

## **9.2 Taming the Uncommon Issues: What Role Should Subclasses Play in Rule 23(b)(3) Certification?<sup>1</sup>**

### **INTRODUCTION**

Federal Rule of Civil Procedure 23, which sets strict prerequisites to class certification, allows courts to subdivide classes, without explaining the purposes for which subclasses should be used. Section (c)(4)(B) of Rule 23 states that "[w]hen appropriate . . . a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." This ambiguous sentence exhausts the guidance Rule 23 offers courts and class counsel. Despite the lack of direction, subclasses have become an important procedural vehicle for fulfilling Rule 23 prerequisites in complex class action suits. The following outline will address the value of subclasses as a means for fulfilling Rule 23 class certification prerequisites.

Part One of this outline will analyze a recent Supreme Court opinion, in which the Court acknowledged the need for subclasses in a class action suit with numerous uncommon issues. Part Two will examine the underlying purpose of Rule 23(c)(4), which confers the right to use subclasses. Part Three will evaluate subclasses in light of each of the Rule 23 prerequisites.

### **I. AMCHEM PRODUCTS, INC. V. WINDSOR, 117 S. Ct. 2231 (1997)--THE SUPREME COURT REQUIRED STRICT APPLICATION OF RULE 23 PREREQUISITES AND ADDRESSED THE NEED FOR SUBCLASSES IN CASES WITH UNCOMMON ISSUES**

#### **A. CLASS CHARACTERISTICS--THE PARTIES SOUGHT CERTIFICATION OF A MASSIVE CLASS OF INDIVIDUALS WHO HAD WIDELY VARIED CLAIMS**

##### **1. Class definition**

---

1 Permission to reprint this article has been granted by Michael P. Malakoff and by the Practising Law Institute which published this article in Consumer Financial Services Litigation (1998).

In Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231 (1997) ("Amchem") the parties sought certification, for settlement purposes only, of a class consisting of all individuals who either were exposed or were the relatives of individuals exposed to asbestos products manufactured by the Defendants and who had not filed claims against the Defendants by January 15, 1993. (For a more detailed definition, see Amchem, at 2239-2240, n.5.) 2. Types of injuries encompassed by the class

The proposed class encompassed individuals who fell into four categories: (1) relatives of individuals who died from asbestos related injuries; (2) individuals who currently suffered from an asbestos-related disease; (3) individuals who experienced either bilateral pleural thickening or asbestosis, the "non-malignant" asbestos-related conditions; and (4) individuals who, though exposed to asbestos, had not yet suffered any identifiable physical change as a result of exposure. Id. at 2240.

#### ***B. PROCEDURAL HISTORY--THE THIRD CIRCUIT VACATED THE DISTRICT COURT'S CERTIFICATION ORDER***

The District Court for the Eastern District of Pennsylvania granted class certification under Rule 23(b)(3) and approved the Settlement Agreement proposed by the parties. Georgine v. Amchem Products, Inc., 157 F.R.D. 246 (E.D. Pa. 1994); *vacated*, 83 F.3d 610 (3d Cir. 1996); *cert. granted sub nom. Amchem Products, Inc. v. Windsor*, 136 L. Ed. 2d 297 (1996); *aff'd*, 117 S. Ct. 2231 (1997). The Third Circuit vacated the district court's order on the ground that the class failed the certification prerequisites, with the exception of numerosity, listed by Rule 23(a) and (b)(3). Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom. Amchem Products, Inc. v. Windsor*, 136 L. Ed. 2d 297 (1996); *aff'd*, 117 S. Ct. 2231 (1997).

#### ***C. THE SUPREME COURT'S HOLDING--THE CLASS FAILED THE CERTIFICATION PREREQUISITES OF FED. R. CIV. P. RULES 23(A) AND 23(B)(3)***

The Supreme Court affirmed the Third Circuit's order, holding that the district court abused its discretion by certifying the proposed class, because the parties failed to prove that common issues predominated over individual issues or that representation was adequate.

