

## Chapter 5

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# Class Action Law

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## 5.1 Overview

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Viewed in the light of the previous decade's tumultuous class action arena, the new millennium must be said to have arrived “not with a bang, but a whimper.” In 2000 the long-awaited decision from the Supreme Court in *Free v. Abbott Laboratories, Inc.*, 529 U.S. 333 (2000) – expected to resolve the split among the circuits as to whether § 1367's provisions on supplemental jurisdiction overruled the holding of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), that required all absent class members to meet the amount-in-controversy requirement for diversity jurisdiction – arrived as a non-binding affirmance by an evenly divided court. In 2001 the U.S. Supreme Court issued no major decisions on class action issues, and the federal Courts of Appeal continued to address issues that had surfaced in prior years, with few groundbreaking decisions. In the state courts appellate decisions clarified some issues, the trend – if any is discernable – being a strengthening of the requirement that courts apply the rigorous analysis test of *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), to every stage of the class certification process. In the wake of the U.S. Supreme Court's decisions in *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), both federal and state courts have demonstrated increasing scrutiny of proposed class settlements, and the emphasis has moved slightly toward review of decisions regarding notice, settlement terms, and fee awards. The decisions reviewed here will be of significance to class litigants in the areas addressed, but are unlikely to send shock waves through the ranks of either plaintiff or corporate defense counsel.

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## 5.2 Federal Legislation

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During the 1990s state courts increasingly became the forum of choice for plaintiffs seeking to represent multi-state classes. Defendants often found themselves in the position of defending actions, brought in state court, that involved millions of dollars of potential liability but which could not be removed to the federal courts because the claims of individual class members did not meet the requisite amount-in-controversy for diversity jurisdiction. Defendants' efforts to persuade federal courts to adopt various theories of aggregation in order to overcome this jurisdictional hurdle were generally unavailing, as the federal circuits rejected arguments for aggregation of claims, of attorney's fees, of punitive damages, and of injunctive relief.

As the federal appellate courts rejected arguments for aggregation and other theories that might permit removal, Congress responded to the phenomenon with the introduction of legislation aimed at expanding diversity jurisdiction to encompass the majority of multi-state class actions. During the 106th Congress, the House on September 12, 1999, passed H.R. 1875, the “Interstate Class Action Jurisdiction Act of 1999.” In the Senate “The Class Action Fairness Act of 2000,” S. 353, was approved by the Senate Committee on the Judiciary on June 29, 2000, and sent it to the full Senate for consideration, but the session ended before the full Senate addressed the bill.

During 2001 legislation was introduced in both the House and Senate of the 107th Congress, again aimed at expanding diversity jurisdiction to bring large multi-state class actions within the ambit of the federal courts. In the House H.R. 2341, the “Class Action Fairness Act of 2001,” was introduced and referred to the House Committee on the Judiciary on June 26, 2001.

In the Senate S. 1712, similarly entitled the “Class Action Fairness Act of 2001,” was introduced in the Senate and referred to the Senate Committee on the Judiciary on November 15, 2001.

Both bills include sections similar to their counterparts in the 106th Congress (although the threshold amount for triggering jurisdiction is \$2,000,000 rather than \$1,000,000). In addition to providing for expanded diversity jurisdiction and more flexible requirements for removal of class actions, the 2001 legislation reflects concerns that the rights of absent class members be well protected by courts considering proposed class settlements. Both bills include provisions dealing with coupon and other non-cash settlements, limitations on certain settlement terms, and information to be provided to absent class members concerning the effect of a proposed settlement.

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## **5.3 Federal Rule 23**

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In the federal courts, class action decisions are governed by Rule 23 of the Federal Rules of Civil Procedure. Parties seeking to have cases certified for class treatment must meet all four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). The requirements of Rule 23(a) are generally referred to as (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy. The alternative requirements of Rule 23(b) reflect the former distinctions between true and spurious class actions, with (b)(1) and (b)(2) class generally involving situations in which there is a risk of inconsistent rulings if claims are brought separately and where injunctive or declaratory relief is sought. Classes certified under (b)(3) are those that were formerly described as spurious class actions, in which independent but similar claims may be adjudicated on a class basis if certain requirements are met.

In addition to applying the provisions of Rule 23(a) and (b) for purposes of determining whether a case may be certified for class treatment, the courts have occasion to address rules regarding notice and opt-out rights of class members, timing for determining the class certification decision, approvals of settlements and fee awards, and the appropriateness of interlocutory appeals of class decisions.

Many of the states have adopted rules substantially identically to federal Rule 23. In some cases the state rule may be organized or worded differently, but the courts have construed their respective state rules to address for the most part the same criteria, in whole or in part, as those addressed in federal Rule 23. For those states that have rules substantially similar to the federal rule, the courts have generally acknowledged that decisions reached under the federal rule are persuasive or authoritative in construing the state rule.

The following chart provides a brief summary of the requirements set out in Rule 23(a) and (b) of the Federal Rules of Civil Procedure. Other portions of the Rule deal with the requirement and timing of notices and opt-out rights, dismissal and compromises of class actions, the scope of discretion granted to the trial court, and availability of interlocutory review of class certification decisions.

### **5.3.1 Rule 23: Requirements for Certification**

The requirements of the federal class action rule, which serves a model for class action rules in many of the states, can be summarized as follows:

- (a) Requirements that must be met by all class actions:
  - (1) Class so numerous that joinder of all members is impracticable (**Numerosity**);

- and**
- (2) Questions of fact or law common to class (**Commonality**);
- and**
- (3) Claims or defenses of representative parties are typical of claims or defenses of class (**Representativeness**);
- and**
- (4) Representative parties will fairly and adequately protect the interests of the class (**Adequacy of Representation**).
- (b) Requirements as to which one subpart must be met to sustain certification:
- (1) Prosecution of separate actions by or against individual members would create risk of:
- (A) Inconsistent or varying adjudications among members, establishing incompatible standards of conduct for party opposing class, or
- (B) Adjudications re: individual members would as a practical matter be dispositive of interests of other members or substantially impair or impede their ability to protect their interests:
- or**
- (2) Party opposing class has acted or refused to act on grounds generally applicable to class, so that final injunctive or declaratory relief appropriate as to class as a whole;
- or**
- (3) Common questions of law or fact predominate over individual questions (**Predominance**)
- and**
- Class action is superior to other available methods for fair efficient adjudication of controversy (**Superiority**).
- Pertinent Factors:**
- (A) Interest of members of class in individually controlling prosecution or defense of separate actions;
- (B) Extent and nature of litigation concerning controversy already commenced by or against members of class;
- (C) Desirability or undesirability of concentrating the litigation of the claims in the particular forum;
- (D) The difficulties likely to be encountered in the management of a class action (**Manageability**).

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## 5.4 Jurisdiction

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Although the focus in class certification cases tends to be on whether a given case meets the requirements of Rule 23, a threshold issue as - in any other case - is whether the named plaintiff has standing to assert the claims he seeks to assert on a class basis. In *Big Elk v. Board of County Comm'rs of Osage County*, 2001 U.S. App. LEXIS 1349 (10<sup>th</sup> Cir. January 31, 2001), plaintiffs sought a permanent injunction against a local sheriff's department's allegedly illegal seizure of horses in connection with a dispute between two private individuals. Because the court found that the individuals did not have standing to assert the claim on their own behalf, it was not necessary to reach the question of whether the court had erred in denying class certification, standing on the part of the named plaintiff being a prerequisite to representational

status under Rule 23. (The finding of lack of standing derived from the court's conclusion that the injunction sought was against harm that was too remote or speculative to support standing.)

In *Murray v. Auslander*, 244 F.3d 807 (11th Cir. 2001), the Eleventh Circuit similarly addressed a claim on a Rule 23(f) interlocutory appeal that certification was inappropriate because of lack of standing. The court found that there was an inadequate factual record to demonstrate that any of the named plaintiffs had standing to assert the claims. Noting that the district court had certified a class under Rule 23(b)(2) without addressing the threshold issue of standing, the court vacated class certification and remanded for a determination that at least one named plaintiff had standing to bring the action.

In *Piazza v. Ebsco Indus.*, 2001 U.S. App. LEXIS 25448, 273 F.3d 1341(11<sup>th</sup> Cir. 2001), the Eleventh Circuit addressed the relationship between standing and the requirements of typicality and adequacy. Plaintiff asserted claims for breach of fiduciary duty in connection with an ERISA plan, naming several defendants. The district court certified the case for class treatment with respect to all of the defendants under Rule 23(b)(3). The Eleventh Circuit granted the petition for a Rule 23(f) interlocutory appeal and vacated the class against one defendant because the named plaintiff lacked standing, his individual claim being barred by the statute of limitations.

A second defendant claimed that the named plaintiff lacked standing, adequacy, and typicality with respect to other members of the class because he had standing to assert his claims only with respect to a limited period of time. The court agreed that the named plaintiff had standing to assert his claims only with respect to the period of time in which he was a participant in the plan, and acknowledged that other class members were participants for other periods of time. The Eleventh Circuit found that this did not, however, defeat the requirements for adequacy and typicality, because the legal issues and the "essential core" of their claims did not vary. 2001 U.S. App. LEXIS 25448 at \*23. Finally, the court held that on a third claim class certification was an error because the named plaintiff lacked standing to assert the claim.

### **5.4.1 Mootness**

Class actions sometimes raise issues of mootness, when the named plaintiff's claims are mooted during the pending of the action. Generally, if mootness occurs after certification, the court will give class counsel an opportunity to substitute a new class representative.

In *Cruz v. Farquharson*, 252 F.3d 530 (1<sup>st</sup> Cir. 2001), the court had occasion to address the question of when resolution of the named plaintiffs' claims renders an action moot for purposes of subsequent class certification. The plaintiffs were citizens and alien spouses seeking relief stemming from processing delays on the part of the Immigration and Naturalization Service. Shortly after the action was filed, the district office of the INS resolved the pending applications for all of the plaintiffs and then moved to dismiss the complaint for mootness. The plaintiffs opposed the motion and moved for class certification. The district court granted the motion to dismiss, denying class certification as moot. The First Circuit affirmed, noting that the named plaintiffs received complete relief within approximately ten weeks after the suit was filed. At that time, there was no motion for class certification, no one had sought to intervene, and there had been no attempt to amend the complaint to add other plaintiffs. On these facts, the court affirmed the district court's finding that the action was moot. The court did note that the Third Circuit, in *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 135 (3<sup>rd</sup> Cir. 2000), had reached a different result where a motion for class certification was filed before the named plaintiffs' claims became moot. Because in this case no such motion had been filed,

however, the court did not reach the question of whether on such facts it would have reached a similar result.

