THE IDC MONOGRAPH:

Can You Still Have an Illinois Class Action in a Mass Tort Case?

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Illinois Class Action Rules for Mass Tort Cases

A class action is the desired way of litigating for many plaintiff's attorneys. The reason is obvious: enormous potential damages. A Florida jury returns a $145 billion punitive damage award in a tobacco class action.[1] An Alaskan jury returns a $5 billion punitive damage award in the Exxon Valdez class action.[2] An Illinois jury returns a $456 million award in a breach of contract class action.[3]

However, no matter what the claimed damages, a putative class action complaint raises pleading issues not encountered in the single or multiple plaintiff case. A putative tort class action adds another level of complexity. In addition to the substantive requirement for all class actions, the "common question of law or fact" analysis becomes especially interesting with a tort class action. Can you still have an Illinois mass tort class action? That probably depends on how you define "tort." However, no matter how you define it, plaintiff's attorneys have not stopped trying.[4] This monograph provides a review of the basic class action requirements and the special issues presented by the mass tort class action.

Class Action Certification Procedure in Illinois

Class certification is governed by the Illinois Code of Civil Procedure Section 2-801.[5] Section 2-801 basically codifies prior Illinois Supreme Court holdings regarding the prerequisites to maintaining a class action.[6] The four essential elements needed to proceed as a class are:

(1) the class is so numerous that joinder of all members is impractical;
(2) there are questions of fact or law common to the class, and those common questions predominate over any questions affecting only individual members;
(3) the representative parties will fairly and adequately protect the interest of the class; and,
(4) the class action is an appropriate method for the fair and efficient adjudication of the controversy.[7]

According to the Illinois Supreme Court, Section 2-801 is patterned after Rule 23 of the Federal Rules of Civil Procedure (Fed. R. Civ. P. 23), and federal decisions interpreting Rule 23 are persuasive authority with regard to the question of class certification in Illinois.[8]

Burden of Proof

The plaintiff bears the burden of establishing that the class certification criteria are met.[9] The statute permits the court to limit class adjudication to certain issues or divide the class into subclasses.[10] The burden rests on the plaintiff, not the court, to propose the subclasses to be certified.[11] Plaintiffs also bear the burden of demonstrating the manageability of individual claims.[12]

Appellate Review

Decisions regarding class certification are within the discretion of the trial court and will not be disturbed on appeal unless the trial court abused its discretion or applied impermissible legal criteria.[13] However, "[a] trial court's discretion in deciding whether to certify a class action is not unlimited and is bounded by and must be exercised within the framework of the civil procedure rule governing class actions."[14] A judgment may be sustained upon any ground warranted by the record.[15] The reasons given by a lower court for its decision or the findings on which a decision is based are not material if the judgment is correct.[16]

An order granting or denying class action status does not determine the final disposition of all claims of all parties of the lawsuit; and hence it is not appealable as a final order.[17] However, Illinois Supreme Court Rule 306(a) specifically allows a party to petition for leave to appeal "an order of the circuit court denying or granting certification of a class

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action." In the event that the appellate court denies leave to appeal, the movant can then file a petition for leave to appeal to the Illinois Supreme Court.[18]

Timing of Certification Motion and Hearing

Section 2-802(a) of the Code of Civil Procedure directs that "[a]s soon as practicable after the commencement of an action . . . the court shall determine . . . whether it may be so maintained and describe those whom the court finds to be members of the class."[19] When matters pertaining to class certification are in dispute, it is appropriate for the court to hold pretrial hearings.[20] Although the merits of the litigation are not to be adjudicated at the class certification stage, the court is obligated "to look beyond the pleadings to understand the claims, defenses, relevant facts, and applicable substantive law."[21] It must identify the substantive issues that will control the outcome and assess which issues will predominate.[22]

Decertification of Class

As under the federal rule, an order of certification may be "conditional and may be amended before a decision on the merits."[23] Although Section 2-802 does not mention decertification, the Illinois Supreme Court has found that decertification was within the scope of the predecessor to Section 2-801.[24] It should be noted that decertification by a subsequent judge requires "changed circumstances."[25]

History of Class Action Rule

For over 100 years, Illinois class actions were governed almost exclusively by case law. Although Federal Rule of Civil Procedure 23 was promulgated in 1937, Illinois did not have a class action rule until 1977 when what is now Section 2-801 was codified.[26] With the adoption of the statute, at least some of the prior case law was rendered irrelevant.[27]

Interplay with Federal Rule 23

Although Section 2-801 borrowed much of the language of Federal Rule 23, there were differences. For example, Section 2-801 does not include the Rule 23 requirement that the "claims and defenses of the representative parties are typical of the claims and defenses of the class."[28] A number of courts have commented that the failure to include a "typicality" requirement is a more liberal approach, which is met when the class representative fairly and adequately represents the absent class members.[29] Another difference is that Section 2-801 does not include the requirement that the "class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[30] Section 2-801 requires only that the class action be an "appropriate" method of adjudicating the controversy.[31] The Illinois Supreme Court has stated that the Illinois requirement that the class action be appropriate "is derived from Rule 23(b)(3)" and that the difference in language "does not require us to discard the construction that has been given to the Federal Rule as it relates to the economies to be affected through the use of class actions."[32]

However, the small differences have had almost no impact on how Section 2-801 has been interpreted. The Illinois Supreme Court has emphasized the similarity between the two rules and has stated that the Illinois rule is "patterned after Rule 23."[33] As a result, federal decisions regarding Rule 23 are "persuasive authority" regarding Section 2-801.[34]

Four Requirements for Class Certification

1. Numerosity

There are four requirements for class certification under Section 2-801. Numerosity is the first requirement. This requirement is usually the simplest to satisfy. Illinois courts tend to allow claims to proceed as a class action when there are a large number of potential claimants individually holding relatively small value claims.[35]

