

CLASS ACTIONS
PLAINTIFF'S PERSPECTIVE

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I. CLASS CERTIFICATION CONSIDERATIONS (RULE 23(a)(1)-(4))

Traditionally, class action certification decisions are reviewed under an abuse of discretion standard, with no distinction being made between decisions that grant certification and those that deny it. The thresholds that must be met in seeking certification of a class action are numerosity, commonality, typicality, and adequacy of representation. Alabama classes are codified for certification purposes at *Ala. Code* §6-5-641.

A. Numerosity: Although seldom dispositive, the numerosity requirement has long been thought to impose a bottom line on class certification that was in the range of 20 to 40 class members. *Cox v. American Cast Iron Pipe Co.*, 784 F. 2d 1546, 1553 (11th Cir. 1986). The United States Supreme Court has imposed a minimum limit of 15 class members. *General Telephone Co. v. EEOC*, 446 U.S. 318, 330 (1980). In Alabama, a 21-member class was denied certification on the basis of the "20-40 person rule". See, *Jones v. Roy*, 202 F.R.D. 658, 665 (M.D. Ala. 2001). The court noted that within the 20 to 40-person zone, factors such as geographic diversity, judicial economy and the ease of identifying the class could be decisive.

The proponent of certification bears the burden of proof. The proponent of class certification may be saddled with showing that a minimum number of plaintiffs are similarly situated as the class representative, but the courts give latitude in acknowledging reasonable estimates based upon common sense assumptions. *Lengle v. Attorney's Title Guaranty Fund, Inc.*, 2002 U.S. Dist. LEXIS 19398 (E.D. Ill. Sept. 26, 2002). The practical advice seems to be to plead a class of more than 40 members and be prepared to show that a minimum number of plaintiffs are estimated to be similarly situated as the class representative and as defined by the plaintiff's complaint.

B. Commonality: A class meets the commonality requirement when its members share a single common question of law or fact. In *Gen Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982), the United States Supreme Court held that a single question of law or fact cannot necessarily be converted into an across the board attack on the defendants. *Id.* But, in *Staton v. Bowling Co.*, 327 F. 3d 938, 953 (9th Cir. 2003), the court concluded that class counsel had interviewed many class members and had collected multiple, if broad, allegations of discriminatory practices and thus found that the commonality requirement was satisfied. Interestingly, the *Bowling* court went on to decline overall class certification in favor of certifying "sub-classes" so as to assure commonality between appropriate class members. *Id.* at 956.

There are some decisions that also require that the common questions of law must be dispositive and must overshadow any other issues. See, *Lienhart v. Dryvit*

Systems, Inc., 255 F. 3d 138, 146 (4th Cir. 2001). But, these cases are the exception, not the rule, and rarely will commonality result in the denial of certification.

C. Typicality: Rule 23(a)(3) requires that a proposed class satisfy the prerequisite of typicality, namely that the claims or defenses of the representative parties are typical of the claims or defenses of the class. Generally, the typicality requirement is not so demanding and does not require a complete identity of claims. Generally, the rule is satisfied if the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claim of the proposed class members. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982). The commonality and typicality requirements of Rule 23(a) tend to merge. *Id.* Typicality measures whether a sufficient nexus exists between the claims of the named representative and those of the class at large. See, *Prado-Steinman ex. rel. Prado v. Bush*, 221 F. 3d 1266, 1279 (11th Cir. 2000).

Broad, sweeping classes are the ones most likely to fail the typicality requirement, particularly if the named class representative does not share the same characteristics of many within the proposed class. For example, in *Heines v. Widwall*, 334 F. 3d 1253 (11th Cir. 2003), it was fatal to the typicality requirement that none of the named representatives had “hiring or transfer claims” (which claims were alleged in the complaint) and that the class included both white collar, non-professional employees, and professional civil service employees. Certification was denied.

The shared characteristics necessary to establish typicality may include such things as the representative share residence in the same state with at least some other class members, whether injuries to members are inherently unique, and whether claims of the named representatives differ from unnamed class members with potentially time-barred claims. *Id.* Although, more liberal decisions continue to emphasize that all members of a class do not have to rely on identical legal theories where plaintiffs allege a common course of conduct and highly similar legal theories. See, *Hicks v. Morgan Stanley & Co.*, 2003 U.S. Dist. LEXIS 11972 (S.D. NY 2003).

D. Adequacy of Representation: Most of the country adheres to a traditional and fairly relaxed adequacy standard. But, several courts have begun applying a stricter standard which generally holds that the class representative must be capable of “understanding and controlling the litigation”. See, *In Re. Cendant Corp. Litig.*, 264 F. 3d 201 (3rd Cir. 2001) and *Burger v. Compaq Computer Corp.*, 257 F. 3d 475 (5th Cir. 2001).

