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Class Act: Best Practices for Defending Class Actions

A Primer On Class Certification Under Federal Rule 23

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Introduction

Plaintiffs seeking to certify a class under Federal Rule 23 must plead and prove: (1) an adequate class definition, (2) ascertainability, (3) numerosity, (4) commonality, (5) typicality, (6) adequacy and (7) at least one of the requirements in Rule 23(b), namely: (a) separate adjudications will create a risk of decisions that are inconsistent with or dispositive of other class members' claims, (b) declaratory or injunctive relief is appropriate based on the defendant's acts with respect to the class generally, or (c) common questions predominate and a class action is superior to individual actions.

Each of these prerequisites is addressed below, along with the burden of proof; the use of subclasses and issue classes; the role of expert testimony; the class certification hearing; the existence of multiple class actions; and the timing, modification and appeal of the certification decision.

Burden of Proof

The plaintiff bears the burden of proving that the prerequisites to class certification have been met by a preponderance of the evidence.¹

Until a few years ago, lower courts struggled to reconcile the Supreme Court's conflicting statements that they must conduct a "rigorous analysis" of whether the prerequisites to class certification have been met² but, at the same time, must not inquire into the merits of the plaintiff's claims,³ even though the merits "are often highly relevant" to a Rule 23 analysis.⁴ Also, while some courts assumed the truth of the plaintiff's factual and legal allegations, other courts allowed defendants to assert evidence-based challenges.

The Supreme Court recently clarified these issues in three decisions. First, in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___, 131 S. Ct. 2541 (2011), the Court held that "Rule 23 does not set forth a mere pleading standard." *Id.* at 2551. Instead, a plaintiff "must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* (emphasis in original). Although a court's rigorous analysis will frequently overlap with an inquiry into the merits, "[t]hat cannot be helped." *Id.* The Court reversed a decision certifying a class of employees suing for sex discrimination after concluding that the commonality requirement was not met where evidence of subjective decision-making by low-level employees could not establish discrimination on a classwide basis.⁵

Next, in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. ___, 133 S. Ct. 1184 (2013), the Court held that there are limits to a court's analysis of the merits at the class certification stage. "Rule 23(b) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Id.* at 1191. "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* at 1194-95. The Court affirmed a decision certifying a class of investors suing for securities fraud after holding that the plaintiffs need only plead, and need not prove, materiality at the class certification stage.

Finally, in *Comcast Corp. v. Behrend*, 569 U.S. ___, 133 S. Ct. 1426 (2013), the Court reiterated that the prerequisites to class certification require evidentiary proof and chided the court of appeals for "refusing to entertain arguments" at the class certification stage merely because they overlap with the merits. *Id.* at 1432-33. The Court reversed a decision certifying a class of subscribers bringing antitrust claims after concluding that the plaintiffs had failed to prove that there was a method to determine legally-available damages on a classwide basis, and so did not satisfy the predominance requirement.

After these decisions, it is now settled that when ruling on class certification the court must resolve any factual or legal disputes that are material to its Rule 23 analysis and find that the plaintiff has met its burden of proof based on evidence, not speculation.⁶

¹ *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012).

² *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364 (1982).

³ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S. Ct. 2140 (1974).

⁴ *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011).

⁵ *Dukes* does not bar class certification where high-level managers exercise subjective decision-making in a common way. *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105 (4th Cir. 2013); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012).

⁶ *Phillips v. Asset Acceptance, LLC*, Case No. 13-2251, 2013 U.S. App. LEXIS 23984, *8-10 (7th Cir. Dec. 2, 2013); *Messner*, 669 F.3d at 811; *Ellis*, 657 F.3d at 983.

