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Re: Committee on State Class Action Law in Virginia

David N. Anthony	James R. McGarry
Senator John S. Edwards	Dale W. Pittman
Joseph C. Kearfott	Donna Miller Rostant
Hon. Stanley P. Klein	S. H. Woodson, III

Dear Roger:

Within the context that Virginia is at present one of only two states who make no provision in their state law for class action litigation (see Exhibit 1, "Class Action Practice in Virginia"), our Committee was asked to address the subject of whether it would be appropriate to seriously consider incorporating provisions for class actions into the law of the Commonwealth.

Our Committee was greatly assisted in its deliberations, by the work done by the American Bar Association Class Action Committee of the Section of Litigation, in particular that Committee's "Survey of State Class Action Law – 2010" (see Exhibit 2).

Of the 48 states whose law does provide for class action, these provisions typically represent some type of modified version of Federal Rule 23, which governs federal class action (for example, see Exhibit 3, "West Virginia: Decisions Interpreting Rule 23 of the West Virginia Rules of Civil Procedure"). The development of comparable provisions in state law began following the United States Supreme Court's ruling in 1985 in *Phillips Petroleum Co. v. Shutts*, 427 U.S. 797 (1985), that state courts can adjudicate claims of non-resident class members, subject to certain due process requirements. This meant that state courts could be a proper forum for multi-state and even nationwide class action that had traditionally been handled in federal forums.

Our Committee began by considering the utility of the Virginia Multi-Claimant Litigation Act, Va. Code §8.01-267.1, *et seq.*, which was enacted by the

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Virginia General Assembly approximately 12 years ago, at the initiation of the Boyd Graves Conference arising out of the work of a Committee chaired by Joe Kearfott. Our Committee concluded generally that this statute has not been widely used, and is most likely not an identical substitute for state class action law.

The Committee members discussed their individual experiences in litigating pursuant to the provisions of state class action law in other states, with the descriptions including "the good, the bad and the ugly." Using the traditional Boyd Graves litmus test of first determining whether something is broken before attempting to fix it, our discussion focused on the kinds of claims that could be brought in Virginia state courts if our law included provisions for class action litigation that cannot be brought under existing law, with the result that several different types of claims were identified, including in particular those in the arena of consumer law. In addition, we recognized that class action provisions being made part of the law of the Commonwealth would require careful study of their relationship to existing law, with summary judgment and the use of the non-suit cited specifically.

Given the large scale of any effort to draft a specific Virginia State class action proposal to be considered by the Boyd Graves Conference, the Committee felt that a logical first step was to raise this new topic for discussion within the Conference, in order to determine whether there exists sufficient interest for the Committee to undertake the task of drafting such a proposal. Depending upon the nature of that discussion, the Chairman of the Conference can then determine whether it is warranted for the Committee to continue its work for a second year, whether to draft such a proposal or for any other purpose.

Thank you for your cooperation. If you have any questions or if I can do anything further, please let me know.

Very truly yours,

W. Coleman Allen, Jr.
Committee Chairman

WCAjr/mck
Enclosures

VIRGINIA

CLASS ACTION PRACTICE IN VIRGINIA

There is no class action under state law in Virginia. By statute, there is a Multi Claimant Litigation Act, which provides a means to join, coordinate, consolidate, or transfer six or more civil actions. There is also case law addressing the equity proceeding known as "parties by representation."

Multi Claimant Litigation Act

- The Multi Claimant Litigation Act, VA. CODE § 8.01-267.1, *et. seq.*, allows a Circuit Court to join, coordinate, or transfer civil actions upon finding that separate civil actions brought by six or more plaintiffs involve common questions of law or fact and arise out of the same transaction, occurrence or series of transactions or occurrences; that the common questions of law or fact predominate and are significant to the actions; and the order will promote then ends of justice and the just and efficient conduct and disposition of the actions, and is consistent with each party's right to due process of law, and does not prejudice each individual party's right to a fair and impartial resolution of each action. VA. CODE § 8.01-267.1(1).

