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Civil Procedure—Class Arguing False Advertising of Health Supplement Meets Sixth Circuit's Moderate Rule 23 Standards—*Rikos v. Proctor & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015).

Patrick Ouellette*

Rule 23 of the Federal Rules of Civil Procedure governs class action lawsuit certification, mandating that members of a class suit share a common question of law or fact among their claims and that their claims represent those that are typical of the class.[1] Based on these prerequisites, a court will generally use an abuse of discretion analysis when reviewing whether a lower court properly certified a class.[2] The Sixth Circuit in *Rikos v. Proctor & Gamble Co.*[3] examined whether the District Court for the Southern District of Ohio abused its discretion by granting class certification for plaintiffs from California, Illinois, Florida, New Hampshire, and North Carolina. The court affirmed the district court's decision to grant class certification in a suit against Proctor & Gamble ("P&G") for false advertising because it concluded that all members

* J.D. Candidate, Suffolk University Law School, 2017; B.A. University of Rhode Island, 2008. Mr. Ouellette may be contacted at pouellette583@gmail.com.

[1] *See* FED. R. Civ. P. 23(a)(1) (discussing that volume is needed for joinder of all members to be impracticable); Fed. R. Civ. P. 23(a)(2) (requiring existence of common questions of law or fact for the class); FED. R. CIV. P. 23(a)(3) (mandating an adequate relationship exist between plaintiff's injury and the conduct affecting the class). *See also* Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 163 n.13 (1982) (discussing how the two provisions are often considered by courts in tandem).

[2] *See* United States v. Haywood, 280 F.3d 715, 720 (6th Cir. 2002) (detailing how there must be a clear mistaken application of the law). *See also* Nicholas A. Fromherz, *A Call for Stricter Appellate Review of Decisions on Forum Non Conveniens*, 11 WASH. U. GLOBAL STUD. L. REV. 527, 559 (2012) (describing how courts typically use the abuse of discretion standard in class certification decisions). Abuse of discretion analysis calls for more than just a "rubber stamp" in affirming a lower court's decision and instead requires meaningful review by the higher court. *Id.* at 599.

[3] *See* 799 F.3d 497, 504 (6th Cir. 2015) (explaining the rationale for affirming the district court's decision).

were exposed to P&G's advertising of the health supplement Align.[4]

Defendant P&G began test marketing Align in October 2005 as a product that helps build and maintain a healthy digestive system, restore natural digestive balance, and protect against occasional digestive upsets, and started offering it to all states in 2009.[5] Dino Rikos bought the product in 2009 and was the first plaintiff to allege that P&G's advertising of Align was "false and misleading" when he filed suit against the company in 2011.[6] Following a transfer from the U.S. District Court for the Southern District of California to the Southern District of Ohio, the court granted in part and denied in part P&G's motion to dismiss, and the court refused to make a class action decision until the plaintiffs submitted a motion for class certification.[7] Later, the court granted P&G's motion for partial judgment on the pleadings and to dismiss certain claims from the first and second amended complaints.[8]

When the plaintiffs filed the second amended complaint, they included a motion for class certification and requested that they serve as class representatives for five states: Rikos represented the California and Illinois plaintiffs, Tracey Burns represented the Florida and North Carolina plaintiffs, and Leo Jarzembrowski represented the New Hampshire plaintiffs.[9] Together, the three plaintiffs represented

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[4] *Id.* at 507-08.

[5] *Id.* at 505-06 (describing marketing purposes of the drug).

[6] *See* Rikos v. Proctor & Gamble Co., 782 F. Supp. 2d 522, 530 (S.D. Ohio 2011) (outlining why Rikos initially brought suit).

[7] *Id.* at 542 (explaining why the court declined to comment on a class suit). The court granted only Rikos's claim for injunctive relief and denied all other claims. *Id.*

[8] *See* Rikos v. Proctor & Gamble Co., No. 1:11-cv-226, 2013 U.S. Dist. LEXIS 12405, at *2 (S.D. Ohio Jan. 30, 2013) (explaining how plaintiffs filed second amended complaint but court still rejected certain claims).

[9] *See* Rikos v. Proctor & Gamble Co., No. 1:11-cv-226, 2014 U.S. Dist. LEXIS 109302, at *34-35 (S.D. Ohio June 19, 2014) (discussing why Jarzembrowski and Burns should be added to the class for streamlining purposes). The court concluded that this was the simplest and most efficient way to adjudicate the claims. *Id.* at *55.

the class comprised of those who viewed the advertisement, bought the product in the different states during 2009 through 2011, and believed that the product failed to provide the digestive benefits that were advertised.[10] The collective plaintiff class contended that its members sufficiently relied upon P&G's promise that the product offered the health benefits listed on its label and, as a result, they "suffered injury in fact and lost money."[11]

The district court certified five single-state classes on June 19, 2014, and ruled that there were questions of law or fact common to the class, the claims were typical of the class, and that the common questions predominated over any individual inquiries.[12] The class included all consumers who bought Align from March 1, 2009, through the date the class first received notice of the lawsuit.[13] P&G later appealed to the Sixth Circuit, arguing that the district court abused its discretion by certifying the plaintiffs' class status.[14] The Sixth Circuit affirmed the Southern District of Ohio Court's decision, and ruled that the plaintiffs' claims created a common question, the claims were typical of the plaintiff class, and the common questions predominated over individual class queries.[15]

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[10] *See Rikos*, 799 F.3d at 503 (discussing the common complaints among the plaintiffs).

[11] *Id.* at 504. *See, e.g.*, N.C. GEN. STAT. ANN. § 75-1.1 (West 2008) (defining unfair methods and competition as "affecting commerce").

