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Class Warfare: The Eighth Circuit Clamps Down on Consumer Class Actions Under Rule 23(b)(3)

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NOTE

Class Warfare: The Eighth Circuit Clamps Down on Consumer Class Actions Under Rule 23(b)(3)

Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773 (8th Cir. 2013)

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I. INTRODUCTION

The class action has proven to be one of the most successful tools in the American justice system for consumers to vindicate their rights. When corporations receive windfalls through misconduct that causes small losses to large groups of people, class actions are often the only effective method for the losses to be recovered. As a result, class litigation plays an important part in the civil justice system's goals of deterring harmful behavior and compensating victims.[1]

Much maligned by the business lobby, this important vehicle for justice is now under attack in legislatures and in the courts. In recent years, the Supreme Court of the United States has taken steps to constrain the use of class actions by consumers and employees.[2] Following their example, the United States Court of Appeals for the Eighth Circuit now appears poised to impose severe restrictions on the use of the device by viewing trial courts' grants of class certification with a heavy dose of skepticism.[3]

This Note will discuss a lawsuit, brought on behalf of North Dakota insurance policyholders, which challenged a scheme by their insurance company to reduce payments on medical claims. Though the trial court allowed the suit to proceed as a class action, the Eighth Circuit found this decision improper and ruled that the class must be decertified.[4] In doing so, the Eighth Circuit did not merely apply the recent Supreme Court rulings disfavoring class actions but also extended them. This Note will argue that these prece-

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1. JOCELYN BOGDAN, CENTER FOR JUSTICE & DEMOCRACY, CUTTING CLASSES: THE SLOW DEMISE OF CLASS ACTIONS IN AMERICA 1 (2013).

2. *See infra* Part III.B.

3. Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 780 (8th Cir. 2013).

4. *Id.* at 780.

dents should instead be narrowly construed so that the goals of class litigation may be achieved.

Part II of this Note discusses the facts and claims that gave rise to the dispute in *Halvorson*. Part III discusses the requirements for certifying a class action under Rule 23 of the Federal Rules of Civil Procedure, as well as recent decisions by the Supreme Court and the Eighth Circuit interpreting the requirements for class certification. Part IV discusses the Eighth Circuit's analysis and resolution of the issues presented by the case. Finally, Part V of this Note analyzes the Eighth Circuit's decision and critiques its holding on various grounds.

II. FACTS AND HOLDING

In December 2008, Shelene and Gale Halvorson filed suit against Auto-Owners Insurance Company (Auto-Owners) and its subsidiary, Owners Insurance Company, alleging breach of contract and bad faith.[5] The suit arose out of a 2005 car accident after which Shelene Halvorson submitted her medical bills to Auto-Owners under her policy's personal injury protection (PIP) provision.[6] Auto-Owners failed to pay $88.01 of the bill, claiming that it exceeded the customary amount for the services she received.[7] The Halvorsons sued for full payment and sought class action certification to pursue redress on behalf of similarly situated policyholders.[8]

According to the Halvorsons, Auto-Owners shortchanged them by an improper third-party review process.[9] Their policy stated that Auto-Owners was required to pay all "reasonable charges incurred" for medical treatment resulting from an automobile accident.[10] To determine whether or not an incurred charge was reasonable, Auto-Owners employed third-party bill reviewers, who reduced the amount paid on claims by making "reasonable and customary" reductions based on a statistical model they maintained.[11]

This statistical model was created by determining the cost of various medical services charged by providers in a given geographic area and arranging these costs based on percentiles.[12] For example, a fifty-fifth percentile assignment reflects the amount at or under which fifty-five percent of doctors would charge for the service in the pertinent geographic area.[13] Auto-Owners determined that it would pay up to the eightieth percentile, essentially concluding that the eightieth percentile reflected their contractual obligation to

5. 27-5 MEALEY'S LITIG. REP. INS. BAD FAITH 1 (2013).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Halvorson*, 718 F.3d at 775.
11. *Id.*
12. *Id*.
13. *Id*.

pay for reasonable charges incurred.[14] Thus, when bills were submitted to Auto-Owners, the bill reviewers would recommend to the claims adjustors that the amount of the claim paid be reduced so that it would not exceed the eightieth percentile.[15]

Auto-Owners argued that its claims adjustors had broad discretion to reject these recommendations.[16] The Halvorsons claimed, however, that this discretion was rarely exercised.[17] They argued, in effect, that Auto-Owners had a corporate policy of denying payment on any amount that exceeded the eightieth percentile and that this failure amounted to a breach of good faith in fulfilling their contractual duties.[18]

The Halvorsons sought to represent a class of North Dakota and Minnesota policyholders who had their claims payments reduced due to a percentile-based review.[19] The Halvorsons initially filed suit in Arizona state court, but Auto-Owners had the case removed to federal court and transferred to the District of North Dakota.[20] On February 23, 2012 the district court entered an order denying class certification to the Minnesota policyholders but granting class certification to policyholders in North Dakota.[21] The court held that Minnesota law required all no-fault claims under $10,000 to be arbitrated, and as a result, the Minnesota class could not be maintained.[22] The court ruled, however, that the class of North Dakota policyholders could go forward. It stated that "because the evidence in this case reflects that the bill review recommendations were almost always followed, the question of whether that process was unfair is ripe for resolution on a class-wide basis." [23]

On appeal, the Eighth Circuit held that the district court abused its discretion by certifying the class.[24] The court found that the class could not be maintained because some of the members did not have standing to sue and because common questions did not predominate over individualized ones.[25] As a result, the requirements for class certification were not met.[26] The court held that because the answer to the question of reasonableness would not

14. *Id.*
15. *Id*.
16. *Id.*
17. *Id.*
18. *Id.*
19. MEALEY'S, *supra* note 5 at ¶ 7.
20. *Id.* at ¶ ¶ 5, 7.
21. *Halverson*, 718 F.3d at 713.
22. *Id.* at 777.
23. Halvorson v. Auto-Owners Ins. Co, No, 3:09-cv-00075-RRR-KKK at *18 (D.N.D. Feb 23, 2012).
24. *Halvorson*, 718 F.3d at 780.
25. *Id.* at 779-80.
26. *Id.* at 780.

produce a uniform answer throughout the class, a class action was not the proper form of adjudication.[27]

III. LEGAL BACKGROUND

This Part will first discuss the requirements for class certification under Rule 23 of the Federal Rules of Civil Procedure. Next, this Part will detail some recent developments in class certification law that have resulted from recent decisions by the Supreme Court. Finally, this Part will discuss the Eighth Circuit's view on class certification prior to its ruling in *Halvorson*.

