118] leaving little room for the plaintiffs to satisfy predominance without creating a class-wide damages model.[119]

The Second Circuit ruled that the lower court misconstrued the ruling in *Comcast*, reversing the district court and vacating the judgment.[120] The court held that *Comcast* did not overrule an existing line of case law in the Second Circuit that established that individual ascertainability of damages itself does not defeat predominance for a Rule 23(b)(3) class.[121]

The court began by explaining its interpretation of the law set forth by the Supreme Court in *Comcast*.[122] In that case, the Court dealt with an antitrust suit where Comcast's acquisition of a cable television provider catapulted its market share in Philadelphia from 23.9 percent to 69.5 percent.[123] To satisfy predominance, the plaintiffs offered expert testimony that modeled the injuries on four different theories of antitrust injury.[124] However, the Court rejected the argument that this was sufficient to demonstrate that common issues predominated over individual ones.[125] It relied on its holding in *Wal-Mart Stores, Inc. v. Dukes*,[126] where it reaffirmed the "rigorous analysis" requirement to meet 23(b)(3) predominance.[127] This standard allows a court to consider the merits of the case when reviewing class certification decisions.[128] In *Comcast*, the Court denied predominance because the model formulated by the plaintiffs' expert was based on four different theories of antitrust violations, whereas the plaintiffs only advanced the "overbuilder" theory in the complaint.[129]

Thus, in the view of the Second Circuit, *Comcast* does not stand for the proposition that inability to measure damages on a class-wide basis

114. *See id.*
115. *See id.*
116. *Id.* at 404 (quoting Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013)).
117. *See id.*
118. 133 S. Ct. 1426 (2013).
119. *See id.*
120. *See Roach*, 778 F.3d at 408–09.
121. *See id.*
122. *See id.* at 405.
123. *See Comcast*, 133 S. Ct. at 1430.
124. *See id.*
125. *See id.* at 1434.
126. 131 S. Ct. 2541 (2011).
127. *Comcast*, 133 S. Ct. at 1428.
128. *See Dukes*, 131 S. Ct. at 2551.
129. *See Comcast*, 133 S. Ct. at 1434.

automatically results in failure of Rule 23(b)(3) predominance.[130] Instead, it merely states that, to meet the predominance requirement, a class-wide damages model must measure damages stemming from the class' asserted theory only.[131] Therefore, in *Roach*, the district court erred by focusing its analysis solely on the question of whether class-wide damages could be measured, because this logic ran contrary to the established jurisprudence in the Second Circuit.[132]

2. The Majority Approach: Abuse of Discretion

The majority of circuit courts give strong deference to the lower courts on class certification decisions.[133] The circuits reverse a certification decision only if "the record provides strong evidence that the trial judge indulged a serious lapse in judgment" under the abuse of discretion standard.[134] It is useful to illustrate the application of this standard in at least two cases to contrast with the Second Circuit's approach.

In *Waste Management Holdings, Inc. v. Mowbray*,[135] the trial court certified a Rule 23(b)(3) class action of all persons who had sold assets to the defendant in exchange for the defendant's common stock.[136] In this Rule 23(b)(3) opt-out class action, the court found that the common question of breach of contractual warranty predominated over individual questions of statute of limitations defenses.[137] The appellate court agreed with the defendant's argument that the district court was required to consider affirmative defenses, including statute of limitations defenses, during the class certification stage.[138] However, the court found that the district court had considered these defenses thoroughly but was not persuaded that individual issues regarding the defenses should prevent certification of a claim that otherwise met the Rule 23(a) prerequisites.[139] Therefore, the First Circuit held that the district court did not abuse its discretion in granting class certification.[140]

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130. *See* Roach v. T.L. Cannon Corp., 778 F.3d 401, 407 (2d Cir. 2015).
131. *See id.*
132. *See id.* at 409.
133. *See In re* Deepwater Horizon, 739 F.3d 790, 798 (5th Cir. 2014); Day v. Persels & Assocs., 729 F.3d 1309, 1316 (11th Cir. 2013); Rodriguez v. Nat'l City Bank, 726 F.3d 372, 377 (3d Cir. 2013); *In re* Dry Max Pampers Litig., 724 F.3d 713, 717 (6th Cir. 2013); *In re* Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig., 716 F.3d 1057, 1063 (8th Cir. 2013); *In re* Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 30 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 338 (2012); Vallario v. Vandehey, 554 F.3d 1259, 1264 (10th Cir. 2009); Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 424 (4th Cir. 2003).
134. *Lupron*, 677 F.3d at 31 (quoting Texaco P.R., Inc. v. Dep't of Consumer Affairs, 60 F.3d 867, 875 (1st Cir. 1995)).
135. 208 F.3d 288 (1st Cir. 2000).
136. *See id.* at 291–92.
137. *See id.* at 292–96.
138. *See id.* at 296.
139. *See id.*
140. *See id.* at 299.

In *Rodriguez v. National City Bank*,[141] the plaintiffs filed a 23(b)(3) class action against a bank alleging racially discriminatory practices in violation of the Fair Housing Act.[142] The district court found that the class failed 23(a)(2) commonality and denied certification.[143] The district court reasoned that the plaintiffs' allegation that they were charged more heavily than other borrowers was inadequate because they failed to show a disparate impact in each of the loan applications.[144] On appeal, the Third Circuit affirmed the district court ruling, finding that the district court was within its discretion to require an affirmative showing of commonality on the part of the plaintiffs.[145]

3. The Seventh Circuit: Deferential but Not Abject

The Seventh Circuit has adopted an approach that also contrasts with the Second Circuit but deviates from the majority's abuse of discretion standard.[146] The Seventh Circuit recognizes that appellate review of a class certification is deferential;[147] however, it adds the caveat that "deferential" does not mean "abject."[148] The language provided by the Seventh Circuit is not particularly enlightening as to what the standard actually means, and thus it warrants further consideration to see how it applies in practice.

