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Lucas Hamilton

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# NOTES

## THE BREAKING OF A WAVE: *JACOBSEN v. ALLSTATE INS. CO.* AND CLASS CERTIFICATION

Lucas Hamilton\*

*The breaking of a wave cannot explain the whole sea. . . .*<sup>1</sup>

### I. INTRODUCTION

Class actions are the tidal waves of litigation: rare, massive, and sweeping. Conversely, lawsuits between individual parties are common, discrete, and narrowly tailored to the facts of the represented parties' dispute. When challenging well-financed, institutional opposition, individual suits are unlikely to create broad change beyond the parties involved. Under the right circumstances, class actions allow individuals to coalesce and challenge massive opponents like corporations, the government, or even endemic social problems.<sup>2</sup> The actions are often costly, bitter court battles with vast sums or broad social questions at stake. But like a shoaling tidal wave that grows taller just before landfall, class actions can be indiscriminate, which may pull in unwitting class members and carry them to a final judgment that is against their best interests. To preemptively break the surge of an errant class action wave, Montana Rule of Civil Procedure 23

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\* Lucas Hamilton, Candidate for J.D. 2016, the University of Montana School of Law. The author would like to thank Professor Hillary Wandler and the editors of the *Montana Law Review* for their advice and guidance. He would also like to thank Cecelia for her support and encouragement.

1. Vladimir Nabokov, *The Real Life of Sebastian Knight* 105 (New Directions 1959) (originally published 1941) ("The breaking of a wave cannot explain the whole sea, from its moon to its serpent; but a pool in the cup of a rock and the diamond-rippled road to Cathay are both water.").

2. For example, civil rights cases of the 1950s and 60s challenged both discrimination and the government institutions in which it grew. See Fed. R. Civ. P. 23 advisory comm. nn. (1966 amend. to subdiv. (b)(2)) (listing several civil rights cases against public education institutions).

and its federal counterpart establish a breakwater—the procedural floor of class certification.<sup>3</sup> Courts presented with class action claims must test the class for compliance with Rule 23, which serves as a due process barrier to not only the class opponent, but to putative class members’ individual rights and interests.

This note analyzes *Jacobsen v. Allstate Insurance Co. (Jacobsen II)*,<sup>4</sup> a case in which the Montana Supreme Court reviewed and ultimately approved certification of a class that challenged Allstate’s allegedly unfair procedures purportedly intended to hasten, cheapen, and settle claims.<sup>5</sup> Unfortunately, the majority’s interpretation of Rule 23 left limited due process protection for both the defendant and absent class members.<sup>6</sup> With an opinion that was both perplexingly cautious and perilously detached, the Court neither adopted nor rejected U.S. Supreme Court class action precedent from the *Wal-Mart v. Dukes*<sup>7</sup> decision, and ran roughshod over long-standing due process protections. By restructuring the class, the Court threatens the viability of future classes following in *Jacobsen II*’s mold. The analogical wave of the *Jacobsen II* class rolled on to remand, effectively undermining the policies of Rule 23 and the plaintiff class’s and the defendant company’s respective goals.

Section II of this note looks at the history of class action litigation and the public policy goals that buttress the modern Rule 23. Section III recites the factual and procedural background of *Jacobsen II* and Allstate’s procedures that led to the lawsuit. Section IV analyzes the majority opinion and the arguments of the two dissents. Section V critiques the majority’s position and offers a policy-driven solution to clear the confusion surrounding Rule 23. Finally, Section VI concludes with predictions for the future of class action litigation in Montana after *Jacobsen II*.

## II. THE HISTORY OF RULE 23

Courts have delicately described the class action as a “departure” from a central rule of litigation.<sup>8</sup> Normally, lawsuits are conducted by and on behalf of the named parties.<sup>9</sup> The premise of class actions, that parties can be bound to the judgment of a court in which they never appeared, opposes

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3. Mont. R. Civ. P. 23; Fed. R. Civ. P. 23.

4. 310 P.3d 452 (Mont. 2013), *cert. denied*, 134 S. Ct. 2135 (2014).

5. *Id.* at 479.

6. *Id.* at 495 (McKinnon, J., dissenting).

7. 131 S. Ct. 2541 (2011).

8. *See e.g. Id.* at 2550; *Jacobsen II*, 310 P.3d at 459.

9. Robert H. King, Jr., *Four Lessons from Wal-Mart v. Dukes and their Application to Montana Class Action Law*, 73 Mont. L. Rev. 255, 255 (2012).

long-standing norms.<sup>10</sup> Yet class actions have a long history of their own, which traces back to English Chancery courts where they served as a remedy when joinder of all parties was impracticable.<sup>11</sup> In this way, judicial efficiency has always been a core policy of class action litigation.<sup>12</sup>

In its earliest incarnation in the United States, the class action only applied to equity claims and could not be used to recover monetary damages.<sup>13</sup> The advent of the Federal Rules of Civil Procedure in 1938 removed the distinction between equity and legal claims and made class actions generally available as a civil claim.<sup>14</sup> The new procedural rules also ushered in a wave of class action litigation.<sup>15</sup> Some viewed this wave of class litigation as a boon for justice,<sup>16</sup> and others an opportunity for “blackmail settlements.”<sup>17</sup> To protect the due process rights of individuals who could be swept up in the expanded scope of class litigation, both the Montana and Federal Rules of Civil Procedure establish nearly identical class action certification requirements in Rule 23.<sup>18</sup> First, the prerequisites of Rule 23(a) ensure that a class be large but sufficiently cohesive to justify class treatment.<sup>19</sup> Next, the class action must fit into one of the Rule 23(b) categories.<sup>20</sup> If the class clears both hurdles, the court can certify the class for trial.<sup>21</sup>

#### A. Rule 23(a) Prerequisites

Rule 23(a) requires that:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

10. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985) (citing *Pennoyer v. Neff*, 95 U.S. 714 (1878) (observing the traditional rule that one must be “made fully a party” for judgment to be binding)).

11. King, *supra* n. 9, at 258.

12. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 414 (5th Cir. 1998) (noting “the chief purpose behind the class action device is to achieve a significant measure of judicial economy”).

13. King, *supra* n. 9, at 258.

14. *Id.*

15. *Id.*

16. William Simon, *Class Actions-Useful Tool or Engine of Destruction*, 55 F.R.D. 375 (1973).

17. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (Columbia Univ. Press 1973)). Congress also acknowledged the benefits and abuses of class actions when it passed the Class Action Fairness Act of 2005. Pub. L. No. 109-2, § 2, 119 Stat. 4, 5 (2005).

18. King, *supra* n. 9, at 255.

19. Fed. R. Civ. P. 23 advisory comm. nn. (1966 amend. to subdiv. (a)).

20. *Id.*

21. Fed. R. Civ. P. 23 advisory comm. nn. (1966 amend. to subdiv. (c)(1)).

- (4) the representative parties will fairly and adequately protect the interests of the class.<sup>22</sup>

The current language of Rule 23(a) traces back to the largely uncontroversial 1966 amendments to the federal rules.<sup>23</sup> Those amendments, which updated language of the prerequisites and redefined the class action categories, led to an explosion of class action litigation.<sup>24</sup> For a time, courts liberally interpreted Rule 23 to certify “tentative” classes that could never be litigated<sup>25</sup> with the hope of producing settlements.<sup>26</sup> Consequently, the U.S. Supreme Court’s *Wal-Mart* decision can be viewed as an attempt to tighten Rule 23 and limit actions pursued by loosely-related classes.<sup>27</sup> In *Wal-Mart*, the Court examined the meaning of the commonality requirement, and held class members must depend upon a “common contention” resolvable in the class action to fulfill Federal Rule 23(a)(2).<sup>28</sup>

The underlying facts of the *Wal-Mart* class action involved allegations of systemic gender discrimination in Wal-Mart stores across the country.<sup>29</sup> The class representatives claimed Wal-Mart favored men for promotions and higher pay.<sup>30</sup> The district court certified a class comprised of 1.5 million women who were past and current employees of the retail giant.<sup>31</sup> The Ninth Circuit affirmed certification, focusing on the plaintiffs’ evidence suggesting a “single set of corporate policies.”<sup>32</sup> The U.S. Supreme Court, however, found Wal-Mart’s policies allowed individual store managers to

22. Mont. R. Civ. P. 23(a).

23. King, *supra* n. 9, at 258 (citing Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 387 (1967)).

24. *Id.* at 255.

25. *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 177 (5th Cir. 1979) (concluding “Rule 23 does not deal specifically with a tentative settlement class. However, a tentative class would appear to be a form of conditional certification, sanctioned by Rule 23(c)(1).” (internal quotation marks omitted)); *Weinberger v. Kendrick*, 698 F.2d 61, 72 (2d Cir. 1982); *In re A.H. Robins Co.*, 880 F.2d 709, 738–740 (4th Cir. 1989).

26. The so-called “settlement classes” were commonly certified with the goal of encouraging settlements. *Pallister v. Blue Cross & Blue Shield of Mont., Inc.*, 285 P.3d 562, 567 (Mont. 2012) (“A settlement class action is designed to avoid litigation altogether.”). The U.S. Supreme Court curtailed the use of settlement classes by emphasizing the importance of Federal Rule of Civil Procedure 23(a) and (b) in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). Today, courts exercise higher scrutiny when reviewing settlement classes. *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 279 (7th Cir. 2002) (concluding that judges must “exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions.”).