A. Requirements of Rule 23

Likely the most fiercely contested decision type in civil litigation is the decision by a court to grant or deny a motion for class certification. This seemingly innocuous pretrial decision often determines whether the litigation will continue at all, and thus, it often amounts to a multi-million dollar question. As one court stated, the certification decision is the "defining moment" in a class action. [28] A denial of certification, in many cases, amounts to a "death knell" for the plaintiffs, closing their only feasible avenue for redress.[29] A court's decision to certify a class, on the other hand, puts enormous pressure on a defendant to settle the case, lest they risk ruinous liability in front of a jury.[30] Though the court's decision on certification has little bearing on the underlying merits of the claim, it is nonetheless often determinative of the outcome.[31]

The reasons for the outsized importance of this seemingly obscure civil procedure device stem from the ubiquity of "negative value" class actions.[32] A negative value claim is a claim that, without the aid of an aggregating mechanism like a class action, is too small to be brought.[33] Essentially, the costs of bringing the claim exceed the amount that could be recovered.[34] A paradigmatic example of such a situation would be a class of 500,000 consumers suing a company for $50 each. If the court denies the consumers' request to proceed as a class, the litigation effectively comes to an end because the cost for each individual to bring a claim would greatly exceed $50. However, if the claims are aggregated, the amount at stake in the suit would

27. *Id.*

28. Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 162 (3d Cir. 2001).

29. *Id.*

30. *Id.* at 164.

31. *Id.* at 167.

32. Mullenix, Linda S., *Complex Litigation: Negative Value Suits*, 26 NAT'L L.J. 11 (2004).

33. *Id.*; Univ. of Texas Law, Public Law Research Paper No. 466, *available at*: http://ssrn.com/abstract=2278312.

34. *Id.*

be $25 million, easily enough money to retain representation and present proof. Thus, in negative value class actions, a decision to deny class certification usually determines whether the litigation will continue in any form and is therefore essentially dispositive of the outcome.[35]

Despite its importance in class action litigation, the motion for certification has little to do with the merits of the claims being made.[36] Instead, it asks whether the plaintiffs have met the requirements set forth in Rule 23(a)-(b) of the Federal Rules of Civil Procedure, which are concerned with determining whether the group of plaintiffs is large enough, cohesive enough, and sufficiently represented to make class adjudication appropriate.[37] To qualify as a class, the plaintiffs must meet the four requirements of Rule 23(a), colloquially referred to as numerosity, commonality, typicality, and adequacy of representation.[38] They must then fit within one of the three types of class actions described in Rule 23(b).[39]

The first requirement of Rule 23(a), numerosity, asks whether the class is so large that use of the joinder device to combine the claims would be impracticable.[40] Generally, courts presume that classes of more than forty members fulfill this requirement,[41] though there are exceptions.[42] The second requirement, commonality, asks if there are questions of law or fact common to the class.[43] Traditionally, courts saw this requirement as being easily met by the plaintiffs.[44] However, in the wake of recent Supreme Court decisions, courts have begun to be much more exacting.[45] The third requirement, typicality, queries whether "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[46] This requirement concerns the capacity of the named class representatives to represent the interests of unnamed and absent class members.[47] As one court stated, "The representative party's interest in prosecuting his own case must simultaneously

35. *Newton*, 259 F.3d at 167.

36. However, courts are free to look to the merits if needed to assist in the resolution of issues presented at certification. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

37. FED. R. CIV. P. 23(a)-(b).

38. FED. R. CIV. P. 23(a).

39. *See infra* note 54.

40. FED. R. CIV. P. 23(a)(1).

41. Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995).

42. Utah v. American Pipe & Constr. Co., 49 F.R.D. 17, 21 (C.D. Cal. 1969) (finding that joinder was not impracticable in a class with 350 members).

43. FED. R. CIV. P. 23(a)(2).

44. Oplchenski v. Parfums Givenchy, Inc., 254 F.R.D. 489, 495 (N.D. Ill. 2008).

45. *See infra* Part II.B; *see also* Bryant, et al. v. Southland Tube, 294 F.R.D. 633, 647 (N.D. Ala. 2013); Miller v. Countrywide Bank, N.A., 708 F.3d 704 (6th Cir. 2013).

46. FED. R. CIV. P. 23(a)(3).

47. Prado-Steiman v. Bush, 221 F.3d 1266, 1278-79 (11th Cir. 2000).

tend to advance the interests of the absent class members."[48] The final requirement under Rule 23(a), adequacy of representation, asks whether "the representative parties will fairly and adequately protect the interests of the class."[49] Courts have stated that this requirement "tends to merge" with typicality because it attempts to ferret out any antagonism between the named representatives and the unnamed class members.[50] Additionally, though, it seeks to ensure that the lawyers representing the plaintiff class are skilled and experienced enough to handle complex class action litigation.[51]

If the plaintiffs meet the requirements under Rule 23(a), they must then establish that their class fits into one of the provisions of Rule 23(b) in order to be certified.[52] Rule 23(b)(1) permits two types of classes: one where inconsistent judgments with respect to individual members would establish incompatible standards for the party opposing the class[53] and one where there is a "limited fund" of recovery, such that "adjudications with respect to individual class members, as a practical matter, would be dispositive of the interests of the other members that are not parties to the individual adjudications."[54] Rule 23(b)(2) permits a class to be maintained if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[55] Finally, Rule 23(b)(3) allows a class action to be maintained if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[56]

Rule 23(b)(3) actions are the most wide-ranging and likely the most controversial type of class action. They differ from (b)(1) and (b)(2) classes in several respects. Perhaps the foremost distinguishing characteristic is that, unlike the more traditional (b)(1) and (b)(2) classes, (b)(3) classes can recover monetary damages that are not merely incidental to injunctive relief.[57] Rule

48. Deiter v. Microsoft Corp., 436 F.3d 461, 466 (4th Cir. 2006).

49. FED. R. CIV. P. 23(a)(4).

50. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 158 (1982).

51. Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir. 1975).

52. FED. R. CIV. P. 23(b).

53. *See* Van Gemert v. Boeing Co., 259 F.Supp. 125, 130 (S.D.N.Y. 1966) (determining the rights of all debenture holders to convert their holdings into common stock in a corporation).

54. FED. R. CIV. P. 23(b)(1). For an example of a "limited fund" class action, see Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (finding that the class was not suitable for limited fund treatment because the defendant's funds were only limited by artifice).

55. FED. R. CIV. P. 23(b)(2). A typical example of a "(b)(2)" class action is a civil rights suit seeking injunctive relief.

56. FED. R. CIV. P. 23(b)(3).

57. RICHARD L. MARCUS ET AL., COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 305 (West, 5th ed. 2010).

23 was amended in 1966 to make judgments on (b)(3) classes binding on all class members, even those absent from the litigation.[58] As a result, unlike (b)(1) and (b)(2) classes, all members of a (b)(3) class must receive notice of the nature of the action and be given the opportunity to opt out so that they are not bound by the judgment and may pursue their own action separately.[59]

Despite these additional requirements, (b)(3) class actions have proven to be a potent tool for consumers to assert their rights, especially against powerful defendants who hold significant structural advantages in determining the outcome of the dispute. Most class action cases asserting a claim for damages alleging corporate misconduct are certified under Rule 23(b)(3).[60] This includes most "negative value" class actions, including the one brought by the Halvorsons in the instant case.

For the plaintiffs to prevail on a motion for certification under Rule 23(b)(3), they must demonstrate the existence of superiority and predominance, in addition to meeting the requirements of Rule 23(a).[61] The superiority requirement asks whether the class action is the best available method for resolving the controversy.[62] A significant consideration for the courts in evaluating superiority is whether the claims are too small to be litigated individually.[63] To meet the predominance requirement, the plaintiffs must demonstrate that common questions of law or fact predominate over individual issues.[64]

Since the inception of the modern Rule 23(b)(3) in 1966, courts have traditionally taken a fairly permissive view of the predominance inquiry.[65] In one early case, the Supreme Court suggested that courts should not delve into the merits to resolve the question.[66] As a result, many lower courts were willing to credit plaintiffs' theories of predominance.[67] However, the law is rap-

58. Susan T. Spence, *Looking Back . . . in a Collective Way: A Short History of Class Action Law*, 11-Aug BUS. L. TODAY 21, 23 (2002).

59. FED. R. CIV. P. 23(c)(2)(B).

60. MARCUS ET AL., *supra* note 57, at 307.

61. FED. R. CIV. P. 23(b)(3).

62. *Id.*

63. MARCUS ET AL., *supra* note 57, at 307.

64. FED. R. CIV. P. 23(b)(3).

65. *See, e.g.*, Basic Inc. v. Levinson, 485 U.S. 224 (1988); Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975); Smilow v. Sw. Bell Mobile Sys., 323 F.3d 32 (1st Cir. 2003).

66. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) (stating that "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action").

67. *See, e.g.*, Tardiff v. Knox County, 365 F.3d 1 (1st Cir. 2004); Williams v. Chartwell Fin. Servs., 204 F.3d 748 (7th Cir. 2000); Kesler v. Ikea U.S., Inc., 2008 U.S. Dist. LEXIS 97555 (C.D. Cal. Feb. 4, 2008).

idly shifting away from this permissive view as the Supreme Court has begun to disfavor the use of class actions.[68]

B. The Supreme Court and Class Action Certification

While the law affecting class actions, including the predominance requirement, is currently in flux, it is clear that the current Supreme Court takes a much more restrictive view of the mechanism than it has in the past.[69] Notably, it has expressed a preference for arbitration, holding in *AT&T Mobility v. Concepcion* that the Federal Arbitration Act preempts state laws of unconscionability that allowed consumers to evade arbitration clauses in adhesive contracts.[70] As a result, many corporations can now avoid class actions altogether by simply including an arbitration clause in their form contracts.[71] The Court extended and clarified its *Concepcion* ruling in *American Express Co. v. Italian Colors Restaurant*,[72] where it held that arbitration clauses will be strictly enforced, even if they deny the plaintiffs the opportunity to "effectively vindicate" their rights.[73] Thus, even in "negative value" situations, where the claim could not rationally be asserted without a class action, arbitration will still be enforced.

While *Concepcion* and *Italian Colors* are potentially devastating for plaintiffs and for the effective enforcement of the nation's consumer protection, antitrust, and securities laws, they do not deal with Rule 23 on its own terms. This is not true of the Court's ruling in *Wal-Mart Stores, Inc. v. Dukes*, which significantly heightened the commonality requirement under Rule 23(a).[74] The Court's ruling in *Dukes*, which emanated from a putative nationwide gender discrimination class action, held that the plaintiffs must establish not merely that they were subjected to the same violation of law but also that they suffered substantially the same injury.[75] The Court held that for

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68. A. Benjamin Spencer, *Class Actions, Heightened Commonality, & Declining Access to Justice*, 93 B.U. L. REV. 441, 446 (2013).

69. *Id.*

70. 131 S. Ct. 1740, 1753 (2011).