The Seventh Circuit standard was recently applied in *CE Design Ltd. v. King Architectural Metals, Inc.*,[149] a 2011 decision written by Judge Richard Posner.[150] *CE Design* featured a consumer class action alleging that the defendant had sent out unsolicited fax advertisements in violation of the Telephone Consumer Protection Act.[151] The complaint alleged that King, the defendant, had sent over 500,000 faxes during one month in 2009.[152] The statutory damages were $500 for each violation.[153] The plaintiff, a civil engineering firm which received two advertisements from the defendant, moved to certify a class of recipients of King advertisements who had not given express permission to receive faxed advertisements.[154] The plaintiff was a professional class action plaintiff that had filed over 150 consumer class actions under the statute.[155]

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141. 726 F.3d 372 (3d Cir. 2013).
142. *See id.* at 374. The plaintiffs were minority mortgage borrowers. *See id.*
143. *See id.* at 376.
144. *See id.*
145. *See id.* at 378–79.
146. *See* CE Design Ltd. v. King Architectural Metals, Inc., 637 F.3d 721, 723 (7th Cir. 2011).
147. *See id.*
148. *Id.*
149. 637 F.3d 721 (7th Cir. 2011).
150. *See id.* at 723.
151. *See id.*
152. *See id.* at 724.
153. *See id.*
154. *See id.* at 723–24.
155. *See id.* at 723.

The district court certified the class, finding that the class had met the requirements in Rule 23(a).[156] However, on appeal, the Seventh Circuit vacated the lower court ruling and remanded it under the "deferential . . . [but not] abject" standard of appellate review.[157] The court focused its analysis on the defendant's contention that the class did not meet the adequacy of representation or typicality of the claims requirements.[158] The court held that the Seventh Circuit standard asks whether the claim of the class representative would be subject to defenses typical to the rest of the class.[159] If the defense asserted against the plaintiff is not typical, the class representative is not adequate under Rule 23(a)(4).[160] The defense asserted against the plaintiff was a consent defense based on the theory that the plaintiff posted its fax number and the words "Contact Us" on its website, soliciting advertisements.[161]

The court found that this defense might have been atypical of the rest of the class, potentially defeating certification for the plaintiffs on both typicality and adequacy.[162] The court reasoned that the consent defense would be especially applicable to the class representative because it listed its information in the *Blue Book* for businesses.[163] Moreover, the class representative potentially lacked credibility because the president of the civil engineering firm that served as plaintiff appeared to misunderstand the purpose of subscribing to the *Blue Book* during his deposition.[164] In light of the evidence against certification, the Seventh Circuit remanded the case to the district court.[165] However, it noted that the plaintiffs could circumvent the typicality and adequacy limitations by adding new class representatives and creating subclasses for certification.[166]

B. The Predominance Requirement of Rule 23(b)(3) in Rule 23(c)(4) Single Issue Class Actions

Another dichotomy exists in the predominance requirement of Rule 23(b)(3).[167] Rule 23(b)(3) requires that (1) common issues of fact or law "predominate" over individual ones and (2) that the class action is superior

156. *See id.* at 727–28.
157. *Id.* at 723.
158. *See id.* at 724.
159. *Id.* at 725.
160. *See id.*
161. *See id.*
162. *See id.* at 728.
163. *See id.* at 725.
164. *See id.* at 725–26.
165. *See id.* at 728.
166. *See id.*
167. *See* Michael J. Wylie, Note, *In the Ongoing Debate Between the Expansive and Limited Interpretations of Fed R. Civ. P. 23(c)(4)(A), Advantage Expansivists!*, 76 U. CIN. L. REV. 349, 354 (2007) (defining the Second Circuit view as an "expansive" reading of 23(c)(4) and the Fifth Circuit view as a "limited" interpretation). *Compare In re* Nassau Cty. Strip Search Cases, 461 F.3d 219, 226–27 (2d Cir. 2006) (certifying a 23(b)(3) class in a 23(c)(4) class action), *with* Castano v. Am. Tobacco Co., 84 F.3d 734, 752 (5th Cir. 1996) (reversing the district court's decision to certify a 23(b)(3) class in a 23(c)(4) class action).

to other methods of resolving the controversy.[168] Rule 23(b)(3) lists a number of factors relevant to these considerations.[169] To satisfy predominance, the judge may order class treatment to particular issues under 23(c)(4).[170]

The Second Circuit and Fifth Circuit have different criteria for satisfying the predominance requirement of 23(b)(3) in 23(c)(4) single issue class actions.[171] The Second Circuit has a more lenient approach in allowing predominance,[172] while the Fifth Circuit is more restrictive in granting certification of 23(b)(3) opt-out class actions.[173] Part II.B.1 dissects the Second Circuit's treatment of predominance in single issue class actions, while Part II.B.2 analyzes the Fifth Circuit's approach toward predominance in 23(c)(4) class actions.[174]

1. The Second Circuit Approach: Sufficient Cohesion to Satisfy Predominance

The Second Circuit predominance standard emerged in 2006 in *In re Nassau County Strip Search Cases*,[175] a civil rights class action alleging constitutional violations on the part of the Nassau County Police Department in New York.[176] Nassau County had a blanket policy of strip searching all newly admitted detainees arrested for committing misdemeanors.[177] The plaintiffs sued under federal civil rights law, federal constitutional law, and New York State constitutional law.[178] After consolidation of three separate class actions, the plaintiffs moved to certify a class of "all persons arrested for or charged with non-felony offenses who have been admitted to the Nassau County Correctional Center and strip searched without particularized reasonable suspicion."[179]

The district court denied certification of the 23(b)(3) class for failure to satisfy predominance.[180] The court reasoned that the individual issues in

168. These class actions are known as "common question" class actions whereby common questions must predominate over individual ones. *See* FED. R. CIV. P. 23(b)(3); *see also* RICHARD L. MARCUS, EDWARD F. SHERMAN & HOWARD M. ERICHSON, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 299–301 (6th ed. 2015).

