

**THE ALABAMA CLASS ACTION:  
DOES IT EXIST ANY LONGER? – AND DOES IT MATTER?  
By Gregory C. Cook**

Ten years ago our firm authored two articles for the Alabama Lawyer regarding the rising tide of class actions and taking inventory of the basic requirements and types of such actions.<sup>1</sup> Since that time, the landscape has drastically changed, including (1) two amendments to FRCP (1999 and 2003), (2) a class action reform bill passed by the Alabama legislature, Ala. Code § 6-5-640 *et seq.*, and (3) much more intense review by the Alabama appellate courts. Several weeks ago the landscape changed again with the passage of the Class Action Fairness Act of 2005 (the “2005 Act”) by Congress. This article aims to summarize the current Alabama law on certification of class actions, summarize the 2005 Act, and highlight the changes since 1994. Despite these changes, there remains an appropriate role for Alabama class actions and the majority of legal standards remain the same as in federal courts and as in the 1994 articles.

The number and result of class action appellate decisions in Alabama is striking from 1997 to the present, as compared to the previous years (very roughly speaking, from 1997 to the present, the decisions are 39 to 6 against class actions and from 1990 to 1996, 6 to 4 for class actions). The legal reasons for this result appear to be centered upon: (1) a lack of predominance for A.R.C.P 23(b)(3) actions (the reason for the vast majority of rejections), (2) sloppy, incomplete or obviously inaccurate class certification orders by the trial court, (3) attempts to force actions into the mandatory class of A.R.C.P. 23(b)(2) that clearly do not fit, (4) an unwillingness of the Alabama appellate courts to allow the "bifurcation" of complex actions to address the predominance issues and (5) a much more rigorous review of certification orders on

appeal (especially those orders which appear to defer difficult management issues until later in the litigation).

### **Summary of Federal Changes**

The Class Action Fairness Act of 2005 makes two types of changes to federal law: (1) it substantially broadens federal jurisdiction (both original and removal) for class actions, and (2) it heightens scrutiny of class action settlements (including attorney fees). These settlement issues are covered briefly in an endnote.<sup>2</sup> It is only effective for newly filed cases.

The 2005 Act establishes original jurisdiction over any class action if the matter in controversy exceeds \$5 million, exclusive of costs and interest, and if minimal diversity exists (that is, any class member is a citizen of a state different from any defendant). Damages are aggregated to determine if the \$5 million is met. A District Court may, in its discretion, decline to exercise jurisdiction in such a class action if (1) the “primary defendants” are citizens of the state in which the action was filed, and (2) between one-third and two-thirds of the members of the proposed plaintiff class are also citizens of such state (must decline if it exceeds two-thirds).<sup>3</sup> There are listed exceptions to such jurisdiction, such as primary defendants that are states, state officials, or other government entities, plaintiff classes less than 100, securities claims, and state law claims involving internal corporate affairs.

Removal is consistent with these original jurisdiction provisions. Further, a class action may be removed to federal court whether or not any defendant is a citizen of the state in which the action is brought, and may be removed by any defendant without the consent of all defendants. Remand orders are appealable (but these are discretionary

appeals with very short time deadlines making them unlikely to be frequently used). However, the multidistrict litigation transfer procedure, 28 U.S.C. § 1407, is not available to these actions. The 2005 Act also applies to “mass actions” (over 100 plaintiffs).

These provisions are dramatic extensions of federal court jurisdiction, but will likely not affect Alabama class actions where the majority of class members are from Alabama – unless there is no “primary” defendant or no defendant from whom “significant relief” is sought from Alabama. One possible effect may be the filing of new cases in federal court that, conceivably might not have been filed in the State of Alabama.

### **General Background on Alabama Classes**

Class actions in Alabama are brought under Rule of Civil Procedure 23, which is identical to pre-1999 F.R.C.P. 23 (even after changes to F.R.C.P. 23, the Alabama courts continue to state that federal decisions are persuasive authority). 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."<sup>4</sup> The new Alabama class action statute (echoing repeated federal decisions and recent Alabama decisions), insists that classes may be certified only after a "rigorous analysis." At all times it is the plaintiff's burden to prove the elements of Rule 23.<sup>5</sup>

A class of defendants may also be certified (apparently in very narrow circumstances). 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" (note the deadlines in the new Alabama statute and the difference from the wording of amended F.R.C.P. 23).

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.<sup>6</sup>

### **The 23(a) Requirements**

The four requirements of Ala. R. Civ. P. 23(a) are often referred to as: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Recent Alabama cases have rarely focused on any of these requirements as decisive, with the sometime exception being adequacy. In sum, these elements have changed very little over the last ten years.