[12] *See Rikos*, 799 F.3d at 502 (referencing how the district court only reviewed class certification, not whether Align worked). *See also* FED. R. CIV. P. 23(b)(3) (noting questions of law or fact common to class members must predominate over individual questions).

[13] *See Rikos*, 799 F.3d at 502 (laying out plaintiff class argument that Align does not improve digestive health for anyone).

[14] *Id.* at 502, 519-21 (detailing how P&G argued the class failed to demonstrate commonality, typicality, or predominance). P&G maintained that some class members were not actually exposed to the advertising of Align, individual questions predominated over common inquiries, Align did work for consumers, and individual damages calculation would be necessary since the class's damages model was inconsistent with their theory of liability. *Id.* at 510.

[15] *Id.* at 508, 519, 521 (explaining why district court did not abuse its discretion in allowing class status). The court stated that P&G did not recognize that the burden on plaintiffs at the certification stage is to show that all members can prove that they have suffered the same injury,

When considering whether it was appropriate to grant class status to a plaintiff group, courts traditionally review whether joinder of individuals was "impracticable" due to volume under Rule 23(a)(1), as well as whether the class met Rule 23(a)(2)'s requirement of common questions.[16] By introducing a rigorous commonality standard, the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes* helped change the current landscape of class certification requirements across the country by essentially reverting back to some clear standards that courts have historically relied upon.[17] Since *Wal-Mart*, courts

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not that they have indeed suffered the same injury. *Id.* at 505. Further, the court added that the question was "whether the purchaser received the product that was advertised." *Id.* at 509. Additionally, with respect to exposure to advertising of Align, the court held that how plaintiffs learned of the product was immaterial to the predominance of common questions:

> Regardless of how customers first heard about Align—whether through P&G's direct advertising campaign, through a physician who had learned about Align through a P&G sales representative, or through a friend or family member who had used Align—they nonetheless decided to purchase the product only for its purported health benefits.

Id. at 511-12.

[16] *See supra* note 1 and accompanying text (outlining Rule 23(a) requirements). *See also In re* Am. Med. Sys., 75 F.3d 1069, 1079 (6th Cir. 1996) (detailing what "substantial" means when joinder of all members is impracticable). The court added that a class size ranging from 15,000 to 120,000 may not be unreasonable. *Id. See also* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 339-340 (2011) (arguing that managers would not exercise discretion in a common way without some common direction); *Falcon*, 457 U.S. at 158 (explaining plaintiffs' class claims were separate and distinct and would not lead to common answers). Wal-Mart employees brought a class action suit against Wal-Mart under Title VII of the Civil Rights Act of 1964, arguing the company had engaged in sex discrimination in pay and promotions. *Wal-Mart*, 564 U.S. at 343. Though the employees did not maintain that Wal-Mart used an express policy to discriminate, they alleged that local managers' autonomy over wages and promotions led to a disparate impact among male and female employees. *Id.* at 344. The *Wal-Mart* court did not believe the managers could act in unison in such a way that would create a common question. *Id.* at 377-378. *See also* Steven Bolanos, *Navigating Through the Aftermath of Wal-Mart v. Dukes: The Impact on Class Certification, and Options for Plaintiffs and Defendants*, 40 WASH. ST. U. L. REV. 179, 182-89 (2013) (discussing how Wal-Mart affected future class action cases). *See also* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 102 (2009) (detailing the challenge of aggregating evidence to propose common wrongs rather than individual injuries). The *Wal-Mart* court deviated from traditional commonality requirements because the sizeable plaintiff class failed to meet commonality and typicality requirements. *Id. See generally* Bolanos, *supra*, at 182 (providing background on the Supreme Court's Rule 23 adoption and eventual revisions).

[17] *See Wal-Mart*, 564 U.S. at 349 (detailing how "the crux of this case is commonality"). The *Wal-Mart* court explained that common questions go beyond the class merely being involved with a violation of the same provision of law. *Id. See also* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571,

have thoroughly examined whether a proposed class has suffered the same injury that produces common answers and would therefore translate to a class-wide resolution.[18] This stricter commonality threshold has not necessarily led to the dissolution of large class certifications across the country, but many courts have followed the Supreme Court's class certification instructions as a result.[19]

599-612 (9th Cir. 2010) (explaining why plaintiffs demonstrated sufficient evidence of commonality for the appellate court). Both the district and appellate courts certified the class in *Wal-Mart*. *Id.* The appellate court cited a string of recent cases that required only "questions of law or fact that were common to the claims" to certify a class. *Id.* at 587. *See also* Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1428 (2013) (referencing the commonality rules discussed in *Wal-Mart*); *Wal-Mart*, 564 U.S. at 350-351 (describing commonality requirements and recent Supreme Court commonality analysis); Klay v. Humana, Inc., 382 F.3d 1241, 1260 (11th Cir. 2004) (explaining how common questions must affect each class member's ability to establish liability); Megan Toal, Note, *The Future of Class Actions in the Wake of Comcast v. Behrend*, 26 LOY. CONSUMER L. REV. 545, 557 (2014) (explaining the importance of having both common questions and common answers). A court must be able to calculate damages on a class-wide basis to find common answers to common questions. Toal, *supra*, at 574.

[18] *See* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1191-92 (2013) (detailing Wal-Mart considerations prior to affirming certification of investor class); Suchanek v. Sturm Foods, Inc., 764 F.3d 750, 755-56 (7th Cir. 2014) (discussing heightened commonality standards brought forth in *Wal-Mart*, despite need for only one common question). *See also* Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 700-01 (2014) (explaining *Wal-Mart*'s Rule 23(a)(2) commonality and cohesiveness analyses were for due process and legitimacy reasons); Aaron B. Lauchheimer, *A Classless Act: The Ninth Circuit's Erroneous Class Certification in Dukes v. Wal-Mart, Inc.*, 71 BROOKLYN L. REV. 519, 528 (2005) (addressing Wal-Mart appellate court's commonality reasoning). *See also, e.g.*, *In re* Whirlpool Corp. Front-Loading Washing Prod. Liab. Litig., 722 F.3d 838, 852 (6th Cir. 2013) (addressing commonality standards by citing *Wal-Mart* decision); Gooch v. Life Investors Ins. Co. of Am., 672 F.3d 402, 427 (6th Cir. 2012) (detailing the importance of common questions to be the main force toward a resolution).

