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**THE CENTRALITY OF CLASS CERTIFICATION
IN AMERICAN CLASS ACTIONS AND ITS
APPLICATION AS A MODEL TO BRAZIL**

A centralidade da certificação coletiva nos processos norte-americanos e sua aplicação como modelo ao Brasil

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ABSTRACT: The article aims to analyze the relevance of the class certification decision in the experience of the American class actions, presenting this ruling as a model to other jurisdictions where forms of collective redress exist, such as Brazil. For this purpose, the discipline and the content of this decision are explored, based on Federal Rule 23 and precedents of the U.S. Supreme Court, to reveal its centrality within the scope of multi-party actions. Endmost, the conclusion is presented by the possibility of extracting from the American experience a fundamental content of the certification decision, equally applicable to other jurisdictions: the definition of the group (class definition), understood as a basic element for the filing of any kind of class action. This content of the decision can directly affect several other procedural issues, such as the adequacy of representation, proper notice, *res judicata*, participation, and settlements.

KEYWORDS: Class actions. Class certification. Collective redress. Group definition. Multi-party actions.

RESUMO: O artigo objetiva analisar a relevância da decisão de certificação coletiva na experiência das ações coletivas americanas, apresentando esta decisão como modelo para outras

jurisdições onde existem formas de processos coletivos, tais como o Brasil. Para tanto, a disciplina e o conteúdo desta decisão são explorados, com base na Regra Federal 23 e precedentes da Suprema Corte dos Estados Unidos, de modo a revelar a sua centralidade no tema. Ao final, a conclusão é apresentada pela possibilidade de extrair da experiência americana um conteúdo fundamental da decisão de certificação, igualmente aplicável a outras jurisdições: a definição do grupo (definição de classe), entendida como um elemento básico para a apresentação de qualquer tipo de ação coletiva. Este conteúdo da decisão pode afetar diretamente várias outras questões processuais, tais como a adequação da representação, a devida notificação, o trânsito em julgado, a participação, e os acordos. O método de abordagem é o indutivo.

PALAVRAS-CHAVE: Processos coletivos. Ações coletivas. Ações de classe. Certificação coletiva. Saneamento processual.

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1. INTRODUCTION

Although England is commonly recognized as the origin of collective litigation, contemporary Law has its reference in the American class actions, starting from the rules of equity, among which Equity Rule 48 is considered the first written rule related to class action in the United States¹. Federal Rule 23 came out in the country in 1938, was subjected to reforms in 1966 and other later ones, and specifically intended to regulate class actions, which were extended to the entire Law, and not only to lawsuits based on equity. As Didier Jr. and Zaneti Jr. point out, ‘the global trend is the universalization of the class action model, undoubtedly the most successful and widespread among the common law and civil law legal systems.’²

To be conducted under the collective form, a claim needs to meet a series of requirements (prerequisites) in American law. This is what the class certification stage encompasses, consisting of a preliminary judgment that aims to verify the possibility of proceeding with the class action, with an impact on the group. This is an extremely important procedural step, with requirements that are expected to provide a fair process, in which the advantages of a uniform trial of the collective dispute are not outweighed by the risks of injustice to absent members of the group.³ The logic here is quite simple: when faced with a claim which outcome can benefit or harm an entire community, due

1 D. Hensler, *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, pp. 10-11 (Santa Monica, Rand, 2000).

2 F. Didier Jr. and H. Zaneti Jr., *Curso de Direito Processual Civil*, p. 57 (Salvador, JusPodivm, 2011).

3 A. Gidi, *A Class Action como Instrumento de Tutela Coletiva dos Direitos*, p. 67 (São Paulo, Revista dos Tribunais, 2007).

to the effects of it on the group, strict compliance with its requirements is a mean of protecting the absent.

In American law, the expression *class certification* is used in two major senses or contents. The first one is the *class definition*, in which the decision takes up the important task of defining the contours of the group, which will completely influence the course of the collective lawsuit⁴. *Class definition* is the basic prerequisite for the filing of any kind of class action⁵ for several reasons, which inspired countries such as Spain to establish the same provision in their procedural legislation.⁶

For instance, the analysis regarding the requirement of representation adequacy will depend especially on the group it intends to protect⁷. Before placing any judgment regarding the collective representative, the court must know the contours of the group that this (alleged) representative intends to protect. As a matter of fact, such a person cannot even be considered a legitimate plaintiff without a prior suitability assessment.⁸

In addition, it is the definition of the group that allows for proper notification of its members, who have the right to opt-out. It also allows the participation of those possibly affected and enables the conclusion of agreements. After all, negotiations will not be possible without a prior definition of those who will be subject to its effects. Finally, only by knowing exactly who the members of the group represented in court are, will one know the parties affected by the collective *res judicata*.⁹

In the context of class actions, in practice, courts usually analyze the existence of a group based on the requirements of Rule 23 for the admissibility of the claim. If the requirements are present, there will consequently be a group.¹⁰ Because of this, in the American system, the existence of a group is not considered a fifth autonomous element yet is extracted mainly from the requirements of numerosity and the common issue.

4 S. Burbank and S. Farhang, 'Politics, Identity, and Class Certification on the U.S. Courts of Appeals.' 119(2) *Michigan Law Review*, p. 231 (2020).

5 J. Tidmarsh and R. Transgrud, *Modern Complex Litigation*, p. 344 (New York, Foundation Press, 2010).

6 As provided in art. 256 of the Spanish Code of Civil Procedure (*Ley de Enjuiciamiento Civil*), in proceedings aimed to defend the collective interests of consumer groups, 'the court shall adopt appropriate measures for the investigation of the members of the group, according to the circumstances of the case and according to the data provided by the applicant, including the requirement to the defendant to collaborate in such determination.' See <https://www.boe.es/buscar/act.php?id=BOE-A-2000-323&p=20151028&tn=1>, last accessed on 11.05.2021.

7 See L. Buril de Macêdo, *O controle judicial da representação adequada: notas ao tratamento legal e doutrinário e proposta de adequação constitucional de seus efeitos*. 39(227) *Revista de Processo* (2014); J. P. Alvarenga Brant, *O controle judicial da representação adequada no processo coletivo* (São Paulo, D'Plácido, 2019) and Clarissa Diniz Guedes, *Legitimidade Ativa e Representatividade na Ação Civil Pública* (Rio de Janeiro, GZ, 2012).

