An Updated Primer to Michigan Class Actions

By Michael D. Wade and Sarah L. Walburn

Introduction

It has been more than nine years since Jonathan Moothart published in the *Michigan Bar Journal* an article entitled "Class Actions in Michigan State Courts: A Primer."[1] Mr. Moothart's article was contemporaneous with an article by Doug Peters and Dave Parker entitled "The History, Law, and Future of State Class Actions in Michigan," which was published in the *Wayne Law Review* in the winter of 1998.[2]

Since those articles came to print, the Michigan appellate courts have issued several published and numerous unpublished opinions relating to MCR 3.501, Michigan's class action court rule. This article seeks to update the articles for the class action practitioner. Because relatively few published cases concerning class actions exist, this article discusses many of the unpublished cases, which are not precedential, but may be persuasive authority.

Preliminary Conditions for Certification

MCR 3.501(A)(1) sets out the five prerequisites for certifying a class action: numerosity, commonality/predominance, typicality, adequacy, and superiority. The case must meet all five factors to be certified as a class action.[3] The proponent of the class action certification has the burden to demonstrate that the requirements for class certification are met.[4] Notwithstanding the explicit nature of the five conditions, there are also silent conditions for bringing a class action.

Fast Facts:

- Recent caselaw clarifies the five prerequisites for certifying a class action.
- *Henry v Dow Chemical* is a must read for class action litigators.
- Do mediation sanctions apply to class actions?

Jurisdiction

The court in which the class action is brought must have jurisdiction.[5] All class actions must be brought in the circuit court, as opposed to the district court or the Court of Claims.[6]

Standing

A threshold consideration for a class action certification requires that the proposed class representative be a member of the class.[7] In addition, a plaintiff who cannot maintain the cause of action as an individual is not qualified to represent the proposed class.[8] The class representative is the plaintiff named in the suit, and there can be more than one.

Class members must have suffered an actual injury to have standing to sue.[9]

Proper Class Description

Closely related to the issue of numerosity is the requirement that the plaintiff must describe in the complaint, as well as in the motion for class certification, a proper class description.[10] Properly defining the class assists the court in making its determinations on the five factors in MCR 3.501.

MCR 3.501 Requirements

Numerosity

MCR 3.501(A)(1)(a) requires that the members of the class be so numerous as to make joinder of all of them impractical.

Zine v Chrysler Corp set forth this requirement of MCR 3.501(A)(1)(a) and is often quoted:

> There is no particular minimum number of members necessary to meet the numerosity requirement, and the exact number of members need not be known as long as general knowledge and common sense indicate that the class is large.[11]

The plaintiff must properly define the class and also must present evidence of the number of class members.[12] This requirement exists so that the court can determine if joinder of the class members would be impractical.[13]

Commonality/Predominance

MCR 3.501(A)(1)(b) requires "questions of law or fact common to the members of the class that predominate over questions affecting only individual members."

Once again, it was *Zine* that spoke authoritatively regarding this requirement. Using federal law, *Zine* interpreted this requirement as centering on whether there is a common issue, the resolution of which will advance the litigation.[14] The *Zine* Court explicated the commonality requirement:

> It requires that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof."[15]

Neal v James explained the commonality requirement a bit more explicitly. It observed that a class action will not be defeated solely because of some variations among the class members' factual circumstances or legal theories.[16] A class action is certifiable when it arises out of the same legal or remedial theory, but case-specific inquiries may defeat this element.[17] *A&M Supply Co v Microsoft Corp* held that class certification was inappropriate because of the many variations among the class members as well as the complexity of calculating the damages. In general, if the differences among members would require separate trials for each class member to determine the member's individual damages, class certification would be inappropriate.[18]

Emphasizing the predominance language of the court rule, *Tinman v Blue Cross & Blue Shield of Michigan* noted that it is not every common question that will suffice, since at some level of abstraction almost any set of claims can be said to display commonality. The question is whether the common issues that determine liability predominate. The predominance requirement is more stringent than the commonality requirement.[19]

Jackson v Wal-Mart Stores, Inc stated the matter this way:

> [When] "after adjudication of the class-wide issues, [the] plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification[.]"[20]

Jackson also elucidated the predominance requirement by stating:

> "'[W]hether an issue predominates can only be determined after considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action[.]'"[21]

In *Williams v Terra Energy, Ltd,*[22] the Court of Appeals examined the separate and varied affirmative defenses that were raised against each class member's claim and held that the variation among those affirmative defenses defeated the commonality requirement because common issues did not predominate. In *Baker v Sunny Chevrolet, Inc,*[23] the Court used diversity of defenses and counterclaims to deny certification on the issue of the superiority requirement of MCR 3.501(A)(1)(e).

The representative party cannot have interests antagonistic to or conflicting with any members of the class, but must represent "all" the interests of the entire class and have an incentive to pursue the claims of the class members.

Typicality

MCR 3.501(A)(1) requires that the claims or defenses of the representative party be typical of the claims or defenses of the class members. Borrowing from a federal case,[24] *Neal* observed that typicality requires the court to focus on whether the named representative's claims have the same essential characteristics as the claims of the class at large. The representative's claims must have arisen from the same claim, event, practice, or course of conduct that gave rise to the claims of all the class members and must be based on the same legal theory or theories. The claims, even if based on the same legal theory, must contain a common core of facts.[25]

Factual differences in the class members' claims are not inherently fatal to class certification so long as some of the claims of the class members and the representative party share a common legal theory. The more factual differences in the circumstances involved in the class members' claims, the less the likelihood that the typicality requirement will be met.[26] For instance, in a case involving differing contracts for royalties on the sale of natural gas, the Court of Appeals held that individual differences among the leases of the class members militated against the typicality requirement.[27]

In *Simmons v Dep't of Treasury,* the Court defined typicality as follows:

> "Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the Court may properly attribute a collective nature to the unchallenged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory."[28]

Adequacy

MCR 3.501(A)(1)(d) requires the representative party to fairly and adequately assert and protect the interests of the absent class members. This requirement has two aspects. First, counsel must be sufficiently qualified to pursue the class action, and second, the representative plaintiff must have the same interests as the members of the class in pursuing the class action.[29]

Michigan law does not specify what qualifications class counsel must have to adequately represent the interests of the class, but surely counsel must have experience in class actions and have the legal and financial wherewithal to pursue the case, including advancing expenses if necessary.

The representative party cannot have interests antagonistic to or conflicting with any members of the class, but must represent "all" the interests of the entire class.[30] The representative party must have an incentive to pursue the claims of the class members.[31]

Superiority

MCR 3.501(A)(1)(e) requires that maintaining the action as a class action be superior to other available means of adjudication in promoting the convenient administration of justice. This part of the court rule requires that the court take into consideration the factors contained in MCR 3.501(A)(2). Only MCR 3.501(A)(2), which contains the manageability requirement, has received attention in caselaw. In general, the relevant inquiry with respect to superiority is whether the issues are so disparate that a class action would be unmanageable.[32] If a class action requires an individual determination of actual damages, the case may be unmanageable and therefore certification could be denied.[33] Regarding superiority, a panel of the Court of Appeals has stated that the

> "'convenient administration of justice' criteria does [sic] not preclude maintenance of a class action where the individual claims differ slightly with regard to such specifics as the time, place, and

> exact nature of the injury. No two claims are likely to be exactly similar. Almost all claims will involve disparate issues of law and fact to some degree. The relevant concern here is whether the issues are so disparate as to make a class action unmanageable."[34]

If individual proofs would bog down the entire action or if the class would settle without any real consideration for individual members' actual damages, the class mechanism would not be superior.[35]

The Court of Appeals has observed that the commonality factor is closely tied to the superiority factor when determining whether the class action is superior to other available methods of adjudication in promoting the convenient administration of justice. When individual questions of fact predominate over common questions, the case will be unmanageable as a class action.[36] *Communication Workers of America v Ameritech Services, Inc* put the matter as follows:

> [T]his court is convinced that the case will evolve into a series of mini trials. The court should seek to avoid certifying a class that will most likely splinter into an unmanageable plethora of individual claims.[37]

Miscellaneous Issues

The cases since 1998 have addressed a number of individual issues in the context of class action litigation. The following briefly explores those issues.