Some courts have begun to emphasize adequacy of class counsel as much as the class representative. Some courts have held that class counsel is not merely an agent of the class, but realistically a principal of the class. Courts seem to be focused on the settlement aspect of a class and whether class counsel’s involvement in negotiation of the settlement was adequate. Obviously, there always exists the chance that class counsel may have more or less than the class members’ best interests at heart and courts have begun to delve into this issue. Courts are looking at the details of the litigation and

whether class counsel has adequately conducted pretrial discovery, included all potentially liable defendants, whether class counsel is requiring that liable defendants are compensating class members and class counsel and the principal defendants' discussions regarding settlement before all discovery is complete.

II. CLASS OPT-OUTS AND OPT-OUT LITIGATION

There are generally three types of class actions: Rule 23(b)(1) classes which authorize a non-opt out, mandatory class action relating to a limited fund; Rule 23(b)(2) classes used to certify actions seeking predominantly equitable relief; and Rule 23(b)(3) classes which seek money damages. My focus will be on Rule 23(b)(3) class actions.¹

Rule 23(b)(3), *Ala. R. Civ. P.*, states as follows:

“(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular form; (D) the difficulties likely to be encountered in the management of a class action.”

Furthermore, Rule 23(b)(3) states as follows:

“(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the

¹ See also, attached Exhibit “A”. This article is reproduced from, *Survey of State Class Action Law-2003*, American Bar Association.

best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.”

As you can see, Rule 23(b)(3) classes provide a mandatory “opt-out provision” or “exclusion provision” for those class members who wish to proceed in a different manner. Typically, a class action will give notice to class members and provide a 60-day window of opportunity to exclude themselves by following certain procedures. The most common procedures involve writing the Class Action Administration Center and requesting exclusion by providing your name, address, Social Security number, and other relevant information. In some cases, the class members wishing to exclude themselves from the class are required to send multiple copies of this information to the Class Administration Center, class counsel, defense counsel, and the clerk of the court where the class action is pending.

Over the last ten years, the state of Alabama has ranked #1 in terms of consumer class action opt-out litigation. More attorneys in Alabama have represented more opt-out litigants than anywhere else in the country. But, the opt-out numbers are relatively low compared to the number of class members who remain in class actions. One study estimated that less than one percent of class members in a typical consumer class action choose to opt out of the litigation. Of those who choose to exclude themselves from a

class action, 75% of them are represented by counsel. This seems to point to the fact that most class members are either unaware or confused about exclusion ramifications. It seems apparent that most class members do not realize that upon excluding themselves from a class action they can pursue their claims individually in a forum of their choice and before a jury of their peers in their home community. This is information which is, of course, not included in any class action notices.

Typically, the class members who exclude themselves from a class action either file their own individual lawsuits against the class defendants or they end up in a group of other similarly situated opt-outs to pursue their claims. Frequently, the opt-outs are joined together in a forum which allows joinder of similar claims. Over the last several years, this has become common practice in the states of Mississippi and West Virginia. Interestingly, the state of Mississippi does not have a state class action statute and has liberally allowed joinder of plaintiffs in state court. Even though not stated, it seems this occurs because of the lack of the class action statute in Mississippi.

III. DEFENDING MOTIONS TO COMPEL ARBITRATION

From the outset, let me say that it should be obvious to everyone that arbitration is favored by the courts of Alabama! In the context of a class action, it is becoming more and more commonplace to find arbitration clauses which rule out the possibility of maintaining a class action in arbitration. The following language is an actual example of the prohibition of class claims in a consumer arbitration clause:

“Each claim or controversy subject to arbitration under this agreement shall be arbitrated by the customer on an individual basis and will not be combined or consolidated or made part of a class action with a claim of any other customer.”

“All parties to the arbitration must be individually named. There shall be no right or authority for any claims to be arbitrated on a class action or consolidated basis or on bases involving claims brought in a purported representative capacity on behalf of the general public (such as a private attorney general), other subscribers, or other persons similarly situated unless your state’s laws provide otherwise.”

As you can see, there are some corporations who have decided to block class actions even in an arbitration proceeding.

But, in *Leonard v. Terminix International Co., L.P.*, 2002 WL 31341084 (Ala., Oct. 18, 2002), *re-hearing denied*, 2003 WL 257404 (Ala., Feb. 7, 2003), the Supreme Court of Alabama reversed an order compelling arbitration of a consumer claim on the grounds that a provision of the arbitration agreement that purported to bar the consumer from bringing claims on behalf of a class of customers was unconscionable. The court concluded that, because the cost of bringing an individual claim exceed the potential recovery, the prohibition on a class action deprived the plaintiffs of a meaningful remedy. So, the Supreme Court of Alabama has recently struck a blow to arbitration clauses prohibiting the use of the Alabama class action statute.

Conclusion

In summary, class actions are becoming more and more difficult to certify but certification is certainly not impossible given the right set of facts. Furthermore, the more class actions are filed around the country under Rule 23(b)(3), the more opt out litigation will continue to thrive.