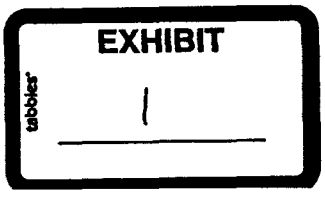
- Factors to be considered by the court include, but are not limited to: the nature of the common questions of law or fact; the convenience of the parties, witnesses, and counsel; the relative stages of the actions and the work of counsel; the efficient utilization of judicial facilities and personnel; the calendar of the courts; the likelihood and disadvantages of duplicative and inconsistent rulings, orders or judgments; the likelihood of prompt settlement of the actions without the entry of the order; and as to joint trials by jury, the likelihood of prejudice or confusion. VA. CODE § 8.01-267.1(3).

- The actions are considered pending in the same circuit court when they have been filed in that court, or when they have been properly transferred to that court, VA. CODE § 8.01-267.2, and the court may coordinate or consolidate separate pending civil actions brought by six or more plaintiffs. VA. CODE § 8.01-267.3.

- When six or more civil actions are pending in different circuit courts, they may be transferred to one of the courts upon application to a panel of circuit court judges designated by the Virginia Supreme Court. VA. CODE § 8.01-267.4.

- The Act provides for interlocutory appeals to the Virginia Supreme Court of the Virginia Court of Appeals as a matter of discretion in certain circumstances. VA. CODE § 8.01-267.8.

Dale W. Pittman is a member of the National Association of Consumer Advocates, the Virginia State Bar, the Virginia Bar Association, the Virginia Trial Lawyers Association, and the Petersburg Bar Association, of which he is a past President. He is a member of the Virginia State Bar Council, the State Bar's governing body, and the Board of Govenors of the Virginia Trial Lawyers Association. He chairs the VTLA's Consumer Law Section. Mr. Pittman is a frequent lecturer on consumer protection laws.



- The Act does not apply to actions against manufacturers or suppliers of asbestos or products for industrial use that contain asbestos to which the provisions of VA. CODE § 8.01-374.1 may apply.

Representative Suits in Equity

There is an argument that, under established common law precedent, plaintiffs in equity may represent others who are similarly situated. *See, e.g., Bull v. Read*, 54 Va. (13 Gratt.) 78 (1855). *See generally*, Boyd, Graves & L. Middleditch, *Virginia Civil Procedure,* 5 4.18(D) (1982). Representative suits in Equity present issues that affect all the potential plaintiffs, there must be a number of potential plaintiffs, and all must share a common interest. The interests need not be identical, and may be several and distinct. *Bull v. Read*, 54 Va. at 86.

Using these standards, Virginia courts have allowed representative suits for injunctive relief against illegal taxes, *Johnson v. Black*, 103 Va. 477, 49 S.E. 633 (1905); *Bull v. Read*, 54 Va. (13 Gratt.) 78 (1855); and for injunctive relief against the illegal administrative orders of state officials. *Blanton v. Southern Fertilizing Co.,* 77 Va. 335 (1883). Virginia courts have found that a representative suit can be brought on behalf of creditors to obtain a new trustee under a deed of trust, even though their interests are not exactly the same. *Reynolds v. Bank of Virginia*, 47 (6 Gratt.) Va. 174, 181 (1849).

Historically, equity courts allowed one or more named parties to represent a larger group. *See, e.g.*, 11. Fletcher, *A Treatise on Equity Pleading and Practice* 5 21 (1902); *Story's Equity Pleadings* § 77, *et. seq.* (1865). According to Fletcher, the common law encourages parties by representation when, among other things, (1) it is impracticable to make all persons parties because the proper parties are unknown to the plaintiff; (2) the parties are "exceedingly numerous" and it would be "impracticable" to join all without delaying and obstructing justice; or (3) the interests of the parties are very small. 11 Fletcher, *A Treatise on Equity Pleading and Practice* S 21, at 37—38 (1902).

