Michigan
Bar Journal

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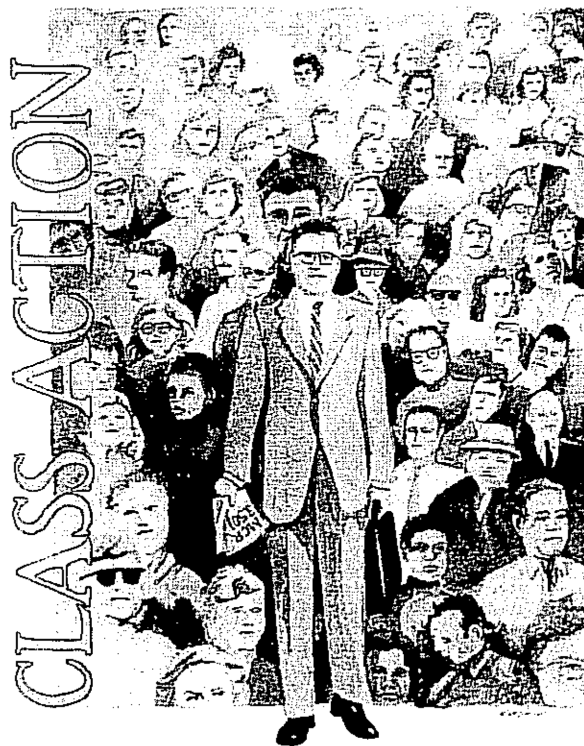

Reprinted from the March 1999 *Michigan Bar Journal,* Volume 78, No. 3

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By Jonathan R. Moothart[1]

CLASS ACTION POLICY

"Despite the admirable evolution of the common law toward increasing responsiveness in such fields as consumer law such as product injury liability, it remains brutal fact that the consumer defrauded or cheated out of $10, $50, $100—even $500—no matter how clear and incontestable the legal wrong which he has suffered, has only a paper right; he is virtually without enforceable remedy."[2] For decades, the class action has afforded consumers a measure of relief in such a circumstance that otherwise would be unavailable. As explained more than 50 years ago by the Seventh Circuit in *Weeks v Bareco Oil Co*:[3]

> *"To permit the defendants to contest the liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent."*

Michigan courts have similarly recognized the salutary effects of class litigation. In *Pressley v Lucas*,[4] the Michigan Court of Appeals observed that "[c]lass actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." And in *Paley v Coca-Cola*,[5] the Michigan Supreme Court stated:

> *"We live in a world where too many individuals often find their environment confusing, if not hostile. They feel like a number or a bit in a massive impersonal computer. All around them they are confronted by giant powers, big government, big corporations, big unions. They feel they have no control over, or even voice in what goes on. The law also seems strange and unfriendly. For too many the law seems like part of the problem instead of part of the solution.*
>
> *The class action certainly is not a solution to all things. But in some areas, at least, it is a breath of hope—a chance to cope. It gives scattered individuals with a common problem an instrument to try and deal with their problem. It has been particularly helpful for one of today's most beleaguered and disaffected groups[,] the consumer. It is a kind of better slingshot for the modern David to tackle Goliath with."*[6]

With such a history of endorsements, one would expect that Michigan circuit courts[7] would welcome class litigation with open arms. Unfortunately, docket pressure, together with the legendary "litigation explosion,"[8] have too often caused a weary judiciary to shun class cases in favor of "real" disputes.

I have experienced this judicial skepticism in overt expression. I was once asked by a circuit judge if I did not think that my case—over a small fee which my clients alleged had been improperly assessed to unknowing consumers thousands of times—really belonged in the district court. Or, in a less direct expression of doubt regarding the virtue of my clients' cause, one court issued its opinion denying class certification a full 15 months after a one-hour class certification hearing. Accordingly, tenacity in reminding the court of "the important function in our judicial system"