71. Amanda Frost, *Academic Highlight: Gilles and Friedman on the Future of Class Actions*, SCOTUSBLOG (Sep. 5, 2012, 10:19 AM), http://www.scotusblog.com/2012/09/academic-highlight-gilles-and-friedman-on-the-future-of-class-actions/.

72. 133 S. Ct. 2304 (2013).

73. David Garcia, *Opinion Analysis: A Class Action Waiver in an Arbitration Agreement Will Be Strictly Enforced Under the Federal Arbitration Act*, SCOTUSBLOG (Jun. 21, 2013, 10:45 AM), http://www.scotusblog.com/2013/06/opinion-analysis-a-class-action-waiver-in-an-arbitration-agreement-will-be-strictly-enforced-under-the-federal-arbitration-act/.

74. Spencer, *supra* note 68, at 463.

75. *Walmart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). The putative class contained over 500,000 wo-men who claimed that Wal-Mart discriminated against them in employment and promotion decisions in violation of Title VIII of the Civil Rights Act of 1964. Lyle Denniston, *Argument Preview: Wal-Mart and Work-*

the commonality requirement to be met, there must be a common contention amongst the members of the class that is capable of resolving the dispute on a classwide basis for all members.[76] This means that "determination of [the common question's] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[77] Essentially, this is very similar to the analysis courts have used to resolve the question of predominance under Rule 23(b)(3). Ostensibly, then, *Dukes s*hould not alter the way courts analyze (b)(3) classes because the opinion in essence imported the predominance inquiry into the commonality question. However, in *Dukes*' aftermath, many courts have adopted more stringent requirements for plaintiffs to establish predominance.[78]

The Supreme Court further restricted the certification of class actions in *Comcast v. Behrend*, which involved a proposed (b)(3) class, in which it held that courts must consider the merits of the claims if the merits pertain to the ability of the plaintiffs to establish damages on a class-wide basis.[79] In its decision the Court held that the plaintiffs' damages model could not establish the element of predominance because the model failed to match up with their only remaining viable theory of liability.[80] Though it is not yet clear how far-reaching the effects of *Behrend* will be, courts denying class certification have already cited the case on numerous occasions.[81]

C. The Eighth Circuit's View on Class Actions

Taken together, these cases indicate a sea change in the way federal courts view class actions.[82] Following the lead of the Supreme Court, lower federal courts have begun to view the device with skepticism and hostility. This trend has become apparent in the Eighth Circuit, which took a fairly

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ers' Rights, SCOTUSBLOG (Mar. 28, 2011, 2:12 PM), http://www.scotusblog.com/2011/03/argument-preview-wal-mart-and-workers-rights/.

76. *Id.*

77. *Id.*

78. John Beisner & Geoffrey M. Wyatt, *Wal-Mart Stores v. Dukes: A Year of Substantial Influence*, BLOOMBERG LAW, http://about.bloomberglaw.com/practitioner-contributions/wal-mart-stores-v-dukes-a-year-of-substantial-influence-by-john-beisner-and-geoffrey-m-wyatt-skadden-arps-slate-meagher-flom-llp/.

79. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013).

80. Sergio Campos, *Opinion Analysis: No Common Ground*, SCOTUSBLOG (Mar. 29, 2013, 4:30 PM), http://www.scotusblog.com/2013/03/opinion-analysis-no-common-ground/.

81. *See, e.g.*, Driver v. Appleillinois, LLC, 2013 U.S. Dist. LEXIS 154773 (N.D. Ill. Oct. 29, 2013) (tipped employees alleging wage theft); Bright v. Asset Acceptance, Inc., 2013 U.S. Dist. LEXIS 108432 (D.N.J. Aug. 1, 2013) (alleged violation of the Fair Debt Collection Practices Act); Powell v. Tosh, 2013 U.S. Dist. LEXIS 120448 (W.D. Ky. 2013) (nuisance action against hog farm).

82. *See infra* Parts IV and V.

liberal view of class certification just a few years ago in *In re Zurn Pex Plumbing Products Liability Litigation*.[83]

In *Zurn Pex*, a class of plaintiffs alleged that the brass fittings on the plumbing systems manufactured by the defendants were inherently defective.[84] Some members of the plaintiff class had already experienced leaks as a result of the alleged defect, but another group, called the "dry plaintiffs," had not yet experienced leaks and sought to sue under Minnesota state warranty law.[85] To demonstrate that it would be simply a matter of time before these defects would occur, the "dry plaintiffs" relied on expert testimony.[86] Notably, the Eighth Circuit found that the district court was not required to perform a full *Daubert* inquiry at the certification stage to determine the admissibility of the testimony.[87] Instead, the Eighth Circuit endorsed an analysis of the experts' methods and conclusions tailored for the questions presented at the certification stage.[88] In doing so, the court relied on the tentative nature of class certification, the early stage of the evidentiary findings, and the argument that the policy underlying *Daubert* is to protect juries, not judges, from unsound science.[89]

Beyond the holding that *Daubert* hearings are not required at the certification stage, the Eighth Circuit also broadened its approach regarding the standing of class members.[90] Previously, the Eighth Circuit had adopted a restrictive approach, stating that "purchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own."[91] It had further held on another occasion that a plaintiff does not invoke standing to sue by "alleg[ing] that a product line contains a defect or that a product is at risk for manifesting this defect."[92] Rather, the court held that "the plaintiffs must allege that their product actually exhibited the alleged defect."[93]

This restrictive view of standing for class members was largely abrogated by the Eighth Circuit in *Zurn Pex*.[94] There, the court held that the plaintiffs could maintain a claim when they alleged that a product was defective, even if that defect had not yet caused any external damage to the plaintiffs' property.[95] It found that these "dry plaintiffs" were distinct from "no injury" plaintiffs because they alleged an inherent defect in the product, not simply a

83. Cox v. Zurn Pex, Inc., 644 F.3d 604 (8th Cir. 2011).
84. *Id.* at 608.
85. *Id.* at 616.
86. *Id.* at 617.
87. *Id.* at 614.
88. *Id.*
89. *Id.* at 613-14.
90. *Id.* at 616-18.
91. Briehl v. Gen. Motors Corp., 172 F.3d 623, 628 (8th Cir. 1999).
92. O'Neil v. Simplicity, Inc., 574 F.3d 501, 503 (8th Cir. 2009).
93. *Id.*
94. *See Zurn Pex*, 644 F.3d at 616-19.
95. *Id*. at 616-17.

hypothetical future defect.[96] The result of this analysis was a less strenuous standard for plaintiffs to bring class actions under warranty statutes.

