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A Primer to United States Procedure in Class Actions and Aggregate Litigation

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I. Introduction

Product liability suits around the globe often present similar regulatory, fact, and policy questions. In the United States, plaintiffs' attorneys often seek to raise these common questions on behalf of many plaintiffs in a single action, a strategy that frequently redounds to the disadvantage (and sometimes the unfair disadvantage) of the defendants. In such cases, the factual proof supporting a claim is offered as to a small number of plaintiffs, and the Court's decision on the merits of those plaintiffs' claims is then projected or extrapolated to all of the claims of all "similarly situated" claimants. This article provides an overview of the procedures that govern such mass product liability actions in the United States.

II. Class Action Procedural Requirements

Any discussion of procedural mechanisms in mass product liability actions in the United States must begin with Federal Rule of Civil Procedure 23. Rule 23 governs the ability of a small number of plaintiffs (usually called "named plaintiffs") to serve as representative parties to bring a "class action" in federal court on behalf of a class of other claimants who are similarly situated. Fed. R. Civ. P. 23. Most states have rules for their own state courts that mirror or are substantially similar to the requirements of Federal Rule 23. Rule 23's current version permits a court to decide common questions of law and/or fact in a single lawsuit where such a common decision will promote convenience, uniformity of decisions, judicial economy, and access to the legal system. Rule 23 sets out a number of criteria that plaintiffs must meet before a court will certify them as representatives of the absent class of claimants.

A. Plaintiffs Must Demonstrate Class Representation Requirements.

Plaintiffs seeking to act as representatives must first establish four procedural prerequisites: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Fed. R. Civ. P. 23(a).

1. Numerosity.

Rule 23(a) provides that a class may be certified "only" if "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Courts have declined to set rigid numerical requirements for plaintiffs' burden of demonstrating such impracticability, but the case law reveals some widely applied standards. Where the plaintiff class--the group of people that the named plaintiffs claim will be affected by the court's decision--numbers fewer than 20, courts rarely find impracticability. In such cases, courts conclude that any additional potential claimants can be joined as direct plaintiffs in the lawsuit through other procedural mechanisms, and class certification is thus unnecessary.

When the class size is between 20 and 40, other factors have a significant influence on the question of impracticability. Courts consider such factors as the nature of the action, the amount of individual damages at issue, the geographic distribution of the class members, and the ability to ascertain the identity of class members. 7A Charles Alan Wright et al., Federal Practice and Procedure § 1762 (3d ed. 2008). For example, small claims, dispersed class members, and a difficulty in identifying plaintiffs are all factors that weigh in favour of class certification.

When the class size is 40 or more, several courts have observed that numerosity is usually established. *Stewart v. Abraham*, 275 F.3d 220, 227 (3d Cir. 2001) (citing 5 James Wm. Moore et al., Moore's Federal Practice, § 23.22[3][a] (3d ed. 1999)); *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986).

2. Commonality.

The second factor in determining the appropriateness of class representation under Rule 23 is commonality. Federal Rule of Civil Procedure 23 requires plaintiffs to demonstrate the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). As the rule notes, these common questions can be questions of fact (for example, the cause of a plane crash that killed a number of people) or questions of law (for example, the interpretation of a broadly used consumer contract).

The commonality requirement often imposes a barrier to class certification in product liability actions. *See, e.g., Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001) (acknowledging that product liability actions contain "potential difficulties" in establishing the requirements of Rule 23). Even where the named plaintiff alleges conduct by a defendant that is common to all class members, true commonality may be lacking. For example, in *Wethington v. Purdue Pharma LP*, 218 F.R.D. 577 (S.D. Ohio 2003), the plaintiffs alleged that the defendants were liable for promoting and marketing the pain medication Oxycontin and for failing to disclose of the medication's alleged risks of addiction. *Id.* at 586-87. Although the courts acknowledged the similarity of claims, they concluded that each plaintiff's damages turned on "individual determinations" of reliance, personal knowledge, past medical history, and the dosage and administration of the medication at issue, undermining any finding of commonality. *Id.* at 588-89; *see also Ardoin v. Stine Lumber Co.*, 220 F.R.D. 459, 460, 463 (W.D. La. 2004) (denying class certification for lack of commonality in products liability action

where plaintiffs alleged that purchased wood treated with product had carcinogenic and mutagenic properties because of variations "in wood, soil, usage, . . . environmental conditions" and risk).

