

Avoiding Death by a Thousand Cuts: The Relitigation of Class Certification and the Realities of the Modern Class Action

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INTRODUCTION

The modern class action may be appropriately analogized to the invention of fire.¹ If used properly, it can significantly advance societal goals. If misused, however, it quickly degenerates into something that causes significant harm. In order to promote the positive aspects of the class action while simultaneously controlling its negative tendencies, it is first necessary to understand the class action's true nature and the important ways in which it departs from more traditional forms of litigation. Unfortunately, neither scholars nor jurists have successfully undertaken this Herculean task. As a result, class action litigation gives rise to considerably more systemic harm than good.

In this Article, we will first discern the unique essence of the class action and then apply our insights to one of the thornier procedural pathologies brought about by the judicial system's failure to recognize the class action's unique status. The difficulty on which we focus our analysis is the serious problem of serial relitigation of class certification. In *Smith v. Bayer Corp.*, the Supreme Court was unsuccessful in its efforts to fashion a solution to this problem because it failed to recognize the unique procedural aspects of the class action.² Those aspects demand treatment that fundamentally differs from the manner in which the courts treat more traditional forms of litigation. In *Bayer*, the Supreme Court decided that a "federal [district] court [had] exceeded its authority under the 'relitigation exception' to the Anti-Injunction Act" when it enjoined an ongoing state judicial proceeding in order to "protect or effectuate" its earlier refusal to certify a class action.³ The Court held that the relitigation exception permitted only injunctions that implemented "well-recognized concepts" of res judicata, and the district court's injunction did not fall within this narrow category.⁴

The Court's decision in *Bayer* appears not to have been met with much criticism. Indeed, on the narrowest level, at least, there was not much to criticize. The Court merely clarified its interpretation of the relitigation exception to the Anti-Injunction Act. On its facts, the decision is correct.⁵ Despite the seemingly straightforward nature of its opinion, however, the *Bayer* Court clearly missed an important opportunity to devise a real solution to a very serious problem: the inefficiency, coercion, and general unfairness

1. See MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 1 (2009).

2. *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011).

3. *Id.* at 2373 (internal quotation marks omitted). "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (2012).

4. *Bayer*, 131 S. Ct. at 2375–76 (quoting *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988)) (internal quotation marks omitted).

5. See discussion *infra* Part I.

that invariably flow from serial attempts to relitigate the issue of the certifiability of a class action against the same defendant.

Normally, a defendant may invoke the family of doctrines encompassed within the concept of *res judicata*⁶ to prevent such harassment. Indeed, such avoidance is usually cited as the very purpose for development of *res judicata* in the first place.⁷ In the procedurally unique context of class action certification, however, *res judicata* is of little or no help in preventing the very injustice and inefficiency it was designed to avoid.

The problem arises because of an intersection of fact and law. While normally *res judicata* bars subsequent suits on the same claim by the same plaintiff or those in privity with her, any individual who is a member of the potential class may seek certification. While respected jurists have argued that an initial denial of certification should bind all potential class members regardless of which of them sought certification in the initial suit,⁸ the *Bayer* Court rightly rejected such an approach. It is well established that procedural due process guarantees each litigant her day in court;⁹ therefore, individuals may not be constitutionally bound by the resolution of a suit in which they were not parties or privies of those who were parties.¹⁰

Although the *Bayer* Court's conclusion was correct as a matter of constitutional law, it leaves the defendant opposing the class in an extremely difficult position. A denial of certification in the initial suit can invite an almost endless parade of potential class members seeking certification, freed from the burdens of the *res judicata* doctrine. Even if the defendant is successful suit after suit, a combination of the never-ending drain on its resources and the everlasting possibility that at some point one of those courts will certify the class effectively forces that defendant to settle, whether or not the merits dictate such a move. This is far from a systemically satisfactory result and the relatively meager alternative solutions which the *Bayer* Court offered defendants are less than comforting.¹¹

In this Article, we propose a solution to the dilemma that all but paralyzed the Court in *Bayer*. In doing so, we fashion a dramatically revised perception of class action litigation. While as a technical matter the class action is nothing more than an aggregation device—much like interpleader,

6. *Res judicata* has been said to refer “to the prohibition on relitigating a claim that has already been litigated and gone to judgment.” RICHARD L. MARCUS, MARTIN H. REDISH, EDWARD F. SHERMAN & JAMES E. PFANDER, *CIVIL PROCEDURE: A MODERN APPROACH* 1094 (5th ed. 2009). The term also “is sometimes loosely used to refer to the totality of preclusion doctrines.” *Id.*

7. *See, e.g.,* *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 401–02 (1981).

8. *See In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig. (Bridgestone II)*, 333 F.3d 763 (7th Cir. 2003), *abrogated by Bayer*, 131 S. Ct. 2368; discussion *infra* Part III.

9. *See* Martin H. Redish & William J. Katt, Taylor v. Sturgell, *Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877 (2009).

10. *See* Taylor v. Sturgell, 553 U.S. 880, 904–07 (2008).

11. *See* discussion *infra* Part V.B.

impleader, or intervention—the indisputable realities of the class action make quite clear that the relationship between attorney and client is qualitatively different in the class context than in traditional litigation. For all practical purposes, class attorneys function as far more than class members' legal representatives: they act as quasi-guardians or trustees on behalf of the absent class members. This may or may not be a positive development.¹² But for good or ill, only the disingenuous or the naïve could seriously question the exceptionally powerful role attorneys play in class actions.

Recognition of the significant difference between traditional litigation and the modern class action should logically lead to the conclusion that, at least for purposes of *res judicata* of the denial of class certification, the named plaintiffs are not the only real parties in interest. The class attorneys should be deemed real parties in interest on the certification issue, and therefore the direct estoppel impact of a certification denial should bar subsequent certification attempts not only by the prior named plaintiffs, but also by the class attorneys. As a result, while individual members of the potential class may subsequently seek certification, they may not do so with the original class attorneys as their legal representatives.

Our proposed solution flows from a synthesis of the purposes served by the doctrine of *res judicata* and the practical realities of the modern class action. Because the driving force behind the class action is the class attorneys rather than the class members, it is very easy for the attorneys to circumvent the salutary goals of *res judicata*, simply by treating class members as fungible substitutes in the capacity of named plaintiffs. A myopic focus solely on who the named plaintiffs were in the initial suit permits the class attorneys to find within the protective reach of *res judicata* a hole big enough to drive a truck through. It is only by recognizing the realities of who is in charge of the class action and adjusting the doctrinal and conceptual scope of *res judicata* accordingly that the federal system can effectively bring about the efficiency and fairness for which *res judicata* was designed.

We recognize that our proposal would require a significant alteration in the classical form of the doctrine of *res judicata*. Up to this point, the fact that litigants have the same attorneys has never provided a basis for a finding of privity between those litigants for *res judicata* purposes.¹³ Nor have attorneys representing litigants, to our knowledge, ever been deemed real parties in interest for *any* purpose, much less for purposes of *res judicata*. But at least since 1966 when the Rules Advisory Committee dramatically

12. See discussion *infra* Part IV.C.

13. See, e.g., *Pollard v. Cockrell*, 578 F.2d 1002, 1009 (5th Cir. 1978). For a discussion of nonparty preclusion, see MARCUS, REDISH, SHERMAN & PFANDER, *supra* note 6, at 1167–86.

revised the multi-party devices,¹⁴ procedure has been driven neither by rigid tradition nor by arid formalism, but rather by the dictates of pragmatism.¹⁵ Our proposed solution to the res judicata dilemma of serial class certification is driven by the same considerations.

We also candidly acknowledge that our proposal will not solve all of a potential class defendant's problems. In fact, our solution would not have helped the defendant in *Bayer* because the challenged attempt to certify came from a different group of attorneys, as well as a different set of named plaintiffs.¹⁶ But in attempting to solve the problem of serial certification attempts, we are not willing to ignore the foundational due process dictate that litigants have a constitutional right to their day in court.¹⁷

We recognize an additional limitation on our proposal, though it is a limitation that would have applied even to the more sweeping standard urged by Bayer and rejected by the Supreme Court. The direct estoppel derived from a denial of certification can apply only where the standards for certification are the same in the second case as they were in the first case. Thus, where the second forum is a state court that employs a standard different from that of Federal Rule 23 governing class certification, the first denial of certification will have no res judicata impact on the second suit.

Despite these limitations, we believe that acceptance of our proposal would almost certainly have a dramatic impact on the problem of serial certification attempts. Today, no one could seriously doubt that as a general matter, it is class action attorneys, and not class members, who stimulate class actions. If a denial of certification binds only the named plaintiffs, attorneys may easily substitute one named plaintiff after another, thereby rendering the direct estoppel branch of res judicata powerless to protect defendants against the very harassment that the doctrine is intended to prevent. By placing the deterrence where it belongs—squarely with the class attorneys who not only choose to engage in harassing relitigation, but also who have the most at stake financially—our proposal would achieve the goals of res judicata by taking account of the realities of the modern class action.

Part I of this Article examines *Bayer* and its implications for the problem of serial certification attempts. Part II describes baseline principles of res judicata in more detail. Part III explores the relitigation of class certification and the specific problems it poses. Part IV places the relitigation of class

14. Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 69, 98–99 (1966) (proposed Rule 23 advisory committee's note).

15. See *id.* at 99 (“The amended rule describes in more practical terms the occasions for maintaining class actions . . .” (emphasis omitted)).