Implicit Prerequisite: An Adequate Class Definition

The requirement of an adequate class definition includes several concepts. First, the class definition must be precise and unambiguous.⁷ Second, it “must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class.”⁸ Finally, it must not be “defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant’s allegedly unlawful conduct.”⁹ Although the lack of an adequate class definition can lead to a denial of class certification, the court may instead choose to remedy its problematic aspects and propose an amended definition.¹⁰

A type of class definition that is frequently challenged is a “fail-safe class,” i.e., one that is defined to include only those individuals who have a valid claim—which is of course a merits question that will not be decided until the end of the case (if at all). Although the Fifth Circuit does not prohibit fail-safe classes,¹¹ other courts have rejected them on the grounds that they do not allow class members to be identified¹² and also are unfair to defendants because “a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment.”¹³

Implicit Prerequisite: An Ascertainable Class

Although a plaintiff need not identify individual class members prior to class certification, he must show that there is an available method to identify class members based on objective criteria.¹⁴ This method must be “reliable and administratively feasible, and permit[] a defendant to challenge the evidence used to prove class membership.”¹⁵ It should not require mini-trials or “extensive and individualized fact finding.”¹⁶

The ascertainability requirement “eliminates serious administrative burdens that are incongruous with the efficiencies expected in a class action.” It protects absent class members by making it more likely that they will receive notice. And it helps ensure that defendants know who is in the class and bound by the judgment.¹⁷

One court cautions that “the size of a potential class and the need to review individual files to identify its members are not reasons to deny class certification.”¹⁸ However, a court may deny class certification if a defendant’s records are simply insufficient to identify class members.¹⁹

The need to rely solely on affidavits from class members to prove class membership raises due process concerns and may be insufficient to establish ascertainability.²⁰

Rule 23(a)(1): Numerosity

⁷ *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591-92 (3rd Cir. 2012).

⁸ *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537-38 (6th Cir. 2012).

⁹ *Messner*, 669 F.3d at 824-25.

¹⁰ *Id.* at 824-26 & n.15.

¹¹ *In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012).

¹² *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 495-97 (7th Cir. 2012).

¹³ *Young*, 693 F.3d at 538.

¹⁴ *Marcus*, 687 F.3d at 592-93.

¹⁵ *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3rd Cir. 2013).

¹⁶ *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 356 (3rd Cir. 2013).

¹⁷ *Marcus*, 687 F.3d at 593.

¹⁸ *Young*, 693 F.3d at 539.

¹⁹ *Carrera*, 727 F.3d at 308-09; *Hayes*, 725 F.3d at 355-56; *Marcus*, 687 F.3d at 593.

²⁰ *Carrera*, 727 F.3d at 309-12; *Marcus*, 687 F.3d at 594.

Rule 23(a)(1) requires the plaintiff to show that “the class is so numerous that joinder of all members is impracticable.”

A finding of numerosity must be based on direct or circumstantial evidence and not on speculation, even if it is “tempting to assume” that there must be a large number of class members.²¹ Numerosity should be shown for each proposed class and subclass.²²

Some courts find that numerosity is typically established when there are at least 40 class members.²³ Other courts have held that no fixed number of class members is sufficient, and that the court must consider not only the number of putative class members but also their geographical dispersion, the ease with which they can be identified, the size of their claims and the nature of the action.²⁴

Rule 23(a)(2): Commonality

Rule 23(a)(2) requires the plaintiff to show that “there are questions of law or fact common to the class.”

Before the Supreme Court issued its decision in *Dukes*, commonality was easily shown because “any competently crafted class complaint literally raises common questions.”²⁵ After *Dukes*, however, merely reciting a list of common questions is insufficient. Instead, “[w]hat matters ... [is] the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.” The class members’ claims “must depend upon a common contention of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”²⁶

A court deciding the commonality of factual issues must rigorously analyze the plaintiff’s contention that they can be proven on a classwide basis, including any evidence offered to back up that contention.²⁷ Allegedly common legal issues may not require such an extended analysis.²⁸

Rule 23(a)(3): Typicality

Rule 23(a)(3) requires the plaintiff to show that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.”

The typicality requirement determines whether the legal or factual position of the named plaintiff “is markedly different” from the position of other class members.²⁹ Courts consider whether: (1) the named plaintiff’s claims are generally the same as those of other class members with respect to the relevant legal theory and factual circumstances,

²¹ *Marcus*, 687 F.3d at 595-97.

²² *Id.* at 595.

²³ *Id.*

²⁴ *In re: TWL Corp.*, 712 F.3d 886, 894 (5th Cir. 2013).

²⁵ *Dukes*, 131 S. Ct. at 2551 (internal quotations and citation omitted).

²⁶ *Id.*

²⁷ *See, e.g., M.D. v. Perry*, 675 F.3d 832, 839-45 (5th Cir. 2012).