### 5.4.2 *Zahn* and Supplemental Jurisdiction

One of the issues on which the Federal circuits continue to be divided in class action litigation is the extent to which the expansion of supplemental jurisdiction under 28 U.S.C. § 1367 overrules the holding of *Zahn v. International Paper Company*, 414 U.S. 291 (1973). In *Zahn* the U.S. Supreme Court held that in diversity cases each absent class member must meet the requisite amount-in-controversy in order for the court to exercise jurisdiction over that class member. The Fifth and Seventh Circuits have held that this holding is overruled by amendments expanding supplemental jurisdiction under Section 1367, *In re Abbott Laboratories*, 51 F.3d 524, 529 (5<sup>th</sup> Cir. 1995); *Stromberg Metal Works Inc. v. Press Mechanical Inc.*, 77 F.3d 928, 930-33 (7<sup>th</sup> Cir. 1996), while the Third, Eighth, and Tenth Circuits have held to the contrary, *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 216 (3<sup>rd</sup> Cir. 1999); *Trimble v. Asarco, Inc.*, 232 F.3d 946, 962 (8<sup>th</sup> Cir. 2000); *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 640-41 (10<sup>th</sup> Cir. 1998). Although the issue was presented to the U.S. Supreme Court in *Free v. Abbott Laboratories*, 529 U.S. 333 (2000), the Court failed to resolve the issue when, after one recusal, the Court split evenly, resulting in an affirmance without precedential value.

In *In re LifeUSA Holding, Inc.*, 242 F.3d 136, 142-43 (3<sup>rd</sup> Cir. 2001), the Third Circuit reiterated its decision in *Meritcare, Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3<sup>rd</sup> Cir. 1999), holding that Section 1367 does not overrule the holding of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). The Third Circuit thus directed the trial court on remand to ensure that all members of the class met the requirements of diversity jurisdiction.

In 2001 the Ninth Circuit addressed the issue in *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9<sup>th</sup> Cir. 2001), and concluded that the plain language of Section 1367 clearly overrules the holding in *Zahn*.

### 5.4.3 Aggregation and Diversity Jurisdiction

A significant number of class action cases that have reached the federal courts of appeals in recent years deal with aggregation of damages, other relief, or attorney's fees across members of the class for purposes of establishing the required amount-in-controversy to establish federal diversity jurisdiction. In 2000, the Eleventh Circuit issued two opinions that significantly limited the grounds for establishing diversity jurisdiction based on such aggregation. *See Morrison v. AllState Indem. Co.*, 228 F.3d 1255 (11<sup>th</sup> Cir. 2000); *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11<sup>th</sup> Cir. 2000).

In 2001 the Eleventh Circuit continued this line of cases in *Smith v. GTE Corp.*, 236 F.3d 1292 (11<sup>th</sup> Cir. 2001), and *Kirkland v. Midland Mortgage Co.* 243 F.3d 1277 (11<sup>th</sup> Cir. 2001). In *Smith* the named plaintiffs sought money damages and equitable relief for alleged fraud and breach of contract in connection with the sale and leasing of telephone equipment. The district court dismissed under the primary jurisdiction doctrine, finding that plaintiffs should first assert their claims before the Alabama Public Service Commission. On appeal the issue of diversity jurisdiction was also raised, plaintiffs arguing that *Cohen* and *Morrison*, *supra*, had been wrongly decided and that the claims for punitive damages, attorney's fees, and injunctive relief should each be aggregated to find the requisite amount-in-controversy. The Eleventh Circuit

analyzed its ruling in *Cohen* and concluded it had been correctly decided. It then examined the common fund and common benefit doctrines and rejected each as a ground for treating attorney's fees as aggregated across the class. Citing to its holding in *Morrison*, the court emphasized that the value of injunctive relief may be taken as a whole only when the plaintiffs are seeking to enforce a single right or title in which they have an undivided interest. Finding that the claims did not meet that test, the court rejected injunctive relief as a ground for jurisdiction. The court held that this result was not affected by plaintiffs' argument that the harm alleged stemmed from a single or common fraudulent scheme.

In *Kirkland* the Eleventh Circuit vacated the trial court's certification of a claim for breach of fiduciary duty, finding that in the absence of aggregation there was no basis for federal court jurisdiction. The court concluded that Georgia law and Oklahoma law, both of which were implicated in the case, would treat punitive damages for purposes of aggregation in the same fashion as do Alabama and Florida law, which were the subject of the earlier decisions. The court distinguished the ruling from *Morrison*, in which it remanded to give the named plaintiff an opportunity to show that some members of the class might meet the required amount-in-controversy. The court concluded that in *Morrison* there was a credible explanation as to why some members of the class might meet that threshold, while in *Kirkland* there was merely a conclusory request for a remand with no explanation of why some members of the class might meet the jurisdictional amount.

In *Spielman v. Genzyme Corp.*, 251 F.3d 1 (1<sup>st</sup> Cir. 2001), the plaintiff appealed the district court's order dismissing his action for lack of subject matter jurisdiction, arguing that attorney's fees available under the statute giving rise to his claims should be attributed solely to him as class representative, rather than being allocated among members of the class. The First Circuit rejected this argument and held that diversity jurisdiction did not exist. The court noted that the Ninth Circuit and the Fifth Circuit had reached different results on questions involving aggregation of attorney's fees, but explained that this might stem from differences in the provisions of the statutes authorizing the award of fees. Reviewing the Massachusetts statute in question, the court concluded that it did not support plaintiff's argument that all of the attorney's fees that might be awarded to class counsel should be allocated to the named plaintiff for purpose of determining the amount-in-controversy. Without the benefit of projected fees available to class counsel, the named plaintiff's individual claims were insufficient to meet the requisite amount-in-controversy, and the dismissal was affirmed.

In *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9<sup>th</sup> Cir. 2001), the Ninth Circuit, after determining that diversity jurisdiction could be asserted over all class members, provided the named plaintiffs met the requirement, then turned its attention to whether the individual plaintiffs met that requirement. (Somewhat unusually, the court also addressed the question of whether the amount-in-controversy requirement could be met through the claims solely of unnamed class members, a suggestion rejected by the court). Because the named plaintiffs' individual claims did not, at least with respect to damages, meet the requisite amount-in-controversy, the court examined several arguments in support of jurisdiction. First, plaintiffs claimed that attorney's fees should be allocated only to the named plaintiffs, resulting in an amount in excess of \$75,000 for each named plaintiff. While the court agreed that fees could easily be that high, it rejected the argument that an award of fees under the California statute in question could be allocated solely to the named plaintiffs. Consistent with the holding of other courts in recent years, the Ninth Circuit found that where the state statute found for an award of attorney's fees to a

successful or prevailing party, the right to fees was bestowed on absent class members as well as named plaintiffs.

Chrysler also argued that federal jurisdiction was available by virtue of the aggregation of claims of disgorgement and punitive damages and discovery sanctions. The court rejected arguments that the disgorgement claims could meet the common interest test or would create a common fund that should be treated as one for purpose of the amount-in-controversy. Analyzing California law, the court similarly rejected an argument that punitive damages should be aggregated, finding no authority for the proposition that under California law they would be treated as a single and undivided interest. As a final argument, the defendant creatively argued that the amount-in-controversy requirement should be deemed met as a result of plaintiffs' discovery tactics. Chrysler argued that the court should, as a sanction for plaintiffs' violation of Rule 11, hold as a factual matter that the requirement was met. Recognizing the theoretical feasibility of the argument, the court nevertheless rejected it because discovery sanctions, if any, would have been awarded in the state court rather than in the federal court, so it was not for the federal court to determine the applicability of sanctions.

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## 5.5 The Certification Decision

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Since the U.S. Supreme Court's decision in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), both federal and state courts have routinely required that courts conduct a rigorous analysis to determine whether a case meets the Rule 23 requirements for class treatment. *See, e.g., Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9<sup>th</sup> Cir. 2001); *Bill Heard Chevrolet Co. v. Thomas*, 2001 Ala. LEXIS 383 (Ala. Oct. 19, 2001). As a general matter, the district court's opinion is expected to address both factual and legal issues supporting its findings with respect to the Rule 23 requirements. If the district court fails to enter such findings, appellate review, normally based on an abuse of discretion standard, is rendered difficult if not impossible.

The Seventh Circuit reversed a certification order of the trial court in *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7<sup>th</sup> Cir. 2001), on two primary grounds. First, the order certifying a class failed to address the required elements of Rule 23. The court found that Rule 23(c)(1)'s reference to the court's permitting conditional grants of class certification does not authorize a trial court to certify a class without rigorous analysis to determine if the prerequisites for class treatment are met. The court found the class certification further flawed because the trial plan provided for substantive determinations on two issues which might be dispositive in favor of plaintiffs before class members were given a right to opt out. The result would be that, if the named plaintiffs were unsuccessful in the first two phases, essentially all members of the class would opt out, whereas if the plaintiffs were successful, the defendant would be placed in the position of almost certainly having to settle because of the extremely high stakes involved in the final phase.

In *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152 (9<sup>th</sup> Cir. 2001), the appellate court found that the trial court's order denying class certification failed to set out the court's conclusions as to why the case failed to meet the Rule 23 requirements. The appellate court found, however, that there was sufficient information in the record for a holding that class certification was appropriate. Reviewing the record, the court agreed with the district court that the case did not meet the common fund requirements of Rule 23(b)(1), but found that it did meet the requirements of Rule 23(b)(3). Noting that certain issues

could not be answered from the record, including the possible need for additional class representatives and a clear definition of the class, the Ninth Circuit remanded for further proceedings in the trial court.

### **5.5.1 Merits Analysis as Element of Class Certification Decision**

It is frequently noted that a court, in deciding whether to grant a motion to certify a class, is not to delve into the merits of the case. While this general proposition stems from language in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the admonition is, more precisely, that the court's assessment of the merits not color its decision on certification. As an analysis of *Eisen* and subsequent cases makes clear, it is frequently necessary for the trial court to analyze the substantive claims, and particularly the elements that must be proven and the nature of proof to be adduced, in order to determine if the requirements of Rule 23 can be met.

In 2001 the Eleventh Circuit addressed the issue of class certification as determined by the substantive issues in a significant Truth-in-Lending case, *Turner v. Beneficial Corp.*, 242 F.3d 1023 (11<sup>th</sup> Cir. 2001). The district court had denied certification, finding that detrimental reliance was a necessary element of the plaintiff's claims and that such reliance was not present. Plaintiff sought interlocutory appeal under Rule 23(f), and the Eleventh Circuit vacated, based on an earlier decision that a plaintiff was not required to demonstrate detrimental reliance in order to bring a claim for actual damages under Truth-in-Lending. In rehearing *en banc*, the Eleventh Circuit vacated the panel's holding and affirmed the decision of the district court. The named plaintiff had testified that she had not read the allegedly erroneous disclosure statements and the court found that she thus could not prove detrimental reliance. The district court had declined to certify, finding that the absence of detrimental reliance rendered her incapable of meeting the typicality and adequacy requirements of 23(a)(3) and (4). In rehearing *en banc*, the court concluded that a plaintiff seeking actual damages under Truth-in-Lending must prove detrimental reliance. The court thus affirmed the district court's denial of class certification.

The Seventh Circuit in *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7<sup>th</sup> Cir. 2001), addressed in some detail the need for a court to inquire into the merits in order to make the class certification decision. In this case, the Seventh Circuit vacated the trial court's certification of a nation-wide class, finding problems of manageability, choice-of-laws, and commonality. The significant underpinning of the case, however, was the trial court's erroneous determination that, in making a decision on class certification, the court was limited to accepting plaintiff's allegations as true, much as the court will do in ruling on a Rule 12(b) motion to dismiss.

The appellate court found that it was an appropriate case for Rule 23(f) review because the class certification rendered the stakes so high for the defendant and because of the suggestion that there were significant legal questions that had not been addressed by the court of appeals. In its analysis the court noted particularly that where choice-of-law and other issues involving disputed facts are essential to a determination of whether the Rule 23 requirements have been met, it is incumbent on the district court to determine what facts are in dispute and in that sense discuss the merits of the case.