8 D. Berman, 'Class Problem!: Why the Inconsistent Application of Rule 23's Class Certification Requirements during Overbreadth Analysis Is a Threat to Litigant Certainty.' 87(1) *Fordham Law Review*, p. 253 (2018).

9 Gidi, *supra* note 3, pp. 193-194.

10 Gidi, *supra* note 3, p. 258.

Also, the composition of the group is limited by the claim of the appropriate representative: since they can solely represent those whose litigation is similar to their own (typicality requirement), only such persons will be part of the group.¹¹ What we observe is that the requirement of a well-defined group is a task performed in conjunction with the other requirements, without the need to invoke subjective criteria or even an extensive factual investigation, which could hinder the progress of the claim. In the end, the *res judicata* will fall on the group, as delimited in the certification decision.

The composition of the group can present a great variation depending on the concrete situation.¹² It is conceivable to think of a class consisting of all the people residing in the State of Louisiana (state-wide class), people residing in several States (multistate class) or even people residing in the whole country (nation-wide class). In the context of labor class actions, it is feasible to imagine a class consisting of all the employees of a particular company (company-wide class), or just employees of a particular gender or nationality.¹³ The composition of the group may consist of amorphous, vague, or indeterminate classes, as in the case of lawsuits filed on behalf of people of a particular social group or origin. It can even be fluid or unstable (fluid class), with a high turnover of its members, as in class actions filed on behalf of students, nurses, patients in a particular hospital unit, etc.

One can also consider a group formed by people who do not even exist (future class members), as occurs in class actions brought on behalf of future contractors or people who are born with a disability due to their parents' exposure to a toxic agent.¹⁴ In such cases, one speaks of hyper vulnerable collectivities, as they are formed by absent, invisible, and passive people, unable to participate in any negotiations.¹⁵

In a second sense, certification consists of a necessary step so that a judge can determine whether the class action meets all the legal requirements, thus deciding on the motion for the collective lawsuit (motion of certification). Here we have the so-called certification of a class action. Both the definition of the group (class definition) and the certification of a class action are carried out in a single decision.

2. THE RELEVANCE OF CLASS CERTIFICATION DECISIONS¹⁶

The processing of a class action has two distinct phases: the first begins with the filing of the lawsuit, in which the judge will evaluate the hypothesis of suitability and

11 Gidi, *supra* note 3, p. 258.

12 J. Tidmarsh, *Mass Tort Settlement Class Actions: Five Case Studies* (District of Columbia, Federal Judicial Center, 1998).

13 Gidi, *supra* note 3, p. 262.

14 *Ibid* 263-166. See also Michelle White, 'Asbestos and the Future of Mass Torts.' 18(2) *Journal of Economic Perspectives*, p. 183 (2004).

15 See M. Reisch, 'Asbestos Class-action Suit: Court Overturns \$1.3 Billion Settlement.' *Catalysis Reviews. Science and Engineering*, p. 6 (1996).

16 For a broader understanding of the topic in both Brazilian and American jurisdiction, see J. P. Lordelo Tavares, *Certificação coletiva: organizando as ações coletivas e o julgamento de casos repetitivos* (Salvador, Juspodivm, 2020).

the presence of its requirements; the second is developed from the definition of the collective structure of the claim. The separation between these two is marked by the decision on admissibility and procedural organization (class certification). This is what gives the proposed claim a collective structure. Only then, it is possible to speak of the existence of a class action. Usually, the request for processing any given action as a collective action occurs from the initial petition (motion for certification). It is possible, however, for an individual action to be converted into a collective action during the proceedings.¹⁷

Similarly, it is feasible that a claim that had been admitted as a class action loses this quality during procedures, receiving the treatment of an individual action, by means of a decertification decision. This may occur, for example, in cases where it is observed, after the certification decision, that the class was poorly represented or when the right to opt-out was exercised by several members, to jeopardize the requirement of the impracticability of the joinder – Rule 23(a)(1). Once the collective certification is revoked, the lawsuit becomes individual, which does not imply the automatic extinction of it.

The request for class certification can be formulated in an action originally brought as a class action or in an individual action. If the request for certification is denied, the lawsuit will continue to be individual in nature. This decision has a purpose and importance very close to that of the ‘sanitation decision’ in Civil Law, as pointed out by authors such as Gidi¹⁸ and Roque.¹⁹

According to Rule 23(c)(1)(B), an order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint the class counsel under Rule 23(g). This decision is extremely relevant in the American system. This is often the most contentious moment of the lawsuit, and may also be the most time-consuming phase of the procedure,²⁰ precisely because it has the power to transform an amorphous mass of individuals into a legally recognized entity, capable of going to court to fight for its interests.²¹ Technically, it is this decision that turns the proposed action into a class action, ensuring, consequently, the subjective efficacy *erga omnes* of the *res judicata* resulting therefrom. When certifying the class action, the court has the task of a) defining the contours of the group (class definition); b) assessing the presence of the requirements in Rule 23(a); and c) deciding which of the types of class action set forth in Rule 23(b) it is. If the situation does not completely fit the legal requirements, the judge may certify an “issue class action”.²² In addition to these structuring elements

17 A. V. Roque, *Class Actions: Ações Coletivas nos Estados Unidos: o Que Podemos Aprender com Eles?*, p. 30 (Salvador, JusPodivm, 2013).

18 Gidi, *supra* note 3, p. 213.

19 Roque, *supra* note 12, p. 231.

20 Tidmarsh and Transgrud, *supra* note 4, p. 341.

21 See B. Fitzpatrick, *The Conservative Case for Class Actions* (Chicago, University of Chicago Press, 2020).

22 Gidi, *supra* note 3, p. 198.

of the nature of the case itself, certification also influences other relevant aspects of the litigation. It influences the parties' leverage to settle, determines the amounts that may be earned by the parties' lawyers, the likely costs of discovery and trial, and the publicity to be given to the litigation.²³

Once class certification is denied, the collective nature of the claim is consequently not recognized, and it will be pursued only in relation to the plaintiff's individual claim. In many cases, however, the plaintiff's interest in pursuing an exclusively individual claim does not even subsist. This occurs especially in cases in which the individual claims are too small, to the point of eliminating the interest of the injured parties in filing their respective lawsuits. In these situations, the decision not to certify will represent the impossibility for the Judiciary to assess the issue as a whole.