27. *Sangwin v. State*, 315 P.3d 279, 284–285 (Mont. 2013) (noting *Wal-Mart* is a more “stringent” standard); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. Rev. 441, 445 (2013) (describing *Wal-Mart* as a heightened standard).

28. 131 S. Ct. at 2550–2551; King, *supra* n. 9, at 281.

29. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 577 (9th Cir. 2010), *rev’d*, 131 S. Ct. 2541 (2011).

30. *Id.* at 577–578.

31. *Wal-Mart*, 131 S. Ct. at 2547.

32. *Dukes*, 603 F.3d at 612.

use discretion in promoting and setting pay.<sup>33</sup> Because store managers did not use a “common mode of exercising discretion,” the class members were not united by a common contention resolvable in a class action.<sup>34</sup> Thus, the putative class failed to meet the commonality requirement of Rule 23(a).<sup>35</sup>

The common contention requirement tightened the prior “permissive”<sup>36</sup> interpretation of the rule’s language.<sup>37</sup> In 1993, Montana adopted the Ninth Circuit’s construction of the permissive standard announced in *McDonald v. Washington* and held commonality is satisfied when “a question of law linking the class members is substantially related to the resolution of the litigation.”<sup>38</sup> As the Ninth Circuit explained in *Jordan v. County of Los Angeles*, this standard follows a long history of class action precedent, which makes the U.S. Supreme Court’s landmark *Wal-Mart* decision a sea change in Rule 23 interpretation.<sup>39</sup> The Montana Supreme Court, however, has declined to decide whether the *Wal-Mart* standard replaces the permissive standard under the virtually identical language of the state rule.<sup>40</sup> As a result, the permissive standard, federally overruled by *Wal-Mart*, is still a valid test for commonality in Montana.<sup>41</sup>

### B. Rule 23(b) Categories

Even if the putative class meets the prerequisites of Rule 23(a), a court can only certify the class if it falls within one of the three class categories allowed under Rule 23(b): prejudice classes,<sup>42</sup> injunctive classes,<sup>43</sup> or dam-

33. *Wal-Mart*, 131 S. Ct. at 2554.

34. *Id.* at 2554–2557.

35. *Id.* at 2557.

36. *Jordan v. Co. of L.A.*, 669 F.2d 1311, 1320 (9th Cir. 1982) (“Courts that have analyzed Rule 23(a)(2) have generally given it a permissive application in a variety of substantive law areas so that the commonality requirement is usually found to be satisfied.”).

37. *Sangwin*, 315 P.3d 279, 284–285 (Mont. 2013) (noting *Wal-Mart* is a more “stringent” standard); Spencer, *supra* n. 27, at 445.

38. 862 P.2d 1150, 1155 (Mont. 1993) (quoting *Jordan*, 669 F.2d at 1320); King, *supra* n. 9, at 280.

39. 669 F.2d at 1311, 1320 (citing *Am. Fin. Sys., Inc. v. Harlow*, 65 F.R.D. 94, 107 (D. Md. 1974); *Harris v. Palm Springs Alpine Ests., Inc.*, 329 F.2d 909 (9th Cir. 1964); *Gibson v. Local 40, Super-cargoes & Checkers*, 543 F.2d 1259, 1264 (9th Cir. 1976)).

40. *Mattson v. Mont. Power Co.*, 291 P.3d 1209, 1220–1221 (Mont. 2012).

41. See *Sangwin*, 315 P.3d at 283–284.

42. The term “prejudice class” has been used by scholars and courts alike to refer to classes certified under Rule 23(b)(1). Dennis Neil Jones et. al., *Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 Ala. L. Rev. 1, 6 (1991) (citing *In re N. Dist. of Cal. “Dalkon Shield” IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 896 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982); N. Todd Leishman, Student Author, *Juzwin v. Amtorg Trading Corp.: Toward Due Process Limitations on Multiple Awards of Punitive Damages in Mass Tort Litigation*, 1990 Utah L. Rev. 439, 452–454 (1990).

43. The term “injunctive class” commonly refers to classes certified under Rule 23(b)(2). See *Charon v. Pinnacle Group N.Y. LLC*, 269 F.R.D. 221 (S.D.N.Y. 2010); *Butler v. Suffolk Co.*, 289 F.R.D. 80

ages classes.<sup>44</sup> A prejudice class certified under Rule 23(b)(1) aims to avoid the prejudicial effect separate actions would have on one another.<sup>45</sup> An injunctive class certified under Rule 23(b)(2) is appropriate when the conduct of the party opposing the class is such that “final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”<sup>46</sup> Finally, a damages class can be certified pursuant to Rule 23(b)(3) if “questions of law or fact common to the class members predominate over any questions affecting only individual members.”<sup>47</sup> The categories of Rule 23(b) imply an important caveat to class certification: a class may satisfy the requirements of 23(a), but should nonetheless be denied class treatment if it falls outside the bounds of 23(b).<sup>48</sup>

Prejudice and injunctive classes are considered “mandatory” because absent class members generally do not have an opportunity to opt out of the litigation.<sup>49</sup> Assuming a class is adequately represented, all members of mandatory classes are bound to the final judgment, whether good or bad.<sup>50</sup> Although a judgment adverse to a mandatory class could extinguish valid individual claims, binding absent class members does not offend due process because, in theory, mandatory class members’ interests are so closely aligned that opting out would be illogical.<sup>51</sup> When monetary damages are implicated in a class action, due process demands additional protections for absent class members.<sup>52</sup> Thus, damages classes certified under Rule 23(b)(3) must comply with the opt-out notice requirement set forth in 23(c)(2).<sup>53</sup> Members who opt out of the class preserve their right to pursue their claim individually, whether or not the class action succeeds.<sup>54</sup> However, members who opt out also lose the benefit of any monetary award

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(E.D.N.Y. 2013); *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005); *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2361 (2013).

44. Classes certified under Rule 23(b)(3) have been called “damages classes” because they are commonly used to pursue monetary damages. See *Jacobsen II*, 310 P.3d at 492; *Charron*, 269 F.R.D. 221; *Sullivan v. DB Invs., Inc.*, 667 F.3d 273 (3d Cir. 2011); *Pierce v. Co. of Orange*, 526 F.3d 1190 (9th Cir. 2008).

45. See Mont. R. Civ. P. 23(b)(1) (noting the risk of “incompatible standards” and judgments that “would be dispositive of the rights of others”); Fed. R. Civ. P. 23(b)(1) (same).

46. Mont. R. Civ. P. 23(b)(2); Fed. R. Civ. P. 23(b)(2).

47. Mont. R. Civ. P. 23(b)(3); Fed. R. Civ. P. 23(b)(3).

48. William Rubenstein, *Newberg on Class Actions* § 4:1 (5th ed., West 2014).

49. *Id.*

50. *Id.* at § 9:1.

51. *Id.* at § 4:1.

52. *Phillips*, 472 U.S. at 812 (requiring opt-out notice for absent class members to satisfy minimum due process).

53. Mont. R. Civ. P. 23(c)(2)(B); Fed. R. Civ. P. 23(c)(2)(B); *Jacobsen II*, 310 P.3d at 490 (McKinon, J., dissenting) (citing *Wal-Mart*, 131 S. Ct. at 2558–2559).

54. Rubenstein, *supra* n. 48, at § 9:39.

won by the class.<sup>55</sup> At a court's discretion, the 23(c)(2) notice can be ordered for prejudice and injunctive classes.<sup>56</sup>

Besides its place in the pantheon of Rule 23(a) analysis, *Wal-Mart* also underscores the minimum due process required when monetary damages are mixed into a mandatory class.<sup>57</sup> The district court in *Wal-Mart* applied the Ninth Circuit's rule for monetary damages in injunctive classes, which requires that monetary damages do not become the predominant relief.<sup>58</sup> The district court found the requested injunction would provide substantial relief in the long-term and outweigh the requested compensatory and punitive damages.<sup>59</sup> On appeal, the Ninth Circuit remanded the case to have the district court analyze if the punitive damages award predominated.<sup>60</sup> With its reversal of the Ninth Circuit, the U.S. Supreme Court cast doubt on the propriety of any monetary damages in an injunctive class but declined to broadly declare monetary damages beyond the reach of injunctive classes.<sup>61</sup> Instead, the Court addressed a narrower issue, unanimously holding that individualized damages are not appropriate in injunctive classes.<sup>62</sup>

### C. Policies Behind Rule 23

The detailed requirements of Rule 23 speak to its competing policy objectives.<sup>63</sup> First, a class action lawsuit makes factually and legally similar claims viable in the aggregate, even though individually they may not be marketable.<sup>64</sup> To the extent class actions provide a degree of judicial effi-

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55. *Id.*

56. Mont. R. Civ. P. 23(c)(2)(A); Fed. R. Civ. P. 23(c)(2)(A).

57. See Megan E. Barriger, Student Author, *Due Process Limitations on Rule 23(b)(2) Monetary Remedies: Examining the Source of the Limitation in Wal-Mart Stores, Inc. v. Dukes*, 15 U. Pa. J. Const. L. 619, 641–642 (2012).

58. King, *supra* n. 9, at 263.

59. *Id.*

60. *Id.* at 266 (citing *Dukes*, 603 F.3d at 622).