In *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3<sup>rd</sup> Cir. 2001), the court addressed the circumstances under which a court in connection with a certification decision must examine issues going to the merits. Tracing the history of the general rule that a court is not to make determinations on the merits as a part of a certification decision, the court

discussed why the certification decision can require the court to examine the substantive issues in order to determine certification.

Noting that in some types of securities fraud actions, both reliance and damages can be presumed, the court concluded that although reliance might be presumed in this case, it was not possible to presume actual economic loss on the part of any given class member without delving into the specific facts surrounding the individual transaction. Whether any absent class member had actually suffered a loss in connection with any transaction depended on what alternative prices were available at the time of the given trade. The court thus concluded that the tests of predominance and superiority could not be met because the trial court would be overwhelmed with the individual questions that would have to be addressed in order to determine liability. In reaching this conclusion, the court made a point of distinguishing between cases in which the fact of economic loss could be presumed or determined on a class-wide basis, leaving only the individualized computations of damages, from the case at bar in which the fact of the loss itself required individualized proof.

The Fifth Circuit's decision in *Smith v. Texaco, Inc.*, 263 F.3d 394 (5th Cir. 2001), similarly reflects the need to analyze the substantive provisions of plaintiff's claims in order to determine if class treatment is available. Reviewing the proof required for plaintiff's employment discrimination claims, the court reversed the district court's certification of a (b)(2) class.

In *In re Visa Check/Master Money Antitrust Litigation*, 2001 U.S. App. Lexis 22480 (2<sup>nd</sup> Cir. Oct. 17, 2001), the Second Circuit analyzed each of the elements of the antitrust claim in light of plaintiffs' explanation of how they intended to prove those elements and in light of expert testimony regarding economic analysis. Although the court found that the damages stage of the litigation might require proof on an individual basis, it cited a number of precedents for its holding that the need to prove damages on an individualized basis was not alone sufficient to defeat certification with respect to liability issues, the court having various devices available for resolution of the damages issue.

State courts addressing the need to consider the substantive questions at issue in order to determine certification have reached similar results. *See, e.g., Advance America v. Garrett*, 40 S.W. 3d 239 (Ark. 2002); *Quamme v. Advance Trading Inc.*, 2001 Iowa App. LEXIS 358 (May 23, 2001) (While the merits are not to be considered by a court, it is appropriate for the trial court to consider the facts and circumstances surrounding the specific contracts and oral representations, as such a consideration was necessary in order to "form a reasonable judgment" as to whether class certification was appropriate.)

### 5.5.2 Class Definition

In *Ferguson v. Kroger Co.*, 37 S.W.3d 590 (Ark. 2001), the Supreme Court of Arkansas had occasion to address the implicit requirement in class actions that there must be a definite class capable of being defined and identified. Plaintiffs sought to represent a class of persons who had been misled and damaged as a result of defendant's double-coupon promotion. The trial court denied certification, finding that plaintiffs had failed to prove commonality, predominance, superiority, and adequacy. The Supreme Court affirmed on a somewhat different ground, concluding that in order to have a class action, there must be a class that can be defined in such a way that it is "administratively feasible" for the trial court to ascertain who is a member of the class. In this case, identifying class members would have required individual inquiries into the

myriad of ways that potential class members might have learned of the promotion, the extent to which they relied on the promotion to make a given purchase, and the shopper's expectation as to how the value of the coupon would be calculated with respect to the sales tax. These and other factors led the Supreme Court to find the plaintiff's "ability to define the class to be all but insurmountable." 37 S.W.3d at 594.

### **5.5.3 Implied Class**

While most class actions involve, at least at some point, the formal decision of a court either to certify or not to certify a class, the Eleventh Circuit, following pre-split Fifth Circuit precedent, confirmed in 2001 that an action not formally certified for class treatment may nevertheless constitute a class action, at least for certain purposes. In *Doe v. Bush*, 261 F.3d 1037 (11<sup>th</sup> Cir. 2001), the state of Florida appealed from a contempt order and a tardily entered class certification order in an action challenging certain elements of Florida's Medicaid program. Although the case had been filed as a class action and a magistrate judge had recommended certification, the district court had entered a judgment against the State and ordered relief without ever certifying the class. The trial court later held the State in contempt for failing to provide relief to all eligible members of the putative class, and the State appealed. One of the grounds for the appeal of the contempt order was that it addressed the State's failure to provide relief to members of the putative class, notwithstanding the fact that the class had never been certified. While this appeal was pending, the district court entered an order granting certification. The state then appealed the certification decision as well.

In its discussion the Eleventh Circuit observed that while formal certification is the usual rule, the absence of a formal order certifying a class under Rule 23 does not necessarily mean that class-wide relief may not be properly entered. The court focused on the fact that both the district court and all of the parties had acted throughout the litigation as if the case were a class action, the defendant raising no objection to the absence of a formal order until the opportunity to argue that absence as a ground for vacating the contempt ruling. The Eleventh Circuit noted that the relief sought was injunctive in nature and so the action would not require that notice be given under a Rule 23(b)(2) certification. On these facts the court recognized the existence of an implied class and held that the existence of such a class defeated the challenges to the contempt order. The court did vacate the class certification order that had been entered in the district court, while the contempt appeal was pending, for lack of jurisdiction, but noted that the district court would have jurisdiction to enter a formal certification order after remand.

### **5.5.4 Adequacy and Typicality**

The requirements for adequacy and typicality are often viewed as easily met, although decisions in recent years have highlighted the need for courts to apply the same degree of scrutiny to these requirements as to the complex issues often raised by requirements for predominance and manageability. Adequacy requires that the named plaintiff not have a conflict with other class members and that class counsel be competent to handle the representation. Typicality focuses on whether the interests of the named plaintiff are essentially similar to and not in conflict with those of class members. *See Stewart v. Abraham*, 2001 U.S. App. LEXIS 27339 (December 26, 2001) (holding that factual differences do not destroy typicality where the claim arises from the

same course of conduct and is based on the same legal theory. 2001 U.S. App. LEXIS 27339 at \*15.

A claimant's election to go forward *pro se* almost certainly defeats any claim to adequacy for class representation. In *Hallan v. Holland American Line Inc.*, 27 P.3d 751 (Alaska 2001), a *pro se* litigant filed a class action under Alaska's wage and hour act. The trial court denied class certification, holding that a *pro se* litigant could not adequately represent a class. The court did not rule on a subsequent motion for class certification conditioned on the plaintiff's obtaining qualified counsel. Summary judgment was granted to the defendant and on appeal the Supreme Court of Alaska held that the trial court had been correct in finding that a *pro se* litigant could not represent the interest of a class, but remanded for consideration of the motion for certification conditioned on plaintiff's obtaining qualified counsel.

In *Palasty v. Hawk*, 2001 U.S. App. LEXIS 14497 (6<sup>th</sup> Cir. June 20, 2001), the court held that a *pro se* prisoner cannot meet the adequacy requirement to represent a class of prisoners. The same circuit a few months later held that an indigent *pro se* plaintiff challenging voting registration requirements was not able to represent the class fairly and adequately and so could not serve as a class representative. *Pepper v. Darnell*, 2001 U.S. App. LEXIS 26618 (6<sup>th</sup> Cir. Dec. 10, 2001).

In *Berger v. Compaq Computer Corp.*, 257 F.3d 475 (5<sup>th</sup> Cir. 2001), the court vacated class certification in a securities class action, finding that the district court had improperly presumed the adequacy of the class representative and had failed to apply the correct test for adequacy under the Private Securities Litigation Reform Act of 1995 ("PSLRA"). In its certification order the district court had stated that there was a presumption of adequacy in the absence of specific evidence to the contrary. The Fifth Circuit found that this was error in that it shifted the burden away from the movants, who have the burden of proving that all of the requirements of Rule 23 are met, and further abrogated the court's responsibility to ensure that the due process rights of absent class members are protected. The court then addressed as a matter of first impression the impact of the PSLRA on the adequacy requirement for class certification. The court noted that Rule 23(a)'s requirement for adequacy generally requires that a class representative be active in the litigation and be capable of exercising control over the litigation. The PSLRA, however, creates a heightened standard in requiring that named plaintiffs be informed and able to demonstrate that they do manage the litigation, rather than deferring entirely to class counsel.

In *Fent v. Oklahoma Natural Gas Co.*, 27 P.3d 477 (Okla. 2001), the Supreme Court of Oklahoma, applying a state rule similar to federal Rule 23, affirmed denial of certification for lack of typicality. The named plaintiffs had been engaged in litigation for a number of years and there had been several proceedings prior to the appeal from the denial of class certification. The claim involved the question of whether the gas company was responsible for maintaining the line on the home owners' property. By the time class certification had been denied, the claims of the named plaintiffs had matured because they had already obtained an order adjudicating the obligations of the gas company with respect to their particular line. Their claims thus were not typical of those asserted on behalf of the class, which included claims for injunctive or declaratory relief with respect to the gas company's obligations. The court found there was no abuse of discretion by the trial court in denying certification, noting particularly that typicality was missing with respect to the claims for equitable relief.

The Massachusetts Supreme Court in *Weld v. Glaxo Wellcome, Inc.*, 434 Mass. 81, 746 N.E. 2d 522 (2001), addressed the issue of whether a plaintiff can represent a class against a

group of defendants, when he dealt with only one of those defendants. Here the plaintiff sought to represent a group of persons claiming that various pharmaceutical companies had wrongfully disclosed and used confidential patient information. The court found that the named plaintiff was complaining about conduct identical across class members and that the legal theories were uniform, thus meeting the usual test for typicality. Noting that all of the class members had dealt with CVS and that the arrangements between CVS and the various manufacturers were essentially identical, the court found a sufficient nexus to meet the test of typicality.

### **5.5.5 Commonality, Predominance, and Superiority**

Among the more elusive of the terms used in Rule 23 is the reference in Rule 23(a)(2) and Rule 23(b)(3) to “common questions” of law or fact. While the rule uses the term “question,” it is clear from both evolving case law and a policy analysis that the test focuses not on the commonality of questions to be posed, but on the nature of the proof required to answer such questions. The issue is not whether a common question of law or fact must be answered with respect to all members of the putative class; it is, rather, whether such questions can be answered on a class-wide basis, rather than requiring individualized proof. *See, e.g., Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997); *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands Inc.*, 244 F.3d 1152 (9<sup>th</sup> Cir. 2001) (holding that commonality involves the ability to resolve or adjudicate issues for all class members through a single adjudication); *Rutstein v. Avis Rent-a-Car Sys., Inc.*, 211 F.3d 1228 (11<sup>th</sup> Cir. 2000); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5<sup>th</sup> Cir. 1996).

In 2001, the Second Circuit issued an opinion reflecting the form of analysis in *In re Visa Check/MasterMoney Antitrust Litig.*, 2001 U.S. App. LEXIS 22480 (2<sup>nd</sup> Cir. Oct. 17, 2001). In this antitrust litigation, plaintiffs sought and obtained certification under both (b)(2) and (b)(3) of a class of merchants claiming to have incurred damages as a result of defendants’ tying arrangement between debit cards and credit cards. The Second Circuit affirmed class certification under Rule 23(b)(3), addressing at some length the basis for its conclusion that the critical issues to be proven for the antitrust claim could be proven through class-wide as opposed to individualized proof.