3. Typicality.

Turning to the third factor, a class action may be maintained only if "the claims or defenses of the representative parties are typical of the claims or defences of the class." Fed. R. Civ. P. 23(a)(3). Typicality is often found when the claims or defences arise from a single event, practice, or course of conduct and invoke the same "legal or remedial theory." *Benedict v. Altria Group, Inc.*, 241 F.R.D. 668, 673 (D. Kan. 2007). The plaintiff's claims need not be identical to those of the absent class members, but the same essential characteristics must be present in all claims. Courts reason that if the resolution of a single party's claim is to be projected onto a larger group of claims, that single claim must be typical of those claims. In product liability suits, typicality can be an obstacle to class certification where putative class members used different products, allege different outcomes after using a product, or require individualised proof of causation. *See, e.g., In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996).

4. Adequacy of Representation.

The certification of a class action also requires the named plaintiffs to establish that they "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The United States Supreme Court has acknowledged that the adequacy of representation requirement "tends to merge" with the commonality and typicality requirements. *Gen. Tel Co. v. Falcon*, 457 U.S. 147, 157, n. 13 (1982). The inquiries unique to the adequacy factor focus on whether (1) conflicts exist between the named plaintiff(s) and the class and (2) the named plaintiffs can demonstrate that they will vigorously prosecute the action.

Because class members who do not directly participate in the lawsuit will usually be bound by its ruling, the court carefully scrutinizes the plaintiffs' ability to represent the class. For example, in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Supreme Court held that the plaintiffs had not demonstrated that their representation of the class would be adequate because the "critical goal" of substantial immediate payments for plaintiffs who had demonstrated injuries as a result of asbestos exposure "tugs against the interest" of ensuring an adequate reserve fund for plaintiffs that had been exposed to the product but had not yet experienced any effects. 521 U.S. at 626. A determination of adequate representation is not final and may be raised by any party or by the court at any time. *Lewis v. National Football League*, 146 F.R.D. 5, 12 (D.D.C. 1992).

B. Plaintiffs Must Demonstrate Their Case Meets One of Three Contemplated Actions.

Even if plaintiffs can demonstrate all four representation requirements, they must also meet the maintainability requirements set forth in the second section of Rule 23. Rule 23(b) enumerates three different types of class actions that plaintiffs may maintain under the rule. The notice required for individual class members and the ability of a class member to "opt-out" of a resulting settlement depend on the type of class action as defined by the rule.

1. Conflicts created by individual suits.

The first category of class actions focuses on preventing conflicts that could arise from individual suits. Rule 23(b)(1) provides for class actions when individual actions harbour a risk for "inconsistent or varying adjudications" resulting in "incompatible standards of conduct" for the party opposing the class. It also allows class actions when an individual suit would be dispositive of or "substantially impede or impair" other plaintiffs' suits. For example, the rule may apply where a defendant does not have funds sufficient to cover all of the alleged claims, and a recovery by some claimants will decrease or eliminate other claimants' right to recover. *Hum v. Dericks*, 162 F.R.D. 628, 641 (D. Haw. 1995). Actions often fall under both categories of the rule. Class members of actions under Rule 23(b)(1) are bound by the court's determination and cannot exclude themselves from the binding effect of the court's judgment.

2. Actions seeking injunctive relief.

The second type of class action under Rule 23(b) focuses on the type of relief sought by the class. Rule 23(b)(2) allows a class action when "the party opposing the class has acted or refused to act on grounds generally applicable to the class," and the representatives are seeking "final injunctive relief or corresponding declaratory relief." Fed. R. Civ. P. 23(b)(2). This type of class action is often used where a defendant is accused of a continuing course of conduct that affects most or all class members. *See Phelps v. Harris*, 86 F.R.D. 506, 511 (D. Conn. 1980) Although the Rule 23(b)(2) class is based on injunctive and declaratory relief, courts are not precluded from awarding monetary damages to classes certified under this rule.