That is why it is here that a true procedural battle is established. Once the collective action is certified, the risks for the adverse party in relation to the collective intensely increase. This is because, before the certification, the position of the group is still quite precarious; after it, with the recognition of the existence of a collective claim, the forces of litigation are balanced.²⁴ It is common to observe, in American forensic practice, the intense opposition of the defendant to collective certification in order to avoid the risks that point to the increase of its liability.²⁵ Due to such risks, when a class action is admitted, the defendant tends to be more willing to settle, thus increasing the group's bargaining power.²⁶

Not always, however, the defendant will resist collective certification. In some cases, they may restrict their defense to specific points, such as a narrower definition of the class based on a narrow view of the common issue. They may also agree or even request that a particular individual action be certified as a class action. The interest of the defendant in doing so is directly related to the economy of procedural costs and attorneys' fees, notably in cases where the individual claims have significant economic value. Class certification, from the defendant's point of view, may represent an attempt to obtain a favorable and definitive solution, to bind the entire affected group, ending the discussion of the litigation,²⁷ either through a court decision or through an agreement.

In addition, the overall amount of damage in a class action is usually lower than the sum of every sole damage that may be awarded in numerous individual lawsuits. For this reason, it has become increasingly common to conclude agreements even before the admissibility phase, through the so-called settlement class actions, filed exclusively

23 Tidmarsh and Trangsrud, *supra* note 4, p. 341.

24 Gidi, *supra* note 3, p. 199.

25 See R. Apfel, J. Parsons, G. W. Schwert, and G. S. Stewart, 'Short Sales, Damages and Class Certification in 10b-5 Actions.' Policy File, p. 1 (2001).

26 S. Berry, 'Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action.' 80(2) Columbia Law Review, p. 299 (1980).

27 Roque, *supra* note 12, p. 231.

so that the Judiciary certifies the class action and ratifies the collective agreement that has already been concluded, binding the entire group.

This is what happened in the case *AmChem Products, Inc. v. Windsor*, in which the Supreme Court of the United States was requested to decide on the effects of the (prior) settlement on the collective certification decision. At that time, several individual actions for damages were filed against manufacturers of asbestos, a substance used in several commercial products at the time, known to lead to major diseases such as lung cancer, mesothelioma, and asbestosis. The cases were consolidated for joint trial (multidistrict litigation) before the District of Pennsylvania, resulting in the execution of a partial global settlement agreement executed by the plaintiffs' and manufacturers' attorneys.

The purpose of the settlement was to bind potential litigants who had not yet filed their individual lawsuits, and collective certification was required only for purposes of approval of the settlement. In the end, the Supreme Court held that purported settlement class actions were possible, subject, however, to the prior Rule 23 certification, which was denied in the concrete situation, due to the absence of a common prevailing issue.²⁸

3. THE TIME TO ISSUE

With respect to the timing of the certification, Rule 23(c)(1)(A) provides that it should occur as soon as possible ('at an early practicable time'). Therefore, it is preferable that it occurs at an early stage of the proceeding. Based on this provision, some courts have come up with local rules, regulating a period within which the request for collective certification must be formulated. This has varied, in general, between thirty and ninety days as of the filing of the action, the service of process, or the end of the pleading phase.²⁹

It is quite common that, before such request is made, the parties perform investigations on the facts relevant to the decision, through the so-called pre-class certification discovery. This is because, naturally, when examining the indeterminate concepts of Rule 23 (impracticability of joinder, common issue, typicality, adequate representation etc), the judge will inevitably have to analyze factual issues regarding the controversy.³⁰

4. CONSIDERATIONS ON THE MERITS OF THE CLAIM IN CLASS CERTIFICATION

The analysis of the merit of the claim, in the admissibility phase, is one of the most sensitive issues in American class actions. In the early years after the 1966 reform, it

28 SCOTUS, 1997 *Amchem Products, Inc. v. Windsor*, 521 U.S. 591.

29 Gidi, *supra* note 3, p. 199.

30 Gidi, *supra* note 3, p. 197.

became common for judges to set opening hearings to analyze the class plaintiff's likelihood of victory, even before a decision on class certification was rendered.³¹

The practice was taken to the Supreme Court in the case *Eisen v. Carlisle & Jacquelin* (1974), where it was decided that there is nothing in Rule 23 or its history that authorizes the judge to hold a preliminary hearing on the merits of the cause to decide whether it may proceed as a class action.³² Based on the precedent, it was established that, in the collective certification phase, the judge should be limited to analyzing the requirements for the suit to be filed as a collective action, which must be done based on the allegations of the collective claimant.

However, one of the requirements of Rule 23 is the existence of a common issue, which is essential for defining the contours of the group being replaced.³³ In recent years, the issue has been addressed by the U.S. Supreme Court in two relevant cases. The first of these, *Wal-Mart Stores, Inc. v. Dukes* (2011), consisted of a class action lawsuit filed on behalf of approximately one and a half million female employees and former employees of the *Wal-Mart* chain, on the grounds of gender discrimination in the workplace. In brief, it was argued that the earnings and promotions of female employees were considerably lower than those of male employees performing similar functions at the same employer.

The District Court certified the class action, which would become the largest class action in the history of the United States and, ultimately, on appeal by the opposing party, the case was distributed to the Supreme Court. The court reversed the certification decision arguing that the commonality requirement in the case had not been satisfied, leading to violation of Rule 23(b)(2). According to Justice Scalia, who guided the winning thesis, in the case in question, the proof of the existence of a common issue needs to outweigh the bare allegation that Wal-Mart develops a pattern or practice of discrimination. Thus, he concluded, 'without some glue tying the alleged grounds together, it is impossible to say that an examination of all the class members' claims will produce a common answer to the crucial question of discrimination'.³⁴

On that occasion, the Supreme Court noted that the phase of collective certification required 'a rigorous analysis', which may include the merits of the claim itself,

31 United States District Court, E. D. New York, 1968 *Dolgow v. Anderson*, 43 F.R.D. 472.

32 'There is 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, and, indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements of the Rule.' SCOTUS, 1974 *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156.