The court in *Zurn Pex* also adopted a deferential posture towards the district court's finding that common questions predominated.[97] Though the Eighth Circuit noted that there were individualized questions to be resolved, it was satisfied that the district court had conducted a rigorous analysis.[98] As a result, it credited the district court's finding on predominance.[99]

While *Zurn Pex* required district courts to conduct a thorough review of plaintiffs' claims to ensure that they complied with the requirements of Rule 23, it created a fairly liberal standard for certifying a class.[100] However, following the spirit of the recent Supreme Court decisions, the Eighth Circuit has begun to charter a new and more restrictive path in *Halvorson*.

IV. INSTANT DECISION

In its ruling, written by Judge Smith and joined by Judges Loken and Benton, the Eighth Circuit held that the class of North Dakota Auto-Owner policyholders who submitted no-fault personal injury claims must be decertified.[101] The court first discussed the nature of the Havorsons' complaint and their challenge to Auto-Owners' percentile-based review of PIP claims.[102] It then outlined the district court's ruling, which found that the class of North Dakota policyholders was to be certified.[103]

The court noted that Auto-Owners challenged the district court's opinion on three grounds: that common issues did not predominate, that some of the class members do not have standing, and that the certification of the class was at odds with the decisions of the majority of other courts that considered similar issues.[104] The court then noted that *Dukes a*nd *Behrend* require that the plaintiffs make a showing of affirmative proof that the requirements of Rule 23 are met.[105] Since this action was filed under 23(b)(3), this meant that the plaintiffs were required to produce evidence that common issues predominated over individualized ones.[106]

The court began its analysis by considering the issue of standing.[107] It recited Auto-Owners' argument that some of the plaintiff class members did

96. *Id.* at 617.
97. *Id.* at 619.
98. *Id.* at 618-19.
99. *Id*. at 619.
100. *See generally Zurn Pex*, 644 F.3d at 617-19.
101. *Halvorson*, 718 F.3d at 774, 780.
102. *Id.* at 775.
103. *Id.* at 776-77.
104. *Id.* at 777-78.
105. *Id.*
106. *Id.* at 778.
107. *Id.*

not have standing because they did not suffer an injury-in-fact.[108] In effect, Auto-Owners claimed that in order to have suffered an injury, the plaintiffs must have submitted proof that their claim was "usual and customary" and that Auto-Owners failed to fully pay it.[109] Otherwise, Auto-Owners argued, if the claim was not "usual and customary," the plaintiff did not suffer an injury.[110]

The court stated that a class could not be certified if it contained members who did not have standing.[111] It went on to say that standing "requires a showing of injury in fact to the plaintiff that is fairly traceable to the challenged action of the defendant."[112]

Regarding the instant putative class, the Eighth Circuit proceeded to state that individualized issues of whether a provider's charge was "usual and customary" (and thus whether the discounted payment was appropriate) would overwhelm common issues regarding whether or not the third-party bill review system was reasonable.[113] The court then acknowledged that the Eighth Circuit recently upheld class certification in *Zurn Pex*, a case where some of the plaintiffs had suffered no injury.[114] The court noted that in upholding class certification (despite the fact that some of the plaintiffs had not yet suffered damages from the alleged defect), it had noted that the underlying substantive law, a Minnesota warranty statute, allowed suits for latent defects that existed at the time of installation.[115]

The court then distinguished the instant case from *Zurn Pex* on the basis that there was no similar statute that creates an injury-in-fact despite the nonexistence of damages.[116] It stated that "[s]ome members [of the class] likely have standing, and some likely do not."[117] The court went on to say that if a health care provider accepted Auto-Owners' payment at the eightieth percentile as payment in full or if Auto-Owners negotiated a settlement with the provider without involving the plaintiff, the plaintiff had not suffered a cognizable injury.[118] Thus, the court held that because the putative class contained members who did not suffer an injury, it could not be certified.[119]

The Eighth Circuit then went on to hold that individual legal issues predominated over class-wide legal issues, meaning that the plaintiffs had failed to meet the requirements for a 23(b)(3) class.[120] It held that the predominance

108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 779.
112. *Id.* (citing Braden v. Wal-Mart Stores, 588 F.3d 585, 591 (8th Cir. 2009).
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 780.
120. *Id.*

requirement was not met, even though the trial court found that Auto-Owners employees did not have discretion in the application of the payment reduction mechanism.[121] The court noted that a claim for breach of contract under North Dakota law required the plaintiff to prove the existence of a contract, the breach of that contract, and damages.[122] The court then found that in order for the plaintiffs to prevail, they would have to show that their claims for payment were based on "usual and customary rates."[123] Because each plaintiff suffered different injuries and was treated by different doctors charging different amounts, the court found that the inquiries were too individualized to permit class proceedings.[124]

The court further stated that the commonality question posed by the *Dukes* majority – *why was I disfavored?* – could not be answered in a uniform manner on a class-wide basis.[125] The court opined that someone at the eightieth percentile may not have received full payment because they were subjected to unreasonable treatment, whereas someone at the ninety-fifth percentile may not have received full payment because their claim was legitimately unusual and not customary.[126] Thus, because the answer as to why individuals would be disfavored would fluctuate throughout the class, and because the reasonableness of any reduction in payment would have to be individually analyzed, the court found that a class action could not be maintained.[127]

V. COMMENT

The Eighth Circuit's ruling in the instant decision demonstrates its eagerness to follow the trend set by the Supreme Court in restricting the use and application of Rule 23. As one of the most conservative federal appellate courts in the nation[128] this outcome is not unexpected. Still, the decision in *Halvorson* is noteworthy because it demonstrates the vigor with which the Eighth Circuit is willing to pursue what it sees as its directive: to clamp down on consumer class litigation.

