

Staying Classy in State and Federal Court

Understanding the Small But Significant Differences Between Michigan and Federal Class Action Rules

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A plaintiff files an action in Michigan state court on behalf of a putative class of residents alleging violations of state law. The Michigan Court Rules, of course, will apply to the action, including the all-important rule governing class actions, MCR 3.501. And because the Michigan Court Rules borrow in large part from the Federal Rules of Civil Procedure, the general principles of Rule 23 must apply in state courts. Right?

Not so fast. It's true that for years, Michigan courts have recognized the similarities between the Federal Rules of Civil Procedure and the Michigan Court Rules relating to class actions, turning to federal cases to fill the gaps where Michigan

caselaw is silent.¹ Yet despite the overlap between the rules, there are enough differences to recommend caution. Practitioners should tread carefully and keep these differences in mind as they litigate class actions in both Michigan and federal courts. Although we don't claim to list all of them, we discuss a few of the most significant differences below.

Timing for motion and certification

Class actions in Michigan state and federal courts are governed by separate time limitations for class certification.² MCR 3.501 requires the plaintiff to affirmatively move for class certification *within 91 days* after filing the complaint unless an extension is obtained “on stipulation of the parties or on motion for cause shown.”³ If the plaintiff does not move for certification within that period, the defendant may file a “notice of the failure,” at which point “the class action allegations are deemed stricken, and the action continues by or against the named parties alone” unless the plaintiff can demonstrate that the failure to move for certification was due to “excusable neglect.”⁴

MCR 3.501, however, does not prevent a plaintiff who has met the 91-day requirement from filing a renewed or subsequent motion for certification, nor does it limit the time for filing any such motion.⁵ In addition, the rule does not specify a time by which the court must *decide* a class certification motion; rather, “[t]he court may allow the action to be maintained as a class action, may deny the motion, or may order that a ruling be postponed pending discovery or other preliminary procedures.”⁶

Rule 23 has no parallel deadline for the plaintiff to seek class certification.⁷ Instead, the rule requires only that “[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.”⁸ Under this language, as under MCR 3.501, there is no hard and fast deadline by which a class certification decision must be made; it need only be made “[a]t an early practicable time.” But the federal rules place the onus on the court to determine whether to certify a class, not on the plaintiff to move for such a decision.

Types of classes

Another significant difference between Rule 23 and MCR 3.501 is the delineation between types of class actions. Rule 23 permits three distinct types: (1) class actions where separate actions would create a risk of adversely affecting class members or the opposing party,⁹ (2) class actions for injunctive or declaratory relief,¹⁰ and (3) class actions in which common questions predominate over individual questions.¹¹ MCR 3.501, on the other hand, does not distinguish between types of class actions.

Fast Facts

Unlike Rule 23, MCR 3.501 requires the plaintiff to affirmatively move for class certification *within 91 days* after filing the complaint.

While Rule 23 provides different notice requirements for certain types of classes, all classes certified in Michigan are subject to the same notice requirements.

In Michigan, all putative class members have the right to opt out of the class. Under the federal rules, only putative members of a Rule 23(b)(3) class must be given notice of the right to opt out.

The delineation under Rule 23 has two important consequences. First, the notice required to be given to the class is dependent on the type of class. For classes certified under Rule 23(b)(1) and 23(b)(2), “the court *may* direct appropriate notice to the class.”¹² For classes certified under Rule 23(b)(3), however, the court *must* direct notice to class members.¹³

Under MCR 3.501, all classes certified in Michigan are subject to the same notice requirements, and the rule details specific notice requirements similar to those for Rule 23(b)(3) classes.¹⁴ For example, MCR 3.501(C)(5)(b) requires that the notice sent to class members include “a statement of the right of a member of the class to be excluded from the action by submitting an election to be excluded...”¹⁵ As a result, the right to opt out of the class exists as to all class actions in Michigan,¹⁶ whereas under the federal rules, only putative members of a Rule 23(b)(3) class must be given notice of the right to opt out.¹⁷

Second, under Rule 23, the type of class action dictates the content of any judgment. For classes certified under Rule 23(b)(1) and 23(b)(2), the judgment must “include and describe those whom the court finds to be class members.”¹⁸ For classes certified under Rule 23(b)(3), the judgment must “include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.”¹⁹

Under MCR 3.501, in contrast, a single rule governs judgments in all class actions: the judgment must describe the parties to be bound²⁰ and “[a] judgment entered in an action certified as a class action binds all members of the class who have not submitted an election to be excluded, except as otherwise directed by the court.”²¹ In other words, the requirements of

Rule 23(b)(3), including the class members' right to opt out of the class, apply to *all* Michigan class actions.