The numerosity element is virtually never a decisive factor. Federal law has generally held that if a class number is at least 50, numerosity is met. The few Alabama cases rejecting numerosity are probably better analyzed as an inability to identify class members (typically a (b)(3) issue).<sup>7</sup>

The plaintiff must also show there are common questions of fact **or** law between all members of the class. Alabama cases have rarely found this factor decisive – probably because it is a much lower hurdle than the predominance factor discussed below and because the courts have found that this factor blurs with typicality.<sup>8</sup> The cases rejecting certification on this basis are probably best understood as predominance cases.<sup>9</sup> The trial court must, however, specifically identify the common issues of fact and law to define the class (or classes).

The class representative's claim must also be typical of the class claims. The concept 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. Like numerosity and commonality, this factor has rarely been decisive in Alabama decisions. Courts sometimes blur typicality with the requirement that the named plaintiff be an adequate representative of the class.<sup>10</sup>

Although some cases, in determining typicality, appear to focus entirely upon whether “a plaintiff/class representative's injury arises from or is directly related to a wrong to a class and that wrong to the class includes the wrong to the plaintiff,”<sup>11</sup> the more detailed opinions look more broadly and consider, among other things, individualized defenses that may exist against the representative,<sup>12</sup> whether certain individualized issues will receive inordinate attention (either for the representative's claim or the class' claim),<sup>13</sup> and the question of whether the representative will be able to establish the bulk of the class' claim through his own claim.<sup>14</sup>

Finally under Rule 23(a), a class representative must show adequacy. A class representative acts in a fiduciary role, and the court will therefore examine the representative to assure the due process rights of the absent class members are protected. 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.

The most important analysis in adequacy is whether there is a conflict of interest (even a potential conflict). In a key decision, the United States Supreme Court added considerable emphasis to this criteria, especially in settlement classes, and emphasized

the constitutional aspects of this requirement. In Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997), the Court confronted a massive Rule 23(b)(3) class action settling monetary claims for personal injury against a number of asbestos manufacturers. Despite an incredibly detailed trial court finding and record, the Court rejected the settlement, holding that (1) class certifications decisions are subject to the same level of scrutiny even if they are the product of a settlement (although the particular factors considered may differ), and (2) potential conflicts of interest among the class must be considered very carefully, especially when the settlement involves persons who may not realize that they are class members.

Other decisions have likewise scrutinized possible conflicts of interest and have considered whether certain class members may have benefited from the alleged wrongdoing, or whether there are major defenses or major elements that the class representative simply has no incentive to pursue (or which he may wish to avoid because of the effect upon himself).<sup>15</sup>

Another adequacy issue (and perhaps related to the conflict issue) is whether the class representative has chosen to ignore certain possible claims. Recently the Alabama Supreme Court clarified this issue and held that the failure of a class representative to plead all claims can bar their adequacy, but normally only where such failure might create a res judicata bar for absent class members. Regions Bank v. Lee, 2004 WL 1859678 at \*6 (Ala. Aug. 20, 2004) (limiting Ex parte Russell Corporation, 703 So. 2d 953 (Ala. 1997)).<sup>16</sup>

### **The Three Class Types**

Disputes over whether actions satisfied one of the Rule 23(b) categories has fueled almost all of the recent Alabama Supreme Court class actions decisions. Rule

23(b)(1) actions (mandatory, no notice) are very rare (only one clear decision approving a (b)(1) action in the last ten years in Alabama).

Rule 23(b)(1) actually establishes two somewhat unrelated types of class actions. The first is Rule 23(b)(1)(A) which establishes a class 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. . . ." <sup>17</sup> Most decisions 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. 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). <sup>18</sup> 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. Rule 23(b)(1)(A) actions are appropriate where a defending part 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. <sup>19</sup>

The Alabama Supreme Court has now apparently agreed with the Eleventh Circuit and held that certification for Rule 23(b)(1)(A) cases is limited to cases seeking injunctive and declaratory relief. <sup>20</sup>

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*. <sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup> Rule 23(b)(1)(B) is not appropriate, usually, for mass torts. The leading case on Rule 23(b)(1)(B) is Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) where the Supreme Court rejected Rule 23(b)(1)(B) in an asbestos class action based upon the theory of a "limited fund", holding that for such a certification to be appropriate, there must be substantial evidence of the limitation of the fund and that the limitation on the fund is independent of the agreement of the parties. Alabama cases have likewise been very strict in requiring substantial evidence of the limitation of the fund and barring the use of (b)(1)(B) based upon the theory that the amount of punitive damages available is limited.<sup>24</sup>

### **Rule 23(b)(2)**

Rule 23(b)(2) allows for mandatory, no notice classes where 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. 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.<sup>25</sup>

If the predominant relief sought is damages, the class should not be certified under Rule 23(b)(2). Determining the predominant relief has been a major dispute over the last ten years in Alabama, and it has been clearly settled now by the adoption of the governing federal case law on how to determine when injunctive relief predominates.