1. Rule 23(a)(4)--Adequacy of Representation

a. **Test for Adequacy of Representation**

Under Rule 23(a)(4), representative parties must "fairly and adequately protect the interests of the class," a requirement that "serves to uncover conflicts of interest between named parties and the class they seek to represent." Amchem, 117 S. Ct. at 2250. To comply with this provision, the named party "must be part of the class and possess the same interest and suffer the same injury as the class members." (Citations omitted). Id. at 2251. In addition, . . . class counsel must be qualified and must serve the interests of the entire class." Georgine v. Amchem Products, Inc., 83 F.3d at 630.

b. **The Supreme Court held that the class lacked adequate representation**

In Amchem, the nine named plaintiffs ". . . included a fairly representative mix of futures and injured plaintiffs. . . ." Id. at 632. Nevertheless, the Supreme Court found that:

In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future

Amchem, 117 S. Ct. at 2251. On this basis, the Court determined that the proposed settlement contained "no structural assurance of fair and adequate representation for the diverse groups and individuals affected." Id.

2. Rule 23(b)(3)--Predominance of common issues over individual issues

a. **Test for Predominance**

Certification under Rule 23(b)(3) is inappropriate unless ". . . questions of law or fact common to the members of the class predominate over any questions affecting only individual members." This ". . . inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem, 117 S. Ct. at 2249. Not all common questions are relevant to the predominance inquiry. Id. Only those "legal or factual questions that qualify each class member's case as a genuine controversy" are relevant. Id.; see also Id. at 2249, n.18.

**b. The Supreme Court held that individual issues predominated**

The district court held that two facts common to the class satisfied the predominance requirement--each class member had been exposed to asbestos, and each had an interest in a settlement that provided prompt, fair compensation with minimal risks and transactions costs. Id. at 2249. The Supreme Court disagreed, however, and held that the class failed the predominance requirement. First, the Court found that the common interest in fair settlement did not qualify as a "common issue of fact or law" for the purpose of determining whether common issues predominated, stating that "[i]f a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that vital prescription would be stripped of any meaning in the settlement context." Id. at 2249-2250. In addition, the Court, while common exposure to asbestosis may be relevant to the predominance inquiry, that one common issue was insufficient, given the vast number of uncommon issues, to fulfill the predominance requirement. Id. at 2250. The unique individual questions surrounding circumstances of exposure and the cause, nature and extent of injury exceeded the commonality of exposure. Id.

***D. THE SUPREME COURT ADDRESSED THE NEED FOR SUBCLASSES IN CLASSES WITH UNCOMMON ISSUES***

The Supreme Court's disapproval of the district court's failure to divide the plaintiff class into subclasses was a recurrent theme in the Amchem opinion. See Amchem, 117 S. Ct. at 2240, 2241, 2242, 2251. The Court's focus on this issue indicates that plaintiff classes with many uncommon issues cannot fulfill the Rule 23 certification prerequisites without subclasses.

1. Adequate Representation

In Amchem, the Supreme Court held that a class containing members with adverse interests could not satisfy Rule 23(a)(4)'s adequate representation requirement without separately represented subclasses. Id. at 2250-2252. The Court criticized the absence of subclasses three times during its discussion of adequate representation. First, it stated that ". . . named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned." Id. at 2251. In the second paragraph following that statement, the Court reiterated, "[a]lthough the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency." Id. Elaborating on that statement, the Court then cited a more detailed analysis of the need for subclasses:

"[W]here differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups . . . . [T]he adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." In re Joint Eastern and Southern Dist. Asbestos Litigation, 982 F.2d 7221, 742-743 (C.A.2 1992).

Id. These passages suggest that classes containing members with adverse interests cannot fulfill the adequate representation prerequisite without separately represented subclasses. See also Lorna G. Schofield, Amchem: The Supreme Court Speaks on Certification for Settlement, 7 A.B.A. Committee on Class Actions & Derivative Suits 6, 8 (Fall 1997).

## 2. Predominance of Common Issues

In contrast, the Supreme Court did not link fulfillment of the predominance requirement with the use of subclasses in its Amchem opinion. The Court made only one reference to the subgroups contained within the class: "[g]iven the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the

significance of those uncommon questions, *any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard.*" (Emphasis added). Amchem, 117 S. Ct. at 2250. The allusion to categories of class members, in this context, suggests that subclasses are irrelevant to the predominance inquiry. If the class could have satisfied the predominance requirement by using subclasses, then the predominance requirement could have been fulfilled despite "the greater number of questions peculiar to the several categories of class members." In the above passage, however, the Court indicated that even questions common to subgroups of the class weigh against the predominance of common issues.