[19] *See* Bone, *supra* note 18, at 701. *See, e.g.*, M.D. *ex rel.* Stuckenberg v. Perry, 675 F.3d 832, 837 (5th Cir. 2012) (revealing the court would use instructions from *Wal-Mart* to review the District Court's holding). The *Perry* court, for example, made its decision shortly after *Wal-Mart*, and the court unambiguously deferred to the Supreme Court's instructions. *Id.* *See also* Fitzpatrick v. General Mills, Inc., 635 F.3d 1279, 1282-83 (11th Cir. 2011) (discussing why proposed class was commonly affected by General Mills' marketing of YoPlus health benefits); Bolanos, *supra* note 16, at 194 (explaining the benefits of a narrow scope of commonality analysis); Julie Slater, *Reaping the Benefits of Class Certification: How and When Should "Significant Proof" Be Required Post-Dukes?*, 2011 BYU L. REV. 1259, 1261 (2011) (offering an explanation of the importance of high commonality standards to justify class claims); Deborah M. Weiss, *A Grudging Defense of Wal-Mart v. Dukes*, 24 YALE J.L. & FEMINISM 119, 133, 173-74 (2012) (explaining why *Wal-Mart* should stand against criticism). Though the *Fitzpatrick* court ultimately vacated and remanded the case for further consideration, it stated that the district court had correctly certified the class. *Fitzpatrick*, 635 F.3d at 1283.

In addition to commonality requirements under Rule 23(a)(2), courts must also evaluate whether a proposed class's claims are typical of the claims or defenses of the entire class, as required by Rule 23(a)(3).[20] Though often associated with commonality, courts will regularly review typicality requirements separately.[21] Typicality is imperative to class claim certification because it serves as the nexus between the injury to the named plaintiff and the conduct of the proposed class.[22] Similar to commonality analysis, a court determines whether the alleged conduct, treatment, or injury is representative of the entire class, and not just a few select individuals.[23]

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[20] *See* FED. R. CIV. P. 23(a)(3) (referencing the need for a connection between the individual and the class); *Falcon*, 457 U.S. at 157 (explaining that an individual's claims must be typical of a class's claims). The *Falcon* court determined that the class lacked the required specificity in its claims:

> Without any specific presentation identifying the questions of law or fact that were common to the claims of respondent and of the members of the class he sought to represent, it was error for the District Court to presume that respondent's claim was typical of other claims against petitioner by Mexican-American employees and applicants. If one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action.

Falcon, 457 U.S. at 158-59. *See also* A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 468-69 (2013) (explaining why lower court tradition led to the *Falcon* court blending commonality and typicality requirements).

[21] *See* Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 542 (6th Cir. 2012) (detailing why commonality and typicality "tend to merge"). Most importantly, the individual representative and group interests must be in agreement. *Id.* According to the court in *Young*, a claim is typical if "it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Id.* at 543. The *Young* court held that the class met typicality requirements because of the class's common use of geocoding software. *Id. See also* Slater, *supra* note 19, at 1261 (noting how commonality and typicality are usually analyzed together).

[22] *See In re* Am. Med. Sys., 75 F.3d 1069, 1082 (6th Cir. 1996) (defining typicality and separating the term from commonality). The court in *Am. Med. Sys.* stated that typicality "determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Id.*

[23] *See Wal-Mart*, 564 U.S. at 377 (describing how one plaintiff's alleged discrimination was not sufficient to be typical of the entire class). The *Wal-Mart* court applied the *Falcon* court's typicality reasoning to find that the proposed individuals' claims were not typical of the respective classes. *Id. See also Falcon*, 457 U.S. at 158-59 (discussing why the lower court erred in holding individual's claim was typical of class claims). In both *Wal-Mart* and *Falcon*, the Court held that a proposed class needs to prove much more than the worthiness of their own claims. *Id.* A

Courts must also decide whether class certification is the most economical and fair method possible, and whether the class falls under one of the Rule 23(b) categories, which require analyzing the creation of risk if the class is not certified, whether the opposing party acted in a way that affects the entire class, or whether questions common to the class will outweigh any lingering individual inquiries.[24] Rule 23(b)(1) and (b)(2) are considered more traditional methods of certification for efficiency purposes and require either specific levels of risk being created or opposing party actions that encompass the entire class, while the non-mandatory Rule 23(b)(3) is used for classes that do not fit into Rule 23 (b)(1) or (b)(2), and requires that common questions weigh far more heavily than any individual queries.[25] After conducting Rule 23(b) analysis, when the facts of the case require it, courts will also assess whether a class damage model is consistent with liability theory, meaning damages are common to the

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proposed class instead must provide evidence that its individual claims were not an outlier and were a common occurrence for the other party. *Id.*