61. *Wal-Mart*, 131 S. Ct. at 2560 (“We need not decide in this case whether there are any forms of ‘incidental’ monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause. Respondents do not argue that they can satisfy this standard, and in any event they cannot.”).

62. *Id.* at 2559–2561 (“[B]ecause the necessity of that litigation [to raise individual defenses] will prevent backpay from being ‘incidental’ to the classwide injunction, respondents’ class could not be certified even assuming, *arguendo*, that ‘incidental’ monetary relief can be awarded to a 23(b)(2) class.”); *Wal-Mart*, 131 S. Ct. at 2561 (Ginsburg, Breyer, Sotomayor & Kagan, JJ., dissenting); King, *supra* n. 9, at 290–291.

63. The dissent in *Allison* identifies five distinct policies served by class actions. 151 F.3d at 427–428. This case note distills the policies underlying class actions into two categories: judicial efficiency and due process. Competition between these policies arises when both sides of a class action raise arguments that purport to advance the policies.

64. *Amchem*, 521 U.S. at 617 (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively

ciency, the collective action is practicable. Second, the specific requirements of class certification under Rule 23 provide due process safeguards, which are particularly valuable considering how often certification itself encourages settlement.<sup>65</sup> As explained below, these policies surfaced in the arguments on both sides of *Jacobsen II*, but the majority's opinion failed to advance either judicial efficiency or due process.

### III. FACTUAL AND PROCEDURAL BACKGROUND

#### A. *Jacobsen I*

In the early 1990s, Allstate hired the consulting firm McKinsey to help stem increasing total payouts on claims.<sup>66</sup> McKinsey developed a set of procedures and guidelines designed to increase the number of claims settled with claimants who did not have legal representation while “holding the line” on claims settled with lawyers involved.<sup>67</sup> McKinsey found failing to promptly and effectively communicate with claimants made them more likely to hire lawyers, and claimants with lawyers typically settle claims for two to three times more than unrepresented claimants.<sup>68</sup> Thus, Allstate could reduce total payouts by focusing on quick claimant contact and claim resolution.<sup>69</sup> The result of McKinsey's analysis was a “zero sum” economic game wherein Allstate gained when claimants lost.<sup>70</sup> Allstate implemented McKinsey's recommendations with the Claim Core Process Redesign (CCPR).<sup>71</sup>

Specifically, the CCPR created a fast-track processing system for certain claims, a “9-step process” for unrepresented claimant contact, and an “attorney economics script” that adjusters read when they contacted claimants.<sup>72</sup> A “Fast Track Evaluation Worksheet” determined whether a claim could be fast-tracked, and one of the fast-track qualifications was that the claimant be unrepresented.<sup>73</sup> The attorney economics script advised claim-

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paltry potential recoveries into something worth someone's (usually an attorney's) labor.” (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); Spencer, *supra* n. 27, at 441.

65. Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). Even in a class action limited to a single issue under Rule 23(c), settlement is likely to follow certification. *In re Chiang*, 385 F.3d 256, 267 (3d Cir. 2004) (“[C]ourts commonly use Rule 23(c)(4) to certify some elements of liability for class determination, while leaving other elements to individual adjudication—or, perhaps more realistically, settlement.”).

66. *Jacobsen II*, 310 P.3d at 457.

67. *Id.* at 457–458.

68. *Id.*

69. *Id.*

70. *Id.* at 458.

71. *Jacobsen v. Allstate Ins. Co.*, 215 P.3d 649, 653 (Mont. 2009) (*Jacobsen I*).

72. *Jacobsen II*, 310 P.3d at 458–459.

73. *Id.* at 458.

ants that an attorney could take between 25–40% of their settlement plus any expenses incurred by the attorney.<sup>74</sup> The script also advised that claimants who settled directly with Allstate would receive the full settlement amount.<sup>75</sup> The script warned adjusters about specifically dissuading claimants from hiring an attorney and instructed adjusters to remind claimants they could retain counsel at any time.<sup>76</sup> However, the script did not mention that represented claimants typically secured larger settlements.<sup>77</sup>

In 2001, Robert Jacobsen suffered bodily injuries and property damage in an auto accident with an Allstate insured.<sup>78</sup> Six days after the accident, he signed a written release and settled his third-party claim with Allstate for \$3,500 and 45 days of medical care.<sup>79</sup> Allstate's adjuster applied the CCPR when processing Jacobsen's claim, and quickly settled with Jacobsen, before he retained legal counsel.<sup>80</sup> Nearly one month later, Jacobsen experienced new shoulder pain while mowing his lawn, prompting him to ask Allstate to rescind the release.<sup>81</sup> When Allstate refused, Jacobsen retained counsel.<sup>82</sup> In an about-face that belied the CCPR's message to consumers, Allstate rescinded the release and reached a new settlement with Jacobsen for approximately \$200,000.<sup>83</sup>

After securing the second settlement, Jacobsen retained new counsel and filed a complaint against Allstate, which alleged violations of the Montana Unfair Trade Practices Act<sup>84</sup> (UTPA), common law bad faith, and intentional and negligent infliction of emotional distress.<sup>85</sup> Jacobsen sought compensatory damages for his attorney's fees in the underlying claim and punitive damages for Allstate's allegedly malicious conduct.<sup>86</sup> After the close of discovery, Jacobsen learned of certain documents detailing Allstate's CCPR, known as the "McKinsey documents," which were not produced during discovery.<sup>87</sup> Jacobsen then sought leave to amend his complaint, add class action claims, and conduct additional discovery.<sup>88</sup> The district court denied Jacobsen's request, and found he failed to show due

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 458–459.

78. *Jacobsen I*, 215 P.3d at 653.

79. *Id.* at 654.

80. *Id.* at 653.

81. *Id.* at 654.

82. *Id.*

83. *Id.*

84. Mont. Code Ann. § 33–18–242 (2013). Specifically, Jacobsen alleged violations of subsections (1) and (6).

85. *Jacobsen II*, 310 P.3d at 455.

86. *Id.*

87. *Jacobsen I*, 215 P.3d at 661.

88. *Id.*

diligence or excusable neglect for failing to timely discover the McKinsey documents.<sup>89</sup> Jacobsen and Allstate proceeded to trial on the original complaint, and the jury found Allstate had violated the UTPA with actual malice, awarding Jacobsen more than \$68,000 in compensatory damages and \$350,000 in punitive damages.<sup>90</sup> Both Allstate and Jacobsen appealed.<sup>91</sup> The Montana Supreme Court found the district court erred and remanded the case for a new trial and directed the district court to compel production of the McKinsey documents.<sup>92</sup>

### B. *Jacobsen II*

Armed with the McKinsey documents and a new trial, Jacobsen amended his complaint to include class action claims alleging Allstate harmed “all unrepresented individuals who had either third-party claims or first-party claims against Allstate” that were adjusted in Montana with the CCPR.<sup>93</sup> Specifically, Jacobsen alleged Allstate’s use of the CCPR violated the UTPA by intentionally misrepresenting that claimants without attorneys generally receive more compensation than claimants with attorneys.<sup>94</sup> Jacobsen also alleged that the fast-track system was inadequate and resulted in unfair settlements.<sup>95</sup>

Applying the strict commonality standard found in *Wal-Mart*, which requires a common contention that is resolvable across the whole class, the district court defined the class claim<sup>96</sup> with three common contentions.<sup>97</sup> First, Allstate’s use of the CCPR was a common pattern and practice in violation of the UTPA.<sup>98</sup> Second, the CCPR “caused indivisible harm to the

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89. *Id.* at 661–662.

90. *Jacobsen II*, 310 P.3d at 455.

91. *Jacobsen I*, 215 P.3d at 655. Allstate argued the district court erred by: (1) allowing the attorney fees and costs from the settlement of the underlying insurance claim to be recoverable as damages; (2) allowing Jacobsen’s testimony regarding Allstate’s refusal to pay Jacobsen’s “advance pay” lost wages and denying Allstate’s lost wages jury instruction; (3) concluding there was sufficient evidence of actual malice to support punitive damages; (4) misstating the law in the jury instructions and jury verdict form; and (5) granting Jacobsen’s motion to exclude evidence of the legal effect of the release and denying Allstate’s jury instruction regarding the release. In his cross-appeal, Jacobsen argued the district court erred by: (1) denying his motion to compel production of the McKinsey documents, and (2) ruling that Jacobsen had to prove serious or severe emotional distress to recover emotional damages in his bad faith claim.

92. *Id.* at 664.

93. *Jacobsen II*, 310 P.3d at 456.

94. *Id.*

95. *Id.*

96. Rule 23 requires a court certifying a class action to define the class claims, issues, and defenses in its certifying order. Fed. R. Civ. P. 23(c)(1)(B).

97. *Jacobsen II*, 310 P.3d at 456–457.

98. *Id.* at 456.

class as a whole” through its “zero-sum economic theory.”<sup>99</sup> Third, Allstate acted with actual malice by implementing the CCPR, which resulted in smaller settlements for class members than what was previously sufficient to fully and fairly settle their claims.<sup>100</sup> The district court also narrowed the definition of the class.<sup>101</sup> Specifically, class members were required to be unrepresented claimants who filed first-party or third-party claims with Allstate.<sup>102</sup> The claims had to be related to an underlying motor vehicle incident and in excess of the policy deductible.<sup>103</sup> Finally, the class only extended to claims adjusted in Montana with the CCPR.<sup>104</sup>

Allstate appealed the class certification<sup>105</sup> and the court’s consideration of evidence that was not in a “trial-admissible form” during its class certification analysis.<sup>106</sup> The Montana Supreme Court addressed Allstate’s arguments as three issues, two of which turned on an analysis of class certification under Rule 23.<sup>107</sup> First, the Court addressed whether the district court abused its discretion in finding the putative class met the requirements of Rule 23(a).<sup>108</sup> Second, the Court examined whether the class was properly certified under Rule 23(b)(2).<sup>109</sup> The details of these two holdings are explored in the following section of this note.