### 3. Importance of the Supreme Court's Discussion of Subclasses

The Supreme Court did not discuss the need for subclasses at length; it merely criticized their absence. Those references suggest that the Court views subclasses as essential to certification of classes with uncommon issues. Nevertheless, the Amchem opinion does not provide guidance for determining whether and when to use subclasses. Thus, the question, "for what can subclasses be used?" remains.

## **II. FEDERAL RULE OF CIVIL PROCEDURE 23(c)(4)--THE ORIGIN OF SUBCLASSES**

### **A. THE TEXT OF RULE 23(C)(4)**

Rule 23(c)(4) states that "when appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

### **B. ADVISORY COMMITTEE'S NOTES ON RULE 23(C)(4), 39 F.R.D. 95, 106**

The Advisory Committee's Notes reveal that both provisions of 23(c)(4) were intended as mechanisms for preventing uncommon issues from overwhelming a class action or preventing certification. Regarding subdivision (A), the Committee states, "[t]his provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a

fraud or similar case the action may retain its 'class' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims." Thus, if the class can prove some elements of a claim by common proof, but other elements would involve overwhelmingly individual evidence, then the class can be certified for the purpose of resolving the common issues.

Regarding subdivision (B), the Committee states that "[t]wo or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class." Like subdivision (A), this subdivision offers a method for ensuring that uncommon issues will not overwhelm the class litigation, so that a class can be certified despite them. However, subclasses are a less extreme response to uncommon issues than removal of the uncommon issues from class litigation. Thus, Rule 23(c)(4) presents a question: when are uncommon issues so prevalent that subclasses cannot effectively control them?

### **III. SUBCLASSES AND RULE 23 REQUIREMENTS**

Subclasses provide an effective method for preventing uncommon issues from barring class certification under Rule 23(b)(3). A class with uncommon issues can be divided into subclasses to fulfill Rule 23's "typicality," "adequacy of representation," and "manageability" requirements. At some point, however, uncommon issues become so prevalent that even certification of a class with subclasses is improper, because under Rule 23(b)(3) common issues must predominate over uncommon issues. If uncommon issues predominate, then the class cannot be certified (unless the uncommon issues are removed), regardless of the use of subclasses.

Moreover, Rule 23(a)(1)'s "numerosity" requirement limits the use of subclasses. Each subclass must independently fulfill the Rule 23 certification prerequisites. See e.g. Retired Chicago Police Association v. City of Chicago, 7 F.3d 584, 599 (7th Cir. 1993), *cert. denied*, 117 S. Ct. 305 (1997) (subclasses must fulfill Rule 23 prerequisites); Central Wesleyan College v. W.R. Grace & Co., 6 F.3d 177, 189 (4th Cir. 1993) (subclasses must fulfill Rule 23

requirements). If a class fulfills the Rule 23 prerequisites, subclasses of that class necessarily fulfill the prerequisites, with the exception that small subclasses may fail the "numerosity" requirement imposed by Rule 23(a)(1).

The following section will discuss the usefulness of subclasses as mechanisms for promoting satisfaction of some Rule 23 requirement and the limitations imposed on the use of subclasses by other Rule 23 prerequisites.

#### **A. RULE 23(A) REQUIREMENTS**

##### **1. Rule 23(a)(1)--Numerosity**

##### **a. Definition of Numerosity**

Fed. R. Civ. P. 23(a)(1) requires the class to be so numerous that joinder is impracticable. "No arbitrary rules regarding class size have been established. In addition to the size of the class, the court may also consider the nature of the action, the size of the individual claims, the inconvenience of trying individual claims, and any other factor relevant to the practicability of joining all the putative members." (Citations omitted). Paxton v. Union Nat'l Bank, 688 F.2d 552, 559-560 (8th Cir. 1982).

##### **b. Subclasses Cannot Assist Small Classes in Meeting the Numerosity Prerequisite**

Obviously, subclasses cannot assist a small class in fulfilling the numerosity requirement, since a subclass cannot be larger or more regionally diverse than the class from which it was drawn.