169. (1) The class members' interests in individually controlling the prosecution or defense of separate actions, (2) the extent and nature of any litigation concerning the controversy already begun by or against class members, (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and (4) the likely difficulties in managing a class action. *See* FED. R. CIV. P. 23(b)(3)(A)–(D).

170. *See id.* 23(c)(4).

171. *Compare Nassau Cty.*, 461 F.3d at 226–27, *with Castano*, 84 F.3d at 741.

172. *See Nassau Cty.*, 461 F.3d at 226–27.

173. C*astano*, 84 F.3d at 741.

174. *See* 2 RUBENSTEIN, *supra* note 40, § 4:91, at 385–86 (noting that only the Second Circuit, Fifth Circuit, and Ninth Circuit have explicitly adopted positions on this issue).

175. 461 F.3d 219 (2d Cir. 2006).

176. *See id.* at 221.

177. *See id.* at 222.

178. *See id.*

179. *Id.*

180. *See id.* at 223.

the case predominated over the common ones.[181] Primarily, there were individual questions of whether subordinate officers had reasonable suspicion to search detainees in some cases, whether there was proximate causation for each injury, and calculations of punitive and compensatory damages.[182] These issues weighed against the common questions of whether the defendants implemented a blanket strip search policy, whether it was unconstitutional, and whether all or some of the defendants were liable.[183]

Applying its unique standard of review, the Second Circuit articulated that the predominance inquiry requires that the proposed class is "sufficiently cohesive to warrant adjudication by representation."[184] Under this predominance test, the court reversed the district court ruling denying class certification.[185]

The Second Circuit acknowledged that variations among class members regarding applicability of defenses do not necessarily prevent eventual class certification.[186] It then surveyed the different stances among the federal appellate courts on this precise question, noting that the Fifth Circuit adopted a strict interpretation of predominance,[187] while the Ninth Circuit allows isolation of common issues for class treatment.[188] The Second Circuit favored the Ninth Circuit approach largely because this interpretation of Rule 23(c)(4) was consistent with the plain language of the Rule as well as the intent of the drafters.[189] Furthermore, predominance analysis condenses to whether a particular issue is "susceptible to generalized, class-wide proof."[190]

In *Nassau County*, a portion of this proof came in the form of a concession by the defendants that they had committed constitutional violations by instituting the strip search policy.[191] In fact, at this point the policy had already been rescinded by Nassau County.[192] Preventing consideration of concession issues in predominance analysis would force each plaintiff to sue individually and prove the defendant's liability,[193] whereas certifying the class would have the binding, preclusive effect on the issue of Nassau County's liability. The court recognized that a significant rationale for the continuance of the class action was to place absent class members on notice of the action.[194]

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181. *See id.*
182. *See id.*
183. *See id.*
184. *Id.* at 224–25.
185. *See id.* (quoting *In re* Vista Check/MasterMoney Antitrust Litig., 280 F.3d 124, 136 (2d Cir. 2001)).
186. *See id.* at 225–26.
187. *See id.* at 226.
188. *See id.*
189. *See id.*
190. *Id.* at 227.
191. *See id.* at 228.
192. *See id.* at 222.
193. *See id.* at 228.
194. *See id.* at 229.

The logic was that many individuals in New York State were unaware that their rights were constitutionally violated and thus would have no recourse to pursue a legal remedy without mandatory notification through class certification.[195] Denying plaintiffs the benefit of aggregate litigation would be counterproductive when, ironically, the issue of liability in this 23(c)(4) class action was uncontested.[196]

2. The Fifth Circuit Approach: The Cause of Action as a Whole Must Satisfy Predominance

The Fifth Circuit's approach is the polar opposite of the Second Circuit's approach. Its standard came from what was one of the largest class actions ever attempted in federal court, *Castano v. American Tobacco Co.*[197] Here, the American tobacco industry was sued by a class of nicotine-dependent Americans who bought cigarettes manufactured by the defendants.[198] The plaintiffs sued under nine causes of action, including fraud, breach of express warranty, breach of implied warranty, negligent misrepresentation, and violation of state consumer statutes.[199] The plaintiffs sought to break this complex class action into four phases.[200] The court certified the class under 23(a) and 23(b)(3), finding that the class met the predominance and superiority requirements under each of the four trial phases.[201]

On interlocutory appeal by the defendants, the Fifth Circuit reversed the district court, holding that two essential questions had not been answered.[202] The first was that the district court failed to account for variations in state law in finding predominance and superiority.[203] The second was that the district court did not address how a trial would be conducted with so many complex issues to be resolved.[204] Both issues militated against a finding that common issues predominated.[205]

On the first question, the court reasoned that there were variances in state law on at least four of the causes of action listed in the complaint, in addition to affirmative defenses and punitive damages.[206] Moreover, the district court merely glossed over the choice-of-law question and did not articulate any kind of methodology it would adopt in deciding the choice of law that would apply for each cause of action.[207] Finally, it did not discuss

195. *See id.*
196. *See id.* at 228.
197. 84 F.3d 734 (5th Cir. 1996).
198. *See id.* Additionally, the class included the estates of nicotine-dependent Americans and the family members of these individuals.
199. *See id.*
200. The four phases were (1) identify issues of core liability, (2) determine compensatory damages, (3) apply compensatory damages to individual members, and (4) apply the punitive damage ratio based on compensatory damages. *See id.* at 738.
201. *See id.* at 738–39.
202. *See id.* at 740.
203. *See id.*
204. *See id.*
205. *See id.* at 740–41.
206. *See id.* at 741–43.
207. *See id.* at 743.

how the class action would remain manageable in the face of potentially fifty applicable legal standards on each state cause of action.[208]

On the second question, the court found the district court's predominance inquiry was inadequate because the court refused to go past the pleadings to make such a determination.[209] The Fifth Circuit held that this was an improper application of Rule 23(b)(3) because the lower court was attempting to advance the case due to its individual merits, while the predominance inquiry is intended to be a strictly legal determination.[210] Furthermore, without an analysis beyond the pleadings, it would be impossible to determine how individual addiction claims and levels of exposure could be treated on a class-wide basis.[211] Lastly, high individual damages awards made individual suits possible, defeating the superiority of the class action.[212]