33 Rule 23(a)(2): 'there are questions of law or fact common to the class'.

34 'Without some glue holding together the alleged reasons for those decisions, it will be impossible to say that examination of all the class members' claims will produce a common answer to the crucial discrimination question' SCOTUS, 2011 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338.

in order to understand the common issues and the outline of the class replaced.³⁵ In light of the concrete situation, the Court considered that the elements in the case file did not evidence the existence of a common policy of discrimination based on gender. Consequently, the existence of a common issue was not recognized.³⁶

A little over a year after this decision, the Supreme Court was called upon to consider a similar affair, in *Comcast v. Behrend* case. Originally, a class action was brought on behalf of users of Comcast's cable television service, under the allegation that the company had violated the federal antitrust legislation, by means of monopolistic practices in Philadelphia. According to what was argued, such practices had weakened free competition and, thus, resulting in higher prices. The class action was admitted by the District Court but was later reversed by decision of the Supreme Court on the ground that the plaintiff had not provided convincing arguments that they would be able to quantify the impact of the alleged unlawful practices on the price of service.³⁷

At that time, Justice Scalia, author of the winning vote, noted that the court of origin improperly required only that the plaintiff provided a method for quantifying damages for the class, failing to assess whether such method was reasonable or based on mere speculation. Because the lower courts did not adequately establish the economic impact of Comcast's actions on the alleged victims, collective certification was ultimately denied. Justices Ginsburg and Breyer, followed by justices Sotomayor and Kagan, moved in the opposite direction, holding that the Court could not evaluate the merits of the case. Once again, therefore, it was decided that the analysis of the requirements for collective certification will often enter the merits of the collective claimant.³⁸

This understanding, in abstract terms, seems correct to the extent that the definition of the replaced group, on the one hand, consists of one of the most relevant aspects of the collective certification decision and, on the other, will depend on an analysis of the allegations of the collective plaintiff. Therefore, an incursion into the facts of the case is inevitable, if it is held in an abstract way, not carrying any judgement on the probability of success of the claim.

35 See T. Levitin, 'Doubt no more.' 121(4) *Columbia Law Review*, p. 1289 (2021).

36 'Because respondents provide no convincing evidence of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question.' SCOTUS, 2011 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338.

37 'Under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages can be measured classwide.' SCOTUS, 2013 *Comcast Corp. v. Behrend*, 569 U.S. 27.

38 "Repeatedly, we have emphasized that it 'may be necessary for the court to probe behind the pleadings before coming to rest on the certification question' and that certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. Ibid. (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U. S. 147-161 (1982)). Such analysis will frequently entail 'overlap with the merits of the plaintiff's underlying claim.' 564 U. S., at ___ (slip op., at 10). That is because the 'class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' Ibid. (quoting *Falcon*, supra, at 160)." SCOTUS, 2013 *Comcast Corp. v. Behrend*, 569 U.S. 27.

5. REVOCATION AND MODIFICATION OF CLASS CERTIFICATION DECISIONS

According to Rule 23(c)(1)(C), collective certification orders are not irreversible,³⁹ and may be revoked or modified later, prior to a final decision on the merits. Thus, a claim admitted in the collective form may be decertified, reverting the case to an individual nature, limited to the parties. It is also possible that a class action previously admitted in a broad form may be restricted, with a new delimitation of the affected group (class redefinition). Likewise, the opposite may also occur: the redefinition of the group in broader terms or even the reconsideration of a decision that had previously denied the request for collective certification. It has been common, for better administration of the process and delimitation of its object, that the court, when faced with the facts of the case, determines a division of the affected group in subgroups (subclasses).

While the precariousness of certification until the final decision on the merits of the claim is certain, the issue of the preclusive effect of this decision has been controversial since the beginning of modern class actions. The discussion gained special prominence with the approval of the Principles of the Law of Aggregate Litigation by the American Law Institute in 2010, the decision of the Eighth Circuit in *In re Baycol Products Litigation*, in the same year, and the decision of the U.S. Supreme Court in *Smith v. Bayer Corp.* in 2011.⁴⁰

Obviously, as in the individual lawsuits, the collective actions are also subject to the preclusive effects of *res judicata*, following the general rule on the subject. The debate rests specifically on the certification decision, arising mainly in two practical situations. In the first one, it is discussed whether it is possible for a second court (federal or state) to recognize the preclusive effects of a decision that previously denied collective certification on the same facts, issued by another court (federal or state). The second one arises when a federal court is called upon to decide a petition formulated by a class action plaintiff to obtain, in a state court, the certification of a class action originally denied in a federal court. The question may be summarized as follows: should a decision denying collective certification have preclusive effect, to prevent the same group from attempting to certify the same class action later?⁴¹

The question is somewhat complex since it is the collective certification decision that binds the group to the performance of the legitimate party. Therefore, would this same group be prohibited from litigating the same issue again in a different court?

Those who defend the preclusive effect of the decision denying collective certification argue that, if the repetition of a new request were allowed later, there would be an unwanted submission of the opposing party to the costs of laborious and costly litiga-

39 Rule 23(c)(1)(C): 'Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.'

40 A. Gidi, 'Issue Preclusion Effect of Class Certification Orders,' 63(4) *The Hastings Law Journal*, p. 1023 (2012).

41 Gidi, *supra* note 38, p. 1028.

tion. In addition, such path would harm the efficiency of the Judiciary and its economy. In this sense, the Seventh Circuit decided, in *In re Bridgestone/Firestone, Inc.* that, if the decision denying collective certification was not granted preclusive effect, there would be a risk that the opposing party would be subject to several actions over time regarding the same case, and only one positive certification decision would reduce all other opposing decisions to insignificance.⁴² In other words, a single positive decision would be able to replace several negative decisions, encouraging illegitimate *forum shopping*.⁴³

The analysis of this argument reached the U.S. Supreme Court in *Smith v. Bayer Corp.* in 2011.⁴⁴ Initially, the factual situation could be summarized as follows: Bayer Corp. withdrew a certain cholesterol control drug (Baycol) from the market in August 2001, due to the serious risks arising from its use, which could lead to the death of some users. Keith Smith and Shirley Sperlazza filed suit in West Virginia state court in 2001 seeking class certification on behalf of Baycol users throughout the state. However, one month earlier, in the same state, another litigant, George McCollins, had filed suit in the same court, and the case was transferred to federal court and consolidated as part of a multidistrict litigation in the District Court for the District of Minnesota. That Court denied certification arguing that the economic losses could not be quantified and litigated in a class action, for want of the predominance of common issues over particular issues. Having proceeded as an individual claim, the merits of the action filed by George McCollins were heard, and the claim was dismissed on the ground that the plaintiff failed to prove the damage suffered individually.