In *Bull v. Read*, 54 Va. (13 Gratt.) 78, 80 (1855), the Virginia Supreme Court approved a representative suit where the named plaintiffs represented about 200 absent plaintiffs. In *Bosher v. Richmond & EI.L. Co.*, 89 Va. 455, 16 S.F. 360 (1892), the decree of the circuit court sustaining a demurrer was reversed, permitting four named petitioners representing about 200 persons to sue to rescind fraudulent stockholder subscription contracts and to obtain a refund of their monies. The Virginia Supreme Court emphasized that:

> [I]n a case like the one made by this bill, where the parties allege in the bill that the fraudulent acts are exactly the same, and perpetrated by the same means, and the injury identical to all, except only in the amount of the injury . . . and the relief sought is the same, . . . there is a community of interest and right, and such persons may unite as co-plaintiffs against the common wrong-doer. If this were not so, it is difficult to see how relief could be had at all. In so many holdings many are necessarily small, and the whole interest destroyed inevitably in an effort to redress an admitted wrong.

Id. at 464—5, 16 SE. at 363 (emphasis added).

While the Virginia General Assembly's failure to enact a class action statute may show the Legislature's intention to make class actions unavailable in state courts in Virginia, the Virginia Code clearly provides that:

> The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly.

VA. CODE § 1-16.

Applying established principles of statutory interpretation, and under long standing case law in Virginia, the common law will not be altered unless the legislature specifically says as much, using words that plainly manifest its intent. *Wallace v. Taliaferro*, 6 Va. (2 Call) 447 (1800); *Commonwealth v. Maclin*, 30 Va. (3 Leigh) 877 (1831); *Matthews v. Commonwealth*, 59 Va. (18 Gratt.) 989 (1868); *Millhiser Manufacturing Co. v. Gallego Mills Co.*, 101 Va. 579, 44 S.F. 760 (1903); *Griffith v. Raven Red Ash Coal Co.*, 179 Va. 790, 20 S.E.2d 530 (1942). The General Assembly's failure to pass a class action statute may not constitute the "clear and explicit" language that is necessary to repeal the common law doctrine of parties by representation.

ABA Survey of State Class Action Law - 2010

Alabama

Rule 23 of the Alabama Rules of Civil Procedure is essentially identical to Rule 23 of the Federal Rules of Civil Procedure as it appeared prior to the amendments of 1998 and 2003.

Alaska

The provisions of Alaska Rule of Civil Procedure 23(a)-(e) are largely identical to those of Federal Rule of Civil Procedure 23(a)-(e),

Arizona

Rule 23 of the Arizona Rules of Civil Procedure is identical to the text of the corresponding federal rule, except that Arizona has no provision analogous to Fed. R. Civ. P. 23(f) (pertaining to appeals).

Arkansas

While the
language of the revised Arkansas Rule largely mirrors the Federal Rule, there are two notable exceptions: (i) the Arkansas Rule does not subdivide subsection (b) into three separate types of class actions as does Federal Rule 23(b); and (ii) the Arkansas Rule omits subsections (f) through (h) found in the Federal Rule.

California

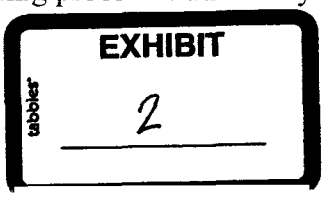
California's operative general class action statute, Code of Civil Procedure section 382, was enacted in 1872 as part of California's Field Code and has remained essentially unchanged. California's second class action statute, the Consumer Legal Remedies Act, is found at Civil Code sections 1750, *et seq,*, and lists 23 prohibited acts, violations of which form the basis for class actions seeking damages and a wide variety of other remedies. In addition, California's Unfair Competition Law ("UCL"), Business and Professions Code sections 17200, *et seq.*, permits anyone who incurs injury-in-fact to seek equitable forms of redress for group harms, including injunction, disgorgement and restitution, through a class action.

Colorado

Rule 23 of the Colorado Rules of Civil Procedure is "virtually" identical to Rule 23 of the Federal Rules of Civil Procedure.