²⁸ *Mazza v. American Honda Motor Co., Inc.*, 666 F.3d 581, 588-89 (9th Cir. 2012).

²⁹ *Marcus*, 687 F.3d at 598.

and/or (2) the named plaintiff is subject to a unique defense that will likely become a major focus of the litigation.³⁰

It is usually sufficient to show that the claims of the named plaintiff and class members “arise from the same event or pattern or practice and are based on the same legal theory.”³¹ They need not be identical and some variation is permissible.³² However, significant differences in the underlying facts may preclude a finding of typicality.³³

Rule 23(a)(4): Adequacy

Rule 23(a)(4) requires the plaintiff to show that “the representative parties will fairly and adequately protect the interests of the class.”

The adequacy requirement seeks to “uncover conflicts of interest between named parties and the class they seek to represent.”³⁴ It calls for a determination of whether the “interests and incentives between the representative plaintiffs and the rest of the class” are aligned or antagonistic.³⁵ Intra-class conflicts may arise when class members seek conflicting remedies³⁶ or some class members actually benefit from the challenged conduct.³⁷ Where an intra-class conflict is alleged, the court should determine whether it is fundamental and real rather than speculative.³⁸

A court may find a lack of adequacy if the class action is truly not in the interests of class members. This can occur when plaintiffs seek relief “that duplicates a remedy that most buyers already have received and that remains available” to class members, and adds the significant cost of providing notice and paying attorneys’ fees to class counsel.³⁹

Some courts consider whether the named plaintiff will adequately represent the interests of class members with respect to the conduct of the litigation, i.e., does he understand the class claims, is he kept informed about the status of the litigation, and will he control the actions of class counsel.⁴⁰ Other courts view these requirements as “unrealistic” given the “nominal” role of the named plaintiff in a lawsuit that “is in fact entirely managed by class counsel.”⁴¹

Before 2003, courts also considered the “competency and conflicts of class counsel.”⁴² Some courts now address that issue when appointing class counsel under Rule 23(g)⁴³ while other courts continue to address it under Rule 23(a)(4).⁴⁴

³⁰ *Id.* at 598; *Ellis*, 657 F.3d at 984-85.

³¹ *Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012).

³² *Id.*

³³ *See, e.g., Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019-20 (9th Cir. 2011).

³⁴ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 117 S. Ct. 2231 (1997).

³⁵ *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 183 (3rd Cir. 2012); *Ellis*, 657 F.3d at 985.

³⁶ *Amchem*, 521 U.S. at 626 (whereas currently injured class members in an asbestos case might prefer generous immediate monetary payments, members who were exposed but not yet injured might prefer to keep the fund as large as possible for future payments).

³⁷ *Dewey*, 681 F.3d at 184.

³⁸ *Id.*

³⁹ *In re: Aqua Dots Prods. Liability Litig.*, 654 F.3d 748, 752 (7th Cir. 2011).

⁴⁰ *E.g., Griffin v. GK Intelligent Sys., Inc.*, 196 F.R.D. 298, 301 (S.D. Tex. 2000).

⁴¹ *Phillips*, 2013 U.S. App. LEXIS 23984, *6.

⁴² *Amchem*, 521 U.S. at 626 n.20.

⁴³ *Dewey*, 681 F.3d at 181 n.13.

⁴⁴ *Gomez v. St. Vincent Health, Inc.*, 649 F.3d 583, 591-93 (7th Cir. 2011).

Rule 23(b)(1): Risk Of Inconsistent Or Dispositive Adjudications

Rule 23(b)(1) applies when adjudication of the named plaintiff's claim creates a risk of disposing of or impairing the claims, interests or rights of absent class members. It requires a showing that "prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Class members are not entitled to notice and a right to opt out.