The District Court then held that the case of Smith and Sperlazza in West Virginia state court would be bound by that decision since it dealt with the same substantive legal issue. They appealed to the Court of Appeals for the Eighth Circuit, which, in 2010, ruled that the decision that had denied certification of the already heard class action was preclusive, preventing further litigation on the same issue. Later, the Supreme Court unanimously followed the vote of Justice Kagan, reforming the appealed decision, understanding that the Federal Court could not prevent a State Court from proceeding with a new analysis of the collective certification. When referring to the decision of the Court of Appeals, it registered:

According to the court, Smith was invoking a similar class action rule as McCollins had used to seek certification ‘of the same class’ in a suit alleging ‘the same legal theories,’ *id.*, at 724; the issue in the state court therefore was ‘sufficiently identical’

42 Southern District of Indiana, 2003 *In Re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 247 F. Supp. 2d 1071.

43 S. Sharma, ‘Do the Second Circuit’s Legal Standards on Class Certification Incentivize Forum Shopping? A Comparative Analysis of the Second Circuit’s Class Certification Jurisprudence.’ 85(2) *Fordham Law Review*, p. 877 (2016).

44 SCOTUS, 2011 *Smith v. Bayer Corp.*, 564 U.S. 299.

to the one the federal court had decided to warrant preclusion, *ibid.* In addition, the court held, the parties in the two proceedings were sufficiently alike: Because Smith was an unnamed member of the class McCollins had proposed, and because their ‘interests were aligned,’ Smith was appropriately bound by the federal court’s judgment. *Ibid.*⁴⁵

In support of its decision, the Supreme Court relied on two main arguments. At first, it noted that the issues posed in Smith’s and McCollins’s actions were not identical; furthermore, since Smith was not a party in the action brought by McCollins, which was not admitted as a class action, he could not be bound by the decision that denied him certification. This is what is extracted from the following part of the vote:

The question here is whether the federal court’s rejection of McCollins’ proposed class precluded a later adjudication in state court of Smith’s certification motion. For the federal court’s determination of the class issue to have this preclusive effect, at least two conditions must be met. First, the issue the federal court decided must be the same as the one presented in the state court. See 18 Wright & Miller § 4417, at 412. And second, Smith must have been a party to the federal suit, or else must fall within one of a few discrete exceptions to the general rule against binding nonparties. See 18A *id.*, § 4449, at 330. In fact, as we will explain, the issues before the two courts were not the same, and Smith was neither a party nor the exceptional kind of nonparty who can be bound. So, the courts below erred in finding the certification issue precluded and erred all the more in thinking an injunction appropriate.⁴⁶

Furthermore, as Gidi points out, there are many reasons for not recognizing the preclusive effect of a decision that does not certify a class action:⁴⁷

- a) the certification decision is not to be confused with the final judgment. That is to say, the collective certification does not properly comprise a judgment on the merits upon which estoppel must be imposed. It is merely a procedural decision, and Rule 23(c)(1)(C) provides that the decision is provisional;
- b) absent parties cannot be bound if there has been no collective certification. Before being certified, the collective action is a merely putative class action, and therefore does not exist in the formal sense. Therefore, at least at this point, one cannot properly speak of substitution of parties by the collective legal entity, and it is inappropriate to bind the absent parties to the decision that denies certification;
- c) absent parties may not exercise the right to opt-out prior to collective certification. This right is an important due process guarantee, and is exercised after

45 SCOTUS, 2011 *Smith v. Bayer Corp.*, 564 U.S. 299.

46 SCOTUS, 2011 *Smith v. Bayer Corp.*, 564 U.S. 299.

47 Gidi, *supra* note 38, pp. 1033-1055.

proper notice to the group at a later time, which will not occur if certification is denied;

- d) the substantive issue may be different. In some cases, there is a significant difference in merit between two collective actions, which should not constitute an obstacle to processing both insofar as there is no risk of legal insecurity derived from indefinitely reopening the examination of the same issue. There are also situations in which, although the factual issues are substantially identical, the procedural laws of the jurisdictions involved, applicable to collective certification, are different;
- e) the collective certification decision bears a greater burden of discretion, which, in light of the case law of some courts, would prevent its immutability;
- f) the asymmetry of results: if a decision denying collective certification has preclusive effect, a decision recognizing it should also make the issues discussed immutable, producing effects on other cases discussing the same circumstances.

All the arguments are sufficient to prevent the preclusive effect of the decision denying collective certification, which may be discussed again. The main reason lies in the second argument presented: once the certification is denied, one cannot speak of binding the absent parties, insofar as their substitution by the alleged collective legitimized party has not yet been acknowledged. In other words, as a matter of logic, if there was no collective certification, there was no collective action, but a mere individual request, followed by a decision that will bind only the individual claimant.

6. PARTIAL CERTIFICATION (ISSUE CLASS ACTION)

Expressly provided for in Rule 23(c)(4),⁴⁸ partial certification consists of a solution commonly applied to mass litigation in cases where the common issue, as originally presented, bears particularities that affect its homogeneity. In such cases, it is possible for the judge to admit the class action through a reduction of its object, restricting it to common aspects that make it possible to decide the case homogeneously. It is quite common for a class action to present, at the same time, issues common to the group as a whole and specific issues related to only part of the group. Thus, Rule 23 allows for issue class action, in which only part of the controversy is certified, avoiding the inadmissibility of the claim.

Partial certification is, therefore, a decision that implies the partial granting of the request for collective certification, with the equally partial use of the factual framework exposed in the initial request.

