

THE ALABAMA CLASS ACTION

In a room of
blind people, someone with partial
sight in one eye is an expert.

St. Raymund
Patron Saint of Lawyers

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While we see more of these suits filed in Alabama state courts than just a few years ago, for many of us, an encounter with a class action requires a refresher course. This first article and one to follow are for the refresher candidate. This first article deals with basic class requirements and class types.

General Considerations

Class actions in Alabama are brought under Rule of Civil Procedure 23, identical to Fed.R.Civ.P. 23. Although the Alabama Supreme Court has addressed class actions on several occasions, federal cases are legion. The Alabama Supreme Court has stated that federal decisions are persuasive authority for class action determinations.¹

The class must meet the requirements of Ala. R. Civ. P. 23(a) **and** must fit within one of the types of class actions set forth in Ala. R. Civ. P. 23(b). Even then, certification of a class remains within the discretion of the trial judge "after considering practicality and manageability of the litigation."² The United States Supreme Court has written that class actions "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rules 23(a) have been satisfied." General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161 (1982). "Mere mimicry is insufficient to undergird a decision either way on the propriety of class certification."³

Although a trial court's decision on certification will be reversed by the Alabama Supreme Court only for an **abuse of discretion**, the Court has been willing to reverse improper class certifications.⁴

A class can be certified for only a portion of the case. A class of defendants may also be certified. Subclasses may be created to handle conflicts or individualized issues, but each subclass must independently meet all of the requirements for a class. Whether a class can be certified should be determined "as soon as practicable after the commencement of the action."⁵

Because of the provisional nature of a class certification, such a ruling can be changed throughout the course of the proceeding. The court may also make orders as may be necessary to avoid undue repetition and complication in presentation of arguments or evidence, allowing molding of the litigation. Once certified, a class action may not be dismissed or compromised without the approval of the court.⁶

The 23(a) Requirements

The four requirements of Ala. R. Civ. P. 23(a) are often referred to as:

- Numerosity
- Commonality
- Typicality
- Adequacy of Representation

Numerosity

While there is not an Alabama decision discussing, in depth, the numerosity requirement, the Alabama Supreme Court in Rowan v. First Bank of Boaz, 476 So. 2d 44 (Ala. 1985) reversed the trial court's certification of the class because there was "no evidence of any kind before the trial court indicating the number of customers of the bank that prepaid their installment loans."

Federal law has generally held that, if a class number is at least **50**, numerosity is met.⁷ In Jones v. Firestone Tire & Rubber Co., Inc., 977 F.2d 527, 534 (11th Cir. 1992), the Eleventh Circuit noted that 21 members is "generally inadequate."

Commonality

The plaintiff must show there are common questions of fact **or** law between all members of the class. Alabama cases have rarely focused upon the commonality requirement. See, e.g., Town of Eclectic v. Mays, 547 So. 2d 96, 102 (Ala. 1989) (concluding that "undeniably, there are common questions of law and fact"). The trial court must, however, identify the common issues of fact and law to define the class (or classes). The class cannot, for example, include plaintiffs who have no right to recovery.⁸

Typicality

The class representatives's claim must be typical of the class claims. The idea is that differences between the claims of the representative and those of other members of the class will operate to the detriment of class members. Some federal courts have required the representative's claims to be "co-extensive" with the claims of the class members.⁹ Courts sometimes blur typicality with the requirement that the named plaintiff be an adequate representative of the class.¹⁰

Alabama Cases on Typicality

The leading Alabama case is Ex parte Blue Cross and Blue Shield, 582 So. 2d 469 (Ala. 1991). There, three class representatives alleged that Blue Cross had maintained an excess contingency reserve and asked for an injunction forcing Blue Cross to distribute that reserve. The trial court certified the class and granted partial summary judgment. Blue Cross sought a

writ of mandamus, which was granted by the Alabama Supreme Court. Evidence showed that the named plaintiffs had either not been injured by the alleged excess contingency reserve or had actually benefited in reduced rates. The court reversed the class certification, finding that the claims of the named plaintiffs were not typical of the class claims.

In Amason v. First State Bank of Lineville, 369 So. 2d 547 (Ala. 1979),¹¹ a debtor brought a class action against a bank alleging fraud and excess finance charges. The trial court refused class certification and the Supreme Court affirmed this holding on the basis that the named plaintiff no longer had an indebtedness to the bank, and yet sought to certify a class of those who did have indebtedness to the bank.

In Butler v. Audio/Video Affiliates, Inc., 611 So. 2d 330 (Ala. 1992), a plaintiff sought certification of a class in a "bait and switch" consumer fraud action. The trial court denied certification and the plaintiff appealed, arguing that a class action was appropriate because of the "pervasive scheme." The Supreme Court affirmed, relying on the trial court's "painstakingly" written order that found that, in order to establish a violation, each class member would have to be questioned to ascertain why he or she had gone to the defendant's store and purchased the item, whether he or she was satisfied with the item, whether any injury occurred, etc. Furthermore, certification was prevented by the fact that the alleged misrepresentations may have varied from one class member to another, and the plaintiff was satisfied with her purchase.

In Harbor Ins. Co. v. Blackwelder, 554 So. 2d 329 (Ala. 1989), participants in a self-funded insurance plan for employees brought actions alleging fraud in the inducement arising from the failure of the plan. The Alabama Supreme Court affirmed class certification. Although fraud cases are not usually candidates for class certification because of the individualized nature

of communications that may occur between different class members and a defendant's representatives, not to mention individualized questions of reliance, the Alabama Supreme Court held that the certification in this particular case was not an abuse of discretion, finding that the misrepresentations to the class members were the same and were redressable under the same theory of recovery.

Federal Cases on Typicality

Federal authorities agree that the major reasons that a plaintiff's claim will not be typical are (1) standing, and (2) individualized defenses. An example is Levine v. Berg, 79 F.R.D. 95, 97 (S.D.N.Y. 1978), in which the court declined to certify a class because the plaintiff failed to meet the burden of showing that his claims were typical of the class. The court noted specifically that the plaintiff's testimony had been so vague and unclear that it was impossible to assess whether or not the plaintiff would be subject to unique defenses.

Another example is Bogle v. Crow-Brighton Co., 96 F.R.D. 1, 3 (W.D. Okla. 1981) in which an owner of a lot in a development alleged that the developer made fraudulent representations about the construction of a clubhouse. Typicality was not met because there would need to be a determination for every class member of the statements that were made to them, by whom the statements were made and whether the developer had any connections with these statements. There would also need to be an individualized determination of the extent of reliance. Most federal courts now agree that the typicality requirement:

may have independent significance if it is used to screen out class actions when the legal or factual positions of the representatives are markedly different from that of the other members of the class, even though common questions of law or fact are raised.¹²

This formulation addresses the danger "that the unique circumstances or legal theory will receive inordinate emphasis, and that other claims will not be presented with equal vigor or will go unrepresented."¹³ In Seiler v. E. F. Hutton & Co., 102 F.R.D. 880, 890 (D.N.J. 1984), the court held that typicality had not been met because the defendant brokers in a securities action had made individual decisions on what information to send their clients and the representations to make to their clients.

In Brooks v. Southern Bell Tel. & Tel. Co., 133 F.R.D. 54, 58 (S.D. Fla. 1990) the court noted that the United States Supreme Court interprets the typicality requirement as meaning that the named representatives "must be able to establish the bulk of the elements of each class member's claims when they prove their own claims."

Adequacy of Representation

A trial judge must view a class representative in a fiduciary role. The representative must protect the class members to enable the class mechanism to conclude their claims. If the class representative lacks sufficient knowledge of the facts or claims, has interests adverse or potentially adverse to the class, or is a meddler or interloper, the court may deny class certification.

Alabama Cases on Adequacy of Representation

Perhaps the leading Alabama case on this requirement is Ex parte Blue Cross and Blue Shield, 582 So. 2d 469, 476-77 (Ala. 1991). The Alabama Supreme Court unanimously reversed a class action certification. Among the reasons, the named plaintiffs could not adequately protect the interests of the class since the evidence showed that the two named plaintiffs would have a conflict of interest with those in the purported class.

Consider also the recent Alabama Supreme Court decision in a shareholder derivative action in Elgin v. Alfa Corp., 598 So. 2d 807 (Ala. 1992). There the Alabama Supreme Court found that one of the representatives for the shareholder derivative suit was inadequate. The court noted that the plaintiff's unfamiliarity with litigation may indicate that he is not an adequate representative and noted that the representative testified that he knew "virtually nothing about the subject matter of the Complaint," that his knowledge of the Complaint came from the "news media", that he had made his decision to be a plaintiff merely a week before the deposition, but had not seen the Complaint until the day of the deposition and had not read it by then.

Federal Cases on Adequacy of Representation

Adequacy of representation has been a hotly contested issue in federal cases. First, the federal courts have long held that the most important factor in determining adequacy is whether the representative can show that his interest will lead him to prove the allegations of the class (i.e., all of the allegations of the class) and whether his interests are in conflict with the class.¹⁴ Second, what constitutes an adequate representative is generally viewed as a question of fact that depends on the circumstances of each case. Third, it is the plaintiff's burden to prove that the class representative is adequate.¹⁵ In addition to examining the plaintiff's interests, the court will examine, among other things, (1) the representative's knowledge of the facts and involvement with the suit, (2) the representative's compliance with discovery, (3) the representative's credibility, (4) the representative's honesty and conscientiousness, (5) the representative's lawyer's ability, experience, conflicts and ethics, and (6) whether other plaintiffs have shown an interest in the litigation.