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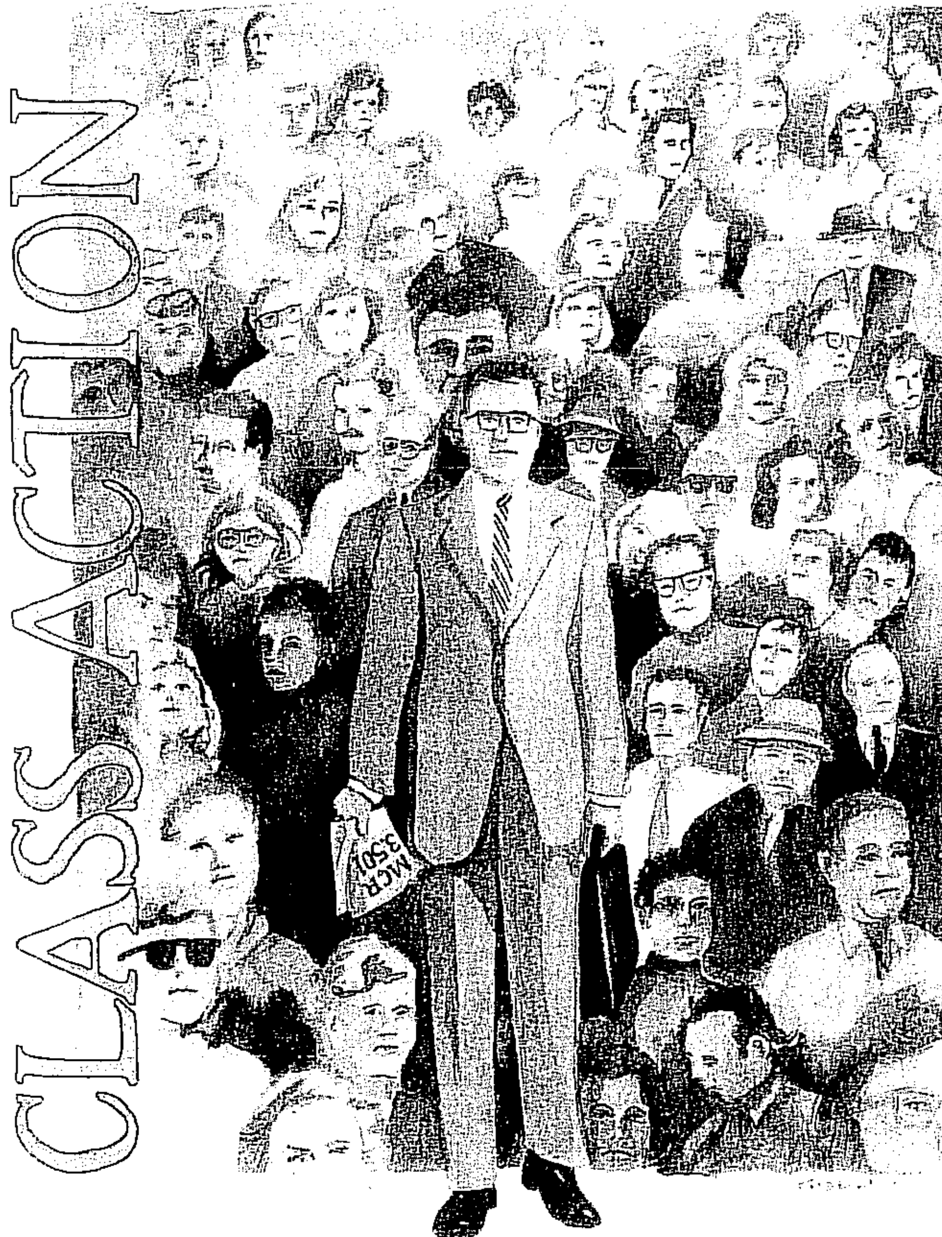
and the beneficial social objectives served by the class action, as well as a good deal of patience and a durable sense of humor, are all critically important to the would-be class counsel.