In *In re LifeUSA Holding, Inc.*, 242 F.3d 136 (3<sup>rd</sup> Cir. 2001), the Third Circuit revisited two issues that were the subject of substantial discussion in earlier cases. The district court had certified a Rule 23(b)(3) class on claims of misrepresentation and related claims stemming from the marketing and sale of annuity policies. The trial court certified the class, notwithstanding evidence that the annuities in question were sold by independent as well as captive agents, and that both the materials used and reviewed by the selling agents and the materials provided to putative class members were non-uniform. The defendant appealed the grant of certification pursuant to Rule 23(f). The Third Circuit initially rejected the petition for Rule 23(f) review, but subsequently reversed that decision and entered a judgment reversing the trial court’s certification.

Focusing on the lack of uniformity in both written and oral materials used by sales persons and putative class members, the court found that the tests of predominance and superiority could not be met. Neither the training of the sales agents nor the presentation of the product to prospective customers was based on uniform, scripted and standardized sales presentations, and thus the district court’s finding of common conduct was not supported by the record. The Third Circuit also noted that the district court failed to address individual issues involving choice-of-law analysis, causation, contract law, reliance, fiduciary status, and

affirmative defenses, including contributory or comparative negligence and statutes of limitations. Given the extent to which these individualized issues were present, the court found both commonality and predominance to be lacking. The Third Circuit further noted that the superiority requirement was not met, noting in particular that the trial court had failed to address how the action could be tried on a class basis. In a footnote, the court noted its concern with the Seventh Amendment claim asserted by the defendant, which argued that bifurcation of common and individualized questions would violate its Seventh Amendment right to trial by jury. The court did not address that issue because of its decision to decertify the class. (Having rejected the trial court's certification, the court did note that the plaintiffs in the course of the appeal had changed their focus from pre-sale to post-sale representations, and directed the trial court to consider whether certification on these altered theories would be appropriate.)

In *Quamme v. Advance Trading, Inc.*, 2001 Iowa App. LEXIS 358 (2001), the Supreme Court of Iowa affirmed the trial court's denial of class certification under Iowa Rule of Civil Procedure 42.3(a). Plaintiffs sought to represent a class of farm owners against a company with whom previous class members had entered into agreements regarding agricultural marketing. Although Iowa's rule differs somewhat from the federal rule, the general analysis is similar in that it requires numerosity, commonality, adequacy, and a determination that class treatment will further "fair and efficient adjudication of the controversy."

The court found that the commonality test was lacking because the claims depended on evidence of a duty and breach thereof, stemming from a variety of written and oral communications conducted by more than one representative of the defendant. The court found that the determination of whether there was any duty to disclose would have to be determined on an individual basis depending on the particular facts and circumstances of the defendant's relationship with each of the individual putative class members. Given the differences in the written agreements and the different participants in critical communications, the court found no abuse of discretion in the trial court's decision that the commonality test was not met. With respect to the second part of the test, the court agreed that class certification would not further a "fair and efficient adjudication of the controversy." Noting that the state rule provides a list of factors to be considered in applying the fair and efficient adjudication test, the court focused on the predominance test, which is similar to that in federal Rule 23(b)(3). The same diversity of written agreements and oral communications that defeated the commonality requirement similarly rendered class treatment inappropriate for a fair and efficient adjudication of the controversy. Because each putative class member's right to recover would depend on the particular facts of his or her situation, class certification was deemed inappropriate.

In a case challenging the city's collection of liquor license fees, the Supreme Court of Kansas affirmed the lower court's certification of a class and award of attorney's fees. *Bigs v. Wichita*, 23 P.3d 855 (Kan. 2001). Construing a state class action rule that is essentially identical to the federal rule, the court rejected defendant's argument that commonality and typicality were defeated by the fact that class members would have differing amounts of refunds depending on the period of years for which fees have been paid and the extent to which the fees were excessive. The court noted that the individual decisions would depend merely on mathematical computations and followed federal court precedent in finding the commonality requirement to be met. The City also complained that the effect of a class certification was to permit individual class members to circumvent the requirement of giving notice to the city before submitting a claim for a refund. The Supreme Court rejected this argument because a letter from class counsel to the city had provided fair and adequate notice of the claims and the city was aware

that there were a significant number of individuals who would be in a position to assert such a claim. The statutory purpose for requiring notice thus was met.

### **Certification of Fraud Claims**

In recent years a number of federal and state courts have addressed the question of whether claims for fraud are amenable to treatment on a class basis. Many courts have concluded that class treatment is not appropriate, at least where predominance is required, because of the difficulties of proving reliance and, in suppression cases, existence of a duty of disclosure, on a class basis. In *Patterson v. Mobil Oil Corp.*, 241 F.3d 417 (5<sup>th</sup> Cir. 2001), the Fifth Circuit reiterated its holding in *Bolen v. Sears, Roebuck & Co.*, 231 F.3d 970 (5<sup>th</sup> Cir. 2000), to the effect that a case asserting fraud could not be certified under Rule 23(b)(3) because of the predominance of individual issues. Of particular note was the fact that each absent class member would have to prove reliance on the alleged fraud and actual injury under RICO. The district court had certified a class under Rule 23(b)(3), and the Fifth Circuit, reviewing the case under Rule 23(f), vacated and remanded.

Applying its earlier decision in *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3<sup>rd</sup> Cir. 2001), the Third Circuit affirmed denial of class certification on fraud claims involving written and oral misrepresentations, for lack of predominance and superiority where both the content of the oral representations and the issues of reliance and causation would have to be addressed and proven on an individual basis. *Johnston v. HBO Film Management, Inc.*, 265 F.3d 178 (3<sup>rd</sup> Cir. 2001). In so holding the court addressed the question of whether the trial court, in ruling on class certification, must take the allegations of the complaint as true or is to go beneath the pleadings to consider evidence proffered on pertinent issues. Here testimony from the individual plaintiffs and others revealed that the misrepresentation claims were necessarily based on diverse oral, rather than uniform written, representations.

The Alabama Supreme Court vacated class certification on claims of fraud and suppression in *Compass Bank v. Snow*, 2001 Ala. LEXIS 470 (Ala. Dec. 28, 2001), finding that the requirements for individualized proof on reliance, causation, choice of law, knowledge, and duty, coupled with diverse defenses and counterclaims and damages calculations requiring individualized proof, defeated claims for superiority, predominance, and manageability.

The trial court also certified under (b)(2), but the court rejected that conclusion, noting that a (b)(2) certification is improper where the primary relief sought is money damages. Because the issue of damages in this case would require extensive inquiries with respect to each class member, the court held certification under that section to be improper. *See also Colonial Bank of Alabama v. McCaffery*, 2001 Ala. LEXIS 478 (Ala. December 28, 2001).

### **Certification of Contract Claims**

Because of the inherent difficulty of proving individual reliance in common law fraud cases, it is not surprising that courts generally find such claims to be unsuited to class treatment. Claims for breach of contract, in contrast, may appear readily amenable to class treatment, at least where the defendant executed boilerplate contracts with putative class members. Yet a number of decisions in recent years have focused on the difficulties that can arise in breach of contract cases that defeat certification.

In *Williamson v. Sanofi Winthrop Pharm., Inc.*, 2001 Ark. LEXIS 641 (Nov. 29, 2001), the Supreme Court of Arkansas addressed the question of whether a class could be certified on breach of contract claims. Distinguishing cases in which the issue was whether a contract had

been breached, the court found that in this case class certification was not appropriate because in order to prevail the plaintiff would have to show that a contract actually existed between the defendant and each member of the class. The plaintiff asserted claims on behalf of commissioned pharmaceutical salespersons in connection with a company-wide bonus program. The plaintiff's theory was that a contract had been created when salespersons responded to the company's announced bonus program. The court found that the requirement for determining on an individual basis whether there had been a meeting of minds sufficient to rise to a contract defeated the requirements of commonality and superiority. The court pointed out that while the plaintiff listed ten questions that were common to each class member, none of these was the question on which the case would turn. Instead, liability depended upon the answers to questions that could not be asked and answered on a class-wide basis, but instead would have to be asked and answered separately with respect to each individual class member.

*In Alfa Life Ins. Corp. v. Johnson*, 2001 Ala. LEXIS 427 (Ala. Nov. 21, 2001), the Alabama Supreme Court vacated class certification on breach of contract claims, finding that when contract claims are presented on a class basis, the court must determine, before addressing certification, whether the terms of the contract are ambiguous and, if so, whether they can be resolved as a matter of law or whether factual issues control. If the latter, class certification is not appropriate because the jury will have to determine the contract terms with respect to individual class members. *See also* *Compass Bank v. Snow*, 2001 Ala. LEXIS 470 (rejecting certification of contract claims requiring individualized proof as to the terms of individual contracts, mitigation, and damages).

### 5.5.6 Bifurcation and Mandatory Classes

Because members of classes certified under (b)(1) and (2) do not share the (b)(3) class member's right to receive notice and an opportunity to opt out of the class, litigants often argue vigorously for application of the former provisions, even when a portion of the claims involve monetary damages. Employment class actions, in particular, often involve both claims for equitable relief and claims for monetary damages, and the federal courts have developed the practice of bifurcating class action claims to provide for mandatory classes on equitable claims while protecting due process and Seventh Amendment rights with respect to claims for money damages.

The issue of certification under Rule (b)(2) or Rule (b)(3) has been at the forefront of employment class actions, particularly since issuance of the decision in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5<sup>th</sup> Cir. 1998) (holding that a class action seeking both equitable and monetary relief could be certified under Rule (b)(2) only when the monetary damages were incidental to the equitable relief sought). The Fifth Circuit applied this rule in *Smith v. Texaco Inc.* 263 F.3d 394 (5<sup>th</sup> Cir. 2001), in which the court reversed class certification, finding that common questions did not predominate and that damages were not merely incidental to injunctive relief, thus triggering a Rule 23(b)(3) analysis.

In 2001, the Second Circuit rejected the test adopted by the Fifth Circuit in *Allison v. Citgo*, and reversed the district court's refusal to certify an employment discrimination case. In *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147 (2<sup>nd</sup> Cir. 2001), the appellate court rejected what it termed the "bright-line prohibition" on (b)(2) certifications in cases seeking compensatory damages and other non-incidental damages. Instead, the court held that in such cases the district court is to consider the evidence and arguments presented and then determine whether certification under Rule 23(b)(2) is appropriate in light of the "relative importance of the

remedies sought, given all of the facts and circumstances of the case.” 267 F.3d at 164. In adopting this test, the Circuit cautioned against certification under (b)(2) where claims for equitable relief were insignificant or a “sham,” ensuring that the equitable relief was reasonably necessary and appropriate in the event of plaintiffs’ success and that such relief was sufficiently valuable that plaintiffs would bring the action even if monetary relief were not also available. 267 F.3d at 164.

In vacating the district court’s denial of class certification, the Second Circuit did note the potential due process risk entailed in certifying a non-opt out class involving monetary damages. The court concluded, however, that due process requirements could be satisfied by affording notice of opt-out rights as necessary.