48 Rule 23(c)(4): ‘Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues’.

Such technique has gained special attention since the aforementioned *Wal-Mart Stores, Inc. v. Dukes*,⁴⁹ in which the Supreme Court, in reference to the theoretical constructions of Nagareda, noted that what matters for class certification is not the raising of common questions, but rather the ability of a case to generate common answers capable of leading to the resolution of the litigation.⁵⁰

Critical views on the ruling are not ignored. In this sense, Hines believes that partial certification may unduly exceed the specific requirements of mass class actions. According to her, among the possible negative consequences of its abusive use are the loss of cohesion of the class, which is necessary for the exercise of class consent, especially for the conclusion of settlements, and the exacerbated encouragement to exercise the right of withdrawal of members (right to opt-out).⁵¹

Despite the relevance of Hines' criticism, it seems to be clear that the partial certification represents an important tool in the hands of the judge. In addition to organizing the process, it (a) prevents the continuation of lawsuits which has excessive dimensions, avoiding the abusive strategy of pressure to the disadvantage of the counterparty, especially for the conclusion of agreements (blackmail settlements); (b) prevents the admissibility of collective lawsuits that could present future problems in the phase of enforcement of the judicial decision, due to the heterogeneity of the common issue; and (c) allows the partial use of the definition of the group, the common issues or the request, preventing the judge from proffering a decision of inadmissibility on the entire demand.

Gidi illustrates the unique utility of partial certification in cases of mass toxic litigation to define the question of causation in the abstract sense (general causation), leaving the analysis of specific causation to individual lawsuits. As an example, in civil liability actions brought against cigarette manufacturers, a type of litigation that, for decades, received prominence in the United States, it is common for the defendant to deny the existence of an abstract causality. The proof for this question can be difficult and considerably costly in financial terms. Its resolution, however, may occur within the scope of a class action, resulting in a significant procedural economy to the extent that, once the discussion on abstract causality in a class action (collateral estoppel) is precluded, it will no longer need to be examined in individual actions. In these actions, the discussion will be restricted to the analysis of the impact of causality on the concrete case.⁵²

The same will occur in cases in which common issues regarding the elements of civil liability (conduct, damage, and causal link) are predominant, but individual issues

49 SCOTUS, 2011 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338.

50 R. A. Nagareda, 'Class Certification in the Age of Aggregate Proof.' 84(1) *New York University Law Review*, p. 97 (1950).

51 L. J. Hines, 'The Dangerous Allure of the Issue Class Action.' 79.3 *Indiana Law Journal*, p. 567 (2004).

52 Gidi, *supra* note 3, p. 206.

predominate regarding the proof and individual damages. As manifested in Brazil (art. 95 of the Consumer Protection Code – CDC)⁵³, the class action may be limited to the examination of the common issues without implying the reduction of the group, with the judge giving a generic decision, leaving the liquidation of the individual damages to each victim, through individual actions.⁵⁴

7. THE ADMISSIBILITY REQUIREMENTS ANALYZED IN CLASS CERTIFICATION DECISIONS: THE RELEVANCE OF COMMONALITY

In 2011, when hearing the case *Wal-Mart Stores, Inc. v. Dukes*, the U.S. Supreme Court was called upon to decide on the issue of class certification. At that time, the Court conducted a thorough analysis of the issue, noting initially that class actions are an exception to the general rule that litigation must be conducted by and on behalf of named individuals.⁵⁵ Therefore, to justify the departure from this general rule, class actions must satisfy the requirements established in Rule 23(a) and (b). Only after such rigorous steps, being clear that the collective route is the most efficient for the solution of the issue, should class certification be recognized.

Although it appears only as a second requirement by Rule 23(a), the existence of a common issue is held by U.S. case law to be central to the admissibility of the class action, and the first point is the subject of analysis.⁵⁶ In this sense, according to Rule 23(a)(2), to be admitted as a class action, it is required that the questions of law or fact be common to the class.⁵⁷ In *Wal-Mart Stores, Inc. v. Dukes*, it was reaffirmed that, as a general rule, this provision requires the plaintiff to show that the members of the class have suffered the same injury, so as to allow the Judiciary to resolve the conflict on a unified solution.⁵⁸

Because of its importance, the existence of a common issue (or common issues) summarizes why there are class actions in any jurisdiction. This is the indispensable requirement for any technique of procedural collectivization, even if it has not been explicitly provided for.

For instance, Brazilian legislation also requires the presence of such requirement, whether in class actions or in test cases' trial. In this sense, when conceptualizing the species of collective rights, art. 81 of the CDC was careful to establish links between tho-

53 Brazilian Consumer Protection Code (Law no. 8.078/1990): 'Article 95. If the claim is well-founded, the sentence shall be generic, establishing the liability of the defendant for the damages caused.'

54 Gidi, *supra* note 3, p. 206.

55 SCOTUS, 2011 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338.

56 Gidi, *supra* note 3, p. 79.

57 Rule 23(a)(2): 'there are questions of law or fact common to the class.'

58 C. S. Minniti, 'The Fundamentals of Class Action Certification.' In: C. Baird *et al* (eds), *Recent trends in class action lawsuits*, p. 11 (Marin County, Aspatore, 2015).

se who comprise the class. Regarding the named 'diffuse rights', it is required that the group members are 'indeterminate persons connected by factual circumstances' (item I); regarding the 'collective rights in the strict sense', the existence of a 'group, category or class of persons connected among themselves or with the opposing party by a basic legal relationship' (item II); regarding 'the individual homogeneous rights', the 'common origin' (item III).⁵⁹ In the trial of test cases, which includes the incident of resolution of repetitive claims (IRDR) and the repetitive appeals (art. 928, I and II, of the Brazilian Civil Procedure Code - CPC), the procedural legislation required, for the former, the presence of an 'effective repetition of proceedings that contain controversy about the same question of law only' (art. 976, I, of the CPC), and an 'identical question of law' for the repetitive special and extraordinary appeals (art. 1036, *caput*, of the CPC).

Without the existence of at least a singular common issue, one could not even talk about the existence of a definable class or group. Not coincidentally, the requirement is present in American law since the origin of class actions, in the Equity Rules. In the absence of this requirement, the divergence of the interests involved will require the resolution of multiple issues through individual lawsuits.

Frequently, alongside the common issues, there will also be individual issues, which single-handedly will not prevent class certification. In other words, it is not required that all persons are exactly in the same situation. In this case, the survival of the requirement will demand the existence of some link between the members of the collective, so that they are in a similar situation (similarly situated) that allows a uniform solution of the dispute, as if they were a single person.⁶⁰ However, if there are individual arguments or conflict of interests that compromise the unity of the group, the solution may be, if feasible, the redefinition of the group (class redefinition), the limitation of the group by partial certification (issue class action), the division into subgroups (sub-classes) or the denial of certification, terminating the case without the resolution of the merits.