MCR 3.501

The rule governing class actions in Michigan courts is MCR 3.501. This rule, effective for actions brought on or after

March 1 1985,[9] replaced the former GCR 1963, 208. With MCR 3.501, Michigan abandoned the archaic "opt-in" provisions of GCR 208 and adopted a modern "opt-out" system based on Rule 23 of the Federal Rules of Civil Procedure. Although MCR 3.501 is not identical to its federal counterpart,[10] citation to federal case law under Rule 23 is often helpful, and even necessary, for a proper presentation of issues arising under MCR 3.501, given the dearth of Michigan cases decided under the "new" rule.[11]

MCR 3.501(B)(1)(a) requires that a motion for class certification be filed within 91 days of the date of the filing of a complaint containing class allegations. The motion should include a proposed class certification order, and must contain a proposal regarding "how, when, by whom, and to whom the notice [to the class] shall be given; the content of the notice; and to whom the response to the notice is to be sent." MCR 3.501(C)[12] MCR 3.501(C)(5) requires that the notice contain certain information—including a description of the action and the relief sought; the right of a member of the class to be excluded from or intervene in the action; and a statement that the judgement, whether favorable or not, will bind all members of the class who are not excluded from the action.



REQUIREMENTS FOR CLASS CERTIFICATION

MCR 3.501 sets out five requirements for the certification of a class, all of which must be proven at the class certification hearing. *First,* the class must be so numerous as to make joinder of all members impracticable.[13] Although this element is commonly referred to as "numerosity," Michigan law is clear that the standard is not tied strictly to the number of class members, but the *impracticability* of joinder of the entire class.

In *Pressley, supra* at note 3, the Michigan Court of Appeals held "It is now recognized that in addition to mere numbers, other factors, such as the instability of the group and the whereabouts of its members, should be weighed in determining whether it is 'impracticable to bring them all before the court.'" James, Civil Procedure, pp. 498, 499.[14] In *Pressley,* a group of 50 to 60 persons was found to be sufficiently numerous to constitute a class. In the analogous class action jurisprudence of the federal courts, a group of 25 to 30 persons is generally recognized as meeting the numerosity requirement.[15] In consumer cases, classes that are a close call on numerosity generally will not generate sufficient damages to be a worthwhile pursuit.

Second, questions of law or fact that are *common* to the members of the class must *predominate* over any such questions that affect only individual members.[16] This subrule combines the "commonality" and "predominance" requirements of the parallel Federal Rule 23. The predominance test is not a stringent one. In *Dix, supra* at note 4, the court explained that "[n]o two claims are likely to be exactly similar. Almost all claims will involve disparate issues of fact and law to some degree."[17] The question to be addressed in any case, as in *Dix,* is whether there is "more commonality... than there is disparity."[18] If so, the predominance test is met.[19]

Third, the claims of the representative plaintiffs must be *typical* of the claims of the class.[20] "A claim is typical when it is based on a 'common question of law or fact... and a common relief is sought.' The claims need not be identical in such matters as the individual amount of damages, [citations omitted], so long as common issues predominate and a judicial economy will be realized through the class action

procedure."[21] In other words, if predominance is established, and the representative plaintiffs are members of the class they seek to represent, typicality is established.

Fourth, it must be established that "the representative parties will fairly and adequately assert and protect the interests of the class."[22] In the federal courts, it is generally recognized that this test is met upon a showing that there are no conflicts of interest between the representative plaintiffs, and a likelihood of vigorous prosecution of the case by competent counsel.[23] Challenges by defendants to adequacy as a means to defeat class certification are often viewed with suspicion.

As observed by the Seventh Circuit in *Eggleston v Chicago Journeyman Plumbers Local Union No 130*:[24]

> *"It is often the defendant, preferring not to be successfully sued by anyone, who supposedly undertakes to assist the court in determining whether a putative class should be certified. When it comes, for instance, to determining whether 'the representative parties will fairly and adequately protect the interests of the class,' or the plaintiffs' ability to finance the litigation, it is a bit like permitting a fox, although with pious countenance, to take charge of the chicken house."*[25]

Often class action defendants will base an adequacy attack on the supposed lack of knowledge of the representative plaintiffs regarding the facts or law relevant to the litigation. Although the representative plaintiffs should be kept abreast of the case in the same way as any other client, and must be knowledgeable about the facts, it is not necessary that they be intimately familiar with every detail. "Generally, as long as the plaintiffs, as class representatives, know something about the case, even though they are not knowledgeable about the complaint's specific allegations, the class should be certified."[26]