Compass Bank v. Snow, 823 So. 2d 667, 678 (Ala. 2001) (reverses (b)(2) certification; adopts Allison v. Citgo Petroleum Corporation, 151 F.3d 402, 414-415 (5th Cir. 1998) and holding that incidental damages under the Allison case are only those flowing directly from a defendant's liability to the class as a whole and do not exist where a calculation of damages would require individualized determinations). In fact, one recent Alabama Supreme Court case called into question whether a (b)(2) class could ever award any money damages of any kind (but did not absolutely foreclose the possibility).<sup>26</sup>

### **Rule 23(b)(3)**

The single most important reason that most class actions fail in Alabama is that they are forced to meet Rule 23(b)(3) and cannot. Rule 23(b)(3) is primarily a damages class, allowing opt out and requiring notice. 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). The standards for certification are considerably more stringent under Rule 23(b)(3).

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. Alabama courts often analyze the manageability factor and superiority requirements together with predominance.<sup>27</sup>

Most recent Alabama cases focus on the predominance requirement. These cases make clear that the predominance requirement is "far more demanding" than the commonality requirement of Rule 23(a)(2) and that it is not sufficient that some common questions merely exist.<sup>28</sup> The Court has recently written that the predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," and that in making this determination "courts examine the substantive law applicable to the claims and determine whether the plaintiffs pursuing sufficient proof that common questions of law or fact predominate over individual claims."<sup>29</sup> The Court has also explained: "we have held that the necessity of individualized testimony from each class member to prove an essential element of the cause of action defeats class certification."<sup>30</sup>

Perhaps the sharpest reaction of the Alabama Supreme Court has been to fraud and suppression claims (and the analytically similar breach of fiduciary duty claims). While there remains one older Alabama case affirming a class certification of a fraud case, all recent Alabama decisions have squarely rejected such a class certifications. Some of these decisions have gone so far as to suggest that there could never be a fraud class certified and others have left a very narrow theoretical possibility.<sup>31</sup> These decisions make clear that if there have been a variety of representations (or a variety of personal interactions between the class and different individuals), that a certification is virtually impossible. Even if there has been a standard representation, by one speaker (such as a written representation), the need to prove individual reliance appears to prohibit class certification (as can be, in different cases, whether there is a duty, whether the statute of limitations has run because of later information, and whether the

reliance is reasonable based upon what the class member knew).<sup>32</sup> Likewise conspiracy claims have failed for the same reasons.<sup>33</sup>

In repeatedly rejecting clearly inappropriate fraud class certifications, the Alabama Supreme Court has also rejected the tool of "bifurcation" (as well as rejecting any "presumption" of reliance theory (such as "fraud on the market" which applies to federal securities claims)).<sup>34</sup> Such methods have been used by some aggressive federal courts (and for certain statutory federal claims) and have reduced the predominance of individual issues. Clearly the Alabama Supreme Court has come to believe, correctly, that the time and resources available to federal courts are substantially greater than the normal Alabama Circuit Court.

Likewise, the Alabama Courts have repeatedly rejected certifications of unjust enrichment claims (on at least five separate occasions) based on a lack of predominance. One of the most recent examples is Avis Rent A Car Systems, Inc. v. Heilman, 876 So.2d 1111 (Ala. 2003). The Alabama Supreme Court refused certification of an unjust enrichment claim because each claim for unjust enrichment "depends on the particular facts and circumstances of each case." The Court noted that it has "repeatedly held that such claims are unsuitable for class action treatment."<sup>35</sup>

Defenses have also been found to destroy predominance (including mitigation of damages, statute of limitations and voluntary payment).<sup>36</sup> However, the defense must be one that the preliminary facts show is not merely theoretical and which has been actually pled.<sup>37</sup> Likewise, the inability to identify class members will doom predominance.<sup>38</sup> In addition, the claim for emotional harm may limit any class action.<sup>39</sup> Counterclaims (again if not merely theoretical and if they cannot be handled with

management tools) can also doom predominance and manageability (and, if they place absent class members at risk of loss, doom superiority).<sup>40</sup>

Similarly, if the class will involve the application of multiple states' laws, predominance may be destroyed (and superiority defeated because of the difficulties of interpreting and applying correctly the law of multiple states). In fact, most Alabama cases dealing with nationwide class actions have failed on this reasoning.<sup>41</sup> The Court has emphasized that the trial court must determine with a rigorous analysis whether variations in state laws defeat the predominance requirement under Rule 23(b)(3).