Discovery

Discovery on class issues is clearly permitted, but the timing of the discovery may become problematic.[38] The class action practitioner should pursue discovery aggressively and early.

Subclasses/Bifurcation

The creation of subclasses is one method to handle disparate claims in a single class action lawsuit.[39] The court may also bifurcate the trial to manage disparate damage claims in class actions.[40]

Burden of Proof

The party seeking class certification bears the burden of proving that the action satisfies all the requirements under MCR 3.501.[41] The burden remains on the proponent of the class action even when the defendant moves to decertify an already existing class action.[42]

The recent case of *Henry v Dow Chemical Co* elucidated the burden of the proponent of class certification and in particular addressed whether the federal "rigorous analysis" test[43] applies to state class actions. Heretofore, under *Neal,* a certifying court would "accept the allegations made in support of the request for certification as true."[44] *Henry* overruled *Neal* in that regard. *Henry* did not accept the "rigorous analysis" paradigm, but rather required the class movant

> to provide the certifying court with information sufficient to establish that each prerequisite for class certification in MCR 3.501(A)(1) is in fact satisfied. A court may base its decision on the pleadings alone *only* if the pleadings set forth sufficient information to satisfy the court that each prerequisite is in fact met. The averments in the pleadings…are only sufficient…in cases where the facts…are uncontested or admitted by the opposing party.
>
> If the pleadings are not sufficient, the court must look to additional information….[C]ourts must not abandon the well-accepted prohibition against assessing the merits of a party's underlying claims at this early stage….[45]

This analysis of the burden on the proponent of a class action clarified the ambiguous "rigorous analysis" applicable in federal courts.

Reference to Federal Law

When there is limited guidance in Michigan law, the court may use federal caselaw in construing similar portions of the court rules in the two jurisdictions, state and federal.[46]

Merger/Bar

It is clear that absent class members as well as the representative party are bound by a judgment rendered in a properly certified class action.[47] An "absent class member" is a member of the class, but not a named representative party.

Notice

MCR 3.501(C) contains the rules regarding notice to the class members. The requirement that absent parties be notified of proceedings affecting their legal interests is obviously a vital part of providing due process, involving the right to be heard.[48] The court has discretion in determining the adequacy of the notice, but must be mindful of the due process rights of the absent class members. Notice by publication is a poor and sometimes hopeless substitute for actual service of notice.[49]

Tolling of Period of Limitations

In *Cowles v Bank West,*[50] the Michigan Supreme Court held in a case of first impression that the filing of the class action complaint tolls the period of limitations under MCR 3.501(F) for putative class members' claims when the defendant has notice of both the claim being brought and the number and generic identities of the potential plaintiffs. The period of limitations for putative class members is tolled only for substantive claims that were raised, or that could have been raised, in the initial complaint. The limitations period resumes running against absent class members as set forth in MCR 3.501(F), including (1) when a notice is filed of the plaintiff's failure to move for class certification within 91 days, (2) 28 days after notice of decertification, (3) on entry of an order denying certification, (4) on submission of an election to be

excluded (that is, at the time of opting out of the class action), or (5) on final disposition of the action.

Availability of Mediation Sanctions

MCR 2.403(O), governing mediation sanctions, applies to class action lawsuits.[51]

Conclusion

The caselaw under MCR 3.501 will continue to evolve and develop as time goes on. Obviously, much has occurred since 1999 and the publication of the two articles noted in the introduction. We predict an increase in the number of state class actions filed in the future, with a concomitant increased evolution of the caselaw. ■