There are many federal cases regarding the representative's true interests. An example is Greeley v. KLM Royal Dutch Airlines, 85 F.R.D. 697, 700 (S.D.N.Y. 1980) where a passenger who refused to settle a claim against the airline for lost and stolen baggage was not entitled to certification of a class that would include passengers who had settled, since there was no assurance that the plaintiff would "vigorously litigate" the questions of fact and law unnecessary to his individual claim, but essential to recovery for the passengers who had settled.¹⁶

In assessing adequacy, the courts are especially wary of conflicts (even potential conflicts) between the representative and others in the class. An example of a potential conflict defeating a class is Plekowski v. Ralston Purina Co., 68 F.R.D. 443, 452-53 (M.D.Ga. 1975) where a former customer brought a class action against a manufacturer of feed products based on an alleged illegal tying of feed purchases to advancements of loans. The court declined certification, holding that the plaintiff's claim was not typical and that he was not an adequate representative, finding that the plaintiff had different interests from those of wholesalers, dealers, growers, ranchers and farms who had good relationships with the defendant, but who nonetheless were purported members of the class.

Another key factor in assessing adequacy is the class representative's lack of knowledge and lack of involvement. An example is Levine v. Berg, 79 F.R.D. 95 (S.D.N.Y. 1978). There, a plaintiff brought a class action based upon the Securities and Exchange Act. The plaintiff could not recall the facts and circumstances that prompted her acquisition of the shares of the corporation, could not recall consulting reports and testified that she glanced only briefly through the complaint before it was filed. The court concluded that the plaintiff's deposition revealed an

"alarming adversity to unearthing facts" and a "total reliance" on her counsel. The court noted that having a qualified counsel is not enough to satisfy the adequacy requirements.

Another example is Epifano v. Boardroom Business Products, Inc., 130 F.R.D. 295 (S.D.N.Y. 1990). There, the plaintiffs brought a securities fraud action, and the court rejected one of the class representatives as inadequate because of lack of knowledge. The representative had no involvement in the filing of the complaint and had no knowledge of it had not spoken to the attorney since the filing of the complaint and had indicated a willingness to settle the case if personally made whole. The court noted that "an additional consideration in assessing adequacy is the extent of the plaintiff's interest in the case in terms of active involvement and time spent. A plaintiff who is not seriously interested in his own litigation cannot be relied upon to vigorously pursue the claims of others."

In Efros v. Nationwide Corp., 98 F.R.D. 703, 706-07 (S.D. Ohio 1983), the court concluded that the attorneys, and not the named plaintiff, were the "driving force" in the litigation. The court was especially concerned about the "unfettered discretion" that the plaintiff had given her attorneys (such as the right to hire new counsel, trial counsel and expert witnesses without even informing her).¹⁷

Another consideration in determining the adequacy of representation is the failure of the plaintiff to comply wholeheartedly and fully with the discovery requirements.¹⁸ Other courts consider that the class representative's lack of credibility as an important factor in determining their adequacy of representation. In Kline v. Wolf, 702 F.2d 400, 402-03 (2nd Cir. 1983), the district court found that the plaintiffs were vulnerable to serious attacks on their credibility and were subject to unique defenses atypical of the rest of the class and, therefore, were not adequate

representatives. In Panzirer v. Wolf, 663 F.2d 365, 367-68 (2nd Cir. 1981) the Second Circuit affirmed denial of class certification, writing that the class representatives "lack of credibility is abundantly clear in the record. She gave no less than four versions of her conversation with her broker. [The court then described the four versions]. The credibility of a plaintiff may be considered by the trial judge in determining the plaintiff's adequacy as a class representative."

In assessing adequacy, courts have also looked at personal factors such as honesty and conscientiousness. In Kendler v. Federated Department Stores, Inc., 88 F.R.D. 688, 694 (S.D.N.Y. 1981), the court found that a charge account customer whose recovery in a class action antitrust lawsuit would likely fall below the amount unpaid on a prior account was not a proper class representative, especially because her current charge account might be subject to cancellation based on inaccurate statements in her application.

Another key consideration for adequacy is the class representative's counsel. The court will examine (1) counsel's competence and experience, (2) counsel's conflicts, and (3) counsel's ethics and actions in this litigation.¹⁹ Courts expect counsel to act in a fiduciary role to protect the class and will examine closely the counsel's own potential conflict of interest.²⁰ For example, some cases have held that it is a conflict of interest for the plaintiff's attorney to actually be a member of the class. In Bachman v. Pertschuk, 437 F. Supp. 973, 976-77 (D.D.C. 1977) the court ruled that an attorney could not be class counsel where his personal interest as a class member and as a person presently employed by the defendant created a conflict of interest. There are many cases holding that counsel for the class cannot also be a **class representative** because of the inherent class conflict.²¹ Furthermore, several courts have stated that a class

representative cannot be allied with the class counsel or have a family relationship with the class counsel.²²

As a general matter, it should be noted that the ethical conduct of the class counsel is a relevant factor to consider when considering their adequacy.²³ For instance, some courts have looked with skepticism upon class counsel who solicited the class representatives and, therefore, solicited the lawsuit. Even though such solicitation may not violate the Alabama Rules of Professional Conduct (provided there was no in person solicitation, direct phone contact and that all solicitations were filed with the State Bar)²⁴, the court can find that the class counsel is not an appropriate or adequate class counsel.²⁵

Finally, courts will sometimes consider whether other members of the class have intervened in support of the plaintiff in determining the plaintiff's adequacy as a class representative. For instance, one court has written that "None of the present customers of the defendant have sought to intervene in this action even though it has been pending since September 1973. The courts have recognized, as a negative factor to class certification, this lack of interest in entering the legal arena."²⁶

The Three Class Types

The plaintiff must satisfy each of the requirements of Rule 23(a) and fall within one of the categories of Rule 23(b) which itemizes three types of class actions:

Rule 23(b)(1)

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

1. The prosecution of separate actions by or against individual members of the class would create a risk of:

- a. Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
- b. Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

Alabama Cases on (b)(1) Type Class

There has only been one Alabama case to discuss Rule 23(b)(1).²⁷ In Taylor v. Liberty Nat. Life Ins. Co., 462 So. 2d 907 (Ala. 1984), a plaintiff sued, alleging misrepresentation regarding a burial policy and collaterally attacking a prior class action case. The prior action did not include individual notice to Taylor as required by Rule 23(b)(3), but not required by Rule 23(b)(1) and Rule 23(b)(2). The court analyzed whether certification of the prior action would have been proper under Rule 23(b)(1) or Rule 23(b)(2). The court determined that 23(b)(1) certification would not have been proper:

A rule 23(b)(1) action is proper in cases where the rights of individual class members would be prejudiced if the suit were brought individually or in cases in which inconsistent adjudication among the parties might result if the suit were individual rather than class; . . . More simply, if the relief requested is predominantly monetary, the action must be brought as a 23(b)(3) suit. . . . 23(b)(1) and (b)(2) classes by their nature are more cohesive than (b)(3) classes.²⁸

Federal Cases on (b)(1) Type Class

Rule 23(b)(1) actually establishes two somewhat unrelated types of class actions. A Rule 23(b)(1)(A) class action is used **for the benefit of the defendant** where "there is risk of inconsistent results leaving the party opposing the class in a quandary as to how he should govern himself. . . ." ²⁹ There must be a real risk that separate actions will occur, otherwise there

is not a danger of the courts fashioning incompatible standards.³⁰ Furthermore, most federal courts hold that if the threatened inconsistency is the possibility of having to pay money damages to one and not another, Rule 23(b)(1)(A) is not met (i.e., 23(b)(1)(A) is not appropriate when the threatened inconsistency is that the defendant might win one individual damages lawsuit and lose another).³¹ This is especially true when the class action is brought by consumers with small claims, because the risk of multiple actions is remote.³² Instead, the courts and commentators usually assume that 23(b)(1)(A) classes are only appropriate when the defendant will truly be in a "conflicted position" (i.e., when different results would impair the defendant's ability to pursue a uniform, continuing course of conduct).³³ Further, Rule 23(b)(1)(A) classes are less likely to be appropriate when there are more individualized issues. One federal court has gone so far as to suggest that if there are any individualized issues, Rule 23(b)(1)(A) is inappropriate.³⁴

The classic example of a Rule 23(b)(1)(A) class action is where suit is brought against a riparian up-river landowner by a down-river owner, as it would be chaotic to permit various individual lawsuits by different down-river landowners.³⁵ Rule 23(b)(1)(A) actions are appropriate where a defending party may be "obliged by law" to treat all similarly. An example would be where an action is brought against a municipality to invalidate or modify a bond issue or assessment.³⁶ Note that the Eleventh Circuit and most courts hold that certification for Rule 23(b)(1)(A) cases is limited to cases seeking injunctive and declaratory relief.³⁷

A Rule 23(b)(1)(B) class action requires that the adjudication might be injurious to the contentions of other individuals. Precedential effect or *stare decisis* is not sufficient, but the prejudice need not be as devastating as a defense of res judicata.³⁸ According to the notes to the Federal Rules, an example of this type of class action is a suit by shareholders to compel a

dividend or recognize preemptive rights, or an action by an indenture trustee to protect the holders of securities.³⁹ Rule 23(b)(1)(B) classes can be seen as a type of an interpleader action, that is, where there is a limited fund or a single object and many claimants. Rule 23(b)(1)(B) is not appropriate, usually, for mass torts. One recent Federal district court has written that "Some have argued that Rule 23(b)(1)(B) should be used for mass accident claims or other circumstances where there is a prospect of depletion of assets of a defendant by multiple claims for punitive damages, but this appears to have been rejected by most courts."⁴⁰ In fact, courts have been generally hesitant to certify any type of class action for mass tort cases, especially Rule 23(b)(1) class actions that do not allow a plaintiff to opt out.⁴¹

Rule 23(b)(2)

2. The party opposing the classes acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or a corresponding declaratory relief with respect to the class as a whole; or

Rule 23(b)(2) is appropriate for injunctive or declaratory judgment actions, but **in addition** the class proponent must show that the other party "acted or refused to act on grounds generally applicable to the class." This type of class was designed primarily to handle constitutional and civil rights cases and has also been extensively used against governmental units, for environmental claims, and for patent claims.⁴² If the predominant relief sought is damages, the class should **not** be certified under Rule 23(b)(2). Because of the notice and class requirements imposed on the plaintiff in Rule 23(b)(3), class plaintiffs and their counsel sometimes attempt to improperly invoke Rule 23(b)(2) by including in their requested relief a demand for an injunction or declaratory judgment.