In general, the question of numerosity depends on the particular facts of each case and no arbitrary rules regarding size of the class have been established.[36] A class as small as 19 has been upheld as sufficiently numerous.[37] On the other hand, classes of 21[38] and 46[39] members have been held insufficient. In short, there is no bright line or magic number below which there cannot be a class but above which there can be.[40]

2. Predominance of Common Questions of Law or Fact

The requirement regarding predominance is in the disjunctive. The requirement is for a common question of law or fact, not both.[41] Of course, this is often the central question in any class action analysis. Later, we will discuss this requirement specifically with regard to tort actions. However difficult the application, the principle has remained the same since the supreme court first discussed the class action statute in *Steinberg v. Chicago Medical School.*[42] *Steinberg* was a class action against the defendant claiming that it had failed to evaluate medical applications according to criteria

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in the school's bulletin.[43] In discussing the common question requirement, the court stated:

> So long as there are questions of fact or law common to the class and these predominate over questions affecting only individual members of such class, the statutory requisite is met . . . . It is, of course, well established that the elemental determination that some members of a class are not entitled to relief because of some particular factor will not bar the class action.[44]

Nor is the predominance of a common question affected by the need for each class member to make proof of its claim. The court stated:

> No doubt there will be situations where there may be questions peculiar to certain members of the class. However, once there is a determination that there exists a question of fact or law common to the class and that this predominates the question affecting only individual members, the statute is satisfied.[45]

The point is that successful adjudication of the named plaintiff's claim should establish the right of recovery in other class members.[46] A common question is established when the claims of the individual members of the class are based on the common application of a statute or they were aggrieved by the same or similar misconduct.[47]

However, it is also clear that individual issues can render class action treatment inappropriate. *Avery v. State Farm Mutual Automobile Insurance Company* was a nationwide class action against an automobile insurer for breach of contract and consumer fraud over the defendant's alleged failure to pay for original equipment manufacturer ("OEM") parts for repairs of damaged vehicles.[48] With regard to the breach of contract claim the common question identified by the trial court was whether the defendant's practice of specifying non-OEM parts constituted a breach of its contractual obligations under the insurance policies.[49] After identifying four separate types of insurance policies, the supreme court concluded that the individual issues of determining the wording of each separate and distinct contract that each class member agreed to and its legal effect outweighed any conceivable common issues and reversed the class action determination.[50]

There have been numerous applications of the predominance test. In *Ramirez v. Midway Moving and Storage Inc.*, customers filed a class action alleging that the defendant intentionally underestimated the cost of moving and then demanded full payment before completing the move.[51] The defendant argued that there were individual factual circumstances peculiar to the named plaintiff, such as weather and parking, which defeated class certification.[52] The appellate court rejected that argument and affirmed the trial court's class certification order, stating:

> [T]he factual allegations in the complaint were broad enough to establish the possible existence of a class action since defendant had a uniform policy of requiring payment before fully unloading the truck, which constitutes a common question of law or fact.[53]

Petrich v. MCY Music World, Inc., is an example of individual questions overwhelming any common questions.[54] In *Petrich*, a concertgoer brought a proposed class action alleging fraud and negligence after traffic and parking problems caused her to miss a portion of the concert. The plaintiff argued that the common question was that the defendants "did not provide access to the venue for hundreds of cars full of people regardless of what time they left."[55] The trial court denied class certification, stating:

> Plaintiff would still have to prove how Defendants caused her damage. An examination of this element of Plaintiff's claim would once again require this court to examine each plaintiff's individual claim. Why each plaintiff arrived at the concert late or missed the concert is an individual consideration. Whether a plaintiff was late or missed the concert because they failed to avail themselves of Defendants' travel and access information, or because of a plaintiff's own negligence…is a determination that would have to be decided on a plaintiff by plaintiff basis.[56]

The appellate court affirmed the denial of class certification.

3. Adequate Representation

The third requirement for class certification is that the named plaintiffs must fairly and adequately represent the interests of the class. Adequacy of representation is determined by whether the interests of those who are parties are the same as those class members who are not before the court, and whether the representative parties fairly represent those absent class members.[57] As discussed above, unlike its federal counterpart, there is no "typicality" requirement in Illinois. However, the distinction is probably immaterial. A class representative may not be disqualified simply because the representative's claim is not identical to the specific claims

of other potential class members.[58] However, a class representative may not seek relief that is potentially antagonistic to members of the representative's class.[59]

Kitzes v. Home Depot U.S.A., Inc. was a proposed class action against Home Depot for selling wood products for outdoor recreational use that were treated with allegedly toxic preservatives.[60] Plaintiffs, seeking only limited economic damages, proposed to exclude from the class individuals who would bring claims for increased personal risk, personal injury or property damage resulting from the treated-wood products.[61] However, the court was concerned with this approach because claim-splitting raised the potential that future claims would be barred by *res judicata,* and as such, plaintiff representatives may not have been adequate representatives. Additionally, the disparity of claims not only adversely affected the adequacy of representation, but also further underscored the problems with establishing commonality.[62] The court concluded that those individual questions, among others, predominated over the common questions and affirmed the trial court's denial of class certification.[63]

Although the class representative is almost always the focus of an adequacy of representation analysis, a second aspect of that requirement is that the plaintiffs' attorney be qualified, experienced and able to conduct the proposed litigation.[64]

4. Appropriate Method of Litigating Controversy

The Illinois statute requires, as the fourth prerequisite, a finding that the class action be an "appropriate method" for litigating the controversy. In deciding this issue, a court should consider whether the class action (1) can best secure the economies of time, effort and expense and promote a uniformity of decision, or (2) can accomplish the other ends of equity and justice that class actions seek to obtain.[65] As discussed above, in contrast, Federal Rule of Civil Procedure 23(b)(3) requires that a class action be "superior" to other available methods of adjudication. At least one court has found that the Illinois standard is not as stringent as its federal counterpart.[66] The Illinois Supreme Court has stated that if the first three class action prerequisites have been satisfied, then it is "manifest that the final requirement of the statute, that a class action be an appropriate method for the fair and efficient adjudication of the controversy is fulfilled."[67]