Connecticut

Class actions in Connecticut are governed by Connecticut Practice Book §§ 9-7 through 9-10 and Conn. Gen. Stat. § 52-105. Connecticut Practice Book § 9-7 is identical to Rule 23(a) of the Federal Rules of Civil Procedure requiring proof of numerosity of potential claimants,



commonality and typicality of issues of law and fact, and adequacy of representation. Similarly, Connecticut Practice Book § 9-8 is also identical to the first paragraph of Federal Rule 23(b) combined with the first sentence of Federal Rule 23(b)(3), requiring predominance of common issues of law or fact and superiority of a class action over other forms of adjudication. The Connecticut rule, however, differs from the federal rule in that the federal rule includes a non-exhaustive list of factors, designated A-D, that a court should consider when determining whether or not the predominance and superiority requirements have been met. While the four factors are not explicitly mentioned in the Connecticut rule, they may be used as standards to aid the state court in its determination as well. 1 W. Horton and K. Knox, *Connecticut Practice: Practice Book Annotated* § 9-8, Authors' Comments. In addition, the two bases for class actions in sections (b)(1) and (b)(2) of Federal Rule 23 are not found in the Connecticut rules.

Delaware

The class action rules in the Superior Court and the Chancery Court are similar to Fed. R. Civ. P. 23.

District of Columbia

The District of Columbia's class action rule, D.C. SCR-CIV. R. 23 (2006), is substantially identical to FED. R. CIV. P. 23.

Florida

Florida Rule of Civil Procedure 1.220 governs class actions. The Supreme Court of Florida amended the Rule in 1980 to bring it in line with modern practice and the federal class action rule, Federal Rule of Civil Procedure 23.

Georgia

Georgia enacted a revised class action statute effective July 1, 2003 and applicable to actions filed on or after that date. O.C.G.A. § 9-11-23. When enacted, the statute was nearly identical to the Federal Rule 23 at the time.

Hawaii

Rule 23 of the Hawaii Rules of Civil Procedure ("HRCP") is identical to FED. R. CIV. P. 23 as it existed prior to the 1998 amendments.

Idaho

The Idaho Rule has not been amended since 1976 and therefore is identical to the federal rule as it appeared prior to the addition of FED. R. CIV. P. 23(f) in December of 1998 and the changes in December 2003 (and subsequently).

Illinois

Class certification in Illinois is governed by Section 2-801 of the Illinois Code of Civil Procedure (735 ILCS 5/2-801), which is patterned after Rule 23 of the Federal Rules of Civil Procedure.

Indiana

Rule 23 of the Indiana Rules of Trial Procedure is similar to Rule 23 of the Federal Rules of Civil Procedure prior to the 2003 amendments to the federal rules.

Iowa

Effective July 1, 1980, Iowa adopted the provisions of the Uniform Class Actions Act, which had been approved in 1976 by the National Conference of Commissioners of Uniform State Laws. To date, only North Dakota and Iowa have adopted this Uniform Act. The Iowa Rules are much more detailed than Rule 23 of the Federal Rules of Civil Procedure.

Kansas

K.S.A. § 60-223 of the Kansas Rules of Civil Procedure is modeled after Rule 23 of the Federal Rules of Civil Procedure.

Kentucky

Rule 23 of the Kentucky Rules of Civil Procedure is similar to Rule 23 of the Federal Rules of Civil Procedure.

Louisiana

For the most part, Louisiana statutes with regard to class actions are the same as Rule 23 of the Federal Rules of Civil Procedure.

Maine

Maine Rule of Civil Procedure 23 was modeled after Federal Rule of Procedure 23, but has not been amended to reflect the 1998 and 2003 amendments to the Federal Rule.

Maryland

In 1984 Maryland adopted a version of Rule 23 of the Federal Rules of Civil Procedure as its own class action rule, replacing former Rule 209. Maryland Rule 2-231 is nearly identical to pre-1998 FED. R. CIV. P. 23

Massachusetts

Rule 23 of the Massachusetts Rules of Civil Procedure establishes a class action rule of general applicability that is modeled on Fed. R. Civ. P. 23 though, as discussed below, it differs from the federal rule in several material respects.

Michigan

The Michigan Court Rules borrowed from a number of sources, including the Federal Rules of Civil Procedure and other states' rules.

Minnesota

Rule 23.01, et seq. of the Minnesota Rules of Civil Procedure is essentially identical to its federal counterpart, Rule 23 of the Federal Rules of Civil Procedure.

