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SOME PRACTICAL NOTES ON
CLASS ACTION LITIGATION IN THE UNITED STATES

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Introduction

American Courts have long recognized the importance of sometimes allowing individual cases to be brought together. Initially called "group litigation," class actions allow people with meritorious small cases to bring them as one case. This allows similarly situated claimants to bring cases together that would otherwise be left without redress. The American experience has faced challenges and abuses. This paper will briefly outline the structure of American class actions and discuss how courts have interpreted Federal Rule of Civil Procedure 23 ("FRCP"). This will include a discussion of some of the problems, encountered and solved, and perhaps some insight into potential issues that may arise as the European Union develops and expands its own class action law.

Class Action History

The modern American Class Action has origins in England and the Magna Carta. Early English law recognized an equitable claim known as a "Bill of Peace" in which some groups of people made a common claim. This created the basis for "representative suits" in the United States where many claims could be brought together in a single claim. While early American decisions provided some basis for lawsuits

similar to Class Actions, this was a haphazard an unpredictable system. Congress enacted the first legislation recognizing class actions in 1937 and the original FRCP 23 in 1966. Congress revisits the law regularly and the current rule was most recently amended in 2003. The United States Supreme Court decision that has recently attracted the most discussion is *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338 (2011).

Federal Rule of Civil Procedure 23

Rule 23(a) Prerequisites.

Rule 23(a) has specific requirements, all of which must be satisfied before a class action can be certified.

Rule 23(a)(1), requires that a proposed class be so numerous that separate lawsuits are impracticable and courts refer to this as "numerosity." The complaint need not allege the exact number of class members and the court is entitled to make common sense assumptions to support a finding of numerosity. For example, proposed classes as small as thirteen people have been held sufficient.[1]

Rule 23(a)(2), requires that the claims share "commonality." This is the requirement that members of a class may sue as representatives only if "there are questions of law or fact common to the class." Commonality is a critical element and is the focus of many decisions determining whether the cases are sufficiently similar to be certified as a class. Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class."

Finally, Rule 23(a)(4) requires that the attorneys representing the class be adequate to represent the entire class. The Rule requires "court appoint class counsel who can fairly and adequately represent the interests of the class."

Rule 23(b) Class Certification – The Most Important Issue.

In addition to satisfying all of the requirement of Rule 23(a), a proposed class action must meet at least one separate requirement of Rule 23(b). The proposed class must:

A. Avoid risk of inconsistent adjudication. (FRCP 23(B)(1)(a));

B. Avoid binding parties who are not class members whose interests may be different from the class. (FRCP 23(B)(1)(b));

C. Present appropriate injunctive relief. (FRCP 23(b)(2); or

[1] *Dale Electronics v. R.C.L. Electronics, Inc.,* 53 F.R.D. 531, 534 (D.N.H. 1971) (Class of 13 was held sufficient). In *Rosario v. Cook County,*(1983), a class of 20 was held sufficient).

D. The court specifically finds that a class action is the best manner of proceeding. (FRCP 23(b)(3).

Rule 23(b)(1)(A) – Avoiding Inconsistent Adjudication.

Rule 23(b)(1)(A) focuses on the party ***opposing*** the class – typically the defendant. This rule requires that many separate actions will be filed if a class action is not certified.

In *In re Federal Skywalk Cases* (1982),[2] the court certified a class of persons who allegedly suffered damage as the result of a hotel collapse. The court considered whether multiple individual suits to determine defendants' liability would be unnecessary and potentially conflicting. Given the common nature of the claims, the court observed that it would be "utter naiveté" to say that there was not a substantial likelihood of multiple suits.[3] The court certified the class.

Still, pursuant to this rule, absent risk of *inconsistent* decisions, most courts find certification inappropriate. In *O'Conner v. Boeing North American, Inc.,* (1997),[4] plaintiffs alleged that hazardous waste released during nuclear testing subjected plaintiffs to an increased risk of illness. The Court held that plaintiff's failed to establish that separate actions would create a risk of "inconsistent adjudications… which would establish incompatible standards of conduct" for Defendants. Like most courts, the *O'Conner* court held that class certification is not appropriate if numerous individualized issues are involved and present the potential for inconsistent decisions.

Rule 23(b)(1)(B) – Protecting the Class Members.