Sometimes the focus on damages complicates courts' analysis under Rule 23(b)(2). For example, in *Barnes v. American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998), the Third Circuit affirmed a district court's decision to decertify a class action brought by cigarette smokers against cigarette manufacturers. The district court had initially denied class certification because of the money damages being sought. Later, it changed course and conditionally granted class certification under Rule 23(b)(2) based on the medical monitoring relief sought by the class. The appellate court decided to endorse the lower court's decision to decertify the class because the plaintiffs' claims lacked cohesiveness and implicated individual questions of addition, causation, and affirmative defences. Many courts have struggled with the question of whether medical monitoring claims fall under Rule 23(b)(2)'s provisions. Like class actions under Rule 23(b)(1), in general all class members under Rule 23(b)(2) are bound by the court's decision.

3. Predominance of common issues.

Last, Rule 23(b) provides for class certification when "questions of law or fact common to class members predominate over any questions affecting only individual members, and … a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) is considered a more general category for class actions. Because it requires mandatory notice to individual class members and class members have the right to "opt out" of the resulting judgment, Rule 23(b)(3) applies only to class actions that do not fit the categories described in Rule 23(b)(1) and 23(b)(2).

Rule 23(b)(3) focuses on two tests. First, the rule imposes what has become known as the "predominance test." Courts are required to determine whether common questions "predominate" over individual questions in the action. The rule also requires that courts employ a "superiority test" to determine whether a class action is superior to other methods of resolving the disputes at issue. As the Advisory Committee Notes to Rule 23(b)(3) explain, "[t]hat common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages . . . . [S]ubdivision (b)(3) requires, as a further

condition of maintaining the class action, that the court shall find that the procedure is "superior" to the others in the particular circumstances." Fed. R. Evid. 23 advisory committee's notes.

The predominance and superiority requirements under Rule 23(b)(3) have generated much litigation and numerous conflicting decisions. Products liability actions are often found to lack the necessary predominance and superiority required by Rule 23(b)(3). *See Amchem Prods., Inc.*, 521 U.S. at 620. In some instances, however, courts have allowed class actions for products liability under Rule 23(b)(3). For example, in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998), the Ninth Circuit approved a class action settlement where minivan owners alleged problems with their rear lift-gates. The Ninth Circuit noted that the case did not include "personal injury [or] wrongful death claims." Rather, the action focused on the defendant's knowledge of the defendant, the design defect, and the potential remedies. The court determined that variations in state laws that applied to the class members did not preclude class certification, although in general "counsel should be prepared to demonstrate the commonality of substantive law applicable to all class members." As is apparent by the *Amchem* and *Barnes* cases, even after a class is certified under Rule 23, it remains subject to decertification at a later date.

III. Class Action Fairness Act: An Expansion of Federal Jurisdiction Over Class Actions

In 2005, the United States Congress enacted legislation to address what it perceived as "abuses of the class action device." *See* Pub. L. No. 109-2 § 2(a)(2), 119 Stat. 4 (Feb. 18, 2005) (codified as amended in scattered sections of 28 U.S.C.). Congress expressed concerns for both plaintiffs and defendants under the then-existing system. On the plaintiff's side, Congress determined that individual class members often receive "little or no benefit" from class actions while plaintiffs' attorneys benefit handsomely from the resulting awards and settlements. *Id.* at §§ 2(a)(1), 2(a)(3). For defendants, the legislature noted that the current system allowed for "forum-shopping" by plaintiff's attorneys, who filed suits in state courts known to exhibit bias against out-of-state defendants, and prevented the resolution of cases of national importance by federal courts rather than state courts. *Id.* at § 2(a)(4).

Congress aimed the Class Action Fairness Act of 2005 ("CAFA") at these two perceived problems. Perhaps counterintuitively, the legislation did not change Rule 23 itself, but instead expanded federal court jurisdiction over class actions and required increased scrutiny of proposed settlements in class actions.

The expansion of federal court jurisdiction in CAFA resulted from the relaxation of the diversity requirements usually applicable to class actions. In the United States, federal courts have limited jurisdiction and can hear only cases that involve questions of federal law or that meet the requirements for diversity jurisdiction. Ordinarily, diversity jurisdiction permits a federal court to exercise jurisdiction over the case (regardless of the absence of any issue of federal law) if (1) the amount in controversy (i.e., the amount sought by plaintiffs) exceeds $75,000 and (2) no plaintiff is a citizen of the same state as any defendant. If one plaintiff and one defendant are citizens of the same state, the federal court cannot exercise diversity jurisdiction.