[24] *See* FED. R. CIV. P. 23(b)(1) (detailing how individual class actions would create specific risks); FED. R. CIV. P. 23(b)(2) (discussing how opposing party has acted in a way that applies to the entire class); FED. R. CIV. P. 23(b)(3) (explaining predominance requirements). *See also Wal-Mart*, 564 U.S. at 345-346 (comparing the three types of classes available under Rule 23(b)). Only these three types of class actions are available to meet Section (a) requirements. *Id.* Common questions must predominate over individual questions. *Id.* The court explained how Rule 23(b)(3) serves as a catch-all of sorts for those classes that are not able to be grouped into (b)(1) or (b)(2). *Id.* The third class under (b)(3), unlike the first two, is non-mandatory in that class members are able to opt out. *Id. See also Comcast Corp.*, 133 S. Ct. at 1432 (explaining why the class certification under Rule 23(b)(3) predominance was improper). The *Comcast Corp.* court suggested that Rule 23(b)(3) analysis tends to be more rigorous than Rule 23(a) analysis, and the class failed to provide evidence of why common issues predominated over individual damage calculation questions. *Id.*

[25] *See Wal-Mart*, 564 U.S. at 346-347 (discussing the background of Rule 23(b)(3) and how it fits in with (b)(2)). *See also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) (describing 23(b)(3) as "the most adventuresome" innovation). Rule 23(b)(3) was added by the Advisory Committee during Rule 23 revisions in 1966. *Id. See also Comcast Corp.*, 133 S. Ct. at 1432 (explaining that because of additional protections, courts review (b)(3) with an even sharper eye). The *Comcast Corp.* court said that the "predominance requirement is meant to "tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 1436 (alteration in original). *See also* Spencer, *supra* note 20, at 470 (discussing how some courts have focused mainly on typicality and predominance analysis, not commonality).

entire class and able to be calculated on a class-wide basis.[26] Finally, courts must determine whether the class is finite and the scope of membership is clear.[27]

In *Rikos v. Proctor & Gamble Co.*, the Sixth Circuit framed much of its Rule 23 analysis around *Wal-Mart* and the landmark cases that preceded it, and also explained how the proposed *Wal-Mart* class, as opposed to the proposed *Rikos* class, failed to identify a common question that would yield a common answer for the class.[28] The

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[26] *See* Parko v. Shell Oil Co., 739 F.3d 1083, 1084-85 (7th Cir. 2014) (explaining the relationship between the plaintiff damages model and liability theory). Because a class action suit needs to be able to calculate damages across the class, class members measured their damages primarily by the impact of the groundwater contamination, which affected all members, on the value of their properties. *Id. See also Comcast Corp.*, 133 S. Ct. at 1432 (revealing why respondents' damages model could not prove that damages were ascertainable across the group). Proving a damage model is often followed by Rule 23(b)(3) analysis, as it was in *Comcast Corp. Id. See also* Carrera v. Bayer Corp., 727 F.3d 300, 311 (3d Cir. 2013) (detailing why Carrera had no way to prove his damages model was reliable). Though *Carrera* has since been criticized in legal circles, both the lower and appellate courts sought ways to verify the numbers behind the damage models, and each of the classes were unable to meet the courts' expectations. *Id. See also* Ryan Goellner, *Sixth Circuit Assesses Class Action Criteria in Digestive Drug Litigation*, SQUIRE PATTON BLOGS: SIXTH CIRCUIT APPELLATE BLOG (Aug. 27, 2015), http://www.sixthcircuitappellateblog.com/news-and-analysis/sixth-circuit-assesses-class-action-criteria-in-digestive-drug-litigation/ (discussing the Sixth Circuit's decision to not follow *Carrera*).

[27] *See Carrera*, 727 F.3d at 305 (explaining how class action is inappropriate if members can be identified without substantial fact-finding). The *Carrera* court also described ascertainability as an essential element of a class action suit. *Id.* at 307. *See* Mullins v. Direct Digital, LLC, 795 F.3d 654, 658 (7th Cir. 2015) (declining to apply *Carrera*'s heightened ascertainability interpretation). The *Mullins* court stated that "[w]hen courts wrote of this implicit requirement of 'ascertainability,' they trained their attention on the adequacy of the class definition itself." *Id.* at 659. "They were not focused on whether, given an adequate class definition, it would be difficult to identify particular members of the class." *Id.*

[28] *See Rikos*, 799 F.3d 497, 505-06 (6th Cir. 2015) (describing the *Wal-Mart* court's impetus for rejecting class certification). The Rikos court stated that "P&G misconstrues Plaintiffs' burden at the class-certification stage." *Id.* at 505. Moreover, the court added that whether the district court properly certified the class "turns on whether Plaintiffs have shown, for purposes of Rule 23(a)(2), that they can prove—not that have already shown—that all members of the class have suffered the 'same injury.'" *Id.* at 505. The *Rikos* court went on to clarify that the common question was whether Align provided health benefits to anyone, not just whether it worked for some members of the class. *Id.* at 506-07. Contrasting the facts and argument of the *Wal-Mart* class to the *Rikos* class, the court reasoned that the common question of whether Align was actually "snake oil" was the main differentiator from *Wal-Mart. Id.* While the *Wal-Mart* class provided no clear common questions, as disparate impact among women still left open the possibility that some male managers may actually favor women, the entire *Rikos* class was affected by the question of whether Align actually worked. *Id. See also Falcon*, 457 U.S. at 159 (applying the reasoning that its plaintiff claims were separate and distinct); Fitzpatrick v. General Mills, Inc., 635 F.3d 1279, 1283 (11th Cir. 2011) (detailing why, despite being remanded, class

Rikos majority stated that since the *Wal-Mart* class was fractured and required individual questions, the Supreme Court was forced to deny class certification.[29] On the other hand, the *Rikos* court determined the *Rikos* class did have common questions, and that a common question could originate from the defendant's course of conduct that allegedly affected all members of a party, such as P&G's failure to provide the health benefits described in Align's marketing materials.[30]

In addition to its commonality findings, the *Rikos* court also distinguished *Wal-Mart* to determine that the district court did not abuse its discretion by holding that the plaintiff claims were typical of the class.[31] The Sixth Circuit also refuted P&G's contentions that the class was invalid because there were no common questions, holding that the common class claims predominated over any individualized inquiries and therefore met Rule 23(b)(3)'s requirement that common questions hold the most weight among class members.[32] As a result of these findings, and in spite of the *Wal-Mart*

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certification was correct); *supra* note 16 and accompanying text (discussing significance of commonality findings). *See generally* Klay v. Humana, Inc., 382 F.3d 1241, 1251 (11th Cir. 2004) (discussing class's need for common question that impacted members' establishment of liability).