Rule 23(b)(1)(B), focuses on *protecting the class* members. This rule permits class certification when individual litigation otherwise risks inconsistent or varying results that results in different treatment of claimants. This can include a situation where a defendant has limited funds available to satisfy the all claims. This rule may be invoked in actions involving labor relations, governmental policies, and trustee' fiduciary obligations, where non-party rights may be effected by an individual lawsuit.[5]

Rule 23(b)(2) – Injunctive Relief.

Rule 23(b)(2) addresses situations in which the primary relief sought is class-wide declaratory relief. Congress envisioned that this subdivision would be used heavily in civil rights cases. The rule provides that a class may be certified when a party

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[2] 93 F.R.D 415 (W.D.Mo. 1982), 680 F.2d 1175 (8th Cir. 1982)
[3] *Id.*
[4] 180 F.R.D. 259 (C.D.Cal. 1997),
[5] *See*, Lloyd v. City of Philadelphia 121 F.R.D. 246, 247-52 (D.Pa. 1988).

opposing the class has acted, or refused to act, in a particular manner to a defined group. This subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.

Rule 23(b)(3) – Specific Court Finding of Appropriateness.

This is the most important rule for mass torts or other claims seeking similar relief.

Rule 23(b)(3) requires a court to make two separate findings: (1) Common issues predominate over issues affecting only individual members; and, (2) Class treatment is "superior" to each member asserting their claims individually. Courts have struggled to determine what it means for common questions to "predominate" over questions affecting only individual members of a proposed class. Specifically, it is Plaintiff's burden to establish that the class action will achieve the economies of time, effort, and expense contemplated by the Rule, without sacrificing procedural fairness or bringing about other undesired results.

Further, Rule 23(b)(3) requires that notice be given to class members who can be identified though *reasonable efforts*. Those potential class members who cannot be readily identified must be given "the best notice practicable under the circumstances" and this is a frequent source of litigation.

Finally, under this rule, members of the class must be notified that they have an opportunity to exclude themselves from the class (to "opt-out"); that they will be bound by the result of the action if they do not opt-out; and, that they may participate separately with their own lawyer.[6]

The Most Important Stage In A Class Action – Certification of the Class

A recurrent problem in class action certification is the degree to which a court should analyze the merits of the case in determining certification. Early cases suggested against an analysis of the merits while more recent cases require a more detailed analysis. Today, it is customary for the trial court to conduct a 'rigorous analysis' to determine whether the party seeking certification has met the prerequisites of Rule 23.[7] Currently, many defendants' strategy to prevent class certification is to seek a detailed pre-certification analysis of the merits and reversal if the court refuses to do so.

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[6] *See*, *The Due Process Right to Opt Out of Class Actions,* 73 N.Y.U. L. Rev. 480, 488-89 (1998). (Opt-out rights are important for due process: they indicate, or not, the consent to jurisdiction and the opportunity to avoid being bound by the results of the litigation).

[7] *See, Zinser v. Accufix Research Inst., Inc.,* 253 F.3d 1180, 1186, *amended* 273 F.3d 1266 (9th Cir. 2001).

Commonality among claimants is critical. The party seeking class certification has the burden of establishing sufficient commonality among proposed class members. Frequently, defendants defeat certification by showing that there is insufficient commonality to meet the requirements of Rule 23.

The "commonality" standard was once a minor issue,[8] however, in *Wal-Mart Stores, Inc. v. Dukes*,[9] the United States Supreme Court made commonality a critical element. In *Dukes*, six employees alleged individual discrimination based on Wal-Mart's policies but the Court held that the commonality analysis revealed that each individual's claim was unique. The fact that each claim was a gender discrimination claim based on the employer's policy was insufficient to satisfy the commonality requirement.

The Supreme Court emphasized that "commonality" requires that class members' claims "depend upon a common contention" such that "determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke."[10] The plaintiff must demonstrate "the capacity of class-wide proceedings to generate common answers" to common questions of law or fact that are "apt to drive the resolution of the litigation."[11] The *Duke's* decision has been criticized because many have argued that the court could have found in a class action that the employer's *policy* was discriminatory yet and still allowed each individual claim to be fully evaluated on its individual merits. Many questions in this area remain unanswered and open to litigation.

Notifying Members of the Proposed Class

Burden of Notice.