The Supreme Court has also rejected a number of breach of contract class certifications based on predominance reasoning – claims that might involve fewer individual issues. These decisions have been based upon the conclusion that the contract has been ambiguous and therefore individual parole testimony would be necessary to determine the intent and understanding of the contracting parties. For instance, in Mann v. GTE Mobilnet of Birmingham, Inc, 730 So. 2d 150 (Ala. 1999), the court not only denied class status to fraud claims but also to the breach of contract claim (the complaint alleged that the defendant's rounding up of any portion of a cellular phone minute was a breach of contract). The Court found that the cellular contracts were ambiguous and that therefore the particular understanding of each customer would need to be individually reviewed for the breach of contract claim, thus defeating predominance under Rule 23(b)(3). This same reasoning defeated class certifications dealing with the interest rate on renewing CD's, the check posting order for NSF fees, fees in loan documents, taxes in lease documents, and severance benefits allegedly promised in group meeting.<sup>42</sup>

The Alabama class action is not dead, however. It lives for (among others) certain contract claims, certain warranty claims, certain pure statutory claims, and true declarative and injunctive claims. For instance, in Avis Rent A Car Systems, Inc. v. Heilman, 876 So.2d 1111 (Ala. 2003), the Court affirmed certain portions of a breach of contract class regarding whether or not certain franchise fees could be added to rental car charges. The Court determined that the breach of contract claim could be certified because not every ambiguity in a contract requires extrinsic evidence. The complete absence of any reference to recruitment on the rental jacket did not create an ambiguity. These can be resolved through the normal canons of construction such as *ejusden generis* and *noscitur a sociis*.

Likewise the Court has found predominance satisfied in a breach of warranty claim. In Cheminova America Corporation v. Corker, 779 So. 2d 1175 (Ala. 2000), the Court affirmed a certification of a class for recovery of economic damages only for a warranty breach for the producer and distributor of skin care products alleging it contained dangerous and unlabeled ingredients. The trial court had rejected the fraud and suppression claims and the personal injury claims, but certified a national class under contract equity and the UCC. The Court noted that "the principles of the UCC can be easily applied on a class-wide basis."

In Ex parte Government Employees Insurance Company (GEICO), 729 So. 2d 299 (Ala. 1999), an insured claimed that GEICO's corporation policies regarding uninsured motorist coverage (imposing a setoff) were invalid. He asserted tort claims (bad faith, fraud, etc.), breach of contract and a declaratory judgment. The Court reversed the class certification on all claims except the declaratory judgment, but held

that such a claim was appropriately certified. Particularly interesting is the Court's determination that the monetary claims were not appropriate for certification under Rule 23(b)(2) or 23(b)(1).

### **Conclusion**

The Alabama class action is not dead – but it has been properly limited to those cases affecting Alabama and limited to those claims and cases that Alabama Circuit Courts have the time and resources to manage. With the passage of the Class Action Fairness Act of 2005, the more difficult to manage class actions may find a forum in the federal courts.

## ENDNOTES

<sup>1</sup> Alan T. Rogers & Gregory C. Cook, "The Alabama Class Action" (Part I & II), 55 Ala. Law. 158 & 105 (1994).

<sup>2</sup> Among other things, the 2005 Act (1) limits the usefulness of coupon settlements by requiring that the portion of attorney's fees attributable to the coupons will be based on value to class members of coupons redeemed, or else on the time counsel reasonably expended, in the court's discretion. If the settlement includes coupons and equitable relief, attorney's fees may be based on a combination of recovery of coupons and time reasonably expended; (2) requires that notice be given to the "appropriate" federal and state officials of a proposed settlement and requires that no approval can occur for 90 days after such notice.

<sup>3</sup> In addition to denying federal jurisdiction to cases where two-thirds of the class and the primary defendants are from the same state, the 2005 Act also denies jurisdiction for such two-third cases if at least one defendant (a) is a defendant from whom significant relief is sought, (b) whose alleged conduct forms a significant basis for the claims asserted, and (c) is a citizen of the state in which the action was originally filed, given that no similar class action has been filed on behalf of the same plaintiffs against the same defendants during the preceding three years. Notably the Act does not define "primary defendants" or "significant relief" or "significant basis."