##### **c. The Numerosity Requirement Imposes a Limitation on the Use of Subclasses**

The numerosity requirement may prevent plaintiffs from using subclasses to fulfill other Rule 23 prerequisites. Since subclasses must independently fulfill Rule 23 criteria, a number of courts have refused to certify small subclasses on the ground that they are not sufficiently large to fulfill the numerosity prerequisite. For example, in Roby v. St. Louis Southwestern Ry. Co., 775 F.2d 959, 962 (8th Cir. 1985), the court affirmed the lower court's decertification of two subclasses containing only four and three members, respectively. Similarly, in Andrews v. Bechtel Power Corp., 780 F.2d 124, 131-132 (1st Cir. 1985), the court affirmed the lower court's



refusal to certify a three subclasses containing only three, seven, and thirty-nine individuals, respectively. The court noted certification of the thirty-nine member subclass was improper, because all of the members were situated in the same geographic region and could be joined in one action.

For cases in which the court held that a subclass independently fulfilled the numerosity requirement, see Paxton v. Union National Bank, 688 F.2d at 559-560 (court overturned lower court's refusal to certify subclass containing a large, but indeterminate number of black employees who received less valuable promotions than white employees or no promotions at all, especially since no individual employee could obtain the broad-based injunctive and declaratory relief sought by the class representatives); Caroline C. v. Johnson, No. 4: CV95-22 RGK, 1996 WL 910023 (D. Neb. Sept. 26, 1996) (subclass of fifty institutionalized women who had been raped by male patients met numerosity requirement. In addition to the size of the subclass, the subclass members' lack of sophistication or knowledge, which inhibited individual actions, enabled the subclass to meet the numerosity requirement).

Some courts have refused to apply the stringent numerosity requirements to subclasses, particularly when the class from which the subclass is drawn has been certified. For example, in Watson v. Shell Oil Co. 979 F.2d 1014 (5th Cir. 1992), *reh'g granted*, 990 F.2d 805 (5th Cir. 1993), and *reh'g dismissed*, 53 F.3d 663 (5th Cir. 1994), the court affirmed the district court's creation of a six-member subclass from a class that previously had been certified.

## 2. Rule 23(a)(2)--Commonality

### **a. Definition of Commonality**

Under Rule 23(a)(2), material questions of law or fact must be common to the class. The commonality prerequisite is fulfilled if at least one material issue of fact or law links all or most of the class members. See DeBoer v. Mellon Mortg. Co., 64 F.3d 1171, 1174 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1544 (1996); Troutman v. Cohen, 661 F. Supp. 802, 810-811 (E.D. Pa. 1987). If no common issue unites the class, then there is no basis for consolidating claims in a class action.

**b. Subclasses Cannot Be Used to Assist A Class Without Common Issues in Meeting the Commonality Requirement**

Since common issues must unite the entire class, a class without common issues fails the commonality standard, even if it can be divided into subclasses, each of which share common issues. The language of Fed. R. Civ. P. 23 dictates this result. Rule 23(a)(2) states that "there [must be] questions of law or fact *common to the class*." (Emphasis added). Only a substantial distortion of the language of Rule 23(a)(2) could produce the interpretation "*common to the class or subclasses thereof*."

**c. The Commonality Prerequisite Does Not Limit the Use of Subclasses to Aid Classes in Fulfilling Other Rule 23 Standards**

If common issues unite the entire class, then they necessarily unite subclasses thereof. Thus, if the class itself meets the commonality prerequisite, subclasses drawn from the class will fulfill that prerequisite.

**3. Rule 23(a)(4)--Adequacy of Representation**

In the text of Rule 23, the typicality requirement precedes the adequacy of representation requirement. This outline discusses adequacy of representation first, however, because typicality contains an adequate representation component.

**a. Definition of Adequacy of Representation**

Under Rule 23(a)(4), the representative parties must adequately protect the interests of the entire class. This prerequisite has two components. First, the interests of the named plaintiff must be sufficiently aligned with those of the class. Second, class counsel must be qualified and must serve the interests of all class members. Georgine v. Amchem Products, Inc. 83 F.3d at 630. "Adequate representation goes to the heart of the problem of binding class members to a judgment litigated in their absence." Penk v. Oregon State Bd. of Higher Ed., 93 F.R.D. 45,50 (D.C. Or. 1981), *aff'd*, 816 F.2d 458 (1987).