Rule 23(b)(3) actions are unique, and class members must receive notice of the existence of the class action. Mainly because (b)(3) specifically seeks monetary relief and will bind non-party claimants, the rule requires that potential class members receive "the best notice practicable under the circumstances… individual notice to all members who can be identified through reasonable efforts."[12]

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[8] *Sprague v. Gen. Motors Corp.,* 133 F.3d 388, 397 (6th Cir. 1998); (noting that it is well established that only one question of law or fact in common is necessary to satisfy the commonlity requirement).
[9] 564 U.S. 338 (2011).
[10] *Id.*
[11] *Id.*
[12] FED. R. CIV. P. 23(c)(2).

These requirements raise questions both with regard to both the form of notice and who should bear the cost of sending the notice to the members of a large class. The Supreme Court held in *Eisen v. Carlisle & Jacquelin*, (1974) that class plaintiffs bear the burden of notice. The Court's rationale was that defendants should not be required to pay until liability has yet to be determined at which time the cost of notice can be shifted back to the defendant.

Cost of Notice.

The cost of notice to potential class members is a serious obstacle in some class actions, especially in consumer class actions. Giving notice in a large class action can be expensive, sometimes overwhelmingly so, particularly in cases where numerous claimants can be identified and thus must receive mail notice. It is frequently argued, and frequently true, that requiring plaintiffs to pay for notice may prevent meritorious suits from being brought if the plaintiffs cannot afford the cost of notice. However, as the *Eisen* court notes plaintiffs generally bear the costs of their own suits and notice cost shifting at the end of the case compensates plaintiffs in meritorious actions.

The Binding Nature of Class Actions

Fundamental due process of law requires that a party be given notice of a class action, the right to participate in or opt-out of the action and the potential of being bound by the litigation. Courts are very careful to require notice in class actions seeking monetary damages before a party can be bound by the result of litigation. Once the party has adequate notice, he or she may be bound by the litigation whether or not they choose to participate. If the party opts-out, he or she may pursue their own individual litigation. If the party does not opt-out, he or she is bound by the result.[13]

Problem: Many Small Claims With Potential for High Attorney Fees and Penalties

Although class actions were designed to aid large numbers of wronged plaintiffs, there are, of course, circumstances where class actions have been abused. One such situation is a class action that purposely aggregates statutory penalties across a large plaintiff class. Such aggregation can result in an enormous penalty judgment against a defendant – where it arguably only acted wrongly one or a few times.

[13] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). In injunctive class actions, the Court has not yet held that absent members are entitled to notice and a right to opt-out as a due process matter, and the federal rules neither requires this. *See,* Lahav, A.D., 2012. Due Process and the Future of Class Actions. *Loy. U. Chi. LJ*, *44*, p. 545.

Aggregated penalties have very large potential to force defendants to settle meritless lawsuits, and result in punishment that is grossly disproportional to the defendant's conduct. For example, in *Price v. Lucky Strike Entertainment, Inc.,* (2007), the proposed plaintiff class of approximately 33,000 members could have collected millions of dollars in penalty damages even though the plaintiffs alleged no actual damages.[14] Defendants have successfully challenged such class actions at the certification stage arguing that aggregation as a class produces a wildly disproportionate damage recovery when none would exist for individual claims.

Some Issues Specific To Insurance

Class action questions arise in the insurance context in both first and third-party insurance coverage situations. Issues regarding commonality of claims, and individualized determinations of claims, are reoccurring themes in class action litigation.

First-Party Claims.

Class certification may be attractive to a plaintiff where there are many similar but relatively small claims. This may appear most often in first-party insurance claims between an insurance company and the policyholder in a property damage claim. These claims are contractual in nature and turn on the specific language of the insurance policy. Typically, the insured makes a claim to cover its own damages and the insurance company compensates the insured according to the insurance policy language.

First party claims for small amounts raising *similar facts and issues* can appear sufficiently similar for class action purposes. This appearance may be enhanced by an insurer's use of estimating and adjusting software-treating claims on a unified basis. This has led to many class actions where individual claims may not have been brought because of their small size.[15] To support class action certification, class representatives usually point to claim management practices as similar across all claimants, urging commonality.

Insurers successfully defeating class status have argued that the individual cases are too different to invoke commonality under the rule. The facts of each claim are

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[14] *Price v. Lucky Strike Entm't, Inc.*, No. CV 07-960ODWMANX, 2007 WL 4812281, at *4 (C.D. Cal. Aug. 31, 2007).