The *Smith v. Illinois Central Railroad* decision, however, may suggest that this last requirement deserves heightened consideration.[68] *Smith*, which is further discussed below, involved a train derailment and subsequent toxic spill that gave rise to personal injury and property damage claims. The trial and appellate courts concluded that common questions of fact and law predominated with respect to the defendant's liability for the derailment. However, in reversing, the Illinois Supreme Court concluded that the lower courts should not have considered only the common question pertaining to how the derailment occurred but instead should have considered if there were common issues pertaining to the alleged health consequences arising from exposure to chemicals.[69] "Clearly, individual issues of proximate causation and damages will consume the great bulk of the time at trial. Consequently, the common issues do not predominate."[70] As such, the court concluded that the plaintiffs failed not only to meet the first, but also the fourth prerequisite, as "the class action device is unsuitable for mass tort personal injury cases such as the one before us."[71]

In denying class certification in a mass tort case, the Illinois Supreme Court concluded that class certification would not be a "superior" means of adjudication, relying in part on two cases from other jurisdictions, *Southwestern Refining Co. v. Bernal*; and *Steering Committee v. Exxon.*[72] Quoting *Southwestern Refining Co. v. Bernal* with approval, the Illinois Supreme Court was mindful that class action is "a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment" but that it is "not meant to alter the parties' burdens of proof, right to a jury trial, or the substantive prerequisites to recovery under a given tort."[73] As such, "convenience and economy must yield to a paramount concern for a fair and impartial trial."[74] Because "the plaintiff must prove, and the defendant must be given the opportunity to contest, every element of a claim," a class action is not appropriate if the defendant's responsibility for each individual claim is at issue – "what may nominally be a class action initially would degenerate in practice into multiple lawsuits separately tried."[75]

Sub-classes

Sub-classes are specifically authorized by Section 2-802(b).[76] They are often used to avoid issues presented by individual questions. In *Steinberg v. Chicago Medical School*,[77] the defendants argued that individual proof would be needed with regard to the fraud claims. Although acknowledging that there may be questions peculiar to certain members of the class, the Supreme Court rejected individual proof, in itself, as an impediment to a class action. The court stated:

> An Illinois court determining that an essential element of the proof is common to only certain members of the class could order separate trials on the

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> particular issue. (citation omitted) Or the class could be broken into various subclasses . . . . The class action, however, is not to be dismissed because of these differences in elements of proof between members of the class.[78]

Miner v. Gillette Co. was a nationwide consumer fraud class action regarding the defendant's promotion of a disposable lighter.[79] The defendant argued that individual questions of law relating to each of the 50 states would have to be considered, thus preventing the claim from being maintained as a class action. The supreme court rejected this argument, stating: "The class action statute specifically provides for the maintenance of a class action which may be 'divided into sub-classes and each sub-class treated as a class.'"[80]

Defenses

If the named plaintiff does not have a valid cause of action, then of course, there is no need to consider the propriety of the class allegations.[81] In those cases where plaintiffs are seeking nominal amounts, it is also possible to moot the claim by tendering payment to the named plaintiff. If the payment is accepted, the plaintiff's claim will be mooted.[82] In *Yu v. International Business Machines Corporation*, the plaintiff brought a class action against sellers of computer software that allegedly was not Y2K compliant.[83] However, the named plaintiff accepted a free upgrade that was Y2K compliant. In affirming the dismissal of the class action allegations, the court stated:

> [O]nce plaintiff accepted [the upgrade] remedy, plaintiff was no longer an appropriate representative of the interests of the class. If none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.[84]

Simply tendering full payment to the named plaintiff, even if not accepted, will also moot the named plaintiff's rights to pursue the class action allegations where there is no motion for class certification pending and the plaintiff has had a reasonable opportunity to file a motion to certify the class.[85]

However, if a motion for class certification is pending at the time of the defendant's tender of payment, the court must decide the motion for class certification before deciding whether or not the case is mooted by the tender.[86] Similarly, if the defendant tenders full payment early in the litigation, before the named plaintiff has had a reasonable opportunity to file a motion for class certification, the tender will not moot the call action.[87]

The fact that the individual claims are *de minimis* is not a valid defense.[88]

Mass Torts

Historically, courts have been reluctant to permit mass tort cases to be tried as class actions. Some courts have reasoned that mass tort cases present significant questions regarding damages and affirmative defenses which make them inappropriate for class action treatment. Courts have provided the following guidelines with regard to various aspects of mass torts, specifically, product liability, negligence, fraud and contamination.

Product Liability

In *Morrissy v. Eli Lilly & Company*, the plaintiff brought a class action on behalf of the daughters of women who ingested diethylstilbestrol ("DES") during pregnancy.[89] Among the allegations were that the DES was not reasonably safe and the daughters were injured as a result of prenatal exposure to DES. The court noted that in the context of personal injury class actions, there was a "notable dearth of Illinois authority" with regard to class certification.[90] In considering whether there were common questions which predominated over individual questions, the court stated:

> [T]he proposed class action cannot be sustained because, as defendants assert, individual determinations of proximate cause would be required which predominate over common questions of law and fact. Included among them are whether the product was properly prescribed for the mother's then existing medical condition; the dosage of DES prescribed; the amount of DES actually ingested; the point during the pregnancy at which the DES was started and ended; the hereditary and genetic history and background of the patient and incidences of cancer or other disorders suspected; the patient's exposure to known carcinogenic agents in the environment; and the personal habits of he individual subjects.[91]

The court affirmed the trial court's denial of class certification.