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121. In a deposition, an officer for Auto-Owners Insurance stated that the company's adjustors were supposed to adhere to the recommendations of the third-party reviewers. *Id.* at 777. Thus, it was company policy to reduce payments over the eightieth percentile.

122. *Id.* at 779-80.

123. *Id.* at 780.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. Andreas Broschild, *Comparing Circuits: Are Some U.S. Courts of Appeals More Liberal or Conservative Than Others?*, 45 LAW & SOC'Y REV. 171, 172 (2011) ("the Seventh and Eighth Circuits are [typically regarded as] two of the most conservative" appellate circuits).

In doing so, the court erred on several fronts. First, it failed to give the district court proper deference on its decision to certify the class. Second, in its zeal to decertify, the Eighth Circuit actually preceded Supreme Court doctrine on the issue of predominance of common questions. Finally, the court ignored important policy considerations weighing in favor of aggregating claims similar to those brought by the Halvorsons.

A. The District Court Did Not Abuse Its Discretion by Certifying the Class

Unlike many appellate decisions that are made on a *de novo* basis, appeals on class certification issues are reviewed for abuses of discretion, a much more deferential standard.[129] However, the court in *Halvorson* gave the lower court's ruling little, if any, deference, instead substituting its own judgment for that of the trial court. In doing so, the court dismantled a class that should have been allowed to go forward under current doctrine, and set the stage for hyper-vigilant review of district court certification orders.

1. The Standing Problem Could Easily Be Cured Without Dismantling the Class

The court based its ruling, in large part, on its finding that some members of the proposed class did not have standing because they did not suffer an injury-in-fact.[130] To support this finding, the court tersely stated that "[i]f a health-care provider accepted Auto-Owner's payment at the 80th percentile as payment in full (or if Auto Owners settled the dispute without involving the plaintiff), the plaintiff was not injured."[131] Essentially, the court stated that even if a defendant short-changed a plaintiff's doctor, the plaintiff did not lose anything unless he was billed for the difference.[132] The court reasoned that because some of the doctors worked out the dispute with the insurance company without involving the plaintiff in any way, some of the policyholders who were subjected to percentile-based review did not suffer any cognizable injury.[133]

Though this may well be true, it does not follow that a class must be decertified as a result. Instead, the court could have taken much less drastic

129. Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1090 (9th Cir. 2010).

130. It is widely held doctrine that a proposed class that contains members who do not have standing cannot be certified. Adashunas v. Negley, 626 F.2d 600, 604 (7th Cir. 1980); *see also* Denny v. Deutsche Bank AG, 443 F.3d 253, 263-64 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing").

131. *Halvorson*, 718 F.3d at 779.

132. *See id.*

133. *Id.* at 779-80.

measures to remedy the problem. A more measured ruling would have remanded the case to the district court to redefine the class and ensure that it did not contain uninjured persons.[134] As constituted in the instant case, the class was defined as:

> From December 10, 2004, through the present, all persons covered by Auto-Owners medpay or PIP policies issued in North Dakota, and their provider assignees, who (1) submitted claims for payment of medical expenses to Auto-Owners pursuant to an Auto-Owners auto policy's PIP coverage; (2) were paid an amount less than the submitted medical expenses based upon a percentile-based reduction resulting from Auto-Owners' third-party bill review process during the defined class period; and (3) were paid an amount less than the policy limits for their claims. Excluded from the class are the following: Auto-Owners, their officers and employees, their affiliates, any entity in which Auto-Owners has a controlling interest, and successors or assigns of any of the foregoing, and those persons who have exhausted the policy limits applicable to their PIP coverage.[135]

To cure the problem of standing, the court could have added an additional requirement to the class definition stating that the insured plaintiff had been billed or had paid an outstanding amount to Auto-Owners.[136] This would have ensured that each plaintiff in the class had suffered a *bona fide* injury. This approach would remedy the standing problem and do so in a way that does not abrogate the function of the trial court, which had found that the instant litigation called for certification under Rule 23(b)(3).

The Eighth Circuit spent most of its discussion of the standing issue distinguishing the case from the *Zurn Pex* decision, which allowed a class to be certified when some of the plaintiffs had not yet suffered property damage and thus were not truly injured.[137] The court's distinction, which turned on the underlying substantive law, was persuasive. The relevant state law in *Zurn Pex*, by definition, held that members of the class who owned imminently defective products had suffered an injury simply by buying these products.[138] The court rightly noted that the North Dakota law relevant to the instant decision made no such allowance.[139] However, by focusing on distinguishing the instant class from the *Zurn Pex* precedent, the Eighth Circuit failed to recognize the ease with which the standing problem could be fixed.

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134. *See id.*
135. *Id.* at 777.
136. *Cf. id.* at 779-80.
137. *Id.*; *see* Cox v. Zurn Pex, Inc., 644 F.3d 604, 617-19 (8th Cir. 2011).
138. *Zurn Pex*, 644 F.3d at 617.
139. *Halvorson*, 718 F.3d at 779.