In some cases, the prior demonstration of the existence of a common issue requires an enormous sacrifice on the part of the collective representative. This is the case in class actions concerning discriminatory practices, with the recurrent request for certification of claims alleging the existence of racial or gender discrimination in employment relationships through the defendant's uniform conduct, as occurred in *Wal-Mart Stores, Inc. v. Dukes*. As seen, in such situations, the task of minimally demonstrating the existence of standardized conduct by the author of the injury can become considerably hard, leaving the path of individual actions.

In the case of class actions governed by Rule 23(b)(3), in addition to the existence of common issues, the predominance test is required, as well as the superiority of

59 A. Gidi, *Rumo a um Código de Processo Civil Coletivo*, p. 214 (Rio de Janeiro, GZ, 2008).

60 Gidi, *supra* note 3, p. 84.

the collective relief technique over other available methods for the efficient resolution of the controversy (superiority test). Due to their predominantly compensatory character,⁶¹ they are called, in the United States, class actions for damages. They are the ones that allow the right of withdrawal (or exclusion) of the group member (right to opt-out), after proper notification.⁶² Inspired by the old spurious class actions of 1938, Rule 23(b)(3) class actions consist of a residual and generic type, without the specific requirements of other class actions. Thus, unlike in Rule 23(b)(1) and (b)(2) class actions, there is no requirement that the dispute is indivisible or that there is a need for uniform treatment of the controversy. This is because here individual claims may be freely exercised, without prejudice to other persons, and collective treatment is justified for reasons of procedural economy, convenience, and access to justice.

This is where the famous class actions for civil liability (mass torts) reside, with undeniable complexity. Due to the autonomy of the individual claims, it is clear the less homogeneous character of the class actions of type (b)(3), in comparison with the other types. And it is precisely for this reason that the predominance of common issues and the superiority of collective relief are required, to provide greater cohesion to the group.

In recent years, the certification of such class actions, within the scope of Antitrust Law, has been gaining special attention in the United States. More than ever, the following question is the center of attention, in lawsuits that boast extremely high economic values: after all, do the common elements of the claim prevail over the individual ones?⁶³ In several precedents, American courts have established a careful economic analysis of the predominance requirement.

In *Superior Beverage Co. v. Owens-Illinois*, a request for certification of a nationwide class action was filed, based on the allegation that the opposing party, consisting of glass container producers, had engaged in an anti-competitive practice, with price cartelization.⁶⁴ The plaintiff presented to the court a method for quantifying the damage suffered by the class. This method consisted of presenting statistical and economic arguments indicating that the profit margin of the producers prior to the price cartel would serve as a parameter for the definition of damages. Thus, it would be possible to calculate the undue gains, comparing them with the profit margin obtained after the price-fixing. In response to the request for class certification, the producers, through a technical assistant appointed by them, alleged the existence of substantial price variation among the parties (within glass bottle producers, producers of larger containers, etc), as well as variation in damages among the members of the class. To resolve the

61 D. C. M. Fernandes, 'Small Claims Class Actions: A Comparative Analysis of the Brazilian and American Systems from the Perspective of Positive Externalities.' 2(1) *Publicum*, p. 140 (2016).

62 Gidi, *supra* note 57, p. 70.

63 B. M. Dickey and D. L. Rubinfeld, 'Antitrust class certification: towards an economic framework.' 66 *NYU Annual Survey of American Law*, p. 459 (2011).

64 Northern District of Illinois, 1993 *Superior Bev. Co. v. Owens-Illinois*, 827 F. Supp. 477.

issue, the district judge appointed a court expert, who concluded that the common elements did not predominate, leading to the certification of subclasses, each with its own distinct methodology for quantifying damages.

In the *In re K-Dur Antitrust* case,⁶⁵ the predominance test was again discussed in the context of the Antitrust Law. Its object was an alleged arrangement made between manufacturers of the drug K-Dur, formed by the controlled-release compound potassium chloride, a patent held by Schering-Plough. Such compound is used to treat potassium deficiencies, including those arising as a side effect of the use of diuretic products in the treatment of hypertension. Schering did not hold a patent for potassium chloride itself, a commonly known and unpatentable compound, but rather on the controlled-release coating applied to potassium chloride crystals. Manufacturers Upsher-Smith and ESI Lederle applied to the federal Food and Drug Administration (FDA) for permission to introduce generic versions of the compound, claiming that their product would not infringe Schering-Plough's patent rights, which resulted in litigation involving all the said manufacturers. As a result of the dispute in question, the parties came to an agreement, in which generic versions of the drug were allowed to be introduced, but only five years before the expiry of the patent, with substantial payments made by Schering-Plough, its owner, to the manufacturers of the generic product.

Subsequently, a class action lawsuit was filed by a group of direct and indirect purchasers of the product, including health insurance companies, union health funds, and individual consumers. The basis of the lawsuit was the allegation that the patent holder made payments to other producers for the improper purpose of delaying the introduction of generic products in the market while maintaining high prices. In their request for class certification based on Rule 23(b)(3), the plaintiffs contended that the delay in introducing the generic drugs resulted in property damage to the collective as they had to pay higher prices to purchase K-Dur when compared to the price they would pay for its generic equivalents. Two types of evidence were demonstrated. At first, it was proven that most medical prescriptions of the compound made after the permission for marketing the generics chose to indicate the generic version. In addition, the plaintiffs demonstrated that the average price of the generically manufactured product was lower than the price charged for K-Dur. Studies were also submitted regarding the effects of the introduction of generic drugs on market prices.

The arguments used by the plaintiff were subject to a dense analysis, and some flaws were identified. The first question raised concerned the homogeneity of the class presented. After all, have all its members been harmed? In response, the technical assistant indicated by the respondent parties emphasized the particularities of the pharmaceutical industry, in which several types of economic agents coexist. It was demonstrated that a large majority of prescriptions of the compound in question were covered

65 District of New Jersey, *In re K-Dur Antitrust Litig.*, No. 01-1652 (JAG) (Consolidated Cases), MDL Docket No. 1419.

by insurance, so that the costs would generally be shared between the patient and the insurance company, or even borne by only one of them. Thus, depending on the type of existing contract, some members of the class would not even have suffered any damage. As if this were not enough, it was shown that, even after the entry of generic drugs, certain patients still received prescriptions for the original compound, which could cost even more, to offset the losses arising from the entry of new competitors.