Having adopted a standard more permissive of (b)(2) certifications in pattern-or-practice cases involving both equitable and monetary relief, the court then addressed the claim that the district court had also erred in failing to bifurcate the issues, certifying for class treatment as to liability only. Reviewing the nature of the proof required, the court held that the district court erred in not bifurcating liability and damages and certifying the liability phase of the pattern or practice disparate treatment claim for class treatment under Rule 23(b)(2). Addressing certification of the disparate impact claim, the court held that district court erred in denying (b)(2) certification. The court addressed concerns as to the Seventh Amendment right to jury trial but held that this could be resolved by putting necessary issues to a jury first.

Finally, the court addressed the argument that the class representatives were inadequate because they did not seek monetary relief. The court found this to be premature, holding that should the case reach that stage the district court would have discretion to appoint additional plaintiffs to represent the class.

In *Bishop v. Gainer*, 272 F.3d 1009 (7<sup>th</sup> Cir. 2001), the Seventh Circuit certified a class for purposes of declaratory injunctive relief under Rule (b)(2) but did not include in the class any claims for monetary damages, holding that notice and opt-out rights would be required if claims for damages were to be encompassed within the class certification.

In *Murray v. Auslander*, 244 F.3d 807 (11<sup>th</sup> Cir. 2001), the Eleventh Circuit addressed the district court’s basis for certifying a class under Rule 23(b)(2), finding that the requirements of adequacy and typicality were sufficiently met as to make the certification claims not an abuse of discretion, at least with respect to the claims for injunctive and declaratory relief. The court did, however, find that the trial court abused its discretion in not exempting claims for compensatory damages from the (b)(2) class. Relying on the Fifth Circuit’s decision in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5<sup>th</sup> Cir. 1998), the court found that the claim for compensatory damages was not incidental to the claim for injunctive relief and directed the district court on remand to determine whether the threshold requirements of Rule 23(b)(3) were met with respect to plaintiff’s damages claims. (The court also noted that overly broad definition of the class could be resolved in the district court through an amendment to the definition of the class.)

In *Piazza v. Ebsco Industries*, 2001 U.S. App. LEXIS 25448 (11<sup>th</sup> Cir. Nov. 30, 2001), the court held that the trial court had abused its discretion in certifying one of the claims under Rule 23(b)(3) rather than Rule 23(b)(1), where certification was available under both sections of the rule, defendants were prejudiced by the opt-out provisions of Rule 23(b)(3), and plaintiffs offered no explanation for why (b)(3) was preferable to (b)(1) for adjudication of the claims under § 502(a)(2) of ERISA.

In *State Farm Mut. Auto. Ins. Co. v. Mabry*, 2001 Ga. LEXIS 910 (Ga. Nov. 28, 2001), an insurance company defendant challenged the trial court's certification of a class for declaratory and injunctive relief. Plaintiff originally sought certification of two sub-classes, one asserting breach of contract claims and the other seeking equitable relief. On appeal the Supreme Court held that, although Georgia's class action rule does not expressly authorize bifurcation of classes, such bifurcation is permissible in an appropriate case. Here the court found that the trial court's decision to certify a class for equitable relief was appropriate, since the rules were clearly satisfied with respect to those causes of action.

In *In re Visa Check/Master Money Antitrust Litigation*, 2001 U.S. App. Lexis 22480 (2<sup>nd</sup> Cir. Oct. 17, 2001), antitrust plaintiffs sought and obtained certification under both (b)(2) and (b)(3) of a class of merchants claiming to have incurred damages as a result of defendants' tying arrangement between debit cards and credit cards. Noting the ongoing debate as to when a case involving both equitable and monetary relief can be certified as a mandatory class under Rule (b)(2), the court elected not to reach the issue in this case. Having found that a class was maintained under Rule 23(b)(3), it did not address the issue of whether the district court had erred in also granting certification under Rule 23(b)(2).

The Supreme Court of North Dakota addressed certain differences between North Dakota's rule for mandatory classes and the federal rule in *Ritter, Laber and Assoc., Inc. v. Koch Oil, Inc.*, 623 N.W.2d 424 (N.D. 2001). A class of unidentified persons having royalty and leasehold interests in certain oil wells had been certified by the trial court on claims that the defendant had inaccurately measured oil for which payments had been made. The defendant appealed this certification, claiming that two requirements of the North Dakota rule had not been met. First, defendant claimed that the rule's requirement of a "joint or common interest" was not satisfied because adjudication of the claim of one member would not be *res judicata* as to the claims of other class members. Second, defendant claimed that the predominance requirement was not met. The Supreme Court rejected both of these arguments and then addressed the defendant's claim that certification deprived the due process rights of class members because the class was certified as a mandatory or non-opt-out class. The court found that the constitutional argument was premature because members of the class had not yet been identified, but went on to observe that North Dakota's rule, unlike federal Rule 23, permits members of the non-mandatory class to participate in class action proceedings and to be represented by separate counsel. The rule thus grants more protection to members of a mandatory class than does the federal rule. The court also noted that the trial court retained the power to create subclasses, or decertify parts or all of the class, based on further evidence.

### 5.5.7 Choice of Law

While the U.S. Supreme Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), opened the door to the filing of multi-state class actions in the federal courts, it also raised choice-of-law issues with respect to adjudication of claims of class members in states other than the forum state. Typically defendants opposing class certification argue that the requirement that the court apply the substantive laws of different states defeats the commonality, predominance, and manageability requirements of Rule 23. Courts have frequently had occasion to address the question of which party has the burden of proving the consequences of choice-of-law issues on the certification decision.

In *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180 (9<sup>th</sup> Cir. 2001), the Ninth Circuit rejected plaintiff's argument that the laws of Colorado and Delaware applied to the claims of all

class members. Examining the forum state's choice-of-law rules, the Ninth Circuit agreed that the plaintiff had failed to meet her burden of showing why the law of a single state should apply or in demonstrating that due process would permit the application of the forum state's substantive law. The court then held that because the plaintiff sought to assert claims on behalf of class members in many states, the burden fell on the plaintiff to demonstrate that the action could realistically be tried as a class, notwithstanding the applicability of numerous state laws on the substantive issues to be decided. The Ninth Circuit analyzed and similarly rejected plaintiff's arguments with respect to superiority, predominance and case management, thus making certification under Rule 23(b)(3) inappropriate. It also rejected plaintiff's argument for certification under Rule 23(b)(2), finding that the request for a medical monitoring program and fund did not meet the requirements of either subsection.

In *Washington Mut. Bank v. Superior Court*, 24 Cal. 4<sup>th</sup> 906, 15 P.3d 1071(2001), the Supreme Court of California found that the trial court had erred in certifying a multi-state class without first analyzing the effect of possible choice-of-law issues. Analyzing the U.S. Supreme Court's decision in *Shutts* and California's choice-of-law rules, the court held that the proponent of certification must address the choice-of-law issue and show in detail how the trial court could manage differences in state laws if the case were to be tried on a class basis. The trial court may not rely on assurances of counsel that a manageable trial plan can be developed; the details of that plan must be presented to the court for consideration in making the certification decision. While the court focused principally on the problems posed by multi-state classes for the matter of manageability, it noted that the requirement to apply the laws of multiple states may also affect other certification requirements, including typicality, adequacy, and predominance.

### **5.5.8 Rule 23(c)'s Requirement for Ruling "As Soon as Practicable"**

Although Rule 23(c) directs the court to make the decision with respect to class certification as early as practicable, there are cases in which rulings on motions for summary judgment are entered before decisions are made on class certification. This procedure was approved by the Ninth Circuit in *Cavanagh v. Humboldt County*, 2001 U.S. App. LEXIS 484 (9<sup>th</sup> Cir. January 10, 2001). Noting that the Circuit had previously approved the district court's grant of summary judgment before addressing class certification, the court found no abuse of discretion where the district court granted summary judgment in a case in which plaintiffs had never filed a motion to have the class certified.

The D.C. Circuit similarly affirmed the district court's decision to rule on a motion for summary judgment before ruling on class certification in *Curtin v. United Airlines, Inc.*, 2001 U.S. App. LEXIS 27286 (D.C. Cir. December 28, 2001). The circuit court found no error because it was readily apparent to the district court that the plaintiff's claims were barred by accord and satisfaction. The court also noted that the defendant had not objected to the trial court's hearing the dispositive motion before obtaining a ruling on class certification.

An unusual set of facts led to a similar ruling from the North Dakota Supreme Court in *DeCoteau v. Nodak Mut. Ins. Co.*, 636 N.W.2d 432 (N.D. 2001). The plaintiff filed a class action but did not file a motion to certify a class. He did serve discovery aimed at developing evidence to support certification, to which the defendant objected. The defendant then filed a motion for summary judgment, effectively seeking entry of judgment against itself for an amount certain with respect to the individual plaintiff's claims. Summary judgment was granted, and the parties exchanged checks for the judgment amount and executed a mutual satisfaction of judgment. The plaintiff then sought to appeal the grant of summary judgment, seeking to have

the case remanded for a ruling on class certification. The Supreme Court held that the appeal was moot based on the facts of the case. In so doing, the court distinguished U.S. Supreme Court decisions permitting a class representative whose individual claims have been mooted after class certification or denial of certification to appeal, because in this case the plaintiff had failed to file either a motion for class certification or a motion to compel the discovery he claimed was a prerequisite to his ability to file the motion for class certification. Because the plaintiff had filed a satisfaction of judgment without reserving any right to appeal on behalf of the class, the court found that he no longer had any interest in class certification. In addition, the court noted that because the trial court had never made any ruling on class certification, there was no trial court ruling from which an appeal could be made.

In *Benning v. Wit Capital Group, Inc.*, 2001 Del. LEXIS 502 (Del. Nov. 1, 2001), the Delaware Supreme Court reversed the lower court's denial of class certification for lack of numerosity, typicality and predominance. Plaintiff appealed, arguing that the trial court had refused to compel defendants to produce documents plaintiff needed to support the motion for class certification. Noting the admonition of Rule 23 that the trial court make a determination of class certification as early in the case as is practicable, the Supreme Court held that this does not authorize the trial court to deny certification before allowing the parties sufficient discovery on class-related issues.

Affirming the lower court's certification a class under Alaska's corollary to federal Rule 23 (b)(3), the Supreme Court of Alaska held that an opportunity for discovery and an evidentiary hearing are not a mandatory prerequisite to class certification. *Bartek v. State*, 31 P.3d 100 (Alaska 2001). The court reviewed cases from other jurisdictions addressing this issue and held that it is nevertheless within the discretion of the trial court to determine that an evidentiary hearing is required in order to meet the rigorous analysis test established by *General Tele. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982).

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## 5.6 Settlement

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### 5.6.1 Settlement Classes After *Amchem* & *Ortiz*

In 1997, the U.S. Supreme Court changed the landscape of class action settlements when it vacated a class action settlement in *Amchem Prod. Inc. v. Windsor*, 521 U.S. 591 (1997), on the grounds that absent class members were not adequately represented and that the trial court had failed to give proper consideration to all of the prerequisites for class certification under federal Rule 23. The adequacy issue arose from the fact that class counsel were in the position of representing both persons who had already evidenced injury as a result of exposure to asbestos and persons whose exposure heralded potential injury in the future.