Decertification

The Michigan Court Rules provide a powerful tool to class action defendants: a broad ability to move to decertify a previously certified class. Although the rules do not expressly contemplate motions to decertify, they explicitly contemplate the revocation of class certification.²² The motion to decertify is independent of a motion for reconsideration and is therefore not governed by the restrictions of MCR 2.119(F). There is no time limitation on when defendants may request revocation of class certification, nor must the motion to decertify bear any specific relationship to the initial opposition to certification.²³ Moreover, a motion to decertify need not be based on a change in circumstances.²⁴ A motion to decertify a class is governed by the same principles as a motion for class certification.²⁵

Rule 23 has no such provision governing revocation of class certification, providing only that “an order that grants or denies class certification may be altered or amended before final judgment.”²⁶ In addition, some federal courts have taken the position that a class certification decision should be revisited only in rare circumstances:

[A] court should not disturb its prior certification findings *absent some significant intervening event, or a showing of compelling reasons to reexamine the question.* Moreover, a court should be wary of revoking a certification order completely at a late stage in the litigation process.²⁷

Class action defendants in Michigan state courts should be aware that the federal standard does not apply²⁸ and that a state court may be willing and able to revisit a certification decision at any time before judgment.

Counterclaims

Another key difference between Michigan state and federal class action rules is the treatment of counterclaims. The Michigan Court Rules specifically authorize the filing of counterclaims against a class or an individual class member²⁹ and outline notice and timing requirements for the filing of counterclaims.³⁰ Importantly, the rules expressly grant the trial court a significant amount of discretion in managing counterclaims:

The court shall take such steps as are necessary to prevent the pendency of counterclaims from making the action unmanageable as a class action. Such steps include but are not limited to severing counterclaims for separate trial under MCR 2.505(B) or ordering that consideration of the counterclaims be deferred until after determination of the issue of

the defendant's liability, at which time the court may hear the counterclaims, remove them to a lower court, change venue, dismiss them without prejudice, or take other appropriate action.³¹

Rule 23 does not address class counterclaims, thus leaving the issue exclusively to judicial development. Federal courts, however, generally use techniques like those authorized in MCR 3.501(H)(5) to manage counterclaims and limit the effect of a counterclaim on the class action as a whole, including frequently considering class counterclaims only during the damages phase.³²

Michigan limits on class actions based on statutory damages

MCR 3.501 places a key limitation on the underlying claim on which a class action may be based. In Michigan courts, “[a]n action for a penalty or minimum amount of recovery without regard to actual damages imposed or authorized by statute may not be maintained as a class action unless the statute specifically authorizes its recovery in a class action.”³³ This provision has a major effect on the filing of class actions under the Telephone Consumer Protection Act—a significant source of class action litigation. The act, which prohibits certain automated telephone calls and faxes, provides a minimum statutory damage amount without regard to actual damages and does not explicitly authorize recovery in a class action.³⁴ Thus, Telephone Consumer Protection Act suits may not be brought as class actions in state court.³⁵ Because federal courts have federal-question jurisdiction over these suits, the barrier to class certification found in MCR 3.501 does not apply to such class actions brought in federal court.³⁶

Michigan courts are not bound by the rigorous analysis framework of the federal rules

Finally, while the prerequisites to class certification—numerosity, typicality, commonality/predominance, adequacy, and superiority—are very similar in both Michigan and federal courts, state courts may apply a different analytical framework to determine whether those prerequisites have been met. Federal courts must conduct a “rigorous analysis” of each of the Rule 23 prerequisites before certifying a class.³⁷ In *Henry v Dow Chemical Company*,³⁸ however, the Michigan Supreme Court noted that “the federal ‘rigorous analysis’ requirement does not necessarily bind state courts.”³⁹ Although the Michigan Supreme Court agreed “that a certifying court may not simply ‘rubber stamp’ a party’s allegations that the class certification prerequisites are met,” it concluded that “the plain language of MCR 3.501(A) provides sufficient guidance for class certification decisions in Michigan.”⁴⁰ Because Michigan caselaw on class certification is “thin,”⁴¹ however,

no real differences between the standards have yet to emerge and, for all practical purposes, Michigan and federal courts continue to apply the same substantive analysis.