16. Our proposal, however, would have helped defendants in at least one other prominent case: *Bridgestone II*, 333 F.3d 763 (7th Cir. 2003), *abrogated by* *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011). See discussion *infra* Part V.A.

17. See discussion *infra* Part V.

certification in the context of the development and realities of the modern class action. By doing so, it will establish that for a number of purposes (including the application of *res judicata*) the class attorneys, not just the named plaintiffs, should be deemed the real parties in interest. Part V assesses alternative solutions proposed in response to the relitigation of class certification, including the solution suggested in *Bayer*, and explains why each of these alternatives fails. Part VI examines the methods by which our solution might be implemented.

I. *SMITH V. BAYER*: A TALE OF TWO CLASS ACTIONS

Smith v. Bayer Corp. concerned two class actions, one federal and one state.¹⁸ The first class action, brought in West Virginia state court, alleged that Bayer had violated the state's consumer-protection statute by selling an allegedly defective drug called Baycol.¹⁹ The second class action, also brought in West Virginia, made similar claims.²⁰ Both class actions requested certification under West Virginia Rule of Civil Procedure 23.²¹

Although they alleged similar violations, the two class actions did not name identical defendants. The first class action asserted claims against several West Virginia defendants, while the second class action named only Bayer.²² Thus, Bayer was able to remove the second class action to federal district court under diversity jurisdiction while the first class action remained in state court.²³ The two class actions proceeded "at roughly the same pace" for six years.²⁴

The federal district court was the first to reach a decision and "declined to certify" the class.²⁵ In an effort to turn one victory into another, Bayer then asked the district court to "enjoin the West Virginia state court from" certifying the still-pending class action, arguing that the two classes were identical and that a state court decision certifying the class would interfere with the federal court's denial of certification.²⁶ "The [d]istrict [c]ourt agreed and granted the injunction."²⁷ The court grounded its decision in the Anti-Injunction Act's relitigation exception,²⁸ which allows federal courts

18. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2373 (2011).

19. *Id.* The action also alleged other violations of West Virginia state law. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 2373-74.

24. *Id.* at 2374.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

to enjoin state proceedings in order to protect or effectuate the federal courts' judgments.²⁹ The appellate court affirmed.³⁰

The Supreme Court reversed, finding that the district court had exceeded its authority under the Act.³¹ The Court held that Congress intended the relitigation exception to implement "well-recognized concepts" of res judicata, and the district court's injunction did not fall within those bounds.³² Although the Seventh Circuit had recently granted a similar injunction of a state court certification proceeding in *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation (Bridgestone II)*,³³ the Supreme Court in *Bayer* expressly disavowed the Seventh Circuit's use of the relitigation exception.³⁴ According to the Court, the relitigation exception requires that the issues decided be the same and that the parties to the case be the same or fit into one of the narrow exceptions to the rule against binding nonparties.³⁵ The facts of *Bayer*, the Court held, met neither requirement because the individual plaintiffs in the state suit were different from the individuals who sought certification in the federal suit.³⁶

The Court's treatment of the relitigation of class certification may reflect the relatively benign nature of the relitigation at issue in that case. The relitigation in *Bayer* took the form of two parallel class actions filed by different and unrelated attorneys. One of those proceedings, although filed a month after the other, happened to reach a decision first.³⁷ Because there was no evidence that the second class action was intended to harass Bayer, the Court may have concluded that the relitigation of class certification in this particular case did not pose a significant problem or, if it did, that it was not one that involved harassment, abuse of judicial resources, or fundamental unfairness. The relitigation of class certification, however, is often more pernicious than the relitigation that took place in *Bayer*. As Bayer noted in its briefs, threats of relitigation frequently force defendants to choose between buying peace through settlements or facing successive suits

29. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988); *see also* 28 U.S.C. § 2283 (2012) ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.").

30. *Bayer*, 131 S. Ct. at 2374.

31. *Id.* at 2382.

32. *Id.* at 2375–76 (quoting *Chick Kam Choo*, 486 U.S. at 147) (internal quotation marks omitted).

33. *Bridgestone II*, 333 F.3d 763, 765 (7th Cir. 2003), *abrogated by Bayer*, 131 S. Ct. 2368.

34. *Bayer*, 131 S. Ct. at 2381.

35. *Id.* at 2376. These exceptions apply when the nonparties have some sort of legal relationship to the parties who litigated the first suit—that is, when they are in privity with one another. For example, preceding and succeeding owners of property are typically considered in privity, as are trustees and their beneficiaries.

36. *Id.*

37. *Id.* at 2373–74.

intended to bleed them dry: litigation's version of death by a thousand cuts.³⁸ But while this does appear to have been the situation in *Bayer*, the Court did not limit its holding to the specific facts of the case, or even to cases where there is no evidence of harassment.³⁹ The Court intended its decision to apply to *all* duplicative motions for certification brought by different named plaintiffs—even those brought by the same attorneys and meant to coerce defendants into class-wide settlement. Thus, the Court not only left Bayer unprotected,⁴⁰ it also left *all* defendants facing the possibility of serial certification attempts out in the cold by giving them nothing more than an oversimplified response to a complex problem.

II. RES JUDICATA AND THE PROBLEM OF SERIAL CERTIFICATION

As a matter of the well-established law of judgments, the *Bayer* Court was correct in reversing the district court's injunction. Judgments law has long recognized a due process limitation, binding only those litigants who either had their day in court in the first litigation or are in privity with those who did.⁴¹

The law of judgments includes both claim preclusion and issue preclusion—collectively referred to as “res judicata.”⁴² At the risk of oversimplification, claim preclusion prohibits the relitigation of a claim when a court's dismissal of that claim is both final and on the merits. The bar applies to the entire claim, without regard to whether the parties litigated all aspects of that claim. Issue preclusion, in contrast, does not prohibit future litigation of the entire claim; rather, it forecloses only the relitigation of issues that the parties already litigated and resolved in a prior litigation.⁴³ By precluding parties from arguing issues or bringing claims which they have already “had a full and fair opportunity to litigate,” these two doctrines further the purpose of judgment law, namely, to “conserve[]

38. Brief for Respondent at 1–2, *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011) (No. 09-1205).

39. See *Bayer*, 131 S. Ct. at 2373.

40. The Court acknowledges that the Class Action Fairness Act (“CAFA”) “may be cold comfort to Bayer,” as it was enacted after the two class actions in *Bayer* were filed. *Id.* at 2382. But even if CAFA had been in force, it is not clear that it would have applied. See *infra* notes 118–27 and accompanying text for a discussion of CAFA, including the fact that it encourages district courts to decline jurisdiction when greater than one-third of the plaintiffs, but less than two-thirds, as well as the primary defendants are from the forum state.

41. See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 34(3) (1982).

42. Claim preclusion and issue preclusion are the modern replacements of the old judgment law lexicon: “Claim preclusion describes the rules formerly known as ‘merger’ and ‘bar,’ while issue preclusion encompasses the doctrines once known as ‘collateral estoppel’ and ‘direct estoppel.’” *Taylor v. Sturgell*, 553 U.S. 880, 892 n.5 (2008).

43. See *Cromwell v. Cnty. of Sac.*, 94 U.S. 351, 352–53 (1876) (explaining the difference between claim preclusion and issue preclusion and noting that issue preclusion prohibits relitigation only of those issues that were actually litigated and determined in the first suit).

judicial resources” and protect against “the expense and vexation [of] multiple lawsuits.”⁴⁴

Claim preclusion applies only when a court’s dismissal of a claim is both final and on the merits.⁴⁵ Therefore, when a court disposes of a case solely on the basis of a procedural issue, claim preclusion does not apply. Where a court disposed of the first suit on the basis of a procedural issue, however, the initial court’s findings will bind future courts’ resolution of that same issue in suits brought by the same plaintiff or one in privity with him. This is known as direct estoppel.⁴⁶ Thus, even though the second suit concerns the same claim as the first suit, the first suit does not preclude a second *action*; it only precludes the relitigation of decided issues.⁴⁷ In *Bayer*, the defendant sought application of direct estoppel on the issue of class certification, since the court disposed of the first suit solely because the class was not certifiable.

As previously mentioned, for direct estoppel to apply—indeed, for any form of issue or claim preclusion to apply—the estopped party must have been a party to the first action because a person who was not a party to the first action did not have a full and fair opportunity to litigate the claims and issues that the action concerned.⁴⁸ However, as the Court in *Bayer* acknowledged, there are “a few discrete exceptions to the general rule against binding nonparties.”⁴⁹ These include, for the most part, cases in which the nonparties were in “privity” with the party who litigated and lost the first suit. More specifically, these include nonparties who have preexisting substantive legal relationships with parties to the first action,⁵⁰ nonparties who were adequately represented in the first suit,⁵¹ and nonparties who later bring suit as the designated representatives of a party to the first suit. It also includes nonparties who assumed control over the first action⁵² or who otherwise agreed to be bound by the first court’s

44. *Montana v. United States*, 440 U.S. 147, 153–54 (1979).

45. See MARCUS, REDISH, SHERMAN & PFANDER, *supra* note 6, at 1095.

46. See *id.* at 1095 n.1.

47. *Id.*

48. See *Montana*, 440 U.S. at 153–54.

49. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2371 (2011).