In reviewing the trial court's analysis of Rule 23 factors, the Court held that a court may not certify a class for settlement purposes without conducting the same rigorous analysis that would be conducted if certification were contested. Noting that certain factors, in particular the manageability factor, may be effectively mooted by a proposed settlement, the court made it clear that the trial court must nevertheless address all of the prerequisites under Rule 23 before certifying a class for settlement purposes.

This decision was followed two years later with the ruling in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). In *Ortiz*, the court addressed a class that had been certified for settlement

purposes under Rule 23(b)(2). Although the case involved claims for money damages, the trial court determined that certification of a mandatory class under Rule 23(b)(2) was appropriate because there was a limited fund available to satisfy the claims of all class members. The Supreme Court vacated, holding that the so-called limited fund was really a creation of the parties to the action and failed to take into consideration insurance assets that might be available to fund a settlement.

In the wake of these two decisions, federal and state courts have reviewed proposed class settlements with increased rigor. In 2001, the repercussions of *Amchem* and *Ortiz* were manifested in a decision of the Second Circuit, in connection with claims brought by plaintiffs claiming injury as a result of their exposure to Agent Orange during the Vietnam War. *Stephenson v. Dow Chem. Co.*, 2001 U.S. App. LEXIS 25898 (2<sup>nd</sup> Cir. Nov. 30, 2001). A class settlement of such claims had been approved by the U.S. District Court for the Eastern District of New York in 1984. That settlement provided for a settlement fund to be paid both to persons then suffering from Agent Orange-related maladies and also to persons who might discover such problems in the future. The case that reached the Second Circuit in 2001 originated with filings, one in state court and one in federal court, by two Vietnam veterans whose health problems were not manifested until after the settlement fund had been depleted. The two actions ultimately were transferred to the court that had approved the earlier class settlement. Based on that earlier class settlement, the district court dismissed the claims and plaintiffs appealed.

On appeal the Second Circuit reversed, finding that the earlier approved class settlement did not meet the test later set out in *Amchem* and *Ortiz* with respect to adequacy. The court held that (1) the district court properly exercised jurisdiction under the All Writs Act; (2) plaintiffs were entitled to challenge the effect of the earlier settlement, where their claim was that they had not been fairly and adequately represented in connection with that settlement; and (3) because of the inherent conflict of interest between the earlier class members who had already discovered their illnesses in time to benefit from the settlement, and those persons who did not discover their illnesses until after the depletion of the funds, the latter were not bound through either *res judicata* or due process to the settlement. Having not been adequately represented in connection with the class settlement, they were not proper parties to the settlement and were not bound by it. The district court's dismissal was thus vacated and the case remanded to district court.

In *Pickett v. Holland Am. Line-Westours, Inc.*, 35 P.3d 351, 2001 Wash. LEXIS 758 (Wash. Nov. 29, 2001), the Supreme Court of Washington reversed the Court of Appeals decision which in turn had reversed the trial court's approval of a class settlement as fair, adequate and reasonable. The settlement was reached after an initial certification motion had been denied, and the Court of Appeals considered this fact in reversing approval of the class settlement. The Court of Appeals determined that the class should have been certified initially and concluded that this would have impacted the settlement negotiations. The Supreme Court reversed, holding that the Court of Appeals had erred in considering whether the initial denial of certification was in error, instead of focusing only the fairness of the settlement order. The Supreme Court reviewed the factors to be applied in testing the settlement and found them to be met by the settlement proposed in the trial court. Those factors include the likelihood plaintiffs will prevail on the merits, the amount of evidence and discovery available, the terms of the settlement agreement itself; experience of counsel, anticipated expenses and duration of action if settlement not approved, recommendations of counsel and neutral parties; the number and nature of objections; and the presence of good faith and lack of collusion. 2001 Wash. LEXIS 758, at \*14.

## 5.6.2 Enforcement of Settlement Terms and Notice

In *Griffith v. University Hos., L.P.*, 249 F.3d 658 (7th Cir. 2001), the Seventh Circuit affirmed a district court's denial of intervention to persons seeking to intervene in a class action, after the settlement had been approved, for the purpose of challenging certain confidentiality provisions in the settlement agreement. Appellants sought to obtain documents subject to the confidentiality provisions for use in a separate arbitration proceeding. The district court expressed concern that permitting intervention for this purpose could derail the settlement and be unfair to class members who had already received notice of the settlement, including the confidentiality provisions in question. The Seventh Circuit affirmed, noting that while intervention is generally an appropriate mechanism for challenging a protective order, the right of class members to rely on the terms of settlement set out in the notice weighed in favor of denying intervention. The court also noted that the documents in question could be obtained through other means, reinforcing the conclusion that the district court had not abused its discretion in denying the motion to intervene.

In a 1998 decision, the Eleventh Circuit alerted class litigants to the importance of drafting notices to absent class members so as to provide adequate notice of the parties' intentions. *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222 (11<sup>th</sup> Cir. 1998). In *Twigg*, the Eleventh Circuit permitted a member of a settlement class to pursue related individual claims, finding that, because of inadequate notice of the release effect of a class-wide settlement in a previous case, he was not precluded from bringing a new action. In 2001 the Third Circuit reached a different result in a decision that emphasizes the importance of class members' paying careful heed to the terms of a class settlement notice. In *In re Prudential Ins. Co. of America Sales Practice Litig.*, 261 F.3d 355 (3<sup>rd</sup> Cir. 2001), the court held that class members who had chosen to exclude certain policies from a class settlement were nevertheless limited by the class settlement in pursuing claims based on those policies in a separate state court proceeding. Although the notice to class members had permitted class members to exclude some or all of their policies from the settlement, it also gave notice that the settlement would constitute a complete release and discharge of claims that were connected with or related to the released transactions. Construing the release language in the settlement notice, the Third Circuit affirmed the district court's order enjoining all policyholders from bringing separate actions based on any of the facts and circumstances involved in the claims asserted within the scope of the class settlement. The end result was that class members could proceed in filing separate actions based on policies that had been excluded from the class settlement, but in so doing could not rely on evidence of the matters at issue in the class action. While it affirmed the district court's decision, the Third Circuit did observe in a footnote that in the future class notices might be better drafted to make clear how the release will impact class members' right to pursue separate actions.

The Eleventh Circuit emphasized the contractual nature of class settlements in *Waters v. International Precious Metals Corp.*, 237 F.3d 1273 (11<sup>th</sup> Cir. 2001). This appeal arose following the settlement of a class action for alleged fraud in connection with trading and commodities options. The settlement agreement required class members seeking recovery to file claims and to include with each claim a copy of certain monthly statements. The district court permitted class members who timely filed claims without the requisite monthly statements to be included among those obtaining a recovery. The district court denied such relief, however, to class members who filed complete claims but outside of the time limits provided for in the settlement agreement. The Eleventh Circuit rejected the holding that permitted payment of

incomplete though timely claims, finding that such filings did not constitute substantial performance and that the terms of the settlement agreement were due to be strictly enforced. The Eleventh Circuit also affirmed the district court's holding that individual class members could not individually appeal the dismissal of their claims, finding that such individual appeals would effectively defeat the efficiencies meant to be achieved by class treatment.

In yet another proceeding in the long-running pedicle screw class action litigation, the Third Circuit addressed the trial court's dismissal of an absent class member's claim, based on untimely filing of a notice provided for in the court-approved settlement. *In re Orthopedic Bone Screw Prod. Liab. Litig.*, 246 F.3d 315 (3<sup>rd</sup> Cir. 2001). The plaintiff claimed that the trial court had abused its discretion in rejecting his argument that the untimely filing should be excused under the "excusable neglect" doctrine, that the missed deadline was itself a violation of equal protection and procedural due process rights, and that the notice given was insufficient under both Rule 23 and due process requirements. The Third Circuit did not reach the constitutional arguments, holding that the trial court had abused its discretion in denying plaintiff the right to participate in the settlement solely because of his failure to meet a deadline for filing a registration form. The court noted that it was significant that the plaintiff had timely filed the proof of claim, which provided the more significant information for purposes of claims administration.

In reaching its conclusion, the court reviewed factors to be addressed by a court applying the excusable neglect doctrine, with respect to both failure to file claims and also failure to file requests for exclusion in opt-out classes. Those factors are: (1) danger of prejudice to the non-movant, (2) length and effect of delay in filing, (3) reason for the delay, and (4) whether movant acted in good faith. Recognizing the importance of having a cut-off date, the court found that the trial court had not properly applied or balanced the equities in the case and thus reversed and remanded.

The practice of awarding incentive fees to named plaintiffs was analyzed by the Court of Appeals for the Sixth Circuit in *In re Southern Ohio Correctional Facility*, 2001 U.S. App. LEXIS 27319 (6th Cir. Dec. 26, 2001), in which the district court awarded incentive fees to named plaintiffs after approving a settlement agreement that made no provision for such fees. Acknowledging the legitimate role played by incentive fees in class actions, the court nevertheless vacated the award as being not authorized by the settlement agreement between the parties.

### **5.6.3 *Cy Pres* and Coupon Settlements**

In some cases class action settlements result in the creation of a fund which is distributed under a *cy pres* rule, which permits the court to authorize unclaimed funds to be distributed to persons other than class members. In *In re Airline Ticket Comm. Antitrust Litig.*, 268 F.3d 619 (8<sup>th</sup> Cir. 2001), the court, while not disapproving the general use of the doctrine, set aside the specific distribution as benefiting primarily local agencies that had no connection to the nationwide class or to the matters at issue in the class action.

In *In the Matter of Mexico Money Transfer Litig.*, 267 F.3d 743 (7<sup>th</sup> Cir. 2001), the Court affirmed the lower court's approval of a class settlement providing *cy pres* relief and coupons to class members. The court found that the coupons had a monetary value and were good for a sufficient period of time to permit free trading. Given that the *cy pres* relief and the coupons had significant value and the court evaluated the merits of the claim as relatively low, the Seventh Circuit declined to find that there had been abuse of discretion in approval of the settlement.

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## 5.7 Attorney Fee Awards and Costs

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### 5.7.1 Attorney Fee Awards

A critical issue in class settlements is frequently the size or method for determining an award of attorney's fees. In *In re Cendant Corp. Prides Litig.*, 243 F.3d 722 (3<sup>rd</sup> Cir. 2001), the district court awarded attorney's fees to class counsel in an amount calculated to be 5.7% of total class recovery under a class-wide settlement. The plaintiffs objected to the amount of the fees, notwithstanding the fact that, under the terms of the settlement distribution, the fees were to be made from unclaimed "rights" that would otherwise revert to the defendant and be canceled (*i.e.*, class members receiving distributions under the settlement theoretically were not impacted by the size of the attorney's fee). Because of this, the Third Circuit first addressed the question of whether the appellant had standing to appeal the award of the fees. Discussing the importance of the court's role in monitoring the fairness of the award in class actions, the appellate court concluded that the appellant did have standing and then proceeded to vacate the award. The court found that the trial court's order was too "terse, vague, or conclusory" to permit adequate appellate review. 243 F.3d at 733. Specifically, the trial court failed to address factors previously announced by the Third Circuit as controlling in fee awards: complexity and duration of litigation, range of awards in other cases, awards in other class actions, relationship between percentage and lodestar calculations.