[29] *See supra* note 17 and accompanying text (describing the Wal-Mart court's analysis concluding that the class lacked a common question).

[30] *See Rikos*, 799 F.3d at 506-07 (explaining how the court came to the conclusion that the *Rikos* class yielded common questions); *supra* note 26 (detailing why the *Rikos* court differentiated its facts from *Wal-Mart* and identified a common question). *See also* Suchanek v. Sturm Foods, Inc., 764 F.3d 750, 756 (7th Cir. 2014) (detailing the importance of defendant conduct that is applicable to the whole class). A court is unlikely to find common answers when the "defendant's allegedly injurious conduct differs from plaintiff to plaintiff." *Id. See also* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1190 (2013) (affirming class certification because court had identified common questions).

[31] *See Rikos*, 799 F.3d at 509 (arguing from the court's perspective that P&G merely duplicated its commonality claims). The *Rikos* district court stated, "The question is not whether each class member was satisfied with the product, but rather whether the purchaser received the product that was advertised." *Id.* The *Rikos* court indicated that the class met typicality requirements because, similar to commonality, the injury was based on the marketing and advertising of Align. *Id. See also Falcon*, 457 U.S. at 158-59 (revealing why district court was wrong to assume respondent's claim was typical of other claims); *supra* note 18 (defining "typical of the class" and why one allegation is not enough to be typical).

[32] *See Rikos*, 799 F.3d at 510-12 (discussing why *Am. Med. Sys.* class was unique and not applicable to the current case). P&G tried to argue that some plaintiffs' lack of exposure to the marketing

aftermath, the *Rikos v. Proctor & Gamble Co.* court held that the district court properly certified the proposed plaintiff class.[33]

The Sixth Circuit in *Rikos v. Proctor & Gamble Co.* departed from the Supreme Court's recent Rule 23 jurisprudence when it broadly framed Align's impact on the class members in its quest to identify a common question.[34] The court in *Wal-Mart*, for

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at issue meant that some members required individual proof and their claims invalidated the class's commonality argument. *Id.* at 512 (discussing why P&G's claims that plaintiffs could not prove causation were invalid). The majority stated that the exposure among class members to Align's advertising was sufficient to form a common question for the class and that any individual answers, such as Align working for some members and not others, did not take priority. *Id.* at 511. The *Rikos* court also knocked down P&G's argument that the differences in individual plaintiffs' state laws in California, Illinois, Florida, New Hampshire, and North Carolina prevented the class from proving false-advertising reliance and causation. *Id.* at 512-18. The court stated, "plaintiffs can prove causation and/or reliance on a class wide basis provided that (1) the alleged misrepresentation that Align promotes digestive health is material or likely to deceive a reasonable consumer, and (2) P&G made that misrepresentation in a generally uniform way to the entire class." *Id. See also Fitzpatrick*, 635 F.3d at 1282 (offering reasoning for individualized questions not predominating and why class was not precluded from common question); *In re* Am. Med. Sys., 75 F.3d 1069, 1085 (6th Cir. 1996) (explaining why class's individualized questions predominated over any common questions). The judge may also modify a certification order if there are subsequent litigation developments. *See Rikos*, 799 F.3d at 525; *Fitzpatrick*, 635 F.3d at 1283. The *Rikos* court also used a similar line of reasoning to that of *Young v. Nationwide Mut. Ins. Co.* by refuting P&G's argument that the class damages model was inconsistent with its liability theory and that an individual damages calculation was necessary. *Rikos*, 799 F.3d at 525. *See also* Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 544 (6th Cir. 2012) (ruling predominance of common questions is not knocked out by mere potential individualized inquiries). Though there were a number of different states involved, the *Rikos* court determined that the class could be reasonably and accurately identified. *See Rikos*, 799 F.3d at 525-26. *See also Young*, 693 F.3d at 539 (explaining why needing to review individual files is not a reason to deny class certification).

[33] *See Rikos*, 799 F.3d at 528. *See also supra* notes 17, 30- and accompanying text (comparing and contrasting analysis in *Rikos* and *Wal-Mart* courts).

[34] *See supra* note 17 (laying out instances in which plaintiff claims could not lead to common answers). *See also Wal-Mart*, 564 U.S. 338, 349-350 (detailing Wal-Mart's 23(a)(2) commonality interpretations). The *Wal-Mart* court stated that a plaintiff class just collectively being involved with the same law violation is not enough to create a common question with a common answer. *Id. at 350.* This is significant because the *Wal-Mart* court went out of its way to detail the level of commonality to achieve class status. *Id. See also* Nagareda, *supra* note 16, at 131-32. The prevalence of dissimilarities is significant to common question analysis and can prevent class certification:

> The existence of common "questions" does not form the crux of the class certification inquiry, at least not literally, or else the first-generation case law would have been correct to regard the bare allegations of the class complaint as dispositive on the certification question. Any competently crafted class complaint literally raises common "questions." What matters to class

instance, refused to certify its respective proposed classes because it applied a "rigorous analysis" of Rule 23 commonality requirements, which the Sixth Circuit arguably did not use.[35] Though the *Rikos* court referenced the *Wal-Mart* holding, it deviated from the standards *Wal-Mart* established by stating that Rule 23(a)(2) commonality actually only

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> certification, however, is not the raising of common "questions" - even in droves - but, rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Id. at 131-132. The *Wal-Mart* court directly quoted the Nagareda article in emphasizing the importance of common answers along with common questions. *See Wal-Mart*, 564 U.S. at 349. The *Rikos* court chose not to consider the dissimilarities among the proposed group of plaintiffs, including those who did or did not have irritable bowel syndrome (IBS). *See Rikos*, 799 F.3d at 528 (Cook, J., dissenting); Bolanos, *supra* note 16, at 190 (referencing why a class needs a common contention capable of class wide resolution). The *Rikos* class had to prove that the validity of its contention "will solve all of the class members' claims at once" and therefore absolve the necessity to review each class member's claim individually. Bolanos, *supra* note 16, at 190.