[15] Marcy Hogan Greer, *A Practitioner's Guide to Class Actions.* American Bar Association. Tort Trial and Insurance Practice Section. (2010).

different, and the software utilization is highly individualized and thus the questions of law or fact are *not* common to all class members. Despite use of software, claim adjustment remains a highly individualized process where the application of electronic tools and claims analysis software still requires the exercise of an adjuster's judgment and discretion. In *Newell v. State Farm Gen. Ins. Co.*, (2004)[16] the court held that a class action cannot be maintained where each insured's right to recover depends upon particular facts of his or her claim.[17] This is bolstered by the fact that properties differ in design, construction materials, elevation, and location, and in the nature of the damage sustained itself.[18]

In *Aguilar v. Allstate Fire and Casualty Company*, (2007)[19] the court held that while the insurer's general policies for adjusting claims may arguably be *one* common issue of fact – demonstrating a wrongful pattern and practice of failing to adjust claims properly – intensive review of individualized facts is required. For example, analysis of each proposed class member's damage claim is required, including: the nature and extent of damage; the timing and adjustment of each class member's claim; how much each class member was paid for his claim; for what damage; and whether that amount was sufficient and timely, must all be considered. The Court held: "On the face of the pleading, it is clear that those individualized and highly personal issues pertaining to each class member patently overwhelm any arguably common issue rendering the claims inappropriate for class treatment."[20] Class certification was denied.

Third-Party Claims

A third party claim is, of course, one in which a claim is made against the insured for which the insurer is called upon to defend and or indemnify the insured. When treated as a class action, such claims can raise issues as to whether the claims against the insured can be aggregated into a class. *In re Synthroid Marketing,* (2001) [21] is an example.

In *Synthroid*, a class of consumers and health insurers brought action against a pharmaceutical company alleging that the company misled physicians about bioequivalence of less expensive drugs to treat hypothyroidism. The court held that

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[16] *Newell v. State Farm Gen. Ins. Co.,* 118 Cal. App. 4th 1094 (2004).
[17] *Id*.
[18] *Id.*
[19] *Aguilar v. Allstate Fire and Casualty Company*, No. 07-1738, 2007 WL 734809 (E.D. La. Mar. 6, 2007).
[20] *Id.*
[21] *In re Synthroid Mktg. Litig.,* 264 F.3d 712 (7th Cir. 2001).

"commonality" was sufficiently satisfied by class members' factual and legal questions of whether the defendants intentionally suppressed scientific information in a way that violated federal and state law. The plaintiffs alleged that the defendants directed standardized conduct toward the potential class members. Despite potential differences in each claimant's individual claim, the court found that claimant's allegations were sufficient to meet the commonality requirements to certify a class.

Except for the differences between the first and third party nature of the claims, the results obtained in the above cases may be irreconcilable. In all three cases, it would appear that the court could make a threshold legal or factual determination – was the adjusting method or drug marketing procedure appropriate? – and then recognize the individual differences in each claim. The difference in outcomes may reflect a difference in courts' perceptions of the overall appropriateness of class action status in a first party insurance contract setting verses a mass tort. In any event, there are numerous recognized class actions in mass torts and relatively few in private contract settings.

Conflicts of Interest and Other Ethical Issues

Unquestionably, class actions create the possibility that claims otherwise too small to be individually pursued will find redress. Unfortunately, along with the benefits of affording plaintiffs a forum for their cases, class actions have also created opportunity and incentive for abuse such as discussed above. This section will identify some ethical issues facing class counsel that have led to litigation and objection to class certification and other problems.

Soliciting and Multiple Litigation.

Lawyers in all jurisdictions are subject to rules governing solicitation of business and their relationship with their clients. Courts recognize that class actions can also be used as a "device for the solicitation of litigation… which is clearly an 'undesirable result' which cannot be tolerated."[22] For defendants, this can be particularly telling when plaintiff's counsel has filed similar class actions with the same representative plaintiff.[23]

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[22] *Rodriguez v. Family Publ'ns Serv., Inc.,* 57 F.R.D. 189, 195 (C.D. Cal. 1972) (quoting *Buford v. Am. Fin. Co.,* 333 F. Supp. 1243, 1251 (N.D. Ga. 1971)).

[23] *See, e.g. Saunders,* 2007 WL 4812287, at *2 n.5 (noting that plaintiff's counsel has filed 37 FACTA class actions with Saunders as plaintiff 11 of the cases); *Price*, 2007 WL 481281, at *5 (noting that plaintiff's class counsel has been involved in at least 20 FACTA cases with Price as plaintiff in six of the cases).