Alabama Cases on (b)(2) Type Class

The leading Alabama case discussing the difference between (b)(2) and (b)(3) is Taylor v. Liberty National Life Insurance Co., 462 So.2d 907 (Ala. 1984), discussed above. The Alabama Supreme Court observed that the major distinction between (b)(2) and (b)(3) classes is the notice requirement for (b)(3) classes involving monetary relief. The Court emphasized that notice is mandatory in (b)(3) class suits, as opposed to the discretionary notice discretionary in (b)(1) and (b)(2) suits. The Alabama Supreme Court held that certification of a (b)(2) class involving claims for monetary relief without individual notice to the class members amounted to a deprivation of the due process rights of the class members.

The Taylor court found that, since the class had been incorrectly certified under Rule 23(b)(2), the class action did not command res judicata. The Court noted specifically that the federal complaint had requested injunctive and monetary relief, but noted that the final settlement of the federal case was one primarily involving monetary relief, making the equitable demands a "mere facade created by the originally named parties." It wrote, "More simply, if the relief requested is predominantly monetary, the action must be brought as a 23(b)(3) suit."

Federal Cases on (b)(2) Type Class

Federal cases are unanimous that a suit seeking predominantly money damages should never qualify under Rule 23(b)(2).⁴³ An example is Indiana State Employees Assoc., v. Indiana State Highway Com., 78 F.R.D. 724, 725-26 (S.D. Ind. 1978). There, the plaintiffs (state employees) sought reimbursement of forced political contributions and declaratory and injunctive relief. The court rejected the plaintiffs' argument that their class qualified under Rule 23(b)(2), stating that the individualized nature of the class member damage claims was such that

the damage issue in the case would predominate or overwhelm issues of generalized, equitable relief.

Rule 23(b)(3)

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 a particular forum;
 - d. The difficulty likely to be encountered in the management of a class action.

Rule 23(b)(3) is primarily a **damages** class and has been used for actions such as consumer rights, securities law violations and antitrust law violations. Courts have considered this type of class to be less cohesive than (b)(2) and (b)(1) classes and have found that the reasons for class certification under (b)(3) are less compelling than the reasons for certification under (b)(1) and (b)(2). Under Rule 23(b)(3), individual notice is required to each class member (who can be determined with diligent effort). Furthermore, the standards for certification are more stringent under Rule 23(b)(3).

Alabama Cases on (b)(3) Type Class

No Alabama case has directly construed Rule 23(b)(3) in determining whether a class action should be certified. Nevertheless, several Alabama cases have determined that classes were not "manageable" and therefore, the classes could not be certified. A case illustrating the "unmanageable" factor is Butler v. Audio/Video Affiliates, Inc., 611 So. 2d 330 (Ala. 1992), involving allegations of bait and switch consumer fraud by a department store. The trial court rejected class certification and the Alabama Supreme Court affirmed, having analyzed the proposed class under the standards of Rule 23(b)(1).

A second major Alabama case discussing the "unmanageable" factor is Marshall Durbin & Co. v. Jasper Utilities Board, 437 So. 2d 1014 (Ala. 1983). There, the Alabama Supreme Court found that a class was not proper because approximately 28% of the proposed class would be subject to **compulsory counterclaims** for delinquent gas service accounts meaning, the class would not be "manageable". The court noted that "each of these accounts would be subject to defenses which would complicate the litigation and, in the words of the trial court, 'defeat the manageability requirement of the class action.'"

Federal Cases on (b)(3) Type Class

Rule 23(b)(3) is intended for class actions involving small claims, often consumer claims.⁴⁴ Rule 23(b)(3) lists two **requirements** for class actions: (1) common questions predominate, and (2) the class action is superior to other methods. It also lists four **factors** (not intended to be exhaustive) to be analyzed: (1) individual interest in controlling litigation, (2) other ongoing litigation, (3) desirability of concentrating litigation in this forum, and (4) the manageability of the potential class action.

The first requirement is common questions must predominate. While this standard has never been quantified, it is not sufficient that common questions merely exist. The cases in which courts have refused to certify class actions under the predominance requirement often involve a potential for separate adjudications of each class member's claim or defense or where there are compulsory counterclaims. An example is Estate of Remley v. Amoco Production Co., 100 F.R.D. 419, 421 (S.D. Tex. 1983). There, a class of oil lessors was not certified in an action against a common lessee when each lease, because of unique qualities, drained in a different manner and at a different rate. Thus, although lessors might show that the lessee systematically drained each field, each would be required to prove individual injury. Another example is Wilcox Dev. Co. v. First Interstate Bank, N.A., 97 F.R.D. 440, 446-47 (D. Oregon 1983). There, the plaintiffs alleged that a bank and its holding company **breached their contract** by charging plaintiffs an interest rate that was higher than the bank's lowest rate. The court found that this was not a proper (b)(3) class because questions of class membership involving each class member's knowledge of the "prime rate" predominated.

A third example is Schmidt v. Interstate Federal Savings & Loan Association, 74 F.R.D. 423, 428-29 (D.D.C. 1977). There, a federal court refused to certify a class of plaintiff home mortgagors. These plaintiffs were located in the District of Columbia, Maryland and Virginia. The court held that it would be necessary to apply 3 separate and possibly inconsistent bodies of law to the breach of a contract and unjust enrichment claims. Because (1) the presentation of the claims on a class basis was unduly complicated, and (2) the case would raise many questions of law that were neither common nor predominate throughout the class, class certification was denied. Note that there are several cases finding a lack of predominance because of the presence

of multiple states' laws.⁴⁵ Compulsory counterclaims can also lead to a finding of no predomination.⁴⁶

An example of common questions predominating is Roper v. Conserve, Inc., 578 F.2d 1106, 1113 (5th Cir. 1978). There, credit card holders brought a class action against a national bank, alleging that credit card charges were usurious under Mississippi law. The plaintiffs argued that the individual fact determinations could be reached by using objective criteria and the assistance of a computer.

The next requirement is that a class action must be superior to other available methods. This analysis is designed to determine whether the objectives of the class action procedure will be served by this analysis, and should involve a weighing of the advantages and disadvantages of class treatment as well as possible alternatives (such as joinder, intervention, joint discovery, administrative treatment, and test cases).⁴⁷ In examining the merits of class treatment, the courts have relied heavily on the four factors listed in Rule 23(b)(3). An example is Parker v. George Thompson Ford, Inc., 83 F.R.D. 378, 381-82 (N.D. Ga. 1979), the court ruled that the class action failed the superiority requirement when class certification would result in a relatively small recovery for individual class members while exposing the defendant to large administrative costs and requiring substantial amounts of court time for supervision of the action.

The first factor under Rule 23(b)(3) is the interest of individuals in controlling their own suits. Cases that find that this factor has not been satisfied usually involve larger claims.⁴⁸ Another situation in which a party may have a strong interest and individual control of the litigation is when there are animosities within the class.⁴⁹

Another consideration in determining the interest of individuals in controlling their own suits is the possibility of counterclaims against them. In Carter v. Public Finance Corp., 73 F.R.D. 488 (N.D. Ala. 1977), the court refused to certify a class action for possible violations of the Truth-and-Lending law. The court determined that 85 of the potential 383 class members were in default, that the defendant had potential counterclaims against each of these class members and that such counterclaims were compulsory. The court noted that these members could find themselves exposed to greater liability for the counterclaims than they could ever hope to recover in the class action and, therefore, probably would never have chosen to bring individual actions. The court, therefore, concluded that the superiority requirement had not been met and that there was a likelihood that large numbers of the class members would move to opt out of the class. Finally, the court held that there would not be a predomination of common questions because of the numerous counterclaims and also noted the administrative difficulty imposed by such counterclaims.

The second factor listed within Rule 23(b)(3)(b) is the "extent and nature of any litigation concerning the controversy already commenced by or against members of the class."

The third factor is the "desirability or undesirability of concentrating the litigation in one forum." Wright, Miller and Kane write regarding this factor that

First, a court must evaluate whether allowing a Rule 23(b)(3) action to proceed will prevent the duplication of effort and the possibility of inconsistent results. Indeed, in defendant class actions, it has been suggested that clause (b)(3)(c) instructs the court to take into account the importance of protecting defendants from being subjected to "the expensive ordeal of continually having to demonstrate their innocence at trial." In this regard, the third factor is closely related to the second consideration enumerated in Rule 23(b)(3) -- the extent to which other actions have been instituted.