2. The Class-Wide Common Questions Presented in the Litigation Predominated Over Individualized Inquiries

The Eighth Circuit, in somewhat summary fashion, stated that the plaintiffs failed to show that common questions predominated over individual ones.[140] The court held that the central question of the case, whether the defendant failed to pay for "usual and customary" medical expenses as was their legal obligation,[141] could not be answered on a class-wide basis.[142] In so finding, it stated that "[m]embers of the class incurred different injuries, which were treated by different medical providers charging different prices for their services."[143] Thus, the inquiry of whether the contract was breached as a result of the percentile-based review process would turn on facts particular to each individual policyholder.[144] The court further stated that the question posed by the Supreme Court in *Dukes*[145] could not be answered on a class-wide basis because someone at the eightieth percentile was in a significantly different legal position than someone at the ninety-fifth percentile[146].

However, the Supreme Court stated in *Dukes* that the requirement of commonality[147] is satisfied if the litigation presents questions that, when answered, are apt to drive the resolution of the plaintiffs' claims on a class-wide basis.[148] In the instant case, the plaintiffs have available two distinct but related legal theories that, when decided, would drive the resolution of the litigation for the entire class.[149] These theories demonstrate that the class is cohesive enough to survive the predominance requirement of Rule 23(b)(3).

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140. *Id.* at 780.

141. North Dakota law states that "'[m]edical expenses' means usual and customary charges incurred for reasonable and necessary medical, surgical, diagnostic, x-ray, dental, prosthetic, ambulance, hospital, or professional nursing services or services for remedial treatment and care." N.D. CENT. CODE ANN. § 26.1-41-01 (West 2013).

142. *Halvorson*, 718 F.3d at 780.

143. *Id.*

144. *Id.*

145. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552 (2011) (posing and answering the question: Why was I disfavored?).

146. *Halvorson*, 718 F.3d at 780.

147. Before *Dukes* heightened the standard for commonality, commonality was considered to be much easier for plaintiffs to satisfy than predominance. *Dukes*, 131 S. Ct. 2562, 2565-66 (Ginsburg, J., concurring in part and dissenting in part); *see* Spencer, *supra* note 68, at 449.

148. *Dukes*, 131 S. Ct. at 2551.

149. *Halvorson*, 718 F.3d at 779-80.

B. Theories

1. The Defendant's Legal Obligation to Pay All "Usual and Customary" Medical Expenses Necessarily Precludes Percentile-Based Reductions

Under this theory, the plaintiffs would essentially argue that percentile-based reductions are *per se* unreasonable under the contract. The argument would start with the contractual language, which requires Auto-Owners to pay all claims for personal injuries that are "usual and customary." The plaintiffs would then argue that this language means that Auto-Owners is obligated to pay the full amount for all procedures of a certain type but is excluded from having to make any payment for other types of procedures. For instance, the plaintiffs could claim that the "usual and customary" language should be construed to require Auto-Owners to pay 100% of submitted claims for setting broken bones and performing blood transfusions but that they need not pay any money on claims for plastic surgery or certain experimental or other nontraditional procedures.

This construction of the relevant language would allow the question of liability to be answered across the board. Percentile-based review would be found to either be acceptable as to all policyholders or inappropriate as to everyone. Thus, the class would follow the *Dukes* dictate that liability be determined as to all plaintiffs in the class, in one fell swoop.[150] It is true that damages would not be uniform, and thus, their determination would require some individualized inquiry. But courts have traditionally been willing to certify (b)(3) classes with members incurring disparate levels of damages, so long as questions of liability remain uniform throughout.[151] Under this theory, the questions regarding which procedures would be considered "usual and customary" would require some individualized determinations. However, these individual questions would be overwhelmed by the question of class-wide applicability: whether the contract allows any percentile-based reductions for certain claims.

2. Percentile-Based Review Is Not a Per Se Breach of Contract, but the Eightieth Percentile Is an Unreasonably Low Point of Reduction

Alternatively, the plaintiffs could argue that the contract permits Auto-Owners to reduce payments based on percentile calculations but that the eightieth percentile is too low to capture the meaning of "usual and customary." Under this theory, the plaintiffs could point out that many other insurance companies use percentile-based review but that they begin reducing

150. *See Dukes*, 131 S. Ct. at 2551.

151. Blackie v. Barrack, 524 F.2d 891, 905 (9th Cir. 1975); Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 40 (1st Cir. 2003).

payments at the ninetieth percentile.[152] Under this theory, the plaintiffs could present a question capable of determining liability on a class-wide basis: whether the eightieth percentile is an unreasonably low point of reduction.

This theory would also have the benefit of allowing damages to be calculated on a class-wide basis. For instance, let us assume that the issue went to trial and that the court found that the eightieth percentile was unreasonable but that the ninetieth percentile was acceptable. Under such a ruling, each plaintiff would be entitled to the amount equal to the eightieth percentile of his claim up to the ninetieth percentile of his claim, unless his claim fell between the eightieth and ninetieth percentile, in which case he could recover based on the difference between his percentile and the eightieth mark used by the defendant.[153] With access to Auto-Owners' percentile data and payment records, the parties could design a class-wide damages model with relative ease.[154]

C. The Supreme Court's Ruling in Wal-Mart v. Dukes Does Not Lend Justification to the Court's Predominance Finding

Throughout the Eighth Circuit's brief and perfunctory discussion of predominance of common questions, it favorably cites the Supreme Court's *Dukes* decision.[155] However, while *Dukes* gives off the general air of hostility toward class actions, it fails to provide any real legal support to the Eighth Circuit's decision to decertify this class.[156] The court states that the question as to why individuals were disfavored would produce disparate answers

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152. *Halvorson,* 718 F.3d at 755; *see also* Appellee's Response Brief at 29, Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773 (2013) (No. 12-1716) (stating that "other national auto insurers using the same method have at various times set their 'reasonableness' cutoffs at the ninetieth, ninety-fifth, and ninety-ninth percentiles.").

153. For instance, take Policyholder A and Policyholder B, both of whom submitted bills for X procedure. Auto-Owners has determined that the prices for X range from $0 to $100 in the relevant geographic area, and are evenly distributed. Thus, the eightieth percentile would be $80. A's claim, at the eighty-fifth percentile, was for $85. B's claim, at the ninety-fifth percentile, was for $95.