<sup>4</sup> Marshall Durbin & Co. v. Jasper Utilities Board, 437 So. 2d 1014, 1025 (Ala. 1983).

<sup>5</sup> Disch v. Hicks, 2004 WL 2418061 (Ala. Oct. 29, 2004) (reversing approval of class action settlement because no rigorous analysis done in approval order); General Motors Acceptance Corporation v. City of Red Bay, 825 So. 2d 746, 748 (Ala. 2002) (reversing because § 6-5-641(e) "requires the trial court to conduct a rigorous analysis to determine whether the party seeking class certification has met the burden of proving that the requirements of Rule 23, Ala. R. Civ. P., had been satisfied"); Allstate Insurance Company v. Ware, 824 So. 2d 739, 744 (Ala. 2002) ("the punitive class representatives bear the burden of proving **all of the Rule 23(a) criteria and at least one of the Rule 23(b) criteria.**") (emphasis in original); Ex parte Exxon Corp., 725 So. 2d 930 (Ala. 1998) (reversing class certification because of choice of law issues: "plaintiffs bear the burden of providing an extensive analysis of state law variations to determine whether there are insuperable obstacles to class certification."); see also Ex parte CIT Communications Finance Corp., 2004 WL 1950292 (Ala. Sept. 3, 2004) (based upon § 6-5-641, stating that it is the burden of plaintiff to show why discovery is class related before certification if defendant objects).

<sup>6</sup> Ala. R. Civ. P. 23(d) and (e).

<sup>7</sup> 7A Wright, Miller & Kane, Federal Practice & Procedures: Civil 2d, § 1762 at pp. 170-186 (1986)(listing cases); Jones v. Firestone Tire & Rubber Co., Inc., 977 F.2d 527, 534 (11th Cir. 1992) (21 members is "generally inadequate"); Cheminova America Corporation v. Corker, 779 So. 2d 1175, 1179 (Ala. 2000) (finding numerosity for a

nationwide class for a breach of warranty; "the numerosity requirement imposes no absolute minimum number . . . the court can accept common sense assumptions in order to support a finding of numerosity and estimates of the class size suffice for the purpose of this rule."); Ex parte Green Tree Financial, 684 So. 2d 1302, 1308 (Ala. 1996) (forced placed insurance; rejecting class because, among other things, no evidence at all of numerosity).

<sup>8</sup> Avis Rent A Car Systems, Inc. v. Heilman, 876 So.2d 1111, 1116 (Ala. 2003) (typicality and commonality blur); Funliner of Alabama, LLC v. Pickard, 873 So.2d 198, 210 (Ala. 2003) (predominance requirement "is far more demanding than the commonality requirement of Rule 23(a)"); Cheminova America Corporation v. Corker, 779 So. 2d 1175, 1179 (Ala. 2000) (commonality requirement "does not require that all questions of law or fact be common . . . a common nucleus of operative facts is usually enough to satisfy the commonality requirement of Rule 23(a)(2)").

<sup>9</sup> General Motors General Acceptance Corporation v. Dubose, 834 So. 2d 67, 78 (Ala. 2002) (reversing class certification because an ambiguity in the lease agreement regarding tax issues prevented the commonality requirement); Mann v. GTE Mobilnet of Birmingham, Inc., 730 So. 2d 150, 155 (Ala. 1999) (refusing class because plaintiff could not establish commonality because the contract was ambiguous about rounding up of minutes on cell phone service); Ex parte Government Employees Insurance Company (GEICO), 729 So. 2d 299 (Ala. 1999) (insured argued that setoff for uninsured motorist coverage was invalid and asserted bad faith, fraud, contract claims; certification reversed on lack of commonality).

<sup>10</sup> 3 B. J. Moore & J. Kennedy, Moore's Federal Practice 23.06-2 (2d ed. 1991); 1 Newberg & Conte, Newberg on Class Actions §3.13 (3d Ed. 1992); 7A Wright, Miller & Kane, § 1764 at pp. 228-232.

<sup>11</sup> Warehouse Home Furnishings Distributors, Inc. v. Whitson, 709 So.2d 1144, 1149 (Ala. 1997).

<sup>12</sup> Cutler v. Orkin Exterminating Company, Inc., 770 So. 2d 67, 71 (Ala. 2000) (refusing certification of portion of class with arbitration clause because of typicality concerns); Ex parte Gold Kist, Inc., 646 So. 2d 1339, 1342 (Ala. 1994) (certifying class but stating that "the possible existence of a defense unique to the claims of one or more of the named plaintiffs" was relevant to typicality but not fatal in that case); Levine v. Berg, 79 F.R.D. 95, 97 (S.D.N.Y. 1978) (refusing certification because of typicality because 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).