In *Mele v. Howmedica, Inc.*, the plaintiff brought a strict liability claim against the manufacturer of a medical device.[92] The plaintiff claimed the design of the device was unreason-

ably dangerous. The trial court found that the common question regarding the design of the device did not predominate over individual questions. In affirming the trial court's decision, the court stated:

> To determine the extent of each class member's recovery, the factfinder may need to make individualized determinations of the likely prognosis for each class member if the [medical device] had not been implanted. Each court should consider the warnings defendant supplied to each surgeon and what information each surgeon conveyed to each class member. Each class member has a different medical history, and each faced different risks. The statue of limitations defense raised against this plaintiff has no bearing on other cases, and defendant may have valid limitations defenses against claims of several class members.[93]

Other Negligence Actions

More recently, federal and some state decisions have found class certification to be appropriate for actions based on a single catastrophic incident such as train derailments and for mass tort actions alleging exposure to hazardous substances. Courts found that such cases demonstrate that the commonality requirement can be met despite the differences in individual claims of injuries and damages. That was the background when the Illinois Supreme Court rendered its decision in *Smith v. Illinois Central Railroad*.[94]

Smith was a class action arising out of a train derailment in southern Illinois, which resulted in the release of certain toxic chemicals. The complaint alleged counts for negligence, negligence based on res ipsa loquitur, nuisance, abnormally dangerous activity and trespass. The proposed class consisted of the persons and businesses who allegedly sustained personal injury and property damage as a result of the derailment. The plaintiff's motion for class certification was granted by the trial court and affirmed by the appellate court.[95] Prior to the *Smith* appellate court decision, no Illinois appellate court decision had ever approved class certification in a mass tort personal injury case.[96]

In reversing the trial and appellate courts, the Illinois Supreme Court focused on the requirement that common questions predominate over questions affecting only individual members. Relying in part on authority construing Federal Rule 23, the Court began its analysis by stating: "The purpose of the predominance requirement is to ensure that the proposed class is sufficiently cohesive to warrant adjudication by representation, and it is a far more demanding requirement than the commonality requirement of Rule 23(a)(2)."[97] The court rejected an approach that merely identified whether the common issues outnumber those that do not. "The test for predominance is not whether the common issues outnumber the individual ones, but whether common or individual issues will be the object of most of the efforts of the litigants and the court."[98]

To determine if common issues predominate, the court must "identify the substantive issues that will control the outcome, assess which issues will predominate, and then determine whether those issues are common to the class."[99] To satisfy the predominance requirement, the plaintiff must show that its successful adjudication "of the purported class representatives' individual claims will establish a right of recovery in other class members."[100] Where the predominance test is met, "a judgement [sic] in favor of the class members should decisively settle the entire controversy, and all that should remain is for other members of the class to file proof of their claim."[101]

The *Smith* court focused upon the difference between liability for the derailment and liability for the alleged adverse health consequences. Establishing liability for the derailment would not establish liability for the alleged health consequences. The court stated:

> The lower court in this case erroneously equated liability for the derailment with liability for the alleged health consequences arising from exposure to the chemicals. However, the vast majority of the damages flow not from the derailment itself, but from the exposure to the chemicals spilled. Proof of proximate causation in this case will involve highly individualized variables, including whether and to what extent, and to which chemicals each member was exposed, location at the time of exposure, age, activity, medical history, and credibility…Clearly, individual issues of proximate causation and damages will consume the great bulk of the time at trial. Consequently, the common issues do not predominate.[102]

Thus, *Smith* establishes that "the class action device is unsuitable for mass tort personal injury cases."[103]

Although *Smith* seems to reject a class claim where each plaintiff must prove up its separate damages based on individual considerations, *Smith* did not expressly discuss or overrule *Fiorito v. Jones*.[104] In *Fiorito*, the constitutionality of the 1967 amendments to the Service Occupation Tax Act was at issue, involving the claims of 43,000 class members from more than 1,000 different retail businesses. The court

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concluded that the common and dominant theme of the action was the constitutionality of the tax, even though each retailer paid the tax in separate transactions. In so ruling, the court did not find that the need for a separate prove up, based on individual factors, would defeat the class, such as the need for each class member to show that it in fact paid the tax, the amount of its payment, and that it had not passed on the tax burden to the customer.

Nevertheless, where "each transaction" that potentially gives rise to liability must be analyzed, there is no longer a common dominant and pervasive issue in the case, and the litigation should not proceed as a class action.[105] In *Goetz v. Village of Hoffman Estates*, the plaintiff homeowners brought a class action against the defendants alleging that unsuitable and unsafe wiring was installed in their homes.[106] Plaintiffs brought the action on behalf of all owners in the subdivision. Plaintiffs urged that the issues central to the disposition of each member's claim are whether unsuitable and unsafe wiring was negligently installed in their homes. Plaintiff argued that each member of the class was wronged in the same basic manner by the defendants and that the remedy sought, rewiring of the homes, was common to all members.[107] The appellate court stated:

> [T]he present case involves separate, and by no means identical, transactions. The possibility that the named plaintiffs could establish that defendants were negligent or guilty of intentional misconduct in selecting, installing, and inspecting the wiring in their homes does not dispense with the need for proof of their negligence or misconduct with respect to every other home in the subdivision. Although the claim of each plaintiff involves the same basic issues, whether the wiring was suited for the particular premises and whether the wire was negligently installed, a finding that this suit may be maintained as a class action does not necessarily follow . . . . [T]he propriety of a class suit depends upon whether a favorable ruling as to the named plaintiffs will establish a right of recovery in other class members. Here, even if the named plaintiffs succeed in proving their claims, the issue remaining to the resolved is whether the wiring in each residence is defective.[108]

The court affirmed the trial court's refusal to certify the class.