MCR 3.501(C)(6) provides that the plaintiff must bear the cost of notice, unless applicable statutory provisions provide otherwise.[27] Representative plaintiffs must be prepared for this responsibility; however, it is doubtful whether the entire burden of class notice and costs should or even may be placed on the representative plaintiff. In *Rand v Monsanto Co*,[28] the Seventh Circuit explained its immensely practical rationale for holding that the representative plaintiffs need only vouch for their *pro rata* share of costs:

> *"Class actions assemble small claims—usually too small to be worth litigating separately, but repaying the effort in the aggregate. A representative plaintiff gains nothing from the collective proceeding. Under the district court's rationale, however, [requiring the representative plaintiff to be personally responsible for all costs,] he could well lose, because filing the class suit could expose him to the entire costs of the case... The very feature that makes class treatment appropriate—small individual claims and large aggregate ones—ensures that the representative will be unwilling to vouch for the entire costs. Only a lunatic would do so. A madman is not a good representative of the class!"*[29]

The court concluded: "[A] district court may not establish a *per se* rule that the representative plaintiff must be willing to bear all (as opposed to a *pro rata* share) of the costs of the action."[30] Sound policy requires that a similar rule should be applied to cases under MCR 3.501.

Fifth, it must be demonstrated that "the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice."[31] Factors that the court is to consider regarding this "superiority" or "convenient administration of justice" element are set forth in MCR 3.501(A)(2), and include the following:

- Whether the prosecution of separate actions by or against individual members of the class might create inconsistent results or *res judicata* problems from one class member to another;
- Whether final equitable or declaratory relief might be appropriate with respect to the class;
- Whether the action will be manageable as a class action;
- Whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
- Whether it is probable that the amount that may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
- Whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

Nearly all class cases that satisfy the predominance test will result in a risk of inconsistent results between class members if all class members' claims are litigated separately. Thus, satisfaction of this subrule is usually easily demonstrated.

Manageability

This factor is more often than not, the battleground upon which class cases are won or lost. Defendants, armed with creative and astute counsel, often do their best to prove to the court just how "unmanageable" the case is, and how burdened and miserable the court will be should it made the mistake of granting the representative plaintiff's motion to certify the class. Although such scare tactics have become common, manageability concerns should rarely result in a denial of certification. As with Federal Rule 23, manageability under MCR 3.501(A)(2)(c) is only one of a number of factors to be considered by the court in determining whether the class action will be "superior."

It is only when management difficulties outweigh other factors to make a class action inferior to "other available methods of adjudication in promoting the convenient administration of justice" (such as individual lawsuits) that the superiority requirement is not fulfilled.[32] Accordingly, most courts have held that manageability difficulties cannot support denial of class certification where, as in most small claim consumer class action cases, no other practical litigation alternative exists.[33]

Balancing Test for Size of Individual Claims

MCR 3.501(A)(2)(d), (e), and (f) all focus on the size and nature of individual claims. Subrule (d) requires that the court consider whether the claims are too small

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to warrant individual litigation. Subrule (e) requires that the court consider whether the claims are large enough to justify the time and effort required by the case. Subrule (f) suggest that if the claims are ones that are large enough that the class members would be likely to want to pursue them on their own, collective treatment in a class case may be inappropriate. It is important to remember, however, that these three subrules are to be balanced against one another and applied together, not in isolation, and then balanced again against the manageability and inconsistent results elements as part of the overall "superiority" analysis, all in the context of comparing the class action to "other available methods of adjudication."[34]

JURISDICTION OVER NON-MICHIGAN CLASS MEMBERS

Although Michigan courts had already been assuming jurisdiction over out-of-state class members,[35] the United States Supreme Court in *Phillips Petroleum Co v Shutts*[36] made it clear that such action passes constitutional muster and is procedurally proper, even in an opt-out class where not all class members meet the "minimum contacts" requirements of *International Shoe*.[37] Accordingly, it is entirely appropriate to request multistate or even nationwide certification in the proper circumstances.[38]