**b. Subclasses Can Be Used to Assist a Class With Uncommon Issues in Fulfilling the Adequacy of Representation Requirement**

Subclasses, each with separate representatives and counsel, can enable a class containing members with diverse interests or uncommon issues to fulfill the adequate representation requirement. In In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 800-801 (3d Cir. 1995), the court held that the class failed the adequacy of representation requirement, because the class contained subgroups with antagonistic interests. As a result, the proposed settlement failed to protect the interests of all class members. Id. "At the very least, the class should have been divided into subclasses so that a court examining the settlement could consider settlement impacts that would be uniform at least within the subclasses." Id.

Similarly, in In re Joint Eastern and Southern Dist. Asbestos Litigation, 982 F.2d 721, 739-745 (2d Cir. 1992), *reh'g granted & op. modified*, 993 F.2d 7 (1993), a proposed settlement class in bankruptcy litigation contained both claimants and co-defendants. The court found that conflicts of interest existed not only between the claimants and co-defendants, but also within the group of claimants and the group of defendants. As a result, the class should have been divided into subclasses of defendants and claimants with common interests. See also Link v. Mercedes Benz of North America, Inc. 788 F.2d 918, 930 (3d Cir. 1986) (The court stated that "[i]f the class representatives did not adequately represent the subclass, the proper remedy was to amend the class certification order or to permit additional plaintiffs to intervene).

**c. The Adequacy of Representation Requirement Does Not Impose Additional Limitations on the Use of Subclasses**

Rule 23(a)(4) imposes no requirements on subclasses additional to those imposed on the class as a whole. Under this provision, all class members and all subclass members must be adequately represented. If all class members are adequately represented, however, all subclass members are adequately represented.

4. Rule 23(a)(3)--Typicality

a. **Definition of Typicality**

Fed. R. Civ. P. 23(c) states that "the claims and defenses of the representative [must be] typical of the claims and defenses of the class." "Typicality focuses on the similarity between the named plaintiffs' legal and remedial theories and the legal and remedial theories of those whom they purport to represent." In re Asbestos Litigation, 90 F.3d 963, 976 (5th Cir. 1996, *vacated*, 117 S. Ct. 2503 (1997)). Some courts have found that this requirement merges with commonality. See e.g. Marisol v. Rudolph W. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997), *cert. denied*, 117 S. Ct. 1694 (1997). Others have held that the typicality inquiry is similar to the adequacy of representation inquiry. See e.g. Georgine v. Amchem Products, Inc., 83 F.3d at 632; see also In re Teletronics Pacing Systems, Inc., 172 F.R.D. 271, 281 (S.D. Ohio 1997) (court found that typicality is interrelated with adequacy of representation and tends to merge with commonality); Vulcan Soc. of Westchester County v. Fire Dept. of City of White Plains, 82 F.R.D. 379, 399 (S.D.N.Y. 1979) ("It is questionable whether the Rule 23(a)(3) requirement that plaintiffs' claims be "typical of those of the class has any meaning independent of Rule 23(a)(2) (common question) or (a)(4) (adequate representation)". For the purpose of determining the usefulness of subclasses, typicality is best viewed as a combination of commonality and adequacy of representation.

#### *1. Adequacy of representation element*

Like the adequacy of representation inquiry, the typicality requirement is designed to assure that the representative plaintiffs will adequately protect the interests of the class. See Georgine v. Amchem Products, Inc. 83 F.3d at 631-632. The class action is based on the premise that the representative party will further class claims by furthering his/her own claims. A plaintiff who represents a class with claims different than his/her own has no incentive to protect class claims. Moreover, a plaintiff who represents a class with interests adverse to his/her own has an incentive not to protect class claims. Thus, typicality, by requiring that the representative party's interests are aligned with those of the class, ensures that the representative party has an incentive to protect class claims. See Marisol A. v. Rudolph W. Giuliani, 126 F.3d at 376.

#### *2. Commonality element*

Commonality provides a baseline, or outside boundary, for the typicality inquiry, because no plaintiff's claim can be typical of a class that has no common questions. See Georgine v. Amchem Products, Inc., 83 F.3d at 632 (court found that typicality cannot exist where uncommon issues abound).