[35] *See Wal-Mart*, 564 U.S. at 349 (describing the requirement that a class actually, not presumptively, conform with Rule 23(a)). *See also supra* note 17 (referencing *Wal-Mart* when conducting common question analysis). When addressing the question of whether their respective classes were able to meet the commonality threshold, it is not a coincidence that these appellate court decisions cited *Wal-Mart* because the Supreme Court clearly laid out how courts should address common questions among class members. *See Wal-Mart*, 564 U.S. at 350-351. *See also* Gooch v. Life Investors Ins. Co. of Am., 672 F.3d 402, 427 (6th Cir. 2012) (discussing when Rule 23(b)(2) certification can be used). The *Gooch* court cited *Wal-Mart*, but recognized that the facts of the current case were not the same as *Wal-Mart*. *Id.* Moreover, the *Rikos* court argued that *Wal-Mart* did not apply and instead referenced *Gooch v. Life Investors Ins. Co. of Am.*, which stated, "although conformance with Rule 23(a) . . . must be checked through rigorous analysis, . . . it is not always necessary . . . to probe behind the pleadings before coming to rest on the certification question, because sometimes there *may be no disputed factual and legal issues* that strongly influence the wisdom of class treatment." *Rikos,* 799 F.3d at 505-06 (emphasis added). The fundamental issue with *Rikos*'s reference to *Gooch* is that there were actually disputed facts and legal issues at play because there were no definitive scientific studies across the class that proved Align did not work for anyone. *Id.* at 519-22. *See also* Slater, *supra* note 19, at 1270 (defining "significant proof" in the eyes of the *Wal-Mart* court). Slater stated that significant proof entails providing evidence that both commonality and typicality requirements have been met. *Id.* The volume and quality of proof required should be proportionate to the size of the class because class certification does not increase efficiency unless the entire class is able to produce common questions and the claims are typical of the class. *Id.* Even prior to *Wal-Mart*, courts narrowly reviewed class certification for efficiency reasons, but this focus has been sharpened following the Supreme Court's decision to deny class certification, making it more difficult to justify large class suits. *Id.*

requires that a class can prove commonality, not that it has already met this burden.[36] The *Wal-Mart* holding should not be iron-clad and inflexible, but the common question identified in *Rikos v. Proctor & Gamble Co.* of whether Align provided health benefits to any individuals fails to reach the heightened Rule 23 guidelines that the Supreme Court recently constructed to promote consistency and efficiency.[37] Moreover, defining a common question of a class of buyers that claim to have been harmed is not as straightforward as the *Rikos* court stated.[38] The *Wal-Mart* court justified its Rule 23 holdings by discussing the importance of continuity within a proposed class, and the Sixth Circuit likely lowered these longstanding and evidence-based standards through its

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[36] *See Rikos*, 799 F.3d at 505-08 (discussing the search for common questions and common answers). The court in *Rikos* recognized the *Wal-Mart* holding, but maintained that the court actually intended for plaintiff claims to be based only on a common question that is capable of a class-wide resolution instead of there already being a common answer available. *Id. See also supra* note 31 and accompanying text (explaining the arguments made in the *Rikos* decision and its common question analysis). *See also Wal-Mart*, 564 U.S. at 350-351 (discussing importance of satisfying commonality requirement). According to the *Wal-Mart* court, Rule 23 "does not set forth a mere pleading standard" and "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule." *Id. at 350.* Much of this analysis was derived from *Falcon*, which also had strict standards for common questions among proposed class members. *Id. at 351-352.*

[37] *See* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1194 (2013); *Wal-Mart*, 564 U.S. at 350-351; Suchanek v. Sturm Foods, Inc., 764 F.3d 750, 755 (7th Cir. 2014); *In re* Whirlpool Corp. Front-Loading Washing Prod. Liab. Litig., 722 F.3d 838, 850 (6th Cir. 2013); Gooch v. Life Inv'rs Ins. Co. of Am., 672 F.3d at 417. Cases such as *Glazer v. Whirlpool Corp.*, *Gooch v. Life Investors Ins. Co. of Am.*, *Suchanek v. Sturm Foods, Inc.*, and *Amgen Inc. v. Conn. Ret. Plans & Trust Funds* all used a high bar similar to *Wal-Mart* when reviewing common questions. These decisions all reflected the necessity to truly determine that an entire class is held together through common questions and common answers, and that these common questions predominate over individual questions. *Id. See also Fitzpatrick,* 635 F.3d at 1283 (holding that class certification was proper). *See supra* note 18 and accompanying text (detailing the post-*Wal-Mart* increased scrutiny applied in commonality analysis). Neither the *Rikos* class nor the *Fitzpatrick* class offered scientific evidence across the group that proved a lack of health benefits. *Rikos*, 799 F.3d at 519-22; *Fitzpatrick*, 635 F.3d at 1282-83.