Conflicts between class members and class counsel.

In traditional litigation, a plaintiff is actually present to monitor the actions of his or her own lawyer, and to agree or disagree to a course of litigation or proposed settlement upon discussion with counsel.[24] If the plaintiff is unhappy with litigation decisions, or dislikes the decisions or terms of a settlement, the client can instruct the lawyer, including to reject or restructure a settlement. However, in class action settlements, class members typically do not learn of a settlement until after class counsel has negotiated the terms with the opposing parties, at which point the class members usually have no opportunity to participate in the settlement decision, to change terms of the settlement, or to meaningfully object to the settlement. Class counsel should be careful not to create a conflict by negotiating an attorney fees deal that creates a benefit for counsel that is manifestly different than the benefit conferred on the class as a whole.[25]

Class counsel and defendant's attorneys understand class action dynamics and may enjoy complete discretion to negotiate a class settlement on behalf of absent class members. Given the size of a certified class, the prospect of a high percentage fee award, and the amount of damages in a typical class action suit, class action lawyers may have a disincentive to incur large expenses in developing the case through discovery and trial. If the counsel for the class can settle early, class counsel will still receive a potentially large percentage of the class recovery (including attorney fees), with reduced effort and expense. This may lead to early resolution extending disproportionate benefit to class counsel, and perhaps defendants, at the expense of class members.

All of these issues have led to litigation of all types: between and among class members; between class members and counsel; and, ethical challenges to the conduct of counsel. These are areas of recurring litigation in the United States.

Confidentiality Concerns.

Confidentiality of litigation and settlements is frequently a concern to parties in cases of all types. Given the potentially large numbers, and communication between lawyers and their "clients", it is impossible to enforce or extend confidentiality in class actions. [26]

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[24] *See In re Masters Mates and Pilots Pension Plan,* 957 F.2d 1020, at 1025-26 (2d Cir. 1992).
[25] *See Ramirez v. Sturdevant*, 21 Cal. App. 4th 904, 916-17 (1994).
[26] *See,* Marc Z. Edell & Philips J. Duffy, *Ethical Pitfalls Confronting the Mass Tort Lawyer*, 166 N.J. LAW. 32, 33 (1995).

The Role of Judges in Class Actions

In an American Jury Trial, the judge decides the law while the jury determines the facts and applies the law to the facts. Class actions test these traditional rules. As noted, in many stages of class actions, judges make determinations that are traditionally factual and can have significant effects on the course of litigation and the rights of the parties.

Class action litigation typically involves an early and active involvement of the judge to oversee and manage the class action. In contrast, in traditional litigation, a judge may not meet the actual parties until the day of trial. In class action litigation, a judge must make a determination as early as possible that the proposed class is suitable to be maintained as a class action. In traditional litigation, parties do not have to seek prior approval of a judge to proceed. The proposed class action must satisfy the threshold requirements for certification, including an assessment by the judge of the adequacy of representation by the proposed class counsel and class representatives. Moreover, the judge must appoint class counsel based on criteria set forth in the rule. In traditional litigation, a judge does not assess the adequacy of representation at any except the most extreme times of litigation.

In class actions, judges have broad managerial powers to supervise and are encouraged to actively oversee the litigation. In traditional litigation, judges will not typically be actively involved in the development or trial of the case. All of these judicial roles present inevitable opportunities for the personal views of the judge to affect the course and outcome of litigation. This can lead to class counsel forum shopping, seeking jurisdictions and judges with particular views, or past rulings, that can dramatically affect the outcome of litigation. It is for this reason that some jurisdictions attract particular types of litigation and defendants fear “judicial hell holes” where plaintiffs in particular cases have been successful, sometimes enormously so. In the context of class action litigation, few of these risks and realities can be avoided, and they all should be deeply studied and planned for by class action defendants and their counsel.

CONCLUSION.

The United States has fifty state jurisdictions and separate federal circuits. The rules vary. There remain many open legal questions in class actions generally. The problems and questions raised are common and the rulings have changed as class action law has developed. Many problems have been solved with practical decisions

that can appear arbitrary, constrain individual claimant and defendant flexibility, and have had some harsh results. It is hoped that this broad general discussion has highlighted some issues in the American experience that will be of use to European parties and their lawyers as class action law continues to develop in the European Union.