Therefore, the Fifth Circuit held that individual issues (in this case, choice of law considerations and individual addiction claims) cannot be merged into the other common issues for class-wide treatment.[213] Predominance requires going beyond the pleadings to determine if the substantive law weighs in favor of certifying the class action.[214] As the Fifth Circuit believes, severing issues under Rule 23(c)(4) would not help the class meet certification because the cause of action as a whole must satisfy the requirements.[215]

C. Certifying Defendant Class Actions Under Rule 23(b)(2)

Defendant class actions, whereby a class represented by a plaintiff sues a class represented by a defendant, are considered a rarity in federal court, in large part because the class certification requirements are the same as ordinary plaintiff class actions.[216] However, they are important devices to enforce substantive legal rights, particularly in civil rights cases when numerous government officials are being sued and therefore deserve scrutiny in the certification context.[217] Defendants scarcely will choose to serve as the class representative, forcing the plaintiff to choose one instead.[218] The result is that courts may be less willing to determine that

208. *See id.* The applicable state law varied on fraud, products liability, negligent infliction of emotional distress, and punitive damages, among other substantive legal considerations. *See id.* at 742 n.15.

209. *See id.* at 744.

210. *See id.* at 745.

211. *See id.* at 744–45.

212. *See id.* at 748.

213. *See id.* at 740–41.

214. *See id.* at 744.

215. *See id.* at 745 n.21.

216. According to one study, there were 688 plaintiff class action settlements in federal court in 2006–2007 and only three defendant class actions. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 817–18 (2010).

217. *See* Francis X. Shen, *The Overlooked Utility of the Defendant Class Action*, 88 DENV. U. L. REV. 73, 74 (2010) (arguing that defendant class actions further social welfare).

218. *See* MARCUS, SHERMAN & ERICHSON, *supra* note 168, at 361.

the class satisfies adequacy because defendants only reluctantly serve as class representatives.[219]

One particular controversy in defendant class actions is whether these types of lawsuits can be certified under Rule 23(b)(2).[220] While 23(b)(1) class actions are generally accepted[221] and 23(b)(3) class actions are possible, though unfeasible, there is no clear consensus on actions based on declaratory or injunctive relief (23(b)(2) class actions).[222] The Second Circuit has taken the view that 23(b)(2) defendant class actions can pass certification while the majority of circuits have interpreted the Rule as only applying to plaintiff class actions.[223] Part II.C.1 scrutinizes the Second Circuit's functional approach, which allows defendant classes in 23(b)(2) class actions. Part II.C.2 then examines the literal approach, which declines to certify defendant class actions.

1. The Second Circuit's Functional Approach: Permitting Defendant Classes in 23(b)(2) Class Actions

The Second Circuit first ruled on this issue in *Marcera v. Chinlund*,[224] a case against forty-two county sheriffs in New York State.[225] The chief allegation was that these sheriffs (and by extension, the counties) had violated the constitutional rights of detainees who were required to remain in police custody until trial.[226] These detainees sued on the theory that they were denied the opportunity to see their families before trial.[227]

Two plaintiffs who were inmates at the Monroe County jail served as the class representatives for the plaintiffs.[228] Sheriff William Lombard of Monroe County likewise served as class representative for the defendants, consisting of the forty-two sheriffs across New York State who had instituted this policy of detainment.[229] However, the district court ruled

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219. *See id.*

220. *Compare* Brown v. Kelly, 609 F.3d 467, 478 (2d Cir. 2010) (holding that defendant classes may be certified under 23(b)(2)), *with* Tilley v. TJX Cos., 345 F.3d 34, 39–40 (1st Cir. 2003) (holding that defendant classes cannot be certified under 23(b)(2)), *and* Henson v. East Lincoln Township, 814 F.2d 410, 417 (7th Cir. 1987) (declining to certify a 23(b)(2) defendant class). These differences are a byproduct of the interpretation of Rule 23(b)(2), which allows certification when "the party *opposing* the class has acted or refused to act on grounds that apply generally to the class." *See* FED R. CIV. P. 23 (b)(2) (emphasis added); *see also* 2 RUBENSTEIN, *supra* note 40, § 5:22, at 464 (noting that the language of the Rule is "deceptively complicated"). The Second Circuit has adopted a "functional" interpretation of 23(b)(2) while other circuits read the Rule "literally." *See id.* § 5:22, at 465–67.

221. *See, e.g.*, *Henson*, 814 F.2d at 412 (ruling that defendant classes "plainly are permitted under Rule [23](b)(1)"); Wyandotte Nation v. City of Kansas City, 214 F.R.D. 656, 664 (D. Kan. 2003) (certifying a defendant class under 23(b)(1)(B)).

222. *See* MARCUS, SHERMAN & ERICHSON, *supra* note 168, at 361–62.

223. *See supra* note 220 and accompanying text.

224. 595 F.2d 1231 (2d Cir.), *vacated on other grounds*, 442 U.S. 915 (1979).

225. *See id.* at 1235.

226. *See id.* at 1237.

227. *See id.* at 1235.