After explaining each of these factors in some detail and discussing prior decisions, the court expressed its concern that the award of fees was disproportionately high, given the nature of the litigation, and remanded to the District Court for further analysis. The court also directed the trial court to reconsider its holding that the appellant was not entitled to an award of fees.

The Seventh Circuit provided an extensive discussion of the problems raised by determining appropriate fee awards in class actions, addressing both the advantages of setting certain parameters at the outset of the litigation and methods for attempting to provide essentially market rate fees to class counsel. *In re Synthroid Mktg. Litig.*, 264 F.3d 712 (7<sup>th</sup> Cir. 2001). The trial court had determined that fees in significantly large class settlements should be capped at 10%, a formula not previously endorsed by the Seventh Circuit and inconsistent with the Circuit's prior decisions regarding appropriate fee levels in common fund cases. Earlier decisions had held that the court should seek to award fees targeted at the market price for legal services provided, taking into account the risk of nonpayment and the normal compensation rates in the market area.

In *Lee v. First Lenders Ins. Serv., Inc.*, 236 F.3d 443 (8<sup>th</sup> Cir. 2001), the Eighth Circuit affirmed imposition of sanctions against the plaintiff's lawyer for filing a class action lawsuit and permitting discovery and motion practice to proceed on a class basis, and then abandoning the class claims without explanation. The Eighth Circuit found that the attorney had failed to provide an explanation for the sequence of events and by his action had caused the defendants to incur unnecessary legal fees and expenses resulting from the inclusion of class allegations in the complaint. The court did approve the discounting of defendants' requested fees, finding documentation inadequate to support the full amount claimed, but nevertheless held that the ultimate sanctions did not constitute an abuse of discretion.

In *State v. Andrade*, 23 P.3d 58 (Alaska 2001), plaintiffs challenged the constitutionality of the State's exclusion of certain illegal aliens from eligibility for Permanent Fund Dividends.

Arguing that class certification was unnecessary because the exclusion's constitutionality could be decided with equal effect in an individual case, the State asserted that the only reason plaintiffs sought class certification was to obtain an avenue for an award of attorney's fees. Acknowledging the effect of certification on the availability of fees, the court found this was not an adequate basis for denying class certification where the requirements of the rule were not clear. The court also noted that protection was given against an abuse of the class action device for the sole purpose of obtaining fees because one of the factors to be considered in determining the amount of fee awards to class counsel was the need to use class treatment for purposes of judicial efficiency and the potential difficulties of engaging adequate counsel in the absence of the possibility of an award of class counsel fees.

In *In re US Bancorp Litig.*, 2002 U.S. App. LEXIS 606 (8<sup>th</sup> Cir. January 15, 2002), the court found no abuse of discretion in the trial court's approval for an attorney's fee equivalent to 36% of a \$3.5 million fund, where class counsel obtained significant monetary relief for members of the class.

In *Bigs v. Wichita*, 23 P.3d 855 (Kan. 2001), the City appealed the trial court's award of fees to class counsel equal to 50% of the total to be refunded to the class with interest (except for the claims of the original plaintiffs, who had a fee agreement entitling them to only a 25% award). The City did not object to the 50% figure, but argued that it should be applied against the amount actually refunded to class members pursuant to claims filed for such refund. The court rejected this argument and permitted the award of attorney's fees to stand.

### 5.7.2 Costs

In *Frost v. Mazda Motor of America*, 540 S.E.2d 324 (N.C. 2000), the court granted review under its general supervisory powers because the portion of the order requiring the defendant to bear the cost and burden of providing notice has significance in class actions generally and was a question of first impression in North Carolina. North Carolina's rule for class certification is similar to Rule 23(a) of the federal rule, but lacks the equivalent of federal Rule 23(b). North Carolina courts consider federal decisions in construing the state class certification rule. The court noted that while the burden of giving notice to class members generally falls on the plaintiff as a part of prosecuting his case, the burden may be placed on the defendant because of the particular circumstances of the case. The court found that in this case it was not an abuse of discretion for the trial court to require the defendant to bear the burden of notice, observing that the cost was relatively low and that the reason given by the trial court for shifting the cost - the defendant's unique control over information concerning the identity of class members - did not support a finding that there had been any abuse of discretion.

In a somewhat unusual decision, the Seventh Circuit had occasion to review the district court's order that named plaintiffs who did not prevail in a class action be required to pay costs pursuant to Rule 54(d)(1). *White v. Sundstrand Corp.*, 256 F.3d 580 (7<sup>th</sup> Cir. 2001). Plaintiffs did not contest the amount of the cost award but argued that the award should be imposed individually rather than jointly and that the amount of individual liability should be determined based on the total number of members in the class rather than merely on the named plaintiffs. The trial court rejected plaintiffs' argument and on appeal the Seventh Circuit affirmed, noting that where class members were not given notice and an opportunity to opt out, there was no basis for an order requiring them to bear any of the costs incurred as a result of the named plaintiffs' actions.

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## 5.8 Appellate Review

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### 5.8.1 Review Under Rule 23(f)

Effective December 8, 1998, Rule 23(f) permits interlocutory review by the federal courts of appeal of decisions either granting or denying class certification. Such appeals are permissive, the appellant court having the discretion to grant or deny the petition for interlocutory review. Since enactment of Rule 23(f), the circuits have adopted varying of standards for determining when to grant a Rule 23(f) petition.

#### Standards for Granting Interlocutory Review

In 2001, the Fourth Circuit enunciated the standards under which it will grant such review. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138 (4<sup>th</sup> Cir. 2001). Reviewing tests adopted by the Seventh Circuit in *Blair v. Equifax Check Serv., Inc.*, 181 F.3d 832 (7<sup>th</sup> Cir. 1999), the First Circuit in *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1<sup>st</sup> Cir. 2000), and the Eleventh Circuit in *Prado-Steiman v. Bush*, 221 F.3d 1266 (11<sup>th</sup> Cir. 2000), the Fourth Circuit adopted the five-factor test enunciated in *Prado-Steiman*. Those factors are: (1) whether the certification decision is likely to be dispositive of the action; (2) whether the certification decision contains a “substantial weakness;” (3) whether interlocutory review will resolve an “unsettled legal question of general importance;” (4) the status of the litigation, including discovery and dispositive motions; and (5) whether future events will likely make appellate review appropriate. 255 F.3d at 144. In adopting these factors the Fourth Circuit noted that there is a sliding scale with respect to the substantial weakness test: where the certification is almost certain to be vacated because of its inherent weaknesses, the extent to which the other factors are met is less important. If the decision below does not evidence a significant weakness, then there must be a more substantial showing with respect to the other factors.

Applying these factors, the court granted review in *Lienhart*. In applying the test, the court noted that it was granting review solely on the basis of the substantial weakness prong, without regard to other factors of the enunciated test, because it had concluded that the certification decision was “manifestly erroneous and certain to be vacated on appeal from final judgment.” 255 F.3d at 146.

The Court of Appeals for the Second Circuit also addressed for the first time the factors to be considered in deciding whether to grant a petition for Rule 23(f) interlocutory review. *In re Sumitomo Copper Litig.* 262 F.3d 134 (2<sup>nd</sup> Cir. 2001), held that such reviews would be granted only when petitioners show that the decision on certification will effectively terminate the litigation, coupled with a showing that the district court’s decision is questionable or that the order involves a legal question as to which there is a “compelling need for immediate resolution.” 262 F.3d at 139. Anticipating that relatively few certification decisions would meet this standard, the court noted that there was still a possibility that a case not meeting the standard would be granted Rule 23(f) review “where it presents special circumstances that militate in favor of an immediate appeal.” 262 F.3d at 140. Like the Eleventh Circuit and Seventh Circuit before it, the court also noted that requests to stay the action in a lower court pending a Rule 23(f) review would be granted only when a balancing test showed that the hardships fell more on the parties seeking the stay.

Having enunciated the standard to be applied, the court held that the petition before it did not meet the requirements and thus denied review in *Sumitomo*. Although agreeing that the certification decision might effectively terminate the litigation, this alone was insufficient as there was no showing that the ruling of the district court was questionable and likely to be overturned if raised on appeal after entry of a final order.

The Third Circuit in 2001 joined other federal circuits in explicating the factors to be considered by the appellate court in deciding whether to grant interlocutory review under Rule 23(f). *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3<sup>rd</sup> Cir. 2001). Beginning with the committee note and decisions from the other four circuits that had considered the question, the court set out factors to be considered, while emphasizing the intent of the rule that the appellate court has virtually unrestricted discretion in determining what factors should be considered. The Third Circuit concluded that interlocutory review was appropriate in *Newton* because an adverse certification decision would have a potentially dispositive effect on the outcome of the case, regardless of whether a class was certified or not. In addition, the court noted that the case raised a fundamental question regarding the type of securities claims that should be certified.

In *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7<sup>th</sup> Cir. 2001), the Court noted that the facts presented a compelling case for review under Rule 23(f) because the case management plan adopted by the trial court would place undue pressure on defendants to settle regardless of the merits of plaintiffs' claims.

### **Scope of Review Under Rule 23(f)**

Standing is indisputably a threshold issue in a class certification case. Less certain is whether the issue of standing is within the scope of an interlocutory review under Rule 23(f). In *Bertulli v. Independent Ass'n. of Continental Pilots*, 242 F.3d 290 (5<sup>th</sup> Cir. 2001), the court of appeals for the Fifth Circuit addressed this question in a Rule 23(f) appeal of the district court's certification of a class of airline pilots. The court noted that under Rule 23(f) only the issue of class certification could be appealed, but that the issue of standing goes to the constitutional power of the court to adjudicate an action. Thus the Fifth Circuit concluded that it had a duty to consider the standing issue regardless of whether it was raised by the parties, and because standing is an inherent prerequisite to certification, it can be raised in the context of a Rule 23(f) appeal. The court went on to affirm certification, finding that the tests of commonality, superiority, predominance and manageability were all met, even though the calculation of damages might require individualized proof.

### **Effect of Motion to Reconsider**

One of the issues raised in the first round of cases under Rule 23(f) is the question of whether the filing of a motion to reconsider tolls the ten-day period provided in the rule for filing the petition for interlocutory review. In a case of first impression, the Eleventh Circuit in 2001 concluded that it does. *Shin v. Cobb County Bd. of Educ.*, 248 F.3d 1061 (11<sup>th</sup> Cir. 2001). Addressing the efficiencies gained by having the interlocutory appeal only as a last resort, the court held that when a motion to reconsider a class certification is made within the ten-day time period, then such filing tolls the ten-day period under Rule 23(f) until the district court rules on the motion to reconsider. The court then confirmed that Rule 6(a) of the Federal Rules of Civil Procedure does

apply to Rule 23(f) proceedings, thus ensuring the exclusion of weekends and legal holidays in computation of the ten-day period.

### 5.8.2 Appellate Review in the State Courts

A Nebraska trial court granted a partial summary judgment enjoining the state of Nebraska from collecting certain fees for handicap parking permits. *Keef v. State DMV*, 634 N.W. 2d 751 (Neb. 2001). The state Supreme Court dismissed the appeal as premature under the state rule providing for interlocutory review of “special proceedings.” The court specifically found that the trial court’s actions granting class certification did not affect a “substantial right” because it did not reach the merits of the case, and that it was not a special proceeding because it was effected pursuant to the state’s class action rule, not as a separate action but simply within the context of the general civil action.