Similarly, in *Rubino v. Circuit City Stores, Inc.*,[109] class certification was denied because an individual inquiry of each claimant would have been required as a prerequisite to making a liability determination as to that plaintiff's claim. As such, common issues did not predominate.[110]

Kitzes v. Home Depot U.S.A., Inc., is the only reported decision citing *Smith.*[111] *Kitzes* involved an interlocutory appeal of an order denying class certification and was affirmed on appeal.[112] This action involved a proposed class action against Home Depot for selling wood products for outdoor recreational use that were treated with allegedly toxic preservatives. The appellate court affirmed the order denying class certification, finding that individual issues predominated. The court noted that the defendants have individualized defenses against each plaintiff, and that the measure of damages would be highly variable.

Federal Rule 23 and Contamination Cases

Different results were reached applying Federal Rule 23 in a number of contamination cases. Interestingly, Rule 23 was never intended to address mass torts. The 1996 Advisory Committee for Rule 23 stated:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.[113]

Nevertheless, federal courts continue to certify mass tort class actions.

In *Ludwig v. Pilkington North America, Inc.*, the plaintiffs brought actions for negligence, nuisance and trespass.[114] The plaintiffs alleged that, over the course of 70 years, the defendant had negligently disposed of arsenic containing waste in certain quarries near Naplate, Illinois causing soil and water contamination. The plaintiffs sought compensatory and punitive damages on behalf of those who lived or owned property in Naplate. The defendants argued that individualized issues of causation and damages required individual proof which predominated over the common issues. Although that argument carried the day in *Smith*, it did not in *Ludwig*. The court concluded that "[a]lthough some individualized questions may exist, they should not defeat class certification."[115]

In *LeClercq v. The Lockformer Company*, the plaintiffs brought negligence, nuisance, trespass and strict liability claims arising out of alleged trichloroethylene contamination of soil, groundwater and domestic water supply in Lisle,

Illinois.[116] The proposed class included persons who own or reside in property in the area of the defendant's plant and whose property had been impacted by the contamination. Plaintiffs sought to require defendant to abate the health risk posed by the contamination, to require defendant to remediate the contamination of the properties, to reimburse the plaintiffs for the costs incurred and to recover compensatory and punitive damages for their injuries. As in *Ludwig*, the court stated that a common question is established where the defendant has "engaged in standardized conduct towards members of the proposed class. (citations omitted) Factual variations among class members' grievances do not defeat a class action."[117] Defendant argued that the common question did not predominate over individual questions because the "variability in contamination between the putative class members will require individualized proof and that individualized issues regarding causation and damages predominate."[118] That argument prevailed in *Smith*. It did not in *LeClercq*. Acknowledging the split in authority in these types of cases, the court stated:

> [t]he problem of individualization of issues often is cited as a justification for denying class action treatment in mass tort accidents. While some courts have adopted this justification in refusing to certify such accidents as class actions, numerous other courts have recognized the increasingly insistent need for a more efficient method of disposing of a large number of lawsuits arising out of a single disaster or course of conduct….Where the defendant's labiality can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may best suited vehicle to resolve such a controversy.[119]

After stating that proof on certain core issues such as the history of operations, spillage, impact on soil and water, and possible remedies would be identical, the court concluded that repetitive discovery for individual cases on those core issues would be "wasteful for both the courts and the parties."[120] However, the court certified the class "for injunctive relief and liability issues but reserved the determination of monetary damages, if needed, for individualized treatment."[121]

The decision to limit class certification to liability and reserve the issue of monetary damages for individualized treatment has been used a number of times in toxic contamination cases. *Mejdreck v. The Lockformer Company* also involved trichloroethylene contamination of soil and groundwater from the same plant as in *LeClercq*.[122] *Muniz v. Rexnord Corporation* involved drinking water contaminated by chlorinated solvents.[123] In both cases, the courts found a common question in the alleged "standardized conduct towards the proposed class"[124] and, in response to the arguments that individual proof of damages would be necessary, limited the class certification to the issue of liability.[125]

The *Ludwig*, *LeClercq*, *Mejdreck* and *Muniz* decisions emphasize the difficulty of resisting a Rule 23 class certification of a toxic contamination case arising from a single source.[126]

Fraud

Whether fraud cases can be maintained as class actions largely depends on how courts treat the element of reliance. Reliance is a necessary element of a common law fraud and not appropriate for class action treatment. However, individual reliance is not an element of a claim under the Consumer Fraud and Deceptive Business Practices Act.[127] Yet a number of Consumer Fraud and Deceptive Business Practices Act class actions have been permitted.

Gordon v. Boden[128] was a class action against a seller of allegedly adulterated orange juice. The plaintiffs sought damages under theories of, *inter alia*, statutory and common law fraud. The trial court granted the plaintiffs' motion for class certification. On appeal, the defendants argued that the individual questions regarding the exact type of item purchased, the particular retail grocery store where the item was purchased, the date it was purchased, the label the item bore, the purchase price, and each consumer's reliance on the defendants' misrepresentations would require each class member to testify to establish a right of recovery. The appellate court rejected that argument, finding that there was a predominate common question: "whether defendant adulterated its organ juice products and committed the other fraudulent acts as alleged."[129] With regard to the defendants' argument that the need to establish each class member's reliance on the defendants' misrepresentation renders a class action inappropriate, the court stated:

> Under the common law, reliance was an element which had to be alleged in order to constitute a valid cause of action for misrepresentation or deceit. However, the language employed in the Consumer Fraud Act clearly indicates that it is the intent of the defendant in his conduct, not the reliance or belief of the plaintiff, which is the pivotal point upon which an action arises. Section 2 of the Act specifically provides that the question of whether a person has

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> been misled, deceived or damaged is not an element of action brought under the Act.[130]

The order of class certification was affirmed.