50. For example, preceding and succeeding owners of property have a substantive legal relationship to one another.

51. This includes suits brought by trustees, guardians, and other fiduciaries as well as certain forms of representative litigation. To the extent it applies to class actions, however, it only applies to “properly conducted class actions.” *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008). As the Court noted in *Bayer*, a class that is denied certification cannot be considered a properly conducted class. *Bayer*, 131 S. Ct. at 2380 (“If we know one thing about the [second] suit, we know that it was *not* a class action. Indeed, the very ruling that Bayer argues ought to be given preclusive effect is the District Court’s decision that a class could not properly be certified.”).

52. A nonparty who assumed control of the prior litigation had “the opportunity to present proofs and argument” and thus has already “had his day in court” even though he was not a formal party to the suit. RESTATEMENT (SECOND) OF JUDGMENTS § 39 cmt. a (1982).

determinations.⁵³ The plaintiffs in the state court class action in *Bayer* did not fall within any of these exceptions, and thus, purely as a matter of the traditional judgments law, the Supreme Court was correct in overturning the district court's injunction, on the basis of the well-accepted due process limitation on the reach of res judicata.

The fact that serial class certification attempts do not run afoul of long established res judicata practice, however, does not alter the fact that such attempts often give rise to serious injustice and inefficiencies. Indeed, as already noted, these injustices and inefficiencies are the very same procedural harms that res judicata is designed to avoid in the first place. To the extent those harms differ at all, it is that in the class certification context harms are, metaphorically speaking, on steroids. While serial individual litigation may well give rise to harassment, waste, and coercion, those pathologies pale in comparison to the severity of the comparable harms in the class action context. Defendants facing the possibility of almost never-ending attempts to certify the same class proceeding in state after state, with the danger of a "bet-the-company" lawsuit awaiting them as soon as one court chooses to certify,⁵⁴ is the procedural equivalent of death by a thousand cuts—hardly a result that our procedural system should tolerate. The goal should be to devise a means to protect defendants against the coercion, waste, and manipulative gamesmanship caused by serial efforts to obtain class certification.

III. THE RELITIGATION OF CLASS CERTIFICATION

The problems of serial certification may occur in one of two ways. First, the plaintiffs' attorneys in the initial case may simply substitute different members of the potential class for the putative class members who have already unsuccessfully sought certification. Second, wholly unrelated attorneys may seek certification in suits brought by different members of the putative class.⁵⁵

A leading example of the first method is *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation (Bridgestone I)*, where the Seventh Circuit overturned the district court's certification of two nationwide classes—one for customers of Ford trucks and the other for customers of Bridgestone and Firestone tires.⁵⁶ After the Supreme Court denied the attorneys' petition for

53. For a more detailed discussion of these exceptions, see *Taylor*, 553 U.S. at 893–95. *Taylor* also cites the existence of a "special statutory scheme" that expressly forecloses litigation by nonparties as an exception to the rule against nonparty preclusion. *Id.* at 895.

54. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297–98 (7th Cir. 1995).

55. However, in *Bayer*, it should be recalled, the second class action was not filed as a response to the first class action, but rather by another attorney. See *Bayer*, 131 S. Ct. at 2373.

56. *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig. (Bridgestone I)*, 288 F.3d 1012, 1019–21 (7th Cir. 2002).

certiorari,⁵⁷ the attorneys decided to try again, using new named plaintiffs to file at least five additional motions for certification in different courts.⁵⁸ One state court certified a class the day the complaint was filed, “without awaiting a response from the defendants and without giving reasons” for its ruling.⁵⁹ In response, Ford and Firestone asked the federal court that had initially granted certification to enjoin the different state courts from certifying the class actions.⁶⁰ Although the district court denied the injunction, the Seventh Circuit granted it in *Bridgestone II*, noting that if the state courts were not barred from considering the subsequent motions for certification, the court would be “perpetuating an asymmetric system in which class counsel can win but never lose.”⁶¹ If a denial of certification has no enduring effect, the court reasoned, plaintiffs’ attorneys would be in a position to “roll the dice as many times as they please,” thereby enabling them to manipulate the system until they got a result they wanted.⁶²

While the court in *Bridgestone II* correctly recognized the serious problem serial certification attempts cause, finding a satisfactory solution to those problems is another matter entirely. To this point, no one has proposed an adequate solution. In the Part that follows, we put forth a radically different solution to the problem, one grounded in the recognition of the important ways in which the modern class action differs from the traditional adversary proceeding.⁶³ After that, we explore the solutions implemented by the Seventh Circuit in *Bridgestone II* and by the Supreme Court in *Bayer*, as well as the approach proposed by the American Legal Institute, and explain the serious flaws in all three.⁶⁴

IV. SOLVING THE SERIAL CERTIFICATION PROBLEM BY RECOGNIZING THE REALITIES OF THE MODERN CLASS ACTION

A. TRADITIONAL *RES JUDICATA* AND SERIAL CERTIFICATION: A SQUARE PEG IN A ROUND HOLE

Even the Rules Advisory Committee has acknowledged the potential for abuse presented by “unfettered opportunities” to file the same class action in different courts.⁶⁵ However, scholars and courts have not always recognized

57. *Gustafson v. Bridgestone/Firestone, Inc.*, 537 U.S. 1105 (2003) (denying certiorari).

58. *Bridgestone II*, 333 F.3d 763, 765 (7th Cir. 2003), *abrogated by Bayer*, 131 S. Ct. 2368. One such case was *Shields v. Bridgestone/Firestone Inc.*, brought in Texas state court. No. B-170,462, 2004 WL 546883 (Tex. Dist. Ct. Mar. 12, 2004).

59. *Bridgestone II*, 333 F.3d at 765.

60. *Id.*

61. *Id.* at 767.

62. *Id.*

63. *See infra* Part IV.

64. *See infra* Part V.

65. Memorandum from David F. Levi, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure, to Honorable Anthony J. Scirica, Chair, Standing Comm. on Rules of Practice and

plaintiffs' attorneys' considerable role in the relitigation. With few exceptions,⁶⁶ they have largely ignored the unique role class attorneys play in the entire process. Before we can explain how our reassessment of the class action ultimately leads to amelioration of the serious problem of serial certification attempts, we must first explore the reasons why traditional *res judicata* doctrine completely fails to achieve its goal in a class action context. *Res judicata* is designed to prevent litigants from creating unfairness, waste, or inefficiency by harassing defendants with multiple suits asserting the same claim or raising factual issues that the parties have already litigated. It has traditionally achieved this goal by barring a losing litigant from bringing suit twice or, on some occasions, relitigating overlapping issues of fact or mixed law-fact. But this traditional *res judicata* model is of no effect where the attorney, rather than the litigants, makes the strategic choices and has available a seemingly endless string of totally fungible potential named plaintiffs.⁶⁷ This is, of course, the exact situation in the overwhelming majority of class actions.

Compounding the problem is that the coercive impact of the multiple litigation threat exponentially increases in the class action context. In short, traditional *res judicata* fails in this setting because it is aimed at the wrong actors in the process. In all other contexts, of course, it makes perfect sense to surgically apply *res judicata* solely to those who were actual litigants in the first suit, because it is they alone who are the real parties in interest: they are the parties with the most at stake and the only ones with authority to bring multiple identical suits against the same defendant. But where, as in the class action context, the primary participant—the actor who both makes the strategic choices and financially has the most at stake—was not a formal litigant in the initial suit, it makes no sense to confine *res judicata*'s reach solely to those formal litigants. The modern class action differs in significant ways from the traditional one-on-one or even multi-party action, and it is for that reason that it is appropriate to redefine the real party in interest in the class action context in order to enable *res judicata* to perform in class actions the salutary function it has long performed in traditional litigation.

Procedure 34 (May 14, 2001), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2001.pdf>.

66. See, e.g., Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2115 (2008) (describing the “single group of entrepreneurial lawyers” responsible for “seriatim attempts at class certification”).

67. Some scholars believe that traditional *res judicata* rules *do* preclude absent class members from bringing additional motions for certification. Analogizing to the jurisdiction-to-establish-no-jurisdiction doctrine, Professor Clermont argues that just as a court's finding of no jurisdiction is preclusive in other actions, a court's finding of no authority to proceed as a class action is preclusive in other actions—even for absent class members. See Kevin M. Clermont, *Class Certification's Preclusive Effects*, 159 U. PA. L. REV. PENNUMBRA 203, 224–27 (2011).

B. THE REALITIES OF THE MODERN CLASS ACTION

As a technical matter, at least, the class action is nothing more than an elaborate aggregation device established by the Federal Rules of Civil Procedure.⁶⁸ The reality, of course, is very different. In important ways, the modern class action differs dramatically from the traditional model of litigation, and nowhere is this truer than in terms of the relationship between attorney and client.

Consider the indisputable ways in which the attorney–client relationships differ in the class action context from that of the traditional litigation framework. Most importantly, in the class action context, class attorneys are invariably the starting and driving force creating the class and conducting the class proceeding. Indeed, in many class actions, widely referred to as “negative value” or “Type B” classes, the claims of individual class members are so small that they would not, standing alone, justify the filing of an individual suit.⁶⁹ It would be a rare negative-value class action where class attorneys are not the driving force behind suit. In these cases, it is left to the attorneys not just to construct the class but also to solicit the named plaintiffs. In the words of two respected scholars, “[t]hat such solicitation occurs on a regular basis is patently obvious.”⁷⁰

In some instances, this solicitation has taken the form of nationwide searches for eligible plaintiffs, as in the Agent Orange⁷¹ and Dalkon Shield⁷² cases. Class action attorneys have even “entered into agreements with labor unions and medical clinics to implement dragnet medical screenings and

68. See FED. R. CIV. P. 23.

69. John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 905 (1987); see also *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996) (noting the superiority of the class action device in negative-value suits).

70. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 99 (1991).

71. See PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 46–52 (1986) (describing the cross-country journey of the attorney who initiated the case to find veterans exposed to Agent Orange).

72. In the Dalkon Shield case, two class action attorneys solicited almost 900 plaintiffs in a fairly short period of time. See Paul Blustein, *How Two Young Lawyers Got Rich by Settling IUD Liability Claims*, WALL ST. J., Feb. 24, 1982, at 1. Other attorneys did the same. See Malcolm Gladwell, *Latest Fight in a Long Case: Attorney Fees; Victims’ Lawyers Getting Too Much, Critics Contend*, WASH. POST, Jan. 22, 1989, at H1 (describing an attorney who represented over 1000 Dalkon Shield claimants and was still searching for more). This raised ethical questions about how much individual attention lawyers were actually able to give their clients. See Jack B. Weinstein, *A View from the Judiciary*, 13 CARDOZO L. REV. 1957, 1963 (1992). As Judge Weinstein noted, “The system, as it works with large masses of cases, does not provide the kind of representation that we envisage when we think of Abraham Lincoln saying to the person coming in off the street, ‘I’ll fight for you, as your lawyer.’ It is quite different in mass torts.” *Id.*; see also Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617, 619 & n.9 (1992) (“Can one attorney or firm properly serve hundreds, let alone thousands, of clients?”).

direct-mail solicitations,” which have yielded thousands of clients.⁷³ In the context of securities and derivative litigation, instead of repeatedly soliciting clients, some attorneys take advantage of “in-house” plaintiffs, “who are virtually satellites of a particular firm” and serve as class representatives in multiple actions.⁷⁴ This same practice occurs in mass-tort cases, where a named plaintiff in one action may serve as the named plaintiff in an entirely unrelated case.⁷⁵

Of course, some class actions involve “positive-value claims.” Unlike negative-value claims, positive-value claims do not depend on the class action device for viability. Instead, they allege injuries sufficiently serious and seek damages of a sufficient amount to justify the costs of individualized litigation. Because these claims are independently viable, plaintiffs have little incentive to bring them as a class.⁷⁶ Thus, if an individual with a positive-value claim brings the claim to an attorney, it is still the attorney who is left to construct the class and conduct the class proceeding. With both negative-value and positive-value class actions, then, it is invariably plaintiffs’ attorneys who seek out plaintiffs and construct the class. In no other established legal proceeding do attorneys play such a central—indeed foundational—role.

The class members’ general lack of involvement in the conduct of the proceeding further strengthens the class attorneys’ role. It is safe to assume that the overwhelming majority of individual class members have little or nothing to do with the conduct of the class proceeding. This is especially true in the context of negative-value classes, but likely applies for the most

73. Coffee, *supra* note 69, at 886. As Professor Coffee notes, these specific solicitations do not offend ethical rules because they are initiated by the labor unions and medical clinics—not the attorneys. *Id.* Direct solicitation, however, does violate ethical rules. See Macey & Miller, *supra* note 70, at 5–6 (“[A]ttorneys are routinely forced to circumvent ethical restrictions on solicitation and maintenance in order to obtain named plaintiffs as their ticket into profitable litigation.”).

74. Coffee, *supra* note 69, at 885. These are typically individuals with broad, but thin, security portfolios. One example is Harry Lewis, who “has been a ‘named plaintiff in several hundred . . . class and derivative actions.’” Douglas M. Branson, *The American Law Institute Principles of Corporate Governance and the Derivative Action: A View from the Other Side*, 43 WASH. & LEE L. REV. 399, 400 n.8 (1986) (quoting Mr. Lewis’s affidavit).

75. Coffee, *supra* note 69, at 885 n.16 (describing “the curious ‘underground railroad’ by which plaintiffs’ attorneys can locate and obtain the services of a valuable plaintiff who can establish standing, diversity jurisdiction, or some other important element of the case”).

76. Professor Coffee believes that it is “rational” for plaintiffs with positive-value claims to prefer the class action device to bringing their claims individually. *Id.* at 904. He argues that the class action device is preferable because it lowers transaction costs, “threatens risk averse defendants with greater liability,” and “avoids a ‘race to judgment’ among competing plaintiffs.” *Id.* We think plaintiffs with positive-value claims are more likely to be concerned with having a say in the litigation of plaintiffs’ rights than with transaction costs, threats to defendants, or races to judgment among plaintiffs. Admittedly, part of this concern with having a say in the litigation of their rights is obtaining the greatest possible award. But as Professor Coffee notes, “some empirical research supports the conventional wisdom that other things being equal, plaintiffs are likely to receive a higher recovery in an individual action than in a class action.” *Id.* at 915.

part to positive-value classes as well. The attorneys direct the suit and make all strategic decisions with little or no consultation with their “clients.”⁷⁷ Indeed, in some class actions, the attorneys never even notify the absent class members of the proceeding, and the class members have no choice as to whether or not to remain members of the class.⁷⁸ As Professor Coffee notes, in what may be something of an understatement, “the retainer agreement in such a context begins to resemble the traditional contract of adhesion.”⁷⁹ Even in situations in which attorneys notify class members they have the right to opt out, class attorneys will almost never have any personal contact with the overwhelming majority of the class.

In a number of situations, the class, as a practical matter, does not even exist in any real sense: while in theory there are injured victims, from the very outset of the proceeding all involved are fully aware that the class proceeding will never reach, much less compensate, the overwhelming majority of the victims. One important way in which the modern class action differs dramatically from the traditional attorney–client relationship is that in the class action context the clients for the most part remain faceless to the attorney representing the class. In contrast, in the traditional individual litigation attorney and client will often develop a bond through one-on-one interaction.

The dominant role class attorneys play is compounded by the fact that class members have limited ability to monitor their attorneys.⁸⁰ Because most litigation decisions are made outside of the clients’ supervision, those decisions are not readily observable. In some instances, especially in the case of negative-value class actions, few class members expect an award large enough to justify the burdens of monitoring their attorneys’ decisions.⁸¹ Indeed, when the class members consider the litigation relatively unimportant, they have no incentive to keep track of either their attorneys or the proceeding. This creates a significant free-rider problem: no class member is willing to incur the costs of monitoring when he would receive such limited benefits.⁸² It is difficult to argue with the rationality of these choices. Of course, this assumes that the class members are even aware a case is pending; often, especially with negative-value claims, the class members are entirely unaware of the litigation, despite having received

77. The situation will be different when certain absent class members are represented by attorneys. At that point, a determination of lead counsel will have to be made. *See* FED. R. CIV. P. 23(g).

78. *See id.* at 23(b)(1)–(2).

79. Coffee, *supra* note 69, at 886.

80. *Id.* at 884; *see also* Macey & Miller, *supra* note 70, at 3 (noting that plaintiffs’ attorneys are “subject to only minimal monitoring by their ostensible ‘clients’ who are [both] dispersed and disorganized”).

81. Macey & Miller, *supra* note 70, at 19–20.

82. *Id.*

formal notice. Thus, the plaintiffs' attorneys inevitably retain a large amount of discretion over the case. Without class members to monitor them, the attorneys have even greater incentives and freedom to direct and control the litigation.⁸³

The structure of the class action, which ensures that the attorneys possess a far greater financial stake in the litigation than any individual member of the class, further enhances the stature and authority of plaintiffs' attorneys. For all of these reasons, it is surely not unreasonable, as a practical matter at least, to characterize the class attorneys as the real parties in interest. Of course, we do not mean to suggest that class attorneys should be deemed the real parties in interest in a formal sense; they could not, for example, assert Article III standing since they do not possess the substantive right being asserted.⁸⁴ But the practical realities of class action practice should not be ignored: in many important ways, it is the class attorneys who have the most at stake in the proceeding, and who have sweeping power to make strategic choices.

C. IMPLICATIONS OF THE REALITIES OF THE MODERN CLASS ACTION: CAPITALISTIC SOCIALISM AND THE "GUARDIANSHIP" MODEL

At this point it is appropriate to attempt to digest the realities of the modern class action and to glean from them an understanding of the class action's impact on American procedural theory. In certain ways, the theoretical framework of the class action amounts to something of an oxymoron. It is, at its core, a form of "capitalistic socialism."

The class action functions as a form of litigation socialism because, like the political theory of socialism, it is generally designed to redistribute wealth from large economic power centers (either government or corporations) to smaller entities and individuals who have been unlawfully injured. The practice is at the same time capitalistic, however, because the attorneys who bring the proceeding have as at least one of their motivations (if not their sole motivation) personal financial gain.

In theory, the practice illustrates the old capitalistic mantra that people can do well by doing good. There are obvious societal benefits derived from the capitalistic socialism dynamic that underlies the class action. Most

83. *Id.* at 3. This "self-interest" often includes negotiating settlements that are good for defense counsels' clients. *Id.* at 21. Because class members do not pick their attorneys (but rather the attorneys pick the class members), plaintiffs' attorneys have little incentive to build reputations that would attract class members. *Id.* They do, however, have significant incentives to build "reputations among the defense bar for . . . [a] willingness to 'deal' by negotiating settlements that minimize the costs to defense counsels' clients." *Id.*

84. The technical party in interest is the party who actually possesses the substantive right being asserted. It is also the party in whose name the action is brought. *See* FED. R. CIV. P. 17(a). Plaintiffs' attorneys do not possess the substantive rights being asserted, nor are class actions brought in their name. However, they do stand to benefit far more from a favorable outcome than the "clients" they represent.

important is the fact that the class action device is capable of circumventing the normal inertia and lack of knowledge that would otherwise render such suits impossible. At least in the case of negative-value classes, the individual claims of victims would never be heard and the perpetrator of the unlawful harm would go unpunished. Because the class attorneys function as a type of economically incentivized guardian, they are able to cut transaction costs and vindicate rights that would otherwise almost certainly go without remedy. For this reason, we characterize the modern class action as a “guardianship” form of litigation.