Mississippi

The Mississippi Rules of Civil Procedure contain no section permitting class actions.

Missouri

The text of Rule 52.08 of the Missouri Supreme Court Rules is similar to that of Rule 23 of the Federal Rules of Civil Procedure.

Montana

Rule 23 of the Montana Rules of Civil Procedure was completely rewritten in 1967 to adopt the language of the federal rule.

Nebraska

Nebraska has no analogue to Rule 23 of the Federal Rules of Civil Procedure as it remains one of the few states that continue to employ the procedural statutes based on the Field Code of 1849. *Neb. Rev. Stat.* ' 25-319 (Reissue 1995) is a broad provision authorizing the use of class actions.

Nevada

Rule 23 of the Nevada Rules of Civil Procedure mirrored its federal counterpart until the Federal Rule was amended in 2003.

New Hampshire

Rule 27-A is similar to Federal Rule of Civil Procedure 23.

New Jersey

The New Jersey class action rules are provided for in the New Jersey Court Rules 4:32-1 and 4:32-2 and largely mirror the language of *Fed. R. Civ. P.* 23.

New Mexico

Rule 1-023 NMRA was adopted by the New Mexico Supreme Court effective July 1, 1995. In 2000, New Mexico added subparagraph F to Rule 1-023 mirroring the wording of Federal Rule 23(f), but New Mexico has not yet adopted the 2003 revisions to Federal Rule 23.

New York

Article 9 of the New York Civil Practice Law and Rules ("CPLR") is substantially similar to Rule 23 of the Federal Rules of Civil Procedure.

North Carolina

North Carolina Rule 23-- there are substantial differences with its federal counterpart.

North Dakota

Rule 23 of the North Dakota Rules of Civil Procedure is based on the Model Class Action Rule as drafted by the National Conference of Commissioners on Uniform State Laws.

Ohio

Fed.R.Civ.P. 23(a), (b), and (c) are identical to their counterparts in the Ohio rule.

Oklahoma

Title 12, section 2023 of the Oklahoma Statutes is similar to Fed. R. Civ. P. 23.

Oregon

Oregon's class action rule is more restrictive than most states' rules, and was designed to address perceived class action abuses. As originally proposed, Oregon's class action statute was an exact duplicate of Federal Rule 23. In response to management concerns perceived to be inherent to the federal rule, however, the Oregon Senate Judiciary Committee requested that the proponents and opponents together draft amendments, which were ultimately incorporated into the bill.

Pennsylvania

Pennsylvania Rule 1702(1), (2), and (3) mirrors Rule 23(a)(1), (2) and (3) on numerosity,

commonality and typicality. Pennsylvania Rule 1702(4) on adequacy incorporates criteria set forth in a separate rule, Pennsylvania Rule 1709, which sets forth a standard for adequacy of representation that is substantively similar to Rule 23(a)(4).

Rhode Island

Rule 23 of the Rhode Island Superior Court Rules of Civil Procedure is *nearly* identical to Rule 23 of the Federal Rules of Civil Procedure. Rhode Island has not adopted paragraphs (f), (g), or (h) of the Federal Rule.

South Carolina

Rule 23 of the South Carolina Rules of Civil Procedure, while derived from F.R.C.P. 23, differs significantly from its federal counterpart.

South Dakota

South Dakota's class action statute mimics the pre-1998 federal rule

Tennessee

The first five sections of Rule 23 of the Tennessee Rules of Civil Procedure, Tenn. R. Civ. P. 23.01 - 23.05, substantially mirror the first five sections of Rule 23 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 23(a) - 23(e).

Texas

Texas Rule 42 is identical in most respects to Federal Rule 23.

Utah

Utah Rule of Civil Procedure 23 is nearly identical to Federal Rule of Civil Procedure 23.

Vermont

Rule 23 of the Vermont Rules of Civil Procedure is largely identical to Rule 23 of the Federal Rules of Civil Procedure.

Virginia

There is no class action under state law in Virginia.

Washington

Until amendments in 2006 added a provision concerning disposition of residual funds, Civil Rule 23 was "an exact counterpart" of the pre-1998 Rule 23 of the Federal Rules of Civil Procedure.