**b. Subclasses Can Be Used to Help a Class with Uncommon Issues Meet the Typicality Requirement**

If a class united by at least one common issue contains a number of uncommon issues, so that no plaintiff has claims typical of the entire class, subclasses may be used to fulfill the typicality requirement. For example, in In re Teletronics Pacing Systems, Inc., 172 F.R.D. at 271, class members' claims varied depending on state law. The court held that, to fulfill the typicality requirement, each state law subclass needed a separate representative party. After additional parties had joined as named plaintiffs, the court held that "Plaintiffs now provide proper class representatives for each subclass because each subclass is represented by an individual whose home state's law permits the cause of action identified by the subclass." Id. at 281. See also Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985) (The court stated that ". . . even atypical elements of a claim may often be adequately treated by judicious severance or use of subclasses or other separate treatment of individual issues."); In re Northern District of California, Dalkon Shield IUD Products Litigation, 693 F.2d 847 (9th Cir. 1982) (The court held that the class failed to satisfy the typicality requirement, but did not "preclude further consideration by the district court of motions to certify a more limited class or subclasses under Rule 23(b)(3).")

However, in some cases, though the class is united by a common issue, uncommon issues are so divisive that even subclasses have no typical representatives. For example, in Georgine v. Amchem Products, Inc., 83 F.3d at 632, the court stated, "[e]ven if this class included only futures plaintiffs, we would be skeptical that any representative could be deemed typical of the class. In addition to the problems created by differences in medical monitoring costs, the course of each plaintiff's future is completely uncertain." A subclass of "futures plaintiffs," individuals

who had not yet suffered any identifiable disease or condition as a result of their exposure to asbestos, would have met the commonality requirement, since an issue common to all was whether exposure to asbestos qualified as an actual injury that conferred standing to sue. Id. Nevertheless, the court found so much uncertainty surrounding the plaintiffs' claims that no representative could be typical. Id.

**c. The Typicality Requirement Does Not Limit the Use of Subclasses to Help Classes Fulfill Other Rule 23 Criteria**

Like commonality and adequacy of representation, typicality imposes no limitations on subclasses additional to those imposed on the class. If the claims of the named plaintiffs are typical of the class, then subclasses drawn from the class necessarily have representatives with typical claims.

**VII. APPLICATION OF SUBCLASSES TO RULE 23(b)(3) REQUIREMENTS**

***A. Certification Criteria under Rule 23(b)(3)***

Certification under Rule 23(b)(3) is appropriate if the court finds that: (1) questions of law and fact common to the class members predominate over questions affecting only individual members ("predominance"), and (2) a class action is the superior method, of all available methods, for the fair and efficient adjudication of the controversy ("superiority"). Matters pertinent to this finding include: (1) the interest of the members of the class in controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation already pending; (3) the desirability or undesirability of concentrating the litigation of the claims in a particular forum; and (4) the difficulties likely to be encountered in the management of the class action.

***B. The Predominance Requirement***

There is an inherent tension between subclasses and the requirement that common issues predominate over issues unique to individual class members. Subclasses provide a mechanism for dealing with issues that are not common to the entire class. The predominance requirement prevents certification of a class with too many uncommon issues. Thus, for classes certified

under Rule 23(b)(3), the predominance requirement sets an outer limit for the use of subclasses. If the issues for which subclasses are needed predominate over issues common to the class, then Rule 23(b)(3) certification cannot stand.

1. Test for Predominance

Courts are not united in their approach to determining whether common issues predominate over individual issues. Cases addressing predominance present two approaches for determining whether common issues predominate.

- a. **Approach One--Conservative Application of Rule 23(b)(3)**

According to the first, more conservative approach, courts evaluate each class claim by issue and certify the class to resolve only those issues that can be proved by overwhelmingly common proof, unless elements that cannot be proved by common proof present only a few, easily manageable individual issues. If an otherwise common issue depends on state law in a multi-state class, and the relevant law is not uniform from state to state, then the issue is not common to class. Moreover, if an issue depends on the class members' individual circumstances, then it is not common to the class.

1. No Certification

In Clement v. American Honda Finance Corp., No. 3:95cv660 (AHN), 1997 WL 693645 at \*5-6 (D. Conn. Oct. 30, 1997), the court held that the class lacked the cohesion necessary for certification, because state law differences rendered some class members significantly less likely to recover on their claims than others. Since the variations in state law that divided the class infiltrated all of the class claims, the court found no common issues for which to certify the class.