The most important point to recognize about the guardianship model is that *capitalistic* guardianship is not identical to *altruistic* or *governmental* guardianship.⁸⁵ Capitalistic guardianship, in contrast to the other two forms, is driven primarily, if not exclusively, by concerns of financial profit. That works fine when the capitalistic interests of the guardian are inherently intertwined with the interests of the “wards,” but one should be able to recognize that this is not always the case in the modern class action. The class action device is vulnerable to a variety of externalities or perverse incentives, meaning that in a number of situations the guardian’s profit incentive and the best interest of the wards (i.e., absent class members) may diverge. For example, a number of commentators have noted that in all too many situations, it is *only* the class attorneys, rather than their clients, who benefit financially from the modern class action.⁸⁶ For present purposes, however, the issue is not whether the guardianship litigation model manifested in the class action is good or bad for society. For good or ill, there can be little doubt that as a descriptive matter, at least, the guardianship model represents an accurate characterization of class action litigation. The task at hand, then, is to determine how recognition of the guardianship model as the theoretical core of the modern class action can help solve many of the problems caused by serial attempts at class certification.

D. IMPLICATIONS OF THE GUARDIANSHIP CLASS ACTION MODEL FOR *RES JUDICATA* IN THE CONTEXT OF SERIAL CERTIFICATION ATTEMPTS

The logical implications of the guardianship model dovetail perfectly with the logic of *res judicata*. *Res judicata* doctrine dictates that its bar

85. Altruistic guardians are private guardians who primarily operate not out of a desire for financial gain (which is usually fairly limited) but more out of concern for the needs of the less fortunate. Governmental guardians, while often motivated by the same concerns, are public guardians who hold government office. For example, the Office of the Cook County Public Guardian represents marginalized children and adults in Chicago. See OFF. COOK COUNTY PUB. GUARDIAN, <http://www.publicguardian.org> (last visited Mar. 21, 2014).

86. See, e.g., REDISH, *supra* note 1, at 24–56; John H. Beisner & Jordan Schwartz, *The Value of Class Action*, in THE AM. LAW INST., FORUM ON CLASS ACTIONS AND AGGREGATE LITIGATION 249, 251 (2013); John H. Beisner, Matthew Shors & Jessica Davidson Miller, *Class Action “Cops”: Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1444–45 (2005).

extends to those who (1) have had their day in court on the relevant issues; (2) have the most to gain by relitigating the issues resolved in the first suit; and (3) exercise ultimate control over the strategic decision to seek relitigation. Unless the third factor is included in the *res judicata* calculus, the doctrine will have little restrictive or deterrent force and therefore fail in achieving its goal of preventing burdensome, wasteful, and harassing relitigation. In contrast, if the first factor is not satisfied, the due process rights of the new plaintiffs to their day in court will have been denied, rendering the application of *res judicata* unconstitutional.

In traditional litigation, it is relatively easy to apply these three criteria. The litigant herself satisfies all three. Because of the unique guardianship relationship of attorney and client in the class action, however, it is impossible to reach a similar conclusion on direct estoppel of the first court's denial of certification. Viewing class attorneys as profit-driven guardians of absent class members enables the court in the second action to accurately view the attorneys who brought the first action as the real parties in interest for purposes of direct estoppel on the issue of class certifiability. To be sure, the class attorneys cannot properly be deemed real parties in interest as a *formal* matter—for example, for purposes of the standing required by Article III's case-or-controversy requirement. For that purpose, only the injured victims themselves qualify.⁸⁷ But it is important to note that the primary purpose of the 1966 revision of Rule 23 (as well as many of the other multi-party joinder devices) was to make the procedures responsive to practical, as well as formalistic, concerns.⁸⁸ Viewing class attorneys as pragmatic real parties in interest solely for purposes of *res judicata* fits well with the multi-party joinder rules' modern focus on considerations of practicality.⁸⁹

It is important to understand the limited nature of our proposed solution to the serial certification relitigation problem. By focusing exclusively on the class attorneys (as well as the named plaintiffs) in the original action, we intentionally exclude from the reach of direct estoppel those who were absent members of the putative class in the initial action. We do so for the simple reason that these litigants have never had their day in court on the issue of class certifiability. To be sure, by extending direct estoppel to the attorneys in the initial action, there will inescapably be an incidental impact on those absent class members, since they will now be

87. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (explaining that the first element of standing under Article III requires that "the plaintiff must have suffered an 'injury in fact'").

88. See *supra* notes 14–15 and accompanying text.

89. See FED. R. CIV. P. 24(a) (focusing intervention on whether the disposition of action "may as a practical matter impair or impede the . . . ability to protect" the intervenor's interest); *id.* at 19(a) (requiring parties to be joined where feasible, else risking a negative impact on the absent party "as a practical matter").

denied the opportunity to retain those attorneys to seek class certification on their behalf. But because they will still be free to retain any unrelated attorney and are not precluded from seeking certification, their due process right to their day in court will not be undermined as a result of this incidental impact.

Our solution represents the most appropriate resolution of the dilemma between preserving the due process rights of the absent members of the putative class on the one hand and protecting defendants against the burdens and harassment of serial recertification attempts, on the other hand. By focusing the restrictive reach of res judicata on the class attorneys as the effective real party in interest—that is, the actor with the most at stake and ultimate strategic decision-making power—our solution assures that res judicata will perform its intended function and protect defendants from manipulative and coercive serial certification attempts. Yet by excluding from the reach of direct estoppel those who have never had their day in court, our solution preserves the due process rights of those who have not had the opportunity to advocate in favor of class certification.

It is true that our solution is by no means optimal from defendants' point of view. They would no doubt prefer to have the initial denial of certification stand as the equivalent of a pure in rem action, binding the entire world. Our answer, bluntly, is that, for reasons already explained, the Due Process Clause simply does not permit such a result. However, one cannot underestimate the benefits of our proposed solution to class defendants. Its greatest contribution is that it prevents the manipulative gamesmanship class attorneys cause by simply substituting fungible members of the putative class as plaintiffs in a heretofore successful attempt to circumvent the intended purposes of res judicata.

Applying our solution to the facts of *Bridgestone II* clarifies how our proposal would work in practice.⁹⁰ Recall that at issue in *Bridgestone II* were two separately certified nationwide classes: one for customers of Ford trucks and one for customers of Bridgestone tires.⁹¹ However, the Seventh Circuit denied certification of both classes on appeal.⁹² In response to this denial, plaintiffs' attorneys petitioned the Supreme Court for certiorari. When that failed,⁹³ plaintiffs' attorneys filed at least five additional motions for certification of the same two classes in other forums.⁹⁴

Our solution would have precluded the plaintiffs' attorneys from filing additional motions of certification. However, it would not have precluded the absent class members from doing the same, as long as they were

90. See *supra* Part III.

91. *Bridgestone II*, 333 F.3d 763, 765 (7th Cir. 2003), *abrogated by* *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011).

92. See *id.* (noting that *Bridgestone II* came after the denial of certification in *Bridgestone I*).

93. *Gustafson v. Bridgestone/Firestone, Inc.*, 537 U.S. 1105 (2003) (denying certiorari).

94. *Bridgestone II*, 333 F.3d at 765.

represented by attorneys unconnected to the attorneys responsible for bringing the initial suits. Thus, had the absent class members chosen to bring additional motions for certification, and enlisted the help of different attorneys, they would not have been precluded from doing so. Our solution would apply only if the same attorneys who had brought the original motion for certification also brought a motion for certification on behalf of the absent class members. Our solution operates against the plaintiffs' attorneys to ensure that, as the real parties in interest, they do not get more than one opportunity to litigate the question of certification.

V. GOING TOO FAR AND NOT GOING FAR ENOUGH: THE PROBLEMS WITH PROPOSED SOLUTIONS TO THE RELITIGATION OF CLASS CERTIFICATION

Prior to our proposal, three solutions to the problem of serial class certification attempts emerged, one adopted by the Seventh Circuit in *Bridgestone II*, a second proposed by the Supreme Court in *Smith v. Bayer*, and a third proposed by the American Legal Institute ("ALI"). For reasons to be discussed, however, all three approaches are seriously flawed.

A. GOING TOO FAR: THE BRIDGESTONE II SOLUTION

The court in *Bridgestone II* precluded all class members and their attorneys from filing any additional motions for certification of the same nationwide classes.⁹⁵ The class members could still bring their claims either individually or as part of a different class action (such as one limited to a single state), but they could not bring them as part of a nationwide class. The court explained that its previous denial of certification in *Bridgestone I* was "binding in personam."⁹⁶ But a decision that binds thousands, if not millions, of unnamed class members who were never before the court can hardly be considered in personam. By precluding absent class members from bringing additional motions for certification, the court turned what should have been an in personam decision into the equivalent of a pure in rem decision: one that binds the entire world. This result, however, is inconsistent with well-established principles of both the law of judgments and the constitutional dictates of procedural due process.