The other consideration a district court must take account of under subdivision (b)(3)(c) is whether the forum chosen for the class action represents an appropriate place to settle the controversy, given the location of interested parties, the availability of witnesses and evidence, and the condition of the court's calendar. The analysis is similar to that used in deciding a transfer of venue question under Section 1404(a) of Title 28.⁵⁰

The fourth factor is the difficulty to be encountered in the management of the class action. This factor is closely related to the superiority determination. Several federal lawsuits have found that proposed class actions under Rule 23(b)(3) were unmanageable and therefore, should be dismissed. A leading case is Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1010-11, 1017 (2nd Cir. 1973). There, a class action was brought for odd lot investors. The court held that the only way that the class action would be manageable was (1) to give less than individual notice to all identifiable class members, (2) to have the defendant share the cost of the notice, and (3) to provide for a fluid class recovery⁵¹ instead of individualized relief; therefore, the court dismissed the action because it was unmanageable -- Rule 23 provides for none of these procedures.⁵²

In deciding the manageability question, federal courts have also sometimes considered the counterclaims of the defendants.⁵³

Conclusion

Although our trial courts are given discretion in molding class action suits, certification of such actions should not occur in the many cases that do not satisfy the fundamental requirements of Rule 23(a). Additionally, factors involved in deciding the type of class under Rule 23(b) may either operate against certification or in favor of restricted or conditional certification. The trial judge must carefully avoid the occasional temptation to grant class certification based simply on broad allegations and willing class representatives and attorneys,

and instead carefully scrutinize the purported class and the named plaintiffs' claims under the Rule 23 guidelines.

The next article in a future issue of the Alabama Lawyer will focus on issues of venue and jurisdiction, pretrial motions, statutes of limitations, discovery, certification hearings, notice, appeals, settlement and attorneys fees in Alabama class actions.

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- 1 See First Alabama Bank of Montgomery, N.A. v. Martin, 381 So. 2d 32, 34 (Ala. 1980); Rowan v. First Bank of Boaz, 476 So. 2d 44, 46 (Ala. 1985);
 - 2 Marshall Durbin & Co. v. Jasper Utilities Board, 437 So. 2d 1014, 1025 (Ala. 1983).
 - 3 Jones v. Diamond, 519 F.2d 1090, 1098 (5th Cir. 1975).
 - 4 See e.g., Ex parte Blue Cross, 582 So. 2d 469 (Ala. 1991); Bagley v. City of Mobile, 352 So. 2d 1115 (Ala. 1977).
 - 5 Ala. R. Civ. P. 23(c) (emphasis added).
 - 6 Ala. R. Civ. P. 23(d) and (e).
 - 7 1 Newberg & Conte, Newberg on Class Actions §3.05 (3d Ed. 1992)(40 raises presumption); 7A Wright, Miller & Kane, Federal Practice & Procedures: Civil 2d, § 1762 at pp. 170-186 (1986)(listing cases).
 - 8 See Eagerton v. Williams, 433 So. 2d 436, 447 (Ala. 1983) (reversing certification).
 9. Levine v. Berg, 79 F.R.D. 95, 97 (S.D.N.Y. 1978); compare East Texas Motor Freight, Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S. Ct. 1891, 1896, 52 L. Ed.2d 453 (1977); Bogle v. Crow-Brighton Co., 96 F.R.D. 1, 3 (W.D. Okla. 1981).
 - 10 3B J. Moore & J. Kennedy, Moore's Federal Practice ¶ 23.06-2 (2d ed. 1991); 1 Newberg on Class Actions ¶3.13; 7A Wright, Miller & Kane, § 1764 at pp. 228-232.
 - 11 See also Helms v. First Alabama Bank of Gadsden, N.A., 386 So. 2d 450 (Ala. Civ. App. 1980).
 - 12 Angelastro v. Prudential-Bache Securities, Inc., 113 F.R.D. 579, 582 (D.N.J. 1986); Weiss v. York Hospital, 745 F.2d 786, 809 n.36 (3rd Cir. 1983).
 - 13 113 F.R.D. at 582.
 - 14 See Stewart v. Winter, 669 F.2d 328, 335 (5th Cir. 1982) (a class representative is not adequate if they will neglect the injunctive portion of the case because of their concentration on damages, but finding adequacy on the facts); Griffin v. Dugger, 823 F.2d 1476, 1483 (11th Cir. 1987) (holding that a class representative must have suffered a cognizable injury on each and every cause of action asserted upon behalf of the class).
 - 15 2 Newberg on Class Actions §7.17; 7A Wright, Miller & Kane, § 1765 at p. 273.
 16. See also Parker v. George Thompson Ford, Inc., 83 F.R.D. 378 (N.D.Ga. 1979); 7A Wright, Miller & Kane, § 1766 at 303 n.9 (listing cases).
 17. See also 7A Wright, Miller & Kane, § 1766 at pp. 310-311.
 18. Darvin v. International Harvester Co., 610 F. Supp. 255, 257 (S.D.N.Y. 1985); Norman v. ARCS Equities Corp., 72 F.R.D. 502, 506 (S.D.N.Y. 1976).
 19. 7A Wright, Miller & Kane, § 1769.1; 1 Newberg on Class Actions §3.42.
 20. See, e.g., Piambino v. Bailey, 757 F.2d 1112, 1143-46 (11th Cir. 1985).
 21. See 7A Wright, Miller & Kane, § 1769.1 at p. 386 n.24 (listing cases); see also Lau v. Standard Oil Co., 70 F.R.D. 526, 528 (N.D. Cal. 1975).
 22. See 7A Wright, Miller & Kane, § 1769.1 at p. 388 n.25 (listing cases); Zlotnick v. Tie Communications, Inc., 123 F.R.D. 189, 193-194 (E.D. Pa. 1988) (attorney is son of named representative; court rejects class on this basis); Kirby v. Cullinet Software, Inc., 116 F.R.D. 303, 308-310 (D. Mass. 1987) (son of representative was class counsel; court does thorough analysis and determines that class representative was not adequate).

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23. See Stavrides v. Mellon National Bank & Trust Co., 60 F.R.D. 634, 636-38 (W.D.Pa. 1973).
 24. Alabama Rules of Professional Conduct 7.3 and comment.
 25. See Shields v. Valley National Bank of Arizona, 56 F.R.D. 448, 450 (D. Ariz. 1971).
 26. Plekowski v. Ralston Purina Co., 68 F.R.D. 443, 453 (M.D. Ga. 1975); Kas v. Financial General Bankshares, Inc., 105 F.R.D. 453, 462-63 (D.D.C. 1989).
 27. Compare these cases in which 23(b)(1) classes involved but not discussed: Brown v. State, 565 So. 2d 585 (Ala.1990); Town of Eclectic v. Mays, 547 So. 2d 96, 102 (Ala. 1989); First Alabama Bank, N.A. v. Martin, 425 So. 2d 415 (Ala. 1982).
 28. 462 So. 2d at 910-11 (citations omitted). Note that a later federal case enjoined further prosecution of the Taylor litigation. See Battle v. Liberty Nat. Life Ins. Co., 660 F. Supp. 1449, 1457 (N.D.Ala. 1987), aff'd 877 F.2d 877, 883 (11th Cir. 1989).
 29. Ala.R.Civ.P. 23, Committee Comments.
 30. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2nd Cir. 1968); 7A Wright, Miller & Kane, § 1773.
 31. McDonnell Douglas Corp. v. U.S. Dist. Court. for Central Dist., 523 F.2d 1083 (9th Cir. 1975) (possibility that some next of kin of passengers in an airplane crash might win and some might lose did not qualify under 23(b)(1)(A)); Pruitt v. Allied Chemical Corp., 85 F.R.D. 100, 106-107 (E.D.Va. 1980) (23(b)(1)(A) not appropriate when the threatened inconsistency is simply that defendant might win one lawsuit and lose another); Goldman v. First Nat. Bank of Chicago, 56 F.R.D. 587, 590 (N.D. Ill. 1972), reversed on other grounds 532 F.2d 10 (7th Cir. 1976).
 32. Eisen, 391 F.2d at 564; 7B Wright, Miller & Kane, § 1782 at p. 55.
 33. Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedures (I)," 81 Harv. L. Rev. 356, 388 (1967); 7A Wright, Miller & Kane, § 1773 at p. 429.
 34. Tober v. Charnita, Inc., 58 F.R.D. 74, 81 (M.D. Pa. 1973); see also In re Dennis Greenman Securities Litigation, 829 F.2d 1539, 1545 n.8 (11th Cir. 1987).
 35. See Advisory Committee Note to 1966 Amendment to Federal Rule 23.
 36. See Advisory Committee Note to 1966 Amendment to Federal Rule 23.
 37. See In re Dennis Greenman Securities, 829 F.2d 1539, 1545 (11th Cir. 1987).
 38. Ala. R. Civ. P. 23, Committee Comments; In re Dennis Greenman Securities Litigation, 829 F.2d at 1546.
 39. See Advisory Committee Notes to 1966 Amendment to Federal Rule 23.
 40. Waldron v. Raymark Industries, Inc., 124 F.R.D. 235, 237 (N.D.Ga. 1989); see generally, C. Lyon, Alabama Practice: Rules of Civil Procedure Annotated, § 23.3 at p. 356 (2nd ed. 1986) (citing cases); In re Dennis Greenman Secs. Litigation, 829 F.2d 1539 (11th Cir. 1987); but see In re A.H. Robins Co., 880 F.2d 709, 741 (4th Cir. 1989).
 41. Waldron v. Raymark Industries, Inc., 124 F.R.D. 235, 237 (N.D.Ga. 1989); 7A Wright, Miller & Kane, § 1783; compare Newberg on Class Actions § 17 (arguing for a contrary result).
 42. 1 Newberg on Class Actions, § 4.11 (listing example cases); 7A Wright, Miller & Kane, §§ 1775, 1776.
 43. See also In re School Asbestos Litigation, 789 F.2d 996, 1003 (3rd Cir. 1986); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2nd Cir. 1968); Walsh v. Ford Motor Co., 130 F.R.D. 260, 264 (D.D.C. 1990); Davenport v. Gerber Products Co., 125 F.R.D. 116, 120 (E.D. Pa. 1989); Hernandez v. United Fire Ins. Co., 79 F.R.D. 419, 429 (N.D. Ill. 1978); In re Plywood Anti-Trust Litigation, 76 F.R.D. 577 (E.D. La. 1976).