#### IV. THE MAJORITY AND DISSENTING OPINIONS

##### A. *The Majority’s Opinion*

###### 1. *Rule 23(a)*

Justice Wheat began the majority opinion’s Rule 23 analysis with a review of the four prerequisites of Rule 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy.<sup>110</sup> Because Allstate did not challenge Jacobsen’s estimates tallying around 600 third-party claimants alone, the

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99. *Id.*

100. *Id.* at 456–457.

101. *Id.* at 457.

102. *Id.*

103. *Jacobsen II*, 310 P.3d at 457.

104. *Id.*

105. *Id.*

106. *Id.* at 476–479 (Regarding Allstate’s evidentiary appeal, which is not the focus of this note, the Court held that the Montana Rules of Evidence do not apply to information reviewed for Rule 23 analysis.).

107. *Id.* at 454.

108. *Id.* at 459–471.

109. *Jacobsen II*, 310 P.3d at 471–476.

110. *Id.* at 459–472.

Court accepted that numerosity was met and focused its attention on the remaining three requirements.<sup>111</sup>

*a. Commonality*

The permissive standard for Rule 23(a)(2) requires questions of law or fact common to the class,<sup>112</sup> which the Court noted was traditionally a “relatively low burden for plaintiffs.”<sup>113</sup> The Court also acknowledged Montana’s “long history of relying on federal jurisprudence” to interpret the requirements of Rule 23—jurisprudence that was tightened by *Wal-Mart*.<sup>114</sup> Specifically, the Court recognized the *Wal-Mart* standard materially differs from the permissive standard by requiring the class to be united not just by any question of law or fact, but by one that drives resolution of the claim with its answer.<sup>115</sup>

Nonetheless, the Court declined to formally resolve whether *Wal-Mart* is the new standard in Montana.<sup>116</sup> The district court had applied the *Wal-Mart* standard, and both Jacobsen and Allstate had briefed the Court with *Wal-Mart*-styled arguments.<sup>117</sup> Without the parties thoroughly briefing the differences between the permissive and rigorous standards, the Court noted it was ill-prepared to make a formal, final decision on the proper standard.<sup>118</sup> Instead, the Court decided to wait for a case where the choice of standard would be dispositive.<sup>119</sup>

In applying the *Wal-Mart* standard, Justice Wheat distinguished Jacobsen’s claim from the claim made in *Wal-Mart*.<sup>120</sup> While the *Wal-Mart* plaintiffs could not prove the existence of a company-wide policy that explained why each class member was harmed, Jacobsen could reasonably show the CCPR caused objectionable settlements for each individual class member. Thus, litigating the lawfulness of the CCPR in a class action would resolve a common issue at the heart of each member’s claim, and the *Jacobsen II* class passed the *Wal-Mart* commonality test.<sup>121</sup>

111. *Id.* at 460.

112. Mont. R. Civ. P. 23(a)(2).

113. *Jacobsen II*, 310 P.3d at 460 (citing *Diaz v. Blue Cross & Blue Shield*, 267 P.3d 756, 763 (Mont. 2011)).

114. *Id.* at 460–461 (citing *Chipman v. N.W. Healthcare Corp.*, 288 P.3d 193, 206–207 (Mont. 2012)).

115. King, *supra* n. 9, at 281.

116. *Jacobsen II*, 310 P.3d at 461.

117. *Id.*

118. *Id.* (quoting *Mattson*, 291 P.3d at 1220–1221).

119. *Id.*

120. *Id.* at 462–463.

121. *Id.* at 463.

*b. Typicality*

The Court also rejected Allstate’s arguments against typicality.<sup>122</sup> Rule 23(a)(3) states the representative party must have claims or defenses that are typical of the class.<sup>123</sup> As Allstate pointed out, Jacobsen’s CCPR-adjusted settlement was rescinded prior to the lawsuit, unlike the rest of the putative class members’.<sup>124</sup> However, the Court found the specific facts of Jacobsen’s case did not prohibit typicality, and held typicality does not speak to an individual plaintiff’s circumstances, but instead to the common legal theory shared across the class.<sup>125</sup> Following *McDonald*, the Court reiterated that a claim is typical if it “stems from the same event, practice, or course of conduct that forms the basis of the class claims and is based upon the same legal theory or remedial theory.”<sup>126</sup> Because all putative class members’ claims, including Jacobsen’s claim, arose from the use of the CCPR, Jacobsen’s legal theory was sufficiently typical of the class.

*c. Adequacy*

Finally, the Court dismissed Allstate’s adequacy arguments.<sup>127</sup> The fourth prerequisite of Rule 23(a) requires that the representative party be able to fairly and adequately protect the interests of the class.<sup>128</sup> Allstate argued Jacobsen’s prior rescinded settlement raised unique defenses that did not apply to the rest of the class.<sup>129</sup> However, the Court held Jacobsen’s interests need not perfectly reflect those of all class members under Rule 23(a)(4).<sup>130</sup> Only conflicts of interest that are “so substantial as to overbalance the common interests of the class members as a whole” would disqualify Jacobsen, and no such conflicts were present.<sup>131</sup>

2. *Rule 23(b)*

The Court’s second step of certification review considered whether the district court abused its discretion by certifying the class under Rule 23(b)(2). As previously noted, Rule 23(b)(2) allows the court to certify a class action if “final injunctive relief or corresponding declaratory relief” is

122. *Jacobsen II*, 310 P.3d at 470.

123. Mont. R. Civ. P. 23(a)(3).

124. *Jacobsen II*, 310 P.3d at 469.

125. *Id.* at 469–470 (citing *Chipman*, 288 P.3d at 209).

126. *Id.* at 470 (quoting *McDonald*, 862 P.2d at 1156).

127. *Id.* at 471.

128. Mont. R. Civ. P. 23(a)(4).

129. *Jacobsen II*, 310 P.3d at 470.

130. *Id.* (citing *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012)).

131. *Id.* (quoting *Matamoros*, 699 F.3d at 138).

an appropriate remedy for the whole class.<sup>132</sup> The emphasis on injunctive and declaratory relief does not necessarily exclude monetary relief, but it does establish, at a minimum, that no other form of relief can outweigh the injunction or declaration.<sup>133</sup>

Because the balance of remedies provided by the injunctive class is essential to the Rule, the Court in *Jacobsen II* first reviewed the four forms of relief certified by the district court.<sup>134</sup> If the trial ended with judgment for the class, only the four remedies certified by the court would be available. The first possible remedy was a declaration of the CCPR's unlawfulness.<sup>135</sup> A declaration of unlawfulness would lead to the second possible remedy, an injunction that required Allstate to give class members an opportunity to have their claims readjusted.<sup>136</sup> Class-wide punitive damages were the third possible remedy, pending a finding of actual malice in Allstate's conduct.<sup>137</sup> If class-wide punitive damages were awarded, a common fund for payment of attorney's fees would be the fourth and final remedy.<sup>138</sup>

The *Jacobsen II* Court reversed the certification of class-wide punitive damages because Allstate had a due process right to raise individualized defenses.<sup>139</sup> The Court recognized each member's damages would be uniquely tied to his or her underlying claim.<sup>140</sup> As a result, the Court expressed concern that a class-wide punitive damages award could reach "non-injured parties."<sup>141</sup> But rather than bar punitive damages entirely, the Court determined it would be best to resolve the common, threshold issue of the CCPR's lawfulness in one class action and let each member seek individual damages, both compensatory and punitive, in separate trials.<sup>142</sup>

The Court relied heavily on the federal *McReynolds v. Merrill Lynch* case to restructure the class to decide only a single element of the class members' claims.<sup>143</sup> The factual basis for *McReynolds* focused on alleged

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132. Mont. R. Civ. P. 23(b)(2).

133. *Wal-Mart*, 131 S. Ct. at 2559 ("Rule 23(b)(2) 'does not extend to cases in which the appropriate final relief relates *exclusively or predominantly to money damages.*'" (emphasis in original) (quoting Fed. R. Civ. P. 23 advisory comm. nn. (1966 amend. to subdiv. (b)(2))).

134. *Jacobsen II*, 310 P.3d at 471–472.

135. *Id.* at 471.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 475 (holding "Allstate should be able to establish defenses to individual claims to ensure that punitive damages are not awarded to claimants that were not actually damaged by the adjustment of their claims under the CCPR.").

140. *Jacobsen II*, 310 P.3d at 475–476.

141. *Id.* at 476.

142. *Id.* at 464–465 (citing *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012)).