The court reasoned that because unnamed class members benefit from favorable judgments, they should also be bound by unfavorable judgments,⁹⁷ and therefore it was fair to bind all absent class members to its denial of certification in *Bridgestone I*. But this argument overlooks the crucial distinction between certified and uncertified classes. Unnamed class members of an uncertified class do not receive the benefit of favorable

95. *Id.* at 769.

96. *Id.*

97. *Id.* at 768 (citing *Williams v. Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266 (7th Cir. 1998)).

judgments—at least not any more than any future litigant might benefit from collateral estoppel due to the now-accepted breach of mutuality.⁹⁸ It is only unnamed class members who are part of a *certified class* who receive formal benefit of those judgments. Unnamed class members who are part of an uncertified class (and thus are not really *members* of anything) cannot constitutionally be bound by a decision merely because they would have benefited from the decision if the class has been certified and a court rendered a favorable judgment. They have not had their day in court, nor are they in privity with those who have. Thus, the major problem with the court's solution was its failure to deal effectively with the due process concern triggered by binding a party, through direct or collateral estoppel, to a finding on which she did not have her day in court. Without certification of the class, absent parties have no connection to the named parties who litigated and lost on the certification issue.

The court's argument that in denying certification the district court had explicitly found that the named parties adequately represented the absent claimants fails to justify its extension of estoppel to those absent claimants. It is black-letter judgments law that findings which were not necessary to the decision have no estoppel impact, either direct or collateral, in future litigation, even on litigants who did have their day in court.⁹⁹ This is true both because there can be no assurance that the fact finder devoted sufficient attention to an issue irrelevant to the case's ultimate resolution and because the litigant who lost on that issue but was victorious overall has no incentive to appeal the negative ruling.¹⁰⁰ Moreover, the absent claimants themselves did not have their day in court on the issue of whether they were in fact adequately represented by the named parties and therefore cannot be bound by that finding.¹⁰¹ In any event, following the Supreme Court's decision in *Taylor v. Sturgell*, the mere fact that absent claimants were "adequately represented" in a prior suit—at least without a more formalized connection to or relationship with the losing litigant in that prior suit—does

98. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326–27 (1979) (expanding breach of mutuality doctrine).

99. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is *essential to the judgment*, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." (emphasis added)); see also *Halpern v. Schwartz*, 426 F.2d 102, 105 (2d Cir. 1970) ("It is well established that although an issue was fully litigated and a finding on the issue was made in the prior litigation, the prior judgment will not foreclose reconsideration of the same issue if that issue was not necessary to the rendering of the prior judgment, and hence was incidental, collateral, or immaterial to that judgment.")

100. RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. h.

101. *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 260–61 (2d Cir. 2001) (explaining that a finding of adequate representation in a prior proceeding cannot bind absent litigants in a present action because they did not have the opportunity to challenge the adequacy of representation), *aff'd in part, vacated in part*, 539 U.S. 111 (2003).

not mean that the findings in that suit may constitutionally bind those claimants.¹⁰²

In defense of the *Bridgestone II* court's decision to bind the absent claimants, we should acknowledge the relatively limited nature of the estoppel impact from the prior suit. Those claimants did not lose their substantive cause of action as a result of the earlier refusal to certify the class. Indeed, they did not even lose their opportunity to seek certification of a geographically limited class. All they were deprived of was the opportunity to seek certification of a nationwide class action because of the district court's earlier refusal to certify such an action. But while accurate as far as it goes, this argument does not alter the due process calculus. The fact remains that litigants who had no connection to a prior litigation are being bound by a finding in that litigation, and as a result the procedural options open to them are being limited.

In some circumstances, the impact of the *Bridgestone II* court's solution would go even further: it would not only deprive absent class members of their right to participate in the litigation of their claims, it would also, as a practical matter, deprive them of their right to bring their claims at all. It is important to recall that class actions enable plaintiffs to bring claims that otherwise could not stand on their own.¹⁰³ Individually, these negative-value claims are too small to justify the costs of individualized litigation, but when many of these negative-value claims are combined into a single class proceeding their litigation becomes economically viable. Denying plaintiffs the right to bring negative-value claims as a class effectively precludes them from bringing negative-value claims at all.¹⁰⁴ Although several scholars have argued that plaintiffs have no right to the use of procedural devices separate from their right to bring the underlying substantive claim,¹⁰⁵ in the case of negative-value claims a plaintiff's right to the class action device is equivalent to her right to bring the underlying substantive claim itself.¹⁰⁶ By precluding

102. *Taylor v. Sturgell*, 553 U.S. 880, 904–06 (2008). See generally Redish & Katt, *supra* note 9.

103. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (“Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually.”); see also *supra* notes 69–70 and accompanying text.

104. *Phillips Petroleum Co.*, 472 U.S. at 809 (noting that, with small claims, “most of the plaintiffs would have no realistic day in court if a class action were not available”).

105. See, e.g., Wolff, *supra* note 66, at 2104 (“[O]ur legal system treats even important procedural and remedial doctrines as matters as to which individuals have no constitutionally recognized prelitigation entitlement or expectation.”). We should note that even if one were to accept Professor Wolff's assertion, it by no means follows that holding absent litigants to a denial of class certification would satisfy due process. Due process requires that a litigant be provided his day in court, even on factual or mixed law fact issues for which he has no independent constitutional right. One should not confuse the “constitutional fact” doctrine with a litigant's due process right to her day in court.

106. Professor Wolff acknowledges this possibility:

absent class members from bringing additional motions for certification, plaintiffs may, in some circumstances, be precluded from bringing their claims at all. Moreover, unless litigants or their privies had their day in court in the litigation of a particular factual issue, due process precludes imposing any form of estoppel impact from the prior courts' findings. The mere fact that those litigants have not been deprived of their right to sue is of no consequence.

As already noted, the court in *Bridgestone II* was attempting to treat the initial denial of certification as a form of a pure in rem proceeding, which binds the entire world.¹⁰⁷ But there is no res involved in a proceeding to certify a class action. The only rights involved are purely personal rights, and the only litigants who can be bound by findings made in the denial of certification are those who had their day in court or who were in privity with those who did. As serious as the problem of serial certification is, it cannot constitutionally be resolved through resort to measures that undermine core dictates of procedural due process.

B. NOT GOING FAR ENOUGH: THE BAYER COURT'S SOLUTION

While the *Bridgestone II* court's solution goes too far, the *Bayer* Court's solution does not go nearly far enough. In declining to authorize a federal injunction to protect the earlier federal court's refusal to certify the class action, the Court in *Bayer* acknowledged the harmful consequences of its decision for the defendant, and then suggested a solution:

Bayer claims that this Court's approach to class actions would permit class counsel to try repeatedly to certify the same class simply by changing plaintiffs. But principles of stare decisis and comity among courts generally suffice to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs. . . . And to the extent class actions raise special relitigation problems, the federal Class Action Fairness Act of 2005

In a negative-value or small-stakes case, aggregate treatment is likely to be the only mechanism by which class members can obtain a recovery. In such a case, an injunction that broadly prevents any subsequent class action on a body of claims following a denial of certification would be the functional equivalent of an adverse judgment extinguishing those claims. In many cases, however, it will be possible to craft an order that enforces the denial of certification in the original lawsuit without foreclosing the possibility that a more narrowly defined class action could properly be certified in a subsequent proceeding.

Id. at 2105–06 (emphasis omitted) (footnote omitted). Wolff then argues that because it was limited to nationwide classes, the Seventh Circuit's injunction in *Bridgestone II* was one of those "narrowly crafted injunction[s]." *Id.* at 2106. It is easy to imagine, however, instances where the class cannot be so easily narrowed, such as when the class action is already limited to one state.

107. See MARCUS, REDISH, SHERMAN & PFANDER, *supra* note 6, at 689.

provides a remedy that does not involve departing from the usual preclusion rules.¹⁰⁸

In other words, the Court was suggesting that defendants subjected to the relitigation of class certification persuade the second court, in the spirit of comity and stare decisis, to follow the first court's denial of certification.

The Court also suggested that, "to the extent class actions raise special problems of relitigation,"¹⁰⁹ the Class Action Fairness Act ("CAFA")¹¹⁰ would provide a remedy. CAFA significantly expanded federal jurisdiction over class actions by allowing defendants to remove to federal court, within specified boundaries, any class action with minimal diversity of citizenship and an amount in controversy exceeding five million dollars.¹¹¹ Although the Court did not explain exactly how CAFA provided a remedy to potential victims of serial certification attempts, presumably it was suggesting that defendants faced with additional motions for certification in state court could use CAFA to remove those proceedings to federal district court and then persuade that court to adhere to the first federal court's denial of certification, purely as a matter of stare decisis. As a solution to the problem of serial certification, however, the Court's proposal leaves much to be desired.

We should emphasize that the concerns that motivated the *Bayer* Court to refuse to uphold the district court's injunction against the state class proceeding were legitimate. While the *Bridgestone II* solution was born out of concerns over gamesmanship and forum shopping on the part of class attorneys, the *Bayer* Court's decision was rooted in concerns for the rights of absent class members. The Court made clear that a denial of certification binds only the parties to a suit and those in privity with them, and that the exceptions to the rule against non-party preclusion are severely limited.¹¹² According to the Court, the federal court's denial of certification could not bind the state court plaintiff in *Bayer* because he had not been a party to the federal suit and did not fall under any of the limited exceptions to the rule against nonparty preclusion.¹¹³ The state court plaintiff was, with respect to the federal suit, an unnamed member of an uncertified class. He was neither a party to the first suit nor in privity with someone who was. While the Court acknowledged that in an earlier case it had held that an unnamed class member of a *certified* class could be considered a party for the purpose of appealing an adverse decision,¹¹⁴ it observed that "no one in that case was

108. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2372, 2381–82 (2011).