Clark v. Tap Pharmaceutical Products Inc. was class action against pharmaceutical companies for unjust enrichment and violation of the Consumer Fraud Act over allegedly inflated prices for a cancer drug.[131] The defendants argued that the individual issues of fact required by the materiality, proximate cause and injury elements of the Consumer Fraud Act claim prevented any common question from predominating.[132] However, the court noted that a class action could be properly maintained where the defendants allegedly acted wrongfully in the same basis manner as to an entire class, and in those circumstances, the common question predominates the case.[133] The court concluded:

> If . . . it is found that the defendants engaged in the deceptive practice of inflating the price of [the drug], with the intent that Medicare beneficiaries rely on the deception, then the defendants acted wrongfully in the same basic manner as to the entire class, the liability questions common to all class members has been established in favor of plaintiffs and the class members may recover a refund for their overpayment for [the drug].

Individual questions regarding the basis for the bills or the amount of individual damages did not defeat class certification. The appellate court affirmed the decision of the trial court.

One way to harmonize the product liability decisions with the contamination decisions is to conclude that individual questions of damages do not prevent class certification but individual questions of liability do prevent class certification.

Conclusion

The lesson to be learned is that the case law draws a distinction in mass tort cases between common disaster cases which arise from a single event and product liability actions where no single accident occurs to cause the harm. In the latter, individual questions of proximate cause and potential affirmative defenses overwhelm any possible common question. While the former may be appropriate for class action treatment, the latter almost always is not.

(Endnotes)

[1] *See Engle v. Liggett Group, Inc*., 945 So. 2d 1246, 1257 (Fla. 2006).

[2] *See Exxon Shipping Co. v. Baker*, 554 U.S. ____, 128 S. Ct. 2605, 2614 (2008). The punitive damage award was eventually reduced to $507 million.

[3] *See Avery v. State Farm Mutual Automobile Insurance Company*, 216 Ill. 2d 100, 121, 835 N.E.2d 801, 817 (2005).

[4] *See Rosolowski v. Clark Refining and Marketing*, 383 Ill. App. 3d 420, 890 N.E.2d 1011 (1st Dist. 2008).

[5] 735 ILCS 5/2-801.

[6] *McCabe v. Burgess*, 75 Ill. 2d 457, 463, 389 N.E.2d 565, 567 (1979).

[7] *Smith v. Illinois Central R.R. Co*., 223 Ill. 2d 441, 447, 860 N.E.2d.332, 336 (2006).

[8] *Avery*, 216 Ill. 2d at 125.

[9] *Dobbs v. Chase*, 94 Ill. App. 3d 177, 181, 418 N.E.2d 919, 922 (5th Dist. 1981).

[10] 735 ILCS 5/2-802(b).

[11] *Miner v. Gillette Co.*, 87 Ill. 2d 7, 17-18, 428 N.E.2d 478, 484 (1981), cert. dismissed, 459 U.S. 86, 103 S.Ct. 484 (1982). *See also Schlenz v. Castle*, 132 Ill. App. 3d 993, 1002, 477 N.E.2d 697, 705 (2d Dist. 1985), aff'd, 115 Ill. 2d 135, 503 N.E. 2d 241 (1986).

[12] *See, e.g., Jensen v. Bayer AG*, No. 01 CH 13319, 2003 WL 22962431, at *5 (Ill. Cir. Cook County Dec. 15, 2003) (denying certification in part because "a workable method of adjudicating claims" had not been presented to the court.); *In re St. Jude Medical, Inc. Silzone Heart Valves Products Liability Litigation*, No. MDL-01-1396, 2004 WL 45504, at *12 (D. Minn. Jan. 5, 2004) (collecting and following cases holding that "plaintiff bears the burden of demonstrating a suitable and realistic plan for trial of the class claims"), rev'd on other grounds, 425 F.3d 1116 (8th Cir. 2005).

[13] *Smith*, 223 Ill.2d at 447.

[14] *Avery*, 216 Ill. 2d at 126 (quoting 4 A. Conte & H. Newberg, *Newberg on Class Actions* §13:62, at 475 (4th ed. 2002)) (internal quotations omitted).

[15] *Bell v. Louisville & Nashville R. Co*., 106 Ill. 2d 135, 148, 478 N.E. 2d 384, 389 (1985).

[16] *Devoney v. Retirement Bd. of the Policemen's Annuity & Ben. Fund for the City of Chicago*, 199 Ill. 2d 414, 422, 769 N.E. 2d 932, 937 (2002).

[17] *Levy v. Metropolitan Sanitary Dist. of Greater Chicago*, 92 Ill. 2d 80, 440 N.E.2d 881 (1982).

[18] *See Smith, supra* note 7.

[19] 735 ILCS 5/2-802(a).

[20] *Frank v. Teachers Ins. & Annuity Ass'n of America*, 71 Ill. 2d 583, 590, 376 N.E.2d 1377, 1379 (1978).

[21] *Smith*, 223 Ill. 2d at 449.

[22] *Id*., *Morrissy v. Eli Lilly & Co.*, 76 Ill. App. 3d 753, 758, 394 N.E. 2d 1369, 1373 (1st Dist. 1979) ("Inquiry into the substantive nature

of proof as to facts in issue is often required to determine the propriety of class certification").

[23] 735 ILCS 5/2-802(a); s*ee also* Fed.R.Civ.P. 23(c)(1)(c).

[24] *Barliant v. Follett Corp*, 74 Ill. 2d 226, 231, 384 N.E.2d 316, 319 (1978).

[25] *See Rosolowski*, 383 Ill. App. 3d at 424-26; *Wernikoff v. Health Care Service Corporation*, 376 Ill. App. 3d 228, 232-33, 877 N.E.2d 11, 14-15 (1st Dist. 2007).

[26] One section of the former Civil Practice Act did regulate the compromise or dismissal of class actions. See Ill.Rev.Stat. (1975), ch. 110, ¶ 52.1.