<sup>13</sup> Angelastro v. Prudential-Bache Securities, Inc., 113 F.R.D. 579, 582 (D.N.J. 1986) ("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"); Weiss v. York Hospital, 745 F.2d 786, 809 n.36 (3rd Cir. 1983).

<sup>14</sup> Avis, 876 So.2d at 1116, 1117 (reversing portions of certification regarding whether certain fees could be added to rental car charges because claims of individual renters were based on written terms of rental jacket unlike business travelers); Brooks v. Southern Bell Tel. & Tel. Co., 133 F.R.D. 54, 58 (S.D. Fla. 1990) (noting that 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.").

<sup>15</sup> See, e.g., Cutler v. Orkin Exterminating Company, Inc., 770 So. 2d 67, 71 (Ala. 2000) (refusing class certification for those class members with arbitration clauses because class representative was inadequate to represent them; "absence of an arbitration clause in the contracts executed by Cutler and Lewin could present a conflict of interest between them and the dismissed homeowners"); 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); Greeley v. KLM Royal Dutch Airlines, 85 F.R.D. 697, 700 (S.D.N.Y. 1980) (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).

<sup>16</sup> Two other surprising Alabama cases on adequacy arose prior to the current Supreme Court trends and therefore may be of questionable validity. See, e.g., Ex parte Russell Corp., 703 So. 2d 953 (holding that plaintiff's counsels alleged threats to file an amendment to add class allegations as settlement leverage was irrelevant); Warehouse Home Furnishings Distributors, Inc. v. Whitson, 709 So.2d 1144 (Ala. 1997) (affirming class certification despite the argument that class representatives did not know the details of the complaint and had criminal convictions because such convictions had nothing to do with the case).

<sup>17</sup> Ala. R. Civ. P. 23, Committee Comments.

<sup>18</sup> 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.

<sup>19</sup> See GEICO, 729 So. 2d at 306 (23(b)(1)(A) classes involve risk if "the prosecution of separate lawsuits would create the risk of inconsistent adjudications. A classic example would be separate lawsuits by individuals against a municipality concerning a bond issue, some individuals wishing to invalidate the issue, others to limit it and still others to enforce interest payments under the bonds . . . another example of the situation suggesting a Rule 23(b)(1)(A) class action would be where individual lawsuits concerning the rights and duties of riparian landowners could result in inconsistent rulings."); Adams v. Robertson, 676 So. 2d 1265, 1268 - 1269 (Ala. 1995); Advisory Committee Note to 1966 Amendment to Federal Rule 23.

<sup>20</sup> See Funliner, 873 So.2d at 207 (Ala. 2003) (reversing class certification in a plaintiff and defendant class action regarding video gaming machines, alleging public nuisance, unjust enrichment, conspiracy and statutory violations; Rule (b)(1)(A) "does not apply to actions seeking compensatory damages but is for actions in which only declaratory or injunctive relief is sought."); In re Dennis Greenman Securities, 829 F.2d 1539, 1545 (11th Cir. 1987); compare Adams v. Robertson, 676 So. 2d 1265, 1270 - 71 (Ala. 1995) (in a settlement case approving both a (b)(1)(A) and (b)(1)(B) class involving reformation of existing insurance policies and restitution for a small group and noting that the equitable and injunctive relief was predominant; later cases may cast some doubt on the scope of these holdings).

<sup>21</sup> Ala. R. Civ. P. 23, Committee Comments; GEICO, 729 So. 2d 299, 307 (Rule (b)(1)(B) actions are appropriate where the individual action "while not technically concluding the other members, might do so as a practical matter."); In re Dennis Greenman Securities Litigation, 829 F.2d at 1546.

<sup>22</sup> Adams v. Robertson, 676 So. 2d 1265, 1269 (Ala. 1995); Advisory Committee Notes to 1966 Amendment to Federal Rule 23.

<sup>23</sup> See Ex parte Holland, 692 So. 2d 811, 817 (Ala. 1997) ("Rule 23(b)(1)(B) focuses on situations where the interests of multiple claimants may be prejudiced by judgments in prior related cases such as one involving multiple claimants to a limited fund which would otherwise be exhausted before all of the claimants were able to share in that fund.").

<sup>24</sup> Ex parte Holland, 692 So.2d at 817 (reversing punitive damage limited fund, barring this theory and bemoaning "failure of trial judges to conduct adequate factual inquiries into the financial condition of the defendant, so as to ascertain whether a 'limited fund' actually existed.").