228. *See id.*

229. *See id.*

that the defendant class failed certification.[230] It held that Rule 23(a)(3) typicality and 23(a)(4) adequacy of representation were not satisfied because the defenses asserted by Sheriff Lombard were not typical of the defenses asserted by the other sheriffs.[231] Lombard claimed that contact visits posed a security risk to the Monroe County jail because they would create potential violence among inmates and incentivize smuggling of contraband into the jail.[232] Although the other jails would be making similar claims, Lombard reasoned that his modern, 325-inmate facility was substantially different from other ones in the state, such as the jail in rural Wyoming County.[233]

The Second Circuit disagreed with this logic, holding that the class satisfied typicality and adequacy.[234] The Second Circuit found that Lombard had made strong defenses of his position, making him an adequate representative of the other sheriffs across the state.[235] Moreover, his defense was typical of the defenses other sheriffs were making because the rationales prohibiting contact visits were generally limited to security, inmate violence, and contraband.[236] Additionally, while the class representative himself opposed certification, the court ruled that the representative need not be willing, only adequate under Rule 23(a)(4).[237] The Second Circuit ultimately held that defendant class actions may be permitted under Rule 23(b)(2) despite the defendant's unwillingness to serve as class representative.[238]

Though the Second Circuit was not bound by this vacated judgment, it chose to follow its prior reasoning almost thirty years later in *Brown v. Kelly*.[239] In *Kelly*, the court dealt with a class of plaintiffs suing the state for enforcement of a penal law deemed unconstitutional.[240] The plaintiff class included all persons arrested, summonsed, or prosecuted under the law, and the defendant class consisted of all New York State law enforcement officials with the powers to enforce the statute.[241]

The district court certified both the plaintiff and defendant classes, finding that the certification requirements of Rule 23(a) and 23(b)(2) were met.[242] However, the Second Circuit reversed on appeal, finding that both classes failed typicality and adequacy.[243] The court reasoned that the

230. *See id.* at 1239.
231. *See id.* at 1238–39.
232. *See id.* at 1238.
233. *See id.* at 1239.
234. *See id.* at 1238–39.
235. *See id.* at 1238.
236. *See id.* at 1238–39.
237. *See id.* at 1239.
238. *See id.* ("[C]ourts must not readily accede to the wishes of named defendants in this area, for to permit them to abdicate so easily would utterly vitiate the effectiveness of the defendant class action as an instrument for correcting widespread illegality.").
239. 609 F.3d 467 (2d Cir. 2010).
240. *See id.* at 470.
241. *See id.*
242. *See id.* at 474–75.
243. *See id.* at 482.

defendant class representatives might be liable for compensatory and punitive damages in addition to injunctive relief, whereas the class members themselves were only subject to injunctive relief.[244] Moreover, there was a lack of statewide practice of enforcing the unconstitutional law, defeating typicality because all state law enforcement officers were being sued.[245]

Despite denying certification, the importance of this holding was that the court continued the rule set out in *Marcera*: district courts may certify defendant class actions under Rule 23(b)(2).[246] However, it listed two limitations.[247] The first is that the class must be bilateral, which requires that there are both plaintiff and defendant classes.[248] The second is that the defendant class must consist of public officials and not private actors.[249] Ultimately, this approach assists plaintiffs in largescale civil rights class actions in their ability to sue state officials for unconstitutional policies.[250]

2. The Literal Approach: No Defendant Class Actions Under Rule 23(b)(2)

In *Tilley v. TJX Cos.*,[251] the First Circuit outlined the literal approach.[252] Here, a graphic designer sued the Dennis East Company and TJX for copying her design and selling it to more than 550 retailers across the country.[253] The plaintiff moved to certify a defendant class consisting of all retailers who used her copyrighted design, alleging equitable and injunctive relief under 23(b)(1) and 23(b)(2).[254] The district court certified the defendant class with TJX as the class representative, prompting an interlocutory appeal from the defendants.[255]

The First Circuit ruled that Rule 23(b)(2) does not apply to defendant classes, reasoning that the drafters of the Rule did not contemplate such circumstances.[256] The court relied heavily on the text of the Rule, which provides that class certification is possible when "the party opposing the class has acted or refused to act on grounds generally applicable to the

244. *See id.* at 479–80.
245. In fact, the only non-New York City counties enforcing the law were Rockland, Erie, Suffolk, and Nassau. *See id.* at 473.
246. *See id.* at 479.
247. *See id.*
248. *See id.*
249. *See id.* at 478 n.9.
250. *See* Marcera v. Chinlund, 595 F.2d 1231, 1240 (2d Cir.), *vacated on other grounds*, 442 U.S. 915 (1979).
251. 345 F.3d 34 (1st Cir. 2003).
252. *Id.* 39–40. It should be noted that this approach follows a Seventh Circuit decision from sixteen years earlier. *See* Henson v. East Lincoln Township, 814 F.2d 410, 414 (7th Cir. 1987).
253. *See Tilley*, 345 F.3d at 35–36. The Fourth Circuit also agrees with the literal view. *See* Paxman v. Campbell, 612 F.2d 848, 854 (4th Cir. 1980).
254. *See Tilley*, 345 F.3d at 36.
255. *See id.*
256. *See id.* at 39–40.

class."[257] The court emphasized that the Rule only applies to the "party opposing the class," not members of the class itself.[258]

The court added that the drafters made no references to defendant classes and only used plaintiff classes as examples to illustrate the application of the Rule.[259] Additionally, this case was distinguishable from *Marcera* because the class opposing injunctive relief in that case was a group of local public officials, not actors in the private sector.[260] Thus, the court held that a defendant class could not be certified under Rule 23(b)(2).[261]

The dichotomy with defendant class actions is important because the Second Circuit provides a mechanism for plaintiffs that is not readily apparent in the text of Rule 23(b)(2).[262] While the Second Circuit's approach is limited to litigation against public officials, it allows plaintiffs to use aggregate litigation as a device to hold the state accountable for civil rights violations.[263] Allowing such suits against defendant classes in injunctive relief cases promotes enforcement of legislative and constitutional norms by "get[ting] to the heart" of institutional reforms.[264]

After detailing how the Second Circuit has crafted its standards of appellate review, predominance, and certification of defendant classes, it is critical to show how the Second Circuit's standards are amenable to class certification. The comparative analysis from this section is dissected in the next section to determine how favorable the Second Circuit's standards are and whether they incentivize forum shopping.