Although courts have frequently certified nationwide tort cases and cases involving complex and varied legal theories,[39] defendants in such cases have sometimes successfully argued that differences between the laws of the various states make the case unmanageable.[40] Simpler cases based on breach of contract,[41] common statutory schemes, or common tort theories, do not present these obstacles, and are more routinely certified.[42]

PRACTICE AIDS

Although many Michigan consumer cases are well suited to treatment as class actions, the use of this procedural tool depends upon the resourcefulness of plaintiff's counsel. In determining whether a class certification is appropriate and in adequately addressing the issues of importance to the court, putative class counsel must have at their disposal the basic tools; a familiarity with MCR 3.501 and applicable case law, and access to the established treatise in the area, *Newberg on Class Actions*.[43] *Newberg* is often cited not only by attorneys, but also by trial and appellate judges[44] and is often in the libraries of counsel who intend or expect to practice in this area. Also helpful and well respected is the *Manual for Complex Litigation*.[45] This resource is considerably shorter than *Newberg*, but is written from a judicial perspective and contains important practice guides also found in *Newberg*.

CONCLUSION

In American jurisprudence, the class action is a time-honored institution. With the modernization of Michigan class action practice in MCR 3.501, the class action provides a unique forum for small consumer claimants to be vigorously represented by competent counsel in Michigan state courts, and serves as a deterrent to large-scale institutional fraud, negligence, and consumer deception. For consumers of mass-marketed goods and services in an increasingly impersonal environment—and an ever more expensive legal market—the class action stands as one of the last effective devices for the protection of individual legal rights. ■

Footnotes

1. Copyright 1998. All rights reserved. Editing assistance provided by Mark C. Brodeur, Brodeur & Reina, P.C., Dallas, Texas.
2. Senate Report No 1124, 91st Cong, 2d Sess 5 (1970).
3. 125 F2d 84, 90 (CA 7, 1941).
4. 30 Mich App 300, 186 NW2d 412 (1971), quoting *Eisen v Carlisle & Jacquelin*, 391 F2d 555, 560 (CA 2, 1968).
5. 389 Mich 583, 209 NW2d 232 (1973) (opinion for affirmance in an equally divided court).
6. *Id.*, 389 Mich at 595, 209 NW2d at 236-237.
7. Class actions in Michigan may only be brought in circuit court. This is the rule regardless of whether the claims of the representative plaintiffs or the class meet the jurisdictional limit. *Dix v American Bankers Life Assur Co of Florida*, 429 Mich 410, 415 NW2d 206 (1987). *Cf. Snyder v Harris*, 394 US 332, 89 S Ct 1053, 22 L Ed 2d 319 (1969) (claim of representative plaintiffs must meet federal jurisdictional requirements for diversity jurisdiction).
8. *See generally* G. Spence, *With Justice For None*, Penguin Books 1990.
9. MCR 1.102; *Dix, supra* at fn 4.
10. For a comparison of MCR 3.501 with FR Civ P 23, see Peters & Parker, *The History, Law, and Future of State Class Actions in Michigan*, 44 Wayne L R 135 (1998).
11. There are only six published appellate decisions containing substantive analysis of MCR 3.501: *Edgcumbe v Cessna Aircraft Co*, 171 Mich App 573, 430 NW2d 788 (1988) (application of the laws of all 50 states in a products liability case made class action too cumbersome); *Lee v Grand Rapids Bd of Education*, 184 Mich App 502, 459 NW2d 1 (1989) (individualized legal and factual issues predominated over common legal and factual issues, rendering class certification inappropriate); *Mooahesh v Dep't of Treasury*, 195 Mich App 551, 492 NW2d 246, 249 (1992) (affirming certification); *McGill v Automobile Ass'n of Michigan*, 207 Mich App 402, 526 NW2d 12 (1994) (affirming denial of certification after summary disposition against representative parties); *Brenner v Marathon Oil Co*, 222 Mich App 128 (1997) (trial court's approval of settlement that was opposed by 87.5 percent of class members held an abuse of discretion; Court of Appeals applying federal cases because of lack of "apposite analysis" in Michigan courts); and *Salesin v State Farm Fire & Casualty Co*, 229 Mich App 346, 581 NW2d 681 (1998) (trial court's denial of class certification reversed where trial court ruled that the case would not proceed as a class action at the conclusion of an unrelated hearing and never conducted a hearing on class certification).
12. A helpful set of forms is included with the *Manual For Complex Litigation 3d* (West 1995).