West Virginia

Rule 23 of the West Virginia Rules of Civil Procedure, adopted on April 6, 1998, is essentially identical to Rule 23 of the Federal Rules of Civil Procedure, except for FED. R. CIV. P. 23(f) and 23(g).

Wisconsin

Wisconsin's succinct, 49-word class action rule, like Fed. R. Civ. P. 23(a)(1), includes the concepts of numerosity and commonality. Unlike the federal rule, however, the Wisconsin rule does not explicitly address typicality, adequate representation, predominance, or superiority. Moreover, the Wisconsin rule, in contrast to the federal rule, states the requirements of numerosity and commonality in the disjunctive rather than the conjunctive.

Wyoming

Rule 23 of the Wyoming Rules of Civil Procedure is identical to Rule 23 of the Federal Rules of Civil Procedure.

WEST VIRGINIA

DECISIONS INTERPRETING RULE 23 OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE

1. Comparison of West Virginia Rule 23 with Federal Rule 23.

Rule 23 of the West Virginia Rules of Civil Procedure, adopted on April 6, 1998, is essentially identical to Rule 23 of the Federal Rules of Civil Procedure, except for FED. R. CIV. P. 23(f) and 23(g). *State ex rel. Erie Fire Ins. Co. v. Madden,* 515 S.E.2d 351 (W. Va. 1998). Prior to that date West Virginia used a variation of the 1938 Federal Rule 23. Therefore, no decisions regarding class issues in West Virginia dealt explicitly with issues arising under 23(b)(3) (superiority, predominance) or 23(b)(1) and (2). *Burks v. Wymer*, 172 W. Va. 478, 307 S.E.2d 647 (1983).

In the last few years, the jurisprudence has finally caught up to the rule. In *In re W. Va. Rezulin Litigation v. Hutchinson*, 214 W. Va. 52, 585 S.E.2d 52 (2003), the Supreme Court of Appeals held that the pre-1998 factors in determining class certification were no longer sufficient. The new rule required a different analysis: provided that the requirements of numerosity, commonality, typicality and adequacy of representation and any of the three requirements of Rule 23(b) were met, the class should be certified. *Rezulin* was followed by *Love v. Georgia-Pacific Corp.*, 214 W. Va. 484, 590 S.E.2d 677 (2003), *Ways v. Imation Enterprises Corp.*, 214 W.Va. 305, 589 S.E.2d 36 (2003), *Gulas v. Infocision Management Corp.*, 215 W.Va. 225, 599 S.E.2d 648 (2004), and *State of West Virginia ex rel. Chemtall, Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004), all of which reaffirmed that new guidelines exist for class actions in West Virginia.

2. Case law interpreting Rule 23.

Certification of a class under Rule 23 may only be granted when the party seeking certification has satisfied all four prerequisites of Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation – and one of the three subdivisions of Rule 23(b). *Chemtall, Inc.*, 216 W. Va. at 453, 607 S.E.2d at 782. *See also, Rezulin*, 214 W. Va. at 64, 585 S.E.2d at 64. The party who seeks to establish the propriety of a class action has the burden of proving that the pre-requisites of Rule 23 have been satisfied. *Rezulin*, 214 W. Va. at 64, 585 S.E.2d at 64 (quoting *Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n.,* 183 W. Va. 15, 22, 393 S.E.2d 653, 660 (W. Va. 1990)). Similarly, the party who seeks to establish the propriety of a class action also has the burden of proving that the statutory prerequisites of a class action have been satisfied. *Ways v. Imation Enterprises Corp.*, 214 W. Va. 305, 589 S.E.2d 36 (2003). Whether the requirements for a class action exist rests within the sound discretion of the trial court. *Id.* (quoting Syl. Pt. 5, *Mitchem v. Melton*, 167 W. Va. 21, 277 S.E.2d 895 (1981)). However, nothing in the language or history of Rule 23 gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be

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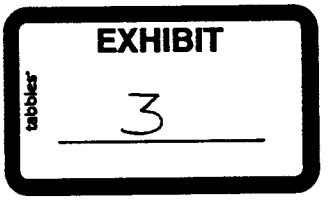
This chapter was prepared by Joseph Beeson and Craig Beeson of the firm of Robinson & McElwee in Charleston, West Virginia.