<sup>25</sup> 1 Newberg on Class Actions, § 4.11 (listing example cases); 7A Wright, Miller & Kane, §§ 1775, 1776.

<sup>26</sup> Funliner, 873 So.2d at 207 n.8 (citing Ticor Title Insurance Company v. Brown, 511 U.S. 117 (1994), noting the existence of "at least a substantial possibility" that actions seeking money damages are certifiable only under Rule 23(b)(3)); but see Robertson (settlement class decisions which allowed money damages as "restitution").

<sup>27</sup> E.g., Reynolds Metals Company v. Hill, 825 So. 2d 100, 108 (Ala. 2002) (superiority failed because "the greater the number of individual issues, the less likely superiority can be established."); Snow, 823 So.2d at 675 ("The court noted approvingly that the superiority analysis is intertwined with predominance, that the need to apply the laws of multiple jurisdiction exacerbates the manageability problem.").

<sup>28</sup> Funliner, 873 So.2d at 198.

<sup>29</sup> Avis, 876 So.2d at 1120 (arguably relaxing the predominance standard when it wrote: "the predominance requirement is met if there is a common nucleus of operative facts relevant to the dispute and as common questions represent a significant aspect of the case which can be resolved for all members of the class in a single adjudication"); Cheminova America Corporation v. Corker, 779 So. 2d 1175, 1181 & 1182 (Ala. 2000) (describing predominance as when "rulings on common issues of law was significantly advanced but resolution of identical or substantially similar questions and issues which would require resolution in connection with the individual's claims," "individual damages issues also did not destroy predominance, since the claim is based upon the amount paid for the product may be confirmed by a special master, or some other device which will lessen the burden on the court").

<sup>30</sup> Smart Professional Photocopy Corporation v. Childers-Sims, 850 So. 2d 1245, 1249 (Ala. 2002).

<sup>31</sup> GEICO, 729 So. 2d at n.3 (reversing certification of fraud case; "As prior federal case law has demonstrated, a fraud claim is wholly inappropriate for class treatment and should be handled in a separate proceeding.").

<sup>32</sup> Regions Bank v. Lee, 2004 WL 1859678 (Ala. Aug. 20, 2004) (claim for fraud, suppression (among others) dealing with bond issue; class certification reversed for failure to meet predominance); Voyager, 867 So.2d 1065 (reversed certification where the allegation was that insurers charged premiums for credit life and credit property insurance and miscalculated them; fraud, suppression); University Federal Credit Union v. Grayson, 878 So.2d 280, 287 – 88 (Ala. 2003) (reversing class certification for fraud and breach of fiduciary duty claim where plaintiff alleged Credit Union included \$2.50 charge in loan documents and designated it as a filing fee when they filed nothing ("this court has previously noted that fraud actions are often not well suited for class certification," "determination that each class member's reliance would require individualized inquiry as to whether the reliance was reasonable based on all the circumstances surrounding the transaction including the mental capacity, educational background, relative sophistication, and bargaining power of the parties"); Reynolds Metals Company v. Hill, 825 So. 2d 100, 105 (Ala. 2002) (fraud class reversed regarding severance benefits where former employer allegedly made promises to group meeting: "plaintiff employees cannot satisfy their burden of proof as to reliance without the necessity for individual testimony from each employee"); Snow, 823 So.2d 667; GEICO, 729 So. 2d 299 (reversing certification because of the need to have individual analysis of reliance (and discussing the need to have an individual analysis of the duty to disclose for suppression claims)); Ex parte Green Tree Financial Corporation, 723 So. 2d 6 (Ala. 1998) (decertifying fraud class of forced placed insurance, even though there were "written representations" because, among many other factors, there were individual issues of reliance); Ex parte AmSouth Bancorporation, 717 So. 2d 357 (Ala. 1998) (alleging a fraudulent scheme to convince depositors to switch from FDIC insured investments to riskier securities sold by an AmSouth subsidiary, including allegations of fraud and suppression and including an extended discussion on the appropriateness of

certification of fraud claims and remanding for consideration of certification of other nonfraud claims).

<sup>33</sup> Funliner, 873 So.2d 198 (reversing class certification; conspiracy fails because underlying fails).