Conclusion

Because Rule 23 and MCR 3.501 provide similar frameworks for filing, prosecuting, and defending class actions, it is possible to overlook the small but significant differences between them. Class action practitioners in Michigan should remember that these rules are not identical and be aware of the key differences so they can effectively litigate class actions in multiple jurisdictions. ■



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ENDNOTES

- Zine v Chrysler Corp*, 236 Mich App 261, 288 n 12; 600 NW2d 384 (1999) ("There being little Michigan case law construing MCR 3.501, it is appropriate to consider federal cases construing the similar federal court rule [F.R. Civ. P. 23] for guidance.");
- Hill v City of Warren*, 276 Mich App 299, 306 n 2; 740 NW2d 706 (2007) ("Federal Rule of Civil Procedure 23 has no similar time limitations, likely making any federal precedent inapplicable.");
- MCR 3.501(B)(1)(a).
- MCR 3.501(B)(2).
- Hill*, 276 Mich App at 306 (upholding the trial court's grant of "renewed motion for class certification" and stating that "[t]he plain language of the court rule mandates that a motion for certification be brought within 91 days of the complaint; it does not forbid subsequent motions for certification or mandate any particular timing requirements for bringing them.");
- MCR 3.501(B)(3)(b).
- In some districts, the local rules may require a class certification motion to be filed within a certain time frame. See, e.g., ND Fla LCR 23.1 (requiring a motion for certification within 90 days of filing). Neither the Eastern District nor the Western District of Michigan has implemented such a rule.
- FR Civ P 23(c)(1)(A).
- FR Civ P 23(b)(1).
- FR Civ P 23(b)(2).
- FR Civ P 23(b)(3).
- FR Civ P 23(c)(2)(A).
- FR Civ P 23(c)(2)(B) (emphasis added).
- MCR 3.501(C) (emphasis added).
- MCR 3.501(C)(5)(b).
- Id.*; see also MCR 3.501(A)(3) ("Class members shall have the right to be excluded from the action in the manner provided in this rule, subject to the authority of the court to order them made parties to the action pursuant to other applicable court rules.");
- FR Civ P 23(c)(2)(B)(v).
- FR Civ P 23(c)(3)(A).
- FR Civ P 23(c)(3)(B).
- MCR 3.501(D)(1).
- MCR 3.501(D)(5).
- See MCR 3.501(B)(3)(d)(ii) (providing that a court may divide a class "for purposes of certifying, denying certification, or revoking a certification" (emphasis added)); MCR 3.501(B)(3)(e) ("If certification is denied or revoked, the action shall continue by or against the named parties alone." (emphasis added)); MCR 3.501(C)(1) (requiring notice "to persons who were included in a class action by a prior certification but who are to be excluded from the class by amendment or revocation of the certification" (emphasis added)).
- Tinman v Blue Cross and Blue Shield of Michigan*, 264 Mich App 546, 561; 692 NW2d 58 (2004).
- Id.* at 561 n 11.
- Id.* at 562.
- FR Civ P 23(c)(1)(C).
- Brooks v GAF Materials Corp*, 301 FRD 229, 230-231 (D SC, 2014) (emphasis added) (citations and internal quotation marks omitted).
- Tinman*, 264 Mich App at 560-561 ("[T]he federal precedent relied on by plaintiff is not persuasive in construing MCR 3.501 as it pertains to motions to decertify a class action.");
- MCR 3.501(H)(1).
- MCR 3.501(H)(2), (3), and (4).
- MCR 3.501(H)(5).
- See, e.g., *Owner-Operator Indep Drivers Ass'n, Inc v Arctic Express, Inc*, 238 F Supp 2d 963, 967-968 (SD Ohio, 2003) (holding that the appropriate time to assert counterclaims against absent class members is after liability has been established); see also Rubenstein, Newberg on Class Actions (5th ed), § 9:24 ("[F]ederal courts have generally not been welcoming of counterclaims in class suits. . . . If courts decide to permit counterclaims, most will utilize a variety of case management techniques. . . to integrate those counterclaims into the class suit with minimal disruption. The primary effect of these management efforts is generally to put off consideration of counterclaims until the end of the lawsuit, typically after liability has been established and damages are being considered.");
- MCR 3.501(A)(5).
- 47 USC 227(b)(3)(B).
- See *American Copper & Brass, Inc v Lake City Indus Prod, Inc*, 757 F3d 540, 545 (CA 6, 2014).
- Id.* at 545-546.
- Gen Tel Co of the Southwest v Falcon*, 457 US 147, 161; 102 S Ct 2364; 72 L Ed 2d 740 (1982).
- Henry v Dow Chem Co*, 484 Mich 483; 772 NW2d 301 (2009).
- Id.* at 502.
- Id.*
- Michigan Ass'n of Chiropractors v Blue Care Network of Michigan, Inc*, 300 Mich App 577, 587; 834 NW2d 138 (2013) ("Precedential caselaw on the subject of certification is thin in Michigan.");