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44. See 7A Wright, Miller and Kane, § 1777.
45. See also Simon v. Merrill, Lynch, Pierce, Fenner & Smith, 482 F.2d 880, 882-83 (5th Cir. 1973); Walsh v. Ford Motor Co., 130 F.R.D. 260, 269-75 (D.D.C. 1990) (variation among state's laws concerning scope and implications of implied warranties and about written warranties); Coca-Cola Bottling Co. of Elizabeth, N.C. v. Coca-Cola Co., 95 F.R.D. 168 (D. Del. 1982); McMerty v. Burtness, 72 F.R.D. 450, 453-56 (D. Minn. 1976) (no (b)(3) class action because the breach of contract claims involve the laws of seven separate states).
46. See Advisory Committee Note to 1966 Amendment to Federal Rule 23; Parker v. George Thompson Ford, Inc., 83 F.R.D. 378 (N.D.Ga. 1979).
47. See Advisory Committee Note to 1966 Amendment to Federal Rule 23. 7A Wright, Miller & Kane, § 1779 at p. 551.
48. See, e.g., AM/COMM Systems, Inc. v. American Telephone & Telegraph Co., 101 F.R.D. 317, 322-23 (E.D. Pa. 1984) (anti-trust action regarding connectivity of various devices to telephone).
49. Id. at 322-23; 7A Wright, Miller & Kane, § 1780 at pp. 567-68.
50. 7A Wright, Miller & Kane, §1780 at pp. 572-73.
51. A fluid class recovery is where there is no individualized determination of damages, but instead the "class as a whole" is the plaintiff and the jury awards a bulk sum which the defendant pays into court. 479 F.2d at 1010. Then the court (the judge) determines how that money is to be distributed. Id.
52. See also Abrams v. Interco, Inc., 719 F.2d 23, 29-31 (2nd Cir. 1983); Kendler v. Federated Dept. Stores, Inc., 88 F.R.D. 688, 694-95 (S.D.N.Y. 1981); Galloway v. American Brands, Inc., 81 F.R.D. 580, 584-87 (E.D.N.C. 1978); Trecker v. Manning Implement, Inc., 73 F.R.D. 554, 560-64 (N.D. Iowa 1976) ; San Antonio Telephone Co. v. American Telephone & Telegraph Co., 68 F.R.D. 435, 443 (W.D. Tex. 1975).
53. 1 Newberg on Class Actions § 4.34 (listing cases); see especially, Cotchett v. Avis Rent A Car System, Inc., 56 F.R.D. 549, 553 (S.D.N.Y. 1972).

THE ALABAMA CLASS ACTION

*In the first part of this article, printed in the March 1994 **Alabama Lawyer**, the requirements for class certification were discussed. This second part covers class action issues involving jurisdiction and venue, discovery, percertification motions, abatement, certification hearings, appeals, statutes of limitations, notice, settlements, and attorney's fees.*

By: Alan T. Rogers and Gregory C. Cook

JURISDICTION AND VENUE

In Alabama, circuit courts have jurisdiction over class actions. District courts are not allowed to adjudicate class actions, see A.R.C.P. 23, District Court Committee Comments, and a circuit court will aggregate the claims of all class members to reach its jurisdictional amount in controversy. See *Thomas v. Liberty National Life Ins. Co.*, 368 So. 2d 254 (Ala. 1979).

Absent federal question jurisdiction, federal diversity jurisdiction may be invoked with diverse citizenship and the requisite amount in controversy. The United States Supreme Court has held that diversity need *only* be maintained between the *named* plaintiffs¹ (as opposed to *each* of the putative class plaintiffs) and the defendants. *Snyder v. Harris*. 394 U.S. 332, 340 (1969). But, as to the requisite amount in controversy, the amount must be shown as to *each* of the named plaintiffs *and* putative class members (*i.e.*, the court will not aggregate the claims of the class to satisfy the amount in controversy). *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *but see Garza v. National American Ins. Co.*, 807 F. Supp. 1256, 1258 (M.D. La. 1992) (citing cases and commentary and holding that 28 U.S.C. § 1367 overruled *Zahn*).

Venue

No Alabama Supreme Court case has yet specifically addressed venue for class actions, but presumably Alabama would follow the federal case law and apply Alabama's normal venue rules to the *named* plaintiffs.²

The principle of *forum non conveniens*, however, may be particularly suited to class actions that are filed in a venue convenient only to a representative plaintiff. Ala. Code § 6-3-21.1, allowing change or transfer of venue for convenience or in the interest of justice, should be carefully considered when a defendant or a substantial portion of the alleged class reside outside of the venue where the case is filed. Because of the broad scope of class action litigation, venue issues may be much more compelling in these cases, as compared to cases involving only a small number of parties and witnesses.

In federal court, venue for a class action under Rule 23³ is determined just as it is in a comparable type of non-class action. The court, however, only considers the residence of the *named* class representatives. See 3B MOORE'S FEDERAL PRACTICE § 23.96 at p. 560.1 n. 11 ("Because venue turns upon the convenience of the parties . . . it would make no sense to consider the residency of the other members of the class").

DISCOVERY

In most cases, discovery must proceed for the trial court to have adequate evidence on which to base its certification decision. The Alabama Supreme Court has stated: "The trial court *has the duty* to determine whether or not a motion is made by either of the parties . . . It *must* determine . . . that all prerequisites of 23(a) are met and, in addition, that at least one of the three requirements of 23(b) are satisfied." *Bagley v. City of Mobile*, 352 So. 2d 1115, 1118 (Ala. 1977).

At the certification hearing, the trial court must make a *factual determination* that the named representatives have met their burden of proof as to each of the elements discussed in the March 1994 *Alabama Lawyer* article, including numerosity, commonality, typicality and adequacy of representation. Because a decision to certify a class will bind absent class member's rights (possibly without notice), courts will often allow discovery to insure that a court's factual determination is correct.

In *First Alabama Bank of Montgomery, N.A. v. Martin*, 381 So. 2d (Ala. 1980), the Montgomery County Circuit Court permitted months of discovery regarding issues posed by the class allegations before conducting a hearing on certification. In *Marshall Durbin & Co. v. Jasper Utilities Board*, 437 So. 2d 1014, 1024 (Ala. 1983), the Walker County Circuit Court conducted a class certification hearing lasting three days and then denied certification. The denial was affirmed on appeal in part because *the evidence* showed that the named plaintiffs had claims arguably different from other members of the purported class.

Commentators have also agreed that fact issues are involved in the certification process and that discovery may be necessary in advance of certification. As stated, for example, by NEWBURG ON CLASS ACTIONS, 3d ed., § 7.08 at p. 7-29:

Discovery . . . of class representatives may be appropriate in order to probe the affidavits submitted in support of the class action, to test the plaintiff's alleged typicality of claims, to challenge specific areas which the defendant reasonably believes involve potential conflicts with class members, or otherwise to question the qualifications of the plaintiff to serve as a representative.

Lyons writes:

Often, some discovery may be necessary before the issue is ripe for judicial intervention.⁴

Discovery requests related to issues of class certification and notification are governed by Rule 23(d) – allowing the court to make such orders as are “appropriate” for the class action. Because the trial court is given flexibility in conducting the class action in general, the trial court is also giving flexibility in designing the timing and scope of discovery. Many federal courts, in adopting discovery orders, have relied on the *Manual for Complex Litigation, Second, 1985*. For instance, federal courts have entered orders limiting discovery to class issues until a certification hearing is held.⁵

The United States Supreme Court has held that trial courts in class actions should not require defendants to bear the costs of performing tasks requested by and benefitting the plaintiff. In *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), the plaintiff sought to obtain a list of all investment fund shareholders. The defendant showed that retrieval of the information would involve substantial costs. The United States Supreme Court held that the defendant should not have to pay the costs of the retrieval:

The general rule must be that the representative plaintiff should perform the tasks, for it is he who seeks to maintain the suit as a class action [A] party must bear the “burden of financing his own suit” Thus ordinarily there is no warrant for shifting the cost of the representative plaintiff’s performance of these tasks to the defendant.

437 U.S. at 356.

Courts have also allowed discovery from absent class members for the purposes of determining the propriety of class certification.⁶ For example, in *Transamerican Refining Corp. v. Dravo Corp.*, 139 F.R.D. 619, 622 (S.D. Tex. 1991), the court allowed discovery into issues of reliance by the absent class members, their actual damages and the amounts of damage.

PRE-CERTIFICATION MOTIONS

What if class certification has not been reached, but the defendant files a motion to dismiss or for summary judgment? May the trial judge dismiss the claims of a putative class before certification is considered? The answer is yes, although the *res judicata* (but *not* the *stare decisis*) effect of a dismissal may be eliminated for unnamed, putative class members.

While voluntary dismissals are subject to court approval, see Rule 23(e), *involuntary* dismissals are an exception. Involuntary dismissals will presumably not involve collusion or benefits to representative plaintiffs at the expense of the class.

Although Justice Maddox opined in a special concurrence in 1981 that pre-certification dismissal of a class action is rarely appropriate – *Jones v. Southern United Life Ins.*, 392 So. 2d 822 (Ala. 1981) (concurring opinion) – his opinion now may be the minority view, and there are Alabama cases in which motions addressed to the merits were considered in advance of certification.⁷ For instance, in *Helms v. First Alabama Bank of Gadsden, N.A.*, 386 So. 2d 450, 454 (Ala. Civ. App. 1980), the court affirmed a summary judgment dismissing the case where there had been no class certification ruling.

In *Amason v. First State Bank of Lineville*, 369 So. 2d 547, 549 (Ala. 1979), the Court affirmed a summary judgment dismissing a case and noted:

[N]o cases cited to us by the plaintiff mandate a postponement of the determination by the court for further discovery and an evidentiary hearing *when* the uncontroverted facts show affirmatively that the plaintiff does not share the identity of interest required [for class certification].