III. DOES THE SECOND CIRCUIT'S APPROACH INCENTIVIZE FORUM SHOPPING?

This part uses the analysis from the previous section and evaluates the notion that the Second Circuit's standards are favorable to class certification, thereby incentivizing filing class actions in district courts within the Second Circuit. Part III.A explains the favorability toward class certification of the Second Circuit's standards of appellate review, predominance requirements in 23(c)(4) class actions, and approach to 23(b)(2) defendant class actions. Part III.B then answers the fundamental question of whether these standards might motivate attorneys seeking class certification to file in the Second Circuit.

257. *Id.* at 39.
258. *Id.*
259. *See id.* at 40.
260. *See id.*
261. *See id.*
262. *See* Brown v. Kelly, 609 F.3d 467, 478 (2d Cir. 2010).
263. *See id.*
264. Scott Douglas Miller, Note, *Certification of Defendant Classes Under Rule 23(b)(2)*, 84 COLUM. L. REV. 1371, 1378 (1984).

A. Are the Second Circuit's Legal Standards Favorable to Class Certification?

This section is divided into three subsections, each addressing whether the Second Circuit's standards are favorable toward class certification. Part III.A.1 concludes that the Second Circuit's standard of appellate review is favorable to class certification. Part III.A.2 surmises that the Second Circuit's approach toward Rule 23(b)(3) predominance in Rule 23(c)(4) class actions is partial toward certification. Finally, Part III.A.3 determines that the Second Circuit approval of Rule 23(b)(2) defendant class actions is preferential toward class certification.

1. Standard of Appellate Review

The cases applying the modern Second Circuit standard discussed in Part II.A.1 indicate that the Second Circuit's standard of appellate review favors class certification. The standard articulated explicitly states that appellate courts should be more deferential toward grants of class certification than denials.[265] While there arguably is a debate as to why and how the Second Circuit arrived at this standard of appellate review,[266] its language and application are unequivocally advantageous toward certification of class actions and skeptical of denials.[267]

In fact, the Second Circuit reversed district court denials of class certification in a broad spectrum of cases.[268] There is no common pattern in these cases other than the Second Circuit finding that the trial court's decision to deny certification was erroneous.[269] In contrast, the ordinary abuse of discretion standard shows no favoritism toward certification or denial.[270] It demonstrates a commitment toward affirming the trial court ruling, regardless of whether it granted or denied certification.[271] The abuse of discretion standard is decidedly neutral on the issue of certification and is not heavily biased in favor of certification like the Second Circuit's standard.[272] The evidence of this assertion is that the abuse of discretion standard provides significant deference toward the trial court, as each case

265. *See* Parker v. Time Warner Entm't Co., 331 F.3d 13, 18 (2d Cir. 2003).

266. One commentator has gone so far as to suggest that the standard adopted by the Second Circuit exists only because of a clerical error that occurred between the *Abrams* and *Robidoux* decisions. *See* Knobler, *supra* note 66, at 4 (noting that the court in *Abrams* made no distinctions between denials and grants of class certification, yet this distinction appeared in *Robidoux*).

267. *See* Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp., 993 F.2d 11, 14 (2d Cir. 1993).

268. The Second Circuit has reversed class certification denials in social welfare, consumer protection, and labor cases. *See supra* Part II.A.1.

269. *See supra* Part II.A.1.

270. *See* Rodriguez v. Nat'l City Bank, 726 F.3d 372, 377 (3d Cir. 2013); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 295 (1st Cir. 2000); *see also supra* note 62 and accompanying text.

271. *See In re* Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 31 (1st Cir. 2011).

272. *See supra* Part II.A.2.

analyzed in this Note shows.[273] Considering that this is the view followed by eight of the eleven circuits, the Second Circuit's approach toward the standard of appellate review of class certification is more favorable toward class certification than the majority of circuits.[274]

The Seventh Circuit view appears to be even *less* favorable toward class certification than the courts applying the abuse of discretion standard.[275] If the Second Circuit is on the opposite end of the spectrum as a "certification friendly" forum, and the majority of the circuits are "certification neutral," the Seventh Circuit is "certification hostile."[276] While the Seventh Circuit's "not abject" language was not as explicit as the Second Circuit's language in indicating its view on certification, the case where the standard was articulated sheds light on how it may apply in practice.[277] In *CE Design*, the Seventh Circuit vacated the district court's decision to grant certification and remanded the case back to the district court.[278] This is a result that would be highly unlikely under both the Second Circuit's and majority's approaches because each of those standards of appellate review provide significant deference to the trial court's decision on class certification.[279] The Seventh Circuit's approach, at least in the way it was applied in the first instance in *CE Design*, does not give the same amount of deference on grants of class certification as the Second Circuit's or majority's standards.[280]

The Second Circuit's standard of appellate review of decisions to grant or deny class certification is an obvious example of the court adopting an approach favorable to class certification. However, in contrast to the Seventh Circuit's "deferential but not abject" standard and the majority's abuse of discretion standard, the Second Circuit's candid preference for certification becomes even clearer. Considering the Second Circuit (along with the Ninth Circuit) adopted a position that is more supportive of class certification than the rest of the federal appellate courts, the Second Circuit's law on this issue clearly favors class certification.[281]

2. Satisfying Rule 23(b)(3) Predominance in a Rule 23(c)(4) Class Action

The difference in jurisprudence between the Second and Fifth Circuits on this particular issue presents a fairly clear dividing line.[282] The Second

273. *See* discussion *supra* Part II.A.2; *see also Waste Mgmt. Holdings*, 208 F.3d at 291–92 (illustrating the amount of deference abuse of discretion provides to the lower court on class certification decisions).
274. *See supra* note 62 and accompanying text.
275. *See supra* Part II.A.3.
276. *See supra* Part II.A.3.
277. *See* CE Design Ltd. v. King Architectural Metals, Inc., 637 F.3d 721, 723 (7th Cir. 2011).
278. *See id.* at 728.
279. *See supra* Part II.A.1–2.
280. *See CE Design*, 637 F.3d at 723.
281. *See supra* Part II.
282. *See supra* Part III.A.2.