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FOOTNOTES

1. Moothart, *Class actions in Michigan state courts: A primer,* 78 Mich B J 272 (March 1999).
2. Peters & Parker, *The history, law, and future of state class actions in Michigan,* 44 Wayne L R 135 (1998).
3. *A&M Supply Co v Microsoft Corp,* 252 Mich App 580, 597; 654 NW2d 572 (2002); see also *Goneck v Workers Disability Compensation Bureau,* unpublished opinion per curiam of the Court of Appeals, issued January 18, 2002 (Docket No. 219610); 2002 WL 77134.
4. *Neal v James,* 252 Mich App 12, 16; 651 NW2d 181 (2002); *Tinman v Blue Cross & Blue Shield of Michigan,* 264 Mich App 546, 562; 692 NW2d 58 (2005).
5. See *Tindall v Michigan,* unpublished opinion per curiam of the Court of Appeals, issued April 17, 2003 (Docket No. 236134); 2003 WL 1904344.
6. *Dix v American Bankers Life Assurance Co of Florida,* 429 Mich 410, 420; 415 NW2d 206 (1987).
7. *Zine v Chrysler Corp,* 236 Mich App 261, 287; 600 NW2d 384 (1999).
8. *Id.; Cork v Applebee's of Michigan, Inc,* 239 Mich App 311, 319; 608 NW2d 62 (2000); *Camden v Kaufman,* 240 Mich App 389, 402; 613 NW2d 335 (2000).
9. *Henry v Dow Chemical Co,* 484 Mich 483, 537–538; 772 NW2d 301 (2009).
10. *Zine,* 236 Mich App at 288; see also *Royal Oak School Dist v MAS-SEG Prop & Cas, PPL,* unpublished opinion per curiam of the Court of Appeals, issued September 16, 2003 (Docket No. 235260); 2003 WL 22138026.
11. *Zine,* 236 Mich App at 288.
12. *Id.*
13. *Id.* at 289.
14. *Id.,* quoting *Sprague v Gen Motors Corp,* 133 F3d 388, 397 (CA 6, 1998); see also *Salesin v State Farm Fire & Cas Co,* 229 Mich App 346, 370; 581 NW2d 781 (1998).
15. *Zine,* 236 Mich App at 290, quoting *Kerr v West Palm Beach,* 875 F2d 1546, 1557–1558 (CA 11, 1989).
16. *Neal,* 252 Mich App at 18–19.
17. *Id.* at 20.
18. *A&M Supply,* 252 Mich App at 641; accord *Hamilton v AAA of Michigan,* 248 Mich App 535, 550; 639 NW2d 837 (2002).
19. *Tinman,* 264 Mich App at 563.
20. *Jackson v Wal-Mart Stores, Inc,* unpublished opinion per curiam of the Court of Appeals, issued November 29, 2005 (Docket No. 258498), p 8; 2005 WL 3191394, quoting *Klay v Humana, Inc,* 382 F3d 1241, 1255 (CA 11, 2004).
21. *Jackson,* n 20 *supra,* slip op at 8; 2005 WL 3191394 at *6, quoting *Rutstein v Avis Rent-A-Car Systems, Inc,* 211 F3d 1228, 1234 (CA 11, 2000).
22. *Williams v Terra Energy, Ltd,* unpublished opinion per curiam of the Court of Appeals, issued July 25, 2006 (Docket No. 260725); 2006 WL 2060396.
23. *Baker v Sunny Chevrolet, Inc,* unpublished opinion per curiam of the Court of Appeals, issued September 13, 2005 (Docket No. 247229); 2005 WL 2219476.
24. *Allen v Chicago,* 828 F Supp 543, 553 (ND Ill, 1993).
25. *Neal,* 252 Mich App at 21–22.
26. See *Maier v Community Resource Mgt Co,* unpublished opinion per curiam of the Court of Appeals, issued March 16, 2006 (Docket No. 257958); 2006 WL 664215.
27. *Williams,* n 22 *supra,* slip op at 8; 2006 WL 2060396 at *6.
28. *Simmons v Dep't of Treasury,* unpublished opinion per curiam of the Court of Appeals, issued January 18, 2002 (Docket Nos. 221657 and 226121), p 2; 2002 WL 77163, quoting *Rugumbwa v Betten Motor Sales,* 200 FRD 358, 363 (WD Mich, 2001).