143. *Id.* at 464–466 (citing *McReynolds*, 672 F.3d 482).

racial discrimination in Merrill Lynch's employment policies.<sup>144</sup> Class members sought compensatory damages, punitive damages, and injunctive relief for Merrill Lynch's continued use of the policies.<sup>145</sup> To be eligible for this variety of remedies, the putative class requested both certification as an injunctive class and issue certification under Rule 23(c)(4).<sup>146</sup> On appeal, the Seventh Circuit held certification was appropriate under both provisions of Rule 23, and remanded the matter to the district court.<sup>147</sup> In dicta, Judge Richard Allen Posner's opinion explained that hundreds of individual suits could assign monetary damages at the conclusion of an injunctive class.<sup>148</sup>

Because the *Jacobsen II* class was set to conclude without awarding class-wide damages, the Court revised the second class claim and removed any mention of an "indivisible harm" the CCPR caused to the entire class.<sup>149</sup> The rewritten second class claim alleged Allstate's CCPR simply "resulted in damages to the members of the class."<sup>150</sup> If the class prevailed, the Court's revision required class members to bring individual claims in hundreds of separate trials to determine individual damages.<sup>151</sup> Allstate argued the revised claim did not provide "final" relief within the meaning of Rule 23(b)(2) because it clearly envisioned hundreds of additional trials to finally resolve each class member's claim.<sup>152</sup> The Court brushed aside Allstate's objection and concluded the word "final" did not "impose a substantive obligation" to conclusively resolve all members' claims in a single class action.<sup>153</sup> With the damages component to be determined in subsequent trials, the remedial balance of the class trial did not predominantly favor monetary damages, and the class could be certified under Rule 23(b)(2).<sup>154</sup>

In sum, the Court held the *Jacobsen II* class, after some retooling, satisfied all four prerequisites of Rule 23(a) and the remedial restrictions of 23(b).<sup>155</sup> The key to balancing the remedies under Rule 23(b)(2) was to push monetary damages into hundreds of subsequent trials where each

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144. *McReynolds*, 672 F.3d at 483.

145. *Id.*

146. *Id.* (quoting Fed. R. Civ. P. 23(c)(4) ("[W]hen appropriate, an action may be . . . maintained as a class action with respect to particular issues.")); see also Mont. R. Civ. P. 23(c)(4) (using a minor difference in wording).

147. *Id.* at 492.

148. *Id.*

149. *Jacobsen II*, 310 P.3d at 467.

150. *Id.*

151. *Id.* at 465.

152. *Id.* at 473.

153. *Id.*

154. *Id.* at 475.

155. *Jacobsen II*, 310 P.3d at 460–471, 479.

member alone would seek to prove damages.<sup>156</sup> With this procedural plan in place, the Court remanded the case to the district court for further proceedings.<sup>157</sup>

### B. *Baker's Dissent*

Justice Baker's dissent, which Justice Rice joined, raised two primary concerns with the majority opinion. First, Justice Baker pointed out the continued confusion that would result from the Court's refusal to reach a definitive position on the applicability of *Wal-Mart* commonality in Montana.<sup>158</sup> Second, she criticized the majority for ignoring the plain language of Rule 23(b)(2).<sup>159</sup>

Regarding commonality, Justice Baker disagreed with the premise that fully briefing the matter was necessary to decide which legal standard should apply in Montana.<sup>160</sup> From Justice Baker's perspective, the proper standard should not even be a point of contention.<sup>161</sup> Montana had traditionally followed in the path of the federal interpretation of Rule 23, and no party had argued for Montana to depart from that path.<sup>162</sup>

Regarding Rule 23(b)(2), Justice Baker directed the Court's attention to the 1966 Advisory Committee notes to the Federal Rules.<sup>163</sup> The Advisory Notes indicate that class actions designed to lay the foundation for damages are the "the province of Rule 23(b)(3)."<sup>164</sup> Thus, the "final injunctive relief"<sup>165</sup> contemplated in Rule 23(b)(2) proscribes certifying injunctive classes when monetary damages are the ultimate remedy.<sup>166</sup> Because the restructured *Jacobsen II* class action is just the first of hundreds of trials needed to resolve the plaintiffs' claims, the class action failed to provide a

156. *Id.* at 475 (because the potential class-wide punitive damages were reversed, there was no need to address whether monetary damages were appropriate in an injunctive class).

157. *Id.* at 479.

158. *Id.* at 479–480 (Baker & Rice, JJ., dissenting).

159. *Id.* at 480–482.

160. *Id.* at 479.

161. *Jacobsen II*, 310 P.3d at 479 ("By perpetuating confusion over whether *Wal-Mart* changed the law—a point I do not believe is reasonably open to dispute—the Court disserves prospective class plaintiffs and defendants . . .").

162. *Id.* at 480.

163. *Id.*

164. *Id.* at 481 (quoting Fed. R. Civ. P. 23 advisory comm. nn. (1966 amend. to subdiv. (b)(2))).

165. Fed. R. Civ. P. 23(b)(2); Mont. R. Civ. P. 23(b)(2).

166. *Jacobsen II*, 310 P.3d at 481 (Baker & Rice, JJ., dissenting) (citing *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530 (D.C. Cir. 2006); *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 499 (7th Cir. 2012); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 979 (5th Cir. 2000); *DWFII Corp. v. St. Farm Mut. Auto. Ins. Co.*, 271 F.R.D. 676, 685 (S.D. Fla. 2010); *Cholakyan v. Mercedes-Benz USA, LLC*, 281 F.R.D. 534, 561 (C.D. Cal. 2012); *Mogel v. UNUM Life Ins. Co. of Am.*, 646 F. Supp. 2d 177, 184 (D. Mass. 2009)).

final resolution.<sup>167</sup> While certification as a damages class may have been appropriate, Justice Baker noted the *Jacobsen II* class failed to preserve and develop its fallback argument for certification under Rule 23(b)(3).<sup>168</sup> Because the opportunity to consider certification as a damages class had passed, Justice Baker argued the Court's only option was to decline certification.<sup>169</sup>

### C. McKinnon's Dissent

Justice McKinnon agreed the Court correctly barred class-wide punitive damages, but found little common ground with the rest of the majority opinion.<sup>170</sup> Like Justice Baker, Justice McKinnon expressed frustration with the Court's unwillingness to adopt the *Wal-Mart* standard outright.<sup>171</sup> Justice McKinnon, however, dedicated most of her dissent to Rule 23(b) and the rewritten class claim, which was the heart of the majority's analysis.<sup>172</sup>

Justice McKinnon believed the district court constructed the class claim to "minimally" satisfy the criteria of Rule 23(b)(2).<sup>173</sup> Justice McKinnon stressed that the district court's decision did not certify a blanket UTPA action, but instead a claim that the CCPR was per se unlawful under the Uniform Declaratory Judgments Act.<sup>174</sup> To Justice McKinnon, the "indivisible harm" the district court referred to was not the sum of hundreds of separate UTPA claims, but a single harm caused by the allegedly unlawful CCPR.<sup>175</sup> Thus, the revision to the second claim fundamentally altered the action.<sup>176</sup> Jacobsen's original class claim sought a declaration of the CCPR's unlawfulness, injunctive relief, and incidental, class-wide damages, but the majority's reconstruction of the claim reduced the declaratory and injunctive relief to a mere predicate for individualized monetary damages.<sup>177</sup> By Justice McKinnon's analysis, the claim could no longer be certified under Rule 23(b)(2) following *Wal-Mart*, which held that individualized damages are never appropriate in an injunctive class.<sup>178</sup> Moreover, the majority's affirmation of the class action jeopardized the class members'

167. *Id.* at 480–481.

168. *Id.* at 481–482.

169. *Id.*

170. *Id.* at 483 (McKinnon, J., dissenting).

171. *Id.* at 493.

172. *Jacobsen II*, 310 P.3d at 482–493.

173. *Id.* at 486.

174. *Id.* at 486–487 (citing Mont. Code Ann. tit. 27, ch. 8).

175. *Id.* at 487–488.

176. *Id.* at 487.

177. *Id.*

178. *Jacobsen II*, 310 P.3d at 491 (citing *Wal-Mart*, 131 S. Ct. at 2559).

due process rights by letting the action proceed without the notice and opt-out protections of Rule 23(b)(3).<sup>179</sup>

## V. AN ANALYSIS OF THE *JACOBSEN II* HOLDING

### A. *Wal-Mart Commonality and Rule 23(a)*

Absent a constitutional basis, the change in federal precedent regarding the federal rules of civil procedure creates no obligation for states to follow suit, despite any similarity between the federal and state rule.<sup>180</sup> However, the Montana Supreme Court has made its general reliance on federal precedent for Rule 23 abundantly clear.<sup>181</sup> When adopting the permissive standard for commonality in *McDonald*, the Court did not labor over its implications.<sup>182</sup> The Court's broad statement in *Chipman v. Northwest Healthcare Corp.* about relying on federal precedent, while not a full-throated embrace of *Wal-Mart*, shows at least a preference for it.<sup>183</sup> The sentiment, however, did not last. The Court reopened the question of *Wal-Mart* commonality in *Mattson v. Montana Power Co.* and saved the choice of "permissive" versus "stringent" standards for a later case.<sup>184</sup> By the time *Jacobsen II* reached the Court, reliance had turned into suspicion about "march[ing] lockstep with federal interpretations" of Rule 23.<sup>185</sup> Even after *Jacobsen II*, the Court has refused to take a firm position on *Wal-Mart* commonality.<sup>186</sup> While the Court's decision to distance itself from pure reliance on federal precedent is reasonable, its continued failure to resolve ambiguity about the proper standard is increasingly unreasonable.