Circuit requires predominance only on the individual question, whereas the Fifth Circuit requires predominance on the cause of action generally.[283] According to a prominent treatise on class actions, this narrow issue does not appear to have a minority and majority view because most circuits have not adopted a concrete position.[284] Therefore, in determining whether the Second Circuit's approach favors class certification, the only point of comparison (other than the Ninth Circuit) is the Fifth Circuit's view.[285]

The Second Circuit's approach gives significant leeway in meeting the predominance requirement of Rule 23(b)(3), and plaintiffs' attorneys should be able to move past class certification if they can show predominance on individual questions.[286] In *Nassau County*, there were still individual questions regarding reasonable suspicion, damages calculations, and proximate causation.[287] However, the common question regarding unconstitutional blanket policy predominated over these individual questions.[288] Therefore, for an attorney filing in this forum, satisfaction of predominance in a Rule 23(c)(4) class action is relatively simple. If there is a single, overarching question that connects the individual ones, like the question of the strip search policy in *Nassau County*, predominance *should* be met, and the action will move past the certification stage.[289]

The Fifth Circuit effectively requires plaintiffs to specify the mechanisms of class treatment on each particular issue.[290] This is a heavier burden for attorneys because it requires them to show predominance on each question that is presented.[291] Essentially, the Fifth Circuit will decline to certify a Rule 23(b)(3) class if there is an important issue in the trial that will ultimately require individual determinations.[292] For example, in the *Castano* case, there were overarching questions of whether cigarettes caused various illnesses and whether the tobacco industry failed to warn consumers of the danger of cigarette smoking.[293] Under the Second Circuit rule, this likely would be enough to satisfy predominance.[294] Instead, the Fifth Circuit found that the variances in law, exposure, and causation predominated over these larger issues enough to not satisfy the predominance requirement in a 23(c)(4) class.[295]

The conclusion that can be drawn from these two cases is that the Second Circuit's approach makes class certification substantially easier, while the Fifth Circuit's stricter position makes it difficult to satisfy in complex class

283. *See supra* Part III.A.2.
284. *See supra* note 174.
285. *See* 2 RUBENSTEIN, *supra* note 40, § 4:91, at 385–86.
286. *See In re* Nassau Cty. Strip Search Cases, 461 F.3d 219, 223 (2d Cir. 2006).
287. *See id.*
288. *See id.* at 227.
289. *See id.*
290. *See supra* Part II.B.2.
291. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996).
292. *See id.* at 740–41.
293. *See id.* at 737.
294. *See Nassau Cty.*, 461 F.3d at 223.
295. *See Castano*, 84 F.3d at 744.

actions.[296] In fact, when considering which rule to adopt, the Second Circuit expressly rejected the Fifth Circuit's view in favor of the Ninth Circuit's standard.[297] The Second Circuit chose a view that is more lenient in granting class certification when compared to the Fifth Circuit's approach.[298] Therefore, when contrasted with the Fifth Circuit's rule, the Second Circuit's approach favors class certification on this issue.

3. Certifying Rule 23(b)(2) Defendant Class Actions

The Second Circuit is unique in permitting plaintiffs to sue a class of defendants under Rule 23(b)(2).[299] The other circuits strictly prohibit this particular type of class action.[300] The Second Circuit actually allows certification on this issue, whereas other circuits deny the existence of the Rule 23(b)(2) defendant class action altogether.[301] While the Second Circuit does have limitations to this type of class action, it is abundantly clear that permitting the certification of a particular type of class action, as opposed to prohibiting it, is advantageous toward class certification. Therefore, the Second Circuit approach on Rule 23(b)(2) defendant class actions favors class certification.

B. The Second Circuit Encourages Class Action Forum Shopping

Although it is clear that the Second Circuit is more favorable toward class certification than other circuits, the question remains as to whether this incentivizes attorneys to file in the Second Circuit as opposed to other circuits.[302]

The illustration provided in the introduction of this Note provides an example of why favorable certification standards similar to the ones adopted by the Second Circuit would encourage forum shopping.[303] As previously discussed, CAFA has changed the landscape by expanding federal jurisdiction over class actions.[304] Many nationwide class actions will be unable to satisfy any of the jurisdictional exceptions to diversity

296. *See* 2 RUBENSTEIN, *supra* note 40, § 4:91, at 381 n.5.

297. *See Nassau Cty.*, 461 F.3d at 226.

298. *See id.*

299. *See* Marcera v. Chinlund, 595 F.2d 1231, 1238 (2d Cir.), *vacated on other grounds*, 442 U.S. 915 (1979).

300. *See* Tilley v. TJX Cos., 345 F.3d 34, 39–40 (1st Cir. 2003); Henson v. East Lincoln Township, 814 F.2d 410, 414 (7th Cir. 1987); *see also supra* Part II.C.2.

301. *Compare Marcera*, 595 F.2d at 1235, *with Tilley*, 345 F.3d at 39–40, *and Henson*, 814 F.2d at 414; *see also supra* Part II.C.

302. It is important to emphasize the particular nuance of the argument asserted in this Note. This Note does not argue that, as an empirical matter, attorneys are actually filing more frequently in the Second Circuit because of its class certification standards on the three issues discussed here. Rather, it argues that attorneys seeking class certification in federal court, all other things being equal, will file their suits in the Second Circuit, particularly if they seek certification for a Rule 23(b)(3) class on a single issue or a Rule 23(b)(2) defendant class.

303. *See supra* Introduction.