13. MCR 3.501(A)(1)(a).
14. 30 Mich App at 319, 186 NW2d at 422 (class consisting of prison population with fluctuating numbers and identity of members).
15. *See, e.g., Dameron v Sinai Hospital, Inc*, 595 F Supp 1404 (D Md 1984).
16. MCR 3.501(A)(1)(b).
17. 429 Mich 410, 415 NW2d 206, 210.
18. *Id.* at fn 14.
19. Although the predominance requirement has not been extensively discussed in Michigan appellate decisions, it is clear in the federal courts that the mere presence of individual questions alone does not destroy predominance. *See, e.g., Eisenberg v Gagnon*, 766 F2d 770 (CA 3, 1985) (individual reliance issues did not predominate over common issues). If a "common nucleus of facts" is present, the predominance test is satisfied. *Esplin v Hirschi*, 402 F2d 94 (CA 10, 1968); *Byrnes v IDS Realty Trust Co*, 70 FRD 601 (D Minn 1976). One court has opined that predominance exists when there is an "essential common link" among class members and the defendant for which the court provides a remedy. *Friedlander v Barnes*, 104 FRD 417 (SDNY 1984) (when a single document is alleged to be false and misleading, the common questions predominate).
20. MCR 3.501(A)(1)(c).
21. *Northview Const Co v St Clair Shores*, 395 Mich 497, 236 NW2d 396 (1975).
22. MCR 3.501(A)(1)(d).
23. *See, e.g., Sosna v Iowa*, 419 US 393, 403 (1975) ("[w]here it is unlikely that segments of the class appellant represented would have interests conflicting with those she has sought to advance, and where the interests of that class have been competently urged at each level of the proceeding, we believe that the test of Rule 23(a)(4) is met.")
24. 657 F2d 890 (CA 7, 1981), *cert den* 455 US 1017 (1982).
25. *Id.* at 895. *See also Sley v Jamaica Water & Utils, Inc*, 77 FRD 391, 394 (ED KLDHA partnership agreement 1977) ("[D]efendants who take such a position on class certification or decertification motions, are realistically not concerned with the 'best' representation for the plaintiff class but rather their goal is to ensure 'no' representation.")
26. *Lerner v Haimsohn*, 126 FRD 64 (D Colo 1989).
27. *See, e.g.*, § 11(5) of the Michigan Consumer Protection Act, MCL 445.11(5).
28. 926 F2d 596 (CA 7, 1991).
29. *Id.* at 599.
30. *Id.* at 601. *See also South Carolina Nat'l Bank v Stone*, 139 FRD 325, 329 (DSC 1991) ("named plaintiff's willingness, or lack thereof, to advance the full costs of the litigation or of class notice is irrelevant"); *Rivera v Fair Chevrolet GEO Partnership*, 165 FRD 361, 365 (D Conn 1996) ("the only relevant inquiry is plaintiff's willingness to pay his *pro rata* share of expenses").
31. MCR 3.501(A)(1)(e).
32. *Reiter v Sonotone Corp*, 442 US 330 (1979) (antitrust); *In re Workers' Compensation*, 130 FRD 99 (D Minn 1990) (dismissal for management reasons is never favored).
33. *Brown v Cameron-Brown Co*, 92 FRD 32 (ED Va 1981); *In re Independent Gasoline Antitrust Litigation*, 79 FRD 552 (D Md 1979). *See also Dix, supra* at fn 4, in which the Michigan Supreme Court established a relaxed manageability standard for Michigan Consumer Protection Act cases, holding that individual reliance on misrepresentations need not be proven with respect to each class member "if the class can establish that a reasonable person would have relied on the representations." This holds true even if the alleged misrepresentations differ somewhat from plaintiff to plaintiff. *Dix, supra*, 429 Mich at 418, 415 NW2d at 210-211.
34. Many techniques are available to the court in managing the action, such as great flexibility in the timing and manner of notice (MCR 3.501(C)(4)), the limitation of the class certification order to particular issues or claims, and the creation of separate classes for different issues. MCR 3.501(B)(3)(d).
35. *See, e.g., Paley, supra* at note 5 (evenly divided court affirming certification of nationwide class of 1.5 million consumers).