CAFA modifies this standard for "mass actions," including any class action that has 100 or more proposed members and is filed pursuant to Rule 23 or an analogous state provision. 28 U.S.C. § 1332(d). The specialised diversity requirements of CAFA provide that a federal court may exercise jurisdiction if the total amount in controversy exceeds $5,000,000 in the aggregate and if any class member is a citizen of a state different from any defendant (known as "minimal diversity"). *Id.* The statute also provides that when any plaintiff or defendant is a citizen of a foreign country, the minimal diversity requirements are satisfied. *Id.* Unlike regular diversity jurisdiction, the consent of all defendants is not required for removal of a qualifying case from state to federal court. 28 U.S.C. § 1453(b).

CAFA contains several exceptions, including exceptions that deny federal jurisdiction where a large number of the plaintiffs and the primary defendants are citizens of the state in which the suit was filed, and when the matter demonstrates the characteristics that establish the controversy is truly local in nature. *Id.* Even with the limitations on its operation, CAFA is intended to permit many defendants that could not have otherwise removed a state court action to federal court to invoke federal court jurisdiction in cases "commenced" after CAFA's effective date. Along with its expansion of federal trial court jurisdiction, CAFA also provides for expedited discretionary appellate review of an order granting or denying a motion to remand an action back to state court. 28 U.S.C. § 1453.

Consistent with its goal of protecting class members, CAFA also increased federal court review of proposed class action settlements. The legislation dubs its provisions as creating a class-action member "bill of rights." 28 U.S.C. §§ 1711-15. The settlement provisions require that defendants provide notice of the proposed settlement to appropriate federal and state officials in every class action and prohibit settlements that favour plaintiffs solely on the basis of geographical proximity to the court. *Id.*

CAFA singles out two specific types of settlements for special treatment. "Coupon settlements"--those in which class action members recover coupons that can be redeemed at a later date--are governed by provisions that limit attorney's fees. 28 U.S.C. § 1712. When such settlements arise in cases where the plaintiffs' attorneys have a contingency fee arrangement (where the attorneys recover a specified portion of the settlement as their fees), the fees paid must be based on the value of the coupons that are actually redeemed by class members. *Id.* When coupon settlements do not involve contingency fees, attorneys may only recover fees that are based on a reasonable number of hours for the class action. *Id.*

Net loss settlements also garner increased scrutiny under CAFA. *Id.* When the payment of attorneys' fees and the receipt of the settlement results in an overall loss to plaintiffs, the settlement may be approved only if the settlement's non-monetary benefits substantially outweigh the monetary loss. *Id.* Unfortunately, CAFA provides no standard for determining whether non-monetary benefits outweigh the monetary loss. Although CAFA has been regarded as "muddled" and "clumsy," by a reviewing court, *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 680-81 (9th Cir. 2006), it nevertheless represents a landmark in the treatment of class actions in the United States.

IV. Multidistrict Litigation Practice

Another significant method by which United States courts treat multiple claims in federal court is the practice of multidistrict litigation ("MDL"). MDL proceedings are governed by a statute that allows for the transfer of cases filed in federal courts across the United States to a single trial court that coordinates or consolidates the actions for pretrial proceedings. 28 U.S.C. § 1407. The purpose of the transfer is to consolidate related actions to promote efficiency in case management and in the resolution of cases.

Multidistrict litigation is overseen by the Judicial Panel on Multidistrict Litigation, which is comprised of seven federal district

and appellate judges. The Panel may designate an MDL court and may transfer cases to that court either on its own initiative or on the motion of a party. The governing statute lays out three requirements for such transfer: (1) the pending actions must involve "one or more common questions of fact"; (2) transfer must advance the "convenience of parties and witnesses" on the whole; and (3) transfer to MDL proceedings must promote the just and efficient conduct" of the actions. 28 U.S.C. § 1407(a). A limited number of exceptions apply to the ability to transfer cases, including certain cases in which the United States is a plaintiff. 28 U.S.C. § 1407(g). Under the United States federal system, the MDL Panel has no authority to transfer cases pending in state (as opposed to federal) courts.