Rule 23(b)(1)(A) applies when the defendant is legally obligated to treat all members of the class alike, as in the case of a utility government or taxing authority, and separate actions would create a risk of imposing incompatible standards of conduct upon it.⁴⁵

Rule 23(b)(1)(B) applies when the action threatens to impair or dispose of the rights and interests of absent class members, as in the case of lawsuits filed by shareholders or against trustees, or where there is a limited fund available to pay damages.⁴⁶

Rule 23(b)(2): Declaratory Or Injunctive Relief

Rule 23(b)(2) applies when class members seek declaratory or injunctive relief and do not assert individualized claims for damages. It requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Class members are not entitled to notice and a right to opt out, although the court may provide such rights in its discretion.⁴⁷

Rule 23(b)(2) requires not only that the defendant have engaged in a common course of conduct that is applicable to all class members, but also that the class members' claims and interests are cohesive.⁴⁸ Named plaintiffs may lack standing to certify a class under Rule 23(b)(2) where they are no longer subject to the allegedly challenged conduct, such as when they no longer buy or own the product at issue.⁴⁹

Rule 23(b)(2) only authorizes classwide declaratory or injunctive relief and does not allow the court to award individualized relief.⁵⁰ However, a court may use subclasses to award different categories of declaratory or injunctive relief to different groups of class members.⁵¹ The Supreme Court has also left open the possibility that incidental monetary damages could be awarded on a classwide basis.⁵²

⁴⁵ *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich.*, 654 F.3d 618, 633 (6th Cir. 2011).

⁴⁶ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833-36, 119 S. Ct. 2295 (1999).

⁴⁷ *Johnson v. Meriter Health Servs. Employee Ret. Plan*, 702 F.3d 364, 370-71 (7th Cir. 2012).

⁴⁸ *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 264-69 (3rd Cir. 2011).

⁴⁹ *McNair v. Synapse Group Inc.*, 672 F.3d 213, 224-25 (3rd Cir. 2012).

⁵⁰ *Dukes*, 131 S. Ct. at 2557.

⁵¹ *Johnson*, 702 F.3d at 369-70.

⁵² *Dukes*, 131 S. Ct. at 2557, 2560-61. See, e.g., *Johnson*, 702 F.3d at 371.

Rule 23(b)(3): Predominance And Superiority

Rule 23(b)(3) applies to individualized claims for damages and requires the plaintiff to establish predominance and superiority. Class members are entitled to notice and a right to opt out.

Predominance

Rule 23(b)(3) requires the court to find that “questions of law or fact common to class members predominate over any questions affecting only individual members.”

The Supreme Court requires courts to take a “close look” at whether this “demanding” prerequisite has been met.⁵³ Predominance will not be established merely because the majority of contested issues are common (i.e., capable of classwide proof) rather than individual (i.e., requiring factual evidence from each class member or a separate legal analysis of each class members’ claims). Instead, the court must analyze the elements of the parties’ claims and defenses and the nature of the evidence that will be presented at trial, compare the relative importance of the contested issues in the case,⁵⁴ and make “some prediction as to how specific issues will play out.”⁵⁵

A court may find a lack of predominance if the plaintiffs cannot prove injury,⁵⁶ causation⁵⁷ or an element of a substantive claim⁵⁸ on a classwide basis. Predominance may also be lacking if the defendant can assert individualized defenses to class members’ claims⁵⁹ or different state laws with material variations apply to different class members’ claims.⁶⁰

Courts agree that the mere existence of individualized damages does not preclude class certification⁶¹ because to hold otherwise would eviscerate the purpose and use of Rule 23(b)(3). Nevertheless, the need to determine damages on an individualized basis may be considered as a factor when determining whether the predominance requirement has been met.⁶² Courts typically handle individualized damages by creating subclasses or bifurcating the proceedings between a class trial on liability followed by individual hearings (which likely will not be needed because the parties will settle by that stage).⁶³

Superiority

Rule 23(b)(3) also requires the court to find that “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

⁵³ *Comcast*, 133 S. Ct. at 1432-35.

⁵⁴ *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013); *Messner*, 669 F.3d at 815.

⁵⁵ *Marcus*, 687 F.3d at 600.

⁵⁶ *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252-53 (D.C. Cir. 2013).

⁵⁷ *Marcus*, 687 F.3d at 603-05.

⁵⁸ *Howland v. First Am. Title Ins. Co.*, 672 F.3d 525, 530-35 (7th Cir. 2012); *Mazza*, 666 F.3d at 594-96.

⁵⁹ *Carrera*, 727 F.3d at 307.

⁶⁰ *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 947-49 (6th Cir. 2011).

⁶¹ *Messner*, 669 F.3d at 815 (citing cases).