29. *Duskin v Dep't of Human Services,* 284 Mich App 400; ___ NW2d ___ (2009); *Neal,* 252 Mich App at 22; see also *Snyder v Grand Valley Title Co,* unpublished opinion per curiam of the Court of Appeals, issued March 5, 1999 (Docket No. 206616); 1999 WL 33453800.
30. *Neal,* 252 Mich App at 23; see also *Caponen v Wolverine Pipe Line Co, Inc,* unpublished opinion per curiam of the Court of Appeals, issued September 30, 2004 (Docket Nos. 235692, 235695, 235693, and 235694); 2004 WL 2196487.
31. See *Stiglmaier v Detroit Entertainment LLC,* unpublished opinion per curiam of the Court of Appeals, issued August 31, 2004 (Docket Nos. 246465 and 246466); 2004 WL 1933169.
32. *Duncan v Michigan,* 284 Mich App 246; ___ NW2d ___ (2009); *A&M Supply,* 252 Mich App at 584; *Hill v City of Warren,* 276 Mich App 299, 314; 740 NW2d 706 (2007).
33. *A&M Supply,* 252 Mich App at 641.
34. *Creech v W A Foote Mem Hosp,* unpublished opinion per curiam of the Court of Appeals, issued June 8, 2004 (Docket Nos. 237437 through 237446), p 12; 2004 WL 1258011, quoting *Dix,* 429 Mich at 418–419 (which was decided under GCR 1963, 208).
35. See *Peet v Sweet Onion, Inc,* unpublished opinion per curiam of the Court of Appeals, issued March 17, 2005 (Docket No. 251736); 2005 WL 624895; MCR 3.501(A)(2).
36. *Zine,* 236 Mich App at 290.
37. *Communication Workers of America v Ameritech Services, Inc,* unpublished opinion per curiam of the Court of Appeals, issued June 24, 2003 (Docket No. 232886); 2003 WL 21465334.
38. See *Briney v Kelsey-Hayes,* unpublished opinion per curiam of the Court of Appeals, issued August 21, 2001 (Docket No. 218621); 2001 WL 951624.
39. See *Keech v S R Jacobson Dev Corp,* unpublished opinion per curiam of the Court of Appeals, June 13, 2006 (Docket No. 258598); 2006 WL 1628281. Although it is outside the time parameters of this article and discussed a predecessor court rule, see also *Dix,* 429 Mich at 419 n 14.
40. See *Simmons,* n 28 *supra,* slip op at 2; 2002 WL 77163 at *2.
41. *A&M Supply,* 252 Mich App at 597–598.
42. *Tinman,* 264 Mich App at 566.
43. *Gen Tel Co of the Southwest v Falcon,* 457 US 147, 161; 102 S Ct 2364; 72 L Ed 2d 740 (1982).
44. *Neal,* 252 Mich App at 15.
45. *Henry,* 484 Mich at 502–503.
46. *Tinman,* 264 Mich App at 557.
47. See *SHR Ltd Partnership v SWEPI LP,* unpublished opinion per curiam of the Court of Appeals, issued January 30, 2007 (Docket No. 271893); 2007 WL 258410, citing *Shults v Champion Int'l Corp,* 35 F3d 1056, 1058 (CA 6, 1994), and *Brown v Malt-O-Meal Co,* unpublished opinion per curiam of the Court of Appeals, issued November 20, 2003 (Docket No. 240793); 2003 WL 22736587.
48. See *Schroeder v New York City,* 371 US 208, 212; 83 S Ct 279; 9 L Ed 2d 255 (1962); see also *Rennie v Marble Head Lime, Inc,* unpublished opinion per curiam of the Court of Appeals, issued June 16, 2005 (Docket No. 249913); 2005 WL 1412942.
49. *Rennie,* n 48 *supra.*
50. *Cowles v Bank West,* 476 Mich 1; 719 NW2d 94 (2006); see also *Zeidman v Psciuk,* unpublished opinion per curiam of the Court of Appeals, issued September 29, 2000 (Docket No. 212848); 2000 WL 33406772 (discussing the effect of the relation-back doctrine when the class description was changed during trial).
51. See *Berkower v Applebaum,* unpublished opinion per curiam of the Court of Appeals, issued April 17, 2003 (Docket No. 232207), p 3; 2003 WL 1904347.