maintained as a class action. *Rezulin,* 214 W. Va. at 63, 585 S.E.2d at 63. The trial court cannot capriciously or arbitrarily refuse a class action if it meets the requirements of Rule 23. *Evans,* 168 W. Va. at 224, 283 S.E.2d at 855. An order by the trial court refusing to certify a class action under Rule 23 is appealable. *Mitchem v. Melton,* 167 W. Va. 21, 32, 277 S.E.2d 895, 901 (1981). The West Virginia Supreme Court of Appeals will review a circuit court's order granting or denying a motion for class certification under an abuse of discretion standard. *Gulas,* 215 W. Va. at 227, 599 S.E.2d at 650. It is an abuse of discretion for the trial court to deny certification and dismiss the class action without appropriate consideration and articulation of how the movant failed to establish the Rule 23 criteria. *Evans,* 168 W. Va. at 224, 283 S.E.2d at 855.

Where a party seeks to proceed as a class representative under Rule 23 and where issues related to class certification are present, reasonable discovery related to class certification issues is appropriate, particularly where the pleadings and record do not sufficiently indicate the presence or absence of the requisite facts to warrant an initial determination of class action status. *Gulas,* 215 W. Va. at 229, 599 S.E.2d at 652, *Love*, 214 W. Va. at 488, 590 S.E.2d at 681. In *Love*, the circuit court abused its discretion in denying the appellant's motion to conduct discovery on class certification. *Accord, Gulas*, 215 W.Va. 225, 599 S.E.2d 648, reversing denial of class certification for the purpose of allowing discovery. Finally, a class certification order should be detailed and specific in showing the rule basis for the certification and the relevant facts supporting the legal conclusions. *Chemtall Inc.*, 216 W. Va. at 454, 607 S.E.2d at 783.

a. Rule 23(a).

Numerosity: Numerosity is an absolute pre-requisite to maintaining a class action suit. *Rezulin,* 214 W. Va. at 64, 585 S.E.2d at 64. The standard under West Virginia practice is whether persons constituting the class are so numerous as to make joinder impractical. *Jefferson County Bd. of Educ.*, 183 W. Va. at 22, 393 S.E.2d at 660. The test for impracticability of joining all members does not mean impossibility but only difficulty or inconvenience of joining all members. *Mitchem*, 167 W. Va. at 33, 277 S.E.2d at 902. Before a class can be certified pursuant to Rule 23 it is imperative that the class be identified with sufficient specificity so that it is administratively feasible for the court to ascertain whether a particular individual is a member. *State ex rel. Metropolitan Life Ins. Co. v. Starcher*, 196 W. Va. 519, 526, 474 S.E.2d 186, 190 (1996). A class action cannot be maintained if it is too ill defined, amorphous, or fails in objective terms to describe the class with necessary specificity. *Id.* at 523.

Commonality: Commonality is an absolute pre-requisite to the certification of a class action. *Rezulin,* 214 W. Va. at 64, 585 S.E.2d at 64. The rights asserted against or on behalf of those making up the class must be of the character specified in the rule. *Jefferson County Bd. of Educ.*, Syl. Pt. 5, 183 W. Va. 15, 393 S.E.2d 653. A common nucleus of operative fact or law is usually enough to satisfy the commonality requirement, as the commonality threshold is not high and requires only that the resolution of common questions affect all or a substantial number of class members. Syl. Pt. 11, *Rezulin,* 214 W. Va. 52, 585 S.E.2d 52 (2003). *See also, Chemtall Inc.*, 216 W. Va. at 452, 607 S.E.2d at 781.