⁶² *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, Case No. 12-3176, 2013 U.S. App. LEXIS 13842, *16-17 (10th Cir. July 9, 2013).

⁶³ *Butler*, 727 F.3d at 798, 801 (7th Cir. 2013). *Accord In re: Deepwater Horizon*, Case No. 13-30095, 2014 U.S. App. LEXIS 575, *61-68 (5th Cir. Jan. 10, 2014).

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.”

The superiority requirement ensures that classes will only be certified under Rule 23(b)(3) if they will “achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.”⁶⁴

When addressing this requirement, the court should “compare other means of disposing of the suit” (such as individual actions) and determine if a class action is superior to them when considering issues like judicial economy, the rights of absent class members, prior dispositive rulings on liability and the size of likely damage awards.⁶⁵ Superiority may be absent if there is a wide variation in state laws, an inability to identify and provide notice to class members,⁶⁶ or a large number of individualized inquiries.⁶⁷ However, courts should not conclude that a class action is not superior merely because of the need to determine individualized claims for damages.⁶⁸

The rule states that a factor in determining whether a class action is superior is whether it will be manageable. Plaintiffs may demonstrate manageability by submitting a detailed trial plan that explains how individualized issues will be handled.⁶⁹

The Use Of Subclasses

Rule 23(c)(5) provides that “[w]hen appropriate, a class may be divided into subclasses that are each treated as a class under this rule.”

Subclasses may be appropriate when class members seek different types of relief, such as medical monitoring for one group and damages for another group. They may be used where there are similar types of factual differences between the claims of different groups of class members. Or, they may be used to handle materially different state laws that apply varying substantive requirements to different groups of class members.

A large number of subclasses “may indicate that common questions do not predominate” and weigh in favor of denying class certification.⁷⁰

The Use Of Issue Classes

Rule 23(c)(4) provides that “[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues.”

“Certification of an issues class is appropriate only if it permits fair presentation of the claims and defenses and materially advances the disposition of the litigation as a whole. If the resolution of an issues class leaves a large number of issues requiring individual decisions, the certification may not meet this test.”⁷¹

⁶⁴ *Amchem*, 521 U.S. at 615 (internal quotations and citation omitted).

⁶⁵ *Pipefitters Local 636 Ins. Fund*, 654 F.3d at 630-32.

⁶⁶ *In re: Aqua Dots Prods. Liability Litig.*, 654 F.3d at 752.

⁶⁷ *Pipefitters Local 636 Ins. Fund*, 654 F.3d at 631.

⁶⁸ *Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 515 (9th Cir. 2013).

⁶⁹ *Pella Corp. v. Saltzman*, 606 F.3d 391, 396 (7th Cir. 2010); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1278-79 & n.20 (11th Cir. 2009).

⁷⁰ Manual for Complex Litigation (4th ed.) (“MCL”) § 21.23.

⁷¹ MCL § 21.24; *accord Gates*, 655 F.3d at 272-74.

Rule 23(c)(4) is commonly used to certify a class limited to liability issues, after which time individual class members will prove their damages in separate hearings.⁷²

The Role Of Expert Testimony

Parties often rely on expert testimony to support or oppose a class certification motion. Courts have historically disagreed as to whether they must exercise their gatekeeper role and determine the admissibility of expert testimony⁷³ at the class certification stage. In the wake of the Supreme Court's recent suggestion that *Daubert* does apply,⁷⁴ several courts have held that an analysis of the admissibility of expert testimony under Federal Rule of Evidence 702 and *Daubert* is required.⁷⁵

The Class Certification Hearing

Courts typically conduct a hearing on class certification, although the type and extent of the hearing depends upon the contested issues before the court. If there are no factual disputes, then the hearing might consist solely of oral argument. If there is a factual dispute then the court might hold an evidentiary hearing with testimony. Alternatively, it might rely on stipulations of fact, affidavits, declarations and documents to establish the factual record.⁷⁶

The Existence Of Multiple Class Actions

Not infrequently, the existence of similar class action lawsuits in other state or federal courts will raise questions about the timing, scope and propriety of class certification. The Manual for Complex Litigation identifies the following possible scenarios:

- Multiple cases with similar class allegations, each of which might be appropriately certified under Rule 23 but which may overlap or conflict if more than one is certified;

⁷² *Butler*, 727 F.3d at 800.