2. Certification of the Class to Resolve Some Issues

The court in Watson v. Shell Oil Co., 979 F.2d at 1022, stated that ". . . a class action issue predominates if it constitutes a significant part of the individual cases." It upheld class certification to resolve only liability issues, because "[t]he class issues to be determined by the Phase 1 jury form integral elements of the claims asserted by each of the more than 18,000 plaintiffs." Id.

### 3. Certification of the Class to Resolve All Issues

In In re Energy Systems Equipment Leasing Securities Litigation, 642 F. Supp. 718, 752 (E.D.N.Y. 1986), the court stated that predominance ". . . requires that common issues provide the dominant core of a case. Any questions of individual reliance can be deferred until after the Court disposes of the question common to each of the classes." The court granted class certification for all claims, because the class claims were rooted in standardized materials sent to investors, and individual issues were minor in comparison to common issues. See also Belinda Peterson v. H & R Block Tax Services, Inc., No. 96 C 6647, 1997 WL 399307 (N.D. Ill. July 10, 1997)

#### **b. Approach Two--Liberal Application of Rule 23(b)(3)**

Courts that choose the second approach will certify a class to resolve all claims if they can find any overarching common issues, regardless of whether the common issues are material issues of fact or law and regardless of the volume of individual issues presented by the claims. For example, in Georgine v. Amchem Products, Inc., 157 F.R.D. at 246, the court held that the class members' common interest in a fair settlement and common exposure to asbestos satisfied the predominance prerequisite, despite an overwhelming number of individual issues resulting from variations in state law, present health condition, length of exposure to asbestos, and other factors contributing to asbestos-related diseases.

#### **c. The Supreme Court Rejected the Second, More Liberal Approach**

In Amchem, 117 S. Ct. at 2249-2250, the Supreme Court overruled the district court's holding for two reasons. First, the common interest in a fair settlement was not one of the legal or factual questions that qualified ". . . each class members' claim as a genuine controversy." Id. at 2249. Second, while exposure presented a common issue, the individual issues presented by variations in state law, present health, length of exposure, and other factors contributing to disease overwhelmed that abstract common question. Id. at 2250. Thus, the Court rejected the liberal approach to determining whether common issues predominate.

### 2. Application of Subclasses to the Predominance Requirement



#### **a. Subclasses Cannot Aid a Class in Fulfilling the Predominance Requirement**

Like commonality, predominance sets a standard of class cohesion that subclasses cannot overcome. Under Rule 23(b)(3), "questions of law and fact *common to the class members* [must] predominate over questions affecting only individual members." (Emphasis added). Since subclasses cannot increase the number of issues that are common to the class, the use of subclasses will not facilitate fulfillment of the predominance requirement.

Plaintiffs can use subclasses, however, to demonstrate that uncommon issues are not as divisive as they appear. For example, in Wilks v. Ford Motor Co., 174 F.R.D. 332 (D.N.J. 1997), the court recognized that ". . . it has been possible in other product liability cases to regroup the applicable laws of the fifty states into . . . general patterns providing an accurate pattern for subclass groupings by state. . . ." Id. at 350. Nevertheless, the court held that the class failed to fulfill the Rule 23(b)(3) predominance requirement, because the plaintiffs made no attempt to demonstrate that class claims could be distilled into a manageable number of subclasses. Id.

#### **b. Predominance Imposes an Outer Limit on the Use of Subclasses**

There is an inherent tension between subclasses and the predominance requirement. Subclasses provide a mechanism for litigating uncommon issues, and the predominance requirement imposes an outer limit on the number of uncommon issues that a class action suit can contain. Thus, predominance establishes the breaking point at which subclasses no longer provide a sufficient mechanism for controlling uncommon issues. When individual issues overwhelm common issues, the court must either certify the class to resolve only common issues, under Rule 23(c)(4)(A), or deny class certification.

For example, in Smith v. Brown & Williamson Tobacco Corp., No. 96-0459-CV-W-3, 1997 WL 381264 at \*7 (W.D. Mo. May 22, 1997), where common issues did not predominate, the court rejected the possibility of using subclasses and denied certification, stating that "[a]t first glance, it would seem that these problems can be solved by adopting a multitude of subclasses. Given the number of permutations involved, this task appears virtually impossible; at best it greatly diminishes any advantage certification offers over individual trials." See also

Briefs on Appeal from the Decision in In re Prudential Insurance Co. of America Sales Practices Litigation, 962 F. Supp. 450 (D.N.J. 1997), *appeal pending*, Nos. 97-5155, 97-5156, and 97-5157 (3d Cir. 1998), portions relating to class certification attached hereto as Exhibits A, B, and C [*not reprinted herein*]. (Appellant argues that the class fails prerequisites to certification under Rule 23(b)(3); appellee argues that uncommon issues can be managed effectively with subclasses).

