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## Class is in Session: Rule 23(a) Requirements for Class Actions

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Rule 23 of the Federal Rules of Civil Procedure governs class actions in federal courts. This article focuses on Rule 23(a), which sets forth the four initial requirements of all class actions.<sup>1</sup> Each of the prerequisites of Rule 23(a) is required for all class actions. In addition, the proposed class representative bears the burden of proof of each prerequisite. See *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996).

Justice Antonin Scalia, in one of the most recent Supreme Court decisions involving Rule 23(a), wrote:

The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. In order to justify a departure from that rule, a class representative must be a part of the class and possess the same interest and suffer the same injury as the class members. Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule's four requirements — numerosity, commonality, typicality, and adequate representation — effectively limit the class claims to those fairly encompassed by the named plaintiff's claims.

*Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (internal quotations and citations omitted).

### **Rule 23(a)(1) – Numerosity**

Rule 23(a)(1) requires that, "the class is so numerous that joinder of all members is impracticable[.]" "There is no strict numerical test for determining the impracticability of joinder." *In re Am. Med. Sys.*, 75 F.3d at 1079. Instead, "the numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *General Telephone Co. v. EEOC*, 100 S.Ct. 1695, 1706 (1980). If, however, the class size reaches substantial proportions, the impracticability requirement can be satisfied based on numbers alone. *In re Am. Med. Sys.*, 75 F.3d at 1079.

In addition to the actual number of proposed class members, the court may also consider: 1) judicial economies achieved from avoiding multiple actions; 2) the geographic dispersion of proposed class members; 3) the financial means of proposed class members; 4) the ability of proposed class members to institute individual lawsuits; 5) the amounts of each proposed class member's individual claims; 6) the knowledge of the names and existence of additional proposed class members; and 7) whether proposed class members have already joined other, similar actions. *Primavera Familienstiftung v. Askin*, 178 F.R.D. 405, 410 (S.D.N.Y. 1998).

As the Supreme Court held in *General Telephone Company*, the numerosity requirement of Rule 23(a)(1) is a fact specific inquiry. When drafting a complaint for a proposed class action, attorneys should be very cognizant of the specific facts of that case, with a focus on the general impracticability of the joinder of all individual proposed class members.

### **Rule 23(a)(2) – Commonality**

Rule 23(a)(2) requires that, "there are questions of law or fact common to the class[.]" The commonality requirement is generally satisfied in actions in which there is "a single issue common to all members of the class." *In re Am. Med. Sys.*, 75 F.3d at 1080.

In *Dukes*, the Supreme Court recently focused on the commonality requirement. Quoting the late Professor Nagareda of Vanderbilt Law School, Justice Scalia, writing for the majority, narrowed the commonality question to, "[w]hat matters to class certification...is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Dukes*, 131 S.Ct. at 2551 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 132). "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Id.* (internal citations omitted).

In *Dukes*, Justice Scalia, again quoting Nagareda, reasoned that Rule 23(a)(2) is easily misread, as "[a]ny competently crafted class

complaint literally raises common 'questions.'" *Id.* at 2550. This language is a clear warning to drafters that complaints need to delve deeper than just identifying a common issue of law or fact; drafters must focus on the ability of the proceeding to answer questions of law or fact that will advance resolution of each individual proposed class member's litigation. Drafters should also be cognizant of the fact that even small dissimilarities within the class can derail the ability to show commonality.

### **Rule 23(a)(3) – Typicality<sup>2</sup>**

Rule 23(a)(3) requires that, "the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" "A claim is 'typical' if it arises from the same event or practice or course of conduct that gives rise to the claims of the other class members, and if his or her claims are based on the same legal theory." *Beattie v. CentryTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) (internal quotations and citations omitted).

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 challenged conduct." *Sprague v. General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (internal quotations omitted). A claim is not "typical" in circumstances in which "a plaintiff can prove his own claim but not necessarily have proved anybody's else's claim." *Beattie*, 511 F.3d at 561 (internal quotations and citations omitted). Importantly, "a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law." *Id.*

### **Rule 23(a)(4) – Adequate Representation**

Rule 23(a)(4) requires that, "the representative parties will fairly and adequately protect the interests of the class." "There are two criteria for determining whether the representation of the class will be adequate: 1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interest of the class through qualified counsel." *Senter v. General Motors Corp.*, 532 F.2d 511, 524–25 (6th Cir. 1976).

"The court reviews the adequacy of class representation to determine whether class counsel are qualified, experienced and generally able to conduct the litigation, and to consider whether the class members have interests that are not antagonistic to one another." *Stout v. J.D. Byrider*, 228 F.3d 709, 717 (6th Cir. 2000) (internal citations omitted).

Class representatives are adequate when it appears that they will vigorously prosecute the interests of the class through qualified counsel, which usually will be the case if the representatives are part of the class and possess the same interest and suffer the same injury as the class members. Because named class members must act through class counsel, the adequacy of representation turns in part on the competency of class counsel and in part on the absence of conflicts of interest.

*Int'l Union, United Auto., Aerospace, and Agr. Implement Workers of America v. General Motors Corp.*, 497 F.3d 615, 626 (6th Cir. 2007) (internal quotations and citations omitted).

## Conclusion

In conclusion, as Justice Scalia wrote in *Dukes*, "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 131 S.Ct. at 2551. A proposed class representative needs to approach class certification thoughtfully and must be prepared to prove the above four elements to a court to achieve class certification.

1 There are a myriad of cases discussing any one of Rule 23(a)(1)–(4). As a result, this article is intended to be a general overview of each, rather than an in-depth discussion of any one.

2 In *General Telephone Co. of Southwest v. Falcon*<sup>2</sup> the Supreme Court stated, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately

protected in their absence. Those requirements therefore also tend to merge with the adequacy of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." 102 S.Ct. 2364, n. 13 (1982). As a result, many of the same concerns/considerations examined under Rule 23(a)(2) will also be raised under Rule 23(a)(3).

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