In *McAllen Med. Cent. East v. Cortez*, 2001 Tex. LEXIS 77 (Aug. 30, 2001), an intermediate appellate court held that certification of a settlement class was not ripe for review. The Supreme Court disagreed, finding that the trial court had given preliminary approval to the settlement and directed the sending of notice without first conducting appropriate review as to whether the requirements for certification had been met. Because the interests of both defendants and absent class members can be prejudiced by premature approval, albeit conditional, of a class settlement, the court found that the appeal was ripe for adjudication. While holding that the preliminary conditional certification of the settlement class was a reviewable order, the Supreme Court found that the substantive terms of the proposed settlement were not ripe for review prior to the fairness hearing.

In *Frost v. Mazda Motor of America, Inc.*, 353 N.C. 188, 540 S.E. 2d 324 (2000), the defendant sought interlocutory review of a trial court order certifying a class and directing defendant to bear the cost of providing notice to class members. Under North Carolina decisions, an order denying certification has been held to involve a substantial right sufficient to permit interlocutory review, but the grant of certification does not have the same effect. Addressing the trial court’s decision, the Supreme Court found that the decision granting certification and directing notice was not subject to interlocutory review. Nevertheless, the court granted review under its general supervisory powers because the portion of the order requiring the defendant to bear the cost and burden of providing notice has significance in class actions generally and was a question of first impression in North Carolina.

In *Hutch v. Paderes*, 2001 Haw. LEXIS 475 (Dec. 5, 2001), the Supreme Court of Hawaii dismissed an appeal from denial of class certification for lack of appellate jurisdiction because the order was not certified for interlocutory appeal.

### 5.8.3 Right of Class Members to Appeal Class Settlement

A critical issue on which the federal circuits are split is whether an absent class member must intervene in a class action in order to have standing to appeal a settlement or other adverse order.

In *Scardelletti v. DeBarr*, 265 F.3d 195 (4<sup>th</sup> Cir. 2001), the Fourth Circuit adopted the rule followed by the majority of the circuits with respect to the right of a class member who unsuccessfully seeks to intervene to appeal the court’s approval of a class settlement. The appellate court agreed that the class member who sought to appeal this settlement had failed to meet the timeliness requirement with his motion to intervene, but went on to address the general issue of when a would-be intervenor has the right to appeal. The court analyzed the policy

concerns underlying both the majority and the minority rules. On the one hand, a number of circuits have denied to unsuccessful would-be intervenors the right to appeal a settlement, citing managerial and efficiency problems. A minority of courts have held that an unsuccessful intervenor may appeal, balancing the scales in favor of fairness to unnamed class members. Acknowledging the importance of both management and fairness concerns, the Fourth Circuit held that a class member who unsuccessfully seeks to intervene in the district court may still have standing to appeal the substantive provisions of the class settlement, if the motion to intervene was wrongfully denied. Where the motion to intervene was correctly denied, however, the would-be intervenor will not have standing to contest the merits of the settlement on appeal. Applying this test to the case at bar, the court agreed that the would-be intervenor's failure to act in a timely fashion supported affirmance of the district court's denial of intervention, thus barring his right to contest the settlement on appeal.

In *Vollmer v. Publishers Clearing House*, 248 F.3d 698 (7<sup>th</sup> Cir. 2001), the Seventh Circuit held that only class members who intervene in a class action may appeal a settlement. It is thus important for the courts to allow such intervention freely for the purpose of permitting class members to object to proposed settlements and appeal adverse orders. In this case the court affirmed the lower court's denial of intervention and found that the proposed intervenor failed to meet the requirements for intervention, had little knowledge of the lawsuit, and was apparently put forward by counsel not to preserve appellate rights regarding the fairness of the settlement, but only to give counsel an opportunity to gain access to settlement-related documents.

In *In re Synthroid Mktg. Litig.*, 264 F.3d 712 (7<sup>th</sup> Cir. 2001), the Seventh Circuit again addressed the question of intervenor status as a prerequisite for a class member's standing to appeal a class settlement. The court noted that a trial court may permit a class member to intervene for the purpose of objecting and for the limited purpose of preserving the right to appeal. The court then noted that the proper procedure is for the class member who is denied a motion to intervene to file an appeal from that denial and also to file an appeal from the approval of the settlement from the final judgment. (Reviewing the merits of the settlement in that case, the court found that the objections were not meritorious, particularly given the difficulty that the class representatives would have had in proving damages and obtaining judgment on the merits.)

The Court of Appeals for the Eighth Circuit confirmed that class members who intervene after approval of a settlement have standing to appeal the district court's approval of the settlement. *In re Bancorp Litig.*, 2002 U.S. App. LEXIS 606 (8<sup>th</sup> Cir. January 15, 2002).

#### **5.8.4 Right of Non-Settling Defendant to Appeal Certification of Settlement Class**

On a related issue, the Texas Supreme Court held that a non-settling defendant does not have standing to contest certification of a settlement class affecting only other defendants, unless the non-settling defendant can show that it is adversely affected by the certification. In *McAllen Med. Cent. East v. Cortez*, 2001 Tex. LEXIS 77 (Aug. 30, 2001), the court found that a hospital had made such a showing and thus had standing to seek interlocutory review of the preliminary certification of the settlement class against a co-defendant physician. Critical to the court's decision regarding standing was the fact that the proposed notice to class members erroneously implied that a class had been certified against the non-settling hospital, was to be sent to hospital patients who had not dealt with the settling physician defendant, and had the practical effect of

giving plaintiff's counsel a "head start" in representing potential class members against the hospital on either class or individual claims.

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## 5.9 Effect of Certification on Other Actions

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### 5.9.1 Tolling of Statute of Limitations

The potential tolling effect of a class action on the statute of limitations otherwise applicable to claims of individual class members has been a significant issue for the courts at least since the Supreme Court's decision in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), in which the Court held that the filing tolls the statute as to class members who timely intervene after denial of class certification. The reach of the tolling principle was expanded in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), to include persons bringing individual actions in a timely fashion after class certification was denied and persons opting out in order to file individual claims. The tolling rule is not, however, so broad as to provide a panacea for tardy-filing plaintiffs.

In *Hunsaker v. Hurwitz*, 2001 U.S. App. LEXIS 15676 (9<sup>th</sup> Cir. July 9, 2001), plaintiff sought to take advantage of the tolling rule in a shareholder action. Acknowledging the general tolling rule, the Ninth Circuit nevertheless affirmed dismissal of the claims, holding that because the defendants had never been served in the proceeding class action, the tolling effect did not apply as to subsequent claims against those defendants.

In *Weston v. AmeriBank*, 265 F.3d 366 (6<sup>th</sup> Cir. 2001), the court affirmed the trial court's grant of summary judgment for defendant based on the statute of limitations. In so doing, the court rejected the plaintiffs' argument that their Truth-in-Lending claims had been tolled by the pendency of a class action, where Truth-in-Lending claims were not asserted in the class action and the class action had itself been filed after the statute of limitations had run for any Truth-in-Lending claims that might have been assertable by the named plaintiffs.

In *Haugh v. DePuy-Motech, Inc.*, 2001 U.S. App. LEXIS 16542 (9<sup>th</sup> Cir. July 20, 2001), plaintiffs sought to take advantage of the tolling rule to defeat a statute of limitations defense in an action in a pedicle screw action. Because the defendants named by the plaintiffs had not been brought in as defendants to the class action in question, however, the Ninth Circuit held that plaintiffs were not entitled to the tolling effect that might otherwise have been triggered by the pendency of the national pedicle screw class action.

In *Arizona Dep't of Revenue v. Dougherty*, 29 P.3d 862 (Ariz. 2001), the plaintiff filed suit on behalf of a class challenging the constitutionality of a corporate tax provision. The statute required a taxpayer to exhaust administrative remedies before pursuing an action in the tax court. The named plaintiff filed such an administrative claim, asserting that she was doing so on behalf of a class of all similarly situated taxpayers. After her administrative claim was denied she filed a class action in the tax court. The appellate court found that while the statute required exhaustion of administrative remedies before an action could be brought in the tax court, the pursuit of an administrative remedy could be effected by a single taxpayer acting as a representative of class members, an administrative analogue of a class action. The court then addressed the question of whether the filing of the administrative claim in a representative capacity had the effect of tolling of the statute of limitations for the filing of administrative claims, similar to the tolling effect of the filing of a class action. The court noted that if such administrative claims were not permitted, it would as a practical matter be almost impossible to

bring a class action that was dependant on exhaustion of administrative remedies. The court thus held that the filing of an administrative claim on a representative basis did have the effect of tolling the statute of limitations for all taxpayers whose claims had not already been barred by the statute at the time of the filing.

### **Cross-Jurisdictional Tolling**

As courts have become increasingly hospitable to certifying multi-state classes, an important issue raised is that of cross-jurisdictional tolling. In most jurisdictions, the filing of a class action complaint will toll the statute of limitations, at least with respect to claimants asserting similar claims in that court's jurisdiction, until such time as the class is certified and litigation completed or class certification is denied. Less certain is the extent to which courts in one jurisdiction will recognize a tolling of the statute of limitations as a result of a class action having been filed in a different jurisdiction.

Late in 2001 the Supreme Court of Tennessee in a case of first impression held that a filing of a class action in federal court outside of Tennessee did not toll the statute of limitations for state claims later asserted in the Tennessee courts. In *Maestas v. Sofamor Danek Group, Inc.*, 33 S.W.3d 805 (Tenn. 2000), plaintiffs had been putative members of a class alleged in an action filed in federal court in Pennsylvania. After the federal court denied certification, plaintiffs brought a new action in a state court in Tennessee. Acknowledging the tolling doctrine in the federal courts, the court declined to adopt cross-jurisdictional tolling, opining that the adoption of such a doctrine would risk an influx of cases being filed in Tennessee rather than in more appropriate states and would, in effect, empower federal courts throughout the country to control the triggering of the state's statutory periods.

### **5.9.2 Federal Court Injunctions**

In recent years a common topic of class action decisions has been the appropriate method for handling competing class actions, in either the same or in different jurisdictions. When two federal courts have cases involving potentially identical classes asserting a given claim, the Panel on Multi-District Litigation generally assures that the cases will be consolidated in a single court. When federal courts face competing class actions in state courts, however, the problem becomes more difficult. In such cases the federal courts have frequently relied on the All Writs Act as grounds for enjoining the parties or putative class members from pursuing their claims in state court.

In 2001 the Eighth Circuit affirmed the district court's issuance of an injunction blocking state court litigation of securities claims that paralleled a federal class action brought pursuant to the Private Securities Litigation Reform Act. In *re BankAmerica Corp. Sec. Litig.*, 263 F.3d 795 (8<sup>th</sup> Cir. 2001). The court upheld the injunction under the exception to the Anti-Injunction Act authorizing federal courts to enjoin state court proceedings where the statute at issue creates a federal remedy that can be fully protected only through issuance of the injunction.

The Court of Appeals for the Fourth Circuit held that an injunction entered under the All Writs Act is subject to the requirement of Rule 65 that a court give reasons for issuing an injunction. *Scardelletti v. DeBarr*, 265 F.3d 195 (4<sup>th</sup> Cir. 2001). The court thus reversed a trial court's order enjoining a class member from pursuing a collateral attack on a class settlement, remanding for further action.