Federal cases have also allowed dispositive motions prior to class certification. A defendant may move for summary judgment prior to or at the same time as class certification. See, e.g., *Lorber v. Beebe*, 407 F. Supp. 279, 291 (S.D.N.Y. 1975). In so doing, however, the defendant assumes the risk that a judgment in his favor would not protect him from subsequent suits by other potential class members – the defendant must be content with *stare decisis* protection, rather than the protection of *res judicata*. See, e.g., *Roberts v. American Airlines, Inc.*, 526 F.2d 757, 762-63 (7th Cir. 1975). The *Manual on Complex Litigation*, § 30.11, p. 209, agrees, stating: “Often . . . the court not only may, but *should* rule on motions under Rule 12 or 56 without awaiting class certification.”

Defendants may raise Rule 12 grounds for dismissal. For example, federal cases have held that the requisites of a class action (*i.e.*, the facts) must be pled by the plaintiff with sufficient specificity for the complaint to withstand a Rule 12 challenge. See *Batsakis v. Federal Deposit Ins. Corp.*, 670 F. Supp. 749, 757 (W.D. Mich. 1987). The class action complaint must allege more than mere conclusory allegations that follow the language of Rule 23. See *Ahrens v. Bowen*, 646 F. Supp. 1041, 1047 (E.D.N.Y. 1986), *overruled on other grounds*, 852 F.2d 49 (2d Cir. 1988).

Pre-certification motions may also help define the scope of the alleged class. For instance in *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975), the court of appeals held that the federal securities laws were inapplicable to sales of a corporation’s stock to foreign purchasers outside of the United States – thus eliminating

from the putative class all purchasers other than those who were residents or citizens of the United States.

ABATEMENT

In a case of first impression, the Alabama Supreme Court recently granted a writ of mandamus ordering a trial court to stay an action brought in an individual capacity. The plaintiff was a member of a class that had already been certified in a separate action against the same defendant regarding the same allegations. See *Ex parte Liberty National Life Ins. Co.*, ____ So. 2d ____, 1993 W. L. 522564 (Ala.). The Alabama Supreme Court broadly wrote that:

The law is clear that the circuit court in which jurisdiction over a controversy is first invoked has exclusive jurisdiction over that controversy until the controversy is concluded, subject only to appellate review.

....

The Barbour Circuit Court initially exercised jurisdiction over this matter, and it must be permitted to retain jurisdiction without any interference by any other circuit court.

Id.

CERTIFICATION HEARING

Very early in the evolution of class action litigation in this state, the Alabama Supreme Court made clear that a class certification hearing and a deliberative process involving the prerequisites of Rule 23 are *mandatory* if a class is to be certified. In *Bagley v. City of Mobile*, 352 So. 2d 1115 (Ala. 1977), the trial court noted in its final judgment in favor of the plaintiffs that “this action has been properly maintained as a class action.” Reversing, the Alabama Supreme Court noted that the record did *not* reflect a class certification hearing or a separate order of class certification. The Court ruled that “an order of determination is mandatory” and that the trial court has the duty to determine the class action question whether or not a motion is made by either of the parties.” *Id.* at 1118.

A hearing may be requested by the one proposing the class, by the one challenging the class suit or by the court on its own motion. The court may permit discovery on questions related to the character and size of the class before the certification hearing and may allow such notice as discretion permits under Rule 23(d)(2).

Class issues and the evidentiary hearing must revolve around the Rule 23(a) requirements and, if a class is to be certified, a determination of Rule 23(b) class types

must be made – all covered in the first part of this article in the March 1994 edition of the *Alabama Lawyer*.

If a class *is* to be certified, an evidentiary hearing should, at a minimum, involve presentations by the named plaintiffs and their counsel to support their burdens to meet the Rule 23(a) requirements and an opportunity for the defendant to address those same issues through examination of the plaintiff's evidence and presentation of evidence of its own. Although the discretion afforded the trial court in molding class litigation allows certification to be modified or wholly withdrawn, and even recognizing that Rule 23 makes reference to certification taking place as soon as practicable, there is little logic in moving too quickly toward a certification hearing without allowing discovery addressed to the issue. Otherwise, the hearing will take on more of the characteristics of a preliminary exercise than it will a full consideration by the trial court of the Rule 23 requirements.

One federal commentator has noted:

In determining whether an action brought as a class action is to be so maintained, the trial court should carefully apply the criteria set forth in Rule 23 for the maintenance of a class action to the facts of the case; and if it fails to do so its determination is subject to reversal by the appellate court when the issue is properly before the latter court.

3B Moore's FEDERAL PRACTICE § 23.50 at p. 411.

APPEALS OF CERTIFICATION ORDERS

If certification is denied, may the plaintiffs appeal that order? If certification is granted, may defendants appeal that order? The Alabama Supreme Court has held that "an order *denying* class certification is an *appealable* 'final' order," noting that denial of certification effectively terminates the litigation as to all members of the class other than the original, named plaintiff (*i.e.*, the death knell doctrine). *Butler v. Audio/Video Affiliates, Inc.*, 611 So. 2d 330, 331 (Ala. 1992). The Court did not address the related question of the *res judicata* effect of the class ruling on any future attempts by class members to assert class rights in separate proceedings.

The federal courts, however, disagree with the "death knell" doctrine and hold that denials of certification are not final, appealable orders. *See, e.g., Gary Plastic Packaging Corp. v. Merrill, Lynch, Pierce, Fenner & Smith*, 903 F.2d 176, 178 (2d Cir. 1990).

As for orders *granting* class certification, the Alabama Supreme Court has ruled that such orders -- being inherently provisional in nature, subject to change as the litigation unfolds -- are *not* final judgments for purposes of appeal. In *First Alabama*

Bank v. Martin, 381 So. 2d 32 (Ala. 1980), the Court indicated its unwillingness to address interlocutory appeals of orders granting class certification, noting that such orders are inherently provisional; that the trial court is at liberty to alter or amend such a ruling at any time; and that the trial court may even terminate the class status at any time after the initial ruling. The *First Alabama* court noted that it did not want to become an advisory panel on certification orders. Federal courts agree.⁸

Later cases, however, reflect a willingness on the part of the Alabama courts to not only review certification orders before a trial on the merits, but to overturn those orders where Rule 23 requirements were not met. For example, in *Ex parte Blue Cross and Blue Shield of Alabama*, 582 So. 2d 469 (Ala. 1991), the Court granted a petition for writ of mandamus and overturned a trial court's certification of a class, the Court finding that the plaintiffs had not met their burden of proving each of the four elements of Rule 23(a).

If class certification is granted, the issue of certification may be raised in an appeal of the entire case. See, e.g., *Harbor Insurance Co. v. Blackwelder*, 554 So. 2d 329 (Ala. 1989); *Bagley v. City of Mobile*, 352 So. 2d 1115 (Ala. 1977).

Because of the broad range of issues included in class certification orders, and because of the provisional nature of these orders, trial courts in Alabama are given a certain amount of latitude or "discretion" in granting or denying class certifications. An oft stated rule is that such rulings will only be reversed for an abuse of discretion. See, e.g., *Butler v. Audio/Video Affiliates, Inc.*, 611 So. 2d 330, 331 (Ala. 1992). Such reversals for abuse of discretion have, however, occurred in some cases where the Alabama Supreme Court reviewed Rule 23 determinations by trial courts.⁹

If the court dismisses the case on the merits – whether or not Rule 23(c)(1) certification took place – the judgment is final and may be appealed. *Nichols v. Mobile Board of Realtors, Inc.*, 675 F.2d 671, 673 (5th Cir. 1982). A dismissal pursuant to settlement approved by the court pursuant to Rule 23(e) is also appealable as a final adjudication. *Gendron v. Shastina Properties, Inc.*, 578 F.2d 1313, 1315 (9th Cir. 1978).

STATUTE OF LIMITATIONS

What happens to the statute of limitations for claims of unnamed, putative class members when certification is denied? That is, if a class suit is filed, but certification is later denied *after* the statute of limitations has run on the class claims, will individual members of the putative class then be barred from bringing their own claims?

Alabama Law

The Alabama Supreme Court has addressed this issue several times, including:

First Baptist Church of Citronelle v. Citronelle-Mobile Gathering, Inc., 409 So. 2d 727, 729 (Ala. 1981)

Class certification was denied and the statute of limitations then expired. A second suit was filed and the defendant raised the statute of limitations. Justice Faulkner, writing for the majority, held that the statute of limitations is tolled from the date of commencement of the action until the date of denial of class certification. Finding that this tolling concept “enhances the policies underlying class action,” the majority opinion also stated that the ruling helped avoid multiplicity of suits. In dissent, Justice Torbert observed that the majority opinion would only serve to multiply suits and stale claims.

White v. Sims, 470 So. 2d 1191, 1193 (Ala. 1985)

Again speaking for the majority, Justice Faulkner observed that the statute of limitations is tolled as to all asserted members of a putative class until class certification is denied, regardless of notice to those individual members. Furthermore, “[w]hen a class action is instituted against a class of unnamed defendants, the statute is tolled as to all putative members of the defendant class.”

Corbitt v. Mangum, 523 So. 2d 348 (Ala. 1988)

Justice Shores’ opinion reiterated the rule of *First Baptist* and *White* and added a twist – although the statute of limitations resumes running when certification is denied, it will be tolled again if an amendment is filed seeking to certify a slightly different class – even though the motion to amend was pending without ruling for one year.

Ex parte Hayes, 579 So. 2d 1343 (Ala. 1991)

Justice Maddox’s majority opinion observed that, even where the single, named class representative turned out to have been dead before the suit was even filed, and even though class certification had never been reached, the statute of limitations was tolled by the mere assertion of a class suit, thus allowing – three years later and after the statute of limitations had run – an intervention of a new class representation to move the case toward a certification hearing.