In the Court's defense, the decision is not one to be made lightly. On one hand, defense attorneys across the nation are enthusiastic about stricter

179. *Id.* at 490–493.

180. *Brilz v. Metro. Gen. Ins. Co.*, 285 P.3d 494, 500 (Mont. 2012) (noting how most states have chosen not to follow the federal precedent for Rule 8(a) set in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Bell A. Corp. v. Twombly*, 550 U.S. 544, 554–555 (2007)).

181. *Sieglock v. Burlington N. Santa Fe Ry.*, 81 P.3d 495, 497 (Mont. 2003) (observing "federal authority is instructive on the issue of class certification").

182. King, *supra* n. 9, at 280, 283 (Montana adopted the permissive approach simply because it was the prevailing test).

183. *Chipman*, 288 P.3d at 208 ("Following this Court's long history of relying on federal jurisprudence when interpreting the class certification requirements of Rule 23, we apply the *Wal-Mart* reasoning to the present case.").

184. *Mattson*, 291 P.3d at 1220 ("The question arises as to whether Montana, which in the past has followed the lead of federal courts in class-certification analysis, should abandon its 'permissive' approach to Rule 23(a)(2)'s commonality requirement in favor of the *Wal-Mart* majority's more stringent standard.").

185. *Jacobsen II*, 310 P.3d at 459.

186. *Sangwin*, 315 P.3d at 284–285 ("Though the District Court relied upon the standard Montana followed prior to *Wal-Mart*, this requirement is met even under *Wal-Mart*'s more stringent standard.").

standards for class certification.<sup>187</sup> They are rightly leery of frivolous suits snowballing into costly class actions.<sup>188</sup> On the other hand, plaintiffs are concerned over a pattern in recent U.S. Supreme Court opinions: an incremental closing of the courthouse doors to class claims.<sup>189</sup> Both positions have merit, and neither is served by the persistent ambiguity surrounding commonality in Montana. From either point of view, the Court's current plan of action—waiting in a holding pattern until it happens across a case that turns on the choice of standards<sup>190</sup>—leaves potential class action litigants in the dark.

The choice of standards should be informed by policies promoted by Rule 23 and class actions generally.<sup>191</sup> Those policies compete in every class action brought before the Court, even if the parties argue for the same standard. Plaintiffs appeal to judicial efficiency through the consolidation of hundreds of potential trials. Similarly, judicial efficiency motivates defendants' arguments about the immense cost and time commitment sunk into

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187. Catherine R. Hecker, *Wal-Mart Stores, Inc. v. Dukes: Taming "Too Big to Fail" Classes in the Battle Against Blackmail Actions and Frivolous Litigation*, 7 *Liberty U. L. Rev.* 49, 86 (2012) (concluding *Wal-Mart* "is a precedent that successfully tames 'too big to fail' classes aimed at blackmailing defendants with deep pockets," but does not stop "meritorious classes"); Daniel Fisher, *Supreme Court Dumps Wal-Mart Sex-Discrimination Class Action*, *Forbes*, <http://perma.cc/SGH6-8RLD> (<http://www.forbes.com/sites/danielfisher/2011/06/20/supreme-court-dumps-wal-mart-sex-discrimination-class-action/>) (June 20, 2011).

188. For a particularly vituperative characterization of the defendant's point of view, see Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century*, 44 *UCLA L. Rev.* 1773, 1775 (1997) ("[F]rom the defendants' perspective, class actions are the ultimate weapon of legal terrorism, launched by litigation-mad, bottom-feeding, money-hungry, professional plaintiffs' lawyers.").

189. Spencer, *supra* n. 27, at 448 ("Dukes's heightened commonality standard is also disquieting in light of the Court's other recent decisions trending in the direction of restricting access to justice."); Robert H. Klonoff, *The Decline of Class Actions*, 90 *Wash. U. L. Rev.* 729, 733 (2013) ("With many more class actions in federal court, and with more class certification decisions being reviewed by appellate courts, federal courts have created new hurdles for plaintiffs seeking class certification."); Deborah M. Weiss, *A Grudging Defense of Wal-Mart v. Dukes*, 24 *Yale J.L. & Feminism* 119, 121 (2012) ("The Court's denial of class certification [in *Wal-Mart*] has been viewed by many commentators as a 'major blow to working women across America' and a wholesale rejection by the Court of the use of discrimination law as an instrument of social change." (quoting Courtney E. Martin, *Wal-Mart v. Dukes Ruling is Out of Sync with 21st-Century Sex Discrimination*, *Christian Sci. Monitor* (June 22, 2011) (available at <http://perma.cc/6K5A-N6NX> (<http://www.csmonitor.com/Commentary/Opinion/2011/0622/Wal-Mart-v.-Dukes-ruling-is-out-of-sync-with-21st-century-sex-discrimination>))))).

190. *Mattson*, 291 P.3d at 1220–1221 ("It may be necessary in a future case—where the issue is properly briefed and argued, and the choice of one standard over the other is dispositive of the commonality inquiry—to decide whether Montana will retain its more permissive approach or instead adopt the *Wal-Mart* majority's approach.").

191. The notion that policy should drive the fair application of Rule 23 is not new. Nearly forty years ago, a Third Circuit panel chose to set aside precedent with complicated procedural history and instead assessed a question of notice in a (b)(2) class with "the policies underlying the constitutional requirement of due process." *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 256 (3d Cir. 1975); see *Allison*, 151 F.3d at 428 (Dennis, J., dissenting) ("Rule 23's requirements for class action suits should be interpreted in light of the basic purposes of the rule.").

class actions. Due process surfaces both as the plea of class members whose claims could not otherwise be heard<sup>192</sup> and the protest of defendants whose individualized defenses are swallowed by the sheer size of the class.<sup>193</sup> The facts of any given case color these policy arguments, and it is reasonable for the Court to want to wait until it can see the bigger picture of policy trade-offs encompassed in a particular standard. However, a just standard ultimately survives on the policies that merit its continued use, not the facts from which it sprang. The perceived frivolity of a class action or reprehensibility of a defendant's acts should not influence the impartial rule that is applied to every future certification question. As Nabokov poetically observed, "the breaking of a wave cannot explain the whole sea."<sup>194</sup> Beyond *Wal-Mart* and *Jacobsen II* is a complicated, conflicted world that will inevitably spawn more class actions. The appropriate standard for evaluating those future classes stems from policy, and the Court has heard plenty of cases to be fully able to weigh the policy trade-offs of the *Wal-Mart* standard.

A fair assessment of Rule 23's policy goals arrives at *Wal-Mart*'s more rigorous commonality standard. As evidenced by the Montana Supreme Court's history of siding with a class when its commonality was at issue,<sup>195</sup> the permissive standard heavily favors class certification. In *Diaz v. Blue Cross Blue Shield of Montana*, the Court's elaboration of the commonality requirement boiled down to two statements: first, a single common issue will suffice, and second, "commonality is not a 'stringent threshold.'" <sup>196</sup> As Justice Scalia observed in *Wal-Mart*, any competently written class complaint can meet the permissive standard.<sup>197</sup> Broad interpretation of commonality under the permissive standard effectively renders the prerequisite

192. *Wetzel*, 508 F.2d at 256 ("The due process problem surfaces because the class action judgment binds all members of a (b)(2) class.").

193. *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues."). The Cato Institute's amicus brief in *Jacobsen II* discusses both the due process rights of absent class members and of defendants who lose the ability to raise individualized defenses. Amicus Curiae Br. of the Cato Inst. & Ctr. for Class Action Fairness in Support of Petrs., *Jacobsen II*, 2014 WL 847538 at \*3 (No. 13-916, 134 S.Ct. 2135 (2014)) ("The Montana Supreme Court's mechanism deprives defendants of their ability to raise individual defenses to the plaintiffs' claims.").

194. Nabokov, *supra* n. 1, at 105.

195. *Diaz*, 267 P.3d at 764; *McDonald*, 862 P.2d at 1155; *Sieglock*, 81 P.3d at 499; *Ferguson v. Safeco Ins. Co. of Am.*, 180 P.3d 1164, 1170 (Mont. 2008); *Chipman*, 288 P.3d at 208; *Mattson*, 291 P.3d at 1219–1220; *Jacobsen*, 310 P.3d at 468; *Sangwin*, 315 P.3d at 285.

196. 267 P.3d at 763 (quoting *Ferguson*, 180 P.3d at 1169).

197. *Wal-Mart*, 131 S. Ct. at 2550–2551 (the language of Rule 23(a)(2) "is easy to misread, since '[a]ny competently crafted class complaint literally raises common questions.'" (quoting Nagareda, *supra* n. 65, at 131–132)).

meaningless. When the prerequisites of Rule 23 are reduced to trivialities, they cease to promote judicial efficiency and due process.

A more rigorous requirement of a “single common question” that is “capable of classwide resolution”<sup>198</sup> is not an insurmountable obstacle.<sup>199</sup> For example, the district court in *Sangwin* applied the permissive standard of commonality and concluded the prerequisite was satisfied.<sup>200</sup> On appeal, the Montana Supreme Court went out of its way to find the *Wal-Mart* standard satisfied, even though neither party argued the issue.<sup>201</sup> Despite its characterization of *Wal-Mart* as a “significant” tightening of commonality,<sup>202</sup> the Court has yet to find a case that fails to meet the *Wal-Mart* standard.<sup>203</sup> The heightened commonality standard of *Wal-Mart* will not foreclose all future class actions, but it will elevate commonality to more than a perfunctory step on the road to certification. The Montana Supreme Court should adopt the *Wal-Mart* standard as a reasonable hurdle for legitimate classes and a needed due process protection for class opponents.