36. 472 US 797 (1985).
37. *International Shoe Co v Washington*, 326 US 310 (1945).
38. Although due process does not require minimum contacts or opt-in consent, it does require adequacy of representation, *Hansberry v Lee*, 311 US 32 (1940), as well as notice and an opportunity to be excluded from the litigation. *Shutts, supra*, 472 US at 813.
39. *See, e.g., In re Telectronics Pacing Systems, Inc*, 172 FRD 271, 292 (SD Ohio 1997) (certifying products liability case and holding that "state law does not need to be universal in order to justify nationwide class certification"); *Broin v Philip Morris*, 641 So 2d 888 (Fla App 1994) tort claims involving class members residing in different states and countries); *Gordon v Boden*, 586 NE2d 461, 466 (Ill App 1991) (in case involving various tort and warranty theories, "question of whether laws of different states apply to specific transactions alleged in a class action will not ordinarily prevent certification of the class"); *Angeles/Quinoco Securities v Collison*, 841 SW2d 511 (Tex App 1992) (affirming certification of class involving laws of 50 states on breach of fiduciary duty); *In re Lilco Securities Litigation*, 111 FRD 663 (EDNY 1986) (application of law of all fifty states on fraud and negligent misrepresentation does not render trial unmanageable *per se*; "Court doubts that the differences in the several states' laws of fraud and negligent misrepresentation are so great as to preclude class treatment"); *Delgozzo v Kenny*, 628 A2d 1080, 1092 (NJ App 1993) (reversing trial court denial of certification motion and stating that denial of certification on the basis of applicability of laws of different states is "the minority approach"); *In re Copley Pharmaceutical, Inc*, 158 FRD 485 (D Wyo 1994) (products liability case in which court stated it was unpersuaded that the application of the laws of numerous states make case unmanageable); *Davis v Southern Bell*, 158 FRD 173 (SD Fla 1994) (application of laws of "dozens of different states" in products case held not to preclude certification); *In re Asbestos School Litigation*, 104 FRD 422, 434 (ED KLDHA partnership agreement 1984) (applying law of 54 jurisdictions in negligence and strict liability).
40. *See, e.g., Castano v American Tobacco Co*, 84 F3d 734 (CA 5, 1996), in which the representative plaintiff stated "nine causes of action: fraud and deceit, negligent infliction of emotional distress, negligence and negligent infliction of emotional distress, violation of state consumer protection statutes, breach of express warranty, breach of implied warranty, strict liability, and redhibition pursuant to the Louisiana Civil Code," all based on "the novel and wholly untested theory that the defendants fraudulently failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in cigarettes to sustain their addictive nature." *Id.* Similarly, *In re Rhone-Poulenc Rorer, Inc*, 51 F3d 1293 (CA 7, 1995), involved a novel "serendipity" legal theory of negligence liability and what the court perceived as numerous differing standards of care from state to state.
41. *See, e.g., Security Benefit Life Ins Co v Graham*, 810 SW2d 943, 946 (Ark 1991) (application of laws of 39 states "does not seem a particularly daunting or unmanageable task"); *Miner v Gillette Co*, 428 NE2d 478, 484 (Ill 1981) (reversing denial of certification regarding nonresidents of Illinois and suggesting subclassing if necessary to further manageability of laws of 50 states); *American Express Travel v Walton*, 883 SW2d 703 (Tex App 1994) (affirming certification of nationwide class of credit card holders).
42. *See* note 39.
43. H. Newberg and A. Conte, *Newberg on Class Actions* (3d ed 1992).
44. *See, e.g., Meighan v US Sprint Communications Co*, 924 SW2d 632, 637 (Tenn 1996).
45. Note 12.