[27] *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 338, 371 N.E.2d 634, 643 (1977).

[28] Fed. R. Civ. P. 23(a)(3).

[29] *Bernstein v. American Family Insurance Co*., No. 02 CH 6905, 2005 WL 1613776, at *3 (Ill. Cir. Cook County July 6, 2005); *Nagel v. ADM Investor Services, Inc*., No. 98 L 731, 1999 WL 1212853, at *3 (Ill. Cir. Cook County Dec. 16, 1999).

[30] Fed. R. Civ. P. 23(b)(3).

[31] *Nagel*, 1999 WL 1212853 at *3.

[32] *McCabe*, 75 Ill. 2d at 468-9.

[33] *Avery*, 216 Ill. 2d at 125.

[34] *Cohen v. Blockbuster Entertainment, Inc.*, 376 Ill. App. 3d 588, 597, 878 N.E.2d 132, 139 (1st Dist. 2007).

[35] *See Miner*, 87 Ill. 2d 7 at 18.

[36] *In re Application of Rosewell*, 236 Ill. App. 3d 165, 174, 603 N.E.2d 681, 686 (1st Dist. 1992).

[37] *Kulins v. Malco, A Microdat Company, Inc*., 121 Ill. App. 3d 520, 530, 459 N.E.2d 1038, 1046-47 (1st Dist. 1984).

[38] *Wood River Area Development Corporation v. Germania Federal Savings and Loan Association*, 198 Ill. App. 3d 445, 447, 555 N.E.2d 1150, 1151 (5th Dist. 1990).

[39] *Board of Education v. Pomeroy*, 47 Ill. App. 3d 468, 473, 362 N.E.2d 55, 59 (3rd Dist. 1977).

[40] *Wood River Area Development Corporation*, 198 Ill. App. 3d at 450.

[41] *Miner*, 87 Ill. 2d at 17.

[42] *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 371 N.E.2d 634 (1977).

[43] *Steinberg*, 69 Ill. 2d at 327.

[44] *Id*. at 338.

[45] *Id*. at 340-41.

[46] *Society of St. Francis v. Dulman*, 98 Ill. App. 3d 16, 18, 424 N.E.2d 59, 61 (1st Dist. 1981).

[47] *McCarthy v. LaSalle National Bank and Trust Company*, 230 Ill. App. 3d 628, 634, 595 N.E.2d 149, 152-53 (1st Dist. 1992).

[48] *Avery, supra* note 3.

[49] *Avery*, 216 Ill. 2d at 126.

[50] *Id*. at 134-35.

[51] *Ramirez v. Midway Moving and Storage, Inc*., 378 Ill. App. 3d 51, 880 N.E.2d 653 (1st Dist. 2007).

[52] *Ramirez*, 378 Ill. App. 3d at 55.

[53] *Id.; see also Cruz v. Unilock Chicago Inc*., 383 Ill. App. 3d 752, 892 N.E.2d 78 (2nd Dist. 2008)(trial court erred in determining that common issues did not predominate in class action over wage claim).

[54] *Petrich v. MCY Music World, Inc*., 371 Ill. App. 3d 332, 862 N.E. 1171 (1st Dist. 2007).

[55] *Petrich*, 371 Ill. App. 3d at 338.

[56] *Id*. at 340.

[57] *Miner*, 87 Ill. 2d at 14. *See Brooks v. Midas-International Corp*., 47 Ill. App. 3d 266, 274, 361 N.E.2d 815, 820 (1st Dist. 1977) (are absent members so represented that their interests will receive "actual and efficient protection").

[58] *Carrao v. Health Care Service Corp.*, 118 Ill. App. 3d 417, 428, 454 N.E.2d 781, 790 (1st Dist. 1983).

[59] *Id*.

[60] *Kitzes v. Home Depot, U.S.A., Inc.*, 374 Ill. App. 3d 1053, 872 N.E.2d 53 (1st Dist. 2007).

[61] *Kitzes*, 374 Ill. App. 3d at 1063.

[62] *Id*. at 1064.

[63] *Id*.

[64] *Steinberg*, 69 Ill. 2d at 339; *Hall v. Sprint Spectrum L.P*., 376 Ill. App. 3d 822, 832-33, 876 N.E.2d 1036, 1047 (5th Dist. 2007).

[65] *Clark v. TAP Pharmaceutical Products, Inc*., 343 Ill. App. 3d 538, 552, 798 N.E.2d 123, 134 (5th Dist. 2003).

[66] *Travel 100 Group, Inc. v. Empire Cooler Service, Inc*., No. 03 CH 14510, 2004 WL 3105679, at *5 (Ill. Cir. Cook County Oct. 19, 2004).

[67] *Steinberg*, 69 Ill. 2d at 339.

[68] *Smith, supra* note 7.

[69] *Smith*, 223 Ill. 2d at 453-54.

[70] *Id*. at 454.

[71] *Id*. at 453.

[72] *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000); *Steering Committee v. Exxon Mobil Corp*., 461 F.3d 598 (5th Cir. 2006).

[73] *Smith*, 223 Ill. 2d at 451.

[74] *Id*.

[75] *Smith*, 223 Ill. 2d at 452.

[76] 735 ILCS 5/2-802(b).

(Continued on next page)

[77] *Steinberg,* supra note 42.

[78] *Steinberg,* 69 Ill. 2d at 342.

[79] *Miner*, *supra* note11.

[80] *Miner*, 87 Ill. 2d at 17.

[81] *Barbara's Sales, Inc. v. Intel Corporation,* 227 Ill. 2d 45, 72, 879 N.E. 2d 910, 925 (2007); *Landesman v. General Motors*, 72 Ill. 2d 44, 377 N.E.2d 813 (1978).