### B. Due Process Protection in Injunctive Classes

While the Court’s failure to take a position on the *Wal-Mart* commonality standard is significant, the more troubling result of *Jacobsen II* is the dismantling of due process for injunctive classes. The Court undermined due process in two ways. First, the Court’s restructured class claim serves as a springboard for individualized damages in opposition to long-standing precedent. Second, by allowing monetary damages to follow the injunctive class, the Court made no effort to incorporate Rule 23’s optional notice and opt-out provisions.

#### 1. Individualized Damages

In an injunctive class action, “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”<sup>204</sup> Class cohesiveness with respect to relief is not

198. *Wal-Mart*, 131 S. Ct. at 2551, 2556 (“[F]or purposes of Rule 23(a)(2) even a single common question will do . . . .”) (internal quotation marks and alterations omitted).

199. Andrey Spektor, *The Death Knell of Issue Certification and Why that Matters after Wal-Mart v. Dukes*, 26 St. Thomas L. Rev. 165, 170 (2014) (“Early returns on *Dukes*, however, show that in practice the commonality requirement is largely unaffected. Diligent class counsel have been careful to isolate concrete common policies for certification, and lower courts have, for the most part, read *Dukes* narrowly, as a bar to certifying policies that do no more than delegate discretion.”).

200. 315 P.3d at 285.

201. *Id.* at 284–285.

202. *Id.* at 284.

203. See e.g. *Jacobsen II*, 310 P.3d at 468; *Mattson*, 291 P.3d at 1221; *Chipman*, 288 P.3d at 208.

204. Mont. R. Civ. P. 23(b)(2); Fed. R. Civ. P. 23(b)(2).

just a suggestion, but an essential characteristic of an injunctive class.<sup>205</sup> While neither the plain language of the rule nor precedent explicitly bars monetary relief for an injunctive class,<sup>206</sup> the Federal Advisory Committee's notes and a long line of caselaw make clear that monetary relief cannot be the predominant remedy.<sup>207</sup> Courts have read into this predominance requirement a license for incidental damages.<sup>208</sup> While the appropriateness of incidental damages is doubtful following *Wal-Mart*,<sup>209</sup> even a liberal interpretation of "incidental" has limitations.<sup>210</sup> Incidental damages are mechanical calculations,<sup>211</sup> devoid of individualized facts and circumstances.<sup>212</sup> This remedial limitation stems from due process concerns.<sup>213</sup> As

205. The homogeneity of (b)(2) classes justifies their lack of due process protections relative to (b)(3) classes. *Wetzel*, 508 F.2d at 253 ("[T]he procedural protections of (b)(3), opting out and notice, are necessary because of the heterogeneity of the (b)(3) class. They are unnecessary for the homogeneous (b)(2) class."):

206. The U.S. Supreme Court's silence on the propriety of monetary damages in (b)(2) classes could be read as either an invitation or a prohibition. Suzette M. Malveaux, *Class Actions at the Crossroads: An Answer to Wal-Mart v. Dukes*, 5 Harv. L. & Policy Rev. 375, 380 (2011) ("Given that the Supreme Court has at different times interpreted silence to allow for and foreclose a particular remedy, Rule 23(b)(2) is open to either interpretation."):

207. Fed. R. Civ. P. 23 advisory comm. nn. (1966 amend. to subdiv. (b)(2)) ("The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."); *Jacobsen II*, 310 P.3d at 480 (Baker & Rice, JJ., dissenting); *Holmes v. Contrl. Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983) (holding monetary damages are inappropriate in (b)(2) injunctive classes):

208. *Allison*, 151 F.3d at 415 (concluding that "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief."). The dissent in *Allison* suggested that weighing the relative predominance of monetary relief required both quantitative and qualitative factors. *Id.* at 429 (Dennis, J., dissenting) (suggesting "the committee may have meant for the court to compare the quantity and quality of the injunctive and monetary remedies in the particular case to see which was predominant."):

209. *Wal-Mart*, 131 S. Ct. at 2557 (noting "serious doubt about whether claims for monetary relief may be certified under" (b)(2)) (citing *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994)). The district court's order in *Jacobsen II* found no serious doubt in the *Ticor* decision. Or. In re Misc. Remand Mots. Challenging 4th Amend. Compl. & Or. Certifying Rule 23(b)(2) Class Action, *Jacobsen II*, No. ADV-03-201(d), slip or. at n. 50 (Mont. 8th Jud. Dist. Ct. Jan. 30, 2012) (available from court & on file with author). Regardless, the *Wal-Mart* opinion expresses those doubts. *Wal-Mart*, 131 S. Ct. at 2557.

210. *Allison*, 151 F.3d at 415 ("[T]he recovery of incidental damages should typically be concomitant with, not merely consequential to, class-wide injunctive or declaratory relief. Moreover, such damages should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances."):

211. *Jacobsen II*, 310 P.3d at 491 (McKinnon, J., dissenting) (noting that incidental "means 'requiring only a mechanical computation'" (quoting *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 825 (7th Cir. 2011)); *Johnson v. Meriter Health Servs. Employee Ret. Plan*, 702 F.3d 364, 372 (7th Cir. 2012) (concluding "mechanical, formulaic" monetary relief does not require additional due process safeguards); *Berger v. Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755, 764 (7th Cir. 2003) (finding monetary damages "followed mechanically" and were an "anticipated consequence of the declaration" in a (b)(2) class):

212. *Allison*, 151 F.3d at 415 ("Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations."); *Lemon v. Loc. No. 139*, 216 F.3d 577, 581 (7th Cir. 2000).

previously noted, mandatory class actions can bind absent class members who might otherwise pursue individual claims, which effectively deprives them of property in the form of a legal claim.<sup>214</sup> Damages classes certified under Rule 23(b)(3) assuage these concerns by further filtering classes at the point of certification and giving absent class members an opportunity to preserve individual claims by opting out of the class.<sup>215</sup> In an injunctive class, however, the limitation on remedies and the adequacy requirement in Rule 23(a)(4) are the only elements of Rule 23 tailored to protect due process.<sup>216</sup>

When the Ninth Circuit reviewed the class certification in *Wal-Mart*, the court recognized a critical due process problem: for some members of the class, relief would be predominantly monetary.<sup>217</sup> While current Wal-Mart employees could benefit from injunctive relief correcting an alleged pattern or practice of discrimination, such a remedy would mean little to past employees.<sup>218</sup> Consequently, the Ninth Circuit excluded from the class all past employees, whose only remedy was an award of back pay.<sup>219</sup> This distinction is illustrative of the due process problem that arises from monetary damages in injunctive classes. An injunction alone would be a pyrrhic victory for past employees. Those class members could only find relief in back pay and punitive damages, which would require individual analysis of each employee's circumstances.<sup>220</sup> Consequently, the Ninth Circuit remanded the case with instructions to consider a (b)(3) damages class for past employees.<sup>221</sup> With this narrowed application of (b)(2) as a starting point, the U.S. Supreme Court's unanimous holding that certification as an injunctive class was inappropriate<sup>222</sup> is a layer of refinement on a well-

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213. *Phillips*, 472 U.S. at 812 (in a case that provides predominantly monetary damages, "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court."); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. denied*, 511 U.S. 117 (1994) ("In order to bind an absent plaintiff concerning a claim for monetary damages, the court must provide minimal due process.").

214. *Wetzel*, 508 F.2d at 252–253 (noting that "the fundamental objective of (b)(2) [is] to bind the members of the class with one conclusive adjudication").

215. Beyond the prerequisites of Rule 23(a), a class certified under (b)(3) must also show that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods" of adjudication. Mont. R. Civ. P. 23(b)(3). Combined with mandatory notice and the ability to opt-out, the predominance and superiority requirements are additional "procedural protections." *Wal-Mart*, 131 S. Ct. at 2558.

216. Barriger, *supra* n. 57, at 622.

217. *Dukes*, 603 F.3d at 623–624 (noting that, for past employees, "it is difficult to say that monetary relief does not predominate.").

218. *Id.* at 623.

219. The court noted that a (b)(3) class could be appropriate for past employees. *Id.*

220. *Id.*

221. *Id.* at 624.

222. *Wal-Mart*, 131 S. Ct. at 2561.

established precedent: injunctive classes are inappropriate when monetary damages predominate.

The circumstances of *Jacobsen II* were admittedly less clear-cut, but the majority's certification nonetheless conflicts with the established rule limiting remedies in injunctive classes. The Court approved certification as an injunctive class because, if the class won at trial, all members of the class would find relief in the injunctive readjustment of their insurance claims.<sup>223</sup> Separate individual trials would determine if monetary relief was justified under the facts of each claim.<sup>224</sup> The line the Court drew between the revised class action and the subsequent trials is thin, but it may be enough to skirt direct conflict with the unanimous rejection of individualized damages in *Wal-Mart*. Nonetheless, the Court's procedural plan clearly conflicts with the intent of *Wal-Mart*, and it does so with no discernable benefit. While the concept of a narrowly crafted class action that decides only one issue of a larger claim is contemplated by Rule 23(c)(4),<sup>225</sup> it affords little judicial efficiency, and more fundamentally, little justice.<sup>226</sup> By adding another step to each class member's pursuit of monetary relief, the Court ensures that the future of *Jacobsen II* will be hopelessly mired in hundreds of individual trials.