⁷³ The expert admissibility standards announced in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93, 113 S. Ct. 2786 (1993) include: "(1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community." Fed. R. Evid. 702 Advisory Committee Notes (2000). Other relevant factors include: whether the expert based his opinion on independent research or developed it expressly for the litigation; whether he extrapolated from an accepted premise to an unfounded conclusion; whether he adequately accounted for obvious alternative explanations; whether he was as careful in his testimony as he would be in his regular professional work; and whether his claimed field of expertise is known to generate reliable results for the proffered type of opinion. *Id.*

⁷⁴ *Dukes*, 131 S. Ct. at 2553-54 (noting the district court's conclusion that *Daubert* did not apply at the class certification stage and stating "[w]e doubt that is so.").

⁷⁵ *In re Rail Freight*, 725 F.3d at 253-55; *Messner*, 669 F.3d at 811-14; *Ellis*, 657 F.3d at 982; *but see In re: Zurn Pex Plumbing Prods. Liability Litig.*, 644 F.3d 604, 611-14 (8th Cir. 2011).

⁷⁶ MCL § 21.21.

- Cases alleging a nationwide class and cases seeking multistate or single-state class certification pending in different courts at the same time;
- Cases filed as class actions in federal and state courts relating to the same type of transactions and involving some or all of the same parties;
- Cases filed by the same lawyers seeking to represent an overlapping or duplicative class of plaintiffs in order to obtain the most favorable forum;
- Cases filed by different lawyers competing for the fastest and most favorable rulings on class certification and appointment as class counsel;
- Multiple individual actions or other forms of aggregate litigation pending in state and federal courts, raising the same issues and involving some or all of the same parties; or
- Prior unsuccessful class certification efforts in state or federal courts.⁷⁷

Potential issues include whether and how to proceed with class certification, whether an MDL proceeding is appropriate, the scope of the class definition, claim preclusion, comity and coordination with other courts, and the Anti-Injunction Act. It is prudent for the court and counsel to inquire about the existence of other pending or terminated lawsuits at the outset of every case and analyze their impact on class certification.

Timing Of The Certification Decision

Rule 23(c)(1)(A) provides that “[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.”

Prior to the 2003 amendments, courts were required to decide class certification “as soon as practicable.” The Advisory Committee notes explain that this requirement was changed because it “neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision.” For example, courts often choose to rule on dispositive motions (which bind only the named parties) before turning to the thornier and potentially unnecessary issue of class certification.⁷⁸

Despite the 2003 amendment, some local rules continue to require that a decision on class certification be made “at an early practicable time.” District judges should “feel free to ignore local rules calling for specific time limits” as they “appear to be inconsistent with the federal rules and ... obsolete.”⁷⁹

Modification Of The Certification Decision

⁷⁷ MCL § 21.25.

⁷⁸ B. Rothstein & T. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* (3rd ed. 2010) (“Class Action Pocket Guide”) at 9; MCL § 21.133 (describing a “substantial rate of precertification rulings” on dispositive motions and noting that such rulings “frequently dispose of all or part of the litigation”).

⁷⁹ Class Action Pocket Guide at 9.

Rule 23(c)(1)(C) provides that “[a]n order that grants or denies class certification may be altered or amended before final judgment.”

A subdivision of Rule 23 that allowed an order of class certification to be conditional was deleted in 2003. The Advisory Committee notes explain that “[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.”

Appeal Of The Certification Decision

Rule 23(f) provides that “[a] court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered.”

The appellate court exercises considerable discretion over whether to accept the appeal. An appeal may be accepted when: (1) the decision is questionable and the certification order represents the death knell for a defendant who will be compelled to settle even if the plaintiff’s claims are not meritorious, (2) the decision raises an unsettled, fundamental and generally applicable issue of law that will likely evade end-of-the-case review, or (3) the decision is manifestly erroneous.⁸⁰

Rule 23(f) also provides that “[a]n appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.” When ruling on a motion for stay, relevant factors include the probability of error in the decision, the effect on the tolling of the statute of limitations, and the possible prejudice to the parties.⁸¹

⁸⁰ *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 250.

⁸¹ MCL § 21.28.