[38] *See* Weiss, *supra* note 19, at 133 (detailing the challenge of defining the scope of common classes of buyers). Narrowing a common question down for a group of buyers with different reactions to products is much more difficult than, for instance, proposing a class of airplane crash victims. *Id.*

broad interpretation of *Wal-Mart's* holding.[39]

The *Rikos* court also used its liberal common question analysis to conclude that the plaintiffs' claim that Align did not provide digestive health benefits to anyone were typical of the class.[40] The issue with this reasoning, as opposed to a measurable defect with the product, is the difficulty in proving that the plaintiffs' claim was actually typical for the rest of the class.[41] The scientific findings were inconclusive at the time of trial, creating enough doubt on either side as to whether Align actually provided health benefits.[42] Based on *Wal-Mart* and *Falcon*, the proposed *Rikos* class did not meet the

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[39] *See Rikos*, 799 F.3d at 529 (Cook, J., dissenting) (discussing why majority's opinion was flawed and detrimental to future courts). By defining the *Rikos* class in such a broad manner, the court created the necessity to narrow the class requirements down in the future if it is later proven that Align indeed provides health benefits to someone. *Id.* Further, a scenario in which P&G was awarded judgment would complicate the class claims. *Id. See also* Weiss, *supra* note 19, at 170-71 (discussing potential future implications of class certification). Though class certifications today normally end in settlements, the *Rikos* court's deviation from jurisprudence is still important to future decisions and the next large proposed class. *Id.* Going forward, potential class members will need to weigh the potential value of pursuing individual damages against the likelihood of succeeding in litigating on a class basis, which may be difficult due to variations in interpretations of the *Wal-Mart* holding. *Id.*

[40] *See Rikos*, 799 F.3d 497 at 509 (addressing P&G's typicality defense). The *Rikos* majority glosses over the typicality requirement to a degree, stating only that "[i]ndeed, in challenging the district court's finding of typicality, P&G largely repeats its arguments against commonality." *Id. See also* Slater, *supra* note 19, at 1262 (noting how commonality and typicality help ensure a class is economical). The *Wal-Mart* court did not directly address typicality standards, but it is clear that "in light of their similarities it seems that a high standard of proof should apply to both commonality and typicality." *Id. See also supra* note 21 (detailing the importance of typicality standards on their own).

[41] *See Rikos*, 799 F.3d 497 at 509 (explaining the court's decision to apply commonality analysis to typicality requirements). *See also supra* note 22 and accompanying text (explaining how the *In re Am. Med. Sys.* court interpreted typicality standards). The *Am. Med. Sys.* court maintained that typicality entails a "collective nature to the challenged conduct," which is worthy of consideration when reviewing how the *Rikos* majority essentially tacked its commonality analysis onto its typicality findings. *In re* Am. Med. Sys., 75 F.3d 1069, 1082 (6th Cir. 1996). *See also* Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 159 (1982) (quoting American Pipe & Construction Co. v. Utah, 414 U.S. 538, 553 (1974)) (explaining why class action suits are brought forward). The *Falcon* court stated that the class action "did not advance the efficiency and economy of litigation which is a principal purpose of the procedure.'" *Id.*

[42] *See Rikos*, 799 F.3d at 520 (analyzing each side's argument as to whether Align's effectiveness could be quantified). The key phrasing in the majority's reference to the plaintiff's expert witness attestation is "whether Align works for anyone *can be* tested." *Id.* The court placed a great deal of weight on this hypothetical study instead of determining whether, at that time, it had been scientifically proven that Align did not provide health benefits to anyone. *Id.* at 528 (Cook, J.,

intended criteria of Rule 23(a)(2) common questions and (a)(3) typicality analysis.[43] These narrow structures for class certification were put in place to maintain high standards of efficiency, economy, and cohesiveness for class actions, and the *Rikos* majority chose to veer from those levels of precedent and certify the class anyway.[44]

When the *Rikos* court reviewed whether common questions predominated over any individualized inquiries, determining if the Align supplement provided health benefits to anyone was a subjective and an inherently individual process, thus making certifying a plaintiff class more difficult.[45] Because, for instance, both the proposed

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dissenting). As noted by the expert's lack of an opinion on the health benefits of Align, the reality is that there was no scientific evidence to affirm either viewpoint, which further muddled the majority's decision. *Id.*

[43] *See also Wal-Mart*, 131 U.S. at 2553 (detailing how there cannot be a gap between an individual's claims and the class's claims); *Falcon*, 457 U.S. at 158 (explaining the importance of finding common questions of law or fact to meet typicality requirements). The *Falcon* court undoubtedly laid the groundwork for the expectation that the plaintiff class would present evidence that supported the argument that the plaintiff's claim was typical of the rest of the class. *Falcon*, 457 U.S. at 158. *See also Rikos*, 799 F.3d at 72 (Cook, J., dissenting) (outlining how differences between effects on IBS sufferers and "healthy" people complicates the plaintiffs' claim). The burden is on the plaintiff class to prove that Align does not work for anyone and instead the plaintiffs divide themselves into groups of IBS sufferers and "healthy" people, which likely respond differently to Align. *Id. See also Wal-Mart*, 131 U.S. at 2551 (explaining importance of creating common answers, not just bringing forth common questions). Though the facts are different, the *Wal-Mart* court's focus on the need for uniformity is critical when comparing the class certification analysis to *Rikos*. *See id.*

[44] *See Rikos*, 799 F.3d at 525 (detailing how the court used standards set in *Young*, not *Wal-Mart*, as a certification baseline). It is significant to note that the Rikos majority appears to defer to Young in determining whether class certification was appropriate because it goes against the heightened requirements set forth in *Wal-Mart*. *Id. See also* Slater, *supra* note 19, at 1270 (explaining how all class actions may not promote judicial efficiency). Courts had previously "recognized that the size of the class matters because of the pressure to settle that a large class may create and because of the difficulty of proving commonality and typicality in such a case." *Id.* Courts must achieve a balance between opening up the floodgates of litigation for class claims and ensuring that proposed class members are able to be heard fairly and not brushed out the door because of sheer size. *Id. See also supra* notes 20-23 (discussing typicality requirements); *supra* note 43 (discussing *Wal-Mart* and *Falcon* reasoning in finding common questions). The *Rikos* class had the burden to prove that its claims were typical of the entire class and not just a portion of the class across five states that purportedly did not benefit health-wise from using Align. *See Rikos*, 799 F.3d at 528 (Cook, J., dissenting).