[82] *Bruemmer v. Compaq Computer Corporation*, 329 Ill. App. 3d.755, 760-61, 768 N.E.2d 276, 281-82 (1st Dist. 2002).

[83] *Yu v. International Business Machines Corporation,* 314 Ill. App. 3d 892, 732 N.E.2d 1173 (1st Dist. 2000).

[84] *Yu*, 314 Ill. App. 3d at 898-99.

[85] *Arriola v. Time Insurance Company*, 323 Ill. App. 3d 138, 151, 751 N.E.2d 221, 231 (1st Dist. 2001).

[86] *Hillenbrand v. Meyer Medical Group, S.C.*, 308 Ill. App. 3d 381, 391-92, 720 N.E.2d 287, 296 (1st Dist. 1999).

[87] *Gelb v. Air Con Refrigeration and Heating, Inc*., 326 Ill. App. 3d 809, 821-22, 761 N.E.2d 265, 274-75 (1st Dist. 2001).

[88] *Miner*, 87 Ill. 2d at 18.

[89] *Morrissy v. Eli Lilly & Company*, 76 Ill. App. 3d 753, 394 N.E.2d 1369 (1st Dist. 1979).

[90] *Morrissy*, 76 Ill. App. 3d at 758.

[91] *Id*. at 761.

[92] *Mele v. Howmedica*, 348 Ill. App. 3d 1, 808 N.E.2d 1026 (1st Dist. 2004).

[93] *Mele*, 348 Ill. App. 3d at 24.

[94] *Smith*, *supra* note 7.

[95] *Smith,* 223 Ill. 2d at 443.

[96] *Id*. at 447.

[97] *Id*. at 448.

[98] *Id*. at 448-49.

[99] *Id*. at 449.

[100] *Id*. (quoting *Avery*, 216 Ill. 2d at 128) (internal quotations omitted).

[101] *Smith,* 223 Ill. 2d at 449 (quoting *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 434 (Tex. 2000)) (internal quotations omitted).

[102] Smith, 223 Ill. 2d at 453-54.

[103] *Id.* at 453.

[104] *Fiorito v. Jones*, 39 Ill. 2d 531, 236 N.E.2d 698 (1968).

[105] *Magro v. Continental Toyota, Inc*., 67 Ill. 2d 157, 365 N.E.2d 328 (1977) (finding that where a determination needed to be made regarding whether defendant correctly charged and collected service occupation tax in transactions with each putative plaintiff, resolution of plaintiff's claim would not determine outcome of each putative plaintiff's claim, and as such, individual issues predominated).

[106] *Goetz v. Village of Hoffman Estates*, 62 Ill. App. 3d 233, 378 N.E.2d 1276 (1st Dist. 1978).

[107] *Goetz*, 62 Ill. App. 3d at 236.

[108] *Id*. at 237-38.

[109] *Rubino v. Circuit City Stores*, Inc., 324 Ill. App. 3d 931, 942, 758 N.E.2d 1, 9 (1st Dist. 2001).

[110] *But see Walczak v. Onyx Acceptance Corp.*, 365 Ill. App. 3d 664, 850 N.E.2d 357 (2nd Dist. 2006) (rejecting defendant's argument that its liability to each class member required an individual finding that but for defendant's alleged wrongdoing, each plaintiff would have exercised its rights and avoided damages, finding instead that the damage was the deprivation of the right itself, and as such, common issues predominated).

[111] *Kitzes*, *supra* note 60.

[112] *Id*.

[113] Fed. R.Civ.P. 23, 1966 Advisory Committee Note.

[114] *Ludwig v. Pilkington North America, Inc*., No. 03 C 1086, 2003 WL 22478842 (N.D. Ill. Nov. 4, 2003).

[115] *Ludwig*, 2003 WL 22478842 at *5.

[116] *LeClercq v. The Lockformer Company*, No. 00 C 7164, 2001 WL 199840 (N.D. Ill. Feb. 28, 2001).

[117] *LeClercq*, 2001 WL 199840 at *4.

[118] *Id*., 2001 WL 199840 at *6.

[119] *Id*., 2001 WL 199840 at *7 (citing *Sterling v. Velsicol Chemical Corporation*, 855 F.2d 1188, 1196-97 (6th Cir. 1988).

[120] *Id*., 2001 WL 199840 at *7.

[121] *Id*.

[122] *Mejdreck v. The Lockformer Company*, No. 01 C 6107, 2002 WL 1838141 (N.D. Ill. Aug. 12, 2002), aff'd, 319 F.3d 910 (7th Cir. 2003).

[123] *Muniz v. Rexnord Corporation*, No. 04 C 2405, 2005 WL 1243428 (N.D. Ill. Feb. 10, 2005).

[124] *Mejdreck*, 2002 WL 1838141 at *3; *Muniz*, 2005 WL 1243428 at *2.

[125] *Mejdreck*, 2002 WL 1838141 at *7; *Muniz*, 2005 WL 1243428 at *1, n. 1.

[126] *But see Duffin v. Exelon Corporation*, No. 06 C 1382, 2007 WL 845336 (N.D. Ill. Mar. 19, 2007)(class certification of contamination class action denied).

[127] 815 ILCS 505/1 *et. seq*.

[128] *Gordon v. Boden*, 224 Ill. App. 3d 195, 586 N.E.2d 461 (1st Dist. 1991).

[129] *Gordon*, 224 Ill. App. 3d at 201.

[130] *Id*., quoting *Brooks v. Midas-International Corporation*, 47 Ill. App. 3d 266, 274, 361 N.E. 815, 820 (1st Dist. 1997).

[131] *Clark v. TAP Pharmaceutical Products, Inc.*, 343 Ill. App. 3d 538, 798 N.E.2d 123 (5th Dist. 2003).

[132] *Clark*, 343 Ill. App. 3d at 547.

[133] *Id.* at 548.