Typicality: A class representative must be a member of the class he or she represents. *Bd. of Educ. of Monongalia County v. Starcher*, 176 W. Va. 388, 391, 343 S.E.2d 673, 676

(1986). A representative party's claim or defense is typical if it arises from the same event, practice, or course of conduct that gives rise to the claims of other class members. *Rezulin,* 214 W. Va. at 68, 585 S.E.2d at 68. A representative's claims need only be typical of the other class members' claims, not identical, and if the representative's claim arises out of the same legal or remedial theory, factual variations will normally not be sufficient to preclude class treatment. *Id. Accord, Ways*, 214 W.Va. at 313, 589 S.E.2d at 44. A change in the status of a class representative does not require the court to dismiss a class action on the basis of mootness. *Miller v. Sencindiver*, 170 W. Va. 288, 290, 294 S.E.2d 90, 92 (1982). A class action is not moot regardless of whether the class representative changes his status or loses a stake in the outcome of the litigation if the issue is capable of repetition and yet evades review. *Rissler v. Giardina*, 169 W. Va. 558, 562, 289 S.E.2d 180, 183 (1982).

Adequacy: The adequacy requirement of Rule 23(a)(4) of the West Virginia Rules of Civil Procedure serves two purposes: First, the adequacy of representation inquiry tests the qualifications of the attorneys to represent the class. Second, it serves to uncover conflicts of interest between the named parties and the class they seek to represent. Syl. Pt. 5, *Chemtall Inc.*, 216 W. Va. 443, 607 S.E.2d 772. *See also, Rezulin*, 214 W. Va. at 69, 585 S.E.2d at 69. The court will protect the absent members of a class if the entire merits of the controversy are placed in issue. *Robertson v. Hatcher*, 148 W. Va. 239, 135 S.E.2d 675 (1964). However, those who elect to opt-out of the class are not deemed to be absent members and lose standing to challenge any settlement reached by those who choose to remain in the class action. *Bd. of Educ. of Monongalia County*, 176 W. Va. 388, 391. 343 S.E.2d at 676.

b. Rule 23(b).

Although prior to April 6, 1998, Rule 23 of the West Virginia Rules of Civil Procedure did not contain 23(b), the West Virginia Supreme Court of Appeals, in *Burks,* addressed nearly identical factors under circumstances in considering the appropriateness of certifying a "spurious" class action. *Burks,* 172 W. Va. at 481, 307 S.E.2d at 657.

Also, the Supreme Court of Appeals discussed two of the three Rule 23(b) requisites in *Rezulin,* noting that the term "generally applicable" in Rule 23(b)(2) should be read to mean that the party opposing the class does not have to act directly against each member of the class. Rather, the key is whether the actions of the party opposing the class would affect all persons similarly situated, so that the acts apply generally to the whole class. *Rezulin* 214 W. Va. 52, 585 S.E.2d 52. In order to be certified under Rule 23(b)(3), a class must first satisfy both the predominance test and the superiority test. *Perrine v. E.I. Du Pont De Nemours and Co.*, 2010 WL 1170661 (W.Va. 2010). Under the predominance test, a trial court is required to find that questions common to the class predominate over questions affecting individual members. *Id.* Under the superiority test, a trial court must compare the class action with other potential methods of litigation. *Id.*

Rule 23(b)(3)'s predominance criterion is a corollary to the commonality requirement of Rule 23(a)(2) – while commonality requires a showing of common questions, predominance requires a showing that the common questions of law or fact outweigh individual questions. *Rezulin* 214 W. Va. 52, 585 S.E.2d 52. The West Virginia Supreme Court of Appeals has

rejected the notion that a claim for punitive damages is inappropriate for class action certification because allegations regarding the defendants' conduct and the resulting harm must be individually examined. *In re Tobacco Litigation,* 218 W. Va. 301, 624 S.E.2d 738 (2005).

3. Miscellaneous comments:

Since the adoption of amended Rule 23, few decisions have been handed down by the West Virginia Supreme Court of Appeals interpreting West Virginia's class action rule. In *State ex rel. Erie Fire Ins. Co. v. Madden,* 204 W. Va. 606, 515 S.E.2d 351 (1998), on a writ of prohibition, the court refused to recognize the doctrine of juridical link under the specific facts of the case. *Madden*, 515 S.E.2d at 354-56. The doctrine of juridical link had never before been recognized in West Virginia.

RULE 23 OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE

Rule 23. Class actions.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination By Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member

that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) 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.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.