[45] *See also Rikos*, 799 F.3d at 529 (detailing the difficulty of placing each member's unique physiology under one class umbrella); *supra* note 24 (explaining how question of predominance fits into class certification analysis). *See also Comcast Corp.*, 133 S. Ct. at 1432 (discussing why Rule 23(b)(3)'s predominance evaluation can tend to be strict). Considering the weight that the

class and P&G divided their analysis between plaintiffs with and without IBS, thus creating individual questions among plaintiffs, it is more difficult to make the argument that the common question predominated over individual inquiries.[46] Although Rule 23(b)(3) compliance does not require a complete absence of individual questions, which is rare in class scenarios, the common questions must still outweigh any singular queries, such as whether or not plaintiffs had IBS.[47] Ideally, however, the proposed plaintiff class would have produced a clinical trial that definitively determined whether Align actually worked as advertised, or whether it truly was "snake oil."[48] Finally, although the majority in *Rikos v. Proctor & Gamble Co.* correctly held the class damages were sufficiently able to be determined, there is little doubt that it extended the reach of its discretion by broadly interpreting individual states' false advertising statutes, specifically in North Carolina, to fit predominance requirements.[49]

Comcast Corp. court placed on predominance analysis, the court should not overlook a determination of whether there are individual questions when reviewing the efficacy of the *Rikos* class. *Id. See generally Wal-Mart*, 131 U.S. at 2557 (explaining how question of predominance fits into class certification analysis).

[46] *See Rikos*, 799 F.3d at 528-29 (Cook, J., dissenting) (referencing alleged division between members of *Rikos* class). This division makes it difficult to hold a common investigation and resolution because the class must be defined so that every plaintiff has standing. *Id. See also supra* note 34 (outlining importance of dissimilarities in a proposed class).

[47] *See supra* note 25 (explaining how courts have traditionally viewed predominance questions with a sharp eye). *See also Rikos*, 799 F.3d at 529 (Cook, J., dissenting) (discussing how *Rikos* common questions did not predominate). The dissent stated that "a rigorous analysis of their evidence shows that resolution of the Plaintiffs' question cannot apply universally to all class members." *Id.*

[48] *See supra* note 42 (detailing need to conduct clinical trial that Dr. Komanduri promised to design). This clinical trial would either prove or disprove whether Align actually provided its advertised health benefits or individuals who used it benefitted from a placebo effect. *See Rikos*, 799 F.3d at 520.

[49] *See Rikos*, 799 F.3d at 519-20 (explaining how court allowed plaintiffs to prove causation or reliance on a classwide basis). The *Rikos* majority admittedly had to stretch North Carolina's reliance requirements to help prove that each state's reliance laws had been violated. *Id.* at 517-18. *See supra* note 27 (referencing ascertainability requirements and interpretations). The *Rikos* class appears to have met ascertainability requirements because of its digital footprint. *See Rikos*, 799 F.3d at 524-25. The court admitted that it was not easy using North Carolina's Unfair and Deceptive Trade Practices Act (UDTPA) to prove actual reliance among class members and that individual issues would not predominate. *See id.*; N.C. GEN. STAT. ANN. § 75-1.1 (West 2008). It

The *Rikos* court was tasked with reviewing whether the district court abused its discretion in certifying the plaintiff class for its lawsuit against P&G based on the argument that the product Align was falsely marketed as providing health benefits to buyers.[50] Under the theory that Align did not provide the advertised benefits to anyone, the majority in *Rikos* held that the class met the Rule 23 requirements and confirmed the district court's decision to certify the class.[51] The court chose not to follow precedent created by higher courts, such as *Wal-Mart Stores, Inc. v. Dukes* and *Comcast Corp. v. Behrend*, which viewed Rule 23 as not just a pleading standard, but a high bar for a proposed class to meet when trying to achieve certification.[52]

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stated, "Although a somewhat closer call, we believe that this classwide proof—that the alleged misrepresentation is material and was made in a generally uniform manner to all class members—would also suffice in North Carolina to show actual reliance such that individual issues would not predominate." *Rikos*, 799 F.3d at 518.

[50] *See Rikos*, 799 F.3d at 504 (discussing standards *Rikos* court would use to determine validity of district court's holding).

[51] *See id.* at 522 (highlighting issue in case specifically addresses whether Align works as promised for anyone).

[52] *See* Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1435 (2013) (describing why Philadelphia subscribers could not be members of a single class under Rule 23(b)(3)); *supra* notes 36-37 and accompanying text (detailing differences between *Wal-Mart* and *Rikos* courts' interpretation of Rule 23).

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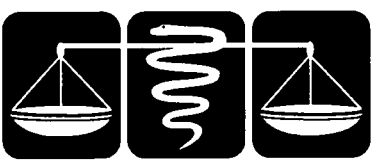

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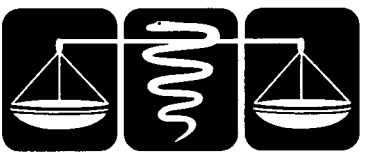

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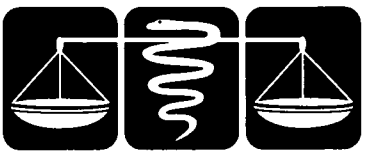

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