The majority's reliance on *McReynolds* to support this shotgun approach—where one class action sparks hundreds of trials—is misplaced. As Justice McKinnon noted, the question of whether individualized damages trials were appropriate was not part of the class's appeal in *McReynolds*.<sup>227</sup> Thus, Judge Posner's pontification on the possibility of subsequent damages trials was not part of the Seventh Circuit holding.<sup>228</sup> Even if it had been, the marketability of the individual damages was an important factor

223. *Jacobsen II*, 310 P.3d at 424–425, 472.

224. *Id.* at 472.

225. Mont. R. Civ. P. 23(c)(4). It should be noted, however, that recent U.S. Supreme Court opinions show an increasing animus toward issue certification. Spektor, *supra* n. 199, at 181 (“The interpretation of *Comcast* and *Amgen* does not bode well for issue certification, which by definition, compartmentalizes class claims to permit class treatment of discrete issues. Neither *Dukes* nor *Comcast* discuss issue certification, but their analyses suggest that it will come under increasing scrutiny.” (citing *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) and *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013))).

226. Spektor, *supra* n. 199, at 187 (“Aside from this possible gain in efficiency, holding independent mini-trials for every individual claim seems to undercut the idea that piecemeal class actions ‘materially advance . . . litigation.’ More likely, they incentivize settlements, but courts are in the business of adjudicating cases, not cajoling amicable resolutions.” (quoting *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008))).

227. The issues presented in *McReynolds* pertained to the class's ability to appeal the denial of certification and the common factual backgrounds of the classes in *McReynolds* and *Wal-Mart*. *Jacobsen II*, 310 P. 3d at 491 (citing *McReynolds*, 672 F.3d at 483).

228. *Jacobsen II*, 310 P. 3d at 491.

of Judge Posner's logic.<sup>229</sup> In *Jacobsen II*, the amount of damages at stake in the possible subsequent trials pales in comparison to the years of back pay at issue in *McReynolds*.<sup>230</sup> With less incentive to pursue the separate trials for damages, the *McReynolds* approach is an impractical solution for *Jacobsen II* class members. Further, Judge Posner's "kicker" supporting individualized damages trials was a determination that "the accuracy of the resolution would be unlikely to be enhanced by repeated proceedings."<sup>231</sup> In *Jacobsen II*, each class member's insurance claim relied on a unique set of facts, and readjustment could result in a major change in the claim's settlement or no change at all.<sup>232</sup> The class's reliance on statistical evidence<sup>233</sup> and the necessity of subsequent individual trials concede this variation. In each individual trial for damages, Allstate would be free to present the defense that, despite a declarative judgment on CCPR's unlawfulness, initial settlements with the individual plaintiffs were fair and adequate. Repeated proceedings would not just enhance the accuracy of the resolution; they would be the only way to achieve an accurate resolution. Thus, if Judge Posner's concept of individualized trials is precedent worth adopting, it nonetheless fails under the facts of *Jacobsen II*.

## 2. Notice and Opt-Out Provisions

For obvious reasons, the Court's procedural plan only becomes a due process issue if the class wins at trial. Unfortunately, the alternative outcome presents an entirely different due process conundrum. Injunctive classes are mandatory, and as long as the class is adequately represented, the resolution of the class trial is binding on all absent class members.<sup>234</sup> While Rule 23(c)(2) gives a certifying court latitude to order notice for absent class members in mandatory classes, this protective measure is optional.<sup>235</sup> Further, although opt-out instructions are occasionally included in the op-

229. *McReynolds*, 672 F.3d at 492 ("The stakes in each of the plaintiffs' claims are great enough to make individual suits feasible.").

230. *Id.* ("Most of Merrill Lynch's brokers earn at least \$100,000 a year, and many earn much more, and the individual claims involve multiple years.").

231. *Jacobsen II*, 310 P.3d at 465 (quoting *McReynolds*, 672 F.3d at 491).

232. As Justice McKinnon put it, "the question whether Allstate's use of the CCPR resulted in damages to the members of the class cannot be answered on a classwide basis in any event." *Jacobsen II*, 310 P.3d at 488–489 (McKinnon, J., dissenting) (internal quotation marks omitted).

233. The class relied on a study from the Consumer Federation of America to show the impact of the CCPR on claimants and Allstate's bottom line. Appellee's Response Br., *Jacobsen II*, 2012 WL 3570015 at \*2–5 (Mont. Aug. 6, 2012) (No. DA12-0130).

234. Rubenstein, *supra* n. 48, at § 4:1.

235. Mont. R. Civ. P. 23(c)(2)(A).

tional notice sent to injunctive classes,<sup>236</sup> the dicta of the *Wal-Mart* decision suggests opt-out rights do not truly exist.<sup>237</sup>

As precedent, the Court's approval of *Jacobsen II*'s mandatory class absent the optional notice and opt-out provisions of Rule 23(c)(2) is troubling. If the *Jacobsen II* class is not successful at trial, individual class members could be barred from bringing independently viable claims.<sup>238</sup> The Court did not address the preclusive effect an adverse judgment would have on absent class members. By not even mentioning notice and opt-out procedures, the Court's certification implies those procedures are not necessary to protect absent class members' due process rights. Had the district court already included notice and opt-out instructions for absent class members in its certifying order, the Court's oversight could be forgivable. The district court's order, however, was specifically crafted to avoid individualized damages and the accompanying burden of notice and opt-out rights.<sup>239</sup> As a result, applying the Court's interpretation of the rule for injunctive classes would effectively "nullify" the added due process protections of damages classes "whenever a plaintiff class, at its option, combines its monetary claims with a request—even a 'predominating request'—for an injunction."<sup>240</sup>

## VI. CONCLUSION

The Court should have rejected certification of the *Jacobsen II* class as an injunctive class. This is not to say the *Jacobsen II* class members have no viable class action, but rather they were allowed to proceed under the wrong type of class action. In its certifying order, the district court rejected the alternate damages class and the concept of a "hybrid" class with claims structured under both subsections of the rule.<sup>241</sup> On appeal, the class did not

236. Rima N. Daniels, *Monetary Damages in Mandatory Classes: When Should Opt-Out Rights Be Allowed?* 57 Ala. L. Rev. 499, 505 (2005) ("Opt-out rights in the (b)(2) context have traditionally been rare. The general rule under 23(b)(2) is that absent individual class members do not have an automatic right to opt out of a certified class to bring their own claims, either in cases where a (b)(2) class is tried or settled.").

237. *Wal-Mart*, 131 S. Ct. at 2558 (noting that Rule 23 "provides no opportunity for (b)(1) or (b)(2) class members to opt out."); see also *Manual for Complex Litigation (4th)* § 21.311 (West 2011) ("If notice is appropriate, it need not be individual notice because, unlike a Rule 23(b)(3) class, there is no right to request exclusion from Rule 23(b)(1) and (b)(2) classes.").

238. *Jacobsen II*, 310 P.3d at 490–491 (McKinnon, J., dissenting) ("If *Jacobsen* loses on the merits, then the class members' individual claims for damages will be seriously compromised, if not totally barred.").

239. Or. In re Misc. Remand Mots. Challenging 4th Amend. Compl. & Or. Certifying Rule 23(b)(2) Class Action, *Jacobsen II*, No. ADV-03-201(d), slip or. at 136, 142 (Mont. 8th Jud. Dist. Ct. Jan. 30, 2012) (available from court & on file with author).

240. *Jacobsen II*, 310 P.3d at 491 (McKinnon, J., dissenting) (quoting *Wal-Mart*, 131 S. Ct. at 2559).

241. *Id.* at 471 (majority).

clarify or expand upon its argument for certification under (b)(3) as a damages class.<sup>242</sup> Had Rule 23(b)(3) been before the Court, the route to certification would not have crossed the limitation on remedies for injunctive classes or circumvented absent class members' due process rights. The question of the CCPR's lawfulness would need to be developed, but it could very well be the predominating question for the class, even though individual circumstances varied. Now that the Court has upheld certification as an injunctive class, however, revisiting damages class certification is pointless. The action will proceed as an injunctive class devoid of critical due process protections.

If *Jacobsen II* has a silver lining, it comes in the practical dilemma of pursuing monetary damages through future injunctive class actions. If damages cannot be assessed until subsequent individualized trials, then the economic incentive of bringing an initial class action is significantly diminished. For class counsel, there is no guarantee individual class members will pick up the baton and carry their individual claims to the finish line, especially if they are satisfied with injunctive and declaratory relief. The questionable outcomes of individualized trials should encourage plaintiffs to consider damages class certification instead, despite its burdensome notice and opt-out provisions.

Time will tell if *Jacobsen II* inadvertently stems the tide of inappropriate injunctive classes. Today, however, the due process gaps in the majority opinion portend stormy seas ahead for class opponents as well as the unlucky absent members of mandatory classes. With ambiguous standards, shoddy due process, and the potential morass of hundreds of individual suits to follow, *Jacobsen II* has made the waters substantially rougher.

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242. Only three paragraphs of the appellee's brief discuss the alternative certification under (b)(3). Appellee's Response Br., *Jacobsen II*, 2012 WL 3570015 at \*47 (Mont. Aug. 6, 2012) (No. DA12-0130).