109. *Id.* at 2381.

110. Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453 & 1711–1715 (2012).

111. 28 U.S.C. § 1332(d)(2).

112. *Bayer*, 131 S. Ct. at 2379–80.

113. *Id.*

114. *Id.* at 2379 (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002)).

‘willing to advance the novel and surely erroneous argument that a non-named class member is a party to the class-action litigation before the class is certified.’”¹¹⁵ The Court noted further that the state court plaintiff did not fall under any of the exceptions to the rule against non-party preclusion.¹¹⁶ More specifically, the Court held that Bayer’s argued-for exception, that “nonparties can be bound in ‘properly conducted class actions’” did not apply, because an uncertified class cannot be considered a properly conducted class action.¹¹⁷ While the Court was correct in placing the due process rights of absent class members above the concededly legitimate interests of the victims of serial certification attempts, its suggestion that these victims invoke removal under CAFA provides at best a band-aid for a very serious problem.

The first difficulty with the Court’s solution is that CAFA does not apply to all class actions, and even when it does apply, CAFA grants district courts discretion to decline jurisdiction. In class actions lacking even minimal diversity or in class actions valued under five million dollars, CAFA fails to provide federal jurisdiction.¹¹⁸ In state court class actions where more than one-third but less than two-thirds of the class, as well as the “primary defendants,” are from the state in which the claim is brought, CAFA gives district courts discretion to decline jurisdiction.¹¹⁹ In exercising this discretion, CAFA directs district courts to consider a number of different factors, including whether the class actions “involve matters of national or interstate interest”¹²⁰ and whether the class actions “will be governed by laws of the State in which the action was originally filed or by the laws of other States.”¹²¹ Thus, CAFA effectively encourages the district court to decline jurisdiction when state court class actions assert claims that do not involve matters of national or interstate interest and are governed by the law of the forum state. While CAFA does suggest that district courts should be wary of class actions that have “been pleaded in a manner that seeks to avoid Federal jurisdiction,”¹²² which would include attempts to relitigate the question of certification once a federal court has denied certification, CAFA does not require district courts to assert jurisdiction over these actions. Thus, there will undoubtedly be instances where a defendant subject to the relitigation

115. *Id.* (quoting *Devlin*, 536 U.S. at 16 n.1 (Scalia, J., dissenting)).

116. *Id.* at 2380.

117. *Id.* (quoting *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008)).

118. 28 U.S.C. § 1332(d)(2) (2012).

119. *Id.* § 1332(d)(3).

120. *Id.* § 1332(d)(3)(A).

121. *Id.* § 1332(d)(3)(B). Although it is clear that a state court would be better at applying its own law than would a federal court, it is not clear that a federal court would be better at applying the other state’s law than would the court in the forum state.

122. *Id.* § 1332(d)(3)(C).

of class certification in state court will be unsuccessful in its attempt to remove serial certification attempts to federal court.

Further complicating the Court's reliance on CAFA is the fact that in certain circumstances, the statute actually requires district courts to decline jurisdiction. Under CAFA, when two-thirds or more of the members of a proposed class action, as well as the "primary defendants," are from the forum state, the district court cannot assert jurisdiction.¹²³ Similarly, when two-thirds or more of a proposed class action, as well as one defendant against whom significant relief is sought, are from the forum state, the district court is again required to decline jurisdiction.¹²⁴ In these situations, a defendant faced with the relitigation of class certification cannot rely on CAFA to remove state court proceedings to federal court. In addition, CAFA does not grant federal courts jurisdiction over state class actions where "the primary defendants are States, State officials, or other governmental entities"¹²⁵ or where the number of plaintiffs in the proposed class is less than one hundred.¹²⁶

By emphasizing the limitations on CAFA's reach we do not intend to understate the significant extension of federal jurisdiction in class action suits brought about by the statute. Certainly, defendants may now remove more class actions filed in state court to federal court than they could have prior to Congress's enactment of CAFA. We merely seek to underscore the indisputable fact that federal jurisdiction under CAFA is by no means limitless.

More importantly, even where CAFA does authorize removal, it in no way automatically puts an end to the class defendants' problems. It is true, of course, that removal would necessarily moot any issue involving the relitigation exception to the Anti-Injunction Act,¹²⁷ since there would no longer be an opportunity for a federal court to consider enjoining an ongoing state proceeding.¹²⁸ But that fact in no way avoids the serious

123. *Id.* § 1332(d)(4)(B).

124. *Id.* § 1332(d)(4)(A). The single defendant must be one "from whom significant relief is sought by members of the plaintiff class" and "whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class." *Id.* § 1332(d)(4)(A)(i)(II)(aa)–(bb). This section also requires that 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" and that "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)(i)(III), (A)(ii).

125. *Id.* § 1332(d)(5)(A).

126. *Id.* § 1332(d)(5)(B).

127. *Id.* § 2283; *see also supra* note 3 and accompanying text.

128. Though a federal injunction against a collateral federal proceeding is theoretically possible, such an occurrence is highly unlikely. *Cf. Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183–85 (1952) (recognizing broad equitable discretion in lower federal courts on the issue of inter-federal injunctions).

problems of res judicata to which the Supreme Court's decision in *Bayer* gave rise. Instead, it merely shifts the problem from the court that decided the first suit to the court hearing the second suit.

The Court in *Bayer* was probably correct in predicting that in many instances the second federal court would defer to some extent to the first court's denial of certification in the prior suit. But it is impossible to be certain of this fact. After all, it should come as no surprise to careful observers to learn that federal courts across the nation on numerous occasions differ with each other on questions of both law and fact. Different federal judges appointed by ideologically different administrations may well have different views towards the appropriateness of class action. Moreover, attorneys representing different litigants may well differ in the persuasiveness and effectiveness of their arguments on behalf of certification. Unless the second federal court were to treat stare decisis as the rough equivalent of a form of collateral estoppel—something it has no authority to do—these differences may well result in a different outcome on certification in the second case than it did in the first. Even assuming the best-case scenario from the defendants' perspective, in the absence of a finding of direct estoppel on the certification issue the second federal court would be shirking its responsibility to the new plaintiffs if it did not engage in its own independent examination of the merits of the arguments supporting certification. This could become especially burdensome for defendants in light of the post-*Wal-Mart v. Dukes* emphasis on preparation of a case's specific factual record prior to certification and the resulting need to provide putative class plaintiffs with an opportunity for merits-based discovery,¹²⁹ which presumably could not properly be confined to whatever discovery the prior plaintiffs had undertaken. In short, it would be naïve to assume that the class defendants would get res judicata-like summary dismissal of a second attempt to obtain certification when the court does not formally apply res judicata. Thus, the fact that, after CAFA, the second class suit will be in federal rather than state court will likely be of relatively limited strategic benefit to defendants in their effort to avoid the expense and burdens involved in battling serial attempts to certify the same class.

One possible reason why CAFA's expanded opportunities for removal of state class actions to federal court might be thought to avoid the serial certification problem is that once the state class action is removed it may be combined into a single multi-district action with the initial suit.¹³⁰ This would avoid the problem caused by the absence of direct estoppel on the issue of certification. But the multi-district litigation ("MDL") alternative is

129. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) ("A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.").

130. See 28 U.S.C. § 1407.

of absolutely no strategic value when the federal and state class actions are filed seriatim, rather than simultaneously. In such a situation, the second action is not filed until the first action has been already disposed of due to the denial of certification.¹³¹

For many of the same reasons, the ALI's proposed solution to the relitigation of class certification, which had been proposed prior to the decision in *Bayer*, should be of little comfort to class defendants. The ALI's solution is to create a rebuttable presumption against certification. The ALI proposed that a "judicial decision to deny aggregate treatment for a common issue or for related claims by way of a class action should raise a rebuttable presumption against the same aggregate treatment in other courts as a matter of comity."¹³² In other words, once one court denies certification of a class, a second court, considering certification of the same class, should presume that the first court's denial was correct. This presumption is grounded in the principle of comity, which the ALI has defined as "the authority of the subsequent court to exercise discretion in its aggregation decision so as to avoid, insofar as is possible, unnecessary friction between judicial systems."¹³³ Plaintiffs can overcome this presumption by affirmative showings, such as a demonstration of inadequate representation in the first suit or a demonstration that the basis for the initial denial of certification is no longer present.¹³⁴

Not surprisingly, the problems with the ALI's solution are similar to the problems with the Court's suggested solution in *Bayer*: it is not much of a solution at all. The ALI's rebuttable presumption is roughly equivalent to the Court's suggestion that defendants who face relitigation of class certification rely on the principles of stare decisis to convince the second court to follow the first court's denial of certification. Indeed, what is stare decisis if not a rebuttable presumption in favor of following another court's ruling?

On the other hand, it is arguable that the ALI's proposal would amount to stronger medicine than simple stare decisis. Recall that the ALI would permit plaintiffs to rebut its presumption either by an affirmative showing that representation in the first suit was inadequate or that controlling circumstances have changed.¹³⁵ Note the extremely important dog that is not barking here: there is no mention of the presumption being rebutted by

131. It is conceivable that while the putative class action no longer exists, the individual actions of the named plaintiffs could continue. But if the plaintiffs' attorneys are seeking to coerce defendants into settling by pursuing a strategy of serial certification attempts, it would make sense for them to drop any ongoing individual actions to prevent any possibility of an MDL proceeding.

132. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.11 (2010).

133. *Id.* § 2.11 cmt. b.

134. *Id.* § 2.11 cmt. c.

135. *See id.*

a convincing showing that the first court had simply been wrong in its denial of certification. If it is in fact true that the ALI's proposal would deny the putative class plaintiff in the second suit the opportunity to challenge the first court's denial of certification on its own merits, then the proposal would indeed go well beyond the force of mere *stare decisis*. But if so, then for all practical purposes the ALI's proposal would be guilty of exactly what the ALI condemned others for: extending a type of impermissible "virtual representation" of plaintiffs in the second suit by plaintiffs in the initial suit.

The ALI's proposal, then, appears to reach a dead-end. On the one hand, class defendants have very legitimate concerns about strategic attempts to force them into settlements in what may well be wholly non-meritorious class actions through coercive and wasteful attempts at class certification in different courts. On the other hand, proposals made to date to solve these problems have been shown to be medicine that is either too strong (because they would violate the due process rights of potential class plaintiffs to their day in court), or too weak (because they would leave defendants vulnerable to many of the same dangers they faced at the outset).

At this point it is appropriate to explore our proposed solution to ameliorate the problem: treating the attorneys who brought the initial certification attempt (along with the named plaintiffs in that suit) as the real parties in interest for purposes of direct estoppel on the first court's denial of certification. In this way, the doctrine of *res judicata* would be modified to account for the realities of the class action by focusing on the actor responsible for the strategic decision to make multiple motions for certification and who had the most at stake in the certification decision. Our proposed solution does so without depriving individual litigants who were not formal parties in the first litigation of their opportunity to seek certification, if represented by attorneys lacking any formal or informal connection to the prior suit.

VI. IMPLEMENTING THE SOLUTION

To this point, we have sought to establish that the only effective means of resolving the serial certification dilemma is to extend the reach of direct estoppel to include not only the putative class plaintiffs, but also the attorneys who brought the original proceeding.¹³⁶ The question thus arises as exactly how to implement this solution. The most likely methods, although not the only methods, are as a judge-made extension of direct estoppel, as an amendment to Rule 23 of the Federal Rules of Civil Procedure, or as a freestanding federal statute.

The simplest method of implementation would be in the form of a judge-made extension of the reach of direct estoppel. Indeed, in a certain

136. See *supra* Part IV.

sense our solution is nothing more than the recognition, purely as a matter of common law doctrine, that in the case of the relitigation of class certification, direct estoppel should apply to both the *technical* parties in interest and the *practical* parties in interest, namely, the class attorneys. Courts' application of direct estoppel to class action attorneys would function in the same way as their application of direct estoppel normally does. First, the preclusive effect of the initial denial of certification would fall to the second court. There, the defendant would raise the issue of direct estoppel as an affirmative defense. The court would then determine whether the defendant established the requirements necessary for direct estoppel. The court would first determine whether the issues were the same, which would require an inquiry into whether the second motion for certification concerned the same plaintiff class, was brought by the same attorney,¹³⁷ and was based on the same legal standards.¹³⁸ The court would then determine whether the question of certification was "actually litigated" and was "essential" to a "valid and final judgment."¹³⁹ The plaintiff would then be able to contest these showings.¹⁴⁰ To be sure, delicate factual issues may arise in the course of the adjudication of the res judicata challenge. This is especially true when the first class action is in a federal court and the subsequent action is brought in a state court. Under these circumstances, either the federal court in exercising its authority under the All Writs Act¹⁴¹ combined with the relitigation exception to the Anti-Injunction Act¹⁴² or the state court invoking res judicata, will have to determine the extent of overlap between the standards. But this is simply a necessary by-product of the res judicata inquiry any time the doctrine comes into play. It is in no way unique

137. Here, the court would also want to consider whether the same firm was bringing the suit, even if it was with a different attorney. The court might even consider the possibility that the attorney had set up a "shell firm" to distract the court from the fact that the attorney was still the real party in interest. The existence of a financial relationship would be telling.

138. Although many states have adopted the text of the Federal Rules of Civil Procedure, they have not always adopted federal courts' application of the Rules. The ALI suggested that this difference in procedural rules will often result in the application of different legal standards, which the ALI thought would be a problem for the application of issue preclusion. See RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. b (1982). The Supreme Court agreed. See *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2377–78 (2011) (noting that although West Virginia had adopted the text of Rule 23, it had explicitly disavowed federal interpretations of it, suggesting that the standard by which a West Virginia court would evaluate a motion for certification was different than the standard by which a federal court would evaluate a motion for certification).

139. RESTATEMENT (SECOND) OF JUDGMENTS § 27.

140. A judge-made extension of direct estoppel would look different if the first court was federal, the second court was state, and the estoppel was effectuated through the relitigation exception to the Anti-Injunction Act. There, the first court would have the authority to determine the effect of its denial of certification.

141. 28 U.S.C. § 1651 (2012) (authorizing the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law").

142. *Id.* § 2283.

to our proposed expansion of the concept of real party in interest in an effort to resolve the inherent unfairness, inefficiency, waste, and harassment caused by serial motions for certification.

An amendment to Rule 23, unlike a judge-made extension of direct estoppel, would allow for more flexibility, because the amendment could dictate the specific parameters of the estoppel. The Rules Advisory Committee, however, has already considered and rejected an amendment that would have given preclusive effect to a denial of certification.¹⁴³ The amendment would have lodged the power of preclusion in the first court, giving it the authority to prohibit absent class members from bringing additional motions for certification.¹⁴⁴ The Committee rejected the amendment based on its concern that the amendment might violate the Rules Enabling Act's prohibition on procedural rules that modify substantive rights.¹⁴⁵ Whether this conclusion flows from a proper reading of the Rules Enabling Act is an issue beyond the scope of this Article.¹⁴⁶

A freestanding federal statute would allow for considerably more flexibility than an amendment to the Federal Rules, since Congress possesses authority to supersede its prior enactments. A statute could specify not only which court would have the authority to determine the preclusive effect of a denial of certification, but also which parties had to make what, if any, affirmative showings to the court.¹⁴⁷ Like the other methods of implementation, however, an independent statute is not without its obstacles. It would require Congress to recognize that plaintiffs' attorneys

143. The proposed amendment read:

A court that refuses to certify—or decertifies—a class for failure to satisfy the prerequisites of Rule 23(a)(1) or (2), or for failure to satisfy the standards of Rule 23(b)(1), (2), or (3), may direct that no other court may certify a substantially similar class to pursue substantially similar claims, issues, or defenses unless a difference of law or change of fact creates a new certification issue.

Memorandum from David. F. Levi to Honorable Anthony J. Scirica, *supra* note 65, at 40 (quoting proposed amendments to Fed. R. Civ. P. 23).

144. *See id.* at 44.

145. *See* 28 U.S.C. § 2072(b) (stating the Federal Rules “shall not abridge, enlarge or modify any substantive right”); *see also* Memorandum from the Honorable David F. Levi, U.S. Dist. Judge, to the Civil Rules Advisory Committee 16 (May 7, 2002), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2002.pdf>.

146. Compare Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 764 (1986) (“[T]he Federal Rules of Civil Procedure do not provide federal preclusion law, because the Rules Enabling Act does not authorize Federal rules of preclusion.”), with Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 92 (2008) (“[A] dismissal with prejudice is precisely the kind of substantive club by which courts can encourage litigants to heed procedural directives.”).

147. Examples would include showings that the plaintiff's attorney who brought the second motion for certification was in fact the same attorney that brought the first motion for certification.

are the real parties in interest. This may be difficult, given how politicized the issues surrounding class actions can be. However, in the right political climate, an independent statute precluding plaintiffs' attorneys from bringing additional motions for certification would be feasible.¹⁴⁸

We remain agnostic as to which method of implementation is best. The goal of this Article is to examine the realities of the modern class action and consider whether the law has responded to these realities. For all practical purposes, plaintiffs' attorneys are the real parties in interest, and the law has yet to acknowledge this. We suggest a response to this reality. For our purposes, little turns on which of the three alternatives is ultimately chosen as a method of implementation.

CONCLUSION

The problem of serial class certification attempts is a serious concern, and the Supreme Court's decision in *Bayer* did little to ameliorate it. In contrast, approaches like the one the Seventh Circuit employed in *Bridgestone II* go unacceptably far because they improperly transform an in personam litigation into a pure in rem action that binds the entire world. In so doing, the approach inescapably contravenes the due process rights of potential class members who never had their day in court.

We propose to resolve the dilemma by recognizing the unique relationship between attorney and client in the modern class action. Invariably, class attorneys today generally function not as merely the class members' legal representatives but rather as their guardians. It is the class attorneys, not the class members, who ultimately make all strategic decisions and who have the most at stake, financially speaking. Since it is the class attorneys who make the strategic choice of when and where to sue, it is appropriate to modify the direct estoppel branch of res judicata doctrine to extend it to include class attorneys, as well as the putative named plaintiffs.

We fully recognize that our proposal is by no means a panacea. But if adopted, it should avoid much of the unfairness, systemic inefficiencies, and waste associated with serial certification attempts. That would, we believe, represent a significant advance in the state of the law.

148. Indeed, a Republican Congress passed CAFA, which is undeniably pro-defendant. The possibility of an independent statute may simply depend on the political climate.