These decisions can be illustrated in this hypothetical: John Doe, purporting to represent a class of customers of ABC, Inc., sues ABC in a class action. The statute of limitations runs the day after the suit is filed. Members of the purported class are never given notice of the suit, and certification is denied one year after suit is filed. The rest of the putative class would then have another day after class certification is denied to file their own claims, even though the statute of limitations had actually run on their claims a year earlier – all because of the fortuity of John Doe having made a class allegation in his own suit. In so doing, John Doe extended by one year the statute of limitations on the claims of the class even though they were not aware of his suit. The clock simply stopped ticking when John Doe's class suit was filed and started ticking again when certification was denied.

The Alabama decisions do not offer any guidance on when the tolling period ceases and the statute commences running once again, under other circumstances. Clearly the conclusion of the litigation would restart the statute of limitations, though *res judicata* issues would be presented in such a situation.

The general proposition in Alabama that it is only the pendency of an action in a court which has jurisdiction that tolls the statute of limitations is presumably applicable to class actions. See *Freer v. Potter*, 413 So. 2d 1079 (Ala. 1982); *Terminal Ry. v. Mason*, 620 So. 2d 637 (Ala. 1993).

Federal Cases

The United States Supreme Court has held that, where class certification is denied, the statute of limitations as to putative class members is tolled from the time of filing suit until the denial of certification. See *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 551-53 (1974) (tolled where class failed to satisfy numerosity); *Crown Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). This rule has been held to apply even where a (b)(3) class is sought and, after notice, certain members opt out. The rule applies to them as well. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). Note, however, that at least one federal court has declined to follow this tolling rule where the original class plaintiffs had failed to satisfy even the typicality or adequacy of representation requirements of Rule 23 and therefore could not serve as class representatives. See *In re Elscint Ltd. Secur. Litigation*, 674 F. Supp. 374 (D. Mass. 1987). Finally, although the limitations period is deemed tolled during the pendency of a class action for purposes of later intervention or individual suit by a class member, a person seeking to bring a later class action may *not* rely upon the tolling effect of an earlier class suit. See, e.g., *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985).

NOTICE

Rule 23 only *requires* notice for Rule 23(b)(3) type class actions and for settlements, regardless of class type (see Rule 23(e)). Rule 23 states:

In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the 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 specific 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 he desires, enter an appearance through counsel.

Rule 23(c)(2).

While notice is not required for (b)(1) and (b)(2) type class actions, Rule 23 allows the trial judge to order such notice when, in the judge's discretion, it is deemed appropriate. Rule 23(d)(2) states:

In the conduct of actions to which this rule applies, the court may make appropriate orders . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.

The failure to provide proper notice, when required, can cause the class action court not to have jurisdiction over those members who are not given notice, and thus may be a basis for collateral attack upon the judgment in the class action, as well as a basis for appeal. See, e.g., *Taylor v. Liberty National Life Ins. Co.*, 462 So. 2d 907 (Ala. 1984) (allowing a collateral attack on a class action in which a (b)(2) class was certified.

In the *Taylor* case, discussing due process requirements for the exercise of jurisdiction over absent class members, the Alabama Supreme Court has written:

When only injunctive and declaratory relief are sought in a class action, "the due process interest of absent members will usually be safeguarded by adequate representation alone." When individual monetary claims are at stake, however, "the balance swings in favor of some sort of notice."¹⁰

The court went on to state:

If analyzed in terms of what the class members have at stake in the different types of class actions, the reason for the different notice requirements for the different type classes is obvious – due process itself

requires different notice based on what rights and obligations are at stake in each of the three different class types.¹¹

In determining whether notice should be required in Rule 23(b)(1) and Rule 23(b)(2) class actions, courts have generally relied upon the degree of cohesiveness of the class and the degree to which property interests of absent class members are being adjudicated. These two factors bear directly upon whether notice is *constitutionally* required for due process and whether or not the class has been properly labeled as a 23(b)(1) or 23(b)(2) class. Rule 23(b)(1) and Rule 23(b)(2) classes tend to be more cohesive and thus may not have internal, conflicting interests.¹² For instance, in 23(b)(2) classes, it is more likely that judgments obtained by one member of the class will equally affect other members of the class, and it is less likely that there will be special defenses or issues relating to individuals.¹³ Because of this cohesion, it is more likely that the named representatives will adequately protect the absent members and everyone will be given their functional equivalent of a day in court.

The more likely that damages on an individual determined basis will be available to individual class members, the more likely that the requirements of Rules 23(b)(1) and 23(b)(2) will not be met and individual notice under Rule 23(b)(3) and Rule 23(c)(2) will be required. One court has said that even certain equitable remedies, if sufficiently individualized, could conceivably require notice to individual class members:

It is conceivable that certain equitable remedies, such as restitution, are sufficiently individual rather than class in nature as to present the same likelihood of divergent interests and thus the same need for heightened notice, as requests for individual, legal relief.¹⁴

Where a case predominantly seeks money damages on an individualized basis, individual notice to the class members may be required in order to satisfy the due process nexus necessary for obtaining jurisdiction. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Currently pending before the United States Supreme Court is *Ticor Title Ins. Co. v. Brown*, D.K. No. 92-1988, raising various issues as to notice and other Rule 23(b)(3) protections as to a class action settled under Rule 23(b)(2) without individual notice.

Costs

Generally, the plaintiff is required to pay the costs of notice. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

Type of Notice

The United States Supreme Court has held that, when notice is required, identifiable class members *should* be given individual notice, despite the cost that may be involved. See *Eisen*, 417 U.S. at 176 (“there is nothing in Rule 23 to suggest that

the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs”). Rule 23(c)(2) requires that all class members who can be identified through reasonable effort be contacted. The normal procedure is for the court to require the representative plaintiffs to submit a proposed list of persons to whom notice should be sent and then allow the defendant to object or offer a counter proposal.¹⁵

Typically, such notice is given via mail, although other methods have been used.¹⁶ Individual notice may also be combined with other types of notice to assure that class members who cannot be identified will be provided the best notice practicable under the circumstances. Typically, such notice is done through publication, notification of vendors, etc. If diligent efforts are used to provide notice to individual class members, the fact that individuals may not receive actual notice does not cause the class to lose its effect. See *J. C. Bradford & Co. v. Calhoun*, 612 So. 2d 396, 397-98 (Ala. 1992) (“Failure to receive notice of a class action does not exempt a class member from abiding by limitations set forth in a settlement thereof.”).

SETTLEMENTS

Whether or not the class has been certified, there can be no settlement without court approval and notice. Rule 23(e) provides:

(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

The purpose of Rule 23(e) is to protect putative class members from unjust settlements or *voluntary* dismissals made because the named class representatives lost interest or fortitude or were able to settle the case to their individual benefit, but not necessarily to the benefit of the class.¹⁷ Class actions are specifically exempted from Rule 41's provision for voluntary dismissals without court approval.

If a settlement is approved by the court and notice provided, the settlement will be *res judicata* to all class members (except for those that may have opted out via Rule 23(b)(3)). See *J. C. Bradford & Co. v. Calhoun*, 612 So. 2d 396, 397-98 (Ala. 1992).

Pre-certification Settlement

In *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 42 F.R.D. 324, 326-28 (E.D. Pa. 1967), three of the 13 defendants in an antitrust class action settled before class certification. The court held that there must be a presumption that there was a proper class action, therefore triggering the Rule 23(e) requirements. The court further noted that its approval of the settlement pursuant to Rule 23(e) could be combined with the consideration of class certification issues pursuant to Rule 23(c)(1). In the alternative, the court stated that it could hold the approval of the settlement in

abeyance pending a determination of class certification. The *Philadelphia Electric* procedures have been adopted by other federal courts.¹⁸

Notice

Court approval of a settlement is not allowed *until* notice has been given to the class members (*i.e.*, the hearing on the fairness of the settlement cannot occur until class members have received notice). However, notice of settlement is *not required* where (1) class certification is denied, (2) the class is dismissed on the merits, or (3) where the case is dismissed for lack of jurisdiction. Remember that, for purposes of case dismissal, notice is required for voluntary dismissals. note Rule 23's language – notice is required “in such manner as the court directs.” This is a discretionary function of the court, there being no single method of notice required under the Rule.

Federal courts have generally preferred written notice sent by mail to each class member, but examples of notices of proposed settlement include:

1. Flyers posted at a correction center giving notice of a prisoners' class action settlement were sufficient even though individual notice may have been practicable. *Van Horn v. Trickey*, 840 F.2d 604, 606 (8th Cir. 1988).
2. Publication of a proposed settlement was acceptable in *Handschu v. Special Services Division*, 787 F.2d 828, 833 (2d Cir. 1986).
3. Individual mail notice and the appointment of a guardian ad litem for any unknown, unborn, incompetent or minor members of a class and notice sent to the state attorney general for any members of the class who were charitable beneficiaries complied with due process. *Meyer v. Citizens & Southern Nat'l Bank*, 677 F. Supp. 1196, 1208-09 (M.D. Ga. 1988).

In at least one case, the Alabama Supreme Court was willing to permit collateral attack on a class action settlement where notice was not properly given to the parties seeking to attack the settlement, presumably on the basis that the failure to give notice was jurisdictional with respect to the class members in question. See *Taylor v. Liberty National Life Ins. Co.*, 462 So. 2d 907 (Ala. 1984).