<sup>34</sup> Ex parte Household Retail Services, Inc., 744 So.2d 871, 880 (Ala. 1999) (rejecting class certification of a fraud and suppression claim regarding the sale of satellite systems to consumers. Justice Lyons conducted a lengthy and detailed analysis of the appropriateness and history of fraud and suppression class actions and squarely rejected the option of "bifurcating" the reliance determination a "presumption-of-reliance" theory); Ex parte Exxon Corp., 725 So. 2d 930, 933 (Ala. 1998) (refusing to adopt a "fraud-on the market" theory where the allegation was that Exxon had deceptively advertised that its gasoline was "superior"); but compare Avis, 876 So.2d 1111 (hints at bifurcation).

<sup>35</sup> Avis 876 So.2d at 1123 & 1121, citing Funliner, 873 So.2d 198; Voyager, 867 So.2d 1065; Smart Professional Photocopy Corporation v. Childers-Sims, 850 So. 2d 1245 (Ala. 2002); Reynolds Metals Company v. Hill, 825 So. 2d 100 (Ala. 2002).

<sup>36</sup> See, e.g., U-Haul Co. of Alabama, Inc. v. Johnson, 2004 WL 1079804 (Ala. May 14, 2004) (reverses certification of breach of contract claim for charging sales tax and not rental tax because of voluntary payment defenses); General Motors Acceptance Corp. v. Massy, 2004 WL 1079877 (Ala. May 14, 2004) (reverses certification of forced placed insurance class because of voluntary payment defense and because of counterclaims; no discretion to omit consideration of these); Funliner, 873 So.2d 198 (rejecting class because, among many other reasons, statute of limitations defense would need to be evaluated individually); Snow, 823 So. 2d 667, 678 (Ala. 2001) (defense of mitigation of damages).

<sup>37</sup> Avis, 876 So.2d 1111 (rejecting voluntary payment defense because it had not actually been pled).

<sup>38</sup> Funliner, 873 So.2d 198; Butler v. Audio/Video Affiliates, Inc., 611 So. 2d 330 (Ala. 1992) (rejecting class in bait and switch consumer fraud by a department store because, among many other reasons, inability to identify the class).

<sup>39</sup> Funliner, 873 So.2d 198 (reversing class certification which would have included emotional harm damages).

<sup>40</sup> See, e.g., General Motors Acceptance Corp. v. Massy, 2004 WL 1079877 (reverses certification on forced placed insurance because of voluntary payment and because of counterclaims; no discretion to omit consideration of these); Snow, 823 So. 2d 667, 668 (Ala. 2001) (reverses class because counterclaim by bank for amounts owed for bad checks in class about NSF fees defeats superiority. The court noted that the potential counterclaims also defeats superiority because it may risk exposure to liability that exceeds any potential recovery.); Ex parte Water Works and Sewer Board of City of

Birmingham, 738 So. 2d 783 (Ala. 1999) (counterclaim for nonpayment of bills makes it unmanageable but noted the possibility of creating subclasses for handling the problems).

<sup>41</sup> General Motors Acceptance Corporation v. City of Red Bay, 825 So. 2d 746 (Ala. 2002) (failure of plaintiff to prove local acts in Alabama would not vary; explains need for plaintiff to prove and the need for rigorous review of this issue); Snow, 823 So. 2d 667 (Ala. 2001) (superiority fails because laws of different states); Ex parte Green Tree, 767 So.2d 1097 (rejecting class because of the need to review the law of 50 different states); Ex parte Exxon Corp., 725 So. 2d 930 (Ala. 1998) (same); Ex parte Citicorp Acceptance Company, Inc., 715 So. 2d 199, 204 (Ala. 1997) (plaintiff's burden; didn't analyze "such issues as choice of law and whether the acts of Citicorp were legal in other states;" "the state to have significant contact or sufficient aggregation of contacts to the claims asserted by each plaintiff to insure that the choice of law was not arbitrary or unfair to the defendant").

<sup>42</sup> University Federal Credit Union, 878 So.2d 280 (filing fee in loan documents); General Motors General Acceptance Corporation v. Dubose, 834 So. 2d 67 (Ala. 2002), (taxes in lease agreement; testimony that many lessees do not read their agreements); Reynolds Metals Company v. Hill, 825 So. 2d 100, 107 (Ala. 2002) (court noted that it had previously rejected class certifications and breach of contract actions "where the terms of the contract were not clear or where individual testimony would be necessary on the contract claims"; "moreover we do not here deal with the contract where a party's acceptance is easily manifest from the presence of a signature on a document. The alleged promise required conduct – staying on as an employee – to manifest acceptance. Because the act of staying on could have been coincidental rather than the result of the alleged promise . . . individual evidence from each class member will be necessary."); Snow, 823 So. 2d 667 (Ala. 2001) (check posting order); Lackey v. Central Bank of the South, 710 So. 2d 419 (Ala. 1998) (CD).