304. *See supra* Part I.A.

unless the parties and the events are deeply rooted in the forum state.[305] The plaintiffs' attorney may decide to file in state court anyway, in hope of the (unlikely) event that the case is remanded to state court after being removed to federal court, because the state law is more favorable to certification than federal law.[306] However, other attorneys might decide to expedite the process, and avoid the delay of two months or more, by filing their class action in federal court.[307] Moreover, they would prefer this option if they wish to exercise some discretion over the choice of forum, which they lose if the defendants remove the case.[308]

The attorneys who choose this option must prioritize the considerations that matter when choosing which federal forum best suits their class action.[309] Class certification is not the only consideration or even the primary consideration for all attorneys.[310] Some may consider the proximity of the forum to their class or the favorability of the discovery rules.[311] However, for an attorney filing a Rule 23(b)(3) single issue class action under Rule 23(c)(4), or a Rule 23(b)(2) defendant class action, differences in class certification standards between the circuits will animate their decision because these class actions are unique and relatively uncommon.[312] The procedural standards are less developed on these issues, and there are few forums that have lenient standards for these types of classes.[313] Indeed, the choice might be between one forum that allows certification and one that does not.[314] The choice of forum, in these cases, is quite predictable. Plaintiffs' attorneys seeking certification of these classes have little choice but to file the lawsuit in the Second Circuit.

In fact, some plaintiffs' attorneys prioritize the applicable class certification law in filing decisions.[315] Generally, it appears that state law on certification is more lenient than federal law.[316] However, state court is not an option in many class actions post-CAFA due to the difficulties in satisfying one of the jurisdictional exceptions.[317] If these attorneys place high value on lenient certification standards, they will choose the forum that has procedural requirements meeting this criterion, all other things being equal.[318]

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305. *See* 28 U.S.C. § 1332(d) (2012).
306. *See supra* note 44 and accompanying text.
307. *See supra* note 43 and accompanying text.
308. *See supra* note 47 and accompanying text.
309. *See supra* note 49 and accompanying text.
310. *See supra* note 49 and accompanying text.
311. *See supra* Part II.A.2–3.
312. *See supra* Part II.A.2–3.
313. *See supra* Part II.A.2–3.
314. *See supra* Part II.A.3.
315. *See supra* note 49 and accompanying text.
316. *See supra* note 59 and accompanying text.
317. *See supra* Part I.A.
318. *See supra* note 59 and accompanying text. The favorability of the Second Circuit's class certification procedures does not only incentivize plaintiffs' attorneys to file in this forum, but can likewise incentivize *defendants* in limited circumstances as well. *See supra* note 55 and accompanying text. The study referenced in Part I.B indicates that a significant percentage of defendants removing a class action to federal court favor strict class

The Second Circuit's standard of appellate review would be a consideration for plaintiffs' attorneys seeking class certification as well, even if they were filing ordinary Rule 23(b)(3) or Rule 23(b)(2) class actions.[319] The Second Circuit, when compared to every jurisdiction other than the Ninth Circuit seems like a safe option if the district court denies class certification.[320] A plaintiffs' attorney that is unsure whether the class will be certified could reasonably conclude that he has a better chance of certification on appeal in the Second Circuit due to the relatively minimal deference given to denials of class certification.[321] Therefore, it is logical, if all other considerations in the case are equal, that the plaintiffs' attorney will file the class action in the Second Circuit.[322]

The purpose of this Note is not to take aim at CAFA for creating horizontal forum shopping in the federal system nor to criticize the Second Circuit for adopting positions that encourage a type of forum shopping. Instead, this Note highlights that attorneys *can* utilize the Second Circuit's standards when seeking class certification in pivotal class action lawsuits.[323] The case law surveyed in this Note illuminates the kinds of cases that are impacted by these standards.[324]

The importance of these outcomes cannot be minimized. The Second Circuit positions on class certification have allowed the prosecution of substantive legal rights in major class actions, ranging from unconstitutional infringement of civil liberties to harms caused by labor violations.[325] Imagine if *Castano* was decided in the Second Circuit. That case was one of the largest class action lawsuits in American history.[326] Millions of consumers had allegedly suffered injuries from cigarette use.[327] At the same time, an entire industry faced significant liability.[328] Affirming the decision to grant class certification by the trial court would have drastically changed the outcome of that case, potentially striking a stunning victory for consumers rather than the tobacco industry.[329] Viewed in a vacuum, Rule 23(b)(3) single issue class actions and Rule 23(b)(2) defendant class actions seem like technical, insignificant rules in the

certification requirements. *See supra* Part I.B. But this study did not appear to calculate the number of defendants seeking certification of a settlement in order to reduce the costs of litigation and the amount owed to the plaintiffs. *See supra* note 49 and accompanying text. In such a settlement class action, especially if it were a Rule 23(b)(3) single issue class, defense attorneys would prefer the Second Circuit's lenient standards on certification. *See supra* note 49 and accompanying text. Though this Note is largely geared toward addressing the forum selection considerations a plaintiff might have, it is important to note that sometimes defendants are also seeking certification for a settlement.

319. *See supra* Part II.A.1.
320. *See supra* Part II.A.
321. *See supra* Part III.A.1.
322. *See supra* Part II.A.1.
323. *See supra* Part II.
324. *See supra* Part II.
325. *See supra* Part II.
326. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996).
327. *See id.* at 737.
328. *See id.* at 752.
329. *See generally id.*

broader class action context. Yet the way different forums construct these "technical rules" has a profound impact on the substantive rights of Americans in class actions.[330]

The Second Circuit's approach toward class certification merits observation in the coming years. The potential forum shopping described in this Note is limited to any areas where the Second Circuit currently has favorable class certification standards. If the Second Circuit continues to craft additional procedures favorable to class certification, perhaps it might be time to revisit those standards and consider whether this is a sensible approach. In the interim, however, the Second Circuit should be noted among lawyers as a forum that has adopted certification-friendly procedures on narrow issues that have a substantial influence on the outcome of critical class action lawsuits.

CONCLUSION

The Second Circuit's class certification jurisprudence, when compared to that of the other circuits, is distinctly favorable toward certification. The consequence is that attorneys seeking certification in a federal forum are incentivized to file their class actions in the Second Circuit due to its certification-friendly measures. It is unclear whether the Second Circuit will construct additional procedures amenable to class certification. However, it is clear that the Second Circuit's current approach has enabled plaintiffs to pursue their substantive legal rights in large-scale class action litigation by allowing their cases to proceed past the certification stage.

330. *See supra* Part II.