In summary, the manufacturers brought solid arguments, in the sense that the class in question would not be composed of homogeneous economic agents, to the extent that many of them did not suffer any benefit with the entry of the generic version of potassium chloride. Because of this, having been corroborated by the expert indicated by the court, the plaintiffs dropped the lawsuit. A possible judicial solution to the case, once again, would reside in the partial certification of the class action, or the division into subclasses, once groups of litigants who suffered homogeneous injuries due to the fact in question were identified. With this, the extension of the *res judicata* to the respective groups would be ensured, without the adverse party running the risk of payment of compensation based on material damages for the benefit of persons who have not suffered any type of loss.

8. CONCLUSION: THE CORE OF CLASS CERTIFICATION AND ITS APPLICATION AS A MODEL TO OTHER JURISDICTIONS

In American law, class definition is the basic prerequisite for the filing of any kind of class action, consisting of one of the dimensions of class certification. This occurs for several reasons that have already been discussed.

In other jurisdictions, such as Brazil, Spain or England and Wales, the same reasons are present. Primarily, in the concrete level, this definition will serve to analyze the thematic pertinence link between the group and the class representative. To define whether a given person or association is entitled to bring a class action in the interest of a given group, it is necessary to know whether their institutional purposes are compatible with the defined class. If that were not the case, the absurd filing of a class action by an association intended for the protection of abandoned animals on behalf of a group composed of financial institutions would be possible. Similarly, in Brazil, the filing of a class action by the Public Defenders, focused on the defense of the ‘needy’ (art. 134 of the Brazilian Constitution) on behalf of consumers of certain superfluous or luxurious consumer goods, such as a sophisticated smartphone, is not appropriate.⁶⁶

Secondly, the definition of the group is also relevant to define the law which applies to the case, as this can interfere in the establishment of the competence of the court. When dealing with a class of employees, the applicable law may be the labor law, gi-

⁶⁶ Didier Jr. and Zaneti Jr., *supra* note 2, p. 223.

ving rise to the jurisdiction of the Labor Court (art. 114, I, of the Brazilian Constitution). In the case of a class composed of indigenous people, the application of the Indian Statute can be attracted, with all its particularities, as well as the competence of the Federal Justice, in the hypothesis that the dispute involves indigenous rights (art. 109, XI, of Brazilian Constitution). Similarly, a class action filed on behalf of a group of consumers may attract the application of the CDC, as well as the jurisdiction of a specialized court in the Common Justice System.

Thirdly, the definition of the group will be necessary to proceed to an adequate notification of its members, even for the exercise of the right of withdrawal (opt-out) of those who prefer to follow the fate of filing an individual lawsuit, as assured by article 104 of the Brazilian CDC. To be able to withdraw from a given class, any individual must first understand themselves as someone who is part of it, which requires the prior definition of the group's contours.

Fourth, the definition of the group will be important for purposes of third-party intervention⁶⁷, observing the discipline regarding the intervention of the group, members of the group, and *amicus curiae*. It is worth noting that, in light of art. 5, § 2, of the Brazilian Class Actions Statute (LACP), other class representatives can 'qualify as co-plaintiffs of any of the parties'. Sometimes, especially in the purported radiated diffusion litigation, marked by high complexity, the proper solution of the case will depend on the participation of other interested classes, allowing their intervention, which can occur even in opposition to the interests of the original class.

Fifth, the definition of the group will be of utmost importance to know the scope of the extension of the *res judicata* to its members, as well as the scope of the precedents formed from the incidents of judgment of repetitive cases. One could imagine that, in a certain class action or test case, the appropriate legal solution to the question of inflationary adjustments of a certain economic plan is being discussed. The definition of the group will depend on a series of common factual or legal circumstances, for example, people who kept amounts in savings accounts with a certain financial institution during a certain delimited period. These same characteristics will be fundamental for the proper interpretation and application of the precedent, distinguishing it from situations of inapplicability.

It is true that, time and again, the delimitation of the group may become a difficult task, presenting few differentiating elements. One could imagine the filing of a class action aiming to condemn a certain company to the payment of compensatory damage, as well as in an injunction, because it caused environmental damage in one extensive bay. How to define, with precise outlines, the injured group?⁶⁸

67 For a broader understanding of the topic, see F. Didier Jr., H. Zaneti Jr. and G. S. Alves, *Intervenção dos membros de grupo no julgamento de casos repetitivos*. 10(1) Civil Procedure Review (2019).

68 This difficulty was considered in Lord Woolf's studies presented in the 1996 *Access to Justice Final Report on Multi-Party Actions in the British legal system*: 'Definition of the group. In some actions, the claimant group will

When discussing the indispensability of the presence of subjective positions in the context of class actions, Ferraro points out the need for the participation of at least four different groups of agents. The first group is composed by the persons affected by the conduct of the opposing party. The second group consists of those responsible for adopting measures to bring about the necessary change. The third, by those possessing relevant knowledge; the fourth, by those in a position to block the realization of the remedy.⁶⁹

How to proceed in delimiting and defining the representation of the groups involved depends on a prior task: identifying the type of conflict. The existence of a single or multiple classes and the degree of internal conflict are factors to be considered in each specific case. To perform this task, in addition to recognizing the category of claims involved, it is necessary to add tools that derive from a new way of conceiving the collective process⁷⁰, starting from the typology of litigation.

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be already well defined. In a transport disaster, there will be a finite group. In a housing case, the group will be the tenants of the estate or lessees of a block of flats and although sub-groups may be helpful there will be a finite number of claimants. In other cases, there will be a potential group defined by its circumstances; for instance, all those within a specific geographical area in an environmental case, or medical cases, all those treated over a specific period. In some cases, the potential group may be very numerous. In each case, the judge will need to decide on the most efficient way of bringing potential claimants into the action, on the stage at which this should be done, and whether it is appropriate to do this before or after examination of issues of principle or some of the generic issues common to all potential claimants. Clearly, it is pointless establishing a register for a large number of potential claimants if a decision on a key issue of liability or causation might determine the action at an early stage' (Lord Woolf, 'Access to justice: Final Report' (1996) <http://webarchive.nationalarchives.gov.uk/20060213223540/http://www.dca.gov.uk/civil/final/contents.htm>, last accessed on 08.04.2021).

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