In addition to the express statutory factors, the MDL Panel has considered a variety of other factors in determining whether transfer is appropriate. Factors that weigh in favour of transfer include the number and complexity of cases involved, the amount of overlapping discovery at issue, the possibility of conflicting rulings, the early stage of the litigation at issue, the request of the transferring judge, and the existence of state court cases addressing a similar subject. David F. Herr, Multidistrict Litigation Manual §§ 5.18-5.29 (2007). On the other hand, a party's opposition to transfer, opposition by the transferring judge, varying or advanced stages of litigation, and motions made for an "improper purpose" weigh against transfer. *Id.* at §§ 5.30-5.38. The Panel has determined that other factors, such as choice of law and jurisdiction, do not affect the appropriateness of transfer. *See, e.g., In re Multidistrict Private Civ. Treble Damage Antitrust Litig. Involving Gypsum Wallboard*, 302 F. Supp. 794, 794 (J.P.M.L. 1969).

The Panel has not treated MDL motions in product liability cases uniformly. The massive discovery involved in many product liability cases has influenced the Panel to grant some motions to transfer products cases under the MDL statute. For example, the Panel granted a motion to transfer and consolidate litigation where plaintiffs alleged diabetes and related disorders stemming from their ingestion of the anti-psychotic medication Seroquel. *In re Seroquel Prods. Liab. Litig.*, 447 F. Supp. 2d 1376, 1378 (J.P.M.L. 2006). The Panel explained that transfer was appropriate because "[c]ommon factual questions for the actions in this docket concern, inter alia, i) the development, testing, manufacturing and marketing of Seroquel, and ii) the defendants' knowledge concerning the drug's possible adverse effects." *Id*. at 1378. In contrast, the Panel at the same time denied a motion to transfer actions brought against other manufacturers that stemmed from medications other than Seroquel, stating that the "remaining claims do not share sufficient questions of fact . . . to warrant inclusion in the [consolidated] proceedings." *Id.*

The Panel has authority to transfer cases to "any" federal district court in the United States. 28 U.S.C. § 1407(a). In selecting the transferee court, the Panel will consider such factors as the geographical appropriateness of the court, the experience of the transferee judge, and the number of the cases on the subject in question that the transferee court already has on its docket. *In re Westinghouse Elec. Corp. Uranium Contracts*, 405 F. Supp. 316, 319 (J.P.M.L. 1975).

After a case has been transferred, the transferee court coordinates the pre-trial motions and discovery. *See In re Wilson*, 451 F.3d 161, 164 (3d Cir. 2006) (describing MDL transferee court that formed a plaintiffs' management committee to coordinate actions, appointed a special discovery master, established deposition guidelines and requirements for submission of plaintiff information, created a document depository for materials produced in discovery, and set up a system to create timetables for the "completion of fact and expert discovery"). Subsequently filed cases, known as "tag-along" actions, may be consolidated into existing MDL proceedings. J.P.M.L. Rule 1.1.

Although the Panel's ability to consolidate multiple non-class actions permits the conservation of resources, the system does not prevent duplicative proceedings. One appellate court acknowledged the danger that parallel actions could proceed in state court during the pendency of consolidated MDL actions. *In re Collins*, 233 F.3d 809 (3rd Cir. 2000).

The overwhelming majority of cases transferred to MDL proceedings terminate either through settlement, summary judgment, or other motion. In the rare event that the cases remain unresolved following pretrial proceedings, they must be remanded for trial to the court in which the suit was originally filed. The United States Supreme Court struck down the practice that had developed in transferee courts to conduct the actual trials in the MDL actions as contrary to the text of the statute in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34-35 (1988).

V. Conclusion

Aggregate litigation in the United States is governed by a variety of statutes that provide for the consolidation of individual actions into class actions, for the transfer class actions to federal court and review of settlements, and for the ability to transfer actions filed in numerous federal courts to one court for coordination of pre-trial activities. Each set of procedures involves numerous requirements and exceptions that require clear understanding before meaningful comparisons with other countries may be made. This article has provided only the broad outlines of the procedural mechanisms for aggregate product liability actions. Should a company be named as a defendant in such a case, considerable additional study of the specific rules and standards that apply would be necessary.

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