Before the litigation commenced, both A and B had $80 paid toward their claims. Thus, A had to pay $5 and B had to pay $15. After the court determined that the eightieth percentile was an unreasonably low point of review and that the ninetieth percentile was appropriate, both A and B are entitled to damages.

The calculation of these damages would be relatively simple. A would be entitled to a full refund of his $5. B, on the other hand, would only be entitled to a partial refund. Since the court found that the ninetieth percentile adequately represented the meaning of "usual and customary" claims, B would not be entitled to any amount over the ninetieth percentile. Thus, he would be eligible to receive $10 in damages. *See Halvorson*, 718 F.3d at 774-76.

154. *See, e.g.*, *Smilow*, 323 F.3d at 40-41 (noting that the plaintiff's expert could "fashion a computer program" to create a classwide damages model).

155. *See Halvorson*, 718 F.3d at 778, 780.

156. *Compare Dukes*, 131 S. Ct. at 2550-52, *with Halvorson*, 718 F.3d at 780.

throughout the plaintiff class.[157] However, this is not necessarily the case. A court could very well find that all class members were disfavored because they were subjected to any form of percentile-based reduction, or that they were subjected to an unreasonably high reduction, for the reasons given previously.[158] These theories would allow a court to answer the *Dukes* question in a yes-or-no fashion on a class-wide basis.

In reality, *Dukes* dealt with an entirely different scenario: one where the agents of the defendant company acted with discretion. The reason the plaintiff class in *Dukes* failed the commonality requirement was that some managers discriminated based on sex while some did not.[159] In the instant case, however, no such discretion was exercised, and the defendant had a standard policy of reducing payment at the eightieth percentile.[160] Thus, questions about the efficacy of this policy, as well as why a certain plaintiff was disfavored, are capable of being answered on a class-wide basis.

D. The Court's Opinion Ignores Important Policy Considerations Underlying Rule 23(b)(3).

The Eighth Circuit's decision to abandon their permissive view of class certification as stated in *Zurn Pex* and adopt a much more stringent standard was an unfortunate policy choice that stands at odds with the intent of Rule 23 and longstanding class action doctrine.[161] Rule 23(b)(3), which contains notice and opt-out provisions to protect the rights of absent class members, was intended to present a much less onerous standard to plaintiffs at the certification stage.[162] The Advisory Committee stated one of the justifications underlying the existence of (b)(3) classes was achieving "economies of time, effort, and expense,"[163] and courts have traditionally understood that the provision should be given flexibility to allow for the certification of negative-value class actions. As one court stated, "The core purpose of Rule 23(b)(3) is to vindicate the claims of consumers and other groups of people whose individual claims would be too small to warrant litigation."[164]

Indeed, without the 23(b)(3) class action procedure, there would be no feasible means for consumers who have been defrauded to assert their substantive rights under the law; nor would there be a significant method of deterrence to hold large-scale miscreants accountable and prevent future mis-

157. *Halvorson*, 718 F.3d at 780.

158. *See supra* Part V.B.

159. *Dukes*, 131 S. Ct. at 2554-56.

160. *See supra* note 120 and accompanying text.

161. *Cf. Halvorson*, 718 F.3d at 779-80.

162. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997) ("[F]ramed for situations in which 'class-action treatment is not as clearly called for' as it is in Rule 23(b)(1) and (b)(2) situations, Rule 23(b)(3) permits certification where class suit 'may nevertheless be convenient and desirable.'").

163. FED. R. CIV. P. 23 advisory committee's notes.

164. *Smilow*, 323 F.3d at 41.

conduct. For most consumers who have been defrauded or scammed, the only economically rational way for them to protect their rights and recover their losses is through a class action. For instance, the Halvorsons assert that they were "nickeled and dimed" out of just over $80,[165] certainly not enough of a loss in itself to justify the legal fees required to bring an individual lawsuit. To paraphrase Judge Richard Posner of the Seventh Circuit Court of Appeals, only a lunatic or fanatic would sue for such an amount.[166] However, because Auto-Owners allegedly perpetrated the same scheme on many other consumers, the economies of scale allow consumers that join together to vindicate their rights.

When courts unduly restrict the ability of consumers to bring class actions, they essentially absolve corporations who commit petty theft on a large scale from any legal repercussions. The effective outcome of restricting class certification is to defang consumer protection laws and immunize large-scale offenders from having to answer for their misconduct. This runs in clear contrast to the policy goals of Rule 23.[167]

The Eighth Circuit appears to be following the general trend set by the Supreme Court in recent years: dismantling the class action procedural device. Though the Eighth Circuit is compelled to follow the specific legal principles outlined by the Supreme Court, it is not required to view all class action issues through the lens of disdain adopted by the Supreme Court majority.[168] By gratuitously extending the holdings of *Wal-Mart v. Dukes* and *Comcast v. Behrend* beyond the point required, the court did a disservice to consumers and to class action doctrine.

VI. CONCLUSION

The Court's ruling in *Halvorson* indicates that the Eighth Circuit is ready to put serious restraints on the use of consumer class actions. The ruling marks a noteworthy step away from the decision in *Zurn Pex*, which indicated a preference for permissive class certification standards.[169] Though the court's finding on the standing issue is not especially onerous, its ruling on the issue of predominance of common questions is far more troubling. Most likely, it is indicative of a future trend to further restrict the use of 23(b)(3) class actions.[170] Hopefully, the Eighth Circuit will rethink the problematic

165. MEALEY'S, *supra* note 5, at ¶ 7.

166. Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

167. *See Amchem Prods.*, 521 U.S. at 616-17.

168. *See* Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 780 (8th Cir. 2013) (extending the principles outlined in *Dukes)*.

169. *See supra* Part III.C.

170. *See, e.g.*, *Halvorson*, 718 F.3d at 780.

consequences of taking such a path and limit this ruling so that consumers can continue to have meaningful access to justice.