Trial Court's Review of Settlement

The trial court's function is to assess the settlement under Rule 23(e). Generally, the trial court will hold a hearing on the settlement. One Alabama case has recently stated that the trial judge should give “meaningful evaluation” to a proposed settlement and provide parties opposed to the settlement a “meaningful opportunity to be heard at the fairness hearing.” *Ex parte Liberty National Life Ins. Co.*, ____ So. 2d ____, 1993

W.L. 522564 (Ala.). The nature of the hearing is determined by the circumstances of each case – for example, most are evidentiary in nature, some are not.¹⁹ The trial court must determine if the settlement is fair and reasonable. See, e.g., *Allen v. Alabama State Board of Education*, 612 F. Supp. 1046, 1053-55 (M.D. Ala. 1985), *vacated on other grounds*, 636 F. Supp. 64 (M.D. Ala. 1986). One federal court has noted that “such a determination is committed to the sound discretion of the trial judge. Great weight is accorded his views because he is exposed to the litigants, and their strategies, positions and proofs.” *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 34 (3d Cir. 1971). The trial court should support its conclusions in written form to aid appellate review.

The United States Supreme Court has held that the only options for the trial judge in reviewing a proposed settlement are to accept or reject the entire proposal. To reject or accept portions of the proposed settlement, or to actively restructure the proposal, are inappropriate. *Evans v. Jeff D.*, 475 U.S. 717, 726-27 (1986).

In approving a settlement, the court must act as a guardian of the rights of the absentee class members. The burden is on the proponents of the settlement to persuade the court that it is fair, adequate and reasonable. See, e.g., *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983). Although the adequacy of the settlement is a discretionary decision based upon the facts of each case, among the most important factors for the court to consider are:

1. Strength of the plaintiffs’ case versus the amount offered in settlement.
2. The presence of any collusion in reaching the settlement.
3. The reaction of class members to the settlement – after notice.
4. Opinions of counsel.
5. The stage of the proceedings and the amount of discovery completed.
6. The plan for distribution of the proceeds.
7. Whether settlement would waive other viable claims of the class members.
8. Whether proper notice has been made.²⁰

Courts have sometimes afforded parties opposed to class action settlements the opportunity to take limited discovery regarding settlement; however, the courts must carefully balance this need against the danger that wide-open discovery will threaten

the compromise and thus injure the class members (e.g., discovery can be used as a threat to raise costs).²¹ Recently, the Alabama Supreme Court allowed limited discovery directed toward the appropriateness of settlement. See *Ex parte Liberty National Life Ins. Co.*, ____ So. 2d ____, 1993 W.L. 522564 (Ala.) (Granting a writ of mandamus to intervenors who sought to compel the trial judge to rule on their discovery motions before the fairness hearing was held on the class settlement).

A trial court's approval of a settlement, put in the form of a final order, is appealable. A member of the class or putative class who appears after notice and objects to the settlement has a right to appeal from the final judgment *approving* the settlement. See *Armstrong v. Board of School Directors*, 616 F.2d 305 (7th Cir. 1980). However, an appellate court will only intervene upon a clear showing that the trial court has abused its discretion. *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 207 (5th Cir. 1981). If the settlement is *not approved*, a writ of mandamus may be sought, but it is rarely issued by an appellate court since the trial court's review of a class settlement is a discretionary function. See *In re Traffic Executive Ass'n – Eastern R.R.*, 627 F.2d 631 (2d Cir. 1980).

ATTORNEY'S FEES

Alabama courts have exercised close supervision of attorney's fees to avoid conflicts of interest developing between the class and its attorneys. See, e.g., *State v. Brown*, 577 So. 2d 1256 (Ala. 1991) (approving an attorney's fee where the circuit court judge did an exhaustive analysis of the proper factors in awarding an attorney's fees); *Reynolds v. First Alabama Bank of Montgomery, N.A.*, 471 So. 2d 1238 (Ala. 1985) (*reducing* attorney's fee in class action).

The Rule 23(e) requirement of court approval for any class action settlement extends to attorney's fees arrangements. This approval by the court may be similar in form to a remittitur.²² Court approval is necessary for *any* award of attorney's fees, whether by way of settlement or resolution of the case or final judgment. Federal courts have noted a need for close supervision of fee awards in class actions, particularly where the fees will come out of a common fund and diminish class members' recoveries. For instance, in *In re Fine Paper Antitrust Litigation*, the district court noted, in response to an attorney's fee request that amounted to over 40 percent of the settlement fund that:

These fee petitions are grossly excessive on their face and, regrettably, lend substance to the widely held and mostly unfavorable impressions of the plaintiffs' class action bar, sometimes referred to as the class action industry.

98 F.R.D. 48, 68 (E.D. Pa. 1983).

The typical approaches to fees include the common fund approach of *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939) and the common benefit rule. See, e.g., *Mills v. Electric Auto-lite Co.*, 396 U.S. 375, 392-97 (1970). Courts have applied both a percentage method and a lodestar method (a multiplier based upon the hours worked) to determine attorney's fees, often using both to ensure that no attorney's fee is out of line.²³

CONCLUSION

Class actions are complex proceedings that should be approached cautiously. Certification of a class involves much more than a belief that there are numerous, potential members of a class. If a class is to be certified, the due process rights of absent class members, who may not receive notice, are dependent upon the adequacy of the representatives and the diligence of the trial judge. The identification of class members and providing notice can be extraordinarily complex and time consuming. The manageability and resolution of class actions can be difficult because of individual issues of reliance, damages and counterclaims. The court must be constantly vigilant against potential conflicts of interest within the class and its attorneys.

Endnotes

1. This article, for simplicity, refers to plaintiff class actions rather than defendant class actions. For purposes of the discussions in this article, there are no distinctions between these type of classes. Presumably, however, both Alabama and federal courts would be more likely to scrutinize the due process concerns of binding absent defendants as opposed to binding absent plaintiffs. Such a consideration is extremely important in deciding what type of notice to provide. See *infra*.
2. Compare *Ex parte Blue Cross and Blue Shield of Alabama*, 582 So. 2d 469 (Ala. 1991) (applying general venue provisions in a class action context); compare, e.g., Ala. Code §§ 6-3-2, 6-3-3, 6-3-4, 6-3-5, 6-3-6, 6-3-7.
3. This article uses “Rule” to refer to both the Ala. R. Civ. P. and the Fed. R. Civ. P. Ala. R. Civ. P. 23 and Fed. R. Civ. P. 23 are essentially identical and the Alabama courts have stated that federal precedent is persuasive authority for Alabama procedure. *First Baptist Church of Citronelle v. Citronelle-Mobile Gathering, Inc.*, 409 So. 2d 727 (Ala. 1981).
4. C. Lyons, *Alabama Practice: Rules of Civil Procedure*, Annotated, § 23.10 at p. 361 (2nd ed. 1986).
5. See, e.g., *Plummer v. Chicago Journeyman Plumbers’ Local Union No. 130*, 77 F.R.D. 399, 402 (N.D. Ill. 1977); *Glass v. Philadelphia Elec. Co.*, 64 F.R.D. 559, 561 (E.D. Pa. 1974). See also Newburg on Class Actions, 3d Ed. § 7.08 at p. 7-28.
6. See 7B Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d*, § 1796.1 p. 334 (hereinafter Wright, Miller & Kane).
7. See, e.g., *Jackson v. CIT*, 630 So. 2d 368 (Ala. 1993) (affirming summary judgment and therefore not reaching class certification); *Sanders v. Colonial Bank of Alabama*, 551 So. 2d 1045 n. 1 (Ala. 1989) (finding class certification moot because summary judgment was proper).
8. See 3B Moore’s Federal Practice ¶ 23.97 p. 23-565.
9. See, e.g., *Ex parte Blue Cross and Blue Shield*, 582 So. 2d 469 (Ala. 1991); *Bagley v. City of Mobile*, 352 So. 2d 1115 (Ala. 1977).

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10. *Taylor v. Liberty National Life Ins. Co.*, 462 So. 2d 907, 911 (Ala. 1984), quoting, *Note, Class Actions: Certification and Notice Requirements*, 68 Geo. L.J. 1009, 1028 n. 161 (1980).
 11. *Id.* at 911.
 12. *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 256 (3rd Cir. 1975); *Battle v. Liberty National Life Ins. Co.*, 770 F. Supp. 1499, 1515 (N.D. Ala. 1991); Wright, Miller & Kane § 1786.
 13. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983); *Battle v. Liberty National Life Ins. Co.*, 770 F. Supp. at 1517 & n. 50 (citing cases and commentaries).
 14. *Battle v. Liberty National Life Ins. Co.*, 770 F. Supp. at 1517, n. 50.
 15. See generally Wright, Miller & Kane § 1786 p. 200-01.
 16. See Manual on Complex Litigant, 2nd, § 30.211 (“notice by mail should generally be employed and, indeed, may be essential”). See, e.g., *In re Asbestos School Litigation*, 104 F.R.D. 422, 439 (E.D. Pa. 1984).
 17. See, e.g., 3B Moore’s Federal Practice § 23.80 p. 23-478; Wright, Miller & Kane § 1797 p. 340.
 18. See Manual on Complex Litigation, 2nd, § 30.45; Wright, Miller & Kane § 1797.
 19. See, e.g., *Calhoun v. Cook*, 487 F.2d 680 (5th Cir. 1973) (reversing a settlement where the trial court did not hold an evidentiary hearing); see generally Wright, Miller & Kane § 1797 at 354-55 (listing cases with and without evidentiary hearings).
 20. 3B Moore’s Federal Practice § 23.80[4] p. 489-90; Wright, Miller & Kane § 1797.1 (listing example cases).
 21. See Wright, Miller & Kane, § 1796.1 (pocket part); *In re Amsted Indus., Inc. Litigation*, 521 A.2d 1104 (Del. Ch. Ct. 1986) (denying discovery).
 22. 3B Moore’s Federal Practice § 23.91 at p. 533-34.
 23. See *Mashburn v. National Healthcare, Inc.*, 684 F. Supp. 679 (M.D. Ala. 1988) (discussing the merits and problems of both methods, in depth).