In contrast, the court in Anderson v. Bank of the South, N.A., 118 F.R.D. 136, 150 (M.D. Fla. 1987), approved the use of subclasses to litigate uncommon damage issues, since common liability issues predominated. See also Alexander Grant & Co. v. McAlister, 116 F.R.D. 583, 590 (S.D. Ohio 1987) (where common issues predominated, court found that subclasses could be used to litigate the few individual issues).

Thus, subclasses can accommodate class claims with multiple individual issues, but if the individual issues exceed the common issues, then subclasses are ineffective.

### ***C. The Superiority Requirement***

The requirement that a class action be the superior method for litigating the controversy involves several inquiries. Subclasses are relevant to only one of those inquiries--the difficulties likely to be encountered in the management of the class action.

#### **1. Subclasses Can Aid a Class in Satisfying the Manageability Requirement**

Since subclasses provide a mechanism for litigating individual issues in a class action, they can enhance the manageability of a class with numerous uncommon issues. For example, in In re Teletronics Pacing Systems, Inc., 172 F.R.D. at 271, where state law distinctions within the class presented manageability problems, the court divided the class into two subclasses, based on the distinctions, and certified the class. See also In re Energy Systems Equipment Leasing Securities Litigation, 642 F. Supp. at 751-752 (the court held that ". . . certification of the litigation as a class action encompassing the three subclasses proposed by the plaintiffs is superior to any other available method for the fair and efficient adjudication of the controversy.")

#### **2. The Manageability Requirement Imposes Limitations on the Use of Subclasses**

Where the number or complexity of uncommon issues is too great, however, subclasses no longer provide an effective control mechanism. For example, in Central Wesleyan College v. W.R. Grace & Co., 6 F.3d 177, 189 (4th Cir. 1993), the court overturned certification of a multi-state class that alleged claims dependent on state law, because "[r]esolution of these issues may require consideration of the laws of the jurisdiction where a particular college or university is located. Instructing a jury on the laws of multiple jurisdictions will be a significant task, and one that has not been resolved in over ten years of School Asbestos Litigation." Moreover, the court determined that "[e]ven the district court's suggested use of subclasses to consider different state laws will pose management difficulties and reduce the judicial efficiency sought to be achieved through certification." Id.

Similarly, in Wilks v. Ford Motor Co., 174 F.R.D. at 352, the court held that litigation of class claims would be unmanageable, even if the plaintiffs used subclasses, reasoning that ". . . it is apparent that appropriate adjudication of the issues in the MDL case would require an unduly large number of subclasses that would divide up the plaintiffs by, among other factors, vehicle model, model year, and the law that governs their claims."

The point at which uncommon issues become unmanageable is most likely the same point where uncommon issues predominate. If uncommon issues are manageable, they will not overwhelm common issues. If uncommon issues are unmanageable, they will predominate over common issues. The court in Central Wesleyan recognized this connection, and followed its disapproval of the use of subclasses with the observation that "[s]imilar concerns over a few common issues not predominating over individual questions in asbestos cases previous prompted the Panel on Multidistrict Litigation not to consolidate property damage actions." Id. at 189. Thus, the "manageability" criterion is contiguous with the predominance criterion.

## **VII. CONCLUSION**

Federal Rule of Civil Procedure 23(c)(4)(B) provides a procedural device for litigating both common and uncommon issues in a single class action. Subclasses can be used to overcome problems with typicality, adequacy of representation, and manageability that afflict classes with uncommon issues. Their usefulness is constrained, however, by the predominance and superiority requirements of Rule 23(b)(3) and the numerosity requirement of 23(a)(1).

Nevertheless, used in conjunction with Rule 23(c)(4)(A), which allows the maintenance of a class action with respect to some issues ("selective litigation"), subclasses significantly increase the certification potential of classes with uncommon issues. See Table of Class Certification Continuum, attached hereto